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**

SIERRA CLUB'S MEMORANDUM *CONTRA*
THE COMPANIES' APPLICATION FOR REHEARING

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INTRODUCTION

After 21 months of litigation, 41 days of hearings, and thousands of pages of post-hearing briefs, the Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, "FirstEnergy" or "Companies") in their application for rehearing propose a major rewrite of the so-called Retail Rate Stability Rider ("Rider RRS") that they had previously proposed and the Commission approved. This new proposal would still shift market risks to customers and, presumably, be used to shore up returns for FirstEnergy Corp. and its shareholders. But after incessantly telling the Commission that its original proposal was needed to ensure the financial viability of FirstEnergy Solutions' ("FES") W.H. Sammis and Davis-Besse plants,[1] FirstEnergy now proposes to discard the underlying power purchase agreement with FES (the "Affiliate PPA") and to pursue a modified rider ("Modified Rider RRS") that would not be directly linked to those two plants. In proposing this new, ill-defined rider, FirstEnergy provides no explanation of how the customer money collected under Modified Rider RRS would be spent or, in the unlikely event that customers receive credits under the rider, how those credits would be funded.

While FirstEnergy's new proposal is lacking in critical details, three things are clear. First, like the original Rider RRS, Modified Rider RRS is unauthorized by Ohio law. FirstEnergy's attempt to rely on R.C. 4928.143(B)(2)(d) fails because:

- As a charge or credit that applies equally to shopping and non-shopping customers and in no way impacts shopping, the rider is not a limitation on customer shopping;

[1] Co. Ex. 29, Moul Suppl. at 1, 3, 4; Tr. X at 2184:13-22, 2185:9-13 (Moul Cross); Tr. XI at 2395:8-15 (Moul cross); Tr. XXXII at 6541:6-12, 6542:3-20 (Moul Rebuttal Cross); Tr. XXXIII at 6818:21-24 (Lisowski Rebuttal Cross); Post-Hearing Brief of Companies ("Co. Br.") at 125-27; Post-Hearing Reply Brief of Companies ("Co. Reply") at 196-201.

- The rider would not involve the provision of any energy to customers or impact the price that customers pay for the energy they use and, therefore, is not related to "retail electric generation service"; and

- There is no evidence in the record that retail electric rates are volatile or that Modified Rider RRS would provide stability or certainty to such rates.

Modified Rider RRS also does not relate to default service or bypassability under R.C. 4928.143(B)(2)(d). As such, Modified Rider RRS is not legally authorized and, therefore, FirstEnergy's rehearing application should be denied and Modified Rider RRS should be rejected.

Second, if Modified Rider RRS were approved, customers would begin losing money on the day it went into effect, and would likely lose hundreds of millions of dollars or more over the eight-year term of the rider. FirstEnergy's own projection of the original Rider RRS showed that customers would lose $363 million over the first 31 months, and with energy, natural gas, and capacity prices below FirstEnergy's forecasts, actual losses would likely be substantially higher. While FirstEnergy suggests that Modified Rider RRS poses less risk than the original rider, customers would still face the significant likelihood that energy, natural gas, and capacity prices will never reach the lofty heights that FirstEnergy forecasted. And if FirstEnergy's unrealistic scenario does not pan out, the simple fact is that customers will lose money. As such, rehearing should be denied and Modified Rider RRS should be rejected because it would not provide a net benefit to customers or be in the public interest, and would not lead to an electric security plan ("ESP") that is more favorable than a market rate offer.

Third, FirstEnergy's Modified Rider RRS proposal is little more than a brazen attempt by the Companies to evade review by the Federal Energy Regulatory Commission ("FERC"). In response to a complaint filed by the Electric Power Supply Association ("EPSA"), FERC ruled on April 27, 2016, that before FirstEnergy could incur any costs under the Affiliate PPA, the

PPA must be subject to FERC review. In issuing its ruling, FERC found that the Affiliate PPA may violate rules that "protect against captive customers of franchised public utilities cross-subsidizing market-regulated power sales affiliates."[2] Rather than submit the PPA to FERC, however, FirstEnergy now seeks to evade FERC review by having Rider RRS move forward without the PPA. And while FirstEnergy implies (though never actually says) that the money collected under Modified Rider RRS would serve customers rather than FirstEnergy Corp. and its shareholders, that suggestion lacks credibility. Instead, customer money collected under Modified Rider RRS could be used to increase the Companies' earnings, to the benefit of FirstEnergy Corp. and its shareholders. In other words, FirstEnergy is attempting to achieve the same basic result as it would have under the original Rider RRS, but in a way that, FirstEnergy thinks, would foreclose FERC review. The Commission should not abet this transparent attempt to sidestep a FERC order and, therefore, should reject the Companies' new rider proposal.

In its rehearing application, FirstEnergy contends that the Commission Order approving the original Rider RRS is "unreasonable because it does not reflect" FERC's ruling on the EPSA complaint.[3] Less than two-and-a-half months ago, however, FirstEnergy argued in its post-hearing reply brief that the Commission should not wait for FERC's ruling because:

> the EPSA complaint raises a narrow issue regarding the application of federal regulations governing wholesale transactions between affiliates (assuming the Complaint is even properly perfected in the first place). The EPSA complaint thus is not relevant to the determinations the Commission must make here under Ohio law regarding whether Stipulated ESP IV and Rider RRS should be approved.[4]

[2] *EPSA v. FES*, 155 FERC ¶ 61,101, FERC Docket No. EL16-34-000, Order Granting Complaint ¶ 65 (Apr. 27, 2016) ("FERC Order").

[3] Companies' Memorandum in Support of Application for Rehearing ("Co. App.") at 12.

[4] Co. Reply at 296.

Now, FirstEnergy seeks "very accelerated" approval of its Modified Rider RRS proposal "in order to timely provide the contemplated benefits commencing June 1, 2016."[5] But the only "benefit" that customers would lose if Modified Rider RRS does not take effect on June 1 is the opportunity to start losing money. As Sierra Club explained in its own application for rehearing, the Commission should rescind its approval of the original Rider RRS. But even if the Commission is disinclined to do so, it should, at a minimum, reject FirstEnergy's attempt to game the system through its modified proposal and, instead, allow the FERC review process – which the Companies themselves previously deemed "not relevant to . . . whether Stipulated ESP IV and Rider RRS should be approved" – to proceed.[6]

I. FirstEnergy Errs in Claiming that Rider RRS is Authorized by the "Default Service" Prong of R.C. 4928.143(B)(2)(d).

In its Order, the Commission considered FirstEnergy's various attempts to justify the legality of Rider RRS, including the Companies' claim that the rider "operates as a financial limitation on the consequences of customer shopping," "relates to bypassability," and "relates to default service."[7] And, as Sierra Club has explained, the Commission erroneously concluded that Rider RRS can be authorized under R.C. 4928.143(B)(2)(d) as "a financial limitation on customer shopping for retail electric generation service."[8] The Commission's treatment of FirstEnergy's other attempts to find a statutory hook for Rider RRS, however, was less

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[5] Mikkelsen Rehearing Test. at 2.

[6] Co. Reply at 296.

[7] *See* Co. Br. at 117-20; Co. Reply at 268-75.

[8] Case No. 14-1297-EL-SSO, Opinion and Order (hereinafter, "Order") at 109 (Mar. 31, 2016). *See* Sierra Club's Memorandum in Support of Application for Rehearing ("SC App.") at 8-14 (explaining errors in the Commission's ruling).

problematic. The Commission properly rejected FirstEnergy's bypassability theory[9] – a holding that FirstEnergy does not challenge in its rehearing application. And the Commission declined to address FirstEnergy's argument that the rider relates to default service.[10]

In its rehearing application, FirstEnergy urges the Commission to find that Rider RRS is permissible under the "default service" prong, claiming that the Commission's failure to make such a finding is unlawful and unreasonable.[11] FirstEnergy's argument is meritless, however, and should be rejected by the Commission.

FirstEnergy claims that Rider RRS meets the default service criterion "because it functions as a rate-stability and price mitigation mechanism to reduce the impact on SSO customers of increasing SSO pricing."[12] This argument fails because there is no statutory basis for concluding that "default service" is synonymous with voluntary SSO service.[13] And even assuming, for the sake of argument, that the two terms could be conflated, FirstEnergy's claim would fail because Rider RRS has nothing to do with SSO service, i.e., the supplying of electricity to the Companies' non-shopping customers. As FirstEnergy witness Eileen Mikkelsen acknowledged at the hearing, "[t]he companies would not use the energy purchased as part of the

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[9] Order at 108-09 (citing *In re Ohio Power Co.*, Case No. 13-2385-EL-SSO, et al., Opinion and Order, at 22 (Feb. 25, 2015)). As Sierra Club explained in its application for rehearing, the Commission did make several erroneous statements in its discussion of bypassability. SC App. at 8 n.12.

[10] Order at 109.

[11] Co. App. at 7-9.

[12] *Id.* at 8.

[13] As the Northeast Ohio Public Energy Council ("NOPEC") explained in its initial post-hearing brief: "While customers can ***voluntarily*** elect to receive the 'SSO service' set by an MRO or ESP proceeding pursuant to R.C. 4928.141, 'default service' is the service that consumers receive ***involuntarily*** as the result of their competitive supplier no longer being able to provide service for the reasons described in R.C. 4928.14. To meet the 'default service' criterion of R.C. 4928.143(B)(2)(d), Rider RRS must relate to an event of default described in R.C. 4928.14. It does not." Initial Brief of NOPEC at 20.

proposed transaction to serve SSO customers."[14] Because Rider RRS does not affect the energy received by SSO customers, nor the price of such energy, this rider cannot be authorized under the "default service" prong.

Indeed, FirstEnergy's argument – that the rider relates to the SSO because it purportedly "provides a means to mitigate the long-term risk of wholesale market price increases that will be incorporated directly into the SSO"[15] – merely underscores that Rider RRS has nothing at all to do with SSO service. By FirstEnergy's logic, *any* type of charge or credit – regardless of its source – would relate to "default service" simply because it would affect the overall amount that SSO customers have to pay to the Companies. This "interpretation would remove any substantive limit to what an electric security plan may contain."[16] In other words, the fact that SSO customers pay electric bills, and that Rider RRS would affect the overall amount that customers must pay, does not connect the rider to "default service."[17] Because Rider RRS is not related to default service, and cannot be found legally permissible under R.C. 4928.143(B)(2)(d)

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[14] Tr. I at 37-38; *see also id.* at 107-08 (acknowledging that non-shopping customers would "continue to receive their energy through a standard service offer even if rider RRS were approved," and stating that "[t]he physical provision of energy and capacity to the nonshopping customers would occur through the competitive bid process and delivered to the SSO customers").

[15] Co. App. at 8.

[16] *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 34.

[17] Although FirstEnergy tries to bolster its default service argument by citing to the AEP ESP II rehearing entry, Co. App. at 8 n.26, FirstEnergy's reliance on that decision is misplaced. In the AEP ESP II case, the Commission found that AEP's proposed rider related to default service because it "freezes non-fuel generation rates throughout the term of the ESP,[] allowing all standard service offer customers to have rate certainty throughout the term of the ESP that would not have occurred absent the [retail stability rider ("RSR")]." Case No. 11-346-EL-SSO, et al., Entry on Rehearing, at 15 (Jan. 30, 2013); *see also id.* at 16 ("[A]s we discussed in extensive detail in our Opinion and Order, the RSR promotes stable retail electric service prices by stabilizing base generation costs at their current rates, ensuring customers have certain and fixed rates going forward.") (citation omitted). In other words, AEP's proposal directly affected the generation rates for electricity *being generated by AEP and used by SSO customers*. By contrast, as FirstEnergy has repeatedly conceded, the energy and capacity that the Companies would purchase from FES would not be used to serve the Companies' customers, but would instead be sold into the PJM markets. Tr. I at 36-39.

based on that prong, FirstEnergy's argument to the contrary must be rejected. Accordingly, the Commission should deny FirstEnergy's third ground for rehearing.

II. FirstEnergy's Submission of a New Proposed Rider In Its Rehearing Application is Unlawful and Unreasonable.

The Commission's rehearing process is designed to give parties an opportunity to identify and explain errors in a Commission order.[18] In other words, the focus of an application for rehearing should be those issues that were "determined in the proceeding."[19] In its rehearing application, however, FirstEnergy brushes aside the purposes of the rehearing process, instead using its brief to propose a new rider with significantly different terms than the Rider RRS proposal litigated over a 21-month period.

FirstEnergy's attempt to shoehorn a new rider proposal into its rehearing application is unlawful and untimely. And the Companies' proposal is particularly improper because it represents a transparent attempt to evade a FERC order. For these reasons (as well as the reasons set forth in Sections III and IV below), the Commission should reject the Modified Rider RRS proposal and FirstEnergy's eighth ground for rehearing.

A. FirstEnergy's New Rider Proposal is Untimely.

In its rehearing application, FirstEnergy proposes an entirely new rider, submits written testimony from FirstEnergy witness Eileen Mikkelsen regarding this proposal, and urges the Commission to approve this new scheme within a matter of weeks.[20] Setting aside for the

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[18] *See* O.A.C. 4901-1-35(A) ("An application for rehearing must set forth . . . the specific ground or grounds upon which the applicant considers the commission order to be unreasonable or unlawful.").

[19] R.C. 4903.10.

[20] Co. App. at 17-23.

moment the unlawfulness and unreasonableness of the new proposed rider,[21] the Commission should deny FirstEnergy's rehearing request because it is untimely.

Under R.C. 4903.10(B), the Commission has discretion to allow the submission of additional evidence during a rehearing proceeding. There is, however, an important limitation on the scope of evidence that can be submitted on rehearing: the Commission cannot "take any evidence that, with reasonable diligence, could have been offered upon the original hearing."[22] This limitation is fatal to FirstEnergy's new rider proposal, because the Companies could have submitted Modified Rider RRS long ago.[23]

In their rehearing application, the Companies do not even cite, much less attempt to satisfy, the reasonable diligence standard. The Companies claim that their new proposal was prompted by the April 27, 2016 FERC Order.[24] That may be so, but the fact that FERC has raised concerns about affiliate abuse is irrelevant to whether the Companies could have previously proposed Modified Rider RRS. And the record demonstrates that, if they had wanted

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[21] The legal and factual shortcomings of FirstEnergy's new rider proposal are discussed *infra* in Sections II.B, III, and IV.

[22] R.C. 4903.10(B).

[23] This Commission regularly refuses to reopen the record or accept additional evidence where such evidence could have, with reasonable diligence, been presented earlier. *See, e.g.*, *In the Matter of the Review of the Alternative Energy Rider Contained in the Tariffs of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*, Case No. 11-5201-EL-RDR, Second Entry on Rehearing, at 37 (Dec. 18, 2013) (denying AEP Ohio's request to reopen proceedings where the company has "failed to set forth why any additional evidence could not, with reasonable diligence, have been presented earlier in this proceeding"); *In the Matter of OPC Polymers, Notice of Apparent Violation and Intent to Assess Forfeiture*, Case No. 11-5330-TR-CVF, Entry on Rehearing, at 4 (Aug. 15, 2012) (denying rehearing on an issue where "with reasonable diligence, the company could have offered evidence on this issue at hearing," "chose not to do so," and "[n]ow . . . seeks to offer such evidence through its application for rehearing"); *In the Matter of the Complaint of C. Richard Smith v. Ohio Edison Company*, Case No. 10-340-EL-CSS, Entry on Rehearing, at 4-5 (Aug. 31, 2011); *In the Matter of the Complaint of Joe E. Snell v. Ohio Edison Company*, Case No. 09-187-EL-CSS, Entry on Rehearing, at 3-4 (Mar. 17, 2010).

[24] Co. App. at 13-14.

to, the Companies could have offered this exact same proposal in their Application filed on August 4, 2014. The Companies elected not to do so.

Moreover, although the Commission has held 41 days of hearings, stretched over a four-and-a-half month period, the Companies made no attempt to introduce this proposal at any point before or during that time period. Instead, the Companies waited 21 months – long after discovery, depositions, hearings, and post-hearing briefing had concluded – to spring this proposal on the Commission and the parties. Because the Companies could have proposed their "Modified Rider RRS" nearly two years ago, this new proposal, and Ms. Mikkelsen's testimony in support of it, must be rejected.[25]

B. FirstEnergy's New Proposal is an Improper Attempt to Evade FERC review.

In its rehearing application, FirstEnergy claims that its new rider proposal is being driven by an effort to avoid FERC review of the Companies' PPA with FES.[26] This itself is a sufficient reason to reject FirstEnergy's new proposal. Although the Commission may not have

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[25] By sandbagging the parties and Commission with this proposal at the eleventh hour, the Companies have also wasted an enormous amount of resources. For nearly two years, the Commission Staff, intervenors, Attorney Examiners, and Commissioners have devoted considerable resources to the Companies' Rider RRS proposal. The Affiliate PPA, and the Companies' proposal to sell the output of Sammis, Davis-Besse, and the OVEC entitlement into the wholesale market, are central to the Rider RRS scheme. *See, e.g.*, Co. Ex. 33, Ruberto Direct at 2. If the Companies had jettisoned the PPA construct at the outset of this proceeding, the Commission, Staff, and parties could have saved countless hours and financial resources. The Companies' disregard for others' financial resources also extends to their customers, who will presumably be forced to absorb the costs that FirstEnergy's employees and counsel incurred advocating for a PPA and Rider they no longer wish to pursue.

[26] Co. App. at 13-14; Mikkelsen Rehearing Test. at 4 ("Because any subsequent proceeding at FERC to review the PPA would require a much more lengthy time period to come to conclusion, the Companies have modified how Rider RRS charges and credits will be calculated . . . .").

In making this argument, FirstEnergy stakes out a position directly contrary to what it previously argued to this Commission. In February, while EPSA's FERC complaint was still pending, FirstEnergy vigorously opposed any delay in a decision by this Commission, arguing that the FERC complaint concerned "a narrow issue that holds no bearing on the Stipulated ESP IV." Order at 105 (citing Co. Reply at 296). Now that the FERC proceeding has turned out differently than FirstEnergy may have hoped, the Companies are using the FERC order as an excuse for submitting a new rider proposal. The Commission should hold FirstEnergy to its word and reject this new proposal.

jurisdiction over federal law issues and the wholesale energy market, it should not abet efforts to circumvent FERC's authority. Because FirstEnergy's new rider proposal is an improper attempt to sidestep a FERC order, the Commission should reject it.

In its April 27, 2016 Order, FERC found that "that the requirement in 18 C.F.R. § 35.39(b) to obtain prior approval for affiliate sales of electric energy or capacity applies to FE Solutions' power sales to [the Companies] under the Affiliate PPA."[27] FERC therefore rescinded the waiver that applied to FirstEnergy's affiliate transactions, and held that, before any sales could be made pursuant to the Affiliate PPA, that PPA must be submitted for FERC review.[28]

In issuing this decision, FERC repeatedly expressed concerns that captive ratepayers could be forced to subsidize FES's merchant generation. FERC noted that the Affiliate PPA "raises the potential for cross-subsidization from [the Companies'] retail customers—who are captive in the sense that they cannot avoid the non-bypassable charge—to FE Ohio Market Affiliates."[29] FERC also noted that "there exists the potential for a franchised public utility with captive customers to interact with a market-regulated power sales affiliate in ways that transfer benefits to the affiliates and its stockholders to the detriment of the captive customers," and stressed that the Rider RRS charges "could be used to effectuate precisely the type of affiliate abuse that the Commission identified in Order No. 697-A."[30] FERC therefore exercised its

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[27] FERC Order ¶ 53.

[28] *Id.* ¶¶ 53 & n.91, 62.

[29] *Id.* ¶ 65.

[30] *Id.* ¶ 60 (citing *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, 123 FERC ¶ 61,055, FERC Stats. & Regs. ¶ 31,268, Order No. 697-A ¶ 188-89 (Apr. 21, 2008)).

"independent role to ensure that wholesale sales of electric energy and capacity are just and reasonable and to protect against affiliate abuse."[31]

Rather than submit its PPA for FERC review, however, FirstEnergy has now concocted a scheme intended to circumvent the FERC Order. The Companies claim their proposal is "designed to be solely within the Commission's jurisdiction," and they urge swift Commission approval so that customers will begin paying charges under the "modified" Rider RRS.[32] But FirstEnergy's scheme is a transparent attempt to sidestep FERC's authority, and the Commission should reject it.

If approved, FirstEnergy's new rider proposal would permit cross-subsidization between the Companies and their affiliates, including FirstEnergy Corp. and potentially FES. Nothing in FirstEnergy's proposal would prevent the Companies from funneling the Rider RRS cash to their affiliates.[33] And given that one of the main rationales for Rider RRS was to provide additional

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[31] *Id.* ¶ 65.

[32] Co. App. at 14, 21-22.

[33] Notably, although Ms. Mikkelsen's written testimony included a question about whether FES will "receive any of the cash associated with this proposal," Ms. Mikkelsen did not squarely address whether this cash could be siphoned off to the Companies' affiliates. Mikkelsen Rehearing Test. at 11. In her answer, Ms. Mikkelsen stated that there would be no contract between the Companies and FES, and that the proposal was not "designed" to transfer regulated revenues to competitive operations. *Id.* These vague statements do not answer the question of whether the Companies' affiliates, such as FirstEnergy Corp. and FES, would financially benefit from Modified Rider RRS. Nothing in the rehearing application or Ms. Mikkelsen's testimony speaks to whether the Companies could funnel Rider RRS cash up to FirstEnergy Corp. and its shareholders. Given that this new proposal was prompted by the FERC Order, that appears to be the most likely destination for this cash: Once the Companies collect the Rider RRS funds, they will distribute those earnings to the parent company. And, with its balance sheet swollen from customer money collected through Modified Rider RRS, FirstEnergy Corp. would be able to reward its shareholders and bolster the finances of FES.

The Companies insist that "the cash associated with Rider RRS charges would not flow to FES," *id.* at 6, but that says nothing about their ability to funnel the cash up to FirstEnergy Corp. And because money is fungible, FES would almost certainly benefit if the parent company receives those funds. The only way to ensure that the Rider RRS cash does not end up benefiting FES would be to deposit that cash in a separate account under the Commission's jurisdiction, with the expenditure of such funds carefully accounted for and earmarked solely for customers' benefit. Of course, FirstEnergy has not proposed anything along these lines.

revenue to Sammis and Davis-Besse,[34] the evidence suggests that FirstEnergy could provide that subsidy indirectly via FirstEnergy Corp. – the parent company of both FES and the Companies. FERC has recognized that an "extreme example" of affiliate abuse would be a situation where a holding company, such as FirstEnergy Corp., "siphons funds from a franchised public utility to support its failing market-regulated power sales affiliate company."[35] If approved, Modified Rider RRS could enable FirstEnergy to siphon funds from its ratepayers to FES via the parent company.[36]

Even if FES were not the ultimate destination of the Modified Rider RRS funds, this rider could still facilitate affiliate abuse. FERC's affiliate restrictions are, *inter alia*, aimed at guarding against "the inappropriate transfer of benefits from such customers to the shareholders of the franchised public utility or its holding company."[37] Consequently, if revenues from Modified Rider RRS end up at FirstEnergy Corp., bolstering its bottom line and allowing it to support other non-utility affiliates, that would likewise breach FERC's affiliate restrictions. Given the Companies' silence regarding the destination of these funds, the evidence suggests that this is what would happen if Modified Rider RRS were approved.

In its Order approving Rider RRS, the Commission recognized the importance of issuing decisions that are consistent with federal law and do not erode FERC's authority. As the Commission explained, "its approval of Rider RRS, as a retail hedge, is based upon retail ratemaking authority under state law, which does not conflict with or erode federal laws or the

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[34] *See generally* Co. Br. at 125-128; Co. Reply at 196-200.

[35] FERC Order ¶ 60 n.101; Order 697-A ¶ 198 n.280.

[36] Modified Rider RRS would also breach the no-conduit provision of 18 C.F.R. § 35.39(g), which prohibits efforts "to circumvent the affiliate restrictions in §§ 35.39(a) through (g)." Because FirstEnergy is seeking to achieve indirectly what the PPA would have done explicitly, this appears to be a textbook violation of the no-conduit rule.

[37] Order 697-A ¶ 198.

responsibility of FERC to regulate electricity at wholesale."[38] The Commission further stressed that its decision was "consistent with federal law."[39] Now, faced with a brazen attempt to erode FERC's regulatory authority, it is incumbent upon the Commission to reject this proposal.

III. The Companies' Request for Hasty Review of Proposed Modified Rider RRS is Unreasonable Because the Proposal is Ill-Defined and the Companies Have Not Articulated any Reason Why a Rushed Decision is Necessary.

FirstEnergy's original Rider RRS proposal triggered 21 months of litigation – including one of the longest hearings in PUCO history and thousands of pages of testimony and briefing – before the Commission issued a ruling. Now FirstEnergy is proposing a substantial modification of Rider RRS that it wants the Commission to approve in less than a month, with the parties having no opportunity for written discovery and only a week to submit any testimony.[40] If the Commission decides to reject FirstEnergy's proposal, it can do so expeditiously because the record is clear that the Modified Rider RRS proposal is unauthorized by law, and unreasonable and unjust for customers. But if the Commission is inclined to entertain this new proposal, the Commission should do so only after providing a full and fair opportunity for the parties and Staff to evaluate the proposal and to present testimony and argument about it.

The Companies have provided no justification for their request that the Commission

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[38] Order at 86-87.

[39] *Id.* at 87. The Commission has long recognized the importance of not undermining FERC's authority. *See, e.g., Re Ohio Power Co., Indus. Energy Consumers Grp., Owens-Corning Fiberglas Corp., Standard Oil Co. of Ohio, Ohio Cable Television Ass'n, Office of Consumers' Council of Ohio,* Case No. 85-726-EL-AIR, 76 P.U.R.4th 121 (Ohio P.U.C. July 10, 1986) (discussing filed rate doctrine, and noting the U.S. Supreme Court's "conclu[sion] that a state must give effect to Congress' desire to give FERC plenary authority over interstate wholesale rates, and to ensure that the states do not interfere with this authority"). The interplay between State and federal authority is also reflected in statutory provisions and case law. *See, e.g., Ohio Consumers' Counsel v. Pub. Util. Comm.,* 111 Ohio St.3d 384, 2006-Ohio-5853, 856 N.E.2d 940, ¶ 38 (noting that the costs of membership in a regional transmission organization "are authorized by federal law, and R.C. 4928.35(A) expressly allows the PUCO, when 'authorized by federal law,' to adjust electric utilities' rate schedules during the market-development period.").

[40] Co. App. at 22.

swiftly approve Modified Rider RRS. While they claim that accelerated review is necessary so that customers can start receiving the benefits of Modified Rider RRS on June 1, 2016, the only "benefit" that customers would receive if Modified Rider RRS goes into effect is the opportunity to start losing money. Moreover, the Companies' repeated claim that they are proposing only a "narrow," "slight," or "modest" change to the rider approved by the Commission[41] is belied by the Companies' own filing and testimony. While Modified Rider RRS would achieve Rider RRS's goals of shifting market risk to customers and shoring up shareholder returns, it would do so through a substantially different mechanism that would significantly impact the finances of the Companies and eliminate or alter the rider's purported benefits. Finally, FirstEnergy's new proposal is lacking in critical details that can only be addressed through a full and fair opportunity for discovery, testimony, cross examination, and briefing.

A. There is No Need for Hasty Review of the Modified Rider RRS Proposal.

FirstEnergy urges the Commission to quickly approve Modified Rider RRS so that the "contemplated benefits" of Rider RRS and ESP IV can start accruing to customers without delay on June 1, 2016.[42] This claim lacks merit.

Throughout this proceeding, FirstEnergy has attempted to sell Rider RRS primarily on the grounds that it would purportedly provide three benefits to customers – a net credit over its eight-year term,[43] increased retail rate stability,[44] and ensuring the continued operation of Sammis and Davis-Besse.[45] As Sierra Club has explained in its prior briefing,[46] each of these

[41] Co. App. at 16, 21, 22; Mikkelsen Rehearing Test. at 5, 21-22.

[42] Mikkelsen Rehearing Test. at 2, 4, 21; Co. App. at 22-23.

[43] SC Ex. 89; Co. Br. at 12-16.

[44] Co. Br. at 120-22.

[45] *Id.* at 125-27; Co. Reply at 196-201.

purported benefits are illusory and unsupported by the record. But even if FirstEnergy's own evidence were credited, none of these purported benefits would accrue in the near term. Under FirstEnergy's projection the purported credits and rate stability impacts of Rider RRS (either the original or modified version) would not accrue to customers until at least 2019. And because the Companies' new rider proposal is now disconnected from Sammis and Davis-Besse, it would not directly impact whether those generation assets are preserved. As such, even accepting FirstEnergy's baseless claims that customers might eventually benefit from Rider RRS does not justify hasty review of this new proposal.

The primary purported benefit that the Commission relied on in approving Rider RRS is the potential for customers to receive a net credit over the eight-year term of the rider.[47] But the record is undisputed that in the first 31 months of Rider RRS, customers would lose hundreds of millions of dollars. For example, FirstEnergy's own projection shows a $363 million net present value ("NPV") loss to customers through the end of 2018,[48] while the other projection credited by the Commission – OCC witness Wilson's Scenario 1 projection, shows a $558 million NPV loss to customers over that same time frame.[49] Under either projection, the only rate stability "benefit" that Rider RRS might provide through at least the end of 2018 would be to deprive

[46] Initial Post-Hearing Brief of the Sierra Club ("SC Br.") at 12-43, 76-89; Post-Hearing Reply Brief of the Sierra Club ("SC Reply") at 18-30, 42-56.

[47] Order at 78, 85.

[48] SC Ex. 89.

[49] OCC/NOPEC Ex. 9, Wilson Second Suppl. Test. at 8, Tbl. 1. Unlike his other projections, Mr. Wilson reported his Scenario 1 results only in nominal dollars and not in NPV dollars. As such, we calculated the NPV using the same formula that FirstEnergy did: Over or Under-Recovery Amount / (1+WACC)^Yrs. *See* SC Ex. 89, at Line 12. The results were projected charges of $192 million, $248 million, and $118 million for 2016, 2017, and 2018, respectively, and projected credits of $70 million, $54 million, $79 million, $62 million, $88 million, and $19 million for each of the years 2019 through 2024, respectively. The total of those numbers is an NPV charge to customers of $186 million over the full eight-year term of Rider RRS.

customers of the benefits of the low market energy prices that they are currently enjoying.[50] Even assuming, contrary to the record evidence, that those losses were more than offset by gains in the latter years of Rider RRS, FirstEnergy has provided no justification for why it is necessary to ensure that customers start losing money on June 1, 2016. Yet that is exactly what the hasty review and approval of the Modified Rider RRS would do.

Another purported benefit of Rider RRS that was highlighted by FirstEnergy is ensuring the continued operation of the Sammis and Davis-Besse plants.[51] While the Commission did not specifically rely on the benefits of preserving such generation in approving Rider RRS,[52] it noted those purported benefits,[53] and relied on its finding that the plants are "at a serious risk of closure" in rejecting Exelon's lower-cost indicative offer.[54] That finding is unsupported by the record, which actually demonstrates that under FirstEnergy's projection neither plant would close even without Rider RRS.[55] But even if Rider RRS would help preserve Sammis and Davis-Besse, Modified Rider RRS would not. As Ms. Mikkelsen concedes in her rehearing testimony, Modified Rider RRS is "not tied to any particular plants."[56] In fact, Ms. Mikkelsen

[50] For example, average SSO auction results over the past few years for the 2015/16 delivery period averaged approximately \$65/MWh. By contrast, the latest auction results from April 2016 averaged approximately \$50/MWh. *See* Case No. 16-0776-EL-UNC, Notification of CBP Auction Results - Redacted Version (Apr. 14, 2016); *id.* (Apr. 27, 2016). The auction results for 2015/16 can be found in Company Exhibits 109A-F. The \$65/MWh figure can be derived by averaging the following auction results (which occurred between Oct. 2012 and Jan. 2015): 17 tranches at \$60.89, 17 tranches at \$59.17, 17 tranches at \$59.99, 17 tranches at \$68.31, 16 tranches at \$73.82, and 16 tranches at \$69.18. The \$50/MWh figure can be derived by averaging the following auction results from April 2016: 16 tranches at \$48.46 , 17 tranches at \$49.36, 17 tranches at \$50.49, 16 tranches at \$49.67, 17 tranches at \$50.76, 17 tranches at \$51.44.

[51] Co. Br. at 125-27; Co. Reply at 196-201.

[52] Order at 87.

[53] *Id.* at 87-88.

[54] *Id.* at 99.

[55] SC Br. at 80-81, 84; SC Reply at 58.

[56] Mikkelsen Rehearing Test. at 14.

suggests that none of the Rider RRS cash would financially benefit FES and might instead be spent by the Companies on grid modernization, battery resources, etc.[57] While that testimony lacks credibility, if credited, there would be no connection between the Modified Rider RRS revenue and FES's generating plants. And even if, as is most likely, the Modified Rider RRS revenues are funneled up to FirstEnergy Corp. (which could then distribute the money as it sees fit without Commission oversight), there still would be no direct link between such revenues and Sammis or Davis-Besse. As such, any concerns about the future of the Sammis and Davis-Besse plants do not justify the hasty review of Modified Rider RRS sought by FirstEnergy because this new proposal does not directly impact the future of those plants.

B. FirstEnergy's Claims that its Proposed Modifications to Rider RRS are Slight and, Therefore, Do Not Need Thorough Review, are Unsupported by the Companies' Own Rehearing Application and Testimony.

In an effort to short-circuit the parties', Staff's, and Commission's review of its belated proposal, FirstEnergy claims that its proposed modifications are "narrow," "slight," and "modest."[58] In reality, the Companies' new proposal represents a major overhaul of the rider that the Companies sought and the Commission approved. While Modified Rider RRS appears designed to achieve the same goals as the original Rider RRS – namely, shifting market risk to customers and shoring up shareholder returns – this new proposal would do so through a much different mechanism. The Modified Rider RRS proposal would significantly impact the finances

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[57] *Id.* at 11-12. While Ms. Mikkelsen states that there is no agreement that would require the Companies to share Modified Rider RRS revenues with FES, and that the proposal is "not designed to transfer regulated revenues to the competitive operations (including FES)," nothing in the Companies' proposal would prohibit such revenues from financially benefiting FES or shoring up the finances of Sammis and Davis-Besse. If it were otherwise – *i.e.*, clearly established that Modified Rider RRS revenues would not go to FES or otherwise offset any profit shortfalls from Sammis and Davis-Besse – and the Commission accepts FirstEnergy's claims about those plants being at risk, then the Companies themselves would be responsible for pushing Davis-Besse and Sammis to the brink of retirement by replacing Rider RRS with Modified Rider RRS.

[58] Co. App. at 16, 21, 22; Mikkelsen Rehearing Test. at 5, 21-22.

of the Companies and eliminate or alter the purported benefits of Rider RRS. These changes warrant careful review, not the rubber stamp that FirstEnergy seeks.

One significant difference with Modified Rider RRS is that it would not be tied to the Affiliate PPA that underlies the original Rider RRS. Under the PPA/Rider RRS structure, the Companies would serve as a revenue neutral pass-through: customers would pay or receive any difference between the costs that the Companies pay FES under the Affiliate PPA and the revenues that the Companies receive from selling the generating plants' energy and capacity into the PJM wholesale market. FirstEnergy's new proposal, however, would eliminate the Affiliate PPA and calculate charges or credits under Modified Rider RRS based on a projection of the plants' financial performance. By eliminating the Affiliate PPA, the Modified Rider RRS would "no longer be revenue neutral to the Companies,"[59] which, instead, would collect charges from or pay credits to customers. In addition, the rider would no longer be directly tied to the Sammis and Davis-Besse plants. These differences further suggest that Modified Rider RRS is unjust, unreasonable, and unlawful. Moreover, these significant differences raise at least three important sets of questions that are not addressed in the Companies' rehearing application and testimony, and that must be answered if the Commission decides to entertain the Companies' modified proposal.

1. The Companies have not explained how the revenues that they would generate from Modified Rider RRS would be spent.

The first set of questions revolves around the disposition of the monies that customers would pay the Companies under the rider. As noted previously, such payments are likely to amount to hundreds of millions of dollars or more in the first 31 months of Modified Rider RRS alone, and under every public projection of Rider RRS except FirstEnergy's, the impact of the

[59] Mikkelsen Rehearing Test. at 18.

rider over the full eight-year term would be a net charge to customers. Yet there is no commitment or even description as to what would happen to the significant sums that customers would pay to the Companies.

In her rehearing testimony, Ms. Mikkelsen tries to make the Modified Rider RRS proposal appear more appealing by suggesting that the revenues "could" fund capital expenditures to modernize the distribution grid, invest in battery resources, or pursue renewable energy.[60] But this appears to be nothing more than a red herring, as the Companies provide no assurance that the revenues would actually be used for such purposes, nor do they explain why Modified Rider RRS would be needed for such investments.

A far more credible explanation of how Modified Rider RRS revenues would be used is that they would be funneled up to the Companies' parent, FirstEnergy Corp., where they could be used, among other things, to supplement any shareholder returns that might be low if Davis-Besse or Sammis do not clear their desired profit levels. Although Ms. Mikkelsen claims that these revenues will not flow to FES, the Companies' silence about whether such funds would flow to FirstEnergy Corp. is deafening.[61]

At best, the record is entirely unclear on this issue. If the Commission decides to entertain FirstEnergy's Modified Rider RRS proposal, a thorough analysis of the disposition of the revenue generated under the rider would be needed so that the Commission can ensure that the Companies' customers are not effectively forced to subsidize FES or FirstEnergy Corp. On the present record, no such assurance is provided.

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[60] *Id.* at 12.

[61] Once those revenues are in FirstEnergy Corp.'s possession (and beyond the Commission's purview), they could be used to increase shareholder returns. Or, such funds could simply be retained by FirstEnergy Corp. to offset any financial assistance it provides to FES. In that sense, money funneled up to FirstEnergy Corp. may replicate the desired goal of the PPA-Rider RRS construct of propping up FES or otherwise offsetting any profit shortfalls from FES's power plants.

2. The Companies have not made clear how the payment of any credits under Modified Rider RRS would be funded.

The Companies have also failed to provide any explanation of how they would fund the payment of any credits under Modified Rider RRS. The Companies' claim, that Modified Rider RRS would be beneficial to customers, relies heavily on their projection that customer charges in the early years of the rider would be more than offset by gains in the latter years.[62] For example, FirstEnergy's own projection estimates $623 million NPV in credits to customers from 2019 through the end of the eight-year term.[63] As Sierra Club has explained in previous briefing, these credits will almost certainly never materialize because FirstEnergy's projection is based on unreasonable market forecasts that are outdated and already proven to be wrong.[64] But in the event that some credits did materialize in the latter years of Modified Rider RRS, the Companies have not explained how they would fund the payment of such credits.

The questions surrounding this issue are numerous. For example, where would the Companies find $623 million (or whatever amount, if any, of credits would result under Modified Rider RRS) to provide to customers over that time frame? How would the Companies' need to pay such credits impact their ability to make other investments to benefit their customers? Would the payment of those credits weaken the Companies' balance sheet and, therefore, justify future rate increases that would essentially force customers to pay for their own credits under Modified Rider RRS? All of these questions raise serious concerns about the new rider proposal, yet none are addressed in FirstEnergy's rehearing application or testimony. They must be if the Commission decides to entertain this proposal.

[62] SC Ex. 89.

[63] *Id.*

[64] SC Br. at 16-30; SC Reply at 19-29.

3. The Companies' "3,200 MW hedge" is undefined and appears to be illusory.

The replacement of the PPA-Rider RRS construct with a standalone Modified Rider RRS also eliminates or significantly alters the purported economic development, transmission, and resource diversity benefits that FirstEnergy claims Rider RRS would provide. As explained above, while the Companies frequently highlighted the unsupported contention that Rider RRS would avoid the purported serious risk that the Sammis and Davis-Besse plants would retire, the Companies acknowledge that Modified Rider RRS would be disconnected from those plants. As such, this new rider would not serve to preserve Sammis and Davis-Besse and, therefore, cannot be credited with any economic development, transmission, or resource diversity benefits that those plants may provide.

FirstEnergy attempts to avoid this fact by proposing what it refers to as the "3,200 MW hedge."[65] Under that proposal, if less than 3,200 MW of formerly rate-based nuclear or fossil generation in the ATSI zone that was owned by the Companies in January 2000, including at least 900 MW of nuclear generation, is operating during the term of the Modified Rider RRS, the Commission would have the authority to proportionally reduce the charge or credit under the rider.[66] The Companies surmise that, as a result of this provision, Modified Rider RRS would "help[] ensure the continued operation of 3,200 MWs of fuel diverse baseload generation" and, therefore, provide economic development, transmission, and resource diversity benefits.[67]

This argument, however, is unsupported for at least two reasons. First, the Companies have not provided a clear listing as to what generating units would count towards the 3,200

[65] Mikkelsen Rehearing Test. at 14.

[66] *Id.* at 15.

[67] *Id.*

MWs. Certainly Sammis, Davis-Besse, and the Perry Nuclear Plant would count, and the 153 MW Bayshore unit would also appear to count.[68] Those units have a combined nameplate capacity of more than 4,500 MWs, which means that at least 1,300 MWs could still retire without triggering any reduction to Modified Rider RRS. In addition, it is not clear whether the nearly 2,500 MW Bruce Mansfield plant, or the approximately 1,800 MW Beaver Valley plant, both of which are located in ATSI and which the Companies appear to have had some interest in in the past, would also qualify. If so, then 5,600 MWs of capacity – including all of the Ohio capacity – could retire without triggering the "3,200 MW hedge." At a minimum, a clear designation from FirstEnergy of the specific units that are or are not included in this proposal is needed.

A second problem with the 3,200 MW hedge claim is that the plants at issue are owned by FES, not the Companies. As such, the Companies cannot control whether or when those plants might retire. And if, as Ms. Mikkelsen claims, the Modified Rider RRS revenues would not flow to FES and are not tied to the actual financial performance of those plants, the rider would provide no incentive for FES to keep any of its units operating. There is no evidence in the record that any FES generating unit would retire without either the original or modified Rider RRS and, in fact, FirstEnergy's projections demonstrate that neither Sammis nor Davis-Besse would. But even if there were any risk of these units retiring, such risk would be lessened by Modified Rider RRS only if the revenues under that rider would eventually accrue to FES or otherwise compensate for any profit shortfalls at Sammis and Davis-Besse. As such, on this record there is no basis to conclude that either the original or modified Rider RRS would

[68] The capacity of the generating units discussed in this paragraph were obtained on FirstEnergy Corp's website at: https://www.firstenergycorp.com/environmental/stewardship/generation/generation_plantsmap.html.

preserve Ohio generation or whatever economic development, transmission, or resource diversity benefits such generation might provide.

IV. The Companies' New Proposal Should be Rejected Because it is Unlawful, Unjust, and Unreasonable.

As the applicant, FirstEnergy bears the burden of proving that its new rider proposal is lawful, just, and reasonable.[69] FirstEnergy has not satisfied that burden, and cannot do so because the Modified Rider RRS is not authorized by law. In addition, FirstEnergy has failed to demonstrate that its new rider is just and reasonable. As explained below, the Companies continue to rely on unreliable and outdated market forecasts that are already proven to be wrong in projecting net charges and credits, have provided no evidence of retail rate volatility, and have failed to demonstrate that Modified Rider RRS would provide stability or certainty regarding such retail rates. For each of these reasons, the Commission should reject the proposed Modified Rider RRS and deny FirstEnergy's eighth ground for rehearing.

A. Modified Rider RRS Cannot be Authorized under R.C. 4928.143.

As explained above, many key provisions of FirstEnergy's new rider proposal remain unknown. Yet no further factual development is needed to conclude that Modified Rider RRS cannot be authorized under R.C. 4928.143. Accordingly, the Commission should reject the Companies' new proposal.

In its rehearing application, FirstEnergy asserts that its Modified Rider RRS proposal could be authorized under R.C. 4928.143(B)(2)(d) because it purportedly relates to bypassability

[69] R.C. 4928.143(C)(1) ("The burden of proof in the proceeding shall be on the electric distribution utility."); O.A.C. 4901:1-35-06(A) (providing that the applicant has the burden "to show that the proposals in [its] application are just and reasonable.").

and default service, and "as a financial limitation on shopping."[70] These cursory assertions are without merit. Sierra Club has already explained at length why the original Rider RRS cannot be authorized under R.C. 4928.143(B)(2)(d).[71] And, for similar reasons, the Modified Rider RRS proposal is likewise impermissible under (B)(2)(d).

1. Modified Rider RRS is not related to "limitations on customer shopping for retail electric generation service," bypassability, or default service.

The Companies' new rider proposal is not related to "limitations on customer shopping for retail electric generation service," for two independent reasons. First, the proposed rider has nothing to do with retail electric generation service. Under Ohio law, "[r]etail electric service" is defined as "any service involved in supplying or arranging for the supply of electricity to ultimate consumers in this state, from the point of generation to the point of consumption."[72] In other words, in order to qualify as a "limitation[] on customer shopping," the rider at issue must address the provision of energy to retail customers through an SSO, or the ability of retail customers to obtain energy for their own needs from a competitive retail electric service ("CRES") provider.

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[70] Co. App. at 21 n.53. In advancing its new rider proposal, FirstEnergy does not argue that its scheme could be authorized under R.C. 4928.143(B)(2)(i), and with good reason. The obvious intent of (B)(2)(i) is to authorize provisions that will implement programs – such as the energy efficiency and economic development riders that were approved by the Commission in the AEP ESP III Order – that are specifically targeted at economic development, job retention, or energy efficiency. *See, e.g.*, *In re Ohio Power Co.*, Case No. 13-2385-EL-SSO, et al., Opinion and Order, at 68-69 (Feb. 25, 2015) ("AEP ESP III Order"). Because Modified Rider RRS would not implement any economic development, job retention, or energy efficiency programs, it cannot be authorized under R.C. 4928.143(B)(2)(i).

[71] *See generally* SC Br. at 5-12; SC Reply at 3-15; SC App. at 6-16.

[72] R.C. 4928.01(A)(27).

The original Rider RRS could not meet this requirement because the energy associated with the rider would not be used to serve the Companies' customers.[73] The same holds true for the Companies' new proposal. As the Companies admit, their new rider proposal "still has no impact on customers' physical generation supply."[74] Indeed, the Companies' new rider proposal does not relate to energy at all. Under this new proposal, the Companies would no longer purchase energy, capacity, and ancillary services from FES, and would no longer sell that output into the PJM markets. Instead, the charges and credits for Modified Rider RRS would be based on "proxy" costs and revenues that do not even relate to wholesale energy transactions[75] – much less "retail electric service," as R.C. 4928.143(B)(2)(d) requires. Because FirstEnergy's new rider proposal is wholly unrelated to "the supply of electricity to ultimate consumers,"[76] it cannot be authorized under R.C. 4928.143(B)(2)(d).

Second, the "limitations on customer shopping for retail electric generation service" provision is also inapplicable because Modified Rider RRS would not limit customer shopping. The "limitations on customer shopping" prong of 4928.143(B)(2)(d) only applies to restrictions

[73] Tr. I at 37-38, 39. Under the original Rider RRS, customers would continue to receive electricity through their CRES provider, and non-shopping customers would still receive energy through an SSO auction process. *See id.* at 38, 107-08. Meanwhile the Companies would sell into the wholesale PJM market the output from Sammis, Davis-Besse, and the OVEC entitlement that it would purchase under the PPA. Ruberto Direct at 3; Tr. I at 36-37; Tr. XIII at 2808.

[74] Co. App. at 21.

[75] *See, e.g.,* Co. App. at 18 ("the cost and revenue proxies are not dependent on FES's actual operational or market performance, or otherwise connected in any way to any particular generation facilities"); *id.* at 18 n.46 (claiming that the purported "hedging function is no longer tied to the performance of the Plants and . . . there will be no underlying PPA between FES and Companies"); Mikkelsen Rehearing Test. at 4 (new proposal would not rely on "the PPA or any other contractual arrangement or other involvement of FES"); *id.* at 5 (noting that there would no "PPA construct," and discussing proxy revenues and assumed costs); *id.* at 6 (noting that the new proposal would "no longer rely[] upon actual generation output and actual capacity cleared in the PJM capacity market"); *id.* at 8 ("Rider RRS charges and credits will no longer be reconciled to actual Plant costs and the Companies will not sell actual Plant output into PJM markets").

[76] R.C. 4928.01(A)(27).

on customer shopping that relate to the "supply of electricity" to FirstEnergy's customers.[77] And here, FirstEnergy's new proposal would not affect the supply of electricity to customers, and would therefore do nothing to limit customers' ability to shop for the energy supply they receive. In addition, just as with Rider RRS, the charges or credits under Modified Rider RRS would apply to the bills of shopping and non-shopping customers equally, and the rider would in no way prohibit customers from shopping, limit how many customers can shop or how much they can shop for, or increase the price of such shopping. Because customers' ability to shop for their retail electric service would be unaffected by Modified Rider RRS, the rider cannot qualify as a "limitation[] on customer shopping for retail electric generation service" under R.C. 4928.143(B)(2)(d).

In its rehearing application, FirstEnergy clings to the flawed notion that a rider, such as its Modified Rider RRS proposal, can be approved under (B)(2)(d) as a "financial limitation on the consequences of customer shopping."[78] FirstEnergy is wrong. The statute does not authorize a rider simply because it could potentially offset the pricing of retail electric generation service.[79] Rather, the statute speaks in terms of limitations on actual shopping, and the Modified Rider RRS would not in any way limit a customer's ability to shop.[80]

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[77] *Id.*

[78] Mikkelsen Rehearing Test. at 10; *see also* Co. App. at 21 n.53 (claiming that Modified Rider RRS is a "financial limitation on shopping").

[79] Moreover, as explained below in Section IV.C, Modified Rider RRS would bring neither stability nor certainty to customers' bills.

[80] FirstEnergy implicitly concedes as much in its rehearing application. FirstEnergy states that "[e]xcept for the specific modifications proposed herein and/or described in testimony, the Stipulated ESP IV shall remain unchanged." Co. App. at 21. Thus, the representation made in the Third Supplemental Stipulation – that Rider RRS "does not in any way limit a customer's ability to shop," Co. Ex. 154 at 18 – applies with equal force to FirstEnergy's new rider proposal.

FirstEnergy's "financial limitation" theory, which the Commission implicitly (and erroneously) credited in its Order,[81] effectively drains the statutory language of its meaning. Under this theory, *any* type of customer charge – no matter how unrelated to retail electric service – could be approved under R.C. 4928.143(B)(2)(d) because it would affect the customer's overall bill. For example, under this interpretation, the Companies could (i) impose charges on their customers, (ii) use that money to buy any financial investment they believe will gain value over time, and (iii) give customers a credit in future years if those investments pay off. Although such a scheme has nothing to do with limitations on customer shopping, it would, under FirstEnergy's logic, "operate[] as a financial limitation on the consequences of customer shopping," and therefore be permissible.[82] Because the Companies' "interpretation would remove any substantive limit to what an electric security plan may contain,"[83] that interpretation must be rejected.[84]

In their rehearing application, the Companies also made the cursory claim that Modified Rider RRS would be permissible because it relates to bypassability or default service.[85] These claims are without merit.

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[81] Order at 109.

[82] Mikkelsen Rehearing Test. at 10.

[83] *In re Application of Columbus S. Power Co.,* 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 34.

[84] FirstEnergy's framing, that Modified Rider RRS would be a "financial limitation on the consequences of customer shopping," would also improperly require the rewriting of the relevant statutory provision. In particular, R.C. 4928.143(B)(2)(d) plainly provides that the provision must relate to a "limitation on customer shopping" – *i.e.*, something that restricts shopping itself by, for example, limiting the number of customers who can shop or how much power they can shop for, or by imposing an additional charge on a customer who decides to shop. A "financial limitation on the consequences of customer shopping" is something entirely different and is not found anywhere in the applicable statutory language.

[85] Co. App. at 21 n.53.

First, the Companies' bypassability argument fails because the mere fact that this new rider would be non-bypassable does not qualify it for inclusion as part of an ESP. The Commission has repeatedly rejected this "bypassability" theory, including in this case. In its Order, the Commission concludes that, "since nearly any charge may be bypassable or non-bypassable, 'bypassability' alone is insufficient to fully meet the second criterion of R.C. 4928.143(B)(2)(d)."[86] This holding, which FirstEnergy did not challenge in its rehearing application, is dispositive with respect to Modified Rider RRS as well.

FirstEnergy's default service argument is equally misplaced. As explained above in Section I, Rider RRS cannot be justified based on the "default service" prong, because Rider RRS has nothing to do with SSO service. The same holds true with respect to FirstEnergy's new Modified Rider RRS proposal. Because Modified Rider RRS would not relate to SSO service – or, really, any kind of electric service – the rider cannot be shoehorned into the default service prong.

In sum, although FirstEnergy asserts that Modified Rider RRS can be authorized under R.C. 4928.143(B)(2)(d) as a term, condition, or charge that relates to "limitations on customer shopping for retail electric generation service, bypassability, [or] . . . default service," none of those claims have merit. Put simply, Modified Rider RRS cannot lawfully be approved under R.C. 4928.143(B)(2)(d).

2. Modified Rider RRS would not "have the effect of stabilizing or providing certainty regarding retail electric service."

Even if the Modified Rider RRS proposal could satisfy the threshold requirements discussed in Section IV.A.1 above – it cannot – this rider could still not be approved under R.C. 4928.143(B)(2)(d) because it would not "have the effect of stabilizing or providing certainty

[86] Order at 108-09 (citing AEP ESP III Order at 22).

regarding retail electric service." Modified Rider RRS fails this requirement for two independent reasons. First, assuming, *arguendo*, that the rider had a stabilizing effect, that effect would not impact retail electric rates. And as the plain language of R.C. 4928.143(B)(2)(d) makes clear, the stabilization or certainty provided must be with respect to "retail electric service," *i.e.*, the electricity purchased by the Companies to supply their customers' needs.[87] Because Modified Rider RRS would not affect the rates that the Companies' customers pay for their electricity – and, in fact, is wholly unrelated to the electricity customers receive and pay for – FirstEnergy's new proposal fails this requirement of 4928.143(B)(2)(d).

Second, even if the statute did not require that any hedging effects be tied to retail electric service, Modified Rider RRS would still not be permissible because, as explained below in Section IV.C, this rider would not have the effect of stabilizing or providing certainty to customers' bills. In short, there is no legal or factual basis for the notion that Modified Rider RRS would "have the effect of stabilizing or providing certainty regarding retail electric service."[88] For this reason, as well as those stated above in Section IV.A.1, FirstEnergy's new rider proposal cannot be authorized under R.C. 4928.143(B)(2)(d).

B. Modified Rider RRS is Unjust and Unreasonable Because There is no Credible Evidence that Customers Would Receive a Net Credit Under the Proposal.

Even if Modified Rider RRS were legally authorized – which, as described above, it is not – FirstEnergy would have to demonstrate that customers would receive a net benefit in order for the proposal to be deemed just and reasonable. FirstEnergy has not and cannot do so.

In her rehearing testimony, Ms. Mikkelsen does not provide any updated projection of charges or credits under Modified Rider RRS. Instead, FirstEnergy continues to rely on the

[87] R.C. 4928.01(A)(27).

[88] R.C. 4928.143(B)(2)(d).

Companies' projection of costs and revenues under Rider RRS, based on market forecasts developed in mid-2014, to contend that customers would receive a projected $561 million nominal credit over the eight-year rider term.[89] As Ms. Mikkelsen further notes, the Commission in its Order approving Rider RRS averaged the Companies' projection with one of three scenarios projected by OCC witness James Wilson to identify a projected credit to customers of $256 million nominal.[90] But neither projection is reliable or up-to-date. Reliance on these projections is therefore arbitrary, unreasonable, and contrary to the manifest weight of the evidence in the record.

First, the projected amount of credits relied on by FirstEnergy and the Commission are reported in nominal, rather than net present value, dollars.[91] As such, the $256 million figure cited by the Commission fails to take into account the fact that customers would lose hundreds of millions of dollars in the early years of the Modified Rider RRS when such dollars are worth comparatively more. Only by projecting significant credits in the later years of the Modified Rider RRS, when dollars are worth comparatively less, can the Companies and Commission claim that customers would receive a net credit over the full term of the rider. By reporting the total results in nominal dollars, rather than NPV, the Companies and Commission fail to account for the value difference between early losses and later credits. When one accounts for that difference and reports the results of the FirstEnergy and Wilson projections in NPV, the purported gain under Modified Rider RRS falls to $37 million, or 85.5% lower than the figure relied on by the Commission and cited by FirstEnergy in its rehearing application.[92]

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[89] Mikkelsen Rehearing Test. at 3.

[90] *Id.* (citing Order at 85).

[91] SC App. at 22-24.

[92] *Id.* at 24.

Even that $37 million figure, however, should not be relied on because it is based upon market forecasts that are unreliable, outdated, and already proven to be wrong. As Sierra Club has explained in its post-hearing briefs,[93] FirstEnergy's projection is based on market forecasts of energy, capacity, and natural gas prices from Judah Rose at ICF International that date from mid-2014. While Mr. Rose forecast increases in prices for all three of those commodities, actual prices have been significantly lower than Mr. Rose forecast. For example:

- In contrast to Mr. Rose's forecast of increasing energy prices, prices declined 8.5% between the 2011-2013 timeframe and 2015.[94] By October 2015 prices were at least 10 to 15% lower than Mr. Rose forecast.[95]

- The 2015 Henry Hub natural gas price of $4.34/mmBtu assumed in Mr. Rose's forecast was 66% higher than the actual 2015 price of $2.61/mmBtu,[96] and the 2016 price of $4.28/mmBtu forecast by Mr. Rose is 70% higher than the market forwards price for that year.[97] In fact, a more recent ICF natural gas price forecast has prices staying below Mr. Rose's 2015 forecast through at least 2018.[98]

- While capacity prices increased somewhat for the 2018/2019 delivery year, they were lower than what Mr. Rose forecast,[99] and ICF has suggested that prices for the 2019/2020 delivery year may be lower than the 2018/2019 results.[100]

In short, real-world developments demonstrate that Mr. Rose's forecasts are outdated and already proven wrong and, therefore, it is arbitrary and unreasonable for the Companies to continue to rely on Mr. Rose's mid-2014 forecasts to project the costs and revenues of its rider proposal in mid-2016. Especially now that FirstEnergy is proposing a new Modified Rider RRS, the

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[93] SC Br. at 18-39; SC Reply at 19-29.

[94] *Compare* 2011-2013 prices reported in Co. Ex. 17, Rose Direct at 13 Tbl. 1, *with* 2015 prices reported in SC Ex. 95, Comings Third Suppl. at 12.

[95] Tr. XXXV at 7228.

[96] *Compare* Rose Direct at 47 Tbl. 8 *with* Co. Ex. 174 at 2.

[97] *Compare* Rose Direct at 47 Tbl. 8 *with* Comings Third Suppl. at 9.

[98] Comings Third Suppl., Ex. TFC-44, A-25 at 17.

[99] SC Reply at 27-28.

[100] SC Ex. 87 at 11.

Companies should be required to provide a new projection of charges and credits under this rider based on up-to-date forecasts of energy, natural gas, and capacity prices so that the parties, Staff, and Commission can evaluate FirstEnergy's proposal on the basis of current information.

FirstEnergy attempts to sell its Modified Rider RRS proposal by contending that it would subject customers to less risk than Rider RRS would.[101] In particular, the Companies note that rather than basing costs and revenues on the actual performance of Sammis and Davis-Besse, they will assume the same costs and levels of generation and capacity for those plants that the Rider RRS forecast was based on.[102] But the new proposal still subjects customers to the significant risk, which has already materialized, that energy and capacity prices will be lower than FirstEnergy's forecast. With prices already lower than what Mr. Rose forecast, and expected to remain lower for at least the next few years,[103] customer losses in the first 31 months of Rider RRS will almost certainly be higher than the $363 million NPV loss FirstEnergy itself projected. And there is no basis in the record to conclude that given the lower-than-forecasted prices to date and for the next few years, energy, natural gas, and capacity prices will then escalate so quickly as to reach the inflated levels that Mr. Rose forecast for the later years of Rider RRS. But without such lofty prices, the credits that would be needed to offset the near-term losses under Modified Rider RRS would likely never materialize. As such, the Companies have failed to satisfy their burden to demonstrate that Modified Rider RRS would provide the net benefit to customers necessary for the proposal to be considered just and reasonable.

[101] Co. App. at 18; Mikkelsen Rehearing Test. at 45-6.

[102] Co. App. at 18, 20.

[103] Tr. VI at 1228; Comings Third Suppl., Ex. TFC-44, A-25 at 17.

C. Modified Rider RRS is Unjust and Unreasonable Because There is no Credible Evidence that Customers Face Significant Retail Rate Volatility, or that Modified Rider RRS Would Be an Effective Hedge Against Any Such Volatility.

In an effort to sell Modified Rider RRS, the Companies proclaim that it would help "safeguard customers against rising and volatile electric prices and future market risks in the years ahead."[104] As has been the case throughout this proceeding, however, the Companies have provided no evidentiary basis upon which to conclude that customers face significant retail rate volatility, or that Modified Rider RRS would be an effective tool against any such volatility.

In her rehearing testimony, Ms. Mikkelsen cites the Commission's description of Rider RRS as "a form of rate insurance" against rising rates to contend that the rider would provide stability and certainty regarding rates.[105] But the insurance analogy is inapt here. As Sierra Club has previously explained, no rational consumer would buy insurance without: (1) knowledge about the size of the loss being insured against, (2) certainty about the price of the insurance, and (3) the ability to shop for a better policy.[106] None of those conditions are satisfied here. Taking them in reverse order, the Companies' customers would have no choice but to pay for Modified Rider RRS and have no opportunity to try to obtain a better "insurance" policy (assuming they even think a policy is necessary). There is also no certainty about what the Modified Rider RRS would cost. While every public projection in the record shows that customers would lose hundreds of millions of dollars or more in the first 31 months of the rider, the Companies claim that customers would receive a net credit (rather than incurring a net cost) over the eight-year

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[104] Co. App. at 12; *see also id*. at 17, 23; Mikkelsen Rehearing Test. at 2, 3, 5.

[105] Mikkelsen Rehearing Test. at 3 (citing Order at 80).

[106] SC Reply Br. at 44-46.

term of Modified Rider RRS.[107] Every other public projection in the record, however, shows significant costs to customers, ranging from $184 million NPV to $2.7 billion NPV over the eight-year term.[108]

Finally, the insurance analogy fails because there is no evidence in the record regarding the size of the loss purportedly being insured against or, translated into terms relevant here, the amount of volatility or retail price increase customers would purportedly be insuring against. FirstEnergy and the Commission have claimed that Rider RRS would insure customers against the energy price increases forecast by Mr. Rose. As explained in Section IV.B above, however, Mr. Rose's forecasts are unreliable, outdated, and already proven to be wrong. In addition, Mr. Rose forecast only wholesale energy prices, and FirstEnergy has offered no analysis of how any wholesale energy price increases would impact the retail rates being paid by customers. In short, the Companies have not satisfied their burden of proving that there is even significant retail rate volatility that needs to be hedged against.

Even assuming a showing of retail rate volatility had been made, the Companies' effort to sell Modified Rider RRS as a rate stabilization mechanism fails because there is no evidence that the rider would be effective in stabilizing rates. In its Order approving Rider RRS, the Commission relied on the "theory" that the rider would stabilize rates because it is designed to do so.[109] But theorizing something is not the same as proving it, and the record is bereft of any analysis of whether or how effectively the rider would offset rate volatility. For example, while the Companies identify temporary price increases in the wake of the 2014 polar vortex as an example of volatility, they have provided no analysis showing that either the original or new

[107] SC Ex. 89.

[108] P3/EPSA Ex. 12, Kalt Second Suppl. at 17; OCC/NOPEC Ex. 9, Wilson Second Suppl. at 12.

[109] Order at 109.

Rider RRS would have been effective in offsetting those price increases. In the absence of any showing regarding how the original or new Rider RRS would actually impact what customers pay during times of price volatility, Modified Rider RRS simply cannot be credited with providing rate stability or certainty to customers.

D. The Modified Rider RRS Fails to Satisfy Other Provisions of Ohio Law.

As explained above, FirstEnergy's new rider proposal is unlawful and unreasonable. Among other shortcomings, FirstEnergy's proposal: fails to meet the standards of R.C. 4903.10, contravenes an April 27, 2016 FERC Order, cannot be authorized under R.C. 4928.143, and would likely cause the Companies' customers to lose hundreds of millions of dollars or more.

But the inadequacies of this proposal do not end there. As explained below, FirstEnergy's proposal is inconsistent with significantly excessive earnings test ("SEET") requirements and fails to satisfy O.A.C. 4901:1-35-03. These deficiencies further demonstrate that the Modified Rider RRS should be rejected.

1. The Modified Rider RRS is Inconsistent With the SEET.

The new rider proposal is also unlawful because FirstEnergy seeks to exempt its Modified Rider RRS earnings from SEET. Under their proposal, the Companies would receive hundreds of millions of dollars or more over the rider's eight-year term. The Companies themselves have projected that they would receive net revenue of $363 million in the first 31 months alone, and, as explained above in Section IV.B, customers would almost certainly end up paying much more than that to the Companies.

Although the Companies would profit handsomely from Modified Rider RRS, FirstEnergy nevertheless insists that these revenues should be excluded from the SEET calculation.[110] This carve-out is described as an "essential element" of the Companies' proposal. FirstEnergy offers scant justification for its demand, cursorily asserting that the Modified Rider RRS revenues should be treated as a "special item, consistent with the Commission's Order in Case No. 09-786-EL-UNC."[111] But that Commission order (hereinafter, the "SEET Order") offers no support for the Companies' requested exclusion. Indeed, the SEET Order and R.C. 4928.143 both establish that the Companies' revenues from Modified Rider RRS should be included in the SEET calculation. FirstEnergy's improper attempt to exclude this large revenue stream from the SEET further demonstrates why Modified Rider RRS should be rejected.

In its rehearing application, however, FirstEnergy makes no attempt to justify its demand that such revenues be exempted from the SEET. FirstEnergy's brief does not mention SEET at all, and Ms. Mikkelsen's testimony does not explain why FirstEnergy believes that Modified Rider RRS revenues can be excluded from SEET as a "special item." Put simply, FirstEnergy has offered no credible explanation for excluding such revenues.

FirstEnergy's requested carve-out is misplaced because it is inconsistent with the SEET Order. In that order, the Commission found that the earned return for the SEET calculation would "equal the electric utility's profits after deduction of all expenses, including taxes, minority interest, and preferred dividends, paid or accumulated, and excluding any non-recurring, special, and extraordinary items."[112] Thus, to be excluded from the SEET calculation, such earnings must be either non-recurring or extraordinary/special. Here, FirstEnergy meets neither of these conditions. Because Modified Rider RRS would remain in effect for an eight-

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[110] Mikkelsen Rehearing Test. at 18.

[111] *Id.*

[112] SEET Order at 18.

year period – more than double the length of a typical ESP – it cannot credibly be characterized as "non-recurring."

Nor would the Modified Rider RRS revenues qualify as an extraordinary, or special, item. In the SEET proceeding, Staff recommended that extraordinary items be excluded from the SEET calculation only if they are unrelated to the ESP. By contrast, "[e]xtraordinary items that are created as an adjustment in the ESP . . . should be included for purposes of the SEET."[113] This recommendation was adopted by the Commission in its SEET Order.[114] And when applied to FirstEnergy's new proposal, this test makes clear the Modified Rider RRS revenues must be included in SEET. Even assuming, *arguendo*, that such revenues could be characterized as an extraordinary or special item – a showing FirstEnergy has failed to make – those revenues would stem from a rider approved as part of ESP IV. Thus, because the revenues would be an extraordinary item "created as an adjustment in the ESP," they would need to be included in the SEET calculation. FirstEnergy's argument to the contrary is without merit. Consequently, FirstEnergy's attempt to insulate the Modified Rider RRS revenues from SEET is improper, and further supports rejection of this new rider proposal.

2. The Companies Have not Satisfied O.A.C. 4901:1-35-03.

FirstEnergy's new rider proposal also fails to meet Commission rules that specify the requirements for an ESP application. In particular, under O.A.C. 4901:1-35-03(C), an application must include, *inter alia*:

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[113] Case No. 09-786-EL-UNC, Staff Recommendations, at 3 (Nov. 18, 2009); *see also* SEET Order at 12.

[114] The Commission ultimately found "that Staff's proposal, with some commenter clarifications, is appropriate for the purpose of determining whether an electric utility has had significantly excessive earnings." SEET Order at 18. Because the Commission did not specify any changes to Staff's recommendation regarding extraordinary items, that recommendation was adopted. (In any event, this recommendation was not seriously disputed, and the Modified Rider RRS could not be excluded as a "special item" under any of the proposals made by the intervenors in Case No. 09-786.)

> Pro forma financial projections of the effect of the ESP's implementation upon the electric utility for the duration of the ESP, together with testimony and work papers sufficient to provide an understanding of the assumptions made and methodologies used in deriving the pro forma projections.[115]

Here, the Companies' proposal fails this requirement because the pro forma financial projections submitted in this case do not reflect the increased revenues the Companies would receive if Modified Rider RRS were approved. As noted in Ms. Mikkelsen's testimony, the original "Rider RRS was to have no net financial impact on the Companies."[116] Now, however, FirstEnergy is promoting a proposal under which the Companies would no longer be revenue neutral.[117] Indeed, the Companies' own numbers show that they would receive $363 million in net revenues during the first 31 months alone.[118] Because the Companies' receipt of hundreds of millions of dollars of revenues would necessarily affect the pro forma financial projections, any new rider proposal should have been accompanied by revised projections. But the Companies provided no such projections with their Modified Rider RRS proposal. The Companies should be required to cure this deficiency before any further consideration of their flawed proposal.

V. FirstEnergy's Second and Seventh Grounds for Rehearing Are Without Merit.

In addition to the errors identified above, FirstEnergy's rehearing application also asserts several other grounds for rehearing. Two of these grounds in particular – nos. 2 and 7 in the Application – are without merit and should be rejected by the Commission.

In its second ground for rehearing, FirstEnergy argues that the Commission erred by removing one of the contingencies that would need to occur before FirstEnergy would be

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[115] O.A.C. 4901:1-35-03(C)(2).

[116] Mikkelsen Rehearing Test. at 18.

[117] *Id.*

[118] See supra at Section IV.B.

required to submit a proposal for the procurement of 100 MW of renewable resources.[119] FirstEnergy's argument is meritless and, by seeking the reinstatement of this contingency, FirstEnergy shows that it does not take seriously its purported renewables "commitment."

The renewables provision presented in the Third Supplemental Stipulation ("Stipulation") was riddled with so many conditions that, taken together, they virtually ensured that FirstEnergy would never need to procure the 100 MW of renewable resources. First, the State or federal government would need to issue a future law or rule for which new renewable resources would be helpful for compliance.[120] Second, Staff would need to determine that the future law or rule had not fostered the development of new renewable resources.[121] Third, the Companies would then make a filing at Staff's request, and the Commission would need to approve the Companies' proposal.[122] At that point, although the Companies would be required to seek the procurement of 100 MW of wind or solar, this requirement would still be sharply limited, because the procurement would not last for any period of time beyond the May 31, 2024 end date of ESP IV.[123] Given the numerous conditions included in the Stipulation, and the May 2024 end point, the time period in which any renewables development could occur would be far too short to support the development of new renewable resources. Thus, even if all the Stipulation conditions were met, there would be virtually no chance that the Companies would successfully procure 100 MW of renewable resources in that narrow timeframe. Far from being a "*bona fide* commitment on the part of the Companies,"[124] this Stipulation provision was virtually meaningless.

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[119] Co. App. at 4-7.

[120] Stipulation at 12.

[121] *Id.*; Tr. XXXVI at 7541.

[122] Stipulation at 12.

[123] *Id.*

[124] Co. App. at 5.

In its Order, the Commission partially addressed the deficiencies of the Stipulation provision by stripping out one of the many conditions that would need to be met before the Companies sought to procure 100 MW of renewables. Specifically, the Commission "modified the Stipulations to eliminate any requirement that the procurement must be related to the enactment of new Federal or state environmental laws or regulations."[125] Although the chances of any renewable resources actually being developed would remain extremely small, this modification does marginally increase the chances that the Companies will be required to follow through on their rhetoric about pursuing "further development of . . . renewable resources."[126]

But FirstEnergy urges the Commission to scuttle this modest reform, claiming that the modification was unreasonable, and that "[n]o rationale or explanation . . . is provided."[127] These arguments miss the mark. First, a careful reading of the Order shows that the Commission was well aware of the problems with this Stipulation provision:

> Environmental Groups, OCC/NOAC, and OHA contend that the lack of enforceability of these various targets and goals should lessen the weight the Commission affords to it when considering these provisions as a potential benefit to customers and the public interest. NOPEC agrees with other opposing parties that the Companies will not be held accountable for any of the goals made to further resource diversification, and thus, should not be considered as commitments nor considered by the Commission when it evaluates whether the traditional three-prong test has been met. Sierra Club and RESA agree that these provisions are subject to several contingencies or are otherwise completely unenforceable and so they should be disregarded by the Commission.[128]

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[125] Order at 97.

[126] Stipulation at 2; *see also, e.g., id.* at 3 (claiming that the Stipulation package "promotes . . . renewed support for energy efficiency and renewable resources in Ohio"); *id.* at 6 (citing "commitments regarding . . . renewable resources"); *id.* at 12 (Stipulation provision entitled "Increase Renewable Resources -- 100 MW of Wind or Solar").

[127] Co. App. at 6.

[128] Order at 68 (citations omitted).

Second, given the Commission's stated support for "the construction of new renewables in this state,"[129] not to mention the Companies' bold claims about pursuing the development of such resources, the Commission was well within its rights in adopting a change that modestly increases the odds of such development occurring. Put simply, there was nothing unreasonable about the Commission's modest improvement of an otherwise meaningless Stipulation provision. The Commission should deny FirstEnergy's second ground for rehearing.

In its seventh ground for rehearing, FirstEnergy challenges the Commission's decision to reserve "the right to prohibit recovery of any costs related to any unit for any period exceeding 90 days for any forced outage during the term of ESP IV, unless otherwise recommended by Staff and approved by the Commission."[130] FirstEnergy claims that the Commission acted unreasonably by "prohibit[ing] cost recovery for Plant outages greater than 90 days."[131] This argument is misplaced for multiple reasons.

First, as a threshold matter, this ground for rehearing does not meet the requirement of R.C. 4903.10(B). The statute requires that a rehearing application "set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful."[132] Here, however, FirstEnergy failed to specifically describe the purported deficiencies of this Commission ruling. Instead, FirstEnergy simply lists several cursory assertions, none of which it

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[129] *Id.* at 97.

[130] *Id.* at 92.

[131] Co. App. at 12, 13.

[132] R.C. 4903.10(B); *see also* O.A.C. 4901-1-35(A) ("An application for rehearing must set forth, in numbered or lettered paragraphs, the specific ground or grounds upon which the applicant considers the commission order to be unreasonable or unlawful. An application for rehearing must be accompanied by a memorandum in support, which sets forth an explanation of the basis for each ground for rehearing identified in the application for rehearing and which shall be filed no later than the application for rehearing.").

elaborated on or explained.[133] Because FirstEnergy's cursory claims fall far short of the statutory requirements, this ground for rehearing should be denied.[134]

Second, in advancing this ground, FirstEnergy misstates what the Order actually says. Contrary to FirstEnergy's claim that "the Commission prohibited cost recovery for Plant outages greater than 90 days," the Order does not contain a blanket prohibition against cost recovery for forced outages that last longer than 90 days.[135] Instead, the Commission reserved the right to prohibit cost recovery for any period greater than 90 days, and it also laid out the necessary conditions for cost recovery to be allowed.[136] FirstEnergy ignores these crucial details, instead mischaracterizing the Commission's ruling as a blanket prohibition.

Third, despite FirstEnergy's (unsupported) claims to the contrary, there is nothing unreasonable about limiting cost recovery for forced outages that last longer than 90 days. Indeed, if anything, the Commission's slight modification does not go far enough to protect customers from the financial risks of Rider RRS.

The term sheet for the Affiliate PPA includes a "unit contingent" provision that excuses FES from providing energy, capacity, and ancillary services during unit outages of up to 180 days.[137] This 180-day exemption, which is provided on a unit-by-unit basis, starts over with each new outage.[138] Under the term sheet, the Companies would continue to pay fixed operation and

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[133] Co. App. at 13 (complaining the Commission's ruling "was not part of the Companies' Application or any of the Stipulations, upsets the balance of competing interests when the negotiating process is viewed as a whole, and is neither supported by the record nor explained by the Commission").

[134] For similar reasons, FirstEnergy's sixth ground for rehearing is also fatally deficient.

[135] FirstEnergy's application further mischaracterizes the Commission's ruling by suggesting that the 90-day provision applies to all plant outages. Co. App. at 12, 13, 16. In truth, however, this ruling specifically refers to *unplanned* outages.

[136] Order at 92.

[137] Co. Ex. 156 § 8.

[138] *Id.* § 13; *see also* Tr. XI at 2296, 2298.

maintenance ("O&M") costs, taxes, and a return on equity for a unit even when it's unavailable – costs that would ultimately be passed along to customers through Rider RRS.[139] As Sierra Club has explained in prior briefing, the scope of this outage exemption is significant.[140]

In its Order, the Commission briefly noted the concerns raised by Sierra Club concerning the PPA's 180-day forced outage provision.[141] Although the Commission did not meaningfully reduce the financial risks that forced outages pose to ratepayers under Rider RRS, it did establish certain conditions that must be met before FirstEnergy could recover costs for outages lasting longer than 90 days. By challenging this very slight improvement to Rider RRS – a scheme that would cost customers hundreds of millions of dollars or more, and would shift enormous financial risks onto ratepayers – FirstEnergy's argument reveals what Rider RRS is all about. Far from providing customers benefits, this rider (whether in its original or modified form) is a scheme designed to maximize profits for FirstEnergy Corp. – at customers' expense. Because there is nothing "unreasonable" about taking steps to reduce customer risk, FirstEnergy's seventh ground for rehearing is meritless.

CONCLUSION

For the reasons stated above, the Commission should reject the Companies' Modified Rider RRS proposal, and should deny the Companies' second, third, seventh, and eighth grounds for rehearing.

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[139] Co. Ex. 156 §§ 8, 13.

[140] SC Br. at 48-50; SC Reply at 34-35.

[141] Order at 53 ("Even in the event the term sheet is finalized, Sierra Club states that it exposes customers to additional financial risks as it excuses FES' provision of energy, capacity, and ancillary services during many unit outages . . . .").

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Respectfully submitted,

s/ Shannon Fisk

Richard C. Sahli (Ohio Bar #0007360)
Richard Sahli Law Office, LLC
981 Pinewood Lane
Columbus, Ohio 43230-3662
Telephone: (614) 428-6068
rsahli@columbus.rr.com

Shannon Fisk (PHV-1321-2016)
Earthjustice
1617 John F. Kennedy Blvd., Suite 1130
Philadelphia, PA 19103
(215) 717-4522
(212) 918-1556 (fax)
sfisk@earthjustice.org

Michael C. Soules (PHV-5615-2016)
Earthjustice
1625 Massachusetts Ave. NW, Suite 702
Washington, DC 20036
(202) 797-5237
msoules@earthjustice.org

Tony G. Mendoza (PHV-5610-2016)
Sierra Club
Environmental Law Program
85 Second Street, Second Floor
San Francisco, CA 94105-3459
(415) 977-5589
tony.mendoza@sierraclub.org

Attorneys for Sierra Club

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Sierra Club's Memorandum *Contra* the Companies' Application for Rehearing has been served upon the following parties via electronic mail on May 12, 2016:

s/ Michael Soules
Michael Soules

PERSONS SERVED

Thomas.mcnamee@puc.state.oh.us
Thomas.lindgren@puc.state.oh.us
Ryan.orourke@puc.state.oh.us
mkurtz@BKLlawfirm.com
kboehm@BKLlawfirm.com
jkylercohn@BKLlawfirm.com
stnourse@aep.com
mjsatterwhite@aep.com
yalami@aep.com
joseph.clark@directenergy.com
ghull@eckertseamans.com
zkravitz@taftlaw.com
Schmidt@sppgrp.com
ricks@ohanet.org
tobrien@bricker.com
wttpmlc@aol.com
lhawrot@spilmanlaw.com
dwilliamson@spilmanlaw.com
Kevin.moore@occ.ohio.gov
sauer@occ.state.oh.us
leslie.kovacik@toledo.oh.gov
jscheaf@mcdonaldhopkins.com
marilyn@wflawfirm.com
matt@matthewcoxlaw.com
gkrassen@bricker.com
dborchers@bricker.com
mfleisher@elpc.org
selisar@mwncmh.com
Amy.Spiller@duke-energy.com
jeffrey.mayes@monitoringanalytics.com
mhpetricoff@vorys.com
laurac@chappelleconsulting.net
mjsettineri@vorys.com
mpritchard@mwncmh.com
cmooney@ohiopartners.org
joliker@igsenergy.com
mswhite@igsenergy.com
Bojko@carpenterlipps.com
Allison@carpenterlipps.com
hussey@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
finnigan@edf.org
meissnerjoseph@yahoo.com
trhayslaw@gmail.com
TODonnell@dickinsonwright.com
dstinson@bricker.com
drinebolt@ohiopartners.org
Ccunningham@Akronohio.Gov
Jeanne.Kingery@dukeenergy.com
toddm@wamenergylaw.com
gthomas@gtpowergroup.com
stheodore@epsa.org
glpetrucci@vorys.com
gpoulos@enernoc.com
david.fein@constellation.com
asonderman@keglerbrown.com
msoules@earthjustice.org
mdortch@kravitzllc.com

sechler@CarpenterLipps.com
cynthia.brady@constellation.com
lael.campbell@exeloncorp.com
tony.mendoza@sierraclub.org
burkj@firstenergycorp.com
cdunn@firstenergycorp.com
jlang@calfee.com
talexander@calfee.com
dakutik@jonesday.com
sam@mwncmh.com
fdarr@mwncmh.com

rparsons@kravitzllc.com
ghiloni@carpenterlipps.com
callwein@keglerbrown.com
Ajay.kumar@occ.ohio.gov
larry.sauer@occ.ohio.gov
maureen.willis@occ.ohio.gov
William.michael@occ.ohio.gov
Kevin.moore@occ.ohio.gov
mkl@smxblaw.com
gas@smxblaw.com
rkelter@elpc.org

Attorney Examiners:
Gregory.Price@puc.state.oh.us
mandy.chiles@puc.state.oh.us
Megan.Addison@puc.state.oh.us