FILE

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan.	:	Case No. 14-1297-EL-SSO

INITIAL BRIEF
OF
THE CLEVELAND MUNICIPAL SCHOOL DISTRICT

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I. INTRODUCTION

This case is before the Commission upon the application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company (collectively, "FirstEnergy," "FE," or the "Companies") for approval of a standard service offer ("SSO") in the form of an electric security plan ("ESP") pursuant to R.C. 4928.143. The central issue in the case is FirstEnergy's request for approval of a rider, dubbed the Retail Rate Stability Rider ("Rider RRS"), which would require all the Companies' distribution customers – including shopping customers that have elected to make their own arrangements for generation supply – to pay for a purchased power agreement ("PPA") between the Companies and their generation affiliate, First Energy Solutions Corp. ("FES"), not to secure a source of generation supply, but to serve as a financial hedge against possible future increases and volatility in the wholesale market price of electricity.[1] As described in the application, the Companies would use the funds

[1] Application, 9-10.

exacted from their ratepayers via Rider RRS to purchase the output of specified FES generation assets,[2] which the Companies would sell into the PJM Interconnection LLC ("PJM") markets.[3] The PPA costs, which include a return of and on the investment in these assets, and any revenues resulting from the sale of the plants' output would then be netted, and the difference would be reflected in Rider RRS as a charge or credit on customer bills, depending on the results of this calculation.[4]

The Commission is on familiar ground in considering Rider RRS, having declined to implement similar arrangements in the most recent AEP Ohio and Duke Energy Ohio ESP proceedings due to the applicants' failure to demonstrate that their proposed riders would produce a net benefit to customers.[5] However, rather than totally rejecting the AEP Ohio and Duke proposals based on the host of legal impediments and public policy considerations cited by nearly every participant in those cases, including its own staff ("Staff"), the Commission permitted placeholder riders to be filed with a zero rate, stating that it believed that arrangements of this type "if properly conceived, *[have]* the potential to supplement the benefits derived from the staggering and laddering of the SSO auctions, and to protect customers from price volatility in the wholesale market."[6] The Commission went on to identify certain factors it expected the

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[2] The assets in question are the Davis-Besse nuclear power station, W. H. Sammis power stations, and FES's share of the Ohio Valley Electric Corporation ("OVEC") power stations.

[3] *Id.*

[4] *Id.*

[5] *See In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143, in the Form of an Electric Security Plan,* Case No. 13-2385-EL-SSO (Opinion and Order dated February 25, 2015) (referred to herein as the "AEP Ohio Order"), and *In the Matter of Application of Duke Energy Ohio, Inc. for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan, Accounting Modifications, and Tariffs for Generation Service,* Case No. 14-841-EL SSO (Opinion and Order dated April 2, 2015) (referred to herein as the "Duke Order").

[6] AEP Ohio Order, 25; Duke Order, 46-47.

applicants to address in the event they were to seek to establish a rate for the riders through a subsequent filing, noting that it would balance these factors, but not be bound thereby, in determining whether to authorize cost recovery.[7] The Commission also set out certain conditions it expected such filings to meet, presumably because it regarded these conditions as essential components of a "properly conceived" rider arrangement.[8]

By leaving the door ajar for AEP Ohio and Duke, the Commission also provided an opening for FirstEnergy, whose application predated the AEP Ohio and Duke orders,[9] to continue to pursue approval of its proposed Rider RRS arrangement in this case. However, although FirstEnergy entered into a series of stipulations designed to garner support for its ESP by providing inducements to signatory parties,[10] it was not until after the initial thirty-five day hearing concluded that FirstEnergy agreed to make any changes to the Rider RRS arrangement as originally proposed in the application. These modifications, which were apparently the result of post-hearing negotiations with Staff, were included in a Third Supplemental Stipulation filed on December 30, 2015.[11] Staff signed off on the Third Supplemental Stipulation despite its previous opposition to the AEP Ohio and Duke riders and despite the testimony of its expert, Dr. Hisham Choueiki, opposing the approval of Rider RRS in this case.[12] Because no Staff witness was called to support the Third Supplemental Stipulation at the hearing that was reconvened on

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[7] *Id.*

[8] *Id.*

[9] The application in this case was filed on August 4, 2014.

[10] *See* Co Ex. 2, Co Ex. 3, and Co. Ex. 4.

[11] Co. Ex.154

[12] *See* Staff Ex. 12 (Choueiki Direct), 11-14.

January 14, 2016, one can only assume that Staff deemed the modifications to the Rider RRS arrangement contained in this stipulation as being sufficient to address the requirements recommended by Dr. Choueiki to make the arrangement more palatable from the Staff's perspective.[13]

Among the modifications relating to the original Rider RRS proposal contained in the Third Supplemental Stipulation, the following two are the most significant. First, the term of Rider RRS was reduced from fifteen years to eight years,[14] while the term of the proposed ESP itself was correspondingly increased from three years to eight years. Second, a minimum credit feature was added, providing for a stipulated minimum credit of $10 million in the fifth year, which would increase in $10 million increments over the sixth, seventh, and eighth years of the rider.[15] If the actual credit resulting from comparing the revenues to the PPA costs exceeded the stipulated credit applicable to the year in question, customers would receive the actual credit through Rider RRS in the following year. On the other hand, if the comparison of the revenues, if any, to the PPA costs for the year in question produced a net cost, the stipulated credit would be applied to offset the cost in determining the Rider RRS rate for the following year.

The Cleveland Municipal School District ("CMSD") is responsible for the operation of the public school system in the city of Cleveland, Ohio, which, with some 45,000 students, is by far the largest school system in the FirstEnergy service territory. Although CMSD is obviously

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[13] As Dr. Choueiki explained in his prefiled testimony, Staff, consistent with its position in the AEP Ohio and Duke cases, was opposed to Rider RRS. However, because the Commission had determined in the AEP Ohio and Duke orders that a properly conceived hedging arrangement could be in the public interest, Dr. Choueiki went on to recommend modifications that would make the proposed Rider RRS arrangement more palatable from Staff's perspective. *See* Staff Ex. 12 (Choueiki Direct), 15-17.

[14] The was coupled with a reduction in the term of the proposed PPA from fifteen years to eight years, which FirstEnergy apparently "negotiated" with FES after it agreed to reduce the term of Rider RRS to eight years.

[15] Third Supplemental Stipulation, Paragraph V.B.2.

not FirstEnergy's largest customer, CMSD owns and maintains over 100 school and administrative buildings, which have an aggregate electric requirement well over ten times the 700,000 kWh threshold for classification as a mercantile customer under R.C. 4928.01(A)(19). Indeed, CMSD pays approximately $7.5 million annually for electric service, which makes the cost of electricity a very significant component of CMSD's budget. Thus, to fulfill its fiduciary obligation in connection with the taxpayer-supplied funds that represent its only source of revenue, CMSD aggressively pursues measures to control its electric costs, including negotiating long-term generation supply contracts with competitive retail suppliers to secure the most favorable pricing possible.

CMSD opposes the approval of Rider RRS, which, even under FirstEnergy's outdated forecast, would cost CMSD hundreds of thousands of dollars over the early years of the ESP while producing no benefit for the Cleveland public schools. As indicated above, CMSD protects itself from volatility in the cost of electricity due to extreme weather conditions by entering into multi-year fixed-price contracts with competitive retail suppliers, an approach necessary to provide the certainty CMSD requires for its budgeting process. Thus, even if one accepts the notion that Rider RRS could, in the long run, provide additional protection to SSO customers from wholesale price increases and market volatility, the prospect that this would somehow eventually translate into a net benefit for CMSD in the out years of the PPA is, at best, sheer speculation. CMSD strenuously objects to being forced to gamble scarce taxpayer dollars on the mere possibility that it might ultimately realize a future net benefit in an unknown and unknowable amount. Indeed, the only guaranteed winners under FirstEnergy's proposal are FirstEnergy's ultimate shareholders, who, contrary to fundamental economic principles – not to mention common sense – would realize a ratepayer-funded return on their investment in the uneconomic FES generation assets in question while being exposed to zero risk. Further, subjecting a customer that elects to manage its risk by entering into its own generation agreements with competitive retail suppliers to an involuntary hedging arrangement is inconsistent with the General Assembly's judgment that market-driven pricing of generation service is in the public interest, which is the reason the legislature restructured Ohio's electric industry in the first place.

Because of the significant adverse impact approval of Rider RRS would have on CMSD, the focus of this initial brief will, for the most part, be confined to this important issue. First, CMSD will demonstrate that the Commission lacks the statutory authority to approve the proposed Rider RRS arrangement. Second, CMSD will show that, even if the Commission had the authority to approve Rider RRS, federal preemption would preclude the Commission from implementing it in any event. Next, CMSD will make the case that approval of the proposed Rider RRS arrangement would be contrary to both Ohio and federal pro-competition policies, and would also be inconsistent with the state policy embodied in the Ohio Uniform Depository Act. Finally, CMSD will demonstrate that the modifications to the Companies' original Rider RRS proposal contained in the Third Supplemental Stipulation do nothing to remedy any of these flaws.

II. ARGUMENT

A. THE COMMISSION LACKS STATUTORY AUTHORITY TO APPROVE RIDER RRS.

1. Rider RRS Does Not Meet the Statutory Criteria for Inclusion as a Component of an ESP.

It is axiomatic that the Commission, as a creature of statute, has only those powers specifically conferred upon it by the General Assembly.[16] As the Commission acknowledged in the AEP Ohio and Duke orders, the Ohio Supreme Court has expressly held that the Commission has the authority to approve, as a component of an ESP, only elements that fall within a category specifically identified in R.C. 4928.143(B)(1) or (B)(2).[17] Thus, if Rider RRS does not meet any of the eligibility criteria the legislature has established for the inclusion of a proposal as an element of ESP, the Commission has no power to approve it.

R.C. 4928.143(B)(1) provides that "(a)n electric security plan shall include provisions relating to the supply and pricing of electric generation service." As explained above, the proposed Rider RRS arrangement is purely a financial hedging mechanism, and the plant output purchased by FirstEnergy under the PPA will not be delivered to the Companies' SSO customers, but will be sold into the PJM market. Moreover, Rider RRS will have no effect on the price paid for generation service be either SSO or shopping customers. Because the proposed Rider RRS arrangement is unrelated to the physical supply of capacity and energy and to the pricing of electric generation service, Rider RRS does not qualify for inclusion in an ESP under R.C. 4928.143(B)(1). Indeed, this proposition is so self-evident that the Commission did not

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

[17] *See* AEP-Ohio Order, 20; Duke Order, 43, citing *In re Columbus S. Power Co.*, 128 Ohio St.3d 512, 519-520 (2011).

even bother to address the question in its AEP-Ohio and Duke orders, and skipped directly to R.C. 4928.143(B)(2) in search of authority that would allow it to include the rider arrangements proposed in those proceedings as a component of an ESP.

Although the applicants in the AEP Ohio and Duke ESP proceedings attempted to shoehorn their proposed riders into several different R.C. 4928.143(B)(2) subdivisions, the Commission ultimately hung its hat on R.C. 4928.143(B)(2)(d) as the source of its statutory authority for approving the placeholder riders in those cases. CMSD reserves the right to respond to any attempt by FirstEnergy to invoke other R.C. 4928.143(B)(2) subdivisions as grounds for authorizing Rider RRS, but, for purposes of this initial brief, will focus on the Commission's rationale for finding that the AEP Ohio and Duke riders were eligible for inclusion in an ESP under R.C. 4928.143(B)(2)(d) based on the assumption that FirstEnergy will rely on that rationale to support the inclusion of Rider RRS in the ESP before the Commission in this case.

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

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

In the AEP Ohio and Duke orders, the Commission began its analysis by parsing R.C. 4928.143(B)(2)(d) to identify three separate conditions that the proposed riders had to satisfy to be eligible for inclusion in an ESP under this provision.[18] The Commission then found that the riders qualified for inclusion because (1) they represented a "charge," (2) the charge "relat(ed)

[18] *See* AEP Ohio Order 20, Duke Order, 43.

to limitations on customer shopping for retail electric generation service," and (3) the charge "would have the effect of stabilizing or providing certainty regarding retail electric service."[19] Although there is no question that AEP Ohio and Duke riders, like Rider RRS, represented a charge, the Commission's determinations that the arrangements in question related to a limitation on shopping and would have the effect of stabilizing or providing certainty regarding retail electric service will not stand up to even cursory scrutiny.

2. Rider RRS Is Not a Charge Relating to a Limitation on Shopping.

Although the Commission determined that the riders at issue in the AEP Ohio and Duke ESP cases represented a limitation on shopping, this conclusion has no basis in logic or the law. The Commission began by conceding that these riders, like FirstEnergy's proposed Rider RRS, were simply financial devices and imposed no physical limitation on shopping.[20] However, the Commission went on to find that the proposed riders "would function as a financial restraint on complete reliance on the retail market for the pricing of retail electric generation service," which, according to the Commission, equated to a limitation on shopping. Not only is this a total non sequitur, but this tortured interpretation flies in the face of the Ohio Supreme Court's rejection of similar Commission interpretations of R.C. 4928.143(B)(2) on the ground that such interpretations "would remove any substantive limit to what an electric security plan may contain, a result we do not believe the General Assembly intended."[21] CMSD respectfully submits that there is no reasonable reading of R.C. 4928.143(B)(2)(d) that would bring Rider

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[19] AEP Ohio Order, 20-22; Duke Order, 43-45.

[20] AEP Ohio Order, 22; Duke Order 45.

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

RRS within its ambit as a charge "relating to a limitation on shopping," and urges the Commission to revisit this interpretation in considering Rider RRS in this case.

Like the riders before the Commission in the AEP Ohio and Duke ESPs, Rider RRS is simply a financial device and imposes no physical constraint on shopping. In CMSD's view, this should end the inquiry. By empowering the Commission to include terms and conditions in an ESP relating to limitations on shopping, the General Assembly recognized that there could be circumstances where constraints on the right to shop, such as customer eligibility requirements or minimum stay provisions, might be necessary or appropriate. However, it is difficult to envision a scenario in which a tariffed charge could constitute a limitation on shopping unless, of course, the charge was imposed only on shopping customers as a condition of the right to shop.[22] Because Rider RRS would be imposed on both shopping an non-shopping customers, there is, as a matter of logic, no way that this charge can reasonably be construed as relating to a limitation on shopping for retail electric generation service. Moreover, the rationale offered by the Commission in the AEP Ohio and Duke orders – the notion that the riders "would function as a financial restraint on complete reliance on the retail market for the pricing of retail electric generation service" – cannot save Rider RRS because this rationale does jibe with any of the conditions appearing in the R.C. 4928.143(B)(2)(d) criteria for the inclusion of an element in an ESP.

If the legislature had intended to confer upon the Commission the extraordinary power to require ratepayers to fund hedging arrangements as a means to stabilize and provide certainty regarding retail electric service, R.C. 4928.143(B)(2)(d) would have explicitly so provided, just

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

as it expressly identifies carrying costs, expense amortizations, deferrals, and deferral recovery as permissible means to achieve these ends. That the legislature failed to include hedging arrangements among the mechanisms specifically identified in the statute is a clear signal that the legislature did not intend to authorize the Commission to include customer-funded hedges as a component of an ESP.[23] Thus, any attempt to qualify Rider RRS under the eligibility criteria set forth in R.C. 4928.143(B)(2)(d) under that guise that the arrangement constitutes a limitation on shopping is doomed by basic principles of statutory construction and would represent the type of linguistic gymnastics that the Ohio Supreme Court has previously rejected as being contrary to the underlying legislative intent.

Although the Commission took great pains to characterize the AEP Ohio and Duke riders as generation charges,[24] no matter what one calls it, Rider RRS is not a charge for generation service because it will not buy any FirstEnergy ratepayer a single kWh of electrical energy. Rather, Rider RRS is a charge that would be imposed on all the Companies' distribution customers regardless of their source of generation supply.[25] Thus, Rider RRS would simply add to the cost both SSO customers and shopping customers would pay as a condition of receiving distribution service, but would in no way limit any customer's right to shop.

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[23] *See, e.g., Cleveland Mobile Radio Sales, Inc. v. Verizon Wireless, 113 Ohio St.3d 394, 2007-Ohio-2203, 865 N.E.2d 1275, ¶ 12* (holding that, "(w)hen interpreting a statute, a court must first examine the plain language of the statute to determine legislative intent. The court must give effect to the words used, making neither additions nor deletions from words chosen by the General Assembly."

[24] AEP Order, 26; Duke Order, 48.

[25] In so stating, CMSD is not taking the position that Rider RRS should be considered to be a distribution charge, a classification that would automatically preclude its inclusion as an element of an ESP and would place it squarely at odds with the R.C. 4928.02(H) prohibition against the recovery of generation costs through distribution rates. CMSD's point here is merely that calling Rider RRS a generation charge does nothing to support the notion that Rider RRS is eligible for inclusion in an ESP because it represents a limitation on shopping.

R.C. 4928.143(B)(2)(d) does not authorize imposing additional costs on customers to create "a financial restraint on reliance on the retail market for the pricing of retail generation service." Indeed, such a result would be inconsistent with granting customers the right to elect to make their own arrangements for generation supply based on their own tolerance for risk.[26] There is nothing in this or any other statute that remotely suggests that the Commission has the authority to substitute its judgment for that of the shopping customer when it comes to the question of risk tolerance, let alone the authority to force shopping customers to pay for a financial hedge that they neither need nor want. Further, as discussed *infra*, the Commission plainly has no jurisdiction over the pricing of wholesale generation, and, thus, has no authority to attempt to influence the rates for wholesale energy and capacity by forcing FirstEnergy ratepayers to provide a subsidy to a particular wholesale supplier.

3. Rider RRS Will Not Stabilize or Provide Certainty Regarding Retail Electric Service.

In its orders in the AEP Ohio and Duke ESP cases, the Commission specifically acknowledged that the impact of the riders proposed in those proceedings "cannot be known to any degree of certainty" and that "the rider may result in a net cost to customers, with little offsetting benefit from the rider's intended purpose as a hedge against market volatility."[27] However, inexplicably, the Commission, in the next breath, concluded that the hedging arrangements proposed in those cases would have the effect of stabilizing or providing certainty regarding retail electric service and, thus, satisfied the final R.C. 4928.143(B)(2)(d) criterion for

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

[27] AEP Ohio Order, 24; Duke Order, 46.

inclusion in an ESP.[28] As a matter of logic, there is no way to square these two conflicting findings, and CMSD urges the Commission not to repeat this error in ruling on Rider RRS in this case. In determining whether the proposed Rider RRS arrangement satisfies this condition, the Commission should keep the following factors firmly in view.

First, under the plain language of R.C. 4928.143(B)(2)(d), the Commission can only include a term, condition, or charge as a component of an ESP upon a showing that the proposed term, condition, or charge "would have the effect of stabilizing or providing certainty regarding retail electric service" (emphasis added). It is not enough that the rider arrangement could have the effect of stabilizing or providing certainty with respect to retail rates or, to use the Commission's words, that the arrangement "would, in theory, have the effect of stabilizing or providing certainty regarding retail electric service." (emphasis supplied).[29] Unlike amortizations and deferrals, where the stabilizing effect on rates can be calculated with certainty going in, or the staggering and laddering of SSO auctions, which, perforce, reduce the impact of wholesale market volatility on the rate paid by SSO customers for generation service, the Rider RRS arrangement carries no guarantee that it will do anything other than increase the bills of all FirstEnergy customers starting on the day Rider RRS is implemented. That the desired effect of

[28] AEP Ohio Order, 21; Duke Order, 44.

[29] AEP Ohio Order, 21; Duke Order, 44. The "theory" the Commission referred to is not a theory at all because there is no inverse relationship between a cost-of-service based price and a market-based price. In fact, either could go up or down at any point in time without regard to the direction in which the other is moving. Moreover, unlike the typical hedge, where the investor combines long and short positions based on known prices to mitigate risk, not only is the future clearing price unknown, but the costs of the PPA may also increase significantly due to environmental requirements. In short, there is no valid theoretical basis to support the proposition that Rider RRS would actually have the effect of stabilizing or providing certainty regarding retail electric service. Yes, the SSO customer's total monthly bill will be less than it otherwise would have been when the wholesale market price exceeds the PPA costs and will be more than it otherwise would have been when the PPA costs exceed the wholesale market price. However, notwithstanding the Commission's conclusion in the AEP Ohio and Duke orders that this will serve to "smooth out market based rates" paid by both shopping and SSO customers, this so-called stabilizing effect will provide no benefit to customers unless the total net Rider RRS credits exceed the total net Rider RRS costs over the entire term of the rider.

a proposed arrangement is to provide additional protection to customers from price volatility in the wholesale market is irrelevant. If the legislature had intended this to be the test, the statute would speak in terms of the purpose or intent of the term, condition, or charge instead of requiring that the term, condition, or charge actually have the effect of stabilizing and providing certainty regarding retail electric service. As discussed *infra,* FirstEnergy has come no closer than AEP Ohio or Duke to sustaining the burden of demonstrating that the Rider RRS arrangement will produce a net financial benefit to customers. Accordingly, Rider RRS is not eligible for inclusion as an element of an ESP under the final R.C. 4928.143(B)(2)(d) criterion.

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

Any question that this is the fundamental nature of Rider RRS can be quickly laid to rest by considering the scenario in which a CRES provider issues its own bills for generation service. If, at some point in the future, the Rider RRS arrangement were to actually result in a credit rather than a charge, the customer of a direct-billing CRES provider would receive the credit on the FirstEnergy bill for distribution service as an offset to the amount the customer would otherwise have to pay for wires service.[30] The customer's bill for generation service would be unaffected by the credit. Thus, the mere possibility that the customer might realize a positive return on its forced investment in the PPA over the life of Rider RRS does not make Rider RRS eligible for inclusion in an ESP under the R.C. 4928.143(B)(2)(d) criterion requiring that the proposed term, condition, or charge <u>have</u> the effect of stabilizing or providing certainty regarding retail electric service.

Third, even under the most optimistic forecast presented in this case, Rider RRS is projected to cost customers some $414 million over the first three years of the ESP.[31] Thus, even if the Commission were to make the leap of logic required to find that Rider RRS would somehow impact the cost of retail electric service, it is impossible to argue with a straight face that Rider RRS would have the effect of stabilizing or providing certainty with respect to this service. In fact, Rider RRS would do precisely the opposite, to the detriment of all customers, but particularly to the detriment of shopping customers who, like CMSD, enter into long-term fixed-price contracts with a competitive retail supplier precisely because they place a high value on stability and certainty. Not only would approval of Rider RRS impact the ability of these customers to budget, but it would also create significant additional risk for all customers, an outcome that is totally at odds with the stated objective of providing stability and certainty regarding retail electric service.

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[30] *See* Application, Attachment 4.

[31] Mikkelsen Workpaper filed December 1, 2015.

Finally, because the Rider RRS Rider rate will be recalculated annually based on the prior year's PPA costs, any credit that might result from netting these historical costs with the historical revenues (if any) realized from selling the output of the subject plants into the PJM would lag the market price increase that created it and, thus, would not contribute to providing stability or certainty with regard to retail electric service. Indeed, on the gas side, one of the concerns that led the Commission to replace the GCR with a commodity rate established via a competitive bidding process was to provide a price signal to customers considering competitive supplier offers that was not distorted by out-of-period adjustments.[32] This timing problem becomes even more pronounced when one considers that no one will know if Rider RRS provided a net financial benefit to customers until after the ESP has run its course. Requiring ratepayers to pay dearly in the early years of the ESP in the hope that, by then end of the ESP, Rider RRS will have generated sufficient credits to produce a net financial benefit to customers cannot meet any definition of stability or certainty. Far from promoting stability and certainty with regard to retail electric service, the Rider RRS arrangement will serve to create instability and uncertainty, and, thus, could not have been what the legislature had in mind in establishing the final criterion of R.C. 4928.143(B)(2)(d).

4. Because the Proposed Rider RRS Arrangement Does Not Meet the Statutory Eligibility Requirements for Inclusion as a Component of an ESP, No Other Extrinsic Factors Are Relevant.

In its orders in the AEP Ohio and Duke ESP cases, the Commission identified certain factors it would weigh if the applicants sought to establish a rate for their riders through a

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

subsequent filing. Specifically, the Commission required the filing to address the following factors:

> . . . financial need of the generating plant; necessity of the generating facility, in light of future reliability concerns, including supply diversity; description of how the generating plant is compliant with all pertinent environmental regulations and its plan for compliance with pending environmental regulations; and the impact that a closure of the generating plant would have on electric prices and the resulting effect on economic development within the state.[33]

Although the Commission indicated that it would "not be bound by these factors," the Commission's statement that it "would balance" these factors "in deciding whether to approve the Company's request for cost recovery"[34] is cause for concern because it suggests that Commission harbors the notion that it is permitted to look beyond the eligibility criteria of R.C. 4928.143(B) in deciding whether to implement a rider of this type. Plainly, the Commission has no jurisdiction over FES generating facilities and no authority to determine the need for these facilities.[35] Although the Commission may be interested in the impact that closure of an FES generating plant would have on electric prices and on economic development within the state, this does not give the Commission authority to require the Companies' ratepayers to prop up these uneconomic generating assets by subsidizing them through Rider RRS. If Rider RRS is not a charge related to a limitation on shopping and will not have the effect of stabilizing or providing certainty with respect to retail electric service, no other extrinsic factors can save it.

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[33] AEP Ohio Order, 25; Duke Order, 47.

[34] *Id.*

[35] As former Commissioner Roberto explained, PJM is responsible for the reliability of generation and transmission service within its footprint. *See* EDF/OEC Ex.1 (Roberto Direct), 11-14.

B. EVEN IF THE COMMISSION HAD AUTHORITY UNDER OHIO LAW TO INCLUDE THE PROPOSED RIDER RRS ARRANGEMENT AS AN ELEMENT OF AN ESP, THE FEDERAL POWER ACT WOULD PREEMPT THE COMMISSION FROM IMPLEMENTING THE ARRANGEMENT.

1. The Commission's Failure to Address the Federal Preemption Issue in This Case Would Expose FirstEnergy Customers to Significant Financial Risk.

As the Commission well knows, Staff and numerous intervenors argued in the AEP Ohio and Duke ESP proceedings that the Federal Power Act preempted the Commission from approving the riders proposed in those cases, citing recent federal court decisions invalidating similar arrangements that had been approved by the Maryland and New Jersey commissions.[36] However, the Commission declined to address the federal preemption issue, stating that "under the specific facts and circumstances of these cases, such issues are best reserved for judicial determination."[37] CMSD understands that the Commission does not have the authority to decide constitutional questions, but submits that the Commission does have the authority, and, indeed, the responsibility, to determine whether it has jurisdiction to consider a proposal advanced in an application, particularly where, as here, the question is not a case of first impression. In fact, the Commission has routinely dismissed cases on preemption grounds in the past.[38] It may be that the language indicating that the "the specific facts and circumstances of these cases" played a role in the Commission sidestepping the preemption issue in the AEP Ohio and Duke ESP cases

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[36] *See PPL EnergyPlus, LLC v. Nazarian*, 974 F. Supp.2d 790 (D. Md. 2013), *aff'd*, 753 F.3d 467 (4th Cir. 2014) and *PPL EnergyPlus, LLC v. Hanna*, 977 F. Supp.2d 372, 393, (D. N.J. 2013), *aff'd sub nom., PPL EnergyPlus, LLC v. Solomon*, 766 F.3d 241 (3d Cir. 2014).

[37] AEP Ohio Order, 26; Duke Order, 48.

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

was a veiled reference to the fact that ratepayers would not be adversely affected by leaving this question to the courts because the riders approved in those proceedings were merely placeholders and contained a zero rate. However, that will not be the case if Rider RRS is approved in this proceeding.

It is well settled under Ohio law that neither the Commission nor the courts can order a refund of previously approved rates that are subsequently invalidated.[39] Thus, if the Commission approves Rider RRS while turning a blind eye to the preemption issue, FirstEnergy ratepayers could well wind up paying millions of nonrefundable dollars to subsidize FES's uneconomic generation assets while awaiting a judicial determination that the Commission was preempted by the Federal Power Act from imposing this charge. Under these circumstances, ratepayers cannot afford to have the Commission defer the federal preemption issue for subsequent judicial determination, and passing the buck to the courts will not absolve the Commission from responsibility for every dollar ratepayers lose between the time Rider RRS is implemented and a judicial determination that the Commission was preempted by federal law from approving the proposed Rider RRS arrangement. If, despite the wealth of authority to the contrary and the advice of Staff counsel in the AEP Ohio and Duke proceedings, the Commission truly believes that it has jurisdiction to intrude upon the FERC-approved, market-based wholesale pricing model in this fashion, it owes it to the customers of FirstEnergy to step up and say so. On the other hand, if the Commission believes that, based on existing precedent, it is preempted from impinging on the PJM wholesale pricing process in this manner, it should not expose ratepayers to this unnecessary risk by hiding behind the proposition that it has no authority to decide the preemption issue.

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

2. Commission Approval of the Proposed Rider RRS Arrangement Would Stand as an Obstacle to the Accomplishment and Execution of the Full Purposes and Objectives of the Federal Policy Embodied in the Market-Based Wholesale Pricing Model Utilized by PJM.

As the Ohio Supreme Court has explained, there are several circumstances under which state regulatory authority will be deemed to be preempted by federal law.

> Under the Supremacy Clause of the United States Constitution, state legislation and regulating authority may be pre-empted in several circumstances: (1) where Congress, in enacting a federal statute, has expressed a clear intent to pre-empt state law; (2) when it is clear, despite the absence of explicit pre-emptive language, that Congress has intended, by legislating comprehensively, to occupy an entire field of regulation and has left no room for the states to supplement the federal law; and (3) when compliance with both state and federal law is impossible or when compliance with state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of the federal policies embodied in the laws at issue.[40]

There is no question that Congress, in enacting the Federal Power Act, intended to preempt state regulation of wholesale power transactions. Indeed, the Ohio Supreme Court has confirmed that "the federal government has preempted the field with regard to FERC's regulation of wholesale power transactions."[41] That said, the Commission will undoubtedly hear from FirstEnergy that the proposed Rider RRS arrangement would not intrude upon FERC's exclusive jurisdiction over the pricing of wholesale capacity and energy because the PPA itself is not subject to the Commission's jurisdiction and will ultimately require FERC approval. However,

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[40] *Marketing Research Services, Inc. v. Pub. Util. Comm. of Ohio*, 34 Ohio St.3d 52, 54 (1987), citing *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 699, 104 S.Ct. 2694, 2700, 81 L.Ed.2d 580 (1984) and *Cleveland v. Pub. Util. Comm.*, 64 Ohio St.2d 209 (1980).

[41] *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.*, 76 Ohio St.3d 521, 525 1996-Ohio-298 (Ohio 1996), citing *Fed. Power Comm. v. S. California Edison Co.* (1964), 376 U.S. 205, 215-216, 84 S.Ct. 644, 651, 11 L.Ed.2d 638, 646 (1964), wherein the Supreme Court stated: " * * * Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction * * *. This was done in the [Federal] Power Act making [FERC] jurisdiction plenary and extending it to all wholesale sales in interstate commerce except those which Congress has made explicitly subject to regulation by the States."

the fact that the Commission is not being asked to approve the PPA does not change that fact that requiring Ohio distribution customers to subsidize the FES generation assets in question produces a result contrary to the purposes and objectives of the federal policy embodied in the FERC-approved Reliability Pricing Model ("RPM") utilized by PJM.

The RPM sets a uniform price for electric generation at various locations throughout the PJM footprint by a competitive auction process. In its order approving the RPM, FERC stated that "in a competitive market, all suppliers will be paid the same price,"[42] and that "(i)n a competitive market, prices do not differ for new and old plants or for efficient and inefficient plants."[43] Thus, the RPM market-based pricing rewards efficient sellers and drives inefficient sellers out of business.[44] FERC specifically stated in the RPM Order that cost-of-service pricing is contrary to this underlying principle because it does not provide incentives to minimize costs or maximize revenue, noting that "sellers *[of cost-based generation]* have far weaker incentives to minimize costs under cost-of-service, because regulation forces a seller to reduce its prices when the seller reduces its cost."[45] Moreover, uniform locational electric pricing fosters infrastructure investment throughout PJM's footprint because the uniform clearing price provides a transparent price signal three years in advance in order for market participants to respond.[46] Plainly, a state regulatory decision that would require customers of an electric distribution utility to fund a cost-of-service based power purchase agreement between the distribution utility and a

[42] ER05-1410-001 Entry 32 Order Denying Rehearing and Approving Settlement Subject to Conditions (Dec. 22, 2006) (the "RPM Order").

[43] RPM Order, 57.

[44] *Id.*

[45] *Id.*

[46] RPM Order, 59.

wholesale supplier would create a subsidy that would be at cross purposes with this enunciated federal policy of providing for market-based pricing of wholesale capacity and energy. As several federal courts have already determined, federal preemption precludes states from interfering with this policy.

PPL EnergyPlus, LLC v. Nazarian[47] involved a challenge to a Maryland Public Service Commission order requiring local electric distribution utilities to enter into long-term purchased power agreements with the owner of yet to be constructed generation. These agreements, which reviewing courts have styled as "contacts for differences," provided that the utilities would pay the generation owner the difference between the amount the owner received from bidding the capacity and energy into the PJM market and a cost-of-service based price contract price established by the Maryland commission.[48] As with the proposed Rider RRS arrangement, these differences would then be flowed through to the utility's ratepayers through charges or credits to customer bills. The federal district court found that the Maryland commission was preempted from authorizing these contracts because they intruded upon FERC's exclusive jurisdiction over the pricing of wholesale capacity and energy and because they were inimical to the FERC-approved market-based pricing model used by PJM.[49] In affirming the district court's determination that the contracts for differences would intrude on FERC's jurisdiction and compromise the integrity of the federal scheme, the Fourth Circuit Court of Appeals agreed that Maryland commission was preempted because the FERC has exclusive jurisdiction over the field of wholesale capacity and energy pricing.[50]

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[47] 974 F. Supp.2d 790 (D. Md. 2013), *aff'd*, 753 F.3d 467 (4th Cir. 2014).

[48] *Id.*, at 830-833.

[49] *Id.*, at 840.

[50] *See PPL EnergyPlus, LLC v. Nazarian,* 753 F.3d 467 (4th Cir. 2014).

Similarly, in *PPL EnergyPlus, LLC v. Hanna,*[51] the federal district court for New Jersey struck down New Jersey legislation that purported to guarantee a capacity price to generators for the purpose of encouraging the construction of new generation. The New Jersey statute authorized the New Jersey Board of Public Utilities to issue a capacity agreement reflecting the costs of developing new generation and required the state's electric distribution utilities to enter into contracts with the generation owners to pay for any differences between the board-approved capacity price contained in the agreement and the market-based price resulting from the FERC-approved RPM.[52] Consistent with the *Nazarian* decisions, the court determined that, under the Federal Power Act, FERC occupied the field of wholesale electric sales and the pricing thereof. The court also found that the conflict preemption doctrine applied because the New Jersey scheme stood as an obstacle to the accomplishment of the purposes and objectives of the FERC-approved market-based RPM, and, thus, must yield to the federal scheme regardless of the objective of the state legislation.[53] Accordingly, the court concluded that the New Jersey legislation was preempted by federal law and was null and void.[54]

On appeal, the Third Circuit of Appeals affirmed the district court's decision, stating that "the Federal Power Act, as administered by FERC, preempts and, therefore, invalidates, state intrusions into the field" of wholesale electricity pricing.[55] The court noted that FERC had

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[51] *PPL EnergyPlus, LLC v. Hanna*, 977 F. Supp.2d 372, (D. N.J. 2013), *aff'd sub nom., PPL EnergyPlus LLC v. Solomon*, 766 F.3d 241 (3d Cir. 2014).

[52] *Id.*, at 406-410.

[53] *Id.*, at 410.

[54] *Id.*, at 412

[55] *PPL EnergyPlus LLC v. Solomon,* 766 F.3d, 241, 253 (3d Cir. 2014).

approved establishing the wholesale capacity price in PJM through the RPM, but that the New Jersey statute could provide certain generators with compensation in excess of that which they might receive through the FERC-approved auction process.[56] Thus, the court concluded that "(b)ecause FERC has exercised control over the field of interstate capacity prices, and because FERC's control is exclusive, New Jersey's efforts to regulate the same subject matter cannot stand."[57]

The proposed Rider RRS arrangement mirrors many of the critical features of the state schemes that were invalidated by the foregoing federal court decisions. By forcing ratepayers of electric distribution utilities to subsidize a particular source of generation, approval of Rider RRS would intrude upon FERC's exclusive jurisdiction over the pricing of wholesale capacity and energy by providing compensation to a generator beyond that it would receive under the FERC-approved RPM process. Moreover, approval of the Rider RRS arrangement would frustrate "the full purposes and objectives of the federal policies" embodied in the FERC-approved process, which include establishing a level playing field for generators, the preference for market-based pricing over cost-of-service based pricing, and establishing a transparent price signal to which generators can react in an economically rational manner. CMSD submits that, in light of these circumstances, there can be little doubt that a reviewing court would find that the Commission is preempted by federal law from implementing the proposed Rider RRS arrangement. Further, there is no doubt that a Commission order approving Rider RRS will be challenged on this ground. It would be one thing if ratepayers could be made whole if the Commission is reversed on appeal, but, as previously discussed, that is not the case. Does the Commission really want to

[56] *Id.*, at 252.

[57] *Id.*, at 253.

put millions of ratepayer dollars at risk by clinging to the hope that a reviewing court will find that approval of the Rider RRS arrangement is not preempted in the face of the overwhelming authority to the contrary? The Commission should acknowledge that it is preempted by federal law from approving Rider RRS and should reject this element of the FirstEnergy ESP.

3. There Is a Significant Risk that PJM Will Apply Mitigation Measures If the Proposed Rider RRS Arrangement Is Approved.

Even if the Commission and a reviewing court were to conclude that the Commission is not preempted by federal law from approving Rider RRS, there is a very real prospect that PJM would apply mitigation measures to FirstEnergy bids to recognize the impact of the subsidies provided by the Companies' distribution customers, thereby increasing the likelihood, if not guaranteeing, that the bids would not clear the PJM auctions and decreasing the likelihood that the Companies' customers will receive a net financial benefit from Rider RRS over its term.[58] In response to the Maryland and New Jersey commission orders discussed above, PJM applied to FERC to eliminate a provision of its tariff that permitted utilities to self-supply capacity via either utility-owned generation or a bilateral contract. FERC authorized this tariff change, thereby rendering the ratepayer-subsidized generation subject to mitigation measures. The Third Circuit Court of Appeals upheld the FERC order in approving the tariff change in *New Jersey Bd. of Pub. Util. v. FERC*.[59] Thus, PJM could require that the ratepayer subsidy provided via Rider RRS be included in the offer floor when FirstEnergy bids the output of the FES plants in question into the PJM market. This outcome would be consistent a recent FERC decision requiring that subsidies provided for demand response must be included when bidding demand

[58] OEC/EDF Ex. 1 (Roberto Direct), 11-12.

[59] 744 F.3d 74 (3rd Cir. 2014).

response into the NYISO capacity markets.[60] The clear message from these decisions is that FERC is not about to let subsidies provided by the ratepayers of distribution utilities undermine federal policy by providing an unfair advantage to certain participants in the PJM auctions. If the Commission approves Rider RRS and PJM applies mitigation measures, the Commission will wind up with egg on its face that will be impossible to remove.

C. APPROVAL OF THE PROPOSED RIDER RRS ARRANGEMENT WOULD BE CONTRARY TO BOTH STATE AND FEDERAL PRO-COMPETITION POLICIES, AND WOULD BE INCONSISTENT WITH THE STATE POLICY EMBODIED IN THE OHIO UNIFORM DEPOSITORY ACT.

1. The Companies' Motivation for Seeking Approval of Rider RRS is Not to Protect Ratepayers from Price Volatility, But to Guarantee a Return to FirstEnergy Corp. Shareholders on FES's Uneconomic Generation Assets.

Even if the Commission had the statutory authority to approve the proposed Rider RRS arrangement and were not preempted by federal law from implementing it, the Commission should still reject the proposed arrangement as being contrary to sound public policy. CMSD begins its discussion of the public policy ramifications of approving Rider RRS by asking the Commission to take a hard look at what it really going on here. Although FirstEnergy pitches the proposed Rider RRS arrangement as providing protection to ratepayers from volatility and future increases in the wholesale price of electricity, there can be no doubt that FirstEnergy's true motivation is to protect the bottom line of its parent, FirstEnergy Corp., for the benefit of its shareholders. The Companies, as business entities, get no financial benefit out of the arrangement, and, with the minimum credit feature proposed in the Third Supplemental Stipulation, could actually lose money if Rider RRS is approved. FES, on the other hand,

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[60] *New York Independent System Operator, Inc.*, FERC Docket Nos. EL07-39-006, *et al.*, 150 FERC ¶ 61,208, Order on Clarification, Rehearing, and Compliance Filing at 14-15 (Mar. 18, 2015).

would receive guaranteed cost recovery and a return on its uneconomic generation assets via the ratepayer-funded PPA. By mandating corporate separation,[61] the legislature put the Companies out of the generation business and, with restructuring, ended the Commission's jurisdiction over the facilities in question. It is one thing for FirstEnergy to try to slip Rider RRS under the door based on the pretense that it is a measure that will benefit the Companies' distribution ratepayers, but it would be quite another for the Commission to require ratepayers to bail out FES under this same pretense as a way to do indirectly what it cannot do directly.

As the Ohio Supreme Court observed, "(p)ursuant to R.C. 4928.03 and 4928.05, electric generation is an unregulated, competitive retail electric service, while electric distribution remains a regulated, noncompetitive service pursuant to R.C. 4928.15(A)."[62] Thus, generation providers are no longer subject to the Commission's economic regulation, and there can be no question that requiring distribution customers to guarantee cost recovery and a return on FES generation assets would be at odds with the state policy set out in R.C. 4928.02(H).

R.C. 4928.02(H) declares that it is policy of this state to:

> Ensure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa, including by prohibiting the recovery of any generation-related costs through distribution or transmission rates.

As previously noted, CMSD does not contend that approval of Rider RRS would violate the prohibition against the recovery of generation-related costs through distribution rates. However, Rider RRS, which would be paid by all customers as a condition of receiving

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[61] *See* R.C. 4928.17.

[62] *Industrial Energy Users-Ohio v. Pub Util. Comm.*, 117 Ohio St.3d 486, 487 (2008).

distribution service, would create an anticompetitive subsidy flowing to First Energy's affiliate, FES, which would receive above-market compensation for the output of the plants in question. There can be no question that this outcome would be contrary to the legislature's judgment that anticompetitive subsidies are inconsistent with ensuring effective competition in the provision of retail electric service. And, as previously discussed in connection with the preemption issue, approval of Rider RRS would also be contrary to federal pro-competition policies as well.

2. Approval of Rider RRS Would also Be Inconsistent with the Commission's Own Prior Pronouncements Regarding the Benefits of Market-Based Pricing.

With the passage of Amended Substitute Senate Bill 3 ("SB 3") in 1999, the General Assembly left behind cost-based regulation of generation supply and embraced the concept that Ohio's future lies with competitive electric markets and policies that promote retail competition. In its 2012 order approving AEP Ohio's prior ESP, the Commission specifically stated that "[t]he most significant of the non-quantifiable benefits *[of the ESP]* is the fact that in just under two and a half years, AEP-Ohio will be delivering and pricing energy at market prices,"[63] a finding consistent with the course the legislature charted by enacting SB 3. Approval of the proposed Rider RRS arrangement in a deliberate attempt to impose a financial restraint on complete reliance on the retail market for the pricing of retail electric generation service would deny FirstEnergy ratepayers the very benefit the Commission had previously touted. Thus, even if, contrary to fact, the Commission had the authority to approve the proposed Rider RRS arrangement, the Commission should reject the proposed arrangement as being a step backwards

[63] *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan,* Case Nos. 11-346-EL-SSO, *et al.* (Opinion and Order dated August 8, 2012), at 76.

on the path to the fully-competitive retail market the legislature envisioned when it enacted SB 3 and which the Commission endorsed by its comments in the prior AEP Ohio ESP case.

3. Commission Approval of Rider RRS Would Place Millions of Ratepayer Dollars at Risk, an Outcome Which, on Its Face, Is Inconsistent with Sound Public Policy.

Reduced to its simplest terms, Commission approval of Rider RRS will force FirstEnergy ratepayers to place a bet on the proposition that, over the term of the rider, the total credits they will receive will exceed the total costs they will pay to fund the PPA. Moreover, the ratepayers are forced to go "all in" at the outset, because, once Rider RRS is approved, the Commission will have no ability to cancel the bet even if it becomes clear at some point down the road that Rider RRS will never generate a net credit. Thus, ratepayers will be 100 percent at risk for every dollar collected through Rider RRS. Further, although FirstEnergy argues that this is a good bet based on FirstEnergy witness Rose's projection of market prices during the out years of the ESP, CMSD trusts that it is not lost on the Commission that FirstEnergy is unwilling to ask its ultimate shareholders to make this same wager by continuing to underwrite the uneconomic FES generating assets until the turn-around occurs. If FirstEnergy truly believed that the bet will have the extraordinary positive payoff it projects, why would FirstEnergy not want its ultimate shareholders to reap this benefit? Indeed, as former Commissioner Roberto points out, FirstEnergy would have a fiduciary duty to shareholders to retain this value for them.[64] Equally telling is the fact that FirstEnergy did not consider any alternative hedging mechanisms that might have reduced the size of the mandatory ratepayer wager and thereby increased the potential for a positive payoff. The Commission should not force the Companies' ratepayers to

[64] *See* OEC/EDF Ex. 1 (Roberto Direct), 16-17.

place a bet which will have the effect of transferring all the ordinary risks associated with owning generation assets from the owner of the assets, over which the Commission has no jurisdiction, to the Companies' customers.

Regardless of the actual objective, there is no precedent for any Ohio regulatory agency imposing this kind of financial risk on residents of this state. Approval of Rider RRS would effectively convert the Commission into the Public Utilities Casino of Ohio, a gambling hall where the only guaranteed winners are FES and the shareholders of its parent. Yes, in a market-based pricing regime, ratepayers may be impacted by volatility in the wholesale market, but the legislature understood this when it enacted SB 3. For SSO customers, this risk is mitigated by the staggering and laddering of SSO auctions. If an SSO customer believes that this still results in too much exposure, the customer can select a long-term fixed price contract from a CRES provider. Customers with more risk tolerance can choose to go with a variable rate option. However, the point is that the customer – the party with actual skin in the game – should be making the decisions as to how to address this risk, and should not be forced to accept a Commission approved-hedging mechanism that forces the ratepayer to place a bet that could be lost in its entirety. The legislature did not grant the Commission the authority to act as a hedge manager, and for the Commission to take on this role would be unimaginably poor public policy. Moreover, the legislature has specifically spoken to the risk question by prohibiting political subdivisions of the state from making speculative investments of this very type.

4. Requiring CMSD and Other Political Subdivisions of the State to Commit Public Funds to a Speculative Financial Transaction by Paying the Rider RRS Rate Is Contrary to the State Policy Embodied in the Ohio Uniform Depository Act.

Chapter 135. of the Ohio Revised Code, also known as the Ohio Uniform Depository Act ("OUDA"), governs the investment of public moneys held by the state and its political subdivisions. R.C. 135.14 addresses the investment of interim moneys by treasurers or governing boards of political subdivisions. R.C. 135.14(B) contains a list of permissible investments, while R.C. 135.14(C) prohibits the investment of interim moneys in speculative financial transactions. R.C. 135.14(C) provides, in pertinent part, as follows:

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

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

In citing this statute, CMSD does not intend to suggest that the OUDA controls Commission ratemaking decisions. However, the Commission should not ignore that the de facto effect of approving Rider RRS would be to force CMSD and other political subdivisions within the Companies' service territory to make an investment that the legislature has wisely prohibited political subdivisions from making directly. The General Assembly has determined that it is not prudent for political subdivisions to speculate with public moneys in this fashion, and the Commission should take this message to heart in considering whether to require political subdivisions to part with scarce public funds to subsidize uneconomic generation assets on the chance that the investment in the PPA might, at some point in the distant future, produce a net positive return. Indeed, a Commission finding that requiring CMSD and other political subdivisions to fund the PPA through Rider RRS is in the public interest would fly in the face of the public policy underlying the R.C. 135.14(C) restriction. Moreover, forcing CMSD to make this investment would require it to divert resources that could otherwise be used in pursuit of its mission to educate the children of Cleveland, an outcome which, on its face, is contrary to the public interest.

In this same vein, even if, contrary to fact, CMSD had idle public dollars at its disposal that could be invested to offset future increases in costs, the Commission can rest assured that CMSD would not employ those dollars in an attempt to hedge against the risk of future volatility and increases in the price of retail generation service. As previously noted, CMSD protects itself from the impact of market volatility by entering into long-term contracts with competitive suppliers, a measure that is consistent with both CMSD's tolerance for risk and its need for price certainty in formulating its budget. Thus, if CMSD actually had public moneys to invest, it would invest those funds in one of the relatively safe investments permitted by R.C. 135.14(B), and would apply the dollar return earned to offset unbudgeted cost increases, not to offset increases in the price of retail electric generation service, a risk that it already has the ability to control through its shopping decisions.

Of course, all this is hypothetical because, like most FirstEnergy customers, CMSD does not have idle dollars lying around to invest in financial hedging mechanisms. However, even those customers that have the financial wherewithal to make this type of investment, and who, unlike political subdivisions, are not precluded from investing in high-risk derivatives by statute, have the right to make their investment decisions based on their own financial judgment and tolerance for risk. Simply stated, it is not the Commission's job to dictate to FirstEnergy customers how to invest their discretionary funds, and it is most certainly not the Commission's place to force customers that do not have discretionary funds available to invest in a speculative hedging mechanism that puts the customers' entire principal at risk as a condition of receiving electric distribution service.

D. THE MODIFICATIONS CONTAINED IN THE THIRD SUPPLEMENTAL STIPULATION DO NOT REMEDY THE FATAL FLAWS IN THE RIDER RRS ARRANGEMENT PROPOSED IN THE APPLICATION IN THIS CASE.

1. The Third Supplemental Stipulation Does Not Meet Two of the Three Prongs of the Test Applied by the Commission in Evaluating Stipulations.

Under the familiar three-pronged test utilized by the Commission for evaluating stipulations, the signatory parties must show (1) that the stipulation is the product of serious bargaining among capable, knowledgeable parties, (2) that the stipulation, as a package, benefits ratepayers and the public interest, and (3) that the stipulation does not violate any important regulatory principle or practice.[65] CMSD does not dispute that the Third Supplemental

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[65] *See Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm*, 68 Ohio St.3d 559 (1994), citing *Office of Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d at 126 (1992).

Stipulation was the product of serious bargaining among capable, knowledgeable parties, but respectfully submits that this stipulation does not satisfy the remaining two prongs of the test.

With respect to the second prong, it goes without saying that signatories to a stipulation presented to the Commission cannot stipulate away Ohio law or the United States Constitution. Thus, even if the Commission believes that the Third Supplemental Stipulation, as a package, benefits ratepayers and the public interest, the Commission cannot adopt the stipulated ESP if it contains individual elements that the Commission has no statutory authority to approve or which the Commission is precluded from implementing due to federal preemption. For the reasons set forth above, the Commission lacks the statutory authority to approve the proposed Rider RRS arrangement and is preempted by federal law from implementing Rider RRS in any event. Thus, in CMSD's view, the question of whether the stipulation, as a package, benefits ratepayers and the public interest, is moot. However, if the Commission reaches this question, the Commission must exclude any claimed benefits associated with the stipulated Rider RRS arrangement from the calculus.

With regard to the third prong of the test, there is no question that approval of the stipulated RRS would violate the important regulatory principles embodied in the state policy set out in R.C. 4928.02(B) and (H), would be inconsistent with the previous pronouncements of this Commission regarding the benefits of market-based pricing, and would be contrary to the federal policy reflected in the FERC-approved, market-based wholesale pricing model. However, CMSD will not repeat these arguments here, and will turn, instead, to the question of whether the modifications to the Rider RRS arrangement contained in the Third Supplemental Stipulation remedy the defects in the arrangement as originally proposed.

2. The Record Will Not Support a Finding that the Stipulated Rider RRS Arrangement Will Provide a Net Financial Benefit for the Companies' Customers.

As previously indicated, Commission rejected the riders proposed in the most recent AEP Ohio and Duke ESP proceedings because it was "not persuaded, based on the evidence of record in these proceedings, that *[the]* . . . rider proposal would provide customers with sufficient benefit from the rider's financial hedging mechanism or any other benefit that is commensurate with the rider's potential cost."[66] It is not clear what the Commission intended by its cryptic reference to "any other benefit," but, because the Commission stated earlier in the AEP Ohio and Duke orders that the "evidence of record reflects that the rider may result in a net cost to customers, with little offsetting benefit from the rider's intended purpose as a hedge against market volatility,"[67] CMSD assumes that the Commission sees the threshold test for approval of a rider of this type to be a showing that the rider will produce a net financial benefit for customers over its term, or, alternatively, regards a net financial benefit to customers as an essential component of a "properly conceived" rider arrangement.

In rejecting the AEP Ohio and Duke riders, the Commission correctly observed that "the magnitude of the impact of the proposed . . . rider cannot be known to any degree of certainty," but went on to find that the evidence reflected "that the rider may result in a net cost to customers, with little offsetting benefit from the rider's intended purpose as a hedge against market volatility."[68] This is the same situation that confronts the Commission in this case. It is a given that no one can know with any degree of certainty what the market-based price of

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[66] AEP Ohio Order, 25; Duke Order, 46.

[67] AEP Ohio Order, 24; Duke Order, 46.

[68] *Id.*

wholesale capacity and energy and the annual PPA costs will be over the term of Rider RRS, and, as in the AEP Ohio and Duke ESP's, the estimates of the impact on customers of approval of Rider RRS are wide ranging. With the stipulated reduction in the term of Rider RRS from fifteen years to eight years[69] and a reduction in the rate of return component of the PPA, FirstEnergy now projects a total net financial benefit to customers of $561 million,[70] while OCC/NOPEC witness Wilson projects a total net cost to customers of $2.6 billion to $3.6 billion under what he deems to be the two most likely scenarios with respect to future natural gas prices.[71] CMSD will leave the analysis of the reasonableness of the competing forecasts to others,[72] but would offer the following observations which CMSD believes should weigh heavily in the Commission's decision with regard to this matter.

First, every forecast presented in the case projects that Rider RRS will result in a significant net cost to customers over the first three years of its term. The Staff expert, Dr. Choueiki, testified that, although he has reasonable confidence in three-year forecasts, he has "zero" comfort level in forecasts with horizons that go beyond three years.[73] Thus, although, based on the evidence, the Commission can reasonably find that Rider RRS will result in a net cost to customers over the first three years of its life, it would be sheer speculation for the

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[69] *See* Third Supplemental Stipulation, Paragraph B.1.

[70] Co. Ex. 155, (Mikkelsen Fifth Supplemental Testimony), 11.

[71] OCC/NOPEC Ex. 9, (Wilson Second Supplemental Testimony), 7.

[72] Although CMSD will not jump into this fray, CMSD feels compelled to point out that the forecast upon which FirstEnergy continues to rely was developed prior to the filing of the application in August of 2014 and has never been updated.

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

Commission to determine that Rider RRS will produce a net financial benefit to ratepayers over its eight-year term.

Second, FirstEnergy agreed to terms with FES for the PPA without conducting any investigation to determine whether a less expensive hedging arrangement was available. As both City of Cleveland witness Cole and OEC/EDF witness Roberto point out, no prudent utility would enter into a contract of the magnitude of the PPA without utilizing a competitive RFP process or, in the case of a traditionally-regulated utility, developing an integrated resource plan.[74] Moreover, the evidence shows that at least one other generation supplier stands ready to offer FirstEnergy a far less-expensive deal that would save the Companies' ratepayers over $2 billion as compared to the PPA.[75] However, the point, for purposes at hand, is that an RFP process should be a critical element of a properly conceived rider arrangement. If the Commission truly cares about the effectiveness of a rider arrangement as a hedge against market volatility, the Commission should reject the stipulated Rider RRS arrangement on this ground alone.

3. <u>The Stipulated Rider RRS Arrangement Does Not Meet the Requirements for a Properly Conceived Rider Established by the Commission in Its Orders in the Recent AEP Ohio and Duke ESP Cases.</u>

a. The stipulated minimum credit provision is not an appropriate risk-sharing mechanism.

In considering the Commission's determination that a properly conceived rider arrangement must include a plan "to allocate the rider's financial risk between both the Company and its ratepayers,"[76] the question that immediately comes to mind is why ratepayers should be

[74] City of Cleveland Ex. 1 (Cole Direct), 5-7; OEC/EDF Ex. 1 (Roberto Direct), 8-10

[75] Constellation/Exelon Ex. 4 (Campbell Second Supplemental Testimony), 5-6.

[76] AEP Ohio Order, 25; Duke Order, 47.

subjected to this type of financial risk in the first place. CMSD does not wish to belabor points previously made, but it bears repeating in this context that the whole purpose of opening the Ohio retail electric market to competition was to give customers the ability to select generation supply products that match their individual tolerances for risk. Subjecting customers to an additional layer of risk by requiring them to fund a hedging mechanism that may or may not be successful is at cross purposes with this objective. Indeed, that the Commission has expressly acknowledged that this type of rider imposes a financial risk on ratepayers reinforces the fact that, although the Commission may believe that rider arrangements of this type have "the potential to supplement the benefits derived from the staggering and laddering of the SSO auctions," such arrangements also have the potential to cost ratepayers millions of dollars more than they would otherwise have paid. Where is the statute that indicates that General Assembly intended to authorize the Commission to subject ratepayers to a financial risk of this type and magnitude?

As proposed in the application, the Rider RRS arrangement would have insulated both FirstEnergy and FES from any financial risk whatsoever and would have placed the entire risk on ratepayers. Under the minimum credit feature of the risk sharing mechanism set out in Paragraph B.2. of the Third Supplemental Stipulation, the Companies would have some exposure in years five through eight of the ESP, but, because the PPA costs may exceed the revenues generated by the sale of the output of the subject plants in one or more of these years (or over all these years combined) by an amount greater than the stipulated credits, ratepayers will still bear the lion's share of the risk associated with the Rider RRS arrangement. Surely, the Commssion must find it curious that, under this risk allocation plan, FES will continue to be guaranteed cost recovery and a return on the generation assets in question, while the Companies, which get no financial benefit from Rider RRS, are required to shoulder some portion of the risk. Why would FirstEnergy, who should be financially indifferent to whether there is hedging mechanism or not, agree to this? The answer, of course, is that the real purpose of the Rider RRS arrangement is not to provide a hedge to ratepayers against the impact of market volatility, but to guarantee a return to FirstEnergy's ultimate shareholders on the uneconomic FES generation assets. The Commission should not allow itself to become complicit in this scheme by subjecting customers to the risk associated with the Rider RRS arrangement.

b. The provisions of the Third Supplemental Stipulation that would reduce the term of Rider RRS to eight years and extend the term of the ESP to a corresponding eight years could have an unintended consequence that would adversely affect the Companies' ratepayers.

In his prefiled testimony, Staff witness Choueiki recommended that if, despite Staff's opposition, the Commission found that the proposed Rider RRS arrangement should be approved, the Commission should require that the term of Rider RRS be "no longer than the term of ESP IV,"[77] which, as proposed in the application, was three years. Because every forecast presented in the case projected that Rider RRS would result in a significant cost to customers in each of its first three years, reducing the term of Rider RRS from the fifteen years proposed in the application to three years would have virtually guaranteed that the arrangement would not provide a net financial benefit to customers and, thus, could not be regaded as a properly conceived hedging mechanism. The Third Supplemental Stipulation addresses Dr. Choueiki's recommendation by reducing the term of Rider RRS to eight years[78] and increasing the term of

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[77] Staff Ex. 12 (Choueiki Direct), 15.

[78] Third Supplemental Stipulation, Paragraph B.1.

the ESP to a corresponding eight years.[79] However, although these changes meet the letter of Dr. Choueiki's recommendation, they could create an impenetrable paradox.

R.C. 4928.143(E) provides, in pertinent part, as follows:

> (E) If an electric security plan approved under division (C) of this section, except one withdrawn by the utility as authorized under that division, has a term, exclusive of phase-ins or deferrals, that exceeds three years from the effective date of the plan, the commission shall test the plan in the fourth year, and if applicable, every fourth year thereafter, to determine whether the plan, including its then-existing pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, continues to be more favorable in the aggregate and during the remaining term of the plan as compared to the expected results that would otherwise apply under section 4928.142 of the Revised Code.

With the stipulated eight-year term, the new ESP would be reexamined in the fourth year to determine if it still passes the "more favorable than an MRO" test. It is certainly possible that the ESP could fail this test and that the Rider RRS arrangement could contribute to this failure if it turns out that Rider RRS is simply adding costs to customers and has no quantifiable benefit as a hedging mechanism. If the ESP fails the test, the Commission would terminate the ESP, but, ironically, would have no ability to terminate Rider RRS before the end of its eight-year term even if the Rider RRS arrangement was the primary reason that the ESP failed the test. This would mean that the market-based MRO pricing that would replace the ESP would be burdened with the legacy non-market based Rider RRS charge, an outcome that would clearly be contrary to the underlying legislative intent.

It is not clear whether Dr. Choueiki's recommendation that the term of Rider RRS should be no longer than the term of the ESP was based on the assumption that the the term of the ESP would be three years as proposed in the application, but reducing the rider term and extending

[79] Third Supplemental Stipulation, Paragraph A.1.

the ESP term to meet Dr. Choueiki's recommendation would subject ratepayer's to this additional risk. To address this possibility, the Commission should modify the Third Supplemental Stipulation to specify that Rider RRS will terminate if the ESP fails the "more favorable" test in four years. This will give FirstEnergy the opportunity to renegotiate the terms of the PPA so that the Companies will not be on the hook for the PPA costs if it no longer has the ratepayer revenue stream from Rider RRS to pay them.

c. The stipulated "Full Information Sharing" requirement provides no benefit to ratepayers.

The AEP Ohio and Duke orders identified a "commit*[ment]* to full information sharing with the Commission and its Staff" as an essential component of a properly conceived rider arrangement.[80] Staff witness Choueiki echoed this proposition in his testimony in this case, and specifically identified the need for information relating to the entire FES generation fleet to permit Staff to determine the reasonableness of costs that would be recovered through the PPA.[81] Although Paragraph B.3.b. of the Third Supplemental Stipulation requires the Companies to provide such information in response to a reasonable Staff request as it conducts its review of a specific cost component of the PPA pricing formula, any suggestion that this requirement will somehow protect the FirstEnergy ratepayers that will ultimately be required to pay the PPA costs through Rider RRS cannot stand.

First, this Commission would have no jurisdiction over the FERC-approved PPA and, thus, would have no power to enforce its terms. So, even if the Staff were to conclude that a particular cost component of the PPA pricing formula is unreasonable based on the information

[80] AEP Ohio Order, 25; Duke Order, 47.

[81] *See* Staff Ex.12 (Choueiki Direct), 16.

received pursuant to Paragraph B.3.b, the Commission could not require FES, over which it has no jurisdiction, to adjust the PPA price. Second, because the Commission is obviously not a party to the PPA, it would have no standing to file a complaint against FES at FERC alleging that PPA price charged to FirstEnergy (but paid by the Companies' ratepayers) is unreasonable. Third, the Commission does not have authority to force FirstEnergy – the entity that would have standing to raise a PPA pricing issue at FERC – to file a complaint at FERC against its sister company. This leaves, as the only remaining avenue of attack, an attempt by the Commission to require the Companies to adjust the Rider RRS rate to exclude the PPA costs that the Commission deemed to be unreasonable. However, this approach would, at minimum, require a hearing, which would have to be conducted in camera due to the strict Paragraph B.3.b. confidentiality requirements, and would certainly be challenged by FirstEnergy because it would involve the Commission interpreting a contract over which it has no jurisdiction. Thus, although the Commission may have seen the information disclosure requirement as a means to protect ratepayers from unreasonable PPA costs, the fact is that this requirement will provide no such protection to customers.

d. The stipulated "Severability Provision" is inconsistent with the severability requirement imposed by the commission orders in the AEP Ohio and Duke ESP cases and will not protect ratepayers from the loss of amounts paid through Rider RRS prior to a judicial determination that the stipulated Rider RRS arrangement is invalid.

In its orders in the AEP Ohio and Duke ESP cases, the Commission indicated that a properly conceived rider arrangement "must include a severability provision that recognizes that all other provisions of its ESP will continue, in the event that the . . . rider is invalidated, in whole or in part at any point, by a court of competent jurisdiction."[82] Although Paragraph B.3.c of the Third Supplemental Stipulation contains a severability provision, this provision is not consistent with the requirement set out in the AEP Ohio and Duke orders.

Paragraph B.3.c states that "(i)f a court of competent jurisdiction invalidates Rider RRS in whole or in part, the Companies will permit any part of Stipulated ESP IV that has not been invalidated to continue while a good faith effort is made by the Signatory Parties to restore the invalidated portion to its equivalent value."[83] Although the paragraph goes on to outline the obligations of the signatory parties to work to restore the invalidated portion to its equivalent value, this paragraph is silent with respect to what happens if it is not possible, in light of the specifics of the reviewing court's decision, to restore Rider RRS to its equivalent value. Because the stipulated severability provision only requires the Companies to permit the provisions of the stipulated ESP that have not been invalidated to continue "while a good faith effort is made" to restore the invalidated portion to its equivalent value, it appears that the Companies can, in fact, terminate the ESP if such effort would be – or turns out to be – futile. Plainly, this is not what the Commission contemplated when it stated that the severability provision must recognize that all other provisions of the ESP will continue if the rider is subsequently invalidated by a court of competent jurisdiction.

The reference in the stipulated severability provision to restoring the invalidated portion of the ESP "to its equivalent value" is also troubling. If this means that the signatory parties must make a good faith effort to come up with an alternative means of providing ratepayers with the $561 million quantifiable benefit FirstEnergy ascribes to the Rider RRS arrangement to

[82] AEP Ohio Order, 25; Duke Order, 47.

[83] Third Supplemental Stipulation, Paragraph B.3.c.

justify the ESP, that would be one thing. However, CMSD believes that it is highly unlikely that this is what FirstEnergy had in mind when it agreed to this language. In any event, the stipulated severability provision should be rejected as written because, contrary to the requirement established in the AEP Ohio and Duke orders, it permits FirstEnergy to walk away from the remaining provisions of the ESP if, as a result of the reviewing court's decision, it is not possible to fix the stipulated Rider RRS arrangement.

As previously discussed, under *Keco* and its progeny, neither the Commission nor the courts can order a refund of previously approved rates that are subsequently invalidated by a judicial decision. Indeed, Paragraph B.3.c of the Third Supplemental Stipulation expressly provides that nothing in the severability provision shall be construed "to affect the prohibition against retroactive ratemaking" and that "(n)o amounts collected shall be refunded as a result of this severability provision." These caveats drive home the point that the Companies' ratepayers will never recover the millions of dollars that the Companies will collect through Rider RRS between the date it is implemented and a judicial determination invalidating Rider RRS on statutory and/or federal preemption grounds. The fact that the Commission has determined that an essential element of a rider proposal is a severability provision that will preserve the remainder of the ESP if the rider is invalidated by a reviewing court certainly suggests that the Commission recognizes that there is a strong possibility that arrangements like the stipulated Rider RRS arrangement will not pass judicial muster. Under these circumstances, the Commission should carefully weigh the consequences for ratepayers of a judicial decision invalidating the rider against the highly-speculative potential value of the proposed rider arrangement as a hedge against market volatility before approving Rider RRS. If, after balancing these considerations, the Commission still believes that Rider RRS should be approved, the

Commission should modify the stipulated severability provision by striking the language prohibiting refunds and substituting a requirement that the Companies refund all amounts collected through Rider RRS prior to a judicial decision invalidating the rider arrangement. If FirstEnergy is truly confident that the stipulated Rider RRS is on firm legal footing, it should be willing to accept this modification, which will merely transfer the financial risk associated with subsequent judicial invalidation of Rider RRS from ratepayers, who never asked for such a rider, to the party that proposed the rider arrangement in the first place.

III. CONCLUSION

R.C. 4928.02(B) declares that is the policy of this state to:

> Ensure the availability of unbundled and comparable retail electric service that provides consumers with the supplier, price, terms, conditions, and quality options they elect to meet their respective needs.

Commission approval of the stipulated Rider RRS arrangement would violate this policy by impinging on the ability of the Companies' customers to select the price, terms, and conditions of retail electric service that meet their respective needs, including their tolerance for risk, by forcing them to participate in a hedging arrangement that does nothing but add additional risk to the equation. To make matters worse, the actual purpose of the proposed Rider RRS arrangement is not to protect ratepayers from the impact of possible future increases and volatility in the wholesale market price of electricity. Rather, the transparent actual purpose of the Rider RRS arrangement is to provide a guaranteed return to FirstEnergy's ultimate shareholders on the uneconomic FES generation assets at ratepayers' expense by requiring distribution customers to subsidize the units in question. For the reasons discussed above, this objective is not only unlawful, but is contrary to both state and federal pro-competition policies.

The Commission should reject the inclusion of the stipulated Rider RRS arrangement as an element of the FirstEnergy ESP.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been served upon the following parties by electronic mail this ~~12~~ 16th day of February 2016.

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