BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

INITIAL BRIEF OF THE RETAIL ENERGY SUPPLY ASSOCIATION

February 16, 2016

TABLE OF CONTENTS

I. INTRODUCTION

Section 4928.03, Revised Code, establishes generation as a competitive service and permits all retail customers to obtain competitive service from a competitive retail electric service ("CRES") provider of their choice, or to take default service from the electric utility. Section 4928.141, Revised Code, then requires an electric utility to provide a means of supplying the competitive services for the default service by either filing and having approved an Electric Security Plan ("ESP") or procuring the needed competitive services via a market rate offer ("MRO"). Thus far, the Commission has not approved an MRO and The Cleveland Electric Illuminating Company, The Toledo Edison Company and the Ohio Edison Company (collectively "FirstEnergy" or "Companies") supply the competitive services for the default standard service within an ESP. The application in the matter at bar is for FirstEnergy's fourth ESP ("ESP IV"). ESP IV is proposed to run from June 2016 through May 2024.[1] An ESP in the aggregate cannot be less favorable in the aggregate than the MRO. Section 4928.143(E) requires that the "more favorable in the aggregate" test be conducted at least once every four years.

A. CRES Issues

The focal point of the ESP IV proceeding has been the Retail Rate Stability Rider ("Rider RRS"). That subject will be detailed and addressed below in the Rider RRS sections. In addition, to Rider RRS, there are several important CRES issues that were presented by the Retail Energy Supply Association ("RESA")[2] though overshadowed during the many weeks of hearing which focused mostly on Rider RRS. Those CRES-related issues should be addressed in

[1] Company Exhibit ("Ex.") 154 at 7.

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

the ESP IV Opinion and Order. First, the Commission should deny the request by FirstEnergy to amend its current bill ready tariff to unreasonably (a) narrow the information that a CRES provider can put on a consolidated bill, (b) restrict meter data, and (c) transfer the risk associated with unaccounted for energy. RESA witness Bennett testified how these changes would harm market development. The tariff should be left as it is today and these proposed amendments denied. Second, though ordered in 2014 by the Commission,[3] FirstEnergy has yet to complete changing its consolidated bill format to include CRES logos. A bill format was presented in the hearing but, it was by FirstEnergy's witness admission on the stand, flawed. Having already delayed implementation by putting the consolidated bill format into the ESP case, RESA asks the Commission as part of the Opinion and Order to approve a new consolidated bill format which treats the FirstEnergy logo and CRES logo the same in terms of size and color and indicates the new format must be put into service now.

Third, FirstEnergy has asked that the Non-Market-Based Rider ("Rider NMB") be expanded to include billing item 1375 from PJM Interconnection LLC ("PJM"). Rider NMB is designed to direct bill PJM cost items over which a load serving entity (CRES provider or utility) has no control or ability to affect. Direct billing cost items that are truly non-market-based, increases transparency for retail customers shopping for generation. PJM billing item 1375 collects operational balance costs. As Mr. Bennett testified, operational balancing costs to a degree can be controlled. By making better forecasts, a load serving entity can reduce future imbalances and thus lower PJM operational balancing costs. Making better forecasts though often requires devoting resources. Passing through the imbalances discourages load serving

[3] *In the Matter of the Commission's Investigation of Ohio's Retail Electric Service Market*, Case No. 12-3151-EL-COI, Finding and Order (March 26, 2014) and Entry on Rehearing (May 21, 2014).

entities from making the investments necessary for better forecasting. In sum, PJM billing item 1375 is not a true non-market-based charge and thus should not be added to Rider NMB.

Fourth, to its credit, FirstEnergy is proposing a supplier web portal. RESA asks the Commission as part of its Opinion and Order in this proceeding to require FirstEnergy to establish a web portal working group to assure that the web portal is standardized with the other Ohio utility web portals and is optimally designed for efficient CRES interface and data exchange. No opposition to this request surfaced at hearing.

Fifth, FirstEnergy's Generation Cost Reconciliation Rider ("Rider GCR") is proposed to be modified. Currently, the Rider GCR provides a means to collect expenses that are experienced in standard service, but for which FirstEnergy has not received full reimbursement. RESA does not oppose reimbursement, but RESA is opposed to the structure of Rider GCR which automatically converts Rider GCR imbalances once the trigger point is reached from bypassable to non-bypassable. Rider GCR should be modified so that if the trigger is reached, FirstEnergy files a request for reimbursement explaining why it is not collecting the authorized expenses and then present solutions. Such a process does not jeopardize FirstEnergy's reimbursement, but offers an alternative to the proposal to automatically collect imbalance for standard service on a non-bypassable basis from all retail customers. The Commission should attempt to craft an equitable solution for the Rider GCR's under collection from the customers who received the service before charging retail customers who did not benefit from the standard service.

Sixth, the Stipulation contains discriminatory pilot programs that should be rejected. RESA considers a pilot program discriminatory if the participants are limited to just those parties that signed the Stipulation. Pilot programs should be designed to gain needed information and be open to all on a non-discriminatory basis. Discriminatory pilot programs which award participation only to those who support the utility are simply a form of favor trading and thus fail, both the requirements for serious negotiations and the regulatory principles and legal principles requirements for accepting a settlement. The discriminatory pilot programs include the pilot for bypassing Rider NMB, and the high load factor time-of-day program.

Seventh, on the subject of time-of-day offers, such specialized service is not part of the standard service and thus should be left to the market to provide. By setting up time-of-day programs in which losses are subsidized by other customers, and mandating the utility provide such offers, the time-of-day provision of the Stipulation actually postpones the development of time-of-day programs from the market participants.

Eighth and final, in the FirstEnergy service territories today, there is still not a purchase of receivables ("POR") program, though the merits for having such a program have been well established in the Commission-ordered retail market investigation.[4] It is time for implementation of a POR program now, particularly if the Commission accepts an eight-year term for the FirstEnergy ESP IV.

B. Rider RRS

The most controversial aspect of ESP IV is Rider RRS. Under Rider RRS, all of FirstEnergy's wire customers would be obligated to make up any and all losses that arise from the Davis-Besse Nuclear Power Station and the W.H. Sammis Plant owned by FirstEnergy Solutions ("FES"), as well as the generation to which FES is entitled from the two Ohio Valley Electric Corporation ("OVEC") Eisenhower-era coal plants located in Ohio and Indiana.[5] FES is a CRES provider that directly competes with the other Commission certificated CRES, none of whom will be receiving Commission authorized supply cost guarantees. Rider RRS originated

[4] *Retail Electric Service Market,supra.*
[5] FirstEnergy Ex. 13 at 5, 7.

with a request from FES to the Companies with whom they are affiliated,[6] and no non-affiliated CRES was allowed to offer plants to include in Rider RRS.

Even though both the Companies and FES are owned by FirstEnergy Corp. and the Companies and FES ultimately report to the same officers at FirstEnergy Corp., FES and the Companies claim to have worked out a term sheet at "arms' length" for a purchase power agreement.[7] The Commission would have no jurisdiction over the Companies/FES purchase power agreement as that is a wholesale power arrangement. While wholesale power agreements are regulated by the Federal Energy Regulatory Commission ("FERC"), the Companies take the position that the FERC also will not be regulating and approving the Companies/FES purchase agreement. If accepted, the agreement to buy FES' output on a cost-plus-return basis will fall into an attractive gap and have no direct governmental regulation.

FirstEnergy claims that, under the Stipulation, Rider RRS is in the ratepayers' interest because there will be profits in excess of the guaranteed costs in the last five years of the eight-year ESP IV term which will cover the early losses anticipated for the first several years.[8] The basis for FirstEnergy's claim that Rider RRS during the proposed eight-year term of Rider RRS will produce a net present value for the customers rests on an outdated set of energy and natural gas price projections made by the economist Judah Rose. Two other economists, Mr. Wilson (for the Ohio Consumers' Counsel and the Northeast Ohio Public Energy Council) and Dr. Kalt (for the PJM Power Providers Group ("P3") and the Electric Power Supply Association ("EPSA")), used more recent data and they project aggregate losses to retail customers in the hundreds of millions of dollars.[9] The Commission has a duty to assure ratepayers that they are not being subjected to an undue, let alone an unlimited, financial risk. In the Stipulation,

---

[6] Tr. Vol. 11 at 2290-2291..
[7] Tr. Vol. 13 at 2752-2762; Sierra Club Ex. 52.
[8] Tr. Vol. 36 at 7677, 7770-7771; FirstEnergy Ex. 155 at 9-10.
[9] OCC/NOPEC Ex. 9 at 3; P3/EPSA Ex. 12 at 17.

FirstEnergy offers $10 million in credits in the fifth year, $20 million in the sixth year, $30 million in the seventh year and $40 million in the last year.[10] Since the offered credits do not apply towards the losses in the first four years and the Companies project losses in excess of $400 million 2016-2018,[11] the only way ratepayers are made whole is if the FES plants are very profitable in the out years. Given the fact that capacity prices are only established three years out, and the Companies' position that wholesale power prices are "so volatile" that the Companies are proposing rate stabilization, ratepayers simply should not be saddled with such risks.

In the past, when economic development subsidies were being given, the Commission put a limit on how much can be passed on to ratepayers.[12] Further, the Stipulation appears to prohibit the Commission as part of its required review of an ESP lasting more than three years under Section 4928.143(E), Revised Code, to not only review whether the ESP is still better than a market rate option, but to take action to change or end the ESP if it is not in the public's interest. The Commission simply would be abandoning its responsibility if it did not insist that the Stipulation contain a cap on the amount of the ratepayers' responsibility. Further, it must change the Stipulation so that if the projected benefits have not occurred, the ESP will end in the fourth year with an obligation for future FES payments.

The state of the record built over a two-month hearing supports only one outcome – rejection of the Rider RRS. First, whether Rider RRS will be a loss or a credit to retail customers is highly dependent on energy price forecasts.[13] Updated studies using *current* natural

---

[10] FirstEnergy Ex. 154 at 7-8.
[11] Sierra Club Ex. 89.
[12] *In the Matter of the Application of Ormet Primary Aluminum Corporation for Approval of a Unique Arrangement with Ohio Power Company and Columbus Southern Power Company*, Case No. 09-119-EL-AEC, Opinion and Order (July 15, 2009).
[13] P3/EPSA Ex. 12 at 18.

gas prices show that natural gas prices have declined sharply.[14] This, among other factors, led economists Dr. Kalt and Mr. Wilson to warn of losses in the hundreds of millions of dollars that will have to be made up by the captive wire customers.[15]

The shift of such burden off FES and on to the retail customers led PJM Market Monitor Dr. Bowring to find Rider RRS to be a subsidy.[16] The harm of a subsidy is that it reduces the efficiencies and innovative benefits of competition, as verified by multiple witnesses (the PJM Market Monitor, Mr. Bennett, Mr. Ellis and Mr. Campbell).[17] FES is a licensed CRES provider and a direct competitor to the members of RESA who also compete for retail customers in Ohio.[18] The result of Dr. Bowing's finding is the subsidy will allow FES to push off its balance sheets the poorer generators in lieu of a non-bid, cost-plus contract, which creates a competitive advantage for FES that could stifle competition. Further, unlike the highly visible subsidy payment made through Rider RRS, the harm caused by a reduction in competition is a cancer that lurks below. It will dissuade new generation builders from coming to Ohio where they will have to compete with subsidized generation,[19] and it will discourage CRES providers from developing assets in Ohio because they must face a subsidized CRES provider on the retail level.

Section 4928.03 Revised Code, permits retail customers to choose a competitive service from any competitive supplier of the customer's choice. Rider RRS though is a non-bypassable rider, which forces customers to buy the alleged rate stabilization hedge which is a generation service and thus a competitive service. That runs counter to the whole statutory scheme of competitive choice for generation and other competitive services.

---

[14] P3/EPSA Ex. 12 at 13.
[15] P3/EPSA Ex. 12 at 17; OCC/NOPEC Ex. 9 at 3.
[16] IMM Ex. 2 at 5.
[17] *See, e.g.,* IMM Ex. 2 at 5; Dynegy Ex. 1 at 5; Exelon Ex. 1 at 6; RESA Ex. 6 at 4;.
[18] Tr. Vol. 11 at 2481.
[19] IMM Ex. 2 at 5.

Rider RRS also violates Section 4928.17, Revised Code. As detailed below, Rider RRS began with FES approaching FirstEnergy and offering its generation for Rider RRS exclusively.[20] FirstEnergy did not approach the Staff, the Consumers Counsel or even survey its customers as to whether there was in fact a problem with retail rate stability, and if so what was the most efficient way to stabilize retail rates. Instead, FirstEnergy bargained with FES as to exclusive terms for a rate guarantee for FES' Davis-Besse and Sammis plants.[21] The term sheet for the FES/ Companies purchase power agreement ("PPA") calls for FirstEnergy as the utility to exclusively obtain its generation rate stability units from FES at cost plus a return on equity, [22] which the utility will collect from the retail customers and remit to FES at no fee. FirstEnergy holds an exclusive monopoly from the state for utility service, the corporate separation statute was designed to prevent using that state monopoly power to leverage the competitive market.

In sum, the Commission should reject Rider RRS.

C. Description of RESA

RESA is a broad and diverse group of energy retail suppliers who share the common vision that competitive retail energy markets deliver a more efficient, customer-oriented outcome than regulated utility structure. Several RESA members are certificated as competitive retail electric service providers and active in the Ohio Edison, Toledo Edison and Cleveland Electric Illuminating (FirstEnergy or Companies) service territories. RESA members participating in the FirstEnergy retail electric markets provide service to residential, commercial, industrial and governmental customers, including supplying governmental aggregation.

RESA was granted intervention and has actively participated throughout the proceeding.

---

[20] Tr. Vol. 1 at 110.
[21] Tr. Vol. 1 at 112; Tr. Vol. 13 at 2760-2762, 2765-2766.
[22] FirstEnergy Ex. 156.

D. Procedural History

The Companies' ESP IV application was filed with the Commission on August 4, 2014,[23] and originally requested an ESP for a three-year period of June 1, 2016 through May 31, 2019. On December 22, 2014, as supplemented on May 28 and June 4, 2015, a partial Stipulation was filed for Commission consideration.[24] The hearing began on August 31, 2015, and the hearing record closed on October 29, 2015, after 35 days of hearing and testimony from numerous witnesses. On December 1, 2015, another supplement to the partial Stipulation was filed.[25] The Attorney Examiner issued a new procedural schedule and ordered the re-opening of discovery, filing of testimony in support and in opposition to the Stipulation, and recommencement of the hearing. The hearing recommenced on January 14, 2016, and concluded on January 22, 2016.

II. STANDARD OF REVIEW

The Companies are proposing in this proceeding to implement a new electric security plan – ESP IV. Considering the nature of the approval the Companies seek, the Commission's standard of review for this proceeding consists of the following six prongs:

(1) Because FirstEnergy seeks to establish an ESP, it has the burden of proof in this proceeding per Section 4928.143(C), Revised Code.

(2) Because FirstEnergy is claiming that its Rider RRS will provide rate stability, FirstEnergy must prove as to Rider RRS that "... considering the plain language of [Section 4928.143(B)(2)(d), Revised Code], ... there are three criteria with which the PPA mechanism must comply. Specifically an ESP component approved under Section 4928.143(B)(2)(d), Revised Code must first be a term, condition, or charge; next, relate to one of the enumerated

[23] FirstEnergy Ex. 1.
[24] FirstEnergy Exs. 2-4.
[25] For ease, the December 22, 2014 Stipulation and Recommendation, as supplemented on May 28, June 4, and December 1, 2015, will be collectively referred to as "the Stipulation."

types of terms, conditions, and charges; and, finally, have the effect of stabilizing or providing certainty regarding retail electric service."[26] (Emphasis added.)

(3) The Commission must determine whether FirstEnergy has complied with the Commission's directive in the *AEP ESP III* Opinion and Order that "to justify any requested cost recovery" a filing "at a minimum" must address the following eight factors which shall be balanced by the Commission:[27]

- The financial need of the generating plant;
- The necessity of the generating facility, in light of future reliability concerns, including supply diversity;
- A description of how the generating plant is compliant with all pertinent environmental regulations and its plan for compliance with pending environmental regulations;
- The impact that a closure of the generating plant would have on electric prices and the resulting effect on economic development within the state;
- In the PPA rider proposal, provide for rigorous Commission oversight of the rider, including a proposed process for a periodic substantive review and audit;
- Commit to full information sharing with the Commission and its Staff;
- Include an alternative plan to allocate the rider's financial risk between both the Company and its ratepayers; and
- Include a severability provision that recognizes that all other provisions of its ESP will continue, in the event that the PPA rider is invalidated, in whole or in part at any point, by a court of competent jurisdiction.

(4) The Commission must evaluate whether the ESP IV will be more favorable in the aggregate than an MRO. The Commission is required by Section 4928.143(C)(1), Revised Code to approve, or modify and approve, an ESP, if the ESP, including its pricing and all other terms and conditions, including deferrals and future recovery of deferrals, is more favorable in the aggregate as compared to the expected results that would otherwise apply under Section. 4928.142, Revised Code." (Emphasis added.)

[26] *ESP III*, Opinion and Order at 20.
[27] *ESP III* Opinion and Order at 25-26.

(5) Because a stipulation is present, the Commission must find that the Stipulation satisfies the three-prong test.

(6) Lastly, the Commission's decision must be based on the evidence in the record. *AEP ESP III*, Order at 24, citing *Tongren v. Pub. Util. Comm.*, 85 Ohio St.3d 87, 706 N.E.2d 1255 (1999) ("[t]he Commission must base our decision on the record before us").

As discussed in greater detail below, FirstEnergy has failed to meet its burden of proof to justify Rider RRS, and to justify approval of the Stipulation.

III. PROBLEMATIC TARIFF AND RIDER PROPOSALS FROM FIRSTENERGY

A. Certain Supplier Coordination Tariff Changes should be rejected and the Bill Format Proposal should be modified.

As part of the ESP IV application, FirstEnergy presented revisions to each of the Supplier Coordination Tariffs. RESA has concerns with regard to three proposed changes, and with regard to the Companies' proposed bill format for consolidated bills.

1. Narrowing what CRES providers can include on consolidated bill should be rejected.

In the tariffs, the Companies propose to insert the word "generation" in the existing definition of "Bill Ready" so that it reads as follows:[28]

> when a Certified Supplier that employs the Consolidated Billing option calculates its Customer's generation charges and provides the Company the Customer's Certified Supplier charges to be billed.

No narrative was presented in the application or testimony given at the hearing as to why this change is needed. The redline changes to the Tariff just appear in Appendix S of the application. The suggested amendment though is one that RESA recognizes as it is similar to Duke Energy Ohio Inc.'s attempt to unreasonably narrow what it would bill and collect as part of

[28] FirstEnergy Ex. 1 at Attachment 5, 1st Revised Page 3 of 52.

consolidated billing.[29] The proposed language appears to limit the ability for CRES to include charges on the consolidated bill for demand response or energy efficiency offerings.

RESA opposes limiting CRES charges to just "generation" because as noted by RESA witness Bennett, FirstEnergy currently bills on the consolidated bill for protection and repair plans, disaster protection plans, surge protection services, and other unregulated non-commodity charges.[30] As Mr. Bennett testified, the proposed insertion of "generation" to the tariff language appears to unduly discriminate against CRES providers. Simply put, if other service providers who are not CRES providers are permitted to bill for non-generation items on the consolidated bill so should CRES providers. FirstEnergy fails to define generation and leaves an ambiguous ability for the utility to deny charges on a bill. There are many different components that go into CRES that are not directly related to generation – for example, employee salaries and marketing. Consolidated billing ought to be offered equally to all under uniform terms established in the tariff. FirstEnergy's proposed language change to the definition of "Bill Ready" should be denied. The Commission should affirmatively state that CRES providers can use bill-ready for billing of all CRES options at a very minimum as this is a defined term. Finally, the Commission should also state that FirstEnergy must allow for bill-ready billing of non-commodity charges so long as FirstEnergy permits others to do so.

[29] *See, In the Matter of the 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*, Direct Testimony of Teresa Ringenbach on behalf of Direct Energy Services, LLC, Direct Energy Business, LLC and the Retail Energy Supply Association at 5-8, Case No. 14-841-EL-SSO (September 26, 2014); and *See In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to 4928.143, Revised Code, in the Form of an Electric Security Plan,* Case Nos. 13-2385-EL-SSO, *et al.,* Initial Brief of Direct Energy Services, LLC and Direct Energy Business, LLC at 7-11 (July 23, 2014).
[30] RESA Ex. 2 at 8-9.

2. Elimination of the ability to request non-summary, customer specific usage data is contrary to a prior Commission directive.

FirstEnergy seeks to eliminate the option for a CRES provider to request (and pay for) non-summary information, such as detailed hourly or sub-hourly metering information.[31] The language change is as follows:

> **Summary Interval Meter Data.** Interval meters are read on a monthly schedule, and raw hourly data is processed through the Company's metering subsystem, which in turn provides summary information to the Company's Customer billing system. This summary information consists of total kWh usage over the billing cycle, and maximum on-peak and off-peak demands over the billing cycle. This summary information will be provided to a Certified Supplier on a monthly basis for that Certified Supplier's Customers equipped with interval metering equipment. **~~Should an interval metered Customer, or that Customer's Certified Supplier, request hardcopy or electronic file formats of non-summary information (detailed hourly or sub-hourly metering information), the Company will provide such information, to the extent that it is available, by account, with the Certified Supplier being responsible for the Company's cost of providing such information per the Schedule of Fees and Charges set forth in this Tariff.~~**

RESA witness Bennett testified that this request is unreasonable, given the importance of receiving actual (non-summary) interval meter data. He stated:[32]

> It is bad enough that the Distribution Utilities charge CRES providers for customers' meter data. It makes it even worse if the Distribution Utilities will not provide it at all under the proposed tariff. This information can be important for a CRES provider helping a customer with their energy usage and habits as well as for pricing purposes. The Distribution Utilities provide no explanation for this change.

The Commission has explicitly required all Ohio electric distribution utilities, including FirstEnergy, to provide interval customer energy usage data to CRES providers, not summary

[31] FirstEnergy Ex. 1 at Attachment 5, 1st Revised Page 21 of 52 at Section G.
[32] RESA Ex. 2 at 10.

data.[33] In response to that directive, FirstEnergy filed a letter with the Commission on November 21, 2014, stating:

> This letter is to advise the Public Utilities Commission of Ohio regarding Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company's (collectively, the "Companies") compliance with paragraph 29 of the Commission's Entry on Rehearing in [Case No. 12-3151-El-COI]. In that Entry, the Commission ordered the EDUs to "provide interval [Customer Energy Usage Data ("CEUD")] to CRES providers in a manner consistent with the Commission's rules, Ohio Adm. Code 4901:1-10-24" and to file "amended tariffs that specify the terms conditions and charges associated with providing interval CEUD within six months of this Entry on Rehearing." The Companies' current Supplier Coordination Tariffs already provide for the terms and conditions and charges associated with providing this information. No further filings are necessary. (Emphasis added.)

Despite the statement in the letter, FirstEnergy had pending changes to this provision in the Supplier Coordination Tariff that would result in that tariff not complying with the Commission's directive. The Commission should require FirstEnergy to provide the customers' information free of charge to CRES providers until the Commission approves a tariff that actually complies with the Commission's long-standing directive to provide interval customer energy usage data to CRES providers.

3. Unaccounted for energy should not become solely the CRES supplier's responsibility.

FirstEnergy has proposed changes to the provision in the Supplier Coordination Tariff that addresses unaccounted for energy as follows:[34]

> ~~**Unaccounted for Energy will be determined by comparing the aggregate load of all**~~ Certified Suppliers will be responsible for Unaccounted for Energy on a load ratio share basis as calculated by the Company pursuant to the Supplier Energy Obligation Manual available on the Company's website. ~~**and the Company at the generation level including losses to the FE Ohio Zone load less non retail load for each respective hour. The difference will then be allocated to Customers'**~~

[33] *Retail Energy Market Investigation, supra*, Entry on Rehearing at 19 (May 21, 2014).
[34] FirstEnergy Ex. 1 at Attachment 5, 1st Revised Page 30 of 52 at Section E.

~~**load and subsequently to the Certified Supplier based on a ratio of each Certified Supplier's load to the total load of the Certified Suppliers and the Company on an hourly basis. The Company may update the method of allocation of Unaccounted For Energy (UFE) as more detailed data becomes available.**~~

As RESA witness Bennett explained, this negatively and unfairly affect CRES providers by removing from the tariff any responsibility FirstEnergy may have and placing the risk solely on CRES providers. All load-serving entities, including FirstEnergy, are responsible for unaccounted for energy.[35] There has not been sufficient explanation or justification for changing this provision as requested and it should be rejected. No testimony was offered to support the change. The burden of proof to change the tariff rests with FirstEnergy and this burden has not been carried.

4. Bill-format change to incorporate CRES logos must comply with the Commission's prior directive.

FirstEnergy witness Smialek presented a new bill format for the Companies in response to the Commission's March 2014 directive in the retail market investigation to include CRES logos.[36] The sample bill was in color, with the FirstEnergy logo in color and the CRES provider logo in black/white. Ms. Smialek testified that the bill sample attached to her testimony was in error and that company prints the bills only in black/white.[37] Ms. Smialek further testified that, upon implementing the addition of CRES logos on its consolidated bills, there will be no color and the size of the CRES logo will be the same size as the FirstEnergy logo.[38] The Commission in the Market Development Investigation Order has already mandated that consolidated bills have both the utility and the CRES logo and contact information. That should be implemented

---

[35] Tr. Vol. 26 at 5345-5346.
[36] FirstEnergy Ex. 15 at 7 and Attachment MBS-1; Tr. Vol. 5 at 1062.
[37] Tr. Vol. 5 at 1052-1053, 1055.
[38] Tr. Vol. 5 at 1057.

now. Further, when implemented, the information should be the same – all color or all black/white.

B. Balancing Operating Reserve (PJM Line Item 1375) should not be billed by FirstEnergy.

FirstEnergy has proposed to modify its Supplier Coordination Tariff so that it will bill and collect for a number of different PJM charges. One of those charges is PJM Billing Line Item 1375 – Balancing Operating Reserve.[39] RESA witness Bennett explained that RESA supports direct billing of PJM billing line items that are not market based, are not hedgeable, are set through administrative means, and which a load serving cannot meaningfully affect.[40] Such PJM line items by their very nature are unknowable until PJM calculates and publishes them and not based on supply and demand fundamentals. Direct billing of such fees which a load serving entity cannot alter enhances the transparency of energy charges for which customers can shop.[41]

RESA opposes moving PJM Billing Line Item 1375 to a non-bypassable charge from FirstEnergy, as proposed. Mr. Bennett explained that the responsibility for Balancing Operating Reserve (PJM Billing Line Item 1375) should remain with CRES providers because load serving entities can affect Item 1371 cost. Item 1375 is for Balancing Operating Reserves. The reserve is not a set PJM fee or based on total PJM costs, rather each load serving entity is charged for the actual deviation from what they scheduled to send in and what the suppliers customers need. Thus, Item 1375 provides incentives for load serving entities to be as accurate as possible in the day-ahead financial market.[42]

---

[39] FirstEnergy Ex. 1 at Attachment 5, Pages 49-52.
[40] RESA Ex. 2 at 11; RESA Ex. 5 at 4-5.
[41] *Id.*
[42] *Id.* at 12.

C. The CRES supplier web portal proposal should be approved, along with a specific directive to hold stakeholder collaborative meetings to assist with development and implementation.

FirstEnergy has proposed to implement a secure, web-based system available to CRES providers.[43] The proposal appears to be similar to the supplier web portals that exist for other Ohio electric distribution utilities. FirstEnergy witness Smialek indicated that the list of information included on pages4 and 5 of her direct testimony were the types of information that FirstEnergy envisions including in the supplier web portal.[44]

RESA supports the development and installation of a secure supplier web portal for providing customer information to CRES providers. RESA witness Bennett noted that RESA has advocated for similar web portals in other ESP proceedings and supports the customer information as listed in Ms. Smialek's testimony (page 4-5).[45] Moreover, based on experiences with the development and implementation of other supplier web portals, Mr. Bennett recommended that FirstEnergy be ordered to establish a stakeholder or collaborative process so that the details of the portal can be discussed prior to implementation and "the web portal that comes out at the end is the worth[y] investment in time and money that we're making and it really does help the market, helps suppliers and helps customers."[46]

Ms. Smialek noted design work for the portal has not begun yet, and further details need to be worked out. For instance, there has not been a decision on how letters of authorization will look or would be submitted.[47] She indicated that FirstEnergy would be receptive to other proposals about the types of information for the portal and that FirstEnergy would be willing to having stakeholder/collaborative meetings to discuss the portal before it becomes fully

---

[43] FirstEnergy Ex. 1 at 19.
[44] Tr. Vol. 5 at 1046-047.
[45] RESA Ex. 2 at 19; Tr. Vol. 26 at 5353.
[46] RESA Ex. 2 at 19; Tr. Vol. 26 at 5363.
[47] Tr. Vol. 5 at 1040, 1042, 1050-1051, 1071.

operational.[48] The Commission should order a working group so that a portal is designed that is in line with the other utility web portals (standardization when possible) and provides the optimal balance of data exchange at a reasonable cost.

D. Generation Cost Reconciliation Rider should be modified to not become automatically bypassable under certain conditions.

The Generation Cost Reconciliation Rider ("Rider GCR") reconciles the total actual expense for generation that FirstEnergy paid to suppliers for standard service generation with the amounts collected from ratepayers for such services. The Rider GCR reconciliations are done quarterly. Since Rider GCR collects what are exclusively generation costs, only standard service customers pay the Rider GCR.[49] However, Rider GCR also allows FirstEnergy to make the rider non-bypassable if one of two conditions exist:

- If the ratio of the unpaid, deferred Rider GCR amounts to the cost of the generation, and if the ratio of Rider GCR deferrals to standard service generation costs exceeds five percent (5%), then the FirstEnergy EDUs can make the Rider GCR non-bypassable.

- If a standard service supplier defaults and FirstEnergy projects that the GCR deferrals will exceed the five percent (5%) ratio trigger.

As part of the ESP IV application, FirstEnergy proposed to change Rider GCR to require that the 5% trigger be exceeded for two consecutive periods.[50] Then, as part of the Stipulation, FirstEnergy agreed to increase the trigger to 10%.[51]

RESA witness Bennett explained three concerns with the Rider GCR concept. First, he pointed out that there is no reason to accept the premise that, once a five percent (5%) ratio is achieved for two quarters, that FirstEnergy will not be fully reimbursed for its standard service generation expenses, or that standard service itself will no longer be viable. Second, there is no

---

[48] Tr. Vol. 5 at 1051.
[49] RESA Ex. 3 at 2.
[50] FirstEnergy Ex. 1 at Attachment 5 at Sheet 103.
[51] FirstEnergy Ex. 2 at 9.

process to revert the Rider GCR back to being bypassable when conditions change or it becomes apparent that FirstEnergy will be fully compensated and the standard service is not in danger of entering an economic death spiral. Finally, and most importantly, the tariff appears to exclude the Commission from crafting a more appropriate remedy than making Rider GCR non-bypassable should either the size of the Rider GCR deferral reach a worrisome level or a supplier defaults. Mr. Bennett explained the better alternative to what has been proposed thus far:

> RESA suggests that if the Rider GCR ratio of deferrals to expenses reaches five percent (5%) for two quarters, the FirstEnergy EDUs at that time should submit a plan to address the factors which are causing the deferral to rise. In keeping with the idea that the optimal solution to a rising deferral to cost ratio should be selected rather than just automatic application of subsidy from other retail customers, the application to alter Rider GCR though should contain an explanation of the why the deferral to generation cost ratio is rising or is expected to rise above the trigger point, and both the solution being offered as well as other solutions which were considered. The FirstEnergy EDU's application may well be for making the Rider GCR non-bypassable, but the application should reflect that the FirstEnergy EDU also considered other options and the Commission can receive and take consideration of comments from the other interested parties as other solutions.
>
> * * *
>
> The Stipulation's raising the threshold before the automatic rate increase kicks in for shopping customers is an improvement over the flawed 5% prior approach, but only reinforcing the Commission's direct oversight and approval will cure the flaw.

RESA's approach is not only more reasonable that the proposal put forth by the Companies (and as modified by the Stipulation), RESA's approach is much more flexible, which is consistent with Section 4928.02(G), Revised Code.[52] Accordingly, the Commission should not adopt the proposed changes for Rider GCR as presented in the Stipulation. Instead, the Commission should adopt RESA's recommendation for this rider.

---

[52] Section 4928.02(G), Revised Code, states that it is the policy of Ohio to: "[r]ecognize the continuing emergence of competitive electricity markets through the development and implementation of flexible regulatory treatment[.]"

E. Time-of-Use Option under the Generation Service Rider

In its ESP IV application, FirstEnergy originally proposed to allow the time-of-day option under the Generation Service Rider ("Rider GEN") to expire.[53] This option is based on power from the bid-winning suppliers at the auction closing price, and then adjusted for time of use pricing based on FirstEnergy approximations.[54] It is not based on direct, market pricing. There is no actual data collected as to the true cost and to the degree that the approximate prices are incorrect then the service either receives a subsidy or pays a subsidy.

RESA does not oppose the continuation of the current FirstEnergy time-of-day rates for the few existing customers who take that service for the term of the ESP IV, but RESA advocates that, in that authorization, the Commission should require FirstEnergy to submit an action agenda to the Staff which will accomplish providing the necessary interval data electronically to CRES providers by the start of ESP IV in June 2016. This directive is appropriate, in exchange for an additional eight years of this option, because the Commission has already concluded that development of proper data exchange protocols is needed so that CRES providers can offer time-differentiated rates.[55]

As explained by RESA witness Bennett, true time-of-day service must have both interval meters for residential and small commercial customers and the IT systems to provide customers and the CRES providers with real-time data suitable for pricing and billing purposes.[56]

IV. A PURCHASE OF RECEIVABLES PROGRAM SHOULD BE ORDERED AS PART OF FIRSTENERGY'S ELECTRIC SECURITY PLAN

Currently, when a shopping customer consumes power in FirstEnergy's service territories, the utility creates an account receivable. The account receivable equals the amount

---

[53] FirstEnergy Ex. 1 at Attachment 5, Sheet 114.
[54] RESA Ex. 3 at 4-5.
[55] *Retail Market Investigation, supra*, Opinion and Order at 37-38.
[56] RESA Ex. 3 at 5.

the customer owes the CRES provider for the power consumed. The CRES provider has the collection risk associated with whether the customer will pay the amount owed to the CRES provider, which risk is a factor that goes into the price ultimately offered by the CRES provider and accepted by the customer. When there are unpaid amounts, the customer must deal separately with the utility and the CRES provider for collection of unpaid amounts.

A Purchase of Receivables ("POR") program would allow for a single bill for customers (covering the wire service, capacity and energy) with a single collection entity. RESA witness Bennett testified that a POR program would be one of the "most significant steps" the Commission could take to encourage more CRES providers to enter into the FirstEnergy market and to help remedy an existing barrier to competition.[57]

A. A Purchase of Receivables Program will further develop the competitive marketplace in the FirstEnergy service territories.

1. The current payment priority system has flaws that can and should be fully resolved with a POR program.

The current manner in which payments on past due amounts are applied by the utility may seem balanced.[58] However, as RESA witness Bennett explained, the system has several flaws. First, the money owed for CRES is not counted for purposes of shut off. To avoid a shut-off for an overdue account, a customer can have the payment priority shifted so that the EDU charges are paid first avoid shut off. This pattern may continue until the CRES provider returns the customer to EDU service for non-payment to avoid an ever increasing CRES arrearage. Second, if there is a service disconnection, the CRES provider is at great disadvantage in trying to collect the remaining CRES past due amounts because the CRES provider has not been doing the billing and because the customer has to pay only the utility arrearage to be reconnected.

[57] RESA Ex. 2 at 13.

[58] Past due CRES amounts are paid first, then the utility's past due amounts, then the utility's present invoice, and then the CRES provider's present invoice.

Third, when customers make partial payments to the utility, the CRES provider is not informed. This is something the Commission recognized and required the utilities to implement procedures for providing the total customer payment amount, the amount billed by the CRES provider, the amount allocated to the CRES provider and the date the payment was applied.[59] FirstEnergy filed a waiver request to allow them to provide this information.[60] That waiver has not been ruled on.

POR avoids all three of these issues because, the electric utility agrees to purchase a CRES provider's customer accounts receivable.[61] A POR program then pays the CRES provider the agreed-upon amount regardless of what the customer pays, which removes the need to provide data to CRES providers on the total amount paid by the customer and how it was applied to the bill. In addition, this eliminates a priority system that can be confusing to customers, while creating a single collection point for customers with the entity that holds the complete data on payments received and processed. This reduces the uncollectible risk for the CRES provider by leveling the playing field between the utility and the CRES provider because the utility now has the authority to shut off for the CRES charges even after service to the customer by the CRES provider has been discontinued. Additionally, the POR program makes it easier for the CRES providers to verify that payments are accurate and is simply easier on the customer when it comes to avoiding collection and remaining current on their utility bill. This evidence demonstrates that a POR program will improve the competitive market in the FirstEnergy service territories.

---

[59] *In the Matter of the Commission's Investigation of the Retail Electric Service Market*, Case No. 12-3151-EL-COI, Finding and Order at 21-22 (March 26, 2014).
[60] *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and the Toledo Edison Company for a Waiver with Regard to Rule 4901: l-37-04(D)(l), Ohio Administrative Code,* Case No. 14-2049-EL-WVR.
[61] The POR program may include a discount rate at which the electric utility pays less than the full amount owed to the CRES provider to accommodate the risk that not all CRES customers will pay for their CRES charges.

2. A purchase of receivables program increases participation in the competitive market.

POR helps increase competition for supply, with many suppliers each offering plans and programs. Mr. Bennett presented a chart illustrating the increased number of suppliers that exist in areas with a POR program versus the number of suppliers in areas without a POR program.[62] Both the Staff and the Commission have agreed that POR increases participation in the competitive market.[63] It is worthwhile to spur competition in this manner at this time since, as of the time of the first phase of the hearing, FES (a CRES provider in the FirstEnergy service territories) no longer participates in the residential marketplace for competitive supply.[64]

B. The Commission Staff and the Commission itself support purchase of receivable programs, finding them beneficial.

Staff supported the implementation of POR programs in *all* electric distribution utility service territories in its January 2014 Market Development Work Plan.[65] In particular, Staff stated that POR will:

- resolve the CRES providers' inability to efficiently and effectively process bad-debt collections
- eliminate a market barrier
- result in an increase in the number of active suppliers, a diversity of the suppliers, and an increase in the number of products available in the market
- reduce customer confusion regarding multiple entities attempting to collect, posting of charges from more than one supplier if a customer elects to switch, the payment allocation

Staff recommended that the Commission order all electric utilities that currently do not offer a POR program to file an application to implement a POR program.[66]

[62] RESA Ex. 2 at 15. *See, also*, Tr. Vol. 26 at 5348.
[63] *Retail Electric Service Market, supra,* Staff Market Development Work Plan at 16 (filed January 16, 2014); *In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143, in the Form of an Electric Security Plan,* Case Nos. 13-2385-EL-SSO, Opinion and Order at 81 (February 25, 2015).
[64] Tr. Vol. 11 at 2342.
[65] *Retail Electric Service Market, supra,* Staff Market Development Work Plan at 16-17 (filed January 16, 2014).

In March 2014, the Commission agreed that POR should be encouraged, and it expressly encouraged each electric distribution utility to include in its next distribution rate case or SSO an application to implement a POR program or equivalent.[67] Even more recently, the Commission approved a POR program for the Ohio Power Company service territory, expressly finding that a POR program will "provide significant customer benefits, including the likelihood of increased number of active CRES providers and product offerings in AEP Ohio's service territory, which, as the record reflects, occurred following the implementation of a POR program in Duke's service territory."[68]

C. FirstEnergy has already implemented POR programs in its other states.

RESA witness Bennett pointed out that all of the FirstEnergy electric distribution companies in Pennsylvania offer POR programs, as well as the FirstEnergy electric distribution companies in Maryland and New Jersey.[69] As a result, FirstEnergy is certainly able to have a POR program, and bring its benefits to Ohio.

Altogether, the record demonstrates that a POR program is a just and reasonable additional feature for the competitive market in the FirstEnergy service territories. It is feasible, well-supported, and worthwhile at this time.

V. RIDER RRS SHOULD BE REJECTED

The single largest component of the ESP IV application is Rider RRS. At the initiative of FES, the Companies propose to purchase the output of two generating plants operated by their affiliate, FES – Davis-Besse and Sammis, as well as FES' entitlement to 4.85% of the output of

---

[66] *Id.*

[67] *In the Matter of the Commission's Investigation of Ohio's Retail Electric Service Market,* Case No. 12-3151-EL-COI, Finding and Order at 20 (March 26, 2014).

[68] *In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143, in the Form of an Electric Security Plan,* Case Nos. 13-2385-EL-SSO, Opinion and Order at 81 (February 25, 2015). ("*AEP ESP III*")

[69] RESA Ex. 2 at

two generating plants owned and operated by OVEC and will either charge or credit customers with the difference between the payments to FES and revenues (and charges) for the sale of the output.

As to Rider RRS, Companies witness Strah explained how it would work:

> The Companies will purchase the plants' output at cost plus a return on capital, and will sell the plants' output into the markets operated by PJM Interconnection LLC ("PJM"). The Companies will net the revenues received from the PJM markets against the costs paid to the generator, and credit or charge the difference to all customers on a non-bypassable basis under Rider RRS.[70]

As a result of the Stipulation, the Rider RRS is now proposed to have an eight-year term and to include a 10.38% return on equity.[71]

FirstEnergy also proposes to include generation costs not recovered through the sales into the PJM markets, as well as "Legacy Cost Components." FirstEnergy witness Mikkelsen defined the legacy costs as:[72]

> [A]ll costs that arise from decisions or commitments made and contracts entered into prior to December 31, 2014, including any costs arising from provisions under such historic contracts that may be employed in the future. These Legacy Cost Components were assumed by a competitive company [FES] that prudently and conservatively incurred costs to effectively participate in the competitive market and deliver shareholder value. * * * Approval of this ESP IV shall be deemed as approval to recover all Legacy Cost Components through Rider RRS as not unreasonable costs.

Rider RRS should be removed from FirstEnergy's ESP IV for many reasons. The Companies' forecasts which Ms. Mikkelsen relies upon for her eight-year projections are outdated and projections based on updated projections show millions of dollars in charges for Rider RRS. The competitive markets will also be harmed and this harm is magnified by the fact

---

[70] FirstEnergy Ex. 13 at 4-5.
[71] FirstEnergy Ex. 154 at 7.
[72] FirstEnergy Ex. 7 at 14. *See, also*, Tr. Vol. 36 at 7622.

that FES is a an active CRES provider in Ohio. There also is little Commission oversight over Rider RRS and little information sharing. The proposed severability provision is also not sufficient. Rider RRS, if approved, will also lead to violations of Ohio law, including Ohio's corporate separation requirement. The arguments of RESA on these points follow.

A. FirstEnergy's forecast of Rider RRS is not reliable, as it is based on out-of-date data and does not recognize the impact of capacity performance penalties.

FirstEnergy presented a forecast of the impact of Rider RRS.[73] The forecast was updated to incorporate the stipulated eight-year term and the 10.38% return on equity, and it shows that customers will be charged under the rider for several years, and then the rider is predicted to be a credit, as follows:[74]

Year	2016 (June-Dec)	2017	2018	2019	2020	2021	2022	2023	2024 (Jan-May)
Rider RRS	$(155M)	$(175M)	$(84M)	$126M	$207M	$216M	$177M	$190M	$60M
Charge/Credit	*Charge*	*Charge*	*Charge*	*Credit*	Credit	Credit	Credit	Credit	Credit

FirstEnergy's forecast relies upon a price forecast prepared in the middle of 2014 by FirstEnergy witness Rose. Mr. Rose's price forecast is out of date, according to P3/EPSA witness Kalt and Sierra Club witness Comings.[75] Dr. Kalt summed up the effect of the outdated price forecasts, stating "the Companies' calculations of ratepayer impacts are underestimating the harms to ratepayers in the early years, and overestimating claimed positive impacts on ratepayers in the later years."[76] Additionally Dr. Kalt and Mr. Comings both noted that there have been sharp declines in market prices of spot and future gas, which also affects forecasts.[77]

---

[73] FirstEnergy Ex. 33 at Attachment JRR-1 (Revised).
[74] Sierra Club Ex. 89.
[75] P3/EPSA Ex. 12 at 12; Sierra Club Ex. 95 at 2.
[76] P3/EPSA Ex. 12 at 12.
[77] P3/EPSA Ex. 12 at 13; Sierra Club Ex. 95 at 8.

In addition, under Rider RRS, capacity performance penalties[78] will be passed through to the ratepayers.[79] The term sheet allows FES to be excused from a failure to deliver capacity when called upon unless FES could have avoided the failure by exercise of "Good Utility Practice" as defined in the term sheet.[80] "Good Utility Practice" is defined as:[81]

> "Good Utility Practice" means any of the practices, methods and acts engaged in or approved by a significant portion of the electric utility industry during the relevant time period, or any of the practices, methods and acts which, in the exercise of reasonable judgment in light of the facts known at the time the decision was made, could have been expected to accomplish the desired result at a reasonable cost consistent with good business practices, reliability, safety and expedition. Good Utility Practice is not intended to be limited to the optimum practice, method, or act to the exclusion of all others, but rather to be acceptable practices, methods, or acts generally accepted in the region.

Thus, so long as FES' prior actions constitute Good Utility Practice, any capacity performance penalty must be paid by the Companies,[82] and will be netted under Rider RRS.[83] In addition, the Stipulation states that PJM performance costs will be netted against any bonus payments,[84] which means that the ratepayers will pay for those netted disallowed costs. FirstEnergy witness Mikkelsen acknowledged, in the following exchange, that the disallowed costs will be netted against bonuses and that the customers are paying for those netted disallowed costs:[85]

> Q. [Mr. Settineri] Again, Ms. Mikkelsen, I believe you said in that example I gave you a $100 penalty, $80 bonus. The Commission disallows the $100 penalty. You subtract the $80 bonus, and that leaves you with $20 that the Commission -- that the companies have to absorb, correct?

---

[78] IMM Ex. 2 at 3-4.
[79] Tr. Vol. 36 at 7707-7715.
[80] FirstEnergy Ex. 156 at 2-3.
[81] FirstEnergy Ex. 156 at 14.
[82] Tr. Vol. 8 at 2809.
[83] Tr. Vol. 8 at 2809.
[84] Company Ex. 154 at 8.
[85] Tr. Vol. 36 at 7715.

A. [Ms. Mikkelsen] Yes.

Q. And in that example what that means is that the customers would have $80 less than they would have otherwise had, correct, because of that penalty?

A. Yes.

FES will be able to avoid capacity performance penalties under the PPA transaction and the Companies are passing through the capacity performance penalties, allowed and disallowed (up to the extent of the bonuses), to the ratepayers.

As a result of these facts, FirstEnergy's forecast cannot be reliable estimates of Rider RRS, and the Commission should reject the forecast presented by FirstEnergy with no certainty on the impact of Rider RRS and considering other forecasts in the record that project millions, if not billions in charges,[86] there is no reason to believe that ratepayers will receive rate stability under Rider RRS.

B. Rider RRS will cause harm to the competitive markets.

FirstEnergy claims that Rider RRS will provide rate stability to the ratepayers because it will act as a hedge against volatile market prices.[87] Instead, FirstEnergy's proposal will "undo" the regulatory framework in Ohio all because its affiliate, FES, was looking to resolve "challenges at the competitive fleets."[88] The Commission Staff wisely evaluated the PPA construct, stating "[i]t took over a decade for the Commission to transition the four Ohio EDUs to a fully competitive retail electricity market. Granting Rider RRS is a move in the opposite direction."[89] The PPA (which is broader in scope and longer in duration than the OVEC-only PPA proposal rejected in *AEP ESP III*) is no different – it too would be a move backwards.

---

[86] OCC/NOPEC Ex. 9 at 12.
[87] See e.g. Tr. Vol. 2 at 428-429.
[88] Tr. Vol. 11 at 2290.
[89] *AEP Ohio ESP III*, Staff Ex. 18 at 9, discussing the 2013 OVEC-only PPA proposal filed by Ohio Power Company as part of its *ESP III*.

Numerous experienced and knowledgeable witnesses testified in this proceeding that Rider RRS should be rejected because it will harm the competitive markets (wholesale and retail) and will be an unjustified subsidy. These witnesses are involved in multiple segments of the electric industry – market participants, market monitor, and industry experts. The Commission should heed their very strong analyses and conclusions. A sampling is set forth in the chart below:[90]

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

[90] Exelon Ex. 4 at 6; Dynegy Ex. 1 at 4;

	information that can repeal partial price-fixing. Rider RRS is explicitly designed to socialize the losses from the three power plants under the PPA. * * * Rider RRS is a cross-subsidy." (OMAEG Ex. 26A at 25)
P3/EPSA witness Kalt	"The proposed plan would shift very large risks from FES' debt and equity investors onto the Companies' captive ratepayers. The economics of the Companies' own calculations shows that their proposed plan would burden the Companies' capital ratepayers with $220 million of uncompensated risk. It would do this without any compensating benefits or return to the general ratepaying public. The plan, in short, is what is commonly called a 'bailout'." (P3/EPSA Ex. 12 at 3-4)
OCC/NOPEC witness Sioshansi	"Such a potential subsidy has no place in a competitive market, such as those operated by PJM, because the market is intended to provide revenues for economic efficient assets to recover their costs. Allowing subsidized generators to participate in the wholesale market is anti-competitive, as the subsidized generators would have a competitive advantage over unsubsidized assets." (OCC/NOPEC Ex. 2 at 2)
OCC/NOPEC witness Wilson	"Rider RRS would shift onto customers the net cost and risk associated with the FE Companies' affiliate's ownership of generation and the contractual relationship with OVEC. This net cost could be considerable * * *." (OCC/NOPEC Ex. 4 at 15)
RESA witness Bennett	"Even setting aside the significant departure from appropriate competitive market structure and the potential disruption and negative impacts inherent to Rider RRS, it is difficult to support the idea that Rider RRS is optimized for customer benefit. By the Distribution Utilities' own admission, the generation assets that the affiliated companies agreed to include in the PPA are economically challenged and are not expected to result in customer credits for the entire length of the [originally proposed] ESP." (RESA Ex. 2 at 7)
RESA witness Scarpignato	"The Commission should reject Rider RRS in its entirety. The units in question have no handicap except that the un-regulated affiliates of the Companies do not like the prices for their output coming from the wholesale competitive marketplace. Indeed, the Companies put forth evidence that the plants in question meet all current Environmental Protection Agency ("EPA") standards and all upcoming standards * * * FirstEnergy Corp. (the parent of the Companies) appears to have so little faith in the market forecasts regarding whether the units will be economic that they instead have the Companies, file for a guaranteed recover (Rider RRS) of these costs, foregoing any possible inframarginal revenues." "Approval of RRS will afford a single generation owner in the PJM wholesale markets subsidy that other generation owners in PJM will not possess. The subsidy will cause inefficient operation and guarantee that the "wrong" generation (Rider Generation) will clear when said generation has out-of-market actual costs. It also introduces many operating inefficiencies that are forced into the market." (RESA Ex. 1 at 4, 14)

Another important reason to reject Rider RRS is that there will be no prohibitions to prevent FES from using the subsidy it receives for its plants to adjust pricing in both the retail and wholesale markets. FES is a certified CRES provider and directly sells generation service to retail customers in Ohio.[91] FES also participates in FE's standard service offer ("SSO") auctions which are used to procure generation for FE's non-shopping customers.[92] Any subsidy that FES receives related to its merchant business can easily be used to help its retail business, at the expense of other CRES providers. Likewise, FES can use the subsidy it will receive under the proposed Affiliate PPA to adjust SSO bid prices and gain a competitive advantage over other bidders. In fact, there is nothing in this case that protects Ohio ratepayers against subsidizing FES sales of lower-priced power outside of Ohio – resulting in Ohioan's subsidizing economic development in other states.

The record is replete with expert testimony opposing Rider RRS,[93] the overwhelming weight of the evidence from these expert witnesses demonstrates that Rider RRS will harm the competitive markets (wholesale and retail). As well the evidence shows that FES can use Rider RRS to its advantage in both the retail and wholesale markets. For those reasons, the Commission should find that Rider RRS will not provide rate stability and then reject Rider RRS.

---

[91] *See,* Case No. 00-1742-EL-CRS, Renewal Certificate Number 00-011E(8) dated November 4, 2014; Exelon Ex. 1 at 12.
[92] Exelon Ex. 1 at 14.
[93] See e.g. P3/EPSA 12; OCC/NOPEC Ex. 9.

C. FirstEnergy did not satisfy all factors required by the Commission in its *AEP ESP III* decision.

In the *AEP ESP III* decision, the Commission required Ohio Power Company "in a future filing, to justify any requested cost recovery" and to address "at a minimum" the following eight factors which shall be balanced by the Commission:[94]

- The financial need of the generating plant;
- The necessity of the generating facility, in light of future reliability concerns, including supply diversity;
- A description of how the generating plant is compliant with all pertinent environmental regulations and its plan for compliance with pending environmental regulations;
- The impact that a closure of the generating plant would have on electric prices and the resulting effect on economic development within the state;
- Provide for rigorous Commission oversight of the rider, including a proposed process for a periodic substantive review and audit;
- Commit to full information sharing with the Commission and its Staff;
- Include an alternative plan to allocate the rider's financial risk between both the Company and its ratepayers; and
- Include a severability provision that recognizes that all other provisions of its ESP will continue, in the event that the PPA rider is invalidated, in whole or in part at any point, by a court of competent jurisdiction.

FirstEnergy acknowledges that these factors must be considered in the Commission's review of the new Rider RRS.[95] However, FirstEnergy failed to meet its burden of proof on the several factors, including for the below reasons.

1. There is no "rigorous" Commission oversight of Rider RRS.

The Stipulation (provision V.B.3.a) contains the "rigorous" review process for the Commission to review/disallow any costs netted under Rider RRS.[96] The Commission must find

[94] *AEP ESP III*, Opinion and Order at 25-26.
[95] Company Ex. 9 at 2.

the costs to be "unreasonable." Initially, Staff will conduct an audit as to calculation verification, and then a Commission review of the costs included in the rider.[97] These will only be financial audits, not a substantive review or Commission oversight of both FES and the Companies' activities under the PPA itself. A more substantive review is necessary, if there is going to be "rigorous" Commission review of the actual costs going into Rider RRS.

Additionally, there is a large loophole in the oversight proposal. FirstEnergy has declared that approval of this ESP IV "shall be deemed as approval to recover all Legacy Cost Components through Rider RRS as not unreasonable costs."[98] Thus, there will be no review of those unknown, and vaguely identified costs. FirstEnergy could claim nearly all costs as being Legacy Cost Components and subvert the oversight process. The proposal is insufficient. The Commission should modify the oversight process and reject FirstEnergy's attempt to carve out the so-called "Legacy Cost Components."

2. There is no "full" information sharing with the Commission and its Staff.

The Companies have not proposed sufficient information sharing with the Commission or its Staff for two reasons. First, there was no information sharing addressed for the OVEC units. Second, the Stipulation (provision V.B.3.a) will allow access to the FES "fleet information on any cost component" if the Staff makes a reasonable request.[99] This is not a commitment to "full" information sharing – the Staff request will have to be deemed reasonable and the Staff will have to know what to ask for in order to receive and review the FES fleet information on any cost component. This is a loophole, creating the possibility that a multitude of documents

[96] Company Ex. 154 at 8.
[97] Company Ex. 4 at 12; Company Ex. 7 at 14-15.
[98] Company Ex. 7 at 14.
[99] Company Ex. 154 at 8. Additionally, the Stipulation's declares that FES' fleet information on any cost component will be given protective treatment indefinitely, regardless of its actual content. A blanket declaration that every AEPGR document will be given confidential treatment indefinitely does not comply with existing Commission practices.

may never be part of the rigorous Commission review. Also, there is no clear right for the Commission Staff to subpoena documents from FES and there is nothing discussing access to FES recovery of PJM penalties, bilateral contracts, other bidding, or plant sales to a new owner, all which would be important to ensure fair dealings vis-à-vis the other plants in the fleet. In light of all of these concerns, a significantly stronger commitment to "full" information sharing with the Commission and its Staff should have been presented in order to meet this Commission criterion.

3. The proposed severability provision does not comply.

The Stipulation proposes the following severability provision:[100]

> If a court of competent jurisdiction invalidates Rider RRS in whole or in part, the Companies will permit any part of the Stipulated ESP IV that has not been invalidated to continue while a good faith effort is made by the Signatory Parties to restore the invalidated provision to its equivalent value. The Signatory Parties agree to work in good faith, on an expedited basis not to exceed 60 days, to cure any court-determined deficiency. The Companies will then file (or jointly file with Signatory Parties) the modified Rider RRS, or its successor provision, for expedited approval by the PUCO, <u>which approval shall not be withheld if the modified Rider RRS, or its successor provision, provides a reasonable remedy to cure the deficiency</u>. The Companies' agreement to permit the stipulated provisions to go into effect in this matter (rather than terminate pursuant to the terms of the Stipulated ESP IV) is contingent upon the Signatory Parties supporting the modified Rider RRS, or its success or provision. A Signatory Party may choose to oppose and express any concerns with the modified Rider RRS, or its successor provision, to the Commission; however, if such concerns are not accepted by the Commission, then any Signatory Party that opposed the modified rider RRS or its successor provision, will forfeit its stipulated provision(s). This commitment on severability is not intended and shall not be construed to affect the prohibition against retroactive ratemaking. <u>No amounts collected shall be refunded as a result of this severability provision.</u> (Emphasis added.)

As explained by RESA witness Bennett, there are three reasons why this is an inadequate severability provision and does not comply with the Commission's prior directive. First,

[100] Companies Ex. 154 at 8-9.

FirstEnergy is proposing that the invalidated RRS rider remain in effect until a modified Rider RRS or its successor provision is approved by the Commission. If invalidated by a court of competent jurisdiction, Rider RRS cannot lawfully remain in effect. Second and third, FirstEnergy's proposal *requires* the parties who are Signatory Parties to go back to the negotiation table to develop a modified Rider RRS or its successor provision. Those who oppose the modified Rider RRS or its successor provision and lose will forfeit Stipulation provisions. This is despite Ms. Mikkelsen acknowledging in her testimony[101] that the severability provision required by the Commission requires all other provisions of the ESP IV to continue as previously approved by the Commission, FirstEnergy is proposing a stipulation "do over." This does not comport with the severability requirement expressed by the Commission.

D. Rider RRS violates Ohio's regulatory framework and corporate separation requirements.

Years ago, the Ohio General Assembly enacted laws declaring generation to be a competitive retail electric service, and requiring separation of the utilities' electric generation assets from their non-competitive assets. Since then, the Commission has spent years helping develop the competitive marketplace, evaluating it, and improving it. FirstEnergy divested its generation assets years ago.[102] Now, via a lengthy non-bid PPA and Rider RRS, FirstEnergy is proposing to entangle itself with the very generation assets that it has divested. As stated by Exelon witness Campbell, FirstEnergy is proposing a 180-degree about-face.[103]

---

[101] FirstEnergy Ex. 9 at 13.

[102] *See,* Company Ex. 1 at 19-20; *In re Ohio Edison Company, et al*, Case No. 10-388-EL-SSO, Opinion and Order at 46 (August 25, 2010) adopting stipulation and recommendation to approve application for corporate separation plan in *In re Ohio Edison Company, et al*, Case No. 09-462-EL-UNC, June 1, 2009 Application at page 3 (noting "Companies are now distribution companies owning no generation assets").

[103] Exelon Ex. 1 at 5.

The Commission must evaluate and find that the Rider RRS is authorized by and does not violate Ohio's corporate separation statute. Section 4928.17, Revised Code states in pertinent part:

> (A) * * * [N]o electric utility shall engage in this state, either directly or through an affiliate, in the businesses of supplying a noncompetitive retail electric service and supplying a competitive retail electric service, or in the businesses of supplying a noncompetitive retail electric service and supplying a product or service other than retail electric service, unless the utility implements and operates under a corporate separation plan that is approved by the public utilities commission under this section, is consistent with the policy specified in section 4928.02 of the Revised Code, and achieves all of the following:
>
>> (1) The plan provides, at minimum, for the provision of the competitive retail electric service or the nonelectric product or service through a fully separated affiliate of the utility, and the plan includes separate accounting requirements, the code of conduct as ordered by the commission pursuant to a rule it shall adopt under division (A) of section 4928.06 of the Revised Code, and such other measures as are necessary to effectuate the policy specified in section 4928.02 of the Revised Code.

Section 4928.17, Revised Code requires a separation between competitive and non-competitive services, but the generation under Rider RRS will not be separated from the Companies.

As to the generation from the FES plants, there will be an intermixing of personnel. The term sheet reflects that the Companies will be involved in plant operations.[104] Under Section 15 of the term sheet, the Companies will schedule and dispatch all of the energy and ancillary services associated with all of the Plants.[105] Additionally, the term sheet reflects:[106]

- FES will transfer capacity rights in PJM's eRPM system to the Companies, after which the Companies will be "solely responsible for offering the [Companies'] Contractual Capacity into the PJM capacity auctions

[104] Companies Ex. 156 at 6-7.
[105] P3/EPSA Ex. 10 at 25 of 32.
[106] Companies Ex. 156 at 7-8.

occurring after the Effective Date and covering PJM capacity delivery years within the Delivery Period."

- "All Energy and Ancillary Services associated with [the Companies'] Contractual Capacity * * * will be allocated to [the Companies] in accordance with their respective shares and will be recorded by the Parties in PJM's scheduling and settlement systems."
- "All credits and charges (including Imbalance Charges) associated with the Capacity, and Energy and Ancillary Services associated therewith and made available at a given Delivery Point will be settled in the respective PJM accounts of [the Companies] by means of the PJM settlement process."

These terms plainly illustrate that the Companies will be involved with the generation.

FES or one of its subsidiaries will be operating the FES plants.[107] However, Section 12 of the Term Sheet reflects that the Companies will be involved with deciding whether capital expenditures should be made and reviewing a capital expenditure plan.[108] Also, before making payments, the Companies will determine whether the work was performed in accordance with Good Utility Practice.[109] These terms further support a finding that the Companies will have oversight at the generating Plants contrary to the corporate separation provisions of Section 4928.17, Revised Code.

VI. FIRSTENERGY HAS NOT DEMONSTRATED THAT THE ESP IV WILL BE MORE FAVORABLE IN THE AGGREGATE THAN A MARKET RATE OFFER

The Commission is required by Section 4928.143(C)(1), Revised Code to "approve, or modify and approve, an ESP, if the ESP, including its pricing and all other terms and conditions, including deferrals and future recovery of deferrals, is more favorable in the aggregate as compared to the expected results that would otherwise apply under Section 4928.142, Revised Code."[110] Section 4928.142, Revised Code refers to the market rate offer ("MRO"). The

[107] Tr. Vol. 36 at 7699.
[108] FirstEnergy Ex. 156 at 3-4; Tr. Vol. 14 at 3000.
[109] Tr. Vol. 1 at 52.

Companies have the burden of showing that the ESP IV is more favorable in the aggregate as compared to an MRO ("ESP versus MRO").

The Stipulation states that "[t]he Stipulated ESP IV is more favorable in the aggregate to customers as compared to the expected results that would otherwise occur under an MRO alternative and represents a serious compromise of complex issues and involves substantial customer benefits that would not otherwise have been achievable."[111] However, no analysis was included with the Stipulation.

FirstEnergy witness Mikkelsen presented the ESP versus MRO analysis and stated that the expected quantitative benefit of the ESP IV was $612 million, which was calculated as follows:[112]

Economic Development Funding	$ 24.0 Million
Low Income Funding	19.1 Million
Customer Advisory Agency Funding	8.0 Million
Retail Rate Stability Rider	561.0 Million
Total Quantitative Benefit:	**$612.1 Million**

Ms. Mikkelsen stated that the total quantitative benefit in the table represented the benefit of the ESP IV over an MRO. Ms. Mikkelsen testified that she was not aware of any reason that prevented FirstEnergy from making the other payments through a MRO, other than her belief that the Companies would not make the payments.[113] Based on that acknowledgement, Rider RRS ($561 million) is the total quantitative benefit supporting FirstEnergy's claim that the ESP IV is quantitatively more favorable than an MRO. Rider RRS, however, is speculative and, as

[110] Section 4928.143(C)(1), Revised Code (emphasis added).
[111] FirstEnergy Ex. 154 at 18.
[112] FirstEnergy Ex. 155 at 10-14.
[113] Tr. Vol. 36 at 7736.

noted earlier, Rider RRS could easily cost the ratepayers billions over the ESP IV term.[114] P3/EPSA witness Kalt rejected the Companies' $561 million projected credit, and explained that using more current gas prices yielded very different results:

- Adjusting in up to day NYMEX natural gas prices resulted in a projected impact on the Companies' captive ratepayers of a net present value **loss** of $858 million[115]
- Using NYMEX natural gas future prices in the first three years and then the U.S. Department of Energy's EIA forecast for price increases for the rest of the term gives a net present value **loss** of $793 million[116]
- assuming that the net generation of the plants corresponded to historical averages would realize a net present value **loss** of $201 million[117]

This evidence establishes that the likely result is an overall charge in the millions for the quantitative amount of Rider RRS.

Ms. Mikkelsen also addressed the qualitative benefits, claiming that the various provisions of the Stipulation provide many qualitative benefits.[118] Those claimed "benefits" are only (a) benefits for the signatory parties and (b) commitments to take future actions. FirstEnergy is overstating and over-relying on the qualitative benefits. Any qualitative benefits found in the Stipulation do not outweigh the potential millions or billions in charges under Rider RRS. FE has the burden of showing that the ESP IV is more favorable in the aggregate as compared to an MRO by showing that either the Rider RRS portion of the ESP IV will net at zero over the term (which it cannot), or showing that Rider RRS will be a credit for the ESP IV term (which it cannot). FE did not meet that burden, and the Commission must strip out Rider RRS before it can find the ESP IV more favorable than a MRO.

---

[114] OCC/NOPEC Ex. 9 at 12.
[115] P3/EPSA Ex. 12 at 17.
[116] P3/EPSA Ex. 12 at 17.
[117] P3/EPSA Ex. 12 at 21-22.
[118] FirstEnergy Ex. 155 at 13.

VII. THE STIPULATION NEEDS TO BE MODIFIED TO BE ACCEPTABLE

Rule 4901-1-30, Ohio Administrative Code, authorizes parties to Commission proceedings to enter into a stipulation, but the stipulation is not binding on the Commission. The standard of review for considering the reasonableness of a stipulation has been discussed in numerous Commission proceedings.[119] The ultimate issue is whether the agreement is reasonable and should be adopted. In considering the reasonableness of a stipulation, the Commission has used the following criteria:

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

The Ohio Supreme Court has endorsed these criteria.[120] While the Stipulation has been presented as a package, the Stipulation is composed of multiple components that require review and analysis.

A. The settlement is not a product of serious bargaining among capable, knowledgeable parties.

The Ohio Supreme Court has addressed the first prong of the Commission's test in the past. In *OCC v. Pub. Util. Comm.*, the Court said that the Commission cannot just rely on the terms of a stipulation, but must determine whether there is sufficient evidence that the stipulation was the product of serious bargaining.[121] The Court added that concessions or inducements apart from the terms agreed to in the stipulation might be relevant to deciding whether negotiations

---

[119] *See, e.g.*, *Cincinnati Gas & Electric Co.*, Case No. 91-410-EL-AIR (April 14,1994); *Western Reserve Telephone Co.*, Case No. 93-230-TP-ALT (March 30, 1004); *Ohio Edison Co.*, Case No. 91-698-EL-FOR, et al (December 30, 1993); *Cleveland Electric Ilium. Co.*, Case No. 88-170-EL-AIR (January 30, 1989); *Restatement of Accounts and Records (Zimmer Plant)*, Case No. 84-1187-EL-UNC (November 26, 1985).
[120] *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.* (1994), 68 Ohio St.3d 559 (citing *Consumers' Counsel, supra*, at 126.)
[121] *OCC v. Pub. Util. Comm.* (2006), 111 Ohio St. 3d 300, 321, 2006-Ohio-5789.

were fairly conducted. * * * If there were special considerations, in the form of side agreements among the signatory parties, one or more parties may have gained an unfair advantage in the bargaining process."[122]

1. Monetary inducements show no serious "bargaining" amount parties.

In this matter, there were many special considerations – through the monetary inducements, as listed below:

- $300,000 to the City of Akron for energy efficiency programs
- $300,000 to COSE's Ohio Efficiency Resource Program
- Up to $1,000,000 to COSE for advancement of energy efficiency projects
- $400,000 to AICUO to encourage the advancement/education of energy efficiency
- Up to $1,000,000 upon AICUO submitting and receiving Commission approval for specific energy efficiency projects
- $1,390,000 for a fuel fund in 2017-2019 in the CEI service territory to benefit the Cleveland Housing Network, the Consumer Protection Association and the Council for Economic Opportunities in Greater Cleveland
- $8,000,000 ($1,000,000 per year in 2017-2024) to the Citizens Coalition for a Customer Advisory Agency
- $7,000,000 ($1,000,000 per year 2016-2023) to OPAE for a fuel fund administered by OPAE in the Ohio Edison and Toledo Edison service territories

TOTAL=$19,390,000

This evidence demonstrates that FirstEnergy has used the Stipulation to arrange for certain parties to receive millions of dollars in exchange for their support for Rider RRS. Nothing in these monetary inducements outweighs the significant legal, policy and economic concerns with Rider RRS or makes it reasonable to approve Rider RRS.

---

[122] *Id.*

2. The side deal also shows no "serious bargaining" among the parties.

The Stipulation in this proceeding was negotiated and signed in several parts. The evidentiary hearing began in August 2015 and concluded in October 2015. Thereafter, settlement negotiations resumed and another last part of the Stipulation was filed on December 1, 2015. The hearing record reopened, additional discovery took place, and the hearing resumed on January 14, 2016. On January 14, 2016, the Companies announced that another party had signed the stipulation and that a separate side deal had been agreed upon between the Companies and that party (a CRES provider). This announcement occurred at the end of the day, after cross-examination had been conducted by several opposing parties of the Companies' only witness in support of the Stipulation. The Companies provided the side deal to the parties that evening.[123] That separate side agreement relates directly to this proceeding, but it was not disclosed to the parties until several had completed their opportunity to conduct cross-examination, even though it plainly had been negotiated beforehand and even though it had been executed earlier in the day.

Rather than disclosing the related side deal to the parties during the negotiations or at the signing of the side deal, the Companies announced after their witness had testified in large part and at the end of several parties' cross-examination. The Companies' failure to disclose this side deal is exactly the type of behavior that the Ohio Supreme Court has cautioned can provide a party with an unfair advantage in the bargaining process.[124]

In this case, the Companies gained an advantage because other parties were unaware of the side deal. Other parties may also have changed their negotiation strategies if they had known about the side deal. The Companies gained an unfair advantage in the bargaining process by

---

[123] OMAEG Exs. 23 and 24. The additional signature page to the Stipulation also was filed electronically with the Commission after business hours (and therefore officially docketed on January 15, 2016). OMAEG Ex. 25.

[124] *Ohio Consumers' Counsel v. Public Utilities Commission of Ohio et al.*, 111 Ohio St. 3d 300; 2006-Ohio-5789 at ¶86.

hiding the side deal from all parties participating in the negotiations and in the second phase of the hearing.

The Supreme Court of Ohio has stated that side financial arrangements or other consideration to sign a stipulation are relevant to the Commission's determination of whether all parties engaged in "serious bargaining."[125] The Commission must "determine whether there exists sufficient evidence that the Stipulation was the product of serious bargaining"[126] The fact that it resolved the issues between the Companies and that one CRES provider in this proceeding, and its secretive execution are conclusive. The side agreement, which purchased the support of that CRES provider, raises serious doubts about the integrity and openness of the negotiation process surrounding the Stipulation.

The Court has expressed its grave concerns about the Commission approving a partial stipulation which arose from exclusionary settlement talks.[127] The Court has also reversed the Commission when reasonable means for settlement participation were not found.[128] Also, the Commission has rejected a stipulation on a lack of serious bargaining when there were side agreements and the evidence did not establish the presence and participation of parties during settlement negotiations.[129]

---

[125] *Id.* at ¶84.

[126] *Id.* at 86.

[127] In *Time Warner AxS v. Pub. Util. Comm.* (1996), 75 Ohio St. 3d 229; 661 N.E.2d 1097; 1996 Ohio LEXIS 181; 1996-Ohio-224

[128] *Ohio Consumers' Counsel v. PUC*, 109 Ohio St. 3d 328, 2006-Ohio-2110, 847 N.E.2d 1184, ¶¶ 18-19 (Ohio 2006) (finding that Commission exceeded its authority in approving a rate-stabilization plan because it did not ensure a reasonable means for customer participation where there was an absence of a signed stipulation by all customers).

[129] *In the Matter of the Application of The Cincinnati Gas & Electric Company to Modify its Nonresidential Generation Rates to Provide for Market-Based Standard Service Offer Pricing and to Establish an Alternative Competitive-Bid Service Rate Option Subsequent to the Market Development Period*, Nos. 03-93-EL-ATA, 03-2079-EL-AAM, 03-2081-EL-AAM, 03-2080-EL-ATA, 2007 Ohio PUC LEXIS 703, *104, Order on Remand (October 24, 2007) (rejecting the stipulation because "[b]ased on provisions in the side agreements, requiring parties to support the stipulation, and given the limited record evidence regarding the continued presence and participation of the supportive parties during negotiations, there is insufficient evidence to support a finding that the parties engaged in serious bargaining."). S*ee, also, Ohio Consumers' Counsel v. PUC*, 111 Ohio St. 3d 300, 2006-Ohio-

The evidence related to the side agreement is akin to exclusionary settlement discussions. As a result, the Commission should find that one or more parties gained an unfair advantage in the bargaining process, and as a result, the Stipulation is not the product of serious bargaining among capable, knowledgeable parties.

B. The settlement, as a package, does not benefit ratepayers and the public interest.

1. The Stipulation's separate credit provision will not mitigate Rider RRS, benefit ratepayers or benefit the public interest.

The Stipulating Parties agreed on a "Risk Sharing" provision under which the Companies may provide separate credits to the ratepayers beginning in year five of the eight-year plan, as outlined below:[130]

Year	If Rider RRS falls below:	Then, the Companies will credit up to:
5	$10 M	$10 M
6	$20 M	$20 M
7	$30 M	$30 M
8	$40 M	$40 M

These separate credit commitments will not effectively mitigate the costs of Rider RRS, will not provide proper incentives to the Companies and FES, and will not share the risk that is being transferred to the ratepayers. There are several reasons. First, since the credits only apply in the last four years, there are no credits (and corresponding incentives) for the Companies to maximize PJM revenues during the first four years of the PPA proposal, leaving the ratepayers at full risk during the first four years. The first four years also happen to include the years in which Companies are predicting millions in losses charges.[131] Thus, the ratepayers will not "share" the

5789, 856 N.E.2d 213, ¶ 86 (Ohio 2006) (holding that discovery should be permitted into side agreements among the parties to determine whether the stipulation was the product of serious bargaining).

[130] FirstEnergy Ex. 154 at 7-8.

[131] Sierra Club Ex. 89.

transferred risk with anyone during the forecasted needy period. Second, the credits will come from FirstEnergy and will not then incent FES or OVEC in the management and operation of the Davis-Besse or Sammis or OVEC plants.[132] Instead, these credits only will incent the Companies to maximize revenues in the PJM markets during the second half of the period when the rider is already predicted to provide credits to the ratepayers.

Next, the credits of $10M, $20M, $30M and $40M apply in their respective year and do not roll over or otherwise aggregate. This means that the annual credits are woefully insufficient to cover the risk that is being shifted to the ratepayers. For example, if the PPA Rider follows the forecast in planning year six (2021/2022), the credit under the rider would be roughly $181.75 million[133] (not accounting for PJM capacity performance penalties) and the Companies would not pay a separate credit under this "risk sharing" provision. Under the OCC's forecasted $3.9 billion charge outcome over the course of the Rider RRS term, the Companies' credits would only account for 3% of the total PPA Rider charges.[134] This does not amount to an equitable sharing of the substantial risk involved with Rider RRS.

Fourth, the ratepayers are not guaranteed to receive any of these separate credits in any of the four years. In contrast, FES will be paid all of its costs plus a return on capital in every year. Fifth, capacity performance penalties could have a significant impact on these separate credits because the penalties could easily exceed the credits.[135] Sixth, the ratepayers are saddled with the risk for the entire eight-year period. There is nothing in this provision that caps that risk; however, the Companies' risk are capped at $10M, $20M, $30M and $40M. Altogether, it is

[132] Tr. Vol. 36 at 7733.

[133] 2017 PPA Rider charge of $194 divided by 12, and then multiplied by 7; and 2018 PPA Rider charge of $103 divided by 12, and then multiplied by 5, with each resulting number summed to equal the total charge for the 2017/2018 PJM planning year.

[134] OCC/NOPEC Ex. 9 at 8.

[135] IMM Ex. 2 at 3-4.

plain to see that this does not amount to a just and reasonable or a true risk sharing provision. The Companies' contribution under this provision is not taking on any fair portion of the risk, which is what is expected in risk sharing. As a result, the Commission should find that the "risk sharing" provision is unreasonable, will not benefit the ratepayers and not in the public interest.

2. As stipulated, Rider RRS does not guarantee benefits or stability to the ratepayers.

As noted earlier, FirstEnergy presented a forecast of the impact of Rider RRS over the period, and it forecasts that customers will incur charges and incur credits over the eight-year period. Moreover, since Rider RRS will be reconciled yearly, the actual rate imposed will vary from the annual forecasted amount. RESA is skeptical of FirstEnergy's forecast, as noted earlier. In addition to the skepticism, however, is the fact that the additional credit provision in the Stipulation is insufficient as noted above. Finally, there is no stability when customers will have no control or knowledge of what they will be charged. Markets move all the time and customers will see this in an annual true-up – this is not a fixed charge or fixed credit; it is a variable charge that customers have no ability to predict or calculate. Bonuses, unknown prior decade costs, penalties and other factors that are not disclosed in addition to market payments create a variable rider that, if offered by a CRES provider, would be an egregious violation of the Commission's own variable product rules. As a result, the ratepayers will be saddled with extensive risk, and are likely to be saddled with expensive risk.

RESA witness Bennett noticed this inequity as well, testifying as follows:[136]

> If FE believes its projections of credits are correct, then it should stand behind them. In other words, instead of just offering an annual dollar commitment for some of the years, FE should assure that at no time will the annual Rider RRS charge exceed a ceiling amount and that by the end of the 8-year term, the aggregate Rider RRS credit will be at least equal to any Rider RRS charges plus carrying charges. The Commission, in its

[136] RESA Ex. 6 at 7-8.

> decision in the AEP Ohio ESP III case, indicated that it would only approve a rider for cost reimbursement of a PPA if the company has an equitable share of the risk. The Stipulation still puts the investor risk for the PPA Units on the distribution customers. The bottom line is that open-ended risk for a merchant generator should be with the merchant generator owner and its voluntary shareholders. (Emphasis added.)

The Commission has appropriately concluded that risk sharing should be equitable. Given that there is nothing in FirstEnergy's application, forecast or in the Stipulation that sets or guarantees a certain level of the Rider RRS charges or a certain level of Rider RRS credits, the public interest dictates that, if the Commission approves Rider RRS, the Commission should craft an additional, appropriate incentive for the eight-year ESP term. If Rider RRS does not result in the credits forecasted by the Companies (which is a very real possibility) or if Rider RRS results in greater charges than forecasted by the Companies, the backlash should not fall on the Commission for ignoring the well-documented inadequacies of the proposal and Stipulation.

There is precedent for including this type of incentive. The Commission has previously considered and imposed additional incentives for another eight-year contractual arrangement that involved Ohio Power Company for which its ratepayers were exposed to risks.[137] This matter involved a unique arrangement with an Ohio Power Company customer. At the recommendation of Staff, the Commission imposed both a floor and a ceiling on the amount of the ratepayers' responsibility under that arrangement. Staff had advocated for a floor as an incentive encouraging efficient and effective operations, and for a ceiling as a safeguard against exposing ratepayers to substantial risks. The Commission agreed with Staff, concluding "generally, unique arrangements must contain a floor, a minimum amount that the party seeking a unique arrangement should be required to pay, and a ceiling, a maximum amount of delta revenue which

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

the ratepayers should be expected to pay."[138] The Commission further explained that it was imposing the floor and ceiling because, in part "[t]he aluminum market is subject to a great deal of volatility and that the unique arrangement should address that volatility.[139]

In the event that the Commission approves Rider RRS in this proceeding (which it should not), it should impose additional, appropriate incentives as advocated by RESA. The Companies' ESP IV is a lengthy eight-year arrangement, for which the ratepayers are exposed to substantial risks. The Commission should address that volatility as it did in *Ormet*, given the demonstrated inadequacies of the Stipulation on this point. Finally, the recommended incentives are also appropriate to curb the subsidy created by the PPA transaction and the financial boost that will be provided to FES and the Companies.

3. The renewable energy procurement provision is unreasonable and should be rejected.

In the Stipulation, FirstEnergy agreed to procure at least 100 MW of new Ohio wind or solar resources if Staff deems it "helpful to comply with a future federal or state law or rule."[140] The procurement will be sold into the market and a new, non-bypassable rider will be established for cost recovery. RESA witness Bennett testified that this provision is ill-conceived and unreasonable:[141]

> Decisions to build and operate renewable generation should follow the same market analysis that accompanies decisions to build, maintain, or retire fossil assets. Namely, that generation development should be based on market fundamentals, projections of profitability, and shareholder risk tolerances. The only difference is that this decision-making for renewable generation often includes additional revenue streams from portfolio standard mandates and/or federal, state, and local tax incentives. <u>FE Ohio should not be allowed to build, own, or contract for renewable generation assets simply as a giveaway provision of the Stipulation.</u> More

[138] *Id.* at 9.
[139] *Id.* at 10-11.
[140] FirstEnergy Ex. 154 at 12.
[141] RESA Ex. 6 at 8-9.

importantly, FE Ohio should not be allowed to tap its captive customer base to fund procurement of these renewable generation assets under a non-bypassable rider. The Commission should disallow and reject this portion of the Stipulation. (Emphasis added.)

For these reasons, the Commission should reject the renewable energy procurement provision.

C. The Stipulation violates important regulatory principles and practices.

1. Federal advocacy provision

The Stipulating Parties agreed that, if a longer term capacity proceed to address state resource adequacy needs is not approved by September 1, 2017, "the Commission will solicit comments from interested parties no later than October 30, 2017, addressing the State's long term resource adequacy needs."[142] The Stipulating parties cannot agree to require the Commission to take action and then compel the Commission to do so. The Commission must exercise its own judgment and follow the statutes as to whether or not to solicit comments, when to do so and what if anything to do with such comments.

2. The Rider NMB Pilot is unduly discriminatory and poorly designed.

The Stipulating Parties have recommended a new "small-scale" pilot that allows certain Stipulating customers to opt out of FirstEnergy's Non-Market-Based Rider ("Rider NMB") and then obtain all the transmission and ancillary services from a CRES provider.[143] The purpose of the pilot is to determine if those customers who opt-out will benefit. However, the Rider NMB-opt-out pilot is limited to a select group of customers: (a) members of the Industrial Energy Users, (b) members of Ohio Energy Group, (c) Nucor Steel Marion, Inc. and (d) Material Sciences Corporation – all of whom are signatory parties or have agreed not to contest the Stipulation. This portion of the Stipulation is also unduly limiting, discriminatory and unjust because it excludes participation by other interested stakeholders or customers simply because

[142] FirstEnergy Ex. 154 at 9.
[143] FirstEnergy Ex. 3 at 3.

they did not sign the Stipulation. All customers eligible will not have an equal opportunity to participate in the pilot. The basis for participation is who signed the Stipulation.[144]

Also, this pilot is contrary to an important tenet of Ohio's electric services policy. Section 4928.02(A), Revised Code, states that it is the policy of the state to "[e]nsure the availability to consumers of * * * nondiscriminatory, and reasonably priced retail electric In addition subsection G of that same statute says it is the policy of the state to "[r]ecognize the continuing emergence of competitive electricity markets through the development and implementation of flexible regulatory treatment.

RESA witness Bennett reviewed this pilot proposal and found none of the necessary information for the Commission to determine if the pilot was justified on a cost-causation basis or if it violated rate change gradualism.[145] He also criticized this pilot on its structure, stating:[146]

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

---

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

[145] RESA Ex. 5 at 7.

[146] RESA Ex. 5 at 7-8.

> usage parameters, and allow Rider NMB to be assessed as to the remaining customers under the tariff formula in place today, adjusted for the costs charged to pilot program participants. Such a design would provide the Commission with all relevant price data, including any operational issues or financial costs of obtaining the individual customer allocation parameters. It would also put the Commission in position to adjust the program if the ratemaking principle of gradualism was being violated.

Certainly, there is room for improvement with the Rider NMB-opt-out pilot. More importantly, however, the Commission cannot approve this pilot as is due to its unduly limiting and discriminatory terms. RESA recommends that the Commission defer a ruling and conduct a separate hearing for further consideration. At that time, the Commission can consider whether a pilot is worthwhile, the goals and structure. RESA also suggests that FirstEnergy's Rider NMB remain non-bypassable for pilot participants and all other ratepayers – with FirstEnergy billing the costs of the Rider NMB based on allocating under individual usage and demand parameters, or under existing class averages.

3. The High Load Factor Time-of-Use Pilot is unduly discriminatory and unjust.

The Stipulation also includes a High Load Factor Experimental Time-of-Use ("HLFTOU") pilot with a purpose of determining "whether time-of-use rates could reduce their overall energy bills." It would be available to customers with *all* of the following characteristics:[147]

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

[147] FirstEnergy Ex. 4 at 1-2.

- A major portion of the load is for refrigeration

This is a very tall order for eligibility and very few customers would qualify. Perhaps only one customer would qualify – The Kroger Co., who signed onto the Stipulation at the time the HLFTOU terms were included.

FirstEnergy witness Mikkelsen testified that she does not know how many customers will participate and that only one customer had expressed an interest in the proposal and that customer did not qualify for it.[148] This is further evidence of how very selective is pilot will be, and as a result how it violates Section 4928.02(A), Revised Code, like the Rider NMB-opt-out pilot noted above.

It is also unclear why the high use must be linked primarily to refrigeration. FirstEnergy has alleged that refrigeration was an eligibility factor in order to "contribute to a homogenous participant pool," but also stated that it was not necessary for the pilot results. RESA witness Bennett noted that that he is not aware of any reason for that eligibility restriction or why a time-of-use pricing pilot needs to have a homogeneous participant pool.[149]

Another twist with this special pilot is that the lucky few customers who qualify will be able to remain on the pilot even if their qualifications do not remain. Ms. Mikkelsen explained, "[o]nce a facility qualifies for the HLFTOU and is, in fact, enrolled in the HLFTOU, that facility may remain on the rate notwithstanding any subsequent changes in the load characterization of the facility or reduction in the energy consumption of the facility."[150] There is no explanation for this special loophole, unless the Companies are worried that the very few customers who could qualify may not be able to remain in the pilot. In which case, the design and success of the pilot are questionable.

---

[148] Tr. Vol. 2 at 289-290; Tr. Vol. 37 at 7788.
[149] RESA Ex. 5 at 10 and Attachments SEB-8 and SEB-9.
[150] Tr. Vol. 2 at 290-291.

Time-of-use and other time-differentiated products are competitive services and should be offered by the competitive market, not the electric distribution utility. As to this specific pilot program, RESA finds that the HLFTOU is too narrowly designed, and should be rejected. As Mr. Bennett pointed out, if FirstEnergy were to provide the interval data needed for a true time-of-use program, then the CRES providers will almost certainly offer more time-of-use products to high load factor customers, as well as other customers.[151]

VIII. CONCLUSION

For all of the foregoing reasons, Rider RRS should be rejected, and multiple terms of the Stipulation should be rejected or modified as detailed herein. The Commission should grant the eight CRES-related items listed in the Section I A and described in Sections III and IV.

Respectfully submitted,

M. Howard Petricoff (0008287), Counsel of Record
Michael J. Settineri (0073369)
Gretchen L. Petrucci (0046608)
Vorys, Sater, Seymour and Pease LLP
52 E. Gay Street
Columbus, OH 43215
614-464-5462
mhpetricoff@vorys.com
mjsettineri@vorys.com
glpetrucci@vorys.com

Attorneys for the Retail Energy Supply Association

[151] RESA Ex. 5 at 12.

CERTIFICATE OF SERVICE

The Public Utilities Commission of Ohio e-filing system will electronically serve notice of the filing of the public version of this document on the parties referenced in the service list of the docket card who have electronically subscribed to this case. In addition, the undersigned certifies that a courtesy copy of the foregoing document is also being served upon the persons below via electronic mail this 16th day of February, 2016.

Gretchen L. Petrucci

burkj@firstenergycorp.com
cdunn@firstenergycorp.com
jlang@calfee.com
talexander@calfee.com
dakutik@jonesday.com
cmooney@ohiopartners.org
drinebolt@ohiopartners.org
tdoughtery@theoec.org
ghull@eckertseamans.com
sam@mwncmh.com
fdarr@mwncmh.com
mpritchard@mwncmh.com
mkurtz@BKLlawfirm.com
kboehm@BKLlawfirm.com
jkylercohn@BKLlawfirm.com
larry.sauer@occ.ohio.gov
Maureen.grady@occ.ohio.gov
joliker@igsenergy.com
schmidt@sppgrp.com
ricks@ohanet.org
tobrien@bricker.com
stnourse@aep.com
mjsatterwhite@aep.com
yalami@aep.com
jfinnigan@edf.org
wttpmlc@aol.com
mkl@smxblaw.com
gas@smxblaw.com

lhawrot@spilmanlaw.com
dwilliamson@spilmanlaw.com
meissnerjoseph@yahoo.com
trhayslaw@gmail.com
lesliekovacik@toledo.oh.gov
cynthia.brady@exeloncorp.com
david.fein@exeloncorp.com
lael.campbell@exeloncorp.com
christopher.miller@icemiller.com
gregory.dunn@icemiller.com
jeremy.grayem@icemiller.com
BarthRoyer@aol.com
athompson@taftlaw.com
Marilyn@wflawfirm.com
blanghenry@city.cleveland.oh.us
hmadorsky@city.cleveland.oh.us
kryan@city.cleveland.oh.us
bojko@carpenterlipps.com
gkrassen@bricker.com
dstinson@bricker.com
dborchers@bricker.com
mkimbrough@keglerbrown.com
mfleisher@elpc.org
matt@matthewcoxlaw.com
todonnell@dickinsonwright.com
jeffrey.mayes@monitoringanalytics.co
twilliams@snhslaw.com
sechler@carpenterlipps.com
gpoulos@enernoc.com

mhpetricoff@vorys.com
mjsettineri@vorys.com
glpetrucci@vorys.com
thomas.mcnamee@puc.state.oh.us
thomas.lindgren@puc.state.oh.us
sfisk@earthjustice.org
msoules@earthjustice.org
tony.mendoza@sierraclub.org
laurac@chappelleconsulting.net
gthomas@gtpowergroup.com
stheodore@epsa.org
mdortch@kravitzllc.com
rparsons@kravitzllc.com
dparram@taftlaw.com
charris@spilmanlaw.com
dwolff@crowell.com
rlehfeldt@crowell.com
dfolk@akronohio.gov
Kevin.moore@occ.ohio.gov
William.michael@oc.ohio.gov
rsahli@columbus.rr.com
ajay.kumar@occ.ohio.gov
callwein@keglerbrown.com
mkimbrough@keglerbrown.com
ghiloni@carpenterlipps.com
jennifer.spinosi@directenergy.com
kristin.henry@sierraclub.org
rkelter@elpc.org