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 CONSTELLATION NEWENERGY, INC. AND EXELON GENERATION COMPANY LLC

PUBLIC VERSION

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I. INTRODUCTION

The most significant question facing the Public Utilities Commission of Ohio ("Commission") in this proceeding is to determine whether The Cleveland Electric Illuminating Company, The Toledo Edison Company and the Ohio Edison Company (collectively, the "Companies") could exclusively contract on a no-bid basis with an affiliated merchant generator/marketer FirstEnergy Solutions Corp. ("FES") to buy all of the output of the Davis-Besse Nuclear Power Station and the W.H. Sammis Plant at FES' actual costs plus a 10.38% return on FES' investment. The Companies would then sell the output in the PJM markets. The Companies then would collect or credit directly to the wire customers, on a non-bypassable basis, the net from the purchase and sale of the FES output. The following brief will present the legal reasons why leveraging the state-franchised monopoly the Companies have for wire service, to produce what the Market Monitor of PJM Interconnection LLC ("PJM") has labeled a clear subsidy for FES, is unlawful, unjust, and unreasonable.

The expressed reason for the Retail Rate Stability Rider ("Rider RRS") is retail rate stability. The Companies claim that the Rider RRS will produce a net present value for the wire customers over the eight-year term, and that failure to have the Rider RRS will reduce reliability and harm the local economy where the plants are located. In fact, the record shows that the plants are not likely to close and that if the plants are needed for reliability, PJM has processes to maintain the needed plants. Most important, the record shows that Rider RRS is likely to produce hundreds of millions of dollars of losses that will have to be paid to FES (via the Companies) by the captive wire customers. The Companies' net present value projections of Rider RRS are based on power and gas prices done two years ago, which are significantly outdated. Updated studies in the record, which take into account the plunge in gas and power prices, show substantial losses. Further, the projected losses far exceed the limited amount of credits offered by the Companies in the Stipulation. Notably, even with those contributions, the Companies cannot guarantee that customers will experience a credit in any single year of Rider RRS.

For those reasons, Exelon Generation Company, LLC and Constellation NewEnergy, Inc. (collectively, "Exelon") advocate rejecting the Rider RRS and the ratepayer guarantees for the Davis-Besse and Sammis plants, as well as the entitlement of power purchased from the Ohio Valley Electric Corporation ("OVEC"). Should the Commission determine that Rider RRS is nevertheless in the interest of Ohio electricity customers, Exelon recommends that a public competitive bidding process be conducted.[1] Exelon has stated that if such a competitive process were held, it would bid a fixed-price, <u>guaranteed</u> eight-year offer (the "Exelon Offer") from 100% emissions-free power units. In comparison to the proposed arrangement between the Companies and FES, the Exelon offer <u>would provide well over $2 billion in savings</u> to Ohio families and businesses.[2] From both an economic as well as an environmental standpoint, the Exelon Offer provides a superior alternative to the purported hedge that the Companies are seeking to impose on ratepayers.

The record in this case shows no evidence of retail rate instability. There is no evidence that customers or the Ohio Consumers' Counsel or the Staff complained about volatile retail rates. What the record does show is that Rider RRS began with a request from FES to the Companies to sell the output of FES' plants.[3] On its face, such a request seems questionable. If FES is in the business of being a merchant generator and has operated these two units and the OVEC entitlement for several years, why is FES unwilling to continue to bear the risks and rewards associated with these units, as does any other wholesale generator in a competitive state?

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[1] Exelon Exhibit ("Ex.") 2 at 7.
[2] Exelon Ex. 4 at 6.
[3] Transcript ("Tr.") Volume ("Vol.") 1 at 110.

Further, if in fact the "out" years of the proposed eight-year PPA are so lucrative, why would FES' parent, or a commercial financing partner, not fund the units during the next few years? Ratepayers should not be made involuntary investors of private merchant generation plants.

As to the other components of the proposed ESP IV, Exelon respectfully submits that the Non-Market-Based Rider ("Rider NMB") be approved with the modifications recommended by Exelon herein, and that modifications be made to the Companies' Master SSO Supply Agreement ("MSA"). The Opinion and Order should also address the current differences between data provided to PJM by the Companies for billing and the data posted on the Companies' website be eliminated.

II. BACKGROUND INFORMATION

A. Description of Exelon Generation Company LLC and Constellation NewEnergy Inc.

Exelon Generation Company, LLC ("Exelon Generation") is one of the largest competitive power generators in the U.S., with more than 30,000 megawatts ("MW") of owned capacity, including nuclear, fossil, hydroelectric, solar, landfill gas, and wind generation assets which are located in a number of organized markets. Exelon is one of the nation's cleanest and lowest-cost power generation fleets. Exelon Generation is the nation's largest owner and operator of nuclear generation, owning and/or operating 24 of the nation's 100 nuclear reactors in Illinois, Pennsylvania, Maryland, New Jersey, and New York. Additionally, Exelon Generation owns and operates renewable generation – 1,640 MW of hydroelectric generation, 410 MW of solar generation, and 1,420 MW of wind generation, making Exelon Generation one of the nation's leading renewable generators. Exelon Generation markets wholesale energy and capacity products to municipal, cooperative, and investor-owned utilities, retail suppliers, retail energy aggregators, merchant participants, power marketers, and major commodity trading houses. Exelon Generation has sold power to Ohio's electric distribution utilities ("EDUs") pursuant to competitive wholesale procurement events overseen by the Commission.

Constellation NewEnergy, Inc. ("CNE") is a subsidiary of Exelon Generation, and it provides electricity and/or energy-related services to retail customers in Ohio as well as in *every other state* in the Continental U.S. and the District of Columbia. CNE serves more than 150,000 business customers and 2.5 million residential customers nationwide. CNE holds a CRES certificate from the Commission to engage in the sale of competitive electric service to retail customers in Ohio, and provides service to customers in *every customer class* in Ohio.

B. History and Summary of the Proceeding.

The Companies filed their fourth electric security plant ("ESP IV") application on August 4, 2014.[4] The application involves a number of provisions for their fourth ESP, originally for a three-year period of June 1, 2016 through May 31, 2019. The single largest component of the ESP IV application is Rider RRS. The Companies propose to purchase the output of two generating plants operated by FES – Davis-Besse and Sammis, as well as FES' entitlement to 4.85% of the output of two generating plants owned and operated by OVEC.[5] As to Rider RRS, Companies witness Strah explained how it works:

> 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 nonbypassable basis under Rider RRS.[6]

Below is a summary of the plants involved with Rider RRS:[7]

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[4] Companies Ex. 1.
[5] Companies Ex. 13 at 5, 7.
[6] Companies Ex. 13 at 4-5.
[7] Companies Ex. 13 at Attachment SES-1; Companies Ex. 33 at 3; Companies Ex. 23 at 2, Tr. Vol. 1 at 31; Tr. Vol. 2 at 407;OCC Ex. 4 at 5.

Plant	Placed in Service	Fuel	Annual Capacity	Location	Operator
Davis-Besse	1977	Nuclear	908 MW	Oak Harbor, Ohio	FES
Sammis	1955	Coal	2,220 MW	Stratton, Ohio	FES
Kyger Creek / Clifty Creek	1955	Coal	116 MW	Ohio/Indiana	OVEC

Also, in their ESP IV application, the Companies have proposed, among other things: (a) continuation of a competitive bid process for procuring generation for the standard service offer ("SSO"); (b) removal of the minimum stay; (c) continuation of Rider NMB with changes; and (d) a web-based supplier portal.[8]

On December 22, 2014, as supplemented on May 28 and June 4, 2015, a partial Stipulation was presented for Commission consideration. 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.[9] This prompted the Attorney Examiner to issue 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. Exelon and CNE jointly file this Initial Brief on a timely basis in accordance with the schedule established by the Attorney Examiner.

A summary of the Stipulation is as follows:[10]

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[8] Companies Ex. 1.

[9] 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."

[10] Companies Exs. 2-4, 154.

Terms of the Stipulation

December 22, 2014 Stipulation

- Renew Rider ELR
- Modify Riders GCR and DRR
- Rider RRS rate for certain customers will be based on billing demand
- Rider RRS rate for residential and lighting schedules will be a kWh charge
- Time-of-day option under Rider GEN will continue
- Provide $300,000 to the City of Akron for energy efficiency programs during a three-year period
- Provide $240,000 over four years to the Council of Smaller Enterprises ("COSE") Ohio Efficiency Resource Program
- Provide up to $1,000,000 to the COSE for applying for the advancement of energy efficiency projects
- Perform 300 level two energy efficiency ("EE") audits for commercial and industrial customers in 2016-2019 for COSE members
- Provide $200,000 to the Association of Independent Colleges and Universities of Ohio ("AICUO") to encourage the advancement and education of energy efficiency
- Provide up to $1,000,000 upon AICUO's applying and receiving Commission approval for specific energy efficiency projects
- Continue a $1,390,000 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
- Contribute $1,000,000 in 2017, 2018, and 2019 to the Citizens Coalition to establish a Customer Advisory Agency
- Material Sciences Corporation agrees that Toledo Edison will bill and collect from it a charge of $4.00 per kVa of billing demand under Rider EDR for service June 1, 2016 through May 31, 2019
- Continue Community Connections program and select administrator

May 28, 2015 Supplemental Stipulation

- Further modified Rider ELR
- Pilot to obtain services otherwise provided in Rider NMB for the benefit of IEU-Ohio member customers, Ohio Energy Group member customers, Nucor Steel Marion and Material Sciences Corporation

June 4, 2015 Stipulation

- Deploy a Commercial High Load Factor ("HLF") Experimental Time-of-Use rate proposal

December 1, 2015 Stipulation

- Modify the term of the ESP IV from three years to eight years (June 1, 2016 - May 31, 2024)
- Modified Rider RRS to an eight-year term, and as to risk-sharing credits, annual compliance reviews, full information sharing, and severability provisions
- Advocate for market enhancements, provide a public quarterly update for the Commission on the state of wholesale electricity markets, and to recommend to the Commission to solicit comments from interested parties no later than October 30, 2017, if PJM has not obtained approval for a longer term capacity product to address state resource adequacy needs by September 1, 2017
- File a grid modernization business plan and initiatives, with recovery of the cost of any grid modernization business plan through a particular rider and for the Companies to provide semi-annual updates to the Commission on the progress made in its grid modernization initiatives

Terms of the Stipulation
• Implement certain resource diversification mechanisms and programs such as the CO2 reduction goal, battery technology, to increase procurement of renewable resources such as wind and solar, and to file a carbon reduction emissions plan • File a case by April 3, 2017, to transition to the proposed straight fixed variable cost recovery mechanism for residential customers' base distribution rates which will be phased in over a three-year term beginning January 1, 2019 • No adjustment to the base distribution rates of the Companies prior to June 1, 2024 except in an emergency • The revenue caps for Rider DSR would increase annually for the periods June 1, 2016 through May 31, 2019, June 1, 2019 through May 31, 2022, and June 1, 2022 through May 31, 2024 • Beginning June 1, 2016 and ending May 31, 2024, retail generation rates would be determined pursuant to the results of a descending clock format competitive bid process • As a result of modifying the three-year term to an eight-year term for ESP IV, modifications were made to Rider ELR, the automaker credit and charge provisions, the general service-transmission rate (Rate GT) provision rider (Rider EDR) and the commercial high load factor experimental time-of-use rate; • The contributions made to the COSE, the AICUO, the Citizens Coalition, and the level of Level II Efficiency Audits and the charges to Material Services Corporation by Toledo Edison were further modified • Other changes to the filed application were also agreed upon in the Third Supplemental Stipulation which included Staff proposed revisions to the electric service regulations, the use of long term cost of debt as a carrying charge for certain riders, the continued funding of the Community Connections program and the expansion of the participation in Rider NMB to include up to five additional Rate GT customers • Modify their economic development and job retention contribution program and provide OPAE with $1,000,000 per year from 2016 through 2023 through shareholder contributions to be used for the funding of a fuel fund to be administered by OPAE in the Ohio Edison and Toledo Edison service territories • FirstEnergy will maintain its corporate headquarters and its nexus of operations in Akron for the duration of Rider RRS • The Signatory Parties agreed that the recovery of new or incremental taxes authorized after May 31, 2014 would continue for the entire stipulation ESP IV period • The Signatory Parties agreed to a termination and transition process and also agreed that termination should not affect the continued cost recovery of Rider DCR and RRS

III. SUMMARY OF RECOMMENDATIONS TO THE COMMISSION

Exelon's brief addresses the following five issues that arise from the ESP IV proposed by the Companies:

Issue One:	Rider RRS should be rejected.
Issue Two:	The Commission should adopt the competitive bidding process in the Companies' ESP IV for the SSO auctions, and the inclusion of the percentage of income payment plan load.
Issue Three:	Rider NMB should be approved with the modifications recommended by Exelon.
Issue Four:	Several modifications should be included in the Companies' Master SSO Supply Agreement.
Issue Five:	Differences between data provided to PJM for billing and the data posted on the Companies' website must be eliminated.

A. Rider RRS Should be Rejected.

Rider RRS is a 180-degree about-face on the progress Ohio has made for its competitive markets. If implemented, Rider RRS threatens the retail market in the Companies' service territories and the state of Ohio as a whole. Rider RRS has been proposed as a "safeguard" for customers from volatility and retail price increases. However, Rider RRS will be a non-bypassable addition to customer bills, causing them to pay higher prices for electricity than the competitive market could otherwise offer. The rider will be the mechanism by which a guaranteed subsidy for FES will flow from the ratepayers to the Companies. The subsidy will allow the Companies to make outside-the-market offers and provide FES with a competitive advantage vis-à-vis other CRES providers and other wholesale market participants. Additionally, Rider RRS will not appropriately address concerns with nuclear generation.

B. Certain Elements of the Companies' Proposed ESP Should be Approved.

Exelon supports the Companies' proposal to continue use of competitive auctions to meet the SSO supply needs. Also, Exelon supports the Companies' proposal to include the percentage of income payment plan ("PIPP") load as part of the competitive auctions. Including the PIPP load in the auctions, rather than placing it privately, is a positive improvement of the competitive process.

C. Rider NMB Should be Approved but with Modifications.

Exelon supports Rider NMB and the Companies' continued collection of certain non-market-based PJM charges generally because it is efficient and reasonable. However, only those PJM charges that are truly non-market-based should be included in Rider NMB. Specifically, Rider NMB should include charges that are not hedgeable, predictable, or manageable. Exelon recommends that the following nine PJM charges not be included in Rider NMB relative to (a) Balancing Operating Reserves (PJM Line Items 1375, 1376, 1378, 2375, 2376, and 2378), (b) Load Reconciliation (PJM Line Item 1450) and (c) Planning Period Congestion Uplift (PJM Line Items 1218 and 2218).

D. Additional Changes to the Master SSO Supply Agreement are Reasonable.

Upon review of the Companies' proposed Master SSO Supply Agreement, there are a handful of changes that would appropriately modify the agreement (a) to eliminate certain terms from the body of the MSA that the Companies have deleted from the definitions, (b) to use the most up-to-date PJM Declaration of Authority, (c) to change the definition of "Settlement Amount," and (d) to include additional language relating to PIPP customers.

E. There Should be no Differences Between the Data Posted by the Companies on their Website and that Data Provided to PJM.

The load data that the Companies are submitting on a daily basis to PJM does not reflect actual daily aggregate Peak Load Contribution ("PLC") for the zone base on customers moving in and out of the zone. However, the data that the Companies post on their website is the daily aggregate PLC for the zone based on customers moving in and out of the zone. Consistency in the information is necessary and the Companies should provide to PJM daily information that reflects actual daily aggregate PLC for the zone based on customers moving into and out of the zone.

IV. THE COMMISSION SHOULD BE FULLY AWARE OF FES' INVOLVEMENT IN DEVELOPING THE SO-CALLED "HEDGE" AND ITS INVOLVEMENT IN BOTH THE RETAIL AND WHOLESALE MARKETS

Significant to the Commission's review is FES' status as (1) an affiliate of the Companies under the same corporate umbrella of FirstEnergy Service Corporation; (2) a competitive retail electric service ("CRES") provider and (3) a PJM Interconnection LLC ("PJM") wholesale market participant. Just as important is the fact that FES came up with the idea for Rider RRS and the purchased power transaction – not the Companies or its captive ratepayers. These facts justify disapproval of Rider RRS and the Stipulation.

A. FES and the Companies are affiliates.

FES is an affiliate of the Companies, and both are wholly owned subsidiaries of FirstEnergy Corp. This is an important fact because the Companies did not competitively bid out the purchased power transaction.[11] For example, it could have asked Exelon to bid on the proposed transaction in competition with FES. That would have resulted in the Exelon Offer or another type of offer depending on the bid instructions. It also could have resulted in terms more

[11] Tr. Vol. 13 at 2748.

favorable to the Companies – and in turn more favorable to Ohio. Instead, the Companies only dealt with its competitive affiliate in developing the proposed transaction.

B. FES is a CRES provider competing in the PJM wholesale and Ohio retail markets.

FES is not a regulated public utility in Ohio with the exception that it is regulated by the Commission as a CRES provider.[12] FES is certified to provide retail generation and power marketer services in Ohio, although it no longer markets in the residential marketplace.[13] FES is also a wholesale provider of generation services, actively participating in the PJM markets.[14] FES has also historically been an active participant in the wholesale SSO supply procurements.[15]

C. The "Hedge" was FES' idea – not the Companies or its Customers.

The Companies claim in their application that their ESP is "designed to help stabilize generation pricing through a proposed [Rider RRS] that will act as a retail rate stability mechanism against increasing market prices and price volatility for all retail customers over the longer term."[16] This claim implies that Rider RRS originated within the Companies for the benefit of its retail customers. The idea for Rider RRS, however, originated from within FES after it saw what Ohio Power Company ("AEP Ohio") had proposed.[17]

FES formulated its proposal in early 2014, after AEP Ohio made its initial PPA proposal to the Commission.[18] FES' Vice President of Commodity Operations, Donald Moul,[19] reviewed the structure of the AEP Ohio proposal, and because he knew that the Companies were filing an ESP shortly, "looked to see if there was something [FES] could add value to that ESP – and

[12] *See,* Case No. 00-1742-EL-CRS, Renewal Certificate Number 00-011E(8) dated November 4, 2014.
[13] *Id.;* Tr. Vol. 11 at 2342
[14] *See*, Tr. Vol. 1 at 72; Tr. 11 at 2346.
[15] Exelon Ex. 1 at 14.
[16] Company Ex. 1 at 9.
[17] Tr. Vol. 11 at 2289.
[18] Tr. Vol. 11 at 2290; 2351.
[19] Mr. Moul transferred to a new position at the time of hearing, to Senior Vice President, Fossil Operations and Environmental at FirstEnergy Generation , LLC. Tr. Vol. 10 at 2180.

provide some certainty in return for our plants."[20] He then discussed the idea internally at FES, including discussing the idea with FES' president, Donald Schneider.

FES' internal discussions took place in early 2014,[21] and included a review of the profit and loss statements for all its plants taking into consideration "the various range of challenges at the competitive fleets."[22]

D. FES approached the Companies seeking to put its entire fleet into a PPA to be coupled with Rider RRS.

After formulating its idea and evaluating its fleet, FES then approached Jim Haney at FirstEnergy Service Company[23] to make its pitch.[24] That pitch, made in May 2014,[25] did not consist of just the Sammis units, the Davis Besse plant and the OVEC entitlement. Rather, FES offered all of the plants to the Companies as a "potential hedge."[26] Because FES offered all of its plants to the Companies, the offer included plants outside of Ohio.[27] The Companies could not accommodate this offer because the offer exceeded the loads of all three EDUs combined.[28] Mr. Haney then wrote back to FES requesting that FES provide a subset of plants for the Companies to consider.[29]

E. FES selected the plants to include in the "hedge."

Mr. Moul testified on what FES did next after receiving Mr. Haney's request. Upon receiving that request, FES started to narrow down which plants to include.[30] FES focused on

[20] Tr. Vol. 11 at 2290.
[21] Tr. Vol. 11 at 2290.
[22] Tr. Vol. 11 at 2290.
[23] Tr. Vol. 13 at 2760 (Mr. Ruberto, an employee of FirstEnergy Service Company noting he reports to Mr. Haney).
[24] Tr. Vol. 11 at 2291.
[25] *Id.*
[26] *Id.* at 2290.
[27] Tr. Vol. 13 at 2745.
[28] Tr. Vol. 13 at 2746; Tr. Vol. 11 at 2328.
[29] Tr. Vol. 13 at 2845-2846.
[30] Tr. Vol. 11 at 2328.

plants located within the state of Ohio and that were built to serve Ohio customers primarily.[31] After identifying Ohio plants, FES then focused on matching the supply diversity of the subset with the diversity of the fleet. FES then selected the Sammis plant and the Davis-Besse plant and included those plants as its subset along with FES' 4.85 percent OVEC entitlement.[32] In regard to OVEC, Mr. Moul said that it was the foundation for the subset based on what he saw done in the AEP Ohio proceeding.[33] With the subset identified, FES then set up a FES team to work on the project and the Companies set up an EDU team.[34]

F. FES has yet to draft and sign a PPA with the Companies.

The term sheet between FES and the Companies was developed by the FES and EDU teams. That term sheet was unsigned, and as admitted to by then-FES Vice President Donald Moul, would not be considered a binding contract between FES and the Companies.[35] Companies' witness Strah also testified that, if the Commission approves Rider RRS as proposed, the Companies will enter into an agreement with FES to acquire the output of the plants and the OVEC entitlement.[36] Subsequently, while the Stipulation was being negotiated, the Companies presented FES with a revised term sheet that matched the terms of the Stipulation. A representative each from the Companies and FES signed the term sheet on November 18, 2015.[37] However, the signed term sheet contains no express language indicating whether it is binding on either party.[38] The omission of any such language implies that FES and

[31] Tr. Vol. 11 at 2328-2329.
[32] Tr. Vol. 11 at 2329; Tr. Vol. 13 at 2744.
[33] Tr. Vol. 11 at 2393.
[34] Tr. Vol. 11 at 2279.
[35] Tr. Vol. 11 at 2344.
[36] Companies Ex. 13 at 5.
[37] *See*, Company Ex. 156; Tr. Vol. 36 at 7685.
[38] *See*, Company Ex. 156.

the Companies are reserving the right to modify the term sheet prior to drafting a complete PPA. That PPA has yet to be drafted.[39]

V. THE COMMISSION SHOULD REJECT RIDER RRS.

A. Rider RRS violates state laws and policies.

1. The Commission lacks the authority to implement Rider RRS under R.C. 4928.143.

The Companies have claimed that Rider RRS is a beneficial rate-stabilizing mechanism.[40] Rider RRS is presumably presented as part of the ESP IV under R.C. 4928.143(B)(2)(d), which states that an ESP may include:

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

a. R.C. 4928.143(B)(2)(d) was not intended for a Rider RRS construct.

As proposed, Rider RRS will be a non-bypassable generation-related rider.[41] The Companies admit that the charges or credits that will be assessed through that rider will be a separate part of the customer's generation charges and that all customers of the companies are already paying market-based generation charges either through a competitively-sourced SSO generation service or from a CRES provider or aggregator.[42] R.C. 4928.143(B)(2)(d) addresses rate stability for ratepayers, but it does not authorize the Commission to impose generation-related charges on ratepayers that underwrite affiliated generation plants selected under a non-arms-length, noncompetitive process. Nothing in the plain language of this provision states that

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[39] Tr. Vol. 36 at 7527.
[40] Companies Ex. 1 at 9; Companies Ex. 7 at 3.
[41] Companies Ex. 13 at 3, 6; Tr. Vol. 2 at 344.
[42] Tr. Vol. 2 at 342, 343.

the Companies are allowed to charge such a subsidy. Moreover, the Commission cannot "write into" the statute the ability to impose a charge on ratepayers because of an affiliate's weak balance sheet. The Commission only has the authority expressly delegated to it by the Ohio General Assembly.[43] Further, the Ohio Supreme Court has ruled that R.C. 4928.143(B)(2) does not permit ESPs to include items other than the ones listed in the statute.[44]

b. Rider RRS will not promote rate stability.

The Companies claimed that Rider RRS will promote rate stability by:[45]

(a) Possibly providing credits to customers that offset increasing market-based retail prices;

(b) Supporting resource diversity (fuel diversity and asset diversity);

(c) Keeping baseload generating plants open;

(d) Providing a rate-stabilization mechanism against retail market fluctuations; and

(e) Providing a rate stabilization mechanism for the ratepayers' benefit.

Companies witness Strah contended that, when market prices rise, the Rider will provide price stability.[46]

In fact, Rider RRS will result in rate *instability*. The charge/credit under the rider will be a separate identifiable charge on the bills, separate from the amount charged to the ratepayers for purchasing generation either from the SSO or a CRES provider or an aggregator.[47] As explained

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[43] *Tongren v. Pub. Util. Comm.* (1999), 85 Ohio St.3d 87, 706 N.E.2d 1255, citing *Columbus S. Power Co. v. Pub. Util. Comm.* (1993), 67 Ohio St.3d 535, 620 N.E.2d 835; *Pike Natural Gas Co. v. Pub. Util. Comm.* (1981), 68 Ohio St.2d 181, 22 O.O.3d 410, 429 N.E.2d 444; *Consumers' Counsel v. Pub. Util. Comm.* (1981), 67 Ohio St.2d 152, 21 O.O.3d 96, 423 N.E.2d 820; and *Dayton Communications Corp. v. Pub. Util. Comm.* (1980), 64 Ohio St.2d 302, 18 O.O.3d 478, 414 N.E.2d 1051.
[44] *Columbus S. Power Co.* 128 Ohio St. 3d 512, 947 N.E.2d 655, 2011 Ohio 1788 (2011).
[45] Companies Ex. 28 at 6; Companies Ex. 13 at 2, 7-11.
[46] Companies Ex. 13 at 3.
[47] Tr. Vol. 2 at 342.

by P3/EPSA witness Kalt, retail rates are "not even remotely as volatile as wholesale spot market prices."[48] However, the Companies' ratepayers will experience greater fluctuations in generation charges from Rider RRS because the rider amounts will be an add-on and may not change in a corresponding fashion with the SSO or the generation charge from a CRES provider or aggregator. As to the SSO customers specifically, they do not experience volatility with the competitive markets because they are supplied from fixed-rate contracts resulting from periodic competitive auctions, which are blended together.[49] Rider RRS will cause greater fluctuations when added in. Plus, the annual reconciliation process will adjust the rate to capture the difference between annual forecasted and actual revenues/costs from the entire previous year.[50] As a result, SSO customers' generation charges will fluctuate more than they do today and in a way that does not match the customer's usage or weather conditions.

As for shopping customers under fixed-price contracts, they lose the benefit of a supply rate that can remain constant for as long as three years.[51] As applied to these customers, Rider RRS will change the total amount paid for generation each year and, on top of that, the reconciliations will adjust the rate even further. As a result, the shopping customers' generation charges will also fluctuate more than they do today, and also in a way that does not match the customer's usage or weather conditions. The swings caused by the reconciliations undercut any claim that customers will receive a hedge when wholesale market prices are higher or lower.

[48] P3/EPSA Ex. 1 at 40.
[49] P3/EPSA Ex. 1 at 40; Staff Ex. 12 at 14.
[50] Companies Ex. 43 at 3.
[51] Companies Ex. 13 at 13; P3/EPSA Ex. 1 at 40.

2. Generation-related costs cannot be recovered through distribution or transmission rates.

The Companies have stated that their proposed Rider RRS will be a non-bypassable generation-related rider[52] and that the costs and revenues in Rider RRS are not costs and revenues that would be included in a base rate case proceeding.[53] In other words, the Companies appear to recognize that Rider RRS cannot recover distribution-related costs or transmission-related costs. Yet, the Companies' proposed tariff sheet for Rider RRS states in pertinent part the following:[54]

> Applicable to any customer who receives electric service under the Company's rate schedules. This Retail Rate Stability Rider (RRS) will be effective for service rendered beginning June 1, 2016. This Rider is not avoidable for customers during the period the customer takes electric generation service from a certified supplier. (Emphasis added.)

This proposed tariff indicates that Rider RRS applies to the services provided by the Companies to the ratepayers. Those services are distribution and transmission services because the Companies are providing "wires only" services.[55]

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

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

Commission approval of Rider RRS violates this statute because it requires ratepayers to underwrite the financial cost of the Companies' affiliate's generation and because it creates a subsidy from the utility distribution service to the utility's affiliated generation service. Whether

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[52] Tr. Vol. 2 at 344.
[53] Tr. Vol. 2 at 401.
[54] Companies Ex. 1 at Attachment 4 page 127 of each proposed tariff.
[55] Staff Ex. 12 at 9.

the sales revenues exceed the affiliates' costs does not change the fact that Rider RRS creates a subsidy. Further, the record clearly shows and the Companies do not dispute that for the first several years, there will be only payments (and no expected credits) from all ratepayers to the unregulated affiliated generator. In fact, Rider RRS requires the Companies' ratepayers to guarantee that the Companies' affiliated generators will earn a profit, thus insulating the affiliated generators from any market/price risks associated with their generation. Given that Rider RRS will be charged by the Companies for their "wires only" services rendered, Rider RRS will be a generation-related charge being collected through distribution or transmission charges. That generation-related cost-recovery guarantee by the ratepayers is an inappropriate subsidy that violates R.C. 4928.02(H).

3. The Stipulation if approved will violate Ohio corporate separation laws.

a. *R.C. 4928.17 requires separation between generation affiliate and the Companies.*

The Commission must evaluate and find that the Rider RRS is authorized by and does not violate Ohio's corporate separation statute. R.C. 4928.17 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.

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

b. *The Companies will have oversight over Plant operations at FES.*

As to the generation from the FES plants, there will be an intermixing of personnel. The term sheet reflects that the Companies will be heavily involved in plant operations.[56] 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.[57] Additionally, the term sheet reflects:[58]

- 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 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 Davis-Besse and Sammis plants. 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

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[56] Companies Ex. 156 at 6-7.
[57] P3/EPSA Ex. 10 at 25 of 32.
[58] Companies Ex. 156 at 7-8.

plan.[59] Also, the Companies will determine before making payments whether the work was performed in accordance with good utility practice.[60] These terms further support a finding that the Companies will have oversight at these generating plants. Rider RRS will also subvert the Commission's prior decision that approved the complete divestiture of the Companies' generation assets,[61] contrary to the corporate separation provisions of R.C. 4928.17.

4. Rider RRS will violate R.C. 4928.03.

R.C. 4928.03 states:

> Beginning on the starting date of competitive retail electric service, retail electric generation, aggregation, power marketing, and power brokerage services supplied to consumers within the certified territory of an electric utility are competitive retail electric services that the consumers may obtain subject to this chapter from any supplier or suppliers. In accordance with a filing under division (F) of section 4933.81 of the Revised Code, retail electric generation, aggregation, power marketing, or power brokerage services supplied to consumers within the certified territory of an electric cooperative that has made the filing are competitive retail electric services that the consumers may obtain subject to this chapter from any supplier or suppliers. Beginning on the starting date of competitive retail electric service and notwithstanding any other provision of law, each consumer in this state and the suppliers to a consumer shall have comparable and nondiscriminatory access to noncompetitive retail electric services of an electric utility in this state within its certified territory for the purpose of satisfying the consumer's electricity requirements in keeping with the policy specified in section 4928.02 of the Revised Code.

R.C. 4928.03 separates electric service into competitive services on the one hand, and regulated utility services on the other hand. That statute specifically lists generation as a "competitive" service and as noted, the Companies consider Rider RRS to be a generation-related charge.[62] If Rider RRS is approved, the ratepayers will not have selected or elected to

[59] Companies Ex. 156 at 3-4; Tr. Vol. 14 at 3000.
[60] Tr. Vol. 1 at 52.
[61] *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 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").
[62] Tr. Vol. 2 at 344.

pay for that additional generation cost. Rather, those customers will be required to pay for the utilities' affiliated generation due to Commission order. The Commission's order will effectively violate Section 4928.03, Revised Code, by undoing the separation in competitive and regulated services.

Because Rider RRS is a mandatory charge, it will also force the shopping customers to buy a competitive service not of their choosing – the generation of the Companies' affiliate. This effect is that Rider RRS will be contrary to R.C. 4928.03 for that reason, as well.

5. Rider RRS will violate R.C. 4905.22 as an unreasonable charge.

R.C. 4905.22 states:

> Every public utility shall furnish necessary and adequate service and facilities, and every public utility shall furnish and provide with respect to its business such instrumentalities and facilities, as are adequate and in all respects just and reasonable. <u>All charges made or demanded for any service rendered, or to be rendered, shall be just, reasonable</u>, and not more than the charges allowed by law or by order of the public utilities commission, <u>and no unjust or unreasonable charge shall be made or demanded for, or in connection with, any service</u>, or in excess of that allowed by law or by order of the commission. (Emphasis added.)

The plain language in R.C. 4905.22 prohibits unjust or unreasonable utility charges. The mechanics of Rider RRS shows that the Companies' attempt to obtain cost recovery through Rider RRS is a complete transfer of risk from FES to the Companies' captive ratepayers.[63] The scales are tipped against the ratepayers, while FES, for numerous years, would not be exposed to <u>any</u> substantial risk associated with the generation from the OVEC, Davis-Besse and Sammis plants.

The transfer of risk is obvious from the proposed deal. FES will be able to receive full cost recovery and a guaranteed return under the to-be-executed contract with the Companies for

[63] Companies Ex. 156.

the entire term and not be subject to market risk.[64] The Companies will pay FES at a rate of "cost plus a return on capital" (10.38%) for the capacity, energy and ancillary services that each plant can provide.[65] The payment and guaranteed return provision transfers the market risks associated with all of these plants to the Companies, which in return is going to use Rider RRS to transfer the market risks to their ratepayers. Without FES being exposed to any substantial risk under the proposed ESP IV application, the Commission should be highly skeptical of the alleged benefits of Rider RRS. The transfer of real and substantial risk to ratepayers as a charge is unjust and unreasonable, and will violate R.C. 4905.22.

B. The PPA and Rider RRS must be evaluated using the existing FERC standards for PPA affiliate transactions .

The PPA and Rider RRS must be evaluated using the existing FERC standards for PPA affiliate transactions. In *Boston Edison Co. Re: Edgar Electric Energy Co.*, 55 FERC ¶ 61,382, FERC established the following three methods for determining whether a wholesale power arrangement between affiliates is at an acceptable market price that can be passed on to the Companies' ratepayers:

- The first method in the *Edgar* decision to determine whether a transaction price between affiliates is at market prices is whether there was head-to-head competition between the affiliated supplier and non-affiliated suppliers, such as by open auction or by use of competitively sealed bids.
- The second *Edgar* method is a demonstration that the sale price is similar to prices being charged by nonaffiliated buyers in relevant markets that are not subject to market power.
- The third *Edgar* method allows a demonstration that the sale was at a market price by submitting "benchmark" evidence of price, terms and conditions of sales by non- affiliated sellers, including purchases made by the utility or other buyers in relevant markets. To be credible, the benchmarks sales must be contemporaneous and for similar services when compared to the ordinal transactions.

[64] Companies Ex. 13 at 4-5.
[65] *Id*.

There is no evidence in the record to support a conclusion that the PPA transaction is priced at a market price. Moreover, the evidence in the record establishes the contrary, given that the Companies did not attempt to contact unaffiliated generators, conduct an RFP from nonaffiliated companies, or conduct a competitive bid.[66] Those efforts would have ensured that the ratepayers pay the least for the purported benefits.

VI. FES WANTS RIDER RRS – NOT THE COMPANIES' CUSTOMERS

The record is clear that neither the Companies nor their customers asked for a "hedge." Rather, it was FES who proposed it to the Companies. The idea for Rider RRS and the PPA came from FES' then Vice President of Commodity Operations, Donald Moul. Mr. Moul admitted that he reviewed the structure of the AEP Ohio proposal, and because he knew that the Companies were filing an ESP shortly, "looked to see if there was something [FES] could add value to that ESP – and provide some certainty in return for our plants."[67] FES' desire for certainty, however, does not mean that the Companies' ratepayers need Rider RRS. That point is established by the record.

A. Rider RRS is not needed for reliability

1. The FES plants are not going to shut down.

The veiled threat by the Companies in this proceeding is that FES is going to close the Sammis, Davis Besse and OVEC plants if it does not receive the risk-free guaranteed return proposed under the Application. When asked directly if a plant was going to close, the Companies' witnesses consistently responded that the plants are "at risk" in the short term. In reality, the plants are not at risk of closing, as FES' own numbers show. They just will not be as

[66] Tr. Vol. 13 at 2748.
[67] Tr. Vol. 11 at 2290.

profitable in the short-term as FES and its parent corporation would like in the next few years. That is not a basis to transfer the market risk for the units to the Companies' captive ratepayers.

a. FES cannot close the OVEC units.

FES' then Vice President of Commodity Operations, Don Moul started with FES' 4.85% OVEC entitlement as the "foundation" for his proposal to the Companies.[68] FES and not the Companies owns the 4.85% OVEC entitlement.[69]

Moreover, FES cannot unilaterally close the OVEC plants because it is a joint owner of the OVEC entitlement with many other utilities.[70] FES cannot unilaterally close any OVEC unit. Moreover, as to financial need, Mr. Lisowski grudgingly admitted that [redacted][71] OVEC is not going to close, is not in financial need, and should not be included in Rider RRS.

b. The Companies' witnesses' testimony indicates that the Sammis and Davis-Besse plants will not close in the short-term.

The Companies' witnesses repeatedly expressed concern that the Sammis and Davis-Besse plants are at risk of closure in the short term, yet none were aware of any plans to retire the plants.[72] Mr. Moul acknowledged that his job responsibilities at the time he submitted his direct testimony included advising senior FES management on whether the plants would retire.[73] Yet, no one within FES had asked his opinion as to whether the Davis-Besse and Sammis plants

[68] Tr. Vol. 11 at 2393.
[69] Tr. Vol. 1 at 30.
[70] Tr. Vol X at 2185.
[71] Tr. Vol. 9 at 1984.
[72] Tr. Vol. 2 at 2305; Tr. Vol. 3 at 521.
[73] Tr. Vol. 11 at 2305.

should close and he had not been involved in any conversations regarding the closure of those plants.[74]

Mr. Ruberto, when asked a series of questions on whether he had an opinion on whether the Davis-Besse and Sammis are at risk of retirement within the next three years, indicated that the future of the plants was uncertain.[75] That testimony was directly contrary to his deposition testimony in which he stated he did not have an opinion on whether either plant was at risk of retirement within the next three years.[76] Ms. Mikkelsen also could not answer the question of whether the plants would retire within the next three years.[77]

FES has also made over $2 billion worth of capital investments in the Davis-Besse and Sammis plants, all of which indicate that FES believes these units have a future. As P3/EPSA witness Dr. Joseph Kalt observed:[78]

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

This testimony (or lack thereof) shows that FES is not seriously considering closing these units.

c. Davis-Besse and Sammis and their avoidable costs.

Both Mr. Lisowski and Mr. Moul believe that the Davis-Besse and Sammis plants are competitive in the wholesale markets.[79] FES' only concern is that in the short-term, cash flow

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[74] Tr. Vol. 11 at 2305.
[75] Tr. Vol. 13 at 2812 to 2815.
[76] *Id.* at 2813-2814.
[77] Tr. Vol 2 at 414.
[78] P3/EPSA Ex. 1 at 41-42, citing Harden Direct Testimony at 10.
[79] Tr. Vol. 32 at 6686; Tr. Vol. 32 at 6636-6637.

will not be sufficient to support the "necessary" capital investments that need to be made in the short term.[80] Another stated concern is the condition of the FES balance sheet.[81]

The concerns are reflected by the following exchange with Mr. Lisowski:[82]

> Q. And your concern for the plants, as you indicate, is in the short-term, correct?
>
> A. [Mr. Lisowski] Yes.
>
> Q. And one concern you have for the plants in the short term is that cash flow will not be sufficient to support the necessary capital investments that need to be made in the short-term correct?
>
> *** [question read]
>
> A. That's correct. That's one reason, and another reason is the condition of FES' current balance sheet.
>
> Q. And if FES had sufficient cash liquidity and a balance sheet that was strong enough to support additional debt, you wouldn't have your short-term concerns regarding these plants, correct?
>
> **** [question read]
>
> A. Yes, I would agree with that hypothetical.

While Mr. Lisowski acknowledged that FES' balance sheet is weak, he also acknowledged the units were competitive:

> Q. And you also believe that the Sammis and Davis-Besse units are competitive in the energy wholesale [markets], correct?
>
> A. Yes.
>
> Q. And you also believe that the Sammis and Davis-Besse units are competitive in the capacity markets, correct?
>
> A. Yes.[83]

[80] Tr. Vol. 32 at 6636-6637; 6686-6687.
[81] Tr. Vol. 32 at 6687.
[82] Tr. Vol. 32 at 6686-6687.
[83] Tr. Vol. 33 at 6686.

Units that are competitive in the PJM capacity and wholesale markets are not going to close. As Dr. Kalt succinctly stated, "the economically rational and fiduciarily responsible decision to operate or shut down ignores sunk costs and, instead, turns on whether going-forward avoidable costs can be covered by expected going-forward operating revenues."[84]

Over the initial 15-year term of Rider RRS, Dr. Kalt found that [redacted][85] He continued, stating:[86]

> [redacted]

> [redacted]

84 P3/EPSA Ex. 2 at 42.
85 *Id.*
86 Id. at 42-44(emphasis added, footnotes omitted).

[redacted]

Dr. Kalt summarized his analysis, stating that:[87]

[redacted]

Even Don Moul [redacted] at which point we would have to make a decision as to whether to continue to invest in them and to keep them online or choose to shut the units down."[88] But continued investment is not an issue in this case. As Dr. Kalt stated, "…[redacted][89]

The economic analysis of the plants by Dr. Kalt along with the testimony of the Companies' witnesses supports a finding that the Davis-Besse and Sammis plants are not at risk of closing in the short term.

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[87] P3/EPSA Ex. 1 at 44.
[88] Tr. Vol. 10 at 2202.
[89] P3/EPSA Ex. 2 at 43.

B. The RTO maintains and ensures reliability – not FES.

As the Commission is aware, PJM has responsibility for ensuring transmission grid reliability.[90] The Companies acknowledge this fact[91] but claim that if Sammis and Davis-Besse closed, $466.5 million in additional transmission investments would need to be made to maintain reliability.[92] The implication by the Companies is that only Rider RRS can avoid the risk of these transmission upgrades. That is a simplistic view of grid reliability and not supported by the record.

In PJM's robust transmission system, which links the FirstEnergy transmission zone to the rest of PJM, capacity resources in any part of the 13-state PJM regional transmission organization can be used to support capacity needs in the FirstEnergy zone and Ohio as a whole.[93] Even if a bona-fide reliability concern existed and reliability truly became an issue, PJM has a process for studying reliability and providing a Reliability Must Run ("RMR") contract for any units determined necessary to maintain for reliability.[94]

PJM has previously used that process with other FES units, including the Ashtabula 5, East Lake 1-3 and Lake Shore 18 Generators.[95] The Companies have not foreclosed using RMR again for FES' units, as witness Donald Moul testified that FES would be willing to evaluate any RMR offer for Davis-Besse and Sammis should the need arise.[96] Although he considered RMR a stop-gap measure, he admitted that it does allow a plant to continue to operate while any

[90] Dynegy Ex. 1 at 10.
[91] Tr. Vol. 2 at 473.
[92] Company Ex. 9 at 7.
[93] Exelon Ex. 1 at 16.
[94] Exelon Ex. 1 at 16.
[95] *See,* FERC Docket number ER12-2710 - informational filing of FirstEnergy Generation Corporation regarding deactivation avoidable cost rate of Lake Shore 18, Ashtabula 5, and East Lake 1, 2, and 3. *See, also,* http://www.pjm.com/planning/generation-deactivation/gen-deactivation-rmr.aspx.
[96] Tr. Vol. 11 at 2258.

necessary transmission upgrades are made.[97] He also acknowledged that two options exist for RMR under the PJM tariff: (i) an Avoidable Project Investment Recovery Rate which provides avoidable cost recovery along with a project investment recovery of no more than $2 million[98] and (ii) a Cost of Service Recovery Rate that allows a generator to receive a cost-of-service rate which requires prior approval.[99]

Other markets have similar processes for compensation due to reliability. For example, Exelon is currently undergoing a similar process in New York to obtain a reliability-based agreement.[100] On November 14, 2014, the New York Public Service Commission entered an Order directing negotiation of a Reliability Support Service Agreement ("RSSA") between Rochester Gas and Electric and R.E. Ginna Nuclear Power Plant, LLC ("Ginna"), an Exelon subsidiary.[101] The RSSA process in New York is akin to the RMR process administered in PJM. As part of the process, Ginna underwent a formal reliability study conducted by the New York Independent System Operator, which found that if Ginna were to retire, there would be a negative impact on the reliability of the New York bulk electric transmission system between 2015 and 2018 until planned transmission upgrades are completed.[102] No such RTO study or finding of need exists for the FES units.

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[97] Tr. Vol. 11 at 2258-2259.
[98] Tr. Vol. 11 at 2261; ELPC Ex. 8, OATT Sections 115, 117-119.
[99] Tr. Vol. 11 at 2263-2264; ELPC Ex. 8, OATT Section 115, 117 and 118.
[100] Exelon Ex. 1 at 16.
[101] *Id.* citing State of New York Public Service Commission, Order Directing Negotiation Of A Reliability Support Service Agreement And Making Related Findings, November 14, 2014, CASE 14-E-0270 - Petition for Initiation of Proceeding to Examine Proposal for Continued Operation of R.E. Ginna Nuclear Power Plant.
[102] Exelon Ex. 1 at 17. The reliability study was conducted in accordance with applicable North American Electric Reliability Corporation (NERC) Reliability Standards, Northeast Power Coordinating Council (NPCC), New York State Reliability Council (NYSRC) Reliability Rules and Procedures, and NYISO planning and operation practices. *Id.*

1. PJM capacity performance will provide additional reliability to the PJM grid.

As part of its oversight, PJM has implemented additional measures to ensure reliability. On December 12, 2014, PJM filed a capacity performance ("CP") proposal to significantly change the design of the PJM capacity market.[103] FERC approved that proposal effective April 1, 2015.[104]

Dr. Joseph Bowring, the PJM Market Monitor, described these changes in his supplemental stipulation testimony, stating:[105]

> PJM has run a Base Residual Auction for Delivery Year 2018/2019, a Transition Auction for Delivery Year 2016/2017 and a Transition Auction for Delivery Year 2017/2018 under the Capacity Performance design. The result was a significant increase in capacity prices for all capacity resources in PJM and particularly for capacity resources in the western 30 part of PJM, including Ohio. One of the most significant elements of the new capacity market design is an increase to the performance incentives for capacity resources. If units do not perform as required, units will pay substantial penalties. Those penalties can exceed total capacity market revenue for a generating unit. Those penalties would be paid to units that did perform when called, as bonus payments.

CP is intended to drive reliability through investment across the PJM generating fleet, with steep penalties for non-performance.[106] The penalties under CP provide a significant incentive to generators to perform when called upon.[107] As the Companies' witness Donald Moul stated, "[u]nder the capacity performance proposal, there is no excuses structured to it, so regardless of what type of generation, whether its natural gas or any other type, it gets no excuse if it doesn't perform for its commitment."[108]

[103] IMM Ex. 2 at 3.
[104] IMM Ex. 2 at 3; *PJM Interconnection, L.L.C. et al.*, 151 FERC ¶ 61,208 (June 9, 2015).
[105] IMM Ex. 2 at 3.
[106] Dynegy Ex. 1 at 10.
[107] IMM Ex. 2 at 3-4.
[108] Tr. Vol. 10 at 2215.

Participation in capacity performance is mandatory, unless the unit receives an exemption from the Market Monitor.[109] The mandatory offer requirement of CP coupled with significant penalties and the opportunity for bonuses will motivate merchant generators to take great efforts to avoid failing to perform.[110] That motivation provides a new source of grid reliability.

C. Rider RRS will result in significant customer charges – not credits.

1. The Companies' forecast is flawed.

The Companies are the only party that believe that Rider RRS will result in a net credit over the eight-year term. The Companies do not present a forecasted range, but instead simply provide one forecast that relies primarily on the price forecasts of Dr. Judah Rose. That forecast, using the FES dispatch model, predicts a net credit for Rider RRS over the eight-year term of $561 million. The Companies' forecast, however, is flawed and now outdated.

P3/EPSA witness Dr. Joseph Kalt explained why the Companies' projections were flawed, including relying on forecast information that is now over a year and a half old.[111] He succinctly summarized his conclusion by stating:[112]

> In summary, Mr. Rose's gas prices – used by the Companies to calculate claimed ratepayer impacts -- start at $[redacted]/MMBTU in 2016. They then rise to [redacted]/MMBTU [redacted] and more than [redacted]/MMBtu by the end of the 8-year term of the Companies' ESP proposal. [redacted] **for the same time periods supported by actual market participants in transactions on NYMEX and the prices forecast by numerous analysts and federal agencies.** For the reasons I have explained above, the effect can only be to inflate the Companies' projections of the subject plants' revenues under their proposed ESP, and to thereby understate ratepayer losses and overstate ratepayer gains.

[109] Tr. Vol. 10 at 2197.
[110] Dynegy Ex. 1 at 9.
[111] P3/EPSA Ex. 12 at 13.
[112] P3/EPSA Ex. 13C at 16.

Dr. Kalt's conclusions were based on the fact that "[redacted] to reflect the sharp declines in the markets for spot and future gas that are now evident and that rationally affect forecasts."[113] Dr. Kalt also noted that:[114]

> Most tellingly, Attachment JPK-SS-1 shows the comparison between Mr. Rose August 2014 forecast of gas prices and actual forecasts in the marketplace in the form of NYMEX futures prices. The latter have particular significance because they do not represent mere opinion. Rather, they represent a concise marketplace summation of the best available information on future natural gas prices. They arise from market participants of all kinds "putting their money where their mouths are" by buying and selling futures contracts. In this sense, the prices struck on the NYMEX represent the balance point between those who believe prices will go up from their current level and those that think they will go down. **In my experience over several decades, NYMEX futures prices are properly and routinely relied upon as the *markets'* forecasts in the energy sector. The highest actual NYMEX prices in Attachment JPK-SS-1 (which occur in the later years)** [redacted] as used by the Companies' in asserting that ratepayers would benefit from their proposed bailout of FES' stockholders and lenders.

Dr. Kalt also came up with a simpler way of making his point that the Companies' forecast is flawed. He simply noted that if FES and the Companies believed in Mr. Rose's forecasts, each entity would be purchasing massive amounts of NYMEX gas futures in the forecast years where Mr. Rose replaced the NYMEX gas futures with his projections.[115] Dr. Kalt concluded by stating:[116]

> The natural gas price forecast built into the Companies' claim that rank-and-file captive consumers will benefit from the proposed ESP plan promises exorbitant payoffs – [redacted] – when such futures come due. In reality, of course, it would be wholly irrational for Mr. Rose, the Companies and FES to take such risk – just as it would be wholly irrational for the Commission to impose such risk on captive ratepayers, as the Companies are asking the Commission to do.

[113] P3/EPSA Ex. 13C at 13.
[114] P3/EPSA Ex. 13C at 14.
[115] P3/EPSA Ex. 12 at 18.
[116] P3/EPSA Ex. 13C at 19.

Relying on eight-year forecast to justify transferring the market risks for the plants from FES to the Companies' captive ratepayers is unreasonable.

2. All economists other than the Companies' witness Rose predict major charges under Rider RRS.

The Companies relied on the testimony of one economist, Dr. Judah Rose, to support their projected $561 million credit. The rest of the economists in the proceeding disagreed with the basis for the Companies' credit—Mr. Rose's forecasts.

P3/EPSA witness economist Dr. Joseph Kalt[117] rejected the Companies' $561 million projected credit, finding instead that with just small adjustments in up-to-date NYMEX natural gas prices held steady over the term, that the projected impact on the Companies' captive ratepayers is a net present value loss of $858 million.[118] 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.[119] Likewise, Dr. Kalt predicted that ratepayers will realize a net present value loss of $201 million simply by assuming that the net generation of the plants corresponded to historical averages.[120]

Other witnesses projected similar harm to ratepayers. Economist James Wilson updated his analysis of the Rider RRS impacts after the Stipulation was filed. He reviewed three scenarios, changing only the natural gas prices and resulting energy prices from the Companies' Rider RRS analysis.[121] Of the two scenarios that he considered more likely to occur, he estimated the cost to customers to range from $2.7 billion ($1.9 billion net present value) to $3.6 billion ($2.7 billion net present value). Of the three scenarios, he considered the $3.6 billion loss

[117] Dr. Kalt is the Ford Foundation Professor (Emeritus) of the International Political Economy at the John F. Kenney School of Government, Harvard University He also works as a senior economist with Compass Lexecon, an economics consulting firm. P3/EPSA Ex. 5 at 1.
[118] P3/EPSA Ex. 12 at 17.
[119] P3/EPSA Ex. 12 at 17.
[120] P3/EPSA Ex. 12 at 21-22.
[121] OCC/NOPEC Ex. 9 at 11.

scenario to be the most likely and reasonable estimate to occur as it was the only one to be based on updated market conditions.[122]

The Exelon offer reinforces the analyses of the expert testimony indicating that the Companies' proposed transaction is billions above-market. Through the offer, Exelon commits to participate in a competitive, market-based process to bid on a comparable transaction for the same time period as the transaction proposed by the Companies. The Exelon commitment reflects its view of the true value of the forward market, and this one offer alone is billions lower than the cost that the Companies project. The forward view of the market reflected in the Exelon Offer is consistent with the forward view of the experts that claim the Companies' proposed transaction will cost Ohio customers billions.

The question for this Commission is whether it is willing to expose ratepayers to the unknown risk of Rider RRS. That is not a risk that this Commission should take or force the ratepayers to take. The better route, if the Commission believes a "hedge" is necessary, is to competitively bid out the amount of capacity and energy that the Companies seek to procure for the "hedge." That approach can yield offers like the Exelon Offer that will guarantee savings to customers.

3. The Exelon Offer proves that the Companies' forecast is wrong and reflects a real market offer – not an affiliate handout.

A good measure of the validity of the Companies' projection of a net credit of $561 million is to compare the FES "hedge" to what other merchant generators are willing to offer to the Companies for the same "hedge." Exelon has made such an offer – which is a guaranteed eight-year offer for 100 percent emissions-free power that will provide a $2 billion savings over

[122] *Id.* at 12.

the FES "hedge offer."[123] Through that offer, Exelon is willing to commit to a 100% carbon-free package of energy and capacity from nuclear, hydro, solar and wind assets in PJM.[124] It will take on 100 percent of the capacity performance risk (unlike FES), so the Companies' customers are not exposed to that risk.[125]

Exelon's offer is also not unit specific like the proposed FES transaction. The Companies may believe that any offer should include Ohio-sited plants to avoid any retirement closures and maintain fuel diverse baseload units.[126] Ignoring that R.C. 4928.143(B)(2)(d) makes no reference to economic retention/development, a real "hedge" offer should be based solely on market pricing to ensure the purchase price of the hedge is as low as possible. That is how competition works, and Exelon's offer is a competitive offer that benefits the ultimate purchaser of the "hedge," the ratepayers.

Exelon's offer shows that FES' "hedge offer" is not a real market offer but rather a subsidy to the Companies' deregulated affiliate. Exelon's offer also established that the Companies' forecast for Rider RRS is flawed and not based on real market conditions.

4. Each Plant's Contribution to Rider RRS.

One detail that the Companies have been able to keep hidden from the public is the amount that the Companies' believe each plant will contribute to the projected $561 million credit under RRS. The information is easy to put together, using Mr. Lisowski's worksheets for each individual plant. Below is that information, that show how each plant contributes to the projected $561 million credit each year and on a cumulative basis throughout the eight-year term of the PPA. The Commission should not ignore that information because it shows that even

[123] Exelon Ex. 4 at 2.
[124] Exelon Ex. 4 at 7.
[125] Exelon Ex. 4 at 7.
[126] Tr. Vol. 37 at 7830.

using the Companies' own projections for each plant, how easily Rider RRS can swing from a credit to a massive charge.

The starting point for this simple analysis is P3/EPSA Ex. 11C. That exhibit calculates the differential for total revenues versus total costs and returns for both the Sammis and Davis-Besse units. The exhibit also shows the difference in total costs and returns for FES' OVEC entitlement. The results in tabular form for each plant are below.

<u>Table 1 – Individual Plant Contribution to Companies' $561 Million Rider RRS Credit</u>

Plant	**2016 (June-Dec)**	**2017**	**2018**	**2019**	**2020**	**2021**	**2022**	**2023**	**2024 (June-May)**	**Total**
Sammis	[redacted]	[redacted]	[redacted]	[redacted]						[redacted]
Davis-Besse	[redacted]	[redacted]	[redacted]				[redacted]		[redacted]	[redacted]
OVEC	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Total	(156M)	(175M)	(84M)	126M	207M	216M	177M	189M	60M	(560M)**

*** The $560 million differs from the Mikkelsen workpaper total of $561 million due to spreadsheet rounding.*

[redacted]

D. The Companies' "retail stability" claim is disingenuous

1. FES' balance sheet is weak and requires strengthening.

During this proceeding, it became apparent that the real incentive for FES to make its "hedge offer" to the Companies is the condition of FES' overall balance sheet. As FES' then Vice President of Commodity Operations, Donald Moul, stated, he became aware of the AEP Ohio proposal because he knew that the Companies were filing an ESP shortly, "looked to see if there was something [FES] could add value to that ESP – and provide some certainty in return for our plants."[127]

The Companies' witness Jason Lisowski, who is familiar with the consolidated balance sheet for FirstEnergy Solutions,[128] highlighted how important the balance sheet is to FES' "hedge" offer:[129]

> Q. And your concern for the plants, as you indicate, is in the short-term, correct?
>
> A. [Mr. Lisowski] Yes.
>
> Q. And one concern you have for the plants in the short term is that cash flow will not be sufficient to support the necessary capital investments that need to be made in the short-term correct?
>
> *** [question read]
>
> A. That's correct. That's one reason, and another reason is the condition of FES' current balance sheet.
>
> Q. And if FES had sufficient cash liquidity and a balance sheet that was strong enough to support additional debt, you wouldn't have your short-term concerns regarding these plants, correct?
>
> **** [question read]
>
> A. Yes, I would agree with that hypothetical.

The Companies believe that the Commission should consider FES balance sheet in this proceeding. As explained by Mr. Lisowski during the following exchange:[130]

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[127] Tr. Vol. 11 at 2290.
[128] Tr. Vol. 8 at 1693.
[129] Tr. Vol. 32 at 6686-6687.

Q. [By Mr. Settineri] Mr. Lisowski, is it your testimony that the Commission should only consider FES's balance sheet versus the balance sheet of any other FES affiliates in this proceeding?

A. [Mr. Lisowski] **I think the Commission should consider FES's balance sheet, yes, because of the fact that FES is the owner of these plants.** I think as part of that, the consideration should also be is how has FES been able to manage over the last several years, in this case, with equity infusions from FE Corp., and given that's not going to be able to be continued, I don't think there is a need to look at any other potential legal entities under the FirstEnergy umbrella of entities.

Q. So I guess, going back to my question, though, again, it's your opinion then that the Commission should only look at FES's balance sheet in deciding this proceeding?

MR. KUTIK: Objection, asked and answered.

EXAMINER PRICE: Overruled. He can answer this more directly.

A. I think the Commission should look at whatever it wants to look at. I don't think they should be limited to anything.

Ohio's ratepayers though, should not be responsible for bailing out FES so it can improve its balance sheet. Especially troubling is Mr. Lisowski's testimony that First Energy Corp., which just gave $2 billion in equity infusions to FES, will no longer do so even though Mr. Lisowski believes FES' balance sheet is stressed.[131] If FirstEnergy Corp. no longer wants to invest in FES, why should the Commission make the Companies' ratepayers make the same investment? R.C. 4928.143(B)(2)(d) is not applicable to charges intended to improve a deregulated affiliate's balance sheet.

[130] Tr. Vol. 32 at 6691-6692.
[131] *See,* Company Ex. 143 at 8.

2. Rider RRS will be subject to CP penalties

a. Customers will bear the risk of CP penalties

The proposed transaction not only bails out FES' balance sheet, but the Stipulation then ensures that FES will no longer be subject to PJM CP penalties. As noted above, PJM has implemented a CP program that can have significant penalties. Those penalties, in a matter of hours, can wipe out a unit's capacity revenues. FES will be subject to that risk of penalty as a committed participant for PJM delivery years through 2018/2019[132] but will be able to avoid paying for any CP penalties for the vast majority of the time under the proposed term sheet.

FES is able to avoid CP penalties because the proposed term sheet imposes little liability on FES for penalties. The Companies' proposed term sheet with Rider RRS expressly exempts FES 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.[133] "Good Utility Practice" is defined as:[134]

> "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 fall under the Good Utility Practice definition in the term sheet, any CP penalty must be paid by the Companies which in turn will pass the penalty

[132] Vol. 36 at 7704; Dynegy Ex. 1 at 9-10.
[133] Company Ex. 156 at 2-3.
[134] Company Ex. 156 at 14.

through to ratepayers.[135] And as the Companies' witness Mikkelsen agreed, it is possible for a unit to incur a CP penalty under circumstances that could be reasonable.[136]

Today, FES has full liability for CP penalties. That is not the case under Rider RRS where so long as its actions are "reasonable," FES will not be responsible for the penalties. Instead, the ratepayers will be responsible.

3. Customers bear risk of disallowed CP costs up to CP bonuses

The Stipulation does nothing to correct this inequity because it forces ratepayers to pay for disallowed CP penalties up to the amount of any CP bonuses. Section V.B.3.a. of the Stipulation calls out the "rigorous review" process that allows the Commission to disallow any costs netted under Rider RRS if the Commission finds the costs to be "unreasonable."[137]

That section then states that the Companies would be responsible for disallowed costs, but includes a parenthetical that although initially confusing on its face, allows the Companies to net disallowed CP penalties against bonuses. The language at issue is:[138]

> The Companies, not their customers, would be responsible for the adjustments made to Rider RRS based on actions deemed unreasonable by the Commission, including any costs (**after proper consideration of such costs and netting of any bonus payments**) associated with performance requirements in PJM's markets.

Eileen Mikkelsen acknowledged that the disallowed costs will be netted against bonuses, which means the customers are paying for those netted disallowed costs. The following example from Eileen Mikkelsen's testimony makes the point clear:[139]

> 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

[135] Companies witness Ruberto acknowledged that capacity performance penalties would be netted under Rider RRS. Tr. Vol. 8 at 2809.
[136] Tr. Vol. 36 at 7707.
[137] Company Ex. 154 at 8.
[138] Company Ex. 154 at 8.
[139] Tr. Vol. 36 at 7715.

leaves you with $20 that the Commission -- that the companies have to absorb, correct?

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.

The end result is that FES will be able to avoid CP penalties under the PPA and the Companies are passing through the CP penalties, allowed and disallowed (up to the extent of the bonuses), to the ratepayers. This result reinforces that Rider RRS is simply a means to help FES and its balance sheet.

4. An RRS charge cannot be a hedge.

Another flaw in Rider RRS is the fact that the Companies project charges from 2016 through 2018, with volatile fluctuations from year to year. This means that based on the Companies' projections, the customers will not be receiving any tangible benefit through 2018 because Rider RRS will be a charge – not a credit.

Table 2 - Rider RRS Annual (Charge)/Credit[140]

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

Ratepayers would only see a potential benefit starting in 2019. To the extent this is a hedge, it is at best a long-term speculative hedge. The further out a forecast goes, the less

[140] Sierra Club Ex. 89.

reliable that forecast becomes. This was affirmed by Staff witness Choueiki who stated that he had zero level of comfort in the forecast past three years – and the uncertainty is over a hundred percent beyond three years.[141] In fact, if Rider RRS ends up being an aggregate charge as predicted by Dr. Kalt and other witnesses, then there will be no hedge.

The proper way to obtain a hedge, as Dr. Kalt indicated, would have been for the Companies to solicit the marketplace for competitive offers that could provide hedges.[142] The Exelon Offer shows that a competitive process can yield a true fixed-price hedge for customers for billions less. Instead, the Companies entered into exclusive discussions with their affiliate FES because FES needs to improve its balance sheet. FES is the only entity receiving a "hedge" under Rider RRS.

VII. THE ESP IS NOT MORE FAVORABLE IN THE AGGREGATE THAN A MARKET RATE OFFER

R.C. 4928.143(C)(1) requires the Commission to approve, or modify and approve, the 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 R.C. 4928.142. The Companies have the burden of showing that the ESP IV is more favorable in the aggregate as compared to a market rate offer ("MRO").

The Companies' witness Eileen Mikkelsen presented the Companies' ESP versus MRO analysis.[143] Her testimony stated that the expected quantitative benefit of the ESP IV was $612 million of which $561 million related to the Rider RRS.[144] The remaining $51 million related to

[141] Tr. Vol. 30 at 6258.
[142] P3/EPSA Ex. 1 at 6.
[143] Company Ex. 155 at 12.
[144] *Id.*

payments by the Companies that would not be recovered by ratepayers.[145] Ms. Mikkelsen stated that the Companies would not make such payments through an MRO – but was not aware of any other reason as to why the payments could not be made in an MRO.[146] The only number that should be considered is the speculative $561 million projected credit for Rider RRS, which the manifest weight of the evidence does not support. As noted previously, P3/EPSA witness economist Dr. Joseph Kalt[147] rejected the Companies' $561 million projected credit, finding instead that with just small adjustments in up-to-date NYMEX natural gas prices held steady over the term, that the projected impact on the Companies' captive ratepayers is a net present value loss of $858 million.[148] 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.[149] Likewise, Dr. Kalt predicted that ratepayers will realize a net present value loss of $201 million simply by assuming that the net generation of the plants corresponded to historical averages.[150] Of three scenarios economist James Wilson reviewed, he concluded a $3.6 billion loss scenario to be the most likely and reasonable estimate to occur as it was the only one to be based on updated market conditions.[151]

The Exelon Offer also weighs against the ESP quantitatively, providing a [redacted]

[145] Tr. Vol. 36 at 7734-7735.
[146] Tr. Vol. 36 at 7736.
[147] Dr. Kalt is the Ford Foundation Professor (Emeritus) of the International Political Economy at the John F. Kenney School of Government, Harvard University He also works as a senior economist with Compass Lexecon, an economics consulting firm. P3/EPSA Ex. 5 at 1.
[148] P3/EPSA Ex. 12 at 17.
[149] P3/EPSA Ex. 12 at 17.
[150] P3/EPSA Ex. 12 at 21-22.
[151] OCC/NOPEC Ex.9 at 12.

[redacted][152] If the Companies predict a $561 million credit, a competitively bid PPA at the Exelon Offer price that costs at least $2 billion less will result in a credit to customers in excess of $2.5 billion.[153] Exelon's commitment to a competitive bidding process shows the significant value that that a market-based solution will provide Ohio.

The Companies, however, did not conduct a competitive bid process.[154] This demonstrates a lack of due diligence if the Companies were truly interested in establishing the quantitative benefit of Rider RRS for purposes of the ESP/MRO test. A competitive bid process would establish the competitive market rate for Rider RRS and ensure that the customers pay the least for the benefits that the Companies purport that Rider RRS provides.[155] If the Companies are truly interested in procuring a long-term PPA for the purported benefit of customers, any such procurement must be done through a competitive bid process.[156]

The Companies failure to conduct a competitive bid leaves the quantitative value of Rider RRS unknown. When faced with questions as to how high a charge would Rider RRS have to reach before the MRO was more favorable than an ESP, Ms. Mikkelsen focused instead on what she believed to be qualitative benefits of the ESP:[157]

> Q. Let me ask you this. If rider RRS was forecasted to result in a charge of $561 million over the eight-year term, would you still believe that the ESP would be more favorable than an MRO?
>
> A. I haven't thought about that question, but certainly there would still be significant qualitative benefits that we have discussed throughout this proceeding associated with the ESP versus the MRO. More specifically, what I would be referring to is the

[152] Exelon Ex. 5 at 6.
[153] Exelon Ex. 5 at 6.
[154] Tr. Vol. 13 at 2748.
[155] Exelon Ex. 1 at 20.
[156] The State of Ohio has even recognized the value of competitive bidding. The policy for state agencies is that, for sizeable purchases, supplies and services be obtained via competitive bid. *See*, R.C. 125.05 ("A state agency shall make purchases of supplies and services that cost fifty thousand dollars or more through the department of administrative services and the process provided in section 125.035 of the Revised Code * * *.")
[157] Tr. Vol. 36 at 7736-7737.

> reliability enhancement; the benefit of having baseload generating units that are fuel diverse with on-site fuel storage capabilities located in the ATSI zone; the job retention benefits; the avoidance of transmission investment; the tax dollars generated associated with these plants; as well as the economic development benefits; coupled with the provisions associated with economic development funding, low-income funding, Customer Advisory Agency funding, and many of the other qualitative commitments made in the stipulation, such as the contemplation of a base rate freeze throughout the eight-year period, so I think as I sit here today, yes.

At a certain point, though, the quantitative risk and cost of Rider RRS outweigh any qualitative benefits under an ESP. Also, many of the qualitative benefits that Ms. Mikkelsen relies upon are linked to plant closure, a risk that in the next few years is zero to none, rendering most of her qualitative benefit claims superfluous.

The purported quantitative benefits of the Companies' proposed ESP IV dominate the ESP/MRO test results. Every witness who opined on Rider RRS believed that the losses would be in the millions and billions. Only the Companies believe that Rider RRS will lead to a credit, and the Exelon Offer amongst other evidence shows those projections are wrong. The weight of the evidence supports a finding that quantitatively the ESP IV is not more beneficial than an MRO, and that any qualitative benefits are outweighed by the magnitude of potential charges under Rider RRS. As a result, the Companies have failed to fulfill this statutory requirement in order to justify the ESP IV.

VIII. THE COMPANIES HAVE NOT SATISFIED THE COMMISSION'S EIGHT-FACTOR BALANCING TEST.

In the *AEP ESP III* decision, the Commission required AEP Ohio "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:[158]

- 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.

Through testimony in this proceeding, the Companies have acknowledged that these factors must be considered in the Commission's review of the new Rider RRS charge.[159] Staff, prior to signing the Stipulation, determined that the Companies had failed to satisfy all factors, including the fact that an 11.15% return on equity was excessive and that the Companies had not

[158] *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 et al., Opinion and Order at 25-26 (February 25, 2015) ("*AEP ESP III*").
[159] Company Ex. 9 at 2.

demonstrated a showing of financial need.[160] The Companies have failed to meet their burden of proof on the eight factors, including for the below reasons.

A. Companies have not established financial need of plants.

The Commission's *AEP ESP III* Opinion and Order stated that the Commission would consider the "financial need of the generation plant."[161] The Companies in this proceeding have presented testimony that the future of the plants is uncertain. While the Companies' witness Donald Moul implied that FES "may" close plants because of the short-term losses,[162] none of the Companies' witnesses (including their outside experts) has testified that the plants are uneconomic and set for closure. In fact, Mr. Lisowski and Mr. Moul both testified that they believe the Davis-Besse and Sammis plants are competitive in the wholesale markets.[163] The Companies' own projections anticipate that the plants will be profitable in the long run.

Also missing from the Companies' short-term projections is capacity performance revenue which the Companies' witness Eileen Mikkelsen acknowledged was not included in her updated forecast.[164] The amount of additional revenue for clearing as a capacity performance unit can be significant, as admitted to by Ms. Mikkelsen[165] and evidenced by two Dynegy press releases in the record.[166] [redacted][167] All of the forgoing facts and testimony alone do not support a finding of financial need, and as indicated above, the plants are not going to close.

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[160] Staff Ex. 12 at 12.
[161] *AEP ESP III*, Opinion and Order at 25-26
[162] Company Ex. 28 at 2-3; Tr. Vol. 11 at 2300.
[163] Tr. Vol. 32 at 6686; Tr. Vol. 32 at 6636-6637.
[164] Tr. Vol. 36 at 7674.
[165] Tr. Vol. 36 at 7707.
[166] *See*, Company Ex. 182; Company Ex. 183.
[167] Tr. Vol. 9 at 1986-1987.

Moreover, the basis for the Companies' claim that Rider RRS is beneficial for retail customers is that the plants will be profitable in the long-term.[168] If the Commission accepts that forecast, then it should conclude that the plants have value, will not be shut down prematurely, and are not in financial need of a ratepayer guarantee. Indeed, in the criteria set forth by the Commission in the *AEP ESP III* Opinion and Order, the financial need of a generation plant is not tied to retaining ownership or receiving a set rate of return. The Companies have shown that FES needs assistance on its balance sheet, but have failed to show that any plant is in financial need, and [redacted]

B. Companies have not established necessity of any of the plants in light of future reliability, including supply diversity.

The fact that the plants are not going to close eliminates any concern over closure-related reliability issues and supply diversity issues. FES cannot close OVEC [redacted] Likewise, the Davis-Besse and Sammis plants are not going to close given (1) FES is not discussing closure internally;[171] (2) FES has not notified PJM that the units are closing;[172] (3) [redacted];[173] (4) [redacted]

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[168] Company Ex. 156 at 9, 12.
[169] P3/EPSA Ex. 2 at 47.
[170] Tr. Vol. 9 at 1984.
[171] Tr. Vol. 3 at 521; Tr. Vol. 11 at 2305.
[172] Tr. Vol 11 at 2337.
[173] P3/EPSA Ex. 6 at 15.

[redacted][174] [redacted][175] and (6) both plants have had significant investments made over the last few years making it unlikely they will close.[176] And as described above in Section B.2, PJM ensures grid reliability including its RMR program (under which some units have rescinded retirement announcements). The fact that the units will not close means the Companies cannot establish the necessity of the plants for future grid reliability including supply diversity.

C. There is no rigorous Commission oversight of the rider, including a proposed process for a periodic substantive review and audit.

As an initial point of the Commission's oversight of the Rider RRS, the Companies' witness Mikkelsen testified clearly that the Commission's oversight will not extend to FES. She stated:[177]

> The Commission does not have, in my mind, oversight authority over FES, but the Commission has full authority to review the costs and the underlying basis for the incurring of those costs for reasonableness such that they can ultimately make a determination in its judgment whether the costs incurred were reasonable based on the facts and circumstances known at the time that the costs were incurred, and, if not, they can make an adjustment to rider RRS. And, again, as we've discussed the exception to that, of course, is the legacy costs.

Section V.B.3.a. of the Stipulation sets out the "rigorous review" process that allows the Commission to disallow any costs netted under Rider RRS if the Commission finds the costs to be "unreasonable."[178] However, the process for the oversight relates to an initial Staff audit as to calculation verification, and then a Commission review of the costs included in the rider.[179] These are financial audits, but not a substantive review and Commission oversight of both FES

[174] Tr. Vol. 9 at 1985-1988.
[175] Tr. Vol. 9 at 1985-1988.
[176] P3/EPSA Ex. 1 at 41.
[177] Tr. Vol. 36 at 7702-7703.
[178] Company Ex. 154 at 8.
[179] Company Ex. 7 at 14-15; Company Ex. 9 at 12.

and the Companies' activities under the PPA itself. That is necessary, though, if there is going to be rigorous Commission review of the actual costs going into Rider RRS.

Since the Companies are going to be purchasing the power from their affiliate on a "cost plus" basis, the Commission simply must be in a position to draw the lines as to what constitutes a proper cost. It is not sufficient to protect the public by having the Commission only do a financial audit of the mechanics of Rider RRS to start with, and then in subsequent years not be able to review the management/performance which questions the legacy investment. Highlighting the lack of Commission oversight is the fact that the Companies believe they can challenge any disallowed cost through the courts.[180]

Also troubling is the fact that the Commission's oversight only applies to the facts known to the Companies at the time a decision was made. So long as the Companies were not aware of the underlying issue that raises a cost issue, it can avoid disallowance. The non-binding term sheet between the parties does include a "Good Utility Practice" requirement, but that also is a reasonableness standard based on "the facts known at the time the decision was made[.]"[181] In other words, the nature of this no-bid affiliate transaction has led to terms that are unfavorable to the ultimate consumer of the so-called "hedge" – the ratepayers. This can be contrasted to the more favorable terms that the ratepayers would receive if the Commission conditioned approval of a PPA rider on a competitively bid PPA. The Exelon Offer shows the many benefits of such a process including the $2 billion in savings to consumers.

D. There is no commitment to full information sharing with the Commission and its Staff.

The Companies' proposal for information sharing with the Commission and its Staff is insufficient for two reasons. First, no information sharing was expressly addressed for the

[180] Tr. Vol. 36 at 7739.
[181] Company Ex. 156 at 2-3.

OVEC units. Second, only one provision addresses the information sharing related to the FES units. That provision in the Stipulation (provision V.B.3.a) has established that FES "fleet information on any cost component" will be provided if the Staff makes a <u>reasonable</u> request.[182] This is not a commitment to "full information sharing" because 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 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 of which would be important to ensure fair dealings vis-à-vis the other plants in the fleet. A separate additional concern is the Stipulation's declaration that FES' fleet information on any cost component will be given protective treatment indefinitely, regardless of its actual content.[183] 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.

E. There is no alternative plan to allocate the rider's financial risk between both the Company and its ratepayers.

The Stipulation includes a provision entitled "Risk Sharing," pursuant to which the Companies may provide credits to the ratepayers beginning in year 5 of the eight-year plan, as

[182] Company Ex. 154 at 8.

[183] Companies Ex. 154 at 8. A blanket declaration that every FES document will be given confidential treatment indefinitely does not comply with existing Commission practices. *See, e.g.*, Rule 4901-1-24, Ohio Administrative Code, pursuant to which the Commission evaluates on a case-by-case basis claims of confidentiality and trade secrets.

follows:[184]

Year	If the 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 stipulated credit commitments are woefully inadequate to provide proper incentives to the Companies and FES, or somehow mitigate or share the risk that is being transferred to the ratepayers. First, the stipulated credits are not intended to provide any incentive to FES in its management and operation of Davis-Besse or Sammis.[185] The stipulated credits are only intended to act as an incentive for the Companies to maximize revenues received from the PJM markets. Second, since the stipulated credits only apply in the last four years, there are no credits 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. Over the first four years, the Companies project an aggregate charge of $288 million[186] with no risk sharing by the Companies. Thus, the ratepayers will not "share" the transferred risk with anyone during the forecasted needy part of the period.

Third, the stipulated credits of $10M, $20M, $30M and $40M apply on an annual basis and not in the aggregate. This means that the stipulated annual credits are woefully insufficient to cover the risk that is being shifted to the ratepayers. For example, if the Rider RRS follows

[184] Companies Ex. 154 at 7-8.
[185] Vol. 36 at 7733.
[186] Sierra Club Ex. 89.

the forecast in planning year 2 (2017/2018), the charge would be roughly $156 million[187] (not accounting for PJM capacity performance penalties) and the Companies would not pay a stipulated credit amount. The ratepayers, in that instance, would be required to pay the entire $156 million in charges in just one year. If the Rider RRS follows the forecast in planning year 6 (2021/2022), there would be a credit under the rider of roughly $181.75 million[188] (not accounting for PJM capacity performance penalties), and the Companies would not pay an additional stipulated credit amount. Under the OCC's forecasted $3.6 billion charge outcome over the course of the Rider RRS term, the Companies' stipulated credits would only account for 2.7% of the total Rider RRS charges.[189]

Fourth, there is no guarantee in this "risk sharing" provision that the customers will receive a stipulated credit in any of the eight years of the plan. In contrast, FES will be paid all of its costs plus a return on equity in every year of the plan. Fifth, the impact of the stipulated credits could be further diminished because capacity performance penalties could easily exceed the credits.[190] Altogether, it is clear that this "risk sharing" provision would not actually amount to any fair sharing by the Companies. Sixth and lastly, 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' risks are capped at $10M, $20M, $30M and $40M. Altogether, it is plain to see that this does not amount to a just and reasonable or true risk-sharing provision. The Companies' contribution under this provision is not taking on any fair portion of the risk, which

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187 2017 Rider RRS charge of $194 divided by 12, and then multiplied by 7; and 2018 Rider RRS 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.

188 2017 Rider RRS charge of $194 divided by 12, and then multiplied by 7; and 2018 Rider RRS 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.

189 OCC/NOPEC Ex. 9 at 8.

190 IMM Ex. 2 at 3-4.

is what is expected in risk sharing. Accordingly, the Commission should find that this factor was not satisfied.

F. The severability provision improperly binds the Commission.

In the *AEP ESP III*, the Commission determined that an application for a PPA rider "<u>must</u> 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." (Emphasis added.) The Stipulation proposes the following severability provision:[191]

> 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.)

This severability language goes beyond what the Commission required in the *AEP ESP III* decision. In doing so, the provision attempts to bind the future rulings from the Commission in multiple ways. First, if a new modified Rider RRS is developed, this provision mandates that

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

the Commission has to approve it if it "provides a reasonable remedy" as a cure. This language would create a very limited focus for any new modified Rider RRS proposal, ignoring any applicable statutory requirements that may exist at the time. This is inappropriate and should be rejected by the Commission. Similarly, the proposed severability provision mandates no refunds if Rider RRS is invalidated. This Stipulation cannot dictate whether refunds are warranted. That is a legal question that will have to be determined when Rider RRS is invalidated. Moreover, the Commission should not be willing to accept such a provision that would decide today – before any ruling on the propriety of Rider RRS – that refunds cannot/should not be awarded. It would be unjust and unreasonable to accept such language today.

IX. RIDER RRS WILL HARM RETAIL CUSTOMERS AND THE MARKETS

A. Rider RRS will negatively affect retail competition

Rider RRS will negatively impact the continuing efficacy of the competitive retail markets, not only in the Companies' service territory but throughout Ohio. FES is certified to provide retail generation and power marketer services in Ohio, and although no longer participating in the residential marketplace as of the time of hearing, continues to engage throughout Ohio as a CRES provider.[192] The guaranteed subsidy FES will receive from ratepayers under Rider RRS will allow FES to make offers to shopping customers that are not reflective of actual market prices, and will provide FES with a competitive advantage over other CRES providers that must procure their commodity supply at market prices.[193] The Stipulation makes no mention of this possibility, and the Commission will have no oversight of FES under Rider RRS and the yet-to-be executed PPA.

[192] Tr. Vol. 2 at 2342.
[193] Exelon Ex. 1 at 6-7.

Allowing FES to gain a competitive advantage in the Ohio retail markets over other CRES providers is against the public interest. This anti-competitive subsidy flowing from a noncompetitive retail electric service to a competitive retail electric service is contrary to Ohio's stated policy goals.[194]

1. Rider RRS increases costs for customers, overall.

Rider RRS imposes generation-related, non-bypassable charges or credits based on the sale of generation. As Exelon witness Lael Campbell testified, "[t]he imposition of non-bypassable riders to recover generation-related costs inappropriately places the financial risks associated with FES's generation squarely on the shoulders of [the Companies'] customers."[195] Business risks for generation-related costs properly belong with FES, the owner of the generation. Instead, the Companies' own projections show that shopping and non-shopping customers will pay more for generation services for the first three years of the Rider RRS term, with any promise of credits in 2019 based on a 2014 forecast. Requiring customers who purchase electricity from CRES providers to compensate the Companies, and in turn FES, for FES' full hedge from market risk for its generation losses is contrary to Ohio law, fundamentally unfair, and anti-competitive.

2. Rider RRS destroys benefits of fixed-price contracts.

Rider RRS will result in the improper intrusion on the sanctity of retail contracts by effectively "un-fixing" fixed-price contracts and price certainty that CRES providers like Constellation provide to shopping customers. Rider RRS would expose all customers, shopping and non-shopping, to variable price risk, as the charge (or credit) a customer receives will vary based on the difference between the PPA price (variable from year to year) and the variable spot

[194] R.C. 4928.02.
[195] Exelon Ex. 1 at 11.

market price the FES-owned generation receives in the market. Because Rider RRS is non-bypassable, a shopping customer that is currently shielded from market volatility under a fixed-price contract from a CRES provider will now be exposed to, and held captive to, these variable generation-based charges. This undermines one of the key benefits of retail competition in Ohio - the ability to negotiate the lowest fixed-price term from a variety of CRES providers. This result also would undermine the contractual certainty that customers taking service from a CRES provider rely upon when entering a longer term fixed-price contract, and is directly at odds with the Commission's goals of pricing transparency.

3. Rider RRS gives FES competitive advantages over other CRES Providers.

The guaranteed subsidy FES will receive from ratepayers under Rider RRS will provide FES with a competitive advantage over other CRES providers that must procure their commodity supply at market prices.[196] This undermines the integrity of the competitive retail market as the subsidy will allow FES to make offers to customers that are not reflective of actual market prices. This anti-competitive subsidy flowing from a noncompetitive retail electric service to a competitive retail electric service is contrary to Ohio's stated policy goals. *See*, R.C. 4928.02.

B. Rider RRS will negatively affect wholesale competition.

Rider RRS poses a detrimental threat to the competitive wholesale markets. That view is shared by many witnesses in this proceeding including the PJM Market Monitor, P3/EPSA witness Dr. Joseph Kalt and merchant generators including Dynegy and Exelon. The impact on competition in the wholesale markets is not mitigated by the Stipulation, which fails to provide any oversight over FES and does not provide adequate, real incentives to the Companies in their new role as PJM market participants.

[196] Exelon Ex. 1 at 12.

1. Rider RRS gives FES competitive advantages over other market participants in the wholesale markets.

FES' power generation fleet, including the Davis-Besse and Sammis plants, have operated under competitive market conditions for over eight years.[197] Specifically, the output of these plants is sold into the competitive PJM wholesale electricity market and the plants compete to offer generation in PJM's annual capacity auctions.[198] Importantly, Mr. Lisowski and Mr. Moul believe that the Davis-Besse and Sammis plants are competitive in the wholesale markets.[199]

Rider RRS provides FES with an additional and unfair competitive advantage over other wholesale market participants. Under the terms of the Rider RRS, FES would receive its costs plus a fixed and known amount of revenue that is calculated from the capital base of each plant.[200] The revenues from the plants subject to the proposed PPA will no longer be subject to market risk. Instead, they will include a ratepayer-guaranteed return on capital investments made previously.[201] The result is that FES obtains a competitive advantage over other merchant generators, receiving a cost-plus subsidy to improve its balance sheet. This result is clearly against the public interest and not what the General Assembly contemplated when passing R.C. 4928.143(B)(2)(d).

2. Rider RRS distorts wholesale markets.

Rider RRS poses a detrimental threat to the competitive wholesale markets. Under the proposed term sheet, the Companies will be bidding output from the units into the PJM wholesale markets. Yet the Stipulation contains no objective limitations as to how and when the Companies will offer the more than 3,200 MW of generation into the wholesale market.

[197] P3/EPSA Ex. 1 at 21.
[198] P3/EPSA Ex. 1 at 21.
[199] Tr. Vol. 32 at 6686; Tr. Vol. 12 at 6636-6637.
[200] P3/EPSA Ex. 1 at 24.
[201] P3/EPSA Ex. 1 at 24.

Moreover, the Companies are not procuring generation for their customers, and thus lack the traditional cost-of-service incentives that apply to vertically integrated utilities.[202] Instead the Companies are essentially revenue-neutral brokers between their ratepayers and their affiliate. The only possible cost to the Companies (other than the costs to obtain Stipulation signatures) are any costs that are disallowed under the Stipulation's undefined "unreasonableness" standard and any credits that the Companies would have to contribute in the last four years of Rider PPA.

Because the Companies will essentially be revenue neutral, there is no incentive for the Companies to offer the units into the wholesale market based on market fundamentals such as the variable costs to operate the units. The lack of any incentive, or requirement, for the Companies to offer the units into wholesale markets based on variable costs, provides the Companies (as a market participant) a competitive advantage over generation owners subject to wholesale market forces and whose offers are guided by the variable costs to operate the unit.[203] Ultimately, this will have a distortive effect on wholesale market price formation, and the integrity of the wholesale markets in general, as more than 3,200 MW of generation will have no incentive to participate in the market based on supply and demand fundamentals.[204]

Dr. Joseph Bowring, the PJM Market Monitor summarized this issue stating:[205]

> The proposed Rider RRS would require that the ratepayers of the Companies subsidize the costs of the plants and the contracts to the benefit of the Companies. **The logical offer price for these resources in the PJM Capacity Market, under these conditions, would be zero. A zero offer would be rational because this would maximize the revenue offset to the customers who would be required to pay 100 percent of the costs of this capacity and bear all of the performance risks. Offers at or near zero would have an anti-competitive, price suppressive effect on the PJM Capacity Market as would any offers at less than the competitive offer level. The proposed Rider RRS would create**

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[202] Dynegy Ex. 1 at 7.
[203] Exelon Ex. 1 at 13.
[204] *Id.*
[205] IMM Ex. 2 at 5 (emphasis added).

> **strong incentives for FirstEnergy to offer this capacity at less than the competitive offer level.**
>
> **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. Competition depends on units making competitive offers that reflect their costs and the risk of paying penalties and/or receiving benefits (e.g. the offer cap for Capacity Performance resources) and on recovering revenues only from the markets and not from subsidies. Such subsidies would negatively affect the incentives to build new generation in Ohio and elsewhere in PJM and if adopted by others would likely result in a situation where only subsidized units would ever be built.

Therefore, if the Commission decides to approve Rider RRS, it is imperative that the Commission include an affirmative obligation that the Companies offer the units into the market in an economically rational manner based on the units' variable costs, using objective criteria.

3. Rider RRS gives FES competitive advantages over SSO suppliers, with potentially chilling effect.

The subsidy FES would receive under Rider RRS could impact the wholesale procurements for SSO supply by the Companies and other EDUs in Ohio. Historically, FES has been an active participant in wholesale SSO supply procurements.[206] The PPA and Rider RRS provide FES with a recovery of all of FES' associated costs plus covering debt and a profit no less than FES could expect to earn in alternative investments of comparable risk.[207] Regardless whether called a subsidy or some other name, FES' guaranteed return on certain of its plants could lead FES to potentially participate in the competitive procurements without bidding in a market-reflective manner. That bidding could be at prices that are below market that are then offset by FES with the subsidy it is receiving via Rider RRS. The uncertainty caused by FES' reduced incentive to make market-based bids could turn away potential participants and distort

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206 Exelon Ex. 1 at 14.
207 P3/EPSA Ex. 12 at 3.

the outcome of the SSO competitive procurements. Ultimately, Rider RRS could compromise the wholesale SSO supply procurements that have brought considerable value to the Companies' customers.

X. THE STIPULATION FAILS THE THREE-PRONG TEST

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.[208] 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.[209]

While the Stipulation has been presented as a package, the Stipulation is composed of multiple components that require review and analysis.

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

Notably, the Stipulation made minimal changes to Rider RRS. The only changes were a reduction in term from 15 years to 8 years (which favors FES assuming the Companies believe their projections in years 9 through 15), reducing the ROE to 10.38% (which remains excessive,

[208] *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).

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

given the fact that FES will have virtually no risk) and adding the Companies' credit commitments in the last 4 years of the term. No cap on the Rider RRS charges was negotiated, no competitive bidding requirement was added, and customers remain subject to CP penalties. The lack of meaningful changes to Rider RRS shows that little to no serious bargaining took place on the most significant issue in this case. Instead, the gap was filled with a side deal and party specific provisions that implies that favor trading took place.

1. The Competitive Market Enhancement Agreement as a side deal shows no serious bargaining.

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.[210] The Court added that concessions or inducements apart from the terms agreed to in the stipulation might be relevant to deciding whether negotiations 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."[211]

In this matter, the Stipulation was negotiated and signed in several parts. The first three parts were negotiated between late 2014 and June 2015. 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, after a full day of cross-examination conducted by several opposing parties of the Companies' only witness in support of the Stipulation, the Companies announced

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[210] *OCC v. Pub. Util. Comm.* (2006), 111 Ohio St. 3d 300, 321, 2006-Ohio-5789.
[211] *Id.*

that a CRES provider would be signing the Stipulation and that a separate side deal, a "Competitive Market Enhancement Agreement," had been agreed upon between the Companies and the CRES provider. The additional signature page to the Stipulation was filed electronically with the Commission after business hours (and therefore officially docketed on January 15, 2016).[212] The Companies provided the side deal to the parties that evening.[213]

That separate side agreement relates directly to this proceeding as it bound the CRES provider to withdraw its testimony and sign the Stipulation. Significantly, as admitted to by Ms. Mikkelsen, the Company did not share the agreement with any other party in the proceeding, including the other signatory parties, before it was produced in discovery the prior evening.[214] The Companies' failure to disclose the side deal to all parties and especially other signatory parties 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.[215]

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."[216] The Commission must "determine whether there exists sufficient evidence that the Stipulation was the product of serious bargaining"[217] The fact that it resolved the issues between the Companies and the CRES provider in this proceeding, and its secretive execution are conclusive. The side agreement, which purchased the support of the CRES provider, raises serious doubts about the integrity and openness of the negotiation process surrounding the Stipulation. For that reason, it must be rejected.

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[212] OMAEG Ex. 25.
[213] OMAEG Exs. 23 and 24.
[214] Tr. Vol. 37 at 7917.
[215] *Ohio Consumers' Counsel v. Public Utilities Commission of Ohio et al.*, 111 Ohio St. 3d 300; 2006-Ohio-5789 at ¶86.
[216] *Id.* at ¶84.
[217] *Id.* at 86.

The Court has expressed its grave concerns about the Commission approving a partial stipulation which arose from exclusionary settlement talks.[218] The Court has also reversed the Commission when reasonable means for settlement participation were not found.[219] 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.[220]

The evidence related to the Companies' 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.

2. Favor trading also demonstrates a lack of serious bargaining.

The Stipulation in this matter includes many items that have nothing to do with the ESP IV application. If the Companies would have directly paid cash to every signatory party that signed the Stipulation, that would constitute favor trading because the cash payments were used to obtain support for the Companies' ESP IV. In this case, the Companies traded favors (signing

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[218] 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.

[219] *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).

[220] *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-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).

on to the Stipulation in exchange for payments) with various parties total over $19 million over the eight-year ESP IV term.[221]

Favor trading in stipulations is similar to secret side deals, and it shows that a lack of serious bargaining took place on the Stipulation. For example, in its October 24, 2007 ruling on remand in Case No. 03-93-EL-ATA et al., the Commission rejected a stipulation finding that:

> [T]he existence of side agreements, in which several of the signatory parties agreed to support the stipulation, raises serious doubts about the integrity and openness of the negotiation process related to that stipulation. Based on the expanded record of this case and our review of the side agreements, we now reach the inevitable conclusion that there is a sufficient basis to question whether the parties engaged in serous bargaining and, therefore, that we should not have adopted the stipulation. We now expressly reject the stipulation on such grounds.[222]

This type of favor trading indicates that serious bargaining did not take place on the subject of the application in this proceeding. Favor trading created the Stipulation, and not serious bargaining. The Stipulation should be rejected.

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

The Stipulation is composed on the one hand of the endorsement of Rider RRS over an eight-year period, and on the other hand a variety of terms that simply do not amount to benefits for ratepayers and benefit for the public interest. Numerous terms in the Stipulation constitute (a) monetary inducements, (b) promises to take a future action which may not ever result in a benefit, (c) terms providing minimal benefits and (d) terms targeted to just select parties who agreed to support Rider RRS. The monetary inducements have already been addressed and will not be repeated here.

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[221] *See*, Company Ex. 4; Company Ex. 154.
[222] *In re. Cincinnati Gas & Electric Company*, Case No. 03-93-EL-ATA, et al., Order on Remand dated October 24, 2007 at 27.

As to promises to take a future action for which there might never be a benefit, several examples are:

- File a grid modernization business plan and initiatives (Dec 1, 2015 Section V.D.2).

- Evaluate investing in battery resources contingent on Commission approval (Dec. 1, 2015 Section V.E.2).

- File in the next EE/PDR Portfolio Plan a customer engagement pilot program (Dec. 1, 2015 Section V.E.3.c).

- File a report every five years regarding carbon reductions until 2045 (Dec. 1, 2015 Section V.E.1).

- File reports regarding their fuel diversification and carbon reduction strategy (Dec. 1, 2015 Section V.E.5).

- File a case by April 3, 2017, to transition to a straight fixed variable cost recovery mechanism for residential customers base distribution rates (Dec. 1, 2015 Section V.F)

These are not significant commitments on the part of the Companies. They cannot claim that the Stipulation is in the public interest based on these future promises that may or may not become reality. In addition, there is the side agreement pursuant to which the Companies will file applications for three new programs – a retail competition incentive charge, a customer referral program and a smart thermostat program.[223]

Regarding terms that provide minimal benefits, if any, several examples are:

- The Companies agreed to advocate for market enhancements (Dec. 1, 2015 Section V.C).
- The Companies agreed to provide a public quarterly update to the Commission regarding wholesale electricity markets (Dec. 1, 2015 Section V.C). The Commission would likely have access to such information through federal filings by the Companies, despite this commitment. Plus, the Commission could require the Companies to provide these updates, if it desired.

[223] OMAEG Ex. 24.

- Provide semi-annual updates to the Commission on the progress made in its grid modernization initiatives (Dec 1, 2015 Section V.D.4). The Commission could and has required such updates in the past,[224] regardless of this Stipulation.

- The Companies will establish a goal to reduce CO2 emissions (Dec. 1, 2015 SectionV.E.1).

- The Companies agree to be cognizant of the principle of gradualism and the effect of decoupling when proposing the straight fixed variable decoupling mechanism (Dec. 1, 2015 Section V.F.3)

- The FirstEnergy corporate headquarters and its nexus of operations will remain in Akron for the duration of Rider RRS (Dec. 1, 2015 Section I). This is not a concession that provides benefits under the Stipulation because it was announced in May 2015 that the corporate headquarters had extended its lease on property in Akron for an 8.5 year period and because a nexus of operation is so vague.[225]

The minimal benefits (if any) of these provisions of the Stipulation do not make it reasonable to approve the Stipulation. These terms will not provide benefits to ratepayers and are not in the public interest, especially when linked to Rider RRS.

There are several non-monetary terms targeted to select parties who agreed to support Rider RRS:

- Pilot to obtain the Rider NMB-provided services for the benefit of IEU-Ohio, Ohio Energy Group, Nucor Steel Marion and Material Sciences Corporation. (May 28, 2015 Section V.A.2)

- Deploy a Commercial HLF Experimental Time-of-Use rate proposal for only a commercial customer with at least 30 facilities in the Companies' service territories that consume at least 1.5GWh yearly the major portion of which is refrigeration (June 4, 2015 SectionV.A.3).

- Toledo Edison will charge Material Sciences Corporation at $4.00 per kVa of billing demand under Rider EDR for service June 2016 through May 2019 (Dec. 22, 2014 Section V.C.3).

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[224] *See, e.g., In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of Ohio Site Deployment of the Smart Grid Modernization Initiative and Timely Recovery of Associated Costs*, Case Nos. 09-1820-EL-ATA, Finding and Order (May 28, 2015).
[225] Dynegy Ex. 1 at 11.

- Renewal of Rider ELR but limiting participation to just those already taking the service and up to 136,250 kilowatts of additional curtailable load (Dec. 22, 2014 Section V.A.1.i; Dec. 1, 2015 Section V.G.4.a.i).

While perhaps these targeted terms are beneficial to a few parties, they do not make the Stipulation as a package beneficial to the ratepayers or in the public interest. As a package, the Stipulation does not benefit ratepayers generally and does not benefit the *public* interest.

C. The Stipulation violates important regulatory principles and practices.

Favor trading also implicates the third prong of the three-part test – whether the Stipulation violates any important regulatory principle or practice. The favor trading in the Stipulation will lead to a violation of Ohio law. For example, OPAE is receiving under the Stipulation a no-bid contract for the administrative services it will perform. If the value of the unbid contract to the Companies and FES is OPAE's support for the ESP IV (including Rider RRS)**,** then the rate is unjust, unreasonable and in contravention of R.C. 4905.22.

There are other independent provisions in the Stipulation that violate important regulatory principles and practices. First, the Stipulating parties agree that, if a longer term capacity proceeding 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."[226] The Stipulating parties cannot agree to require the Commission to take action. This provision is simply improper and the Signatory Parties are knowledgeable enough to realize that they cannot agree to a term that orders the Commission to take action.

Second and third, the Stipulation contains discriminatory and unjust terms. The HLF Experimental Time-of-Use ("HLFTOU") proposal is limited so that few customers would

[226] Companies Ex. 154 at 9.

qualify and perhaps only the one party who signed onto the Stipulation at the time the HLFTOU terms were included. Ms. Mikkelsen testified that only one customer had expressed an interest in the proposal and that customer did not qualify for it.[227] She further explained, however, that certain eligibility criteria did not need to be maintained, stating "[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."[228] Also, it is unclear why the high use must be linked to primarily refrigeration. Also, the avoid-Rider NMB pilot is limited to only members of IEU and OEG, Nucor and Material Sciences – IEU has opted to not oppose the Stipulation and the others are signatory parties. These two parts of the Stipulation are also unduly limiting, discriminatory and unjust because they exclude participation by other interested stakeholders or customers simply because they did not sign the Stipulation. Also, they are contrary to Ohio's electric services policy – R.C. 4928.02(A) states that it is the policy of the state to "[e]nsure the availability to consumers of * * * nondiscriminatory, and reasonably priced retail electric service."

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."

The Commission cannot approve these unduly limiting and discriminatory terms.

In addition, there is a side agreement between the Companies and a CRES provider pursuant to which the Companies will file an application for a smart thermostat program to be developed and implemented solely by that CRES provider. This agreement, which pledges

[227] Tr. Vol. 2 at 289-290.
[228] Tr. Vol. 2 at 290-291.

support for the Stipulation, is equally discriminatory. The Commission cannot approve these unduly limiting and discriminatory terms.

The Commission cannot ignore that the signatory parties are receiving tailored benefits under the Stipulation that do not comport with regulatory practices and principles. As such, these provisions are not just, reasonable or beneficial.

XI. AT A MINIMUM, THE COMMISSION SHOULD COMPETITIVELY BID OUT THE NEEDED GENERATION.

Exelon is opposed to the Stipulation and Rider RRS in its entirety (including the proposed PPA), and believes that the Commission should reject both outright. However, if the Commission determines that Rider RRS is in the interest of Ohio electricity consumers (which it is not), Exelon urges the Commission to hold a competitive process to obtain a PPA to include in Rider RRS that will provide the best value to Ohio customers.

A. A competitive bidding process will benefit customers.

The benefits of competitive bidding have been well established in Ohio's electricity auctions,[229] as well as in Ohio law. As the Commission noted in its *AEP ESP III* Order, "… there are already existing means, such as the laddering and staggering of SSO auction products and the availability of fixed price contracts in the market, that provide a significant hedge against price volatility …."[230] Likewise, the State of Ohio has recognized the value of competitive bidding having implemented a policy for state agencies to procure sizeable purchases, supplies and services via competitive bid.[231]

[229] Exelon Ex. 4 at 3.
[230] *AEP ESP III* Opinion and Order at 24.
[231] *See*, R.C. 125.05 ("A state agency shall make purchases of supplies and services that cost fifty thousand dollars or more through the department of administrative services and the process provided in section 125.035 of the Revised Code * * *.")

The Companies, however, believe that an eight-year purchase for capacity, energy and ancillary services does not warrant a competitive bid process.[232] That is unreasonable and has resulted in a Stipulation that puts the vast majority of financial risk on the ratepayers. As P3/EPSA witness Dr. Kalt observed:

> [r]ather than soliciting the marketplace for competitive offers that could provide hedges against such circumstances, the Companies instead entered into exclusive discussions with their affiliate FES. This produced the terms and conditions of a 15-year cost-based agreement that would have ratepayers support the recovery of and on historical and recent capital investments in the noted FES generation assets.[233]

Conditioning Rider RRS' approval upon a competitive process is consistent with the competitive processes (SSO auctions) that Ohio electric distribution utilities use to procure energy.[234] These processes have worked to lower energy costs and provide choice to millions of Ohio families and businesses.[235] Ironically, the Companies led the drive to competition, and up until this proceeding, took positions before this Commission and other agencies and public officials which embraced competition and retail choice.[236] The Companies were right then; they are wrong today. Competition will yield the best price.

B. The Exelon alternative

Having watched experts battle on the validity of the Companies' forecast, Exelon decided to take a more practical route to proving to the Commission that Rider RRS will cost the Companies' ratepayers billions of dollars over the eight-year term.[237] Exelon developed a commercial offer (the Exelon Offer) and presented that through the testimony of Exelon witness Lael Campbell.

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[232] Tr. Vol. 13 at 2748.
[233] P3/EPSA Ex. 2 at 6.
[234] *See*, Ohio Administrative Code Rule 4901:1-35-11.
[235] Exelon Ex. 4 at 3.
[236] *Id.*
[237] Exelon Ex. 4 at 2, 4.

To prepare the offer, Mr. Campbell requested that Exelon's commercial group develop a quote for an eight-year bundled fixed price for energy and capacity delivered to ATSI from 100% zero carbon resources, with Exelon maintaining <u>100%</u> of the PJM capacity performance risk.[238] He requested a maximum fixed price to which Exelon would commit for a fixed quantity product of anywhere up to 3,000 MW (the combined nameplate capacity of the Davis-Besse and Sammis plants) of unforced capacity ("UCAP") and around-the-clock ("ATC") energy for the same eight-year period.[239] The capacity product included in the offer is the PJM Capacity Performance product.[240]

Through the Exelon Offer, which was approved by Exelon's Chief Executive Officer,[241] Exelon predicts that customers in Ohio will receive $2 billion more in credits under Rider RRS versus FES' "hedge" offer of $561 million in credits.[242] As Mr. Campbell testified:[243]

[redacted]

The Exelon Offer has other terms that beat FES' offer. Specifically, the Exelon Offer includes (1) a 100% carbon-free package of energy and capacity from nuclear, hydro, solar and wind assets in PJM; and (2) zero capacity performance risk for the Companies and their

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[238] Exelon Ex. 4 at 6.
[239] Exelon Ex. 4 at 6.
[240] *Id.*
[241] Tr. Vol. 38 at 8031.
[242] Exelon Ex. 5 at 6.
[243] *Id.* (emphasis added, footnotes omitted).

customers.[244] The Exelon Offer can be compared with the non-carbon free 2,100 MW of generation from the Sammis coal-fired facility and FES' 100 MW interest in the OVEC units.[245] More importantly, the Exelon Offer can be contrasted to the Stipulation's transfer of capacity performance penalties to customers – penalties that are not accounted for in the Companies' most recent forecast.[246]

C. A competitive bid by the Companies will provide the greatest value to customers.

At its core, the Exelon Offer shows that robust competition for any "hedge" that the Commission believes necessary for the Companies' ratepayers will result in the best offer. A competitive bid process will lead to the development of offers that may vary and allow the Companies to select the offer that is best for their customers. That could include terms covering the spread if the ATSI zone separates on pricing and product requirements. Other terms may not be necessary such as collateral requirements because the Companies are not procuring generation like the standard service auctions and the requiring output location to be in Ohio (especially as the Sammis and Davis-Besse plants are not closing).

The Commission should consider the need for a competitive bid process for an eight-year hedge. It can start that process by stripping out Rider RRS from the Stipulation, especially as Rider RRS is not a necessary component for general service to the Companies' ratepayers. The Companies can start the ESP as of June 1, 2016, allowing the standard service auctions to procure generation for non-shopping customers. At the same time, the Companies can develop a request for proposal (that is not one-sided in favor of FES) that merchant generators like Exelon and Dynegy can respond to with competitive offers. With a competitively bid offer in place and

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[244] Exelon Ex. 4 at 7.
[245] *Id.* at 5.
[246] Tr. Vol. 36 at 7674.

terms that ensure ratepayer protection, the Companies can reapply to the Commission for Rider RRS. Doing so will put the leverage where it belongs, with the customers who have not asked for a hedge but, in the aggregate, have load that can be bid out as a hedge.

XII. IF THE COMMISSION FINDS THAT AN ESP SHOULD BE APPROVED, THE FOLLOWING ELEMENTS OF THE COMPANIES' ESP IV SHOULD BE APPROVED.

A. Approve Rider NMB with Modifications.

Rider NMB is the direct recovery mechanism for PJM charges that are not hedgeable, predictable, or manageable by the CRES suppliers. The Companies have proposed to continue Rider NMB, but the specific list of charges includes categories that should not be part of Rider NMB.[247] Exelon witness Campbell testified that the following PJM line item charges should not be included in Rider NMB:

- Balancing Operating Reserves (PJM Line Items 1375, 1376, 1378, 2375, 2376, and 2378)
- Load Reconciliation (PJM Line Item 1450)
- Planning Period Congestion Uplift (PJM Line Items 1218 and 2218).

B. Approve the Master SSO Supply Agreement with Modifications.

Upon reviewing the Companies' proposed Master SSO Supply Agreement ("MSA"), Exelon witness Campbell testified that several revisions were found to be necessary. They are listed below:

(1) There is a risk to the wholesale suppliers competing in the auction process that legislative or regulatory efforts may result in a change in law during the ESP IV term that results in PIPP customers being removed from SSO load. Additional language in the MSA, such as a change in law provision, can address the risk to

[247] Exelon Ex. 1 at 27.

SSO suppliers of a legislative action that would result in PIPP customers being removed from SSO supply.[248] Without such a provision, this regulatory risk will likely be priced into wholesale supplier bids, potentially resulting in a higher SSO auction clearing price.

(2) The Companies deleted the following credit terms from the definitions in the MSA: "Independent Credit Requirement or ICR", "Independent Credit Threshold or ICT", "ICR Collateral", "ICRT", and "ICT Guaranty."[249] However, those same terms are still found within the body of the MSA and should be removed from the MSA to ensure consistency and avoid confusion.

(3) The definition of "FE Ohio Aggregate" in the MSA should be updated to include the specific price node identifiers ("PNode IDs").[250] Inclusion of the specific PNode IDs in the MSA will resolve any ambiguity or confusion regarding the settlement and pricing of transactions associated with serving SSO customers.

(4) The PJM Declaration of Authority found in Appendix F to the proposed MSA is different from the form PJM currently requires suppliers to execute.[251] Appendix F of the MSA should be updated to reflect the long-form Declaration of Authority currently used by PJM.

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[248] Exelon witness Campbell recommended the following language: "At the time of execution of this Agreement, Percentage of Income Payment Plan ("PIPP") customers are included in the SSO Load served by SSO Suppliers. If, during the Delivery Period, PIPP Customers are no longer included in the SSO Load served by SSO Suppliers due to a change in applicable law, order, rule, or regulation, the Companies shall provide Supplier with as much advanced written notice as possible of the loss of such PIPP Customers, such notice to include the Companies' reasonable estimate of the amount of load associated with such PIPP Customers, such estimate to constitute the 'Load Shortfall.' Supplier shall calculate its expected costs, gains and losses reasonably attributable to the Load Shortfall. Supplier shall provide a copy of such calculation to the Companies within [__] Business Days of receiving notice from the Companies regarding the Load Shortfall. If Seller's losses and costs associated with the Load Shortfall exceed Seller's gains, the Companies shall pay the amount of such excess to Supplier as part of next monthly invoice." Exelon Ex. 1 at 30.

[249] Attachment EBS-1 to the Direct Testimony of Edward Stein (MSA), Article I, pg. 6.

[250] Attachment EBS-1 to the Direct Testimony of Edward Stein (MSA), Article I, pg. 5.

[251] Attachment EBS-1 to the Direct Testimony of Edward Stein (MSA), Appendix F.

(5) The definition of "Settlement Amount"[252] should be revised to delete the "notional quantity language". Exelon recommends the following specific change to the definition:

> "Settlement Amount" means the net amount of the Losses or Gains, and Costs, expressed in U.S. Dollars, which the Non-Defaulting Party incurs as a result of Early Termination, calculated from the Early Termination Date through the end of the Original Delivery Period. For purposes of calculating the Settlement Amount, the quantity of Energy (and other components of SSO Supply) provided for under this Agreement for the period following the Early Termination Date through the remainder of the Original Delivery Period will be determined by the Non-Defaulting Party in a commercially reasonable manner reflecting estimated SSO Load for un-switched customers as of the Early Termination Date based on the then most recent load switching report filed by the Companies with the PUCO as of the Early Termination Date ~~will be deemed to be those quantities that were delivered on an hourly basis, or would have been delivered on an hourly basis had this Agreement been in effect, during the previous calendar year, adjusted for any SSO Load changes as may have occurred since the previous calendar year as determined by the Companies~~. The calculation of Settlement Amount with respect to an Early Termination shall exclude Default Damages calculated pursuant to Section 5.2(b).

Mr. Campbell noted that this recommended language has been approved by the Commission for Duke Ohio and that in other agreements in other states.[253] He added that this notional quantity language can have the effect of making the MSA unassignable for any supplier that has designated the MSA as a normal purchase and sale. The ability to assign the MSAs reassures suppliers that they will be able to appropriately manage their obligations and their participation in the

[252] Attachment EBS-1 to the Direct Testimony of Edward Stein (MSA), Article I, pg. 9.
[253] Exelon Ex. 1 at 31-33.

competitive bidding process.[254] Deleting this language from the MSA could make the bidding process more robust by attracting more wholesale suppliers.

C. There should be no differences between the data posted by the Companies on their website and that data provided to PJM.

The load data that the Companies submit to PJM each day does not reflect the actual daily aggregate PLC for the zone based on customers moving in and out of the zone.[255] However, the data that the Companies post on their website is the actual daily aggregate PLC for the zone based on customers moving in and out of the zone. Consistency in the information is necessary and the Companies should provide to PJM daily information that reflects actual daily aggregate PLC for the zone based on customers moving into and out of the zone.

D. Approve the proposed SSO competitive bidding process for the ESP IV, including the percentage of income payment plan load.

As part of the Companies' ESP IV, they have proposed to conduct competitive bids for the procurement of generation for the SSO load.[256] Exelon has reviewed the Companies' proposal and Mr. Campbell noted that the proposed competitive SSO procurement process is improved with the percentage of income payment plan ("PIPP") load included as part of the auctions (rather than being privately place).[257] The Commission should adopt the competitive bidding process in the Companies' ESP IV for the SSO auctions, and the inclusion of the PIPP load therein.

XIII. CONCLUSION

The Companies' Rider RRS proposal is a 180-degree about-face on the progress Ohio has made for its competitive markets and its ratepayers should not be forced to take on all of the risks associated with generation from the Davis-Besse, Sammis and OVEC plants from June 2016

[254] Exelon Ex. 1 at 34-35.
[255] Exelon Ex. 1 at 37-38.
[256] Companies Ex. 1 at 6-8; Companies Ex. 12.
[257] Exelon Ex. 1 at 22.

through May 2024. The Companies have not demonstrated and cannot demonstrate that the Rider RRS is a just and reasonable rider or in the public interest. The Companies have not demonstrated that Rider RRS will have the effect of stabilizing the ratepayers' rates or that all of the Commission's *AEP ESP III* factors have been met. Additionally, there are numerous reasons why Rider RRS does not comply with the law. Also, a review of the Stipulation demonstrates that it is not the product of serious bargaining, is not reasonable, and is not in the public interest. For all of the foregoing reasons, the Commission should reject the Companies' proposed Rider RRS and the Stipulation. In the event that the Commission finds that Rider RRS is in the public interest, the Commission should require the Companies to hold a competitive bid process to enter into a real PPA for inclusion in Rider RRS.

As to the other components of the ESP IV, the Commission should (a) adopt the proposed competitive bidding process for the SSO auctions, (a) approve Rider NMB without the nine PJM line items identified by Exelon, (c) incorporate the modifications suggested by Exelon for the MSA and (d) require the Companies to provide to PJM daily information that reflects *actual* daily aggregate PLC for the zone based on customers moving into and out of the zone.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

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