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 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
OFFICE OF THE OHIO CONSUMERS' COUNSEL
AND
NORTHWEST OHIO AGGREGATION COALITION (AND ITS INDIVIDUAL COMMUNITIES),
VILLAGE OF HOLLAND
LAKE TOWNSHIP BOARD OF TRUSTEES
LUCAS COUNTY BOARD OF COMMISSIONERS
CITY OF MAUMEE
CITY OF NORTHWOOD
VILLAGE OF OTTAWA HILLS
CITY OF PERRYSBURG
CITY OF SYLVANIA
CITY OF TOLEDO
VILLAGE OF WATERVILLE

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INITIAL BRIEF OF OFFICE OF THE OHIO CONSUMERS' COUNSEL AND NORTHWEST OHIO AGGREGATION COALITION (AND ITS INDIVIDUAL COMMUNITIES)

In a radical reversal of Ohio's progress toward electric markets, FirstEnergy[1] ("FirstEnergy" or "Utilities") offers up a settlement that could add $800 (or much more) to 1.9 million Ohioans' electric bills to subsidize aging deregulated power plants. And as testament to what is possible using other people's money, this subsidy charge is just one settlement term among others that would cost hard-working Ohioans dearly.

PUCO Staff Witness Choueiki testified previously that " * * * Staff does not see a need for granting a PPA rider that is tied to electric generation. …It took over a decade for the Commission to transition the four Ohio EDUs to a fully competitive retail electricity market. Granting a PPA rider is a move in the opposite direction."[2]

It gets worse for Ohioans. There is the testimony of the PJM Independent Market Monitor. He warned of his intention to prevent subsidized FirstEnergy power from

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[1] FirstEnergy refers to Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company.

[2] Proffer Tr. Vol. III at 6118 -6122 (October 16, 2015), Proffer OCC Ex. 30 the testimony of Dr. Hisham Choueiki in Case No. 14-841-EL-SSO and OCC Ex. 31 the testimony of Dr. Hisham Choueiki in Case No. 13-2385 See also, AEP Ohio ESP III, Case No. 13-2385-EL-SSO, Prefiled Testimony of Staff Witness Choueiki at 9 (May 20, 2014).

harming the nation's competitive electric markets. If the Market Monitor succeeds, Ohioans could bear charges much greater than $800 each, because FirstEnergy's power plants might not clear in the market. And without clearing, the power plants would not receive revenue to offset the fixed and variable plant costs. Under that scenario (where the plants do not clear) consumers would pay much more in subsidies.[3]

I. INTRODUCTION

The Office of the Ohio Consumers' Counsel ("OCC"), on behalf of residential utility customers, and the Northwest Ohio Aggregation Coalition ("NOAC") submit their initial brief. In this proceeding, Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company (collectively, "FirstEnergy," or "Utilities") seek approval of their fourth electric security plan ("ESP"). The Utilities have presented a settlement[4] that is even worse for consumers than the ESP in their Application.

The Stipulating Parties[5] have asked the PUCO to approve the contested Stipulation (settlement),[6] and the ESP as modified by the contested Stipulation.

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[3] *See* IMM Ex. 2 at 6 (Bowring Supplemental).

[4] FirstEnergy Ex. 154 (Third Supplemental Stipulation) (December 1, 2015).

[5] The Stipulating Parties include Ohio Edison Company, the Toledo Edison Company, The Cleveland Electric Illuminating Company, the City of Akron, Cleveland Housing Network, Consumer Protection Association, Council for Economic Opportunities in Greater Cleveland, Citizens Coalition, Ohio Energy Group, the Ohio Power Company, Council of Smaller Enterprises, EnerNOC, Inc., NUCOR Steel Marion, Inc., Material Sciences Corporation, Association of Independent Colleges and Universities of Ohio, the Kroger Company, and International Brotherhood of Electrical Workers Local 245, The PUCO Staff and Interstate Gas Supply. IEU-Ohio notified the PUCO that it does not oppose the Third Supplemental Stipulation.

[6] An initial Stipulation was filed on December 22, 2014. Subsequently, on May 28, 2015 a Supplemental Stipulation was filed. On June 4, 2015, a Second Supplemental Stipulation was filed. OCC will refer to all three stipulations as "the contested Stipulation."

This case originated when FirstEnergy filed an Application on August 4, 2014, that turned retail competition in Ohio on its head. The Application included a power purchase agreement ("PPA"). The Utilities negotiated a Stipulation and two Supplemental Stipulations none of which altered in any respect the PPA provisions in the Application.

The PPA included a proposed (an inaptly named) Retail Rate Stability ("RRS") Rider. The Utilities seek to charge all retail customers for profit and costs related to certain deregulated power plants through this non-bypassable rider. These plants are Davis-Besse, Sammis and a portion of OVEC. Davis-Besse is a 900 MW nuclear-powered plant at Oak Harbor, Ohio. W.H. Sammis is a 2,233 MW coal-fired power plant at Stratton, Ohio. OVEC owns two coal-fired power plants: the 1,086 MW Kyger Creek Plant at Cheshire, Ohio and the 1,304 MW Clifty Creek Plant near Madison, Indiana of which FES has a 4.85% entitlement.[7] ("Plants" or "PPA Units")

FirstEnergy does not propose to use the output of the Plants and OVEC to serve the consumption of non-shopping customers who remain under the Standard Service Offer ("SSO"). Instead, FirstEnergy plans to offer the Plants and FES's share of OVEC capacity and energy in the PJM-operated markets. Under the proposed Rider RRS, FirstEnergy would collect from all customers, on a non-bypassable basis, the cost of purchasing the capacity, energy, ancillary services, and environmental attributes of the Plants and FES's portion of OVEC. These charges would be net of the energy, ancillary service, and capacity market revenues earned from selling the Plants' and FES's share of OVEC's output in the PJM-operated markets. Thus, Rider RRS could increase or

[7] OCC/NOPEC Ex. 1 at 5-6 (Sioshansi Direct).

decrease customers' bills, depending upon whether the Plants' and OVEC's costs turn out to be greater or less than the associated market revenues.[8] Unfortunately, the PPA charges can be expected to disfavor customers, meaning customers will pay, and pay a lot, to FirstEnergy.

Between August 31 and October 29, 2015, the PUCO conducted 35 days of evidentiary hearings resulting in 7,400 pages of hearing transcript amassing a substantial record before sending parties off to write their briefs.

Several weeks later, ironically during the week of Thanksgiving, a settlement concocted in private between the Utilities and the PUCO Staff first saw the light of day. After a very short holiday week negotiation session, the Third Supplemental Stipulation was filed on December 1, 2015. Unfortunately for a couple million Ohioans, the cornerstone of the Utilities' original Application, the PPA, resurfaced from the negotiations with minimal improvements. The PPA changes were:

1. The PPA term was reduced from 15 years to eight years.

2. The profit or return on equity ("ROE") that consumers will pay in the PPA, was reduced from 11.15% to 10.38 %.

3. A maximum of $100 million of *potential* credits, to flow through the PPA, was made available to consumers in years five through eight.

The Stipulating Parties have asked the PUCO to approve the contested Third Supplemental Stipulation, and the as-filed ESP as modified by the contested Stipulation. The case was reset for an additional evidentiary hearing beginning January 14, 2016, and concluded on January 21, 2016. The Attorney Examiner then set the briefing schedule

[8] OCC/NOPEC Ex. 1 at 6 (Sioshansi Direct).

with Initial Briefs being due on January 12 (later extended to January 16) and Reply Briefs to be due on February 19, 2016 (later extended to February 26).[9]

OCC and NOAC hereby submit this Joint Initial Brief.

II. EXECUTIVE SUMMARY

OCC/NOPEC Witness Kahal testified that the concept of an ESP has outlived any purpose it may have served for customer protection (if it ever did protect customers) under Senate Bill 221 ("S.B. 221).[10] The PUCO is not required to approve an electric security plan. An ESP operates now as a circumvention of both the market pricing intended in 1999 under Senate Bill 3 ("S.B. 3") and the regulation of monopoly distribution service that otherwise would occur under R.C. Chapter 4909. And, an ESP is not needed to provide the benefits of competitive pricing to consumers. Under Ohio law, the standard service offer (based upon wholesale auctions) can be accomplished through the market-rate offer under the 2008 law, as the Utilities themselves acknowledge.

In this regard, former PUCO Chairman Snitchler proposed eliminating the electric security plan as soon as 2015:

> The fundamental, structural changes that have occurred since 2011, including resolving generation ownership and corporate separation of all investor owned utilities, eliminates the need for the ESP or MRO filing…. For these reasons, the requirement that such filings be made should be eliminated from the statute starting in 2015 or at the time 100% of the Standard Service Offer (SSO) load is secured at wholesale auction.[11]

[9] Entry at 2 (February 12, 2016).

[10] OCC/NOPEC Ex. 7 at 13 (Kahal Direct).

[11] *In the Matter of the Commission's Investigation of Ohio's Retail Electric Service Market,* Case No. 12-3151-EL-COI, Concurring Opinion at 3 (Mar. 26, 2014).

Generation and distribution service for FirstEnergy have been corporately separated. And 100% of the SSO load has been, and will be, supplied through a wholesale auction. The use of and structure of the wholesale auctions are not in dispute in this case. Now is the time to utilize a market-rate offer, and reject the harmful and unnecessary features of an ESP for Ohioans.

The PUCO can modify the Utilities' proposed plan, changing it into a market-rate offer instead of an ESP, under R.C. 4928.143(C)(1). Modifications to the Utilities' plan should include restructuring the plan so that the SSO is provided to Ohioans through a market-rate offer with all features of the proposed ESP rejected (other than the wholesale auctions). Under a market-rate offer, much of the added costs that customers are being asked to pay, including the PPA net charge and the distribution rider charges, would be eliminated, as would be eliminated the deal-making with other people's (Ohioans) money that has added to the harm to consumers. This would provide customers bill savings and would fully address reliability and customer service needs. And it is consistent with the fact that the Utilities are offering an SSO through an approved competitive bid process, as envisioned under a market-rate offer.

Further, the PUCO should review the Stipulation without the use of the three-prong test for evaluating settlements. There are several reasons for this recommendation, which are addressed later in this brief. In sum, the three-part test yields unjust and unreasonable results for consumers because of the unequal bargaining power that, as former Commissioner Roberto wrote, is built into the ESP process. Further, the hodgepodge of unrelated terms in the Stipulation should not be considered a "package" under the three-prong test for purposes of evaluating the settlement because there is no nexus to the core of the Utilities' Application (the PPA). Indeed, such terms should be assessed on their own in separate PUCO proceedings.

In any event, the PUCO should reject the settlement even if it uses the three-prong test. The PPA is a violation of the deregulatory principles upon which Ohio's electric policy is founded for serving Ohio consumers. The PPA is projected by OCC/NOPEC's expert to be outrageously expensive for Ohioans, so it harms consumers and disserves the public interest.

The Utilities' proposed ESP also violated the statutory test for electric security plans. Under the law, an ESP cannot be adopted unless it is more favorable in the aggregate than a market-rate offer. But this ESP is not more favorable in the aggregate than serving consumers under a market-rate offer.

Further, the PPA fails to meet the factors for PPA's that the PUCO described in the AEP ESP III order.[12] The Utilities' PPA proposal should be rejected by the PUCO under those factors. In this regard, the four factors should be supplemented with other factors, as we describe in this brief, because the PUCO's four factors are not sufficiently focused on consumer protection.

The PUCO should instruct the Utility to file a market-rate offer, without a PPA, to replace its existing ESP. The market-rate offer should begin when the ESP expires on May 31, 2016.

[12] See *In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to § 4928.143, Rev. Code, in the Form of an Electric Security Plan*, Opinion and Order at 25-26, PUCO Case No. 13-2385-EL-SSO (February 25, 2015) ("AEP ESP III Order").

III. STANDARD OF REVIEW

As stated, the PUCO should modify the proposed electric security plan into a market-rate offer. The market-rate offer would serve the public interest and promote the policies of the state. It would dispense with the Utilities' use of financial inducements (e.g., cash and cash equivalents) to acquire support for its settlement proposals. And the market-rate offer would end the Utilities' lean on government to layer regulatory charges on top of market prices.

The standard of review for ESP cases is found in R.C. 4928.143(C)(1), which states in pertinent part:

> [T]he commission by order shall approve or modify and approve an application filed under division (A) of this section if it finds that the electric security plan so approved, including its pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, is more favorable in the aggregate as compared to the expected results that would otherwise apply under section 4928.142 of the Revised Code. Additionally, if the commission so approves an application that contains a surcharge under division (B)(2)(b) or (c) of this section, the commission shall ensure that the benefits derived for any purpose for which the surcharge is established are reserved and made available to those that bear the surcharge. Otherwise, the commission by order shall disapprove the application.

In order to determine whether an ESP passes this statutory test, the PUCO must individually examine each provision of the ESP, in light of the 14 policy objectives of R.C. 4928.02. The Commission has held that an electric utility should be deemed to have met the "more favorable in the aggregate" standard "only to the extent that the electric utility's proposed MRO is consistent with the policies set forth in section 4928.02, Revised Code."[13] And, the PUCO must ensure that every public utility furnishes necessary and adequate service and facilities, and that all charges for any service must be just and reasonable. R.C. 4905.22.

The PUCO has authority to modify the Utilities' proposed ESP under R.C. 4928.143. Indeed the PUCO has expressly ruled that its authority to modify a utility's ESP is not dependent upon its finding that the ESP is not more favorable than the expected results of an MRO.[14] Rather the PUCO aptly described its statutory authority as including the authority to make modifications to the ESP that are supported by the record in the case.[15]

Also, this case contains a settlement. The standard of review for considering a settlement has been discussed in a number of PUCO cases and by the Ohio Supreme Court ("Court"). As the Ohio Supreme Court stated in *Duff v. Pub. Util. Comm.*[16] a stipulation is merely a recommendation that is not legally binding upon the Commission. The Commission "may take the stipulation into consideration, but must determine what is just and reasonable from the evidence presented at the hearing." *Id.*

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[13] *In the Matter of the Application of Ohio Edison Companies, the Cleveland Electric Illuminating Companies, and the Toledo Edison Companies for Approval of a Market Rate Offer to Conduct a Competitive Bidding Process for Standard Service Offer Electric Generation Supply, Accounting Modifications Associated with Reconciliation Mechanism, and Tariffs for Generation Service*, Case No. 08-936-EL-SSO, Opinion and Order at 14 (Nov. 25, 2008); see also *In the Matter of the Application of Ohio Edison Companies, the Cleveland Electric Illuminating Companies, and the Toledo Edison Companies for Authority to Establish a Standard Service offer Pursuant to Section 4928.143, Revised Code in the Form of an Electric Security Plan,* Case No. 08-935-EL-SSO, Opinion and Order at 12 (Dec. 19, 2008)(finding that in determining whether the ESP meets the requirements of R.C. 4928.143, the Commission takes into consideration the policy provisions of R.C. 4928.02).

[14] *In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets*, Case No. 08-917-EL-SSO, Opinion and Order at 72 (Mar. 18, 2009).

[15] Id.

[16] *Duff v. Pub. Util. Comm*. (1978), 56 Ohio St.2d 367; see also Ohio Adm. Code 4901-1-30.

The Court in *Consumers' Counsel v. Pub. Util. Com.*[17] considered whether a just and reasonable result was achieved with reference to criteria adopted by the PUCO in evaluating settlements:

> 1. Is the settlement a product of serious bargaining among capable, knowledgeable parties, where there is diversity of interests among the stipulating 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 settlement, being a hodgepodge of unrelated terms, should disqualify it from being considered as a "package" under the second and third prongs of the PUCO's settlement test.[18] For treatment as a package, a settlement should have terms that, in the context of an application, have a sufficient nexus between each other and can be lawfully and reasonably considered in the case as filed.[19] Terms that are merely inducements to join the settlement lack a reasonable nexus to the subject of the case, the PPA, and are therefore not a package. In a case allegedly about "hedging" electric generation costs, there is no nexus to the various terms and issues that have shown up for the first time at case-end in a settlement--other than that the terms induced others to sign.

Moreover, in evaluating settlements in electric security plans, the PUCO should recognize the asymmetrical bargaining positions of the parties—where the Utilities have

[17] *Consumers' Counsel v. Pub. Util. Comm.*. (1992), 64 Ohio St.3d 123, 126.

[18] OCC/NOPEC Ex. 11 at 6-10 (Kahal Second Supplemental).

[19] In re *Duke SmartGrid Case*, Case No. 14-1051-GE-RDR, (The PUCO ruled that issues which are "not contained within the intended subject matter" of the utility's application, are the subject matter of other ongoing PUCO proceedings, and contemplate programs which are, thus far, not in existence or in operation are not relevant with regard to the consideration of the utility's application and should not be considered for purposes of the three-prong test.)

a superior bargaining position because they can reject the PUCO's order under the 2008 law. The problems of unequal bargaining power are discussed in Commissioner Roberto's dissent in the PUCO's Order in FirstEnergy's initial electric security plan filed in 2008.[20]

IV. BURDEN OF PROOF

R.C. 4928.143(C)(1) provides that the "burden of proof in the [ESP] proceeding shall be on the electric utility." That burden refers to not only proving the ESP meets the statutory test, but also extends to proving that the provisions in the ESP have a basis in law under R.C. 4928.143(B)(2)(b). And in this proceeding, where a contested Stipulation is offered that modifies the initially-proposed ESP, the burden of proof is on the Utilities to show that the contested Stipulation meets the three-prong test.

V. RECOMMENDATIONS

A. The core responsibility of FERC, not the PUCO, is to protect consumers by overseeing the nation's wholesale electric markets; the PUCO is without jurisdiction under federal law and state law to approve the PPA Rider.

1. It is necessary and appropriate for the PUCO to decide if it has jurisdiction in the first instance.

The PUCO is an administrative agency with the power to determine its own jurisdiction.[21] It has recognized that before addressing the merits of a case, it must first

[20] *In re FirstEnergy's 2008 ESP Case*, Case No. 08-935-EL-SSO, Second Opinion and Order, Opinion of Commissioner Cheryl L. Roberto Concurring in Part and Dissenting in Part (Mar. 25, 2009) at 1-2 (citations omitted).

[21] *See, e.g., In the Matter of the Complaint of Mentor Trailer Park, Inc.*, 1985 Ohio PUC Lexis 574, 14 (PUCO Case No. 84-757-WW-CSS).

determine the extent of its jurisdiction, if any.[22] It has also recognized that it will not address the merits of a case, even after hearing, where further review of jurisdictional issues leads to a finding of no jurisdiction.[23] As the Ohio Supreme Court has explained, it is "necessary and appropriate" for the PUCO to consider germane law to decide its own jurisdiction in the first instance.[24] Upon such consideration here, the PUCO can come to but one conclusion: It lacks jurisdiction.[25]

2. FERC has exclusive jurisdiction over wholesale energy transactions as a matter of federal law.

The PUCO's jurisdiction over FirstEnergy's proposed PPA Rider is field and conflict preempted under the Federal Power Act ("FPA").[26] The FPA vests FERC with exclusive jurisdiction over the "transmission of electric energy in interstate commerce" and the "sale of electric energy at wholesale in interstate commerce."[27] Under the FPA, a wholesale sale is simply a sale for resale.[28] Rather than directly setting rates, FERC has

[22] *See, e.g., In the Matter of the Commission Investigation into the Operations and Service of Lake Erie Utilities Company*, 1988 Ohio PUC Lexis 958, 4 (PUCO Case No. 86-1561-WS-COI).

[23] *See, e.g., In the Matter of the Complaint of Chatham v. Lakeside Utilities Corp.*, 1984 Ohio PUC Lexis 458, 17-18 (PUCO Case No. 83-413-WS-CSS).

[24] *See In re Complaint of Residents of Struthers*, 45 Ohio St. 3d 227, 231 (1989). Stated differently in an analogous context, when trial courts' subject matter jurisdiction is challenged by way of a motion under Ohio Civil Rule 12(B)(1), appellate courts have explained that "the trial court *must decide* whether the plaintiff has alleged any cause of action which the court has the authority to decide." *Westside Cellular v. Northern Ohio Cellular Tel. Co.*, 100 Ohio App. 3d 768, 770 (Cuyahoga 1995) (italics added).

[25] To date, the PUCO has deferred ruling on the preemption issue.

[26] 16 U.S.C. 824d (2006).

[27] 16 U.S.C. 824(b)(1); *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966 (1986); *see also PPL EnergyPlus, LLC v. Solomon*, 766 F.3d 241, 251 (3rd Cir. 2014) ("the wholesale price for capacity . . . is squarely, and indeed exclusively, within FERC's jurisdiction.") (citation omitted).

[28] 16 U.S.C. 824(d).

chosen to achieve its regulatory aims by "protecting the integrity of interstate markets."[29] To do so, FERC has authorized the creation of regional transmission organizations to oversee certain multistate markets – including PJM.[30] PJM operates energy and capacity markets.[31] Both markets "are designed to efficiently allocate supply and demand, a function which has the collateral benefit of incenting the construction of new power plants when necessary[]" via price signals.[32] They represent "a comprehensive program of regulation that is quite sensitive to external tampering."[33]

a. Field preemption under the Federal Power Act.

Field preemption occurs when "Congress has legislated comprehensively to occupy an entire field of regulation, leaving no room for the States to supplement federal law."[34] Actual conflict between a state enactment and federal law is not necessary to a finding of field preemption – "it is the mere fact of intrusion that offends the Supremacy Clause."[35] "A wealth of case law confirms FERC's exclusive power to regulate wholesale sales of energy in interstate commerce, . . ."[36] The FPA "leaves no room either for direct state regulation of the prices of interstate wholesales of [energy], or for state regulations which would indirectly achieve the same result."[37] States cannot "rely on mere formal distinction in 'an

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[29] *PPL EnergyPlus, LLC v. Nazarian*, 753 F.3d 467, 472 (4th Cir. 2014); *see also Solomon*, 766 F.3d at 248 ("FERC favors using market mechanisms to produce competitive rates for interstate sales and transmissions of energy.")

[30] *Nazarian*, 753 F.3d at 472.

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.* at 474.

[35] *Id.*

[36] *Id.* at 475 (citations omitted).

[37] *Id.* (citation omitted).

attempt' to evade preemption and 'regulate matters within FERC's exclusive jurisdiction.'"[38]

Accordingly, a state program under which a participant in the PJM markets receives a fixed sum for every unit of capacity and energy that it clears, *even if the state program does not fix the rate paid by PJM to the market participant*, is preempted.[39] So is a state program under which a PJM market participant receives the rate paid by PJM to the market participant plus an additional amount.[40] "The fact that [a state program] does not formally upset the terms of a federal transaction is no defense, since the functional results are precisely the same."[41] Nor is a state program saved where it incorporates, rather than repudiates, PJM clearing prices.[42]

b. Conflict preemption under the Federal Power Act.

Conflict preemption applies "where under the circumstances of a particular case, the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[43] A state program that has the potential to distort PJM auction price signals has been held conflict preempted.[44]

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[38] *Id.* at 476.

[39] *See id.* at 476-77.

[40] *See Solomon*, 766 F.3d at 252.

[41] *Nazarain*, 753 F.3d at 477. Importantly, whether a state program functionally sets the price received by the PJM market participant for energy and capacity at a just and reasonable rate is immaterial to the preemption analysis. *Solomon*, 766 F.3d at 253.

[42] *Solomon*, 766 F.3d at 254.

[43] *Nazarian*, 753 F.3d at 478 (citation omitted).

[44] *Id.* at 478-79.

3. The PUCO's jurisdiction is field preempted because, under the PPA Rider, the PJM market participant (FirstEnergy) would receive a fixed sum for energy and capacity sold on the PJM markets.

Under FirstEnergy's proposal, the proposed sale from FirstEnergy into the PJM markets is a wholesale transaction.[45] That transaction would be revenue neutral to FirstEnergy.[46] This results from how the PPA Rider will function. When the revenues accruing to FirstEnergy from the sale of PPA entitlements into the PJM markets exceed all costs associated with the PPA, FirstEnergy will credit customers the difference through the PPA Rider.[47] When the revenues accruing to FirstEnergy resulting from the sale of PPA entitlements into the PJM markets are less than all costs associated with the PPA, FirstEnergy will charge customers the difference through the PPA Rider.[48]

Accordingly, the revenues received by FirstEnergy from the sale of the capacity, energy, and ancillary services associated with both the Affiliate PPA and the OVEC entitlements combined with the net PPA Rider credit or charge will equal FirstEnergy's expenses associated with the Affiliate PPA and OVEC entitlements.[49] In short, FirstEnergy's proposal would fix the amount received by the PJM market participant – FirstEnergy – for the wholesale transaction[50] – sale of energy, capacity, and ancillary services into the PJM markets – at the contract price for the PPAs.

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[45] *See* Tr. Vol I at 37 (Mikkelsen).

[46] *See* Tr. XVIII at 3640 (Savage) (stating that the Proposed Transaction would be "financially neutral").

[47] *See* Tr. XVII at 3642 (Savage).

[48] *See* Tr. XVIII at 3640 (Savage) ("The costs in the proposed transaction would be the projected costs that are included as that part of the rider calculation.").

[49] *See* Tr. XVIII at 3640 (Savage).

[50] Tr. Vol. XXX at 6294 (Choueiki).

The annual (or quarterly, if the Joint Stipulation is approved) adjustment process[51] proposed by FirstEnergy confirms this. If there was a deviation regarding projected energy revenues from actual energy revenues that would be adjusted in the Rider RRS's over- or under-recovery mechanism.[52] If there were a deviation in the amount of capacity revenues realized from the market, that would be adjusted in the Rider RRS's over- or under-recovery mechanism.[53] If there were a deviation in energy charges, for whatever reason, that would be adjusted in the Rider RRS's over- or under-recovery mechanism.[54] Any deviation between forecasted and actual debt rate, equity rate, tax rates, depreciation rates, operation and maintenance expenses, and "other charges" would be adjusted in the Rider RRS's over- or under-recovery mechanism.[55]

There is no dispute but that FirstEnergy's proposed sale of the capacity, energy, and ancillary services in the PJM markets is a wholesale transaction. That sale is under federal jurisdiction as a matter of law.[56] The amount received by FirstEnergy, the PJM market participant, for the sale is revenue neutral to FirstEnergy. There is one and only one way that the sale could be revenue neutral – if the amount received by FirstEnergy for the sale is fixed at the costs of the sale. As FirstEnergy itself has explained, that is exactly how the credit/charge of the Rider RRS, and the Rider RRS's adjustment mechanism, will work. Because FirstEnergy's proposal will fix the amount it receives for capacity, energy, and

[51] *See* FirstEnergy Ex. 43 at 4 (Savage Direct).

[52] *See* FirstEnergy Ex. 43 at 3 (Savage Direct).

[53] *See* FirstEnergy Ex. 43 at 3-4 (Savage Direct).

[54] *See* FirstEnergy Ex. 43 at 3-4 (Savage Direct).

[55] *See* Tr. XI at 2334-2335(Moul).

[56] *See* VA2, *supra.*

ancillary services wholesaled on the PJM markets, its proposals are field preempted by federal law. The PUCO should therefore dismiss this case.

4. The PUCO's jurisdiction is conflict preempted because FirstEnergy's proposal would distort PJM's auction price signals.

The PPA Units currently operate in a competitive market.[57] They do so as a result of S.B. 3 and S.B. 221.[58] In a competitive market, there is no predictable source of revenue.[59] In point of fact, inherent in a competitive market is that there are *no* predictable sources of revenue.[60] But under FirstEnergy's proposal, the PPA Units will have a predictable (guaranteed) source of revenue.[61] And they will have a predictable return on equity (profit) for their entire useful lives (or, if the Joint Stipulation is approved, eight and a half years) – that which is defined in the PPAs.[62]

FirstEnergy's proposal would directly subsidize the operating and capital costs of the PPA Units and FES's entitlement to OVEC.[63] As OCC witness Sioshansi states, such a circumstance is improper "in a competitive wholesale market, such as those operated by PJM, because the market is intended to provide revenues for economically efficient assets to recover their costs."[64] If FES' subsidized generators are allowed to participate in a wholesale

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[57] *See* Ohio Senate Bill 3, as passed by the 123rd General Assembly, 1999.

[58] *See id.*

[59] *See id.;* OCC Ex. 25 at 12; FirstEnergy Ex. 29 at 2-5.

[60] *See id.*

[61] *See* OCC/NOPEC Ex. 25 at 14-16 (Sioshansi Direct).

[62] *See* OCC/NOPEC Ex. 25 at 14-16 (Sioshansi Direct).

[63] *See* OCC/NOPEC Ex. 25 at 4 (Sioshansi Direct).

[64] OCC/NOPEC Ex. 25 at 4 (Sioshansi Direct).

market against unsubsidized assets it will destroy the short- and long-run efficiency benefits of the price signals provided by the market."[65] OCC witness Sioshansi also states :

> By fully subsidizing the operating and capital costs of the Plants and OVEC (in addition to the guaranteed profit), the Program eliminates any incentives that the PJM-operated wholesale markets create to reduce operating and capital costs of the Plants and OVEC. This means that for the cost of supplying customers' energy and capacity needs using the Plants and OVEC may be higher than they otherwise would without the subsidy in place.[66]

"The proposed PPA Rider would constitute a subsidy analogous to the subsidies previously proposed in New Jersey and Maryland, both of which were found to be inconsistent with competition in the wholesale power markets."[67] Generation sold into PJM that is insulated from the competitive forces that all other generation faces inherently distorts PJM's auction price signals.[68] FirstEnergy's proposals are therefore conflict preempted by federal law. The PUCO should therefore dismiss this case.

5. The PUCO also lacks jurisdiction under state law.

As another threshold matter, the PUCO must determine if it has subject matter jurisdiction here under *state* law.[69] To do so, it must determine if such jurisdiction is expressly granted by statute. The PUCO has and can exercise only the authority conferred upon it by the General Assembly.[70] If the PUCO were to approve the PPA Rider, it would supplement the PJM wholesale auction clearing price and functionally set

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[65] OCC/NOPEC Ex. 25 at 4 (Sioshansi Direct).

[66] OCC/NOPEC Ex. 25 at 4-5 (Sioshansi Direct).

[67] IMM Ex. 1 at 3 (Bowring Supplemental).

[68] Id. at 4.

[69] *Ohio Edison Co. v. Pub. Util. Comm*., 52 Ohio St.2d 123 (1977).

[70] *Columbus S. Power Co. v. Pub. Util. Comm.*, 67 Ohio St. 3d 535 (1993); *Pike Natural Gas Co. v. Pub. Util. Comm.*, 68 Ohio St. 2d 181 (1981); *Consumers' Counsel v. Pub. Util. Comm.*, 67 Ohio St. 2d 153 (1981); *Dayton Communications Corp. v. Pub. Util. Comm.*, 64 Ohio St. 2d 302 (1980).

the "wholesale" prices for the PPA Units. Because R.C. Title 49 limits the PUCO's subject matter jurisdiction to "retail" electric service, the Amended Application/Modified Amended Application must be denied because the PUCO lacks jurisdiction to set wholesale prices.

Further, the Ohio General Assembly intended for it, and it alone, to make any adjustments to the competitive environment established by S.B. 3 as and when necessary. If the PUCO were to approve the PPA Rider, it would fundamentally change the competitive environment established by S.B. 3 to the detriment of Ohio's consumers. As a creature of statute with limited and defined powers, the PUCO cannot do so by way of an Order.

As stated above, wholesale electricity compensation is within the exclusive jurisdiction of FERC. Accordingly, the Commission lacks subject matter jurisdiction over Rider RRS. Lacking subject matter jurisdiction over Rider RRS, a Commission order approving it will be *void ab initio*.[71]

a. The PUCO lacks jurisdiction to approve the PPA Rider since it would functionally set wholesale prices.

i. The General Assembly has expressly limited the PUCO's subject matter jurisdiction to "retail" electric service.

The Ohio Supreme Court has recognized that the FPA provides FERC with exclusive jurisdiction related to the "sale of electric energy at ***wholesale***," defined as a

[71] *Twin City Fire Ins. Co. v. Adkins*, 400 F.3d 293, 299 (6th Cir. 2005), citing *Int'l Longshoremen's Ass'n v. Davis*, 476 U.S. 380, 392, 90 L. Ed. 2d 389, 106 S. Ct. 1904 (1986) (holding that where "a state court. . . has no subject matter **jurisdiction** to adjudicate this issue . . ., any judgment issued by the state court will be ***void ab initio***") (emphasis in original).

"sale of electrical energy to any person ***for resale***."[72] Indeed, the courts have recognized that, in enacting the FPA, "Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction …."[73]

Consistent with this jurisdictional separation, the Ohio General Assembly limited the PUCO's jurisdiction to "retail" electric services. The PUCO's authority only extends to "an electric light company when engaged in the business of supplying electricity . . . ***to consumers*** within this state."[74] This limitation of jurisdiction also was imposed on the PUCO in subsequently enacted R.C. Chapter 4928, which is replete with references restricting the PUCO's authority to "retail electric service." Specifically, as it pertains to this proceeding, R.C.4928.141 requires "an electric distribution utility" to provide "***consumers*** . . . a standard service offer of all competitive ***retail electric services*** . . . ."[75] R.C. 4928.143 permits an "electric distribution utility" to comply with R.C. 4928.141 by filing an ESP for the PUCO's approval.[76]

For purposes of R.C. Chapter 4928, the General Assembly defined an "electric distribution utility" [77] as an "electric utility,"[78] which in turn is defined as an "electric light company" under R.C. 4905.03(C), discussed above.[79] FirstEnergy satisfies each of these definitions, and under each definition, the General Assembly consistently and

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[72] *See Cleveland Elec. Illum. Co. v. Pub. Util. Comm*., 76 Ohio St.3d 521, fn. 4 (1996) (italics added, citation omitted).

[73] *Fed. Power Comm. v. S. California Edison Co.*, 376 U.S. 205, 215-216 (1964).

[74] *See* R.C. 4905.03.

[75] *See* R.C. 4928.141(A).

[76] *See* R.C. 4928.143(A).

[77] *See* R.C. 4928.01(A)(6).

[78] *See* R.C. 4928.01(A)(11).

[79] *See* R.C. 4928.01(A)(8).

expressly limited the PUCO's jurisdiction to the provision of retail electric service. Thus, the PUCO's jurisdiction clearly is limited to retail electric service.

ii. The PUCO has jurisdiction over retail electric service; the PPA Rider is not for retail electric service.

Under R.C. 4928.01(A)(27) retail electric service is defined as "any service involved in supplying or arranging for the supply of electricity to ultimate consumers in this state, from the point of generation to the point of consumption." The Rider RRS does not fit within the definition of retail electric service. This is because the PPA Rider does not constitute a service that is involved in supplying or arranging for the supply of electricity to ultimate consumers in this state.

Instead, the Rider RRS is a financial transaction that is separate and distinct from the sale of electricity to consumers in this state. It involves a FERC jurisdictional contract[80] between FirstEnergy and it affiliate FES. Under the PPA, FirstEnergy will contract to purchase all the energy, capacity, and ancillary services of the PPA Units on a cost basis plus return on investment.[81] FirstEnergy will then offer the energy, capacity, and ancillary services into the PJM markets – it will not supply the energy from the plants to ultimate consumers in this state. After the sale of the energy, capacity, and ancillary services into the PJM markets, retail customers will be charged/credited for the difference between the PPA contract price and market price obtained through the sale into the PJM market. Retail customers are twice removed from the transaction, which involves (1) a wholesale sale between FirstEnergy and FES, and (2) a wholesale sale by FirstEnergy

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[80] *See* V.A. 2-4, Supra.

[81] *See* Tr. I at 34-37 (Mikkelsen) (public).

into the PJM markets. With no electricity service being provided directly (or even indirectly) by FirstEnergy to retail customers, there is no valid claim that the PPA Rider proposal pertains to retail electric service.

iii. Approving the PPA Rider proposal would involve the PUCO in supplementing the PJM wholesale auction clearing price and, thus, exceed its subject matter jurisdiction by functionally setting wholesale prices to consumers.

The PUCO's approval of the PPA Rider would create a program where FirstEnergy participates in the PJM markets by bidding the products purchased under the PPAs into the PJM auctions. This program would accomplish the same objective as in the contracts for differences programs that were found preempted in *Solomon*[82] and *Nazarian*[83] supplementing the PJM wholesale auction clearing prices received by the PJM market participant with the revenues secured through out-of-market state subsidies. By supplementing the PJM wholesale auction clearing price, the PUCO would be setting wholesale prices, which is beyond its subject matter jurisdiction under state law. Therefore, the PUCO should deny the Amended Application/Modified Amended Application.

b. The PUCO lacks jurisdiction to approve the PPA Rider because it would fundamentally change the competitive environment established by S.B. 3.

As described above, the Ohio General Assembly created a *competitive* market for generation. And it specifically contemplated that adjustments to the market structure may

[82] 753 F.3d at 473-74.

[83] 766 F.3d at 248; 252.

have to be made. And it found that the PUCO would have a role to play in that regard, in passing R.C. 4928.06(C). The statute provides for monitoring of the market by the PUCO, reports by the PUCO to the General Assembly, and for recommendations by the PUCO for *legislative* action. It does not provide for wholesale changes to the competitive generation market, such as that which FirstEnergy rather candidly advocates for here, by way of a PUCO Order.

That the General Assembly intended for any adjustments to the competitive generation market be made through legislation was confirmed by the Ohio Supreme Court in *In re Columbus Southern Power Co.* There, the Supreme Court noted that *legislative* action might be required to address perceived deficiencies in the competitive market. And the General Assembly, itself, reaffirmed its intent by passing S.B. 221 – it did not wait for a PUCO Order.

As recognized by the Ohio Supreme Court, the statutory regime and history of deregulation in Ohio confirm that the Ohio General Assembly intended for it, and it alone, to make adjustments to the competitive environment established by S.B. 3 as and when necessary. FirstEnergy concedes that the PPAs are not driven by the competitive market, as it would not enter into the contracts absent the PUCO's authorization of regulatory recovery through the PPA Rider.[84] As a creature of statute with limited and defined powers, the PUCO has no jurisdiction to fundamentally change the competitive environment established by the General Assembly by way of an Order.[85] As OCC

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[84] *See* Tr. XI at 2333 (Moul) ("Certainly the structure of rider RRS relies on generating assets as part of the proposed transaction. So I don't see that they would exist separately.")

[85] *See* R.C. 4928.02 (H) (stating that it is state policy 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.")

witness Rose explained, FirstEnergy's Rider RRS is "inconsistent with the legislative intent of a deregulated generation market in the State of Ohio."[86]

Ohioans have been awaiting the end of a 16-year journey to competition in the electric generation market. This road to markets has been long and winding, and very expensive for Ohioans. At a time when Ohioans should be reaping the benefits of markets, FirstEnergy's objective is to reap the benefits of consumer subsidies by resort to old regimes of government command and control. The PUCO should resist this initiative by utilities to try to maneuver around competitive markets. The PUCO should deny FirstEnergy's proposal.

6. To protect Ohio consumers, the PUCO should not rule until FERC rules on the legality of the power purchase agreement.

On January 27, 2016, Electric Power Supply Association, et al. filed a complaint against FirstEnergy and AEP Generation Resources and Ohio Power Company[87] ("EPSA Complaints").[88] EPSA asked FERC to review FirstEnergy's affiliate agreement with its generating affiliate ("PPA") to ensure against competitive abuse and to protect consumers from unjust and unreasonable charges. EPSA is asking FERC to rescind a waiver of the corporate affiliate power sales restrictions previously granted to FirstEnergy, because FERC did not grant the waiver contemplating the current circumstances of the PPA. Rescinding the waiver granted to the FirstEnergy and AEP makes sense because FERC's

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[86] OCC/NOPEC Ex. 25 at 24 (Rose Direct).

[87] *EPSA, et al. v. AEP Generation Resources and Ohio Power Company,* FERC Case No. EL-16-33-000.

[88] *EPSA, et al. v. FES and , Ohio Edison, Cleveland Electric Illuminating Company and Toledo Edison,* FERC Case No. EL-16-34-000.

core responsibility is stated to be: "guard the consumer from exploitation by non-competitive electric power companies."

For these reasons, the PUCO should not rule in this case, until the FERC rules on the EPSA Complaints. FirstEnergy has said their plan is about consumers paying upfront and potentially benefitting later. But consumers should not have to pay a penny if FERC ultimately declares the plans to be unlawful. In this regard, FirstEnergy has protected itself in the settlement from making any refunds to consumers, if he PUCO's order authorizing the PPA is invalidated. The PUCO should not cater to FirstEnergy's' request to deny refunds to consumers. FERC may ultimately invalidate the PUCO's actions. Therefore, the PUCO should not rule on this case, until there is a ruling from FERC on the EPSA Complaints. At a minimum, the PUCO should reject FirstEnergy's settlement term of no refunds to customers, and require refunds for such reasons as FERC invalidating the PUCO's order.

B. The PUCO should not use its three-prong test for reviewing settlements to decide this case; but at a minimum the PUCO should not consider the settlement as a "package" under the three-prong settlement test.

The settlement is a hodgepodge of unrelated terms that should disqualify it from being considered as a "package" under the second and third prongs of the PUCO's settlement test.[89] For treatment as a package, a settlement should have terms that, in the context of an application, have a sufficient nexus between each other and can be lawfully

[89] OCC/NOPEC Ex. 11 at 6-10 (Kahal Second Supplemental).

and reasonably considered in the case as filed.[90] Terms that are merely inducements to join the settlement lack a reasonable nexus to the subject of the case, the PPA, and are therefore not a package. In a case allegedly about "hedging" electric generation costs, there is no nexus to the various terms and issues that have shown up for the first time at case-end in a settlement--other than that the terms induced others to sign. The terms in the Third Supplemental Stipulation are specifically tailored to the individual parties to be induced to sign (generally at the expense of other customers), and should not be confused with benefits to customers generally or the public interest.

1. The PUCO must be mindful of the unequal bargaining power of the Utility in an Electric Security Plan Case, and should invoke a stricter standard than the PUCO's traditional three-prong test to protect consumers.

As OCC witness Kahal explained, bargaining with Utilities in this setting is not sufficiently serious because Utilities can unilaterally reject any modifications to their electric security plan.[91] This problem is explained in the insightful opinion of Commissioner Roberto in FirstEnergy's initial ESP case filed in 2008:

> When parties are capable, knowledgeable and stand equal before the Commission, a stipulation is a valuable indicator of the parties' general satisfaction that the jointly recommended result will meet private or collective needs. It is not a substitute, however, for the Commission's judgment as to the public interest. The Commission is obligated to exercise independent judgment based on the statutes

[90] *In the Matter of the Application of Duke Energy Ohio to Adjust Rider DR-IM and Rider AEU for 2012 Smart Grid Costs*, Case No. 13-1141-GE-RDR, Opinion and Order at 16-17 (April 9, 2014). (The PUCO ruled that issues which are "not contained within the intended subject matter" of the utility's application, are the subject matter of other ongoing PUCO proceedings, and contemplate programs which are, thus far, not in existence or in operation are not relevant with regard to the consideration of the utility's application and should not be considered for purposes of the three-prong test.)

[91] See OCC/NOPEC Ex. 11 at 6 (Kahal Second Supplemental Direct).

> that it has been entrusted to implement, the record before it, and its specialized expertise and discretion.
>
> In the case of an ESP, the balance of power created by an electric distribution utility's authority to withdraw a Commission-modified and approved plan creates a dynamic that is impossible to ignore. I have no reservation that the parties are indeed capable and knowledgeable but, because of the utility's ability to withdraw, the remaining parties certainly do not possess equal bargaining power in an ESP action before the Commission. The Commission must consider whether an agreed-upon stipulation arising under an ESP represents what the parties truly view to be in their best interest - or simply the best that they can hope to achieve when one party has the singular authority to reject not only any and all modifications proffered by the other parties but the Commission's independent judgment as to what is just and reasonable. In light of the Commission's fundamental lack of authority in the context of an ESP application to serve as the binding arbiter of what is reasonable, a party's willingness to agree with an electric distribution utility application cannot be afforded the same weight due as when an agreement arises within the context of other regulatory frameworks. As such, the Commission must review carefully *all terms and conditions of this stipulation*.[92]

Commissioners Centolella and Lemmie stated similar concerns.[93]

As reflected in Commissioner Roberto's opinion, the bargaining is tilted in favor of the Utilities because FirstEnergy has the ability to reject modifications to its ESP plan. The favoring of the utility in the negotiation process for a stipulation in an ESP case negates the serious bargaining required to meet the first prong. This is evidenced by the fact that they did not secure benefits for all individuals or businesses that were not direct

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[92] *In re FirstEnergy's 2008 ESP Case*, Case No. 08-935-EL-SSO, Second Finding and Order, Opinion of Commissioner Cheryl L. Roberto Concurring in Part and Dissenting in Part at 1-2 (March 25, 2009) (citations omitted, emphasis added).

[93] Id., Opinion of Commissioners Paul A. Centolella and Valerie A. Lemmie, Concurring at 2 (March 25, 2009) ("The ability of an electric distribution utility to withdraw a Commission-modified and approved ESP…need to be taken into account when considering the weight to be given to this stipulation" and "The Commission must evaluate whether the stipulation represents a balanced and appropriate resolution of the issues.").

participants in the bargaining, but rather, they sought benefits either for their own company (e.g., Kroger) or benefits for their members (e.g., IEU-Ohio or OEG).[94] This settlement outcome should not be looked upon favorably by the PUCO.

2. The terms of the Stipulation should not be considered as a package under the PUCO's second and third prongs; consumers should be protected from the unrelated and onerous terms resulting from the utility's financial inducements for others to sign.

OCC witness Kahal elaborated on reasons for not relying on the PUCO's three-prong stipulation standard that carry-over into the second and third prongs. Mr. Kahal stated:

> the settlement should not be judged as a package, regarding the second and third prongs. The settlement is an amalgamation of onerous terms for consumers, many of them unrelated to the core of the Utilities Application in this case. In fact, this settlement includes, as a result of the deal-making, far-ranging provisions that are not logically connected to the ESP and should not be reviewed by the PUCO as a package. It is not reasonable for the PUCO to defer to this Stipulation by treating it as a package.[95]

It is counter-intuitive to view the provisions of the Stipulation as a package not only because of their unrelated nature to the case, but also because the Utilities were agreeable to the specific giveaways because, in large part, customers (not the Utilities or their shareholders) would be paying for the agreed upon subsidies. "This approach is not an appropriate way to conduct ratemaking and public policymaking."[96]

The PUCO recognized the danger of settlements that included cash and cash equivalents paid to the signatory parties in a stipulation. Recently, when reviewing a

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[94] Id. at 8.

[95] OCC/NOPEC Ex. 11 at 7 (Kahal Second Supplemental Direct).

[96] OCC/NOPEC Ex. 11 at 7-8 (Kahal Second Supplemental Direct).

stipulation that directed payments to the stipulation's signatories, the PUCO noted that such provisions are "strongly disfavored."[97] And the PUCO warned that such provisions are likely to be stricken in future stipulations:

> The Commission notes that provision l.b. of the Stipulation includes direct payments to intervenors of funds to be refunded to ratepayers. Because of the unique circumstances of this case, including the hard work of the Signatory Parties in reaching the Stipulation and the lengthy procedural history of this case, the Commission will not disturb this provision and will approve the Stipulation without modification. **However, the Signatory Parties to this Stipulation and parties to future stipulations should be forewarned that such provisions are strongly disfavored by this Commission and are highly likely to be stricken from any future stipulation submitted to the Commission for approval**.[98]

It should be concerning in this case that certain of the intervenors agreeing to the stipulation will receive cash equivalents and other benefits that are to be paid by consumers who oppose the settlement. Examples of cash equivalents that are given to signatory parties but paid for by other customers are automaker credits, interruptible load credits, and other rate discounts or rate design concessions.

This concern was also articulated by OMAEG witness Professor Hill earlier in this proceeding who stated:

> Here, the Companies have assembled a coalition to promote a policy that benefits their affiliate, FirstEnergy Solutions, and the other coalition members. The benefit to the Companies consists of

[97] *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Recover Cost Associated with the Ultimate Construction and Operation of an Integrated Gasification Combined Cycle Electric Generation Facility,* Case No. 05-376-EL:-UNC, Order on Remand at 12 (Feb. 11, 2015).

[98] *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Recover Costs Associated with the Ultimate Construction and Operation of an Integrated Gasification Combined Cycle Electric Generation Facility,* Case No. 05-376-EL-UNC Order on Remand at 11-12 (February 11, 2015). (Emphasis added).

> a subsidy to pay for its affiliated company's underperforming generation. This benefit to the Companies has been valued at $3 billion by one expert witness for a non-signatory party, the Office of the Ohio Consumers' Counsel.
>
> The large heterogeneous group that has to pay for the majority of this proposed policy, as well as the other costs embedded in the stipulations, consists of the remaining commercial, industrial, and residential ratepayers of northern Ohio who are not members of the redistributive coalition. This large ratepayer group would be very difficult and expensive to organize for purposes of advocating the group's interests.[99]

Professor Hill further stated," in the Third Supplemental Stipulation, the Utilities have raised new issues, offered new arguments, and presented an expanded coalition of supporters in an attempt to influence the public policy process in ways that are deleterious for the state of Ohio".[100]

Instead of considering the settlement as a package, the PUCO should consider each individual Stipulation term on its own merit or lack of merit, under law and regulations applicable to it. These unrelated provisions (such as the proposal to implement straight fixed variable rates for residential customers and the proposal to use other people's money to build renewable power plants)[101] should not even be considered in the current proceeding, and instead should only be considered in a separate stand-alone case, if at all.[102]

[99] OMAEG Ex. 19 at 19-20 (Hill Second Supplemental Direct).

[100] OMAEG Ex. 19 at 19-20 (Hill Second Supplemental Direct).

[101] FirstEnergy Ex. 154 at 12 (Third Supplemental Stipulation).

[102] OCC/NOPEC Ex. 11 at 9 (Kahal Second Supplemental Direct).

This point was examined by RESA witness Kalt when questioned at the evidentiary hearing by Commissioner Haque on the last day of the evidentiary hearing:

Question: (COMMISSIONER HAQUE):

…

> So just think of that concept of – just conceptually think of this concept, okay? And you are an economist, and you know you have provided testimony and eloquently provided testimony in responding to questions today. My question is how do you evaluate as an economist the social utility of potential good that can come from something like what we are dealing with today, the stipulation that we are dealing with today? And so, you know, in a previous proceeding I said this, and I'll -- I'll cite this to you as well here, so the concept of grid modernization, okay, this is something that a number of state utility commissions are looking at. It is not foreign to state utility commissions right now. There's a lot of good that can be done with this concept, albeit, there is still much to explore, okay? The concept of decarbonized -- decarbonized generation fleet in the future, again, we can argue what the stipulation says, I don't want to do that, I just want to ask you this theoretical question as an economist, how do you evaluate social utility in your field?

ANSWER (KALT):

…

> I will try to give you a briefer answer. That's sort of the topic of public policy economics. That's what we teach about. The first principle that we invoke is the public has an abiding interest in an economically efficient economy meaning you deliver what consumers want at the lowest possible cost. You don't waste resources. And you -- that's principle No. 1. Principle No. 2 is that where you have some inefficiency the appropriate public policy approach to that we sometimes say to the students you go at it head on. What we mean by that, if you need grid modernization among your regulated companies, then what you do is you get grid modernization for its own sake. And, you know, to go to the heart of this case in some sense, you don't, for example – in other words, if it's efficient to do it, you ought to do it. **You don't, for example, say we will do that as part of a trade. We'll let you shift all these costs and have the captive ratepayers and use their captivity to guarantee the rates of return and so forth on a couple of plants in order to get grid modernization. You want to separate those from a public policy point of view.** And there's actually theorems about this in the work of Nobel Prize Winner Paul Samuelson about how you want to take on those

> things because -- I don't know why I am squeaking, but if you try to mess up, if you will, make this inefficient over here in order to get some inefficiency over here, you are going to end up distorting the whole economy, and that's contrary to the public interest. **And so we have this principle of separation we call it, approach the problem head on. Want a better, cleaner environment? Go regulate the plants for environmental cleanliness.** Don't trade it away by doing something like, you know, using your captive ratepayers to cut a deal. I think that's trying to be responsive.[103]

Accordingly, the signatures on the settlement were obtained through financial inducements, and financed with other people's money--being Ohioans' hard-earned money. The settlement was not negotiated in a give-and-take exchange yielding the best result (for consumers and Ohio) at the settlement's conclusion. The Stipulation should not be evaluated under the three-prong test. At the least, it should not be viewed as a package.

3. Each Stipulation term should be evaluated on its own merits (not in a package) in order to protect consumers from the onerous nature of the Stipulation package.

A review of this settlement using the three-prong test will not yield a just outcome. The ESP should be reviewed on its own merits, and not as packaged in the Stipulation. The fact that the signatory parties have assembled a Stipulation package of unrelated cash and cash equivalents (funded by other customers) tailored to their individual desires, is problematic enough. But a deeper dive into the various provisions raises more fundamental concerns with this settlement, if viewed as a package. Therefore, the provisions in the Stipulation should instead be viewed individually on their own merits.

[103] Tr. XLI at 8717-8718 (Kalt).

This concept was raised by ELPC witness Karl Rabago. Mr. Rabago stated:

> I recommend that the Commission narrowly review the subject matter of the PPA arrangements proposed in the Program, as now modified in the Third Stipulation, and reach its own conclusions regarding the propriety of the core Company proposal. In reaching its conclusions, I recommend that the Commission not assign any weight to settlement terms that supplement and expand the Companies' Application unless those settlement terms apply directly to the Program. Because so many of the Stipulation terms have no direct relationship to the Program itself, the Commission must separately weigh whether the Program is prudent and in the public interest before undertaking any consideration of the value of the other non-core elements of the settlement package.[104]

Mr. Rabago, in his testimony, instructed the PUCO to evaluate carefully the non-Rider RRS terms of the Stipulation. Mr. Rabago stated:

> I further recommend that the Commission reject the Stipulation until such time as the parties to the Stipulation and other appropriate parties submit or at least have an opportunity to submit testimony on each substantive issue addressed in the Stipulation. That testimony and evidence must be tested against a standard that requires that the form and substance of each proposal be fully and transparently evaluated, and that the settlement terms, both individually and as a package, benefit the public interest and Companies' customers as a whole.

Without such evidence, the PUCO should not give any weight to the Stipulation terms in evaluating whether the settlement package will benefit ratepayers and the public interest.[105] Mr. Rabago's concerns with the Stipulation were consistent with OCC witness Kahal who noted the conspicuous absence of testimony by other signatories in support of the Stipulation.[106]

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[104] ELPC Ex. 28 at 6-7 (Rabago Direct).

[105] Id. at 7. See also Tr. XXXVIII at 8203 (Rabogo responding to questions from Commissioner Asim Haque).

[106] OCC Ex. 11 at 29 (Kahal Second Supplemental Direct).

To give the stipulation deference as a "package" would allow for terms that are unreasonable or even outrageous for consumers to be accepted by the PUCO, in the name of considering the package without items having to individually withstand PUCO scrutiny. It should not be done. As RESA witness Kalt suggests, each provision should be taken head on and reviewed on its own merits. There should not be the thought that a trade-off of an inefficient provision (e.g., Rider RRS) for some perceived efficiency from another provision (e.g., SmartGrid or renewable energy) is rational behavior.

The PUCO should adopt OCC/NOAC's recommendation to review the Utilities PPA outside of the three-prong test. If it doesn't, then the PUCO should accept our Recommendation Sections B, C, and D, which elaborate on why the Third Supplemental Stipulation (and all predecessor Stipulation provisions) should fail under all three of the prongs of the PUCO's test.

C. The partial settlement does not pass the first prong of the three-prong test: The settlement is not a product of serious bargaining among capable, knowledgeable parties, with a diversity of interest.[107]

The first prong of the settlement test asks whether the PUCO can determine that the negotiations over the settlement took place in an environment of sufficient conflict (i.e., "serious bargaining") between knowledgeable signatories.[108] Only 16 intervenors (excluding FirstEnergy) in a field of 54 were willing to sign onto the Stipulation. One intervener (IEU-Ohio) merely agreed to not oppose the settlement. OCC/NOPEC Witness Kahal testified that the contested Stipulation "is not representative of a diversity

[107] OCC/NOPEC Witness Kahal testified that the use of the three-prong test "is not the most appropriate way to determine the outcome of this case that presents important issues affecting approximately two million Ohio electric customers." OCC/NOPEC Ex. 8 at 5 (Kahal Supplemental).

[108] *In re Restatement of Accounts and Records of CG&E, DP&L, and CSOE*, Case No. 84-1187-EL-UNC, Order at 7 (Nov. 26, 1985).

of interests and does not constitute serious bargaining" as required under the PUCO's first criterion."[109]

1. The settlement is not a product of serious bargaining.

This proceeding could drastically alter the energy landscape in Ohio and increase consumers' utility bills by billions of dollars over the next eight years. The unequal bargaining power position held by the Utilities in an ESP case is very real in this case, and justifies the cause for concern raised by Commissioner Roberto.[110] This is evidenced by some parties to this proceeding pursuing their parochial interests, signed onto an agreement that could impose those billions of dollars of costs on the general body of the Utilities' customers., That was in exchange for modest and narrow benefits in rate design changes, increases in energy efficiency and low-income assistance valued in $10s of millions, nowhere near the billions of dollars that FirstEnergy stands to receive under the Third supplemental Stipulation.

The PUCO should observe that the parties signed onto an agreement that only minimally modified the core provision of the Utilities' Application and the PPA. The fact that a number of parties were willing to agree to the as-filed ESP, with minimal changes to the fundamental provisions, shows the lack of serious bargaining. With the Utilities being in a superior bargaining position, they did not have to offer much –and did not offer much-- to get parties to sign onto their multi-billion dollar rate increase to consumers in this case.

[109] OCC/NOPEC Ex. 8 at 11 (Kahal Supplemental Direct).

[110] *In re FirstEnergy's 2008 ESP Case*, Case No. 08-935-EL-SSO, Second Finding and Order, Opinion of Commissioner Cheryl L. Roberto Concurring in Part and Dissenting in Part at 1-2 (March 25, 2009)

Even the PUCO Staff could not make enough headway in modifying the terms of the Proposed Transaction. Before signing the Third Supplemental Stipulation, Dr. Choueiki testified to a number of alternative recommendations should the PUCO find that Rider RRS is in the public interest (which it is not).[111] Dr. Choueiki proposed limiting the term of Rider RRS to no longer than the term of the ESP IV.[112] At the time Dr. Choueiki's testimony was filed, the ESP IV term was three years. The PUCO Staff, negotiated the Rider RRS term from 15 years to eight years (more than double the three years) in the Third Supplemental Stipulation.[113] In addition, Dr. Choueiki also testified in favor of a risk-sharing mechanism that required FES to be responsible for a portion of the costs associated with Rider RRS.[114] Under the Third Supplemental Stipulation, FirstEnergy provides the potential for consumers to receive a very limited credit in years 5 through 8 only.[115] And FES has no obligation to share in the risk. The Third Supplemental Stipulation contains a much watered-down provision from what was recommended by Dr. Choueiki.

Finally Dr. Choueiki recommended a severability provision in the event Rider RRS was invalidated by a court of competent jurisdiction.[116] However, the Third Supplemental Stipulation expanded on Dr. Choueiki's testimony and included the following anti-consumer provision: "this commitment on severability is not intended and

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[111] Staff Ex. 12 at 15-17 (Prefiled Testimony Choueiki).

[112] Staff Ex. 12 at 15 (Prefiled Testimony Choueiki).

[113] FirstEnergy Ex. 154 at 7 (Third Supplemental Stipulation).

[114] Staff Ex. 12 at 16 (Prefiled Testimony Choueiki).

[115] FirstEnergy Ex. 154 at 7-8 (Third Supplemental Stipulation).

[116] Staff Ex. 12 at 17 (Prefiled Testimony Choueiki).

shall not be construed to affect the prohibition against retroactive ratemaking. No amounts collected shall be refunded as a result of this severability provision." Any decision regarding refunds should be determined by the PUCO.

Therefore, the PUCO should find that no serious bargaining occurred, and should determine the contested Stipulation fails the first prong of the three-prong standard.

2. There is a lack of diversity of interests on the contested Stipulation.

Diversity of interests is an important component for determining if a stipulation is reasonable. The PUCO has found that when diverse interests are present, there is strong support for the reasonableness of a settlement package.[117]

OCC/NOPEC Witness Kahal testified, however, that the settlement "is not representative of a diversity of interests."[118] Although there are a number of non-utility settling parties, there are also numerous active parties not supporting the contested Stipulation, representing a range of perspectives. Marketers and power producers, who compete with FES, did not sign.[119] Parties representing environmental interests did not sign.[120] Aggregators did not sign.[121] The Market Monitor for PJM did not sign the Stipulation.

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[117] *In re: Restatement of Accounts and Records of CG&E ,DP&L, and C&SOE*, Case No. 84-1187-EL-UNC, Order at 7 (Nov. 26, 1985).

[118] OCC/NOPEC Ex. 8 at 11 (Kahal Supplemental).

[119] Dynegy, Direct Energy, PJM Power Producers, EPSA, Exelon, Constellation.

[120] Sierra Club, Environmental Defense Fund, and ELPC.

[121] NOPEC and NOAC.

The City of Akron, the locale for FirstEnergy's corporate headquarters, did sign. But it is one community with a limited number of customers out of the 1.9 million residential customers served by FirstEnergy. Its stated interest in this case is as follows:

> Akron is a significant customer of Ohio Edison Company and therefore the nature and **extent of its interest lies partly in the potential relationship between this proceeding and the prices that Akron may pay for electric service**.[122]

The PUCO should note that the City's stated interest lies in what the City of Akron, not its residents, pays for electricity. By contrast, the PUCO should note NOPEC and NOAC who collectively represent the interests of nearly 630,000 residential and small commercial customers in approximately 185 communities in all three FirstEnergy EDU's service territories.[123] Lacking a signatory party that represents residential customers in the Applicant's three service territories and lacking widespread consumer support in a signatory party, the Stipulation fails to represent the diversity interests of FirstEnergy's customers and thus fails to meet the first prong of the PUCO's standard for judging stipulations.

Another signatory party, OPAE, fails to move the needle much with regards to improving the Stipulation's diversity of interest as part of the PUCO's first prong analysis. As a general matter for PUCO regulation, Ohioans in need should be assisted. But for purposes of whether to impose the extreme costs of a utility bailout on a couple million Ohioans, OPAE's signature should matter little for determining if FirstEnergy passes the PUCO's settlement standard. The record reflects that, out of 1.9 million

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[122] City of Akron Motion to Intervene, Memorandum in Support at 4 (October 1, 2014). (Emphasis added)

[123] NOPEC and NOAC Joint Initial Brief at 3-4 (June 22, 2012).

consumers, OPAE has assisted around 2,704 customers from the fuel fund in 2014.[124] In addition, the winter crisis program element of the HEAP (Home Energy Assistance Program) benefitted 16,000 customers in 2014, out of 1.9 million consumers who would each pay $800 or much more partly as a result of OPAE's signature.[125] If these numbers indeed represent FirstEnergy customers (and not customers from outside FirstEnergy's area), then the total number of OPAE-assisted customers (18,704) represents less than 1 percent of total FirstEnergy residential customers.[126]

The statutory representative of FirstEnergy's 1.9 million residential customers, the Ohio Consumers' Counsel, as well as NOPEC and NOAC, are not signatories to the contested Stipulation and recommend that the PUCO protect consumers by rejecting it. This circumstance demonstrates that the contested Stipulation is not broadly supported by parties representing a diverse range of interests or customer classes.[127] Therefore, that aspect of the PUCO's first prong analysis must fail.

3. There is a lack of diversity of interests on the contested Stipulation.

Diversity of interests is an important component for determining if a stipulation is reasonable. The PUCO has found that when diverse interests are present, there is strong support for the reasonableness of a settlement package.[128]

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[124] OPAE Ex. 1 at 7) (Rinebolt Direct).

[125] Tr. XXIX at 6037 (Rinebolt).

[126] 18,704 / 1,900,000 x 100 = 0.9 percent.

[127] OCC/NOPEC Ex. 8 at 11 (Kahal Supplemental).

[128] *In re: Restatement of Accounts and Records of CG&E ,DP&L, and C&SOE*, Case No. 84-1187-EL-UNC, Order at 7 (Nov. 26, 1985).

OCC/NOPEC Witness Kahal testified, however, that the settlement "is not representative of a diversity of interests."[129] Although there are a number of non-utility settling parties, there are also numerous active parties not supporting the contested Stipulation, representing a range of perspectives. Marketers and power producers, who compete with FES, did not sign.[130] Parties representing environmental interests did not sign.[131] Aggregators did not sign.[132] The Market Monitor for PJM did not sign the Stipulation.

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[132] NOPEC and NOAC.

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parties representing a diverse range of interests or customer classes.[138] Therefore, that aspect of the PUCO's first prong analysis must fail.

4. The inaptly named "retail enhancement" side deal between FirstEnergy and IGS demonstrates a lack of serious bargaining (and a misuse of the words retail enhancement).

In an earlier case at the PUCO involving side deals within a stipulated case, the Supreme Court of Ohio decided that such arrangements were relevant to the PUCO's consideration of serious bargaining.[139] The Supreme Court stated:

> The [PUCO] cannot rely merely on the terms of the stipulation but, rather, must determine whether there exists sufficient evidence that the stipulation was the product of serious bargaining. Any such concessions or inducements apart from the terms agreed to in a stipulation might be relevant to deciding whether negotiations were fairly conducted. The existence of concessions or inducements would seem particularly relevant in the context of open settlement discussions involving multiple parties, such as those that purposely occurred here. If there were special considerations, in the form of side agreements among signatory parties, one or more parties may have gained an unfair advantage in the bargaining process.[140]

The Side Agreement (between IGS and FirstEnergy) is dated January 14, 2016. The Third Supplemental Stipulation was filed on December 1, 2015

This opportunistic Agreement benefits IGS (and other Marketers), to the detriment of consumers who use the standard offer to purchase electricity or who shop for alternative offers to the standard offer. This agreement is solely between IGS and the Utilities, and hence would not involve bargaining among any parties but the two signing the Agreement. The Side Agreement would arbitrarily increase the standard offer price

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[138] OCC/NOPEC Ex. 8 at 11 (Kahal Supplemental).

[139] *Ohio Consumers' Counsel v. PUC*, 111 Ohio St. 3d 300 (November 22, 2006).

[140] Id. at 320.

that other Ohioans pay.[141] It also would provide a customer referral program[142] and a smart thermostat program.[143]

For example, when FirstEnergy witness Mikkelsen was questioned about specific details regarding the smart thermostat program the specifics of the program were unknown.[144] That is because the program is to be jointly developed and the specifics are not now known at this time.[145] This denotes a serious lack of bargaining. The Side Agreement is just another effort by FirstEnergy to induce a result (quelling the opposition to its PPA) by silencing the opposition.

Also, the absurdly named "retail enhancement" provision in the Side Agreement is discriminatory. And it results in an unreasonable price to consumers because it falsely inflates the SSO price of electricity. Both results are in violation of R.C. 4928.02(A). It

[141] The Retail Enhancement provision of the IGS side deal provides for a future filing wherein, IGS and FirstEnergy will determine the level of the charge to establish a competition incentive mechanism, or an arbitrary charge added to the Utilities standard service offer price to incent customers to shop.

[142] Under the program, consumers seeking to establish distribution service shall be asked if they want to be referred to a competitive retail electric service providers' standard discount rate offer (which shall provide a guaranteed discount off the price to compare without early termination fees). The appropriate discount rate and the cost to participating suppliers shall be established in the separate filing. All costs incurred and revenues received as a result of this program shall be recovered through a rider. The customer referral program, once implemented, shall remain in effect so long as Rider RRS remains.

[143] The Companies agree to include in their next Energy Efficiency and Peak Demand Reduction Portfolio Plan, a residential smart thermostat program to be jointly developed with, and implemented by, Interstate Gas Supply, Inc. ("IGS") as the exclusive provider. The program budget shall include up to $1,000,000 annually for rebates and IGS implementation costs, to empower targeted customers to optimize operation of HVAC equipment to produce electric energy savings in participants' homes. The amount of thermostat rebates shall be up to $100 perthermostat. The energy savings and peak demand reductions from this program will be committed to the Companies and counted towards the Companies' energy efficiency and peak demand reduction goals and statutory benchmarks.

[144] Tr. Vol. XXXVII at 7907 (Mikkelsen).

[145] Tr. Vol. XXXVII at 7907 (Mikkelsen).

is discriminatory in that it is bypassable for those customers who shop and would only be charged to customers who are served by the SSO.[146]

IGS seeks approval of this anti-competitive, self-serving proposal that was originally proposed in the recent Retail Market Investigation.[147] In that proceeding, the PUCO rightly rejected the proposal.[148] This proposal has no place in an ESP (or any) proceeding, and shows that IGS' side deal for those customers who should be given no weight in determining their participation in this Stipulation because it does not constitute serious bargaining.

Also, the Side Agreement adds unnecessary and arbitrary costs to the competitive market. Had all parties participated in the negotiation of this provision, there might have been a chance for rationality to prevail—meaning rejection of the term. But that level of serious negotiations did not take place. It is little wonder why this provision was negotiated privately as a side deal between just FirstEnergy and IGS.

Another provision establishes funding for a new so-called "agency," the "Customer Advisory Agency." Under the Stipulation, this new "agency" will be funded at $1,000,000 per year ($8 million in total), with the money allocated among the Cleveland Housing Network, Consumer Protection Association and Council for Economic Opportunities in Greater Cleveland. It should not go unnoticed that the

[146] *see also* R.C. 4905.33 (prohibiting discrimination).

[147] See *In the Matter of the Commission's Investigation of Ohio's Retail Electric Service Market,* Case No. 12-3151-EL-COI, Comments of Interstate Gas Supply at page 3.

[148] See *In the Matter of the Commission's Investigation of Ohio's Retail Electric Service Market* Case No. 12-3151-EL-COI, Finding and Order at 19 (March 26, 2014). See also FirstEnergy Reply Comments at 1 (February 20, 2014) ("For example IGS recommendation to simply eliminate the Standard Service Offer ("SSO") is contrary to law and state policy.")

"Consumer Protection Association" is, according to proffered evidence[149] by OMAEG, potentially defunct. If so, it's not clear what the Consumer Protection Association will do with its share of the Customer Advisory Agency money for consumers.[150] There is virtually no information in the Stipulation pertaining to the establishment and operation of this organization. [151] The Customer Advisory Agency will be designed to ensure the preservation and growth of the competitive market in Ohio and will be available to help residential customers.[152]

Finally, the real reason for FirstEnergy's motivation in advancing IGS's self-interest was revealed in the consideration IGS was to provide. Specifically, the consideration to be given by IGS required IGS to withdraw its testimony in this case (except for testimony that supports the issues in this settlement).[153] It was an odd thing for them to think that evidence already admitted in the hearing could be unilaterally un-admitted. That was demonstrated at hearing when the Attorney Examiner denied IGS' attempt to withdraw its testimony after the fact.[154] This Side Agreement shows all the more that the settlement does not involve serious bargaining. The first-prong of the PUCO's settlement test is not met.

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[149] Tr. Vol. XXXIX at 8387 – 8393 (Hill).

[150] Tr. Vol. II at 233 (Mikkelsen).

[151] Tr. Vol. II at 232-235 (Mikkelsen).

[152] FirstEnergy Ex. 154 at 14 (Joint Stipulation) (December 22, 2015).

[153] OMAEG Ex. 24 at 1 (IGS Side Agreement) (January 14, 2016).

[154] Tr. Vol. XLI at 8598 (Price).

5. The Commission should reverse the Attorney-Examiner's ruling to exclude evidence of whether a signatory party is an ongoing entity, which is relevant to the whether the Stipulation passes the first-prong of the PUCO's test.

The Attorney Examiner determined that testimony pertaining to the status of a signatory party would be excluded, so it was proffered by OMAEG. Ohio Adm. Code 4901-1-15(F) allows a party to seek reversal of an Examiner ruling by "discussing the matter as a distinct issue in its initial brief…." Accordingly, OCC/NOAC seeks reversal of the rulings described herein. The relevant pages from the transcript are attached.

On redirect OMAEG witness Professor Hill was providing some information he found regarding the Consumer Protection Association. Professor Hill provided the following testimony on the witness stand:

Q. (By Ms. Bojko) Do you recall questions from counsel about the redistributive coalition and signatory parties -- constituting the redistributive 3 coalition?

A. I do.

Q. And you were also asked about how diverse does the class have to be. Do you recall that?

A. I do.

Q. With regard to the signatory parties and the diversity of the class, have you learned anything about the signatory parties that would affect your position on what diverse means in the context of the signatory parties and redistributive coalition?

A. Yeah. Some concern, I first noticed that some of the signatory parties, particularly those that -- or those that deal with anti-poverty issues and low-income households, were represented by the same attorney, so I was wondering about the independence of the signatories.

And I am very familiar with two of the three signatories. In fact, I'm a fan -- I am a large fan of the Cleveland Housing Network. It's an extraordinary group. And I am optimistic about the recovery from the financial problems and leadership problems that the Council for Economic Opportunities in Greater Cleveland had. So that was good.

But I was really puzzled -- I'm from Cleveland, just moved down, civically active, and I hadn't heard of the Consumers Protection Association, so that led me to look at the Consumers Protection Association so I could learn more of it to see what function it provided.

And I first went to the website and found out the website for the organization was down. Then I did a news search to look at its activity, and the news search revealed that the organization closed its doors on August 15 and is subject to a federal investigation, and its funding by the Social Security Administration has been lifted and the ADAMH Board, the director of the ADAMH Board is on tape stating that starting in 2011, the organization had managerial problems, and he also stated that there's probably -- that there was fraud in the administration of the organization.

So the question is, the Consumer Protection Association still may exist as a legal entity, but as a direct service organization representing low-income households, the fact that it's being subject to a federal investigation leads me to really wonder what group it's currently representing.

The other part that I found really confusing was I went to the Council for Economic Opportunities' website where they listed the -- the -- oh, what was that group? The citizens' group? I have to go and check one more signatory to make certain I get this right. Oh, that's it, the Citizens Coalition because that's another group I had never heard of it.

Now, the Citizens Coalition is represented by the same attorney, and the members of that coalition are the other signatories, so CEOG, the Cleveland Housing Network, and the Consumer Protection Association form the Consumers Coalition. So, in reality, they managed to sign twice, with one-third of that coalition currently being in very difficult straits of operation.

So I had -- so if you think about – and it's also interesting that the C -- well, I want to make sure I get it right, the Council for Economic Opportunities in Greater Cleveland lists the Citizens Coalition as a partner organization when really it's them.

So this amount of confusion makes it really interesting to me as to who is representing the interest of low-income

> renters and occupants in Cleveland since this is a large portion of the notion of diversity of interests. So I admit I was confused and disappointed at the scrutiny that the signatory parties were put through.
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> MS. BOJKO: Thank you.[155]

Professor Hill's answer was ultimately stricken from the record.[156]

The Attorney Examiner's ruling was inappropriate. A question of whether a signatory party's is even a going concern is highly relevant and should be heard.. The evidence is important because it should go into the calculus of the diversity of interest and seriousness of the settlement negotiation bargaining process. It is also relevant from the standpoint that the settlement provides for an allocation of certain dollars from the settlement to this party (the Consumer Protection Association). It would be important (essential) for PUCO decision-making to know if the party is even a going concern.

The evidence excluded under the Attorney Examiner's ruling involved information that the Signatory Party's (Consumer Protection Association) website was down, and it had allegedly closed its doors on August 15, [2015]. Nevertheless, the Consumer Protection Association signed the Third Supplemental Stipulation on December 1, 2015.[157] The Signatory Party is allegedly subject to other concerns.[158] Based on documents filed at the Ohio Secretary of State's office, the Consumer Protection

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[155] Tr. Vol. XXXIX at 8387 – 8391 (Hill) (January 20, 2016).

[156] Tr. Vol. XXXIX at 8393 (AE Chiles) (January 20, 2016).

[157] Fraud Investigation At Consumer Agency, wkyc (August 28, 2015), http://legacy.wkyc.com/story/news/local/cleveland/2015/08/28/local-seniors-money-managing-agency-being-probed/71321190/

[158] Fraud Investigation At Consumer Agency, wkyc (August 28, 2015), http://legacy.wkyc.com/story/news/local/cleveland/2015/08/28/local-seniors-money-managing-agency-being-probed/71321190/

Association filed for dissolution.[159] However, this dissolution was cancelled by the Secretary of State's office when they were not able to cash the check for the filing fee required for dissolution of the organization.[160] It is clear that this organization is no longer a viable party to sign this stipulation. This is an organization that, with FirstEnergy, has asked the PUCO to allocate it a portion of $1,000,000 per year under the Stipulation for the eight-year term. The Examiner's ruling should be reversed.

D. The partial settlement does not pass the second prong of the stipulation standard: As a package, it does not benefit ratepayers and is not in the public interest.

The Utilities argue that both the Application and contested Stipulation benefit customers and serve the public interest. Utilities' witness Mikkelsen claims that over the term of the rider (eight years) the quantified benefit to customers under the plan is $612.1 million ($296 million on a net present value basis).[161] Ms. Mikkelsen also testifies that the public interest is served because jobs are preserved by avoiding plant retirements, costly transmission investments (which would be needed if the plants retire) are avoided, reliability and fuel diversity are enhanced, and rate stability is provided.

However, the research and evidence presented by numerous intervenor expert witnesses has demonstrated that these claim are not true—and even if they were true, the cost of these so-called benefits is just too high for customers to pay. As OCC/NOPEC Witness Kahal testified, the "important point for the PUCO is that any benefits to customers associated with the additional Stipulation provisions pale in comparison to the

[159] *See* Certificate of Dissolution filed Nov. 20, 2015, Consumer Protection Association, Ohio Secretary of State *available at* http://www2.sos.state.oh.us/reports/rwservlet?imgc12g&Din=201532401648

[160] *See* Ohio Secretary of State Cancellation filed Jan. 20, 2016, Consumer Protection Association, Ohio Secretary of State *available at* http://www2.sos.state.oh.us/reports/rwservlet?imgc12g&Din=201602000860

[161] See FirstEnergy Ex. 155 at 12 (Mikkelsen Fifth Supplemental).

harms to customers from Riders Retail Rate Stability, Distribution Capital Recovery, and Governmental Directives Rider documented in OCC/NOPEC testimony."[162]

OCC/NOPEC Witness Kahal testified that the contested Stipulation is not in the public interest.[163] The contested Stipulation will harm customers and is not in the public interest, primarily because it retains Riders RRS, DCR, and GDR essentially as filed.[164] Mr. Kahal testified that these riders and the provisions of ESP will lead to higher customer rates than through the application of a market-rate offer.[165] And as discussed below, there is no employment or associated economic impact public interest benefit from adopting Rider RRS. Nor will the ESP preserve jobs or incomes for Ohio communities. And there is no evidence that it will enhance reliability and fuel diversity for the region. Furthermore, as discussed below, the numerous other alleged benefits of the proposed ESP are implausible and/or unproven.

1. The contested stipulation proposes a modified electric security plan that is not more favorable in the aggregate for customers than a market-rate offer. This does not benefit ratepayers and is not in the public interest.

Ohio statutes require that electric distribution utilities provide a generation standard offer either through an ESP or a market-rate offer for customers that do not take generation service from Marketers. The Utilities chose to file an electric security plan.[166]

If an electric utility chooses to provide a standard offer through an ESP, the PUCO may approve an ESP only if it finds that it is more favorable in the aggregate for

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[162] OCC/NOPEC Ex. 8 at 8 (Kahal Supplemental).

[163] See OCC/NOPEC Ex. 11 at 27 (Kahal Second Supplemental).

[164] OCC/NOPEC Ex. 11 at 36-37 (Kahal Second Supplemental).

[165] OCC/NOPEC Ex. 11 at 26-27 (Kahal Second Supplemental).

[166] R.C. 4928.141(A).

customers than a market-rate offer. (R.C. 4928.143(C)(1). Under the law the expected price of the SSO generation under an electric security plan is compared to the expected price derived under a market-rate offer. This requires a price of electric service comparison to determine which is better for customers. The utility bears the burden of proof in this matter.

Additionally, R.C. 4928.143(C)(1) requires the comparison to be made on an "aggregate" basis. That means that the comparison must consider "all other terms and conditions" of the ESP plan. The PUCO has determined that such provisions may include quantifiable non-price benefits and qualitative benefits . Parties, including NOPEC, have challenged the PUCO's authority to apply the ESP vs. MRO test using qualitative factors. The outcome of the test should be determined using quantitative factors, not qualitative factors which are manipulated to reduce or cancel out a more objective quantitative analysis. The Ohio Supreme Court has limited the items that can be included in an ESP to those expressly listed in R.C. 4928.143(B), and the Court subsequently found that each of those items were "categories of cost recovery." The categories of cost recovery do not include qualitative factors.[167] This comparison has been referred to by the Commission and parties as the statutory test. [168] Under R.C. 4928.143(C)(1) the utility has the burden of proving that its ESP meets the statutory test – that it is more favorable in the aggregate for customers.

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[167] See *S. Ct. 2013-513*.

[168] See *In the Matter of the Application of Columbus Southern Power Companies and the Ohio Power Companies for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the form of an Electric Security Plan*, Case No. 11-346-EL-SSO, Opinion and Order at 27 (Dec. 14, 2011).

OCC/NOPEC Witness Kahal presented testimony comparing the as-filed ESP with the expected results of an MRO. Mr. Kahal concluded that the as-filed ESP would produce results that are less favorable in the aggregate to customers than the expected MRO results.[169] Specifically, Mr. Kahal determined that over the eight-year term proposed for Rider RRS and the ESP, the net cost to customers would be in excess of $3.2 billion more under the ESP than a market-rate offer.[170]

Mr. Kahal also testified that the contested Stipulation adds a shareholder contribution of $51.1 million over eight years for economic development funding, low-income assistance funding, and customer advisory agency funding.[171] Yet, taken as a whole, the contested Stipulation still remains overwhelmingly adverse for the Utilities' customers.[172] In fact, the contested Stipulation is even worse than the as-filed ESP, which was also damaging to customers. Because the ESP, as filed and as modified by the Stipulation, fails to produce results for customers that are more favorable in the aggregate than an MRO, the PUCO must reject the ESP.

a. It would be harmful to consumers if the PUCO allows certain Riders, which cause the MRO v. ESP test to fail, to continue to be charged to consumers

Section K of the Joint Stipulation states that, as required under R.C. 4928.143(E), in the fourth year of the ESP the PUCO will test whether the ESP is more favorable in the aggregate than a market rate offer. The Section K goes on to state that if the Stipulated ESP IV fails this ESP vs. MRO test in the fourth year, the ESP will be terminated.

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[169] OCC/NOPEC Ex. 11 at 26-27 (Kahal Second Supplemental).

[170] OCC/NOPEC Ex. 11 at 26-27 (Kahal Second Supplemental).

[171] OCC/NOPEC Ex. 11 at 16-18 (Kahal Second Supplemental Direct).

[172] OCC/NOPEC Ex. 11 at 14-15, 26-27 (Kahal Second Supplemental Direct).

However, “termination shall not affect the continued cost recovery of Riders DCR and RRS.”[173] Such a provision is wholly unjust and unreasonable for Ohio consumers.

As OCC/NOPEC witness Kahal testified, the Third Joint Stipulation fails the ESP v. MRO test. In reaching this conclusion Mr. Kahal used OCC/NOPEC witness Wilson’s estimate that Rider RRS (for the power purchase agreement) will cost Ohio consumers approximately $2.713 billion. Mr. Kahal also calculated the cost estimate of Rider DCR (for distribution cost recovery) to be approximately $240 to $330 million. Mr. Kahal then offset these costs with the $51.1 million that FirstEnergy has committed for economic development funding, low-income funding, and customer advisory funding.

These calculations resulted in Mr. Kahal determining that the stipulated ESP will increase customer rates by $2.902 to $2.992 billion as compared to the market rate offer. Therefore, the main reasons why the stipulated ESP fails the ESP v. MRO test are the large costs attributable to Riders DCR and RRS. Yet, the Stipulation states that if the ESP fails the ESP vs. MRO test, Riders DCR (for distribution charges) and RRS (for the power purchase agreement) will survive. Again, this is a nonsensical, unjust and unreasonable provision for consumers that the PUCO should not approve. FirstEnergy would have the PUCO continue the very charges to consumers that likely would be the cause of the ESP failing the statutory test that is supposed to protect consumers. FirstEnergy would write a basic consumer protection in the 2008 energy law out of the law.

[173] FirstEnergy Ex. 154 at Section K (Third Supplemental Stipulation).

b. The Utilities' electric security plan, as modified by the contested settlement, is quantitatively more costly to customers than a market-rate offer over the three-year term of the ESP.

When FirstEnergy originally conducted the statutory test for the appropriate three-year period, it produced a result that shows the ESP is NOT more favorable for customers in the aggregate than the market rate offer on a quantitative basis. Under FirstEnergy's own projections, Rider RRS will produce a net loss to customers of $420 million during the original three-year ESP term from June 1, 2016 to May 31, 2019.[174] Taking the $3 million economic development contribution into account, and accepting the Utilities' calculations (and its unrealistic view that Rider DCR is a "wash"), the proposed ESP would be more costly for consumers than a market rate offer by $417 million.

Over the new eight-year term of the ESP proposed in the Third Supplemental Stipulation, FirstEnergy claims that the ESP is estimated to be more favorable than the expected results of a market rate offer by $621.1 million on a nominal basis and $296.0 million on a net present value basis.[175]

But FirstEnergy's calculation of the eight-year cost of its ESP is likely understated. According to OCC/NOPEC Witness Wilson, if energy prices follow his projected path, the proposed ESP could cost customers in excess of $3.2 billion during the eight-year ESP term. [176] Mr. Kahal then took into consideration the shareholder contribution of $51.1 million over eight years for economic development funding, low

[174] See FirstEnergy Ex. 34 (Ruberto errata).

[175] FirstEnergy Ex. 155 at 12 (Mikkelsen Fifth Supplemental).

[176] OCC/NOPEC Ex. 7 at 8 (Wilson Second Supplemental).

income assistance funding and customer advisory agency funding.[177] Then Mr. Kahal considered the $240 to $330 million cost to customers of Rider DCR. After taking these amounts into account, Mr. Kahal concluded that the proposed ESP would be more costly to consumers than a market rate offer by $3.260 to $3.350 billion.[178]

Therefore, on a quantitative basis the ESP option is not more favorable in the aggregate for customers than a market rate offer.

c. The alleged qualitative benefits that the Utilities allege for making their proposed ESP more favorable than a market rate offer should not be considered under Ohio law; however, they are either non-existent or are outweighed by the significant quantitative costs imposed on customers for the various riders.

FirstEnergy claims that the ESP is also more favorable to customers from a qualitative perspective. These alleged qualitative benefits include, among other things, (1) the benefits from both the Delivery Capital Recovery Rider ("Rider DCR") and Governmental Directives Rider ("Rider GDR"); (2) avoiding the effects of plant retirement, including job losses and transmission investment; (3) an increase in reliability and fuel diversity; and (4) rate stability. Additionally, the Third Supplemental Stipulation includes a host of other provisions that FirstEnergy claims will benefit customers. These benefits include, among other things, (1) a commitment to advocate for a longer term capacity product; (2) a commitment to advocate for grid modernization; (3) a commitment to reduce CO2 levels; (4) a commitment to evaluate battery resource investment; and (5) a commitment to file a case to transition from decoupled residential

[177] OCC/NOPEC Ex. 11 at 16, 27 and 11A (Kahal Second Supplemental and Kahal Errata).

[178] OCC/NOPEC Ex. 11 at 26-27 and 11A (Kahal Second Supplemental and Kahal Errata).

base distribution rates. However, when the alleged qualitative benefits are examined one by one, it becomes evident that they are either non-existent or are outweighed by the significant costs these provisions impose upon customers under Rider RRS.

Additionally, the PUCO should recognize that FirstEnergy is attempting to use subjective qualitative factors to reduce or cancel out a more objective quantitative analysis. Such an approach is problematic under the law. See *In the Matter of Northeast Ohio Public Energy Council*, Appeal No. 2013-0513.

i. The Distribution Capital Recovery Rider will not provide a qualitative benefit to customers. Instead it will cause customers to pay more than they otherwise would pay in a distribution rate case.

Rider DCR is intended to compensate the Utilities for the costs of additions to plant in service over and above the plant included in their base rates, at consumer expense. The Utilities propose that Rider DCR, which was approved originally as part of the Utilities' ESP II [179] and extended as part of ESP III, [180] should be modified to increase the amount of dollars (the revenue cap) the Utilities can collect from customers. Specifically, the Utilities propose to increase the Rider DCR revenue collected by up to $30 million per year for the first three years—an increase that was opposed by the PUCO Staff.[181] The new $30 million annual cap doubles the rate increase to consumers ($15 million per year) previously permitted under the current (and prior) ESPs.[182] The Rider DCR cap will then increase by $20 million annually for the subsequent three years and

[179] *FirstEnergy ESP II*, Case 10-338-El-SSO, Opinion and Order at 11-12, 35-36, 40 (August 25, 2010).

[180] *FirstEnergy ESP III*, Case 12-1230-EL-SSO, Opinion and Order at 10-11, 33-34 (July 18, 2012).

[181] PUCO Staff Ex. 6 at 6 (McCarter Direct).

[182] Tr. XX at 3961-3964 (Fanelli).

$15 million annually for the final two years of the proposed eight-year ESP. The total Rider DCR increases over the proposed eight-year term of the ESP could require customers to pay an additional $240 to $330 million in revenues, for a total of $915 million in DCR charges over the term of FirstEnergy's ESP.[183] Those are the quantitative facts that the PUCO should not overlook.

Yet despite the hefty price tag for the DCR, the Utilities treat it as a "wash" in the statutory test,[184] assign qualitative benefits to it, and seek PUCO approval of it as part of its ESP. The Utilities' facile suggestion that the DCR rate increases to consumers are a "wash" with a distribution rate case is wrong.

The Utilities rely upon the assumption that base rate cases and the rider DCR create a "wash" where the cost increases under both are presumed to be the same.[185] But OCC/NOPEC Witness Kahal testified that such a general assumption does not hold true in this case for two key reasons.

First, all three utilities are potentially substantially over-earning for distribution utility service, as shown in OCC Witness Effron's analysis.[186] In the Utilities' base rate cases, in which utility earnings are comprehensively reviewed, any excess earnings would serve as an offset for the new distribution costs that FirstEnergy would collect through increases to Rider DCR.[187]

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[183] OCC/NOPEC Ex. 11 at 23-24 and 11A (Kahal Second Supplemental Direct and Kahal Errata).

[184] OCC/NOPEC Ex. 11 at 16-17 and 11A (Kahal Second Supplemental and Kahal Errata); FirstEnergy Ex. 50 at 7 (Fanelli Direct): Tr. XX at 3930 (Fanelli).

[185] FirstEnergy Ex. 50 at 7 (Fanelli Direct); Tr. XX at 3930 (Fanelli).

[186] OCC Ex. 18 at 17 (Effron Direct).

[187] OCC/NOPEC Ex. 8 at 30 (Kahal Supplemental).

Second, Rider DCR (and GDR) includes a stale 10.5 percent return on equity (and 8.48 percent overall return) that was set in a 2007 rate case. The cost of capital has declined substantially since 2007, when these returns were set.[188] A new base rate case would set the current cost of capital based on financial market conditions at that time. Thus, the out of date and overstated rate of return associated with Rider DCR would likely be corrected, saving customers money and providing at least a partial offset to new distribution investment costs. Rider DCR increases would only serve to perpetuate, or even increase, the excess return on the investment that customers would be unnecessarily required to fund.

Taking into account these serious problems with Rider DCR, OCC/NOPEC Witness Kahal testified that Rider DCR creates a $90-180 million cost on the ESP side of the statutory test (and not the MRO side).[189] However, the proposed eight-year ESP would inflate these figures to $240 million to $330 million. These costs on the ESP side (and not the MRO side) reflect the fact that customers would likely avoid at least a large portion of the large and unnecessary rate increases under Rider DCR if instead a base rate case was filed (under an MRO).[190]

The Utilities also argue that Rider DCR will provide a qualitative benefit to its customers. According to Utilities witness Fanelli, Rider DCR promotes infrastructure investment "more efficiently" than a rate case.[191] But as Mr. Kahal testifies, there is no

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[188] See OCC/NOPEC Ex. 11 at 22-23 and 11A (Kahal Second Supplemental and Kahal Errata); OCC/NOPEC Ex. 8 at 31 (Kahal Supplemental).

[189] See OCC/NOPEC Ex. 11 at 22 and 11A (Kahal Second Supplemental and Kahal Errata).

[190] See OCC/NOPEC Ex. 11 at 22-26 and 11A (Kahal Second Supplemental and Kahal Errata); OCC/NOPEC Ex. 7 at 33 (Kahal Direct).

[191] FirstEnergy Ex. 50 at 7 (Fanelli Direct).

convincing basis for the assertion that Rider DCR will function more efficiently and foster greater reliability than collecting costs through a base rate case.[192]

Rider DCR does not provide qualitative benefits to consumers. Instead, as structured, it seeks to collect huge costs from customers that the Utilities have failed to show are needed to provide the Utilities with a fair return (as would happen in a base rate case) and meet customers' reliability expectations.[193] If Rider DCR is allowed, the PUCO should count the significant quantitative costs of the rider ($240-330 million) when it conducts the statutory test. It should reject FirstEnergy's unfounded premise that Rider DCR provides qualitative benefits that should be counted in the statutory test.

ii. The rider to charge consumers for Government Directives has not been shown to provide a qualitative benefit to customers.

The Government Directives Recovery Rider ("Rider GDR") is a proposed new rider that the Utilities seek to implement to collect from customers any future costs related to programs required by legislative or governmental directives.[194] The Utilities asked that they be permitted to seek authority from the PUCO to defer and collect costs associated with government directives prior to including costs in Rider GDR.[195] The Utilities do not at this time propose a specific rate increase for Rider GDR, but they have

[192] OCC/NOPEC Ex. 8 at 31 (Kahal Supplemental).

[193] OCC Witness Williams testified that "customers are unwilling to pay more to avoid non-major outages" and therefore customer and utility expectations on this issue "are not aligned." OCC Ex. 27 at 21 (Williams Direct).

[194] OCC Witness Effron recommended that the PUCO reject the rider. OCC Ex. 18 at 22 (Effron Direct). Instead, Mr. Effron advised that if complying with government directives would increase costs and cause a revenue deficiency, then the Utilities should file a rate case. Staff witness McCarter also recommended rejecting the rider. PUCO Staff Ex. 6 at 6 (McCarter Direct). See discussion infra.

[195] FirstEnergy Ex. 7 at 24-26 (Mikkelsen Direct).

indicated that it could be used to collect costs from customers for remediation of manufactured gas plant sites.[196]

FirstEnergy witness Fanelli makes claims that Rider GDR provides a qualitative benefit for an ESP because through it (and Rider DCR) the Utilities, "will be able to invest in their infrastructure and provide safe and reliable service more efficiently than would be achieved through a base distribution rate case under an MRO."[197] But as noted by OCC/NOPEC Witness Kahal, this claim is vague and poorly described.[198]

In fact the Rider will likely harm, not benefit customers. Conceptually, the issues are the same as for Rider DCR—it is single-issue ratemaking requested at a time when the evidence shows substantial excess earnings by the Utilities.[199] Not only is this proposed rider objectionable as single-issue ratemaking, but the Utilities compounded the problem by making it asymmetric. That is, under the rider the Utilities have no obligation to file for rate reductions resulting from changes in governmental regulations.

The Third Supplemental Stipulation fails to adequately address any of these concerns, and even makes Rider GDR worse by extending it to eight years. Rider GDR does not provide a qualitative benefit that should be considered as part of the statutory test. The PUCO should not include this illusory and unsupported claim by the Utilities that this rider provides benefits to customers.

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[196] FirstEnergy Ex. 7 at 24-26 (Mikkelsen Direct).

[197] FirstEnergy Ex. 50 at 9 (Fanelli Direct).

[198] OCC/NOPEC Ex. 7 at 23 (Kahal Direct).

[199] OCC/NOPEC Ex. 7 at 22 (Kahal Direct); and FirstEnergy Ex. 7 at 24 (Mikkelsen Direct).

iii. The Stipulation's provision for federal advocacy lacks any demonstrated value for consumers.

FirstEnergy has included in the Stipulation a provision to support federal advocacy.[200] The Stipulation language lacks firm commitment from the Utilities. The Stipulation states:

> Through May 31, 2024, the Companies shall, in good faith, advocate for market enhancements such as a longer term capacity product, and any other market improvements. [201]
>
> The Utilities are also required to provide a quarterly update to the PUCO on the state of the wholesale electricity markets from FirstEnergy's perspective.[202]

OCC witness James Wilson offered his perspective on this particular provision in the settlement. Mr. Wilson stated:

> PJM stakeholders have at least four times over several years considered this idea, at the urging of one or another stakeholder, and have four times rejected it. RPM is fundamentally a short-term capacity construct. To acquire capacity through auctions, a standard capacity product must be defined. Numerous issues arise when a multi-year product is considered, such as the duration of the product; the fraction of the total capacity requirement to acquire under the long-term product; whether sellers are allowed to offer to provide both the long-term and/or short-term product; how to clear indivisible offers for the long-term product; whether the long-term product is available to all sellers or only to certain types of sellers, such as new entrants; how capacity cleared under the long-term product is represented in the capacity auctions in subsequent years; how to mitigate seller and buyer market power in offers for the long-term product; what happens if a seller is unable to perform; how non-price attributes, such as environmental characteristics or operating flexibility, can be reflected in the auction for a long-term capacity product; and the allocation of the capacity and its costs, to name a few of the issues. Long-term

[200] FirstEnergy Ex. 155 at 10 (Mikkelsen Fifth Supplemental Testimony).

[201] FirstEnergy Ex. 154 at 9 (Third Supplemental Stipulation).

[202] FirstEnergy Ex. 154 at 9 (Third Supplemental Stipulation).

> capacity commitments are more appropriately negotiated between willing buyers and sellers on a bilateral basis, and within such negotiations (in contrast to an auction), the many different attributes of the subject capacity can be considered and valued[203].

This provision of the Stipulation provides no quantitative benefit for consumers. And because of the speculative nature of the provision as pointed out by OCC witness Wilson, there are no qualitative benefits to be derived from this provision either.

iv. The PUCO should not consider the effects of plant retirement, such as job loss and transmission investment, as a qualitative benefit to customers under the electric security plan.

The Utilities claim that one of the qualitative benefits of its ESP is that jobs at the Davis-Besse and Sammis plants will be preserved and new transmission facilities will not need to be built.[204] The Utilities' testimony insinuates (but fails to definitively state) that these two power plants are vulnerable to economic retirement if they are left to operate as unregulated merchants, without customers paying a subsidy.

If the plants are retired the Utilities estimate that about 3,000 jobs would be lost, severely impacting local communities.[205] And Utilities witness Cunningham provides a perspective under which customers would be forced to pay $442 million in transmission upgrades if the plants retire.[206] According to Mr. Cunningham the Utilities customers can already expect to pay $1.0 billion in transmission system upgrades due to recent generating plant retirements.[207]

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[203] OCC Ex. 9 at 20-21 (Wilson Second Supplemental).

[204] See, e.g., FirstEnergy Ex. 50 at 9 (Fanelli Direct).

[205] See FirstEnergy Ex. 35 at 6,8; Attachment SM-1, SM-2.(Murley Direct).

[206] FirstEnergy Ex. 37 at 4 (Cunningham Direct).

[207] FirstEnergy Ex. 37 at 3 (Cunningham Direct).

In order for job preservation and avoided transmission to be qualitative benefits under the ESP (and not the MRO), one would have to assume that absent the ESP (and specifically Rider RRS), the two power plants *will be retired and consequently, jobs will be lost and transmission upgrades will be necessary.* But nowhere in the record do the Utilities assert that FES will shutter these plants if Rider RRS is not permitted. Time and time again when numerous Utilities witnesses were asked, none would state that in fact that the plants would close if Rider RRS was not approved. And no evidence was presented in this case that establishes that the retirement of both of these units is likely (despite Mr. Moul's rather unconvincing testimony that the "economic viability of the plants is in doubt.")[208]

To the contrary, FirstEnergy's own projections of energy market prices (presented by FirstEnergy witness Ruberto) show that the power plants would be economically viable (and in fact highly profitable) and therefore not retired during the 2016 through 2031 timeframe absent Rider RRS.[209] OCC/NOPEC Witness Kahal testified that based on the Utilities' own projections, the two plants will earn far more revenue, at customer expense through Rider RRS, than needed to be economically viable.[210] Mr. Kahal emphasized that Mr. Ruberto's projections provide both a very healthy return of, and on, legacy capital, plus an additional surplus market revenue of $2 billion.[211]

Additionally, the specter of retirement seems unlikely given the recent and expensive investment undertaken by FES at both Sammis and Davis-Besse. A $1.8

[208] FirstEnergy Ex. 28 at 2 (Moul Direct).

[209] OCC/NOPEC Ex. 7 at 34-44 (Kahal Direct); OCC/NOPEC Ex. 8 at 34 (Kahal Supplemental).

[210] OCC/NOPEC Ex. 7 at 37-38 (Kahal Direct).

[211] FirstEnergy Ex. 33 at 6 (Ruberto Direct).

billion environmental controls investment was completed for Sammis in 2010.[212] In 2014, FES replaced the Davis-Besse steam generator at the cost of several hundred million dollars. And, the FES is presently seeking to extend, until 2037, the Davis-Besse operating license, that otherwise expires in 2017. As Mr. Kahal noted, it seems unlikely that these very expensive investments and activities would have been undertaken if FES thought there was any substantial likelihood that these plants are expected to retire soon due to a lack of economic viability.[213]

In summary, there is no evidence in the Utilities' case suggesting that retirement is a reasonable expectation. Rather, the retirement of both plants is at best highly speculative. Because any benefit from avoiding retirement is not certain, the PUCO should not consider job preservation or avoiding transmission investment to be qualitative benefits of the ESP in the statutory test. This would be consistent with how the PUCO refused to consider an uncertain discount provided to marketers as a benefit of a utility's ESP.[214]

v. The PUCO should not consider an increase in reliability and fuel diversity as a qualitative benefit to customers under the electric security plan.

Utilities witness Fanelli testified that under the ESP with Rider RRS, the two plants will contribute power supply benefits in the form of reliability and fuel diversity.[215] This is another example of a vague and poorly described claim in his testimony.

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[85] FirstEnergy Ex. 32 at 10 (Harden Direct).

[213] OCC/NOPEC Ex. 7 at 38 (Kahal Direct).

[214] See *In re: Ohio Power*, Case No. 11-346-EL-SSO, Opinion and Order at 30-31 (Dec. 14, 2011).

[215] FirstEnergy Ex. 50 at 9 (Fanelli Direct).

OCC/NOPEC Witness Kahal testified that under the Utilities ESP, Rider RRS and the underlying PPAs are a purely financial arrangement.[216] There is no physical change at all in the manner in which the plants operate (as compared to how they would operate as merchant generators under an MRO). With or without Rider RRS, customers will obtain all of their physical power from the vast PJM wholesale market, a market that has around 200,000 MW of capacity resources.[217] <u>This is a federal issue. A primary responsibility of FERC is reliability.</u>

Rider RRS does not it any way change how that market works; nor would that rider earmark the reliability and fuel diversity contributions of the two power plants for the Utilities' customers. Customers ultimately obtain the fuel diversity and reliability benefit from the very broad regional PJM market. Davis-Besse and Sammis are a very small percentage of the generation fleet providing service in PJM's boundaries.[218]

Whether FES chooses to retire the Davis-Besse and Sammis, there will be sufficient reliable capacity to serve Ohio and other areas of the PJM service territory as a result of the operation of the PJM markets, including the reliability pricing model ("RPM") capacity market construct.[219] If the plants are retired, new resources, which may be some combination of new power plants, demand response, or energy efficiency, will be developed; if the plants are not retired, it is likely that the development of some new resources will be delayed.

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[216] OCC/NOPEC Ex. 7 at 28 (Kahal Direct).

[217] OCC/NOPEC Ex. 7 at 29 (Kahal Direct).

[218] OCC/NOPEC Ex. 7 at 29 (Kahal Direct).

[219] OCC/NOPEC Ex. 4 at 53 (Wilson Direct).

And, finally generation reliability is not the responsibility of individual generators. And it is not the responsibility of the PUCO.[220] Instead that is a responsibility of PJM and the North American Electric Reliability Corporation ("NERC").[221]

For these reasons the Utilities' claim that there are qualitative benefits of the ESP associated with increased reliability and fuel diversity should be rejected. The claims are unfounded and misleading, and reveal at best a misunderstanding of how Rider RRS works as a purely financial mechanism.

vi. The PUCO should not consider rate stability as a qualitative benefit to customers under the electric security plan.

Utilities' witness Fanelli claims that under the ESP, Rider RRS will provide benefits to customers (over and above the Utilities' projected net savings) by providing rate stability.[222] He views the rate stability as a qualitative benefit that exists under the ESP (and not the MRO) that should be counted in the statutory test. But Mr. Fanelli overstates his case.

OCC/NOPEC Witness Wilson[223] testified that there is no assurance that Rider RRS would contribute to more stable rates. Mr. Wilson testified that SSO customers' rates in general (without Rider RRS) tend to be fairly stable over time because their rates

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[220] Tr. Vol. XXX at 6266 (Choueiki)..

[221] Tr. XV at 3252-3254 (Phillips); see also NERC website, "About NERC", last visited February 11, 2016, available at http://www.nerc.com/AboutNERC/Pages/default.aspx; PJM website, "PJM's Mission & Vision", last visited February 11, 2016, available at http://www.pjm.com/about-pjm/who-we-are/mission-vision.aspx.

[222] FirstEnergy Ex. 50 at 9 (Fanelli Direct).

[223] OCC/NOPEC Ex. 4 at 49-52 (Wilson Direct).

are derived from auctions that reflect forward prices for delivery periods.[224] Rider RRS will be reconciled annually and thus a credit or charge will be made on customers' bill each year depending upon whether market prices were relatively high or low in the prior year.[225] The reconciliation method can mean that changes in Rider RRS may move in the same, or the opposite, direction of SSO rates. Mr. Wilson, thus, testified that it cannot be assumed that Rider RRS will stabilize SSO customers' rates.[226] Moreover there is no guarantee whatsoever from the Utilities that Rider RSS will ever produce a net credit to customers to offset any market volatility.

Without evidence that the Rider RRS will enhance rate stability, the PUCO should reject the notion that there is a qualitative reliability benefit to consider in the statutory test.

vii. The PUCO should not consider the various new provisions in the Third Supplemental Stipulation as qualitative benefits to customers under the electric security plan.

FirstEnergy witness Mikkelsen claims that under the Third Supplemental Stipulation to the ESP customers will reap a bounty of new qualitative benefits. Specifically, Ms. Mikkelsen states that in addition to the benefits of the Economic Stability Program the new stipulation's qualitative benefits include, among other things, federal advocacy for a longer term capacity product, grid modernization, a commitment to reduce CO2 levels, battery resource investment evaluation, energy efficiency offerings beginning in 2017, increased renewable energy resources, commitments to file a case to

[224] OCC/NOPEC Ex. 4 at 50 (Wilson Direct).

[225] OCC/NOPEC Ex. 4 at 50 (Wilson Direct).

[226] OCC/NOPEC Ex. 4 at 50 (Wilson Direct).

transition to decoupled residential base distribution rates.[227] Her allegations simply are not true and the alleged new benefits will actually work counter to customers' best interests.

As OCC/NOPEC witness Kahal testified, the qualitative benefits in Ms. Mikkelsen's testimony are mere conclusory assertions that are accompanied by no supporting evidence. What is clear is that a number of these new initiatives are intended to benefit shareholders, not customers. For example, the increase in the energy efficiency shared savings from $10 million per year to $25 million per year will likewise only be a detriment to customers. That is, the decision to increase energy efficiency shared savings will not benefit customers.[228] Rather it will provide additional revenue to shareholders.

Additionally, the proposal to move to decoupling through a straight fixed variable ("SFV") rate design for residential distribution service is the opposite of a qualitative benefit to customers. (And the proposal should be rejected.) First, the proposed SFV, to the detriment of customers, does not include a corresponding rate of return reduction in recognition of lowered business risk.[229] As the risk for FirstEnergy decreases, the rate of return should decrease. Here, although the SFV rate design will decrease risk, the rate of return has stayed constant. This is not just and reasonable for consumers.

Second, as FirstEnergy itself has stated in the past, SFV ignores the cost causation principle of ratemaking and may have the effect of shifting cost recovery from higher-usage customers to lower-usage customers. Third, adopting SFV rates will result in customers having less of an economic incentive to participate in energy efficiency or

[227] FirstEnergy Ex. 155 at 13 (Mikkelsen Fifth Supplemental).

[228] OCC/NOPEC Ex. 11 at 26 and 11A (Kahal Second Supplemental and Kahal Errata).

[229] OCC/NOPEC Ex. 11 at 26 and 11A (Kahal Second Supplemental and Kahal Errata).

peak demand reduction programs resulting in an increase in the cost of the programs in order to achieve the statutorily required savings and reductions.

Fourth, the fact that SFV rates include a much higher customer charge will increase customer utility bills. This will negatively impact low use customers the most. To the extent these low use customers are also low income customers who are already participants in the percentage of income payment plan ("PIPP") program, shifting revenue responsibility will not increase their obligation to pay, but will simply shift more dollars into the USF rider that all customers pay. Further, substantially increasing the cost for low income customers that qualify for PIPP, but that do not currently participate in the PIPP program may well drive substantially more customers to join the PIPP program, thereby increasing the USF Rider even more and further shifting the burden to other customers.

2. The Rider RSS charge to retail consumers completely transfers all risks associated with the continued operation of the Plants and OVEC to FirstEnergy's captive customers, to the detriment of those customers and the public interest.

FES, the owner of the Plants and OVEC, are currently solely responsible for the profitability of these generating facilities. That responsibility involves controlling the costs of operating and maintaining these facilities, prioritizing and justifying capital expenditures and implementing the bidding strategies that generate the revenues from the competitive wholesale markets. Currently, consumers have no responsibility for the generating facilities' profitability. That allocation of risk is consistent with the transition to a deregulated generation market.

FirstEnergy's senior management has been on the public record touting the benefits, for consumers, of the transition to the competitive market. In 2011, Leila Vespoli, FirstEnergy's Executive Vice President and General Counsel, publicly stated:

> Regarding competitive markets for electric generation, we already know that they work because these markets have resulted in lower electric generation prices and less risk for Ohio customers. That's good news for businesses and homeowners looking for every opportunity to stretch their limited resources.[230]

Ms. Vespoli further stated that the transition to competition transferred ownership of the generating assets, as well as, transferred the accompanying risks associated with the assets, and made the asset owner more cost conscious and efficient. Ms. Vespoli stated:

> Among other changes, we structurally separated our regulated and unregulated operations so our power plants are no longer owned by our electric distribution companies. But more important, all of our generation-related investments – including the risks that accompany them – are now borne by our shareholders, not by customers. This includes the significant investments we've made in environmental controls at our generating plants. This change has made us better – leaner, more efficient, and more customer focused.[231]

Finally, in favor of the competitive market, Ms. Vespoli points to the investment in generating capacity that the Utilities' unregulated affiliate has made, since 1999, at no risk to consumers. Ms. Vespoli stated:

> Since 1999, our competitive subsidiary, FirstEnergy Solutions, has invested nearly $6.4 billion in its generating fleet while adding more than 900 megawatts of power. That's the equivalent of a large, baseload power plant – and, once again, we've brought that additional capacity online *at no risk to customers*.[232]

[230] IGS Ex. 11 at Ex. 1 (Matt White Supplemental Direct) Competitive Markets Work House Public Utilities Committee Leila Vespoli (10/19/11) (3/2/15).

[231] IGS Ex. 11 at Ex. 1 (Matt White Supplemental Direct) Competitive Markets Work House Public Utilities Committee Leila Vespoli (10/19/11) (3/2/15).

[232] IGS Ex. 11 at Ex. 1 (Matt White Supplemental Direct) Competitive Markets Work House Public Utilities Committee Leila Vespoli (10/19/11) (3/2/15).

Despite the pro-market rhetoric from Ms. Vespoli, just a few years ago, the Utilities are now doing the unregulated generation affiliate's bidding by seeking authority from the PUCO to implement Rider RRS, and enabling FES to step away from the competitive market, and the associated risks.

OCC/NOPEC Witness Dr. Sioshansi explained that Rider RRS completely transfers all risks (including costs and strategies involving participation in PJM's markets) associated with the continued operation of the Plants and OVEC to the Utilities' customers. The Utilities justify the approval of Rider RRS, in part, by forecasting that the Plants and OVEC will be less costly sources of energy, ancillary services, and capacity than other alternatives that will be available in the market in the future. Based on these projections, the Utilities anticipate that Rider RRS will yield approximately $2 billion in credits to customers over its 15-year term.[233] Under the Third Supplemental Stipulation; however, Rider RRS is in effect for 8 years and the Utilities estimate that consumers will save $561 million.[234]

However, these projections are based on a number of assumptions that may not necessarily materialize in the future. And these projections are not guaranteed by the Utilities.[235] Additionally, Mr. Wilson's estimated cost to consumers was revised to reflect the shorter 8 year term, and he calculated that revised cost to be $3.6 billion.[236]

[233] OCC/NOPEC Ex. 1 at 19-21 (Sioshansi Direct).

[234] FirstEnergy Ex. 155 at 11 (Mikkelsen Fifth Supplemental).

[235] Tr. Vol. I at 42-43 (Mikkelsen).

[236] OCC/NOPEC Ex. 9 at 7 (Wilson Second Supplemental).

Admittedly, Rider RRS projections are just that projections, and no one knows for certain how they will turn out.

In fact, the only certainty is the 10.38 percent ROE (profit) included in the Third Supplemental Stipulation.[237] That profit will be guaranteed by utility customers and paid to FES. But there are reasons why the Utilities' projections should be viewed by the PUCO as less reliable.

(1) Dr. Sioshansi makes the following logical argument as to why the Utilities' Rider RRS projections are unreliable:

> The [Utilities]' claim that the Program is likely to produce a $2 billion credit to ratepayers over its term is difficult to accept *prima facie*. The Companies admit that the Plants and OVEC cannot recover their costs from PJM market revenues today. If the [Utilities] believe their own analysis, that the plants are likely to become profitable within a few years (to the tune of nearly $2 billion over the next 15 years), one would assume that FES would invest capital or utilize debt to keep the Plants and OVEC operating until that time. Because FES (and presumably shareholders and investors) is unwilling to bear that risk, there is no rationale for why the [Utilities'] customers should be obliged to do so.[238] The above argument holds true for FirstEnergy's

[237] See FirstEnergy Ex. 154 (Third Supplemental Stipulation).

[238] OCC/NOPEC Ex. 1 at 19-21 (Sioshansi Direct).

eight-year term and projected $561 million credit to customers.

(2) OCC witness Wilson makes a practical argument to counter the Utilities projection on the cost side of the Rider RRS projections: It is not appropriate for FirstEnergy to collect the net costs of the Plants and OVEC entitlement from customers through a cost tracker such as the proposed Rider RRS. This would shift the cost and risk of the assets onto customers, while eliminating incentives to control their costs.[239] An absence of cost controls or an environment condoning inefficient operations could increase costs to customers in excess of the Utilities' Rider RRS projections.

(3) Additionally, Dr. Sioshansi raises concerns on the revenues side of the Utilities Rider RRS projections by stating: As I outline in my response to Q16, the strategies employed by the [Utilities] for offering the Plants and OVEC into the PJM-operated markets can act to suppress or increase wholesale prices. To date, the [Utilities] have not made a firm commitment as to if or how the Plants and OVEC will

[239] OCC/NOPEC Ex. 4 at 57 (Wilson Direct).

be offered into the PJM-operated markets. Thus, it is not clear how the [Utilities'] offering strategies may be influenced by the participation of affiliates' generation assets in the markets. In a worse-case scenario for customers, the [Utilities] may adopt an offer strategy, in which the Plants and OVEC are offered into the market above cost and do not clear *any* of PJM's markets for capacity, energy, or ancillary services. Although the Plants and OVEC would not generate any revenues in the market, the Utilities would nevertheless earn a guaranteed profit through Rider RRS. Moreover, the resulting increase in wholesale PJM-market prices would improve the revenues earned by generation affiliates' generators participating in the PJM-operated markets.[240]

(4) Finally, OCC Witness Ferrey raised concerns over uncertainties surrounding environmental regulations that may lead to increased compliance costs or reduced revenues due to decreased plant operations. Professor Ferrey stated: Citing the PUCO's comments to EPA regarding the CPP, changing from the current market-driven dispatch order to new environmentally-affected

[240] OCC/NOPEC Ex. 1 at 15-16 (Sioshansi Direct).

> market dispatch would increase operating costs per unit of power generated to Ohio consumers by 39%, costing Ohio consumers $2.5 billion each year by 2025.[241] Furthermore, Professor Ferrey stated: "[i]n summary, any decrease in plant operations due to pending environmental regulations could reduce revenues needed to offset the plant's potentially increasing fixed and variable costs due to these same pending regulations. This uncertainty of decreased revenues and increased costs is a scenario which would harm FirstEnergy's customers under the proposed PPA."[242]

If the Utilities' Rider RRS projections do not materialize, the Plants and OVEC may be more costly than alternative sources of energy, ancillary services, and capacity. Moreover, other unanticipated technology advancements and economic downturns may further affect the economic viability of the Plants and OVEC relative to alternatives sources of energy available in the market. If the market price of energy, ancillary services, and capacity do not rise as projected by the Utilities, their customers must nevertheless fully guarantee the cost recovery and profits.

Such a guarantee for these uneconomic and inefficient Plants and OVEC could result in a bad deal for consumers for the entire modified eight-year term. Because there is no guarantee from the Utilities that any customers will benefit from the proposed transaction or Rider RRS, customers fully bear all of the cost and economic risk of the

[241] OCC Ex. 21 at 19-20 (Ferrey Direct) See Attachment SF-2 at 28 – 31.

[242] OCC Ex. 21 at 25-26 (Ferrey Direct).

Plants and OVEC. Such transfer of risk to captive monopoly customers is improper in a deregulated market for generation services.[243]

FirstEnergy's claim that the PPA could produce a $561 million (or $2 billion) credit to ratepayers over its term is difficult to accept (and believe), especially in light of the fact that the Utilities do not guarantee their customer refund projections. The Utilities admit that the PPA Units may not be able to recover their costs from PJM market revenues today. If FirstEnergy believes its own analysis, that the PPA Units are likely profitable over the PPA Rider's term, one would expect that FES would invest capital to keep the PPA Units operating. Because FES (and presumably shareholders and investors) is unwilling to bear that risk, there is no rational reason for why FirstEnergy's customers should be obligated to do so. The only assumption that is guaranteed to come to fruition throughout the course of the PPA is the ongoing profits for the PPA Units. Under this proposal, these profits would be guaranteed by FirstEnergy's captive customers.

Therefore, the proposed transaction and Rider RRS do not benefit customers and are not in the public interest, and should be rejected by the PUCO.

[243] OCC/NOPEC Ex. 1 at 19-21 (Sioshansi Direct).

3. Allowing subsidized power plants (by utility affiliates) to participate in a wholesale market against unsubsidized power plants destroys the benefits to customers of a properly functioning competitive wholesale market.

a. Short-run efficiency benefits to customers and the market are undermined.

The proposed ESP threatens to undermine the short-run efficiency benefits of the PJM-operated wholesale markets. This is because the capital and operating costs of the Plants and FES's entitlement to OVEC would be fully subsidized by FirstEnergy's customers.[244] That is, the Plants and OVEC would not have to compete against other unregulated generators in the PJM region to recover their costs.[245] This would allow FirstEnergy to follow an uneconomic business strategy and have their costs fully recovered through Rider RRS, to the detriment of the energy market (and consumers).[246]

For example, FirstEnergy could choose to offer the Plants and its OVEC entitlement into the PJM markets below their true costs. This could result in the Plants being dispatched by PJM at a net operating cost.[247] FirstEnergy would then recover its cost deficit through Rider RRS, even though the Plants and OVEC would not recover their operating costs through the market.[248] Moreover, the inefficiency of the market would be intensified. There could be other generators that could serve customer demands at lower operating cost than the Plants and OVEC and those plants instead would sit

[244] OCC/NOPEC Ex. 1 at 12 (Sioshansi Direct).

[245] OCC/NOPEC Ex. 1 at 12 (Sioshansi Direct).

[246] OCC/NOPEC Ex. 1 at 12 (Sioshansi Direct).

[247] OCC/NOPEC Ex. 1 at 12 (Sioshansi Direct).

[248] OCC/NOPEC Ex. 1 at 12 (Sioshansi Direct).

idle.[249] Conversely, FirstEnergy could choose to offer the Plants into the PJM markets at their actual cost above the market clearing price. This could result in the Plants not being dispatched by PJM. Although the Plants and OVEC would not earn revenues in the PJM market, FirstEnergy would recover this revenue shortfall from their customers through Rider RRS.[250]

FirstEnergy has made no firm commitment regarding how the Plants and OVEC will be offered into the PJM-operated markets.[251] Thus, no one knows what type of short-run operating and efficiency impacts the Program would have.[252] Moreover, any claims by FirstEnergy that it plans to offer the generation into the PJM markets at cost would be difficult to evaluate, because the inherent subsidy in the Program implies that the Plants and OVEC have zero marginal capital and operating costs to the Utilities.[253]

b. Long-run efficiency benefits to customers and the market are undermined.

The proposed Program threatens to undermine the long-run efficiency benefits of the PJM-operated wholesale markets in two ways.[254] That means it will be more costly in the long-run to supply customer demands reliably.[255] This will serve as a detriment to consumers.

First, because the operating and capital costs of the Plants and FirstEnergy's OVEC entitlement will be guaranteed and subsidized by the Utilities' customers the

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[249] OCC/NOPEC Ex. 1 at 12 -13 (Sioshansi Direct).

[250] OCC/NOPEC Ex. 1 at 13 (Sioshansi Direct).

[251] OCC/NOPEC Ex. 1 at 13 (Sioshansi Direct).

[252] OCC/NOPEC Ex. 1 at 13 (Sioshansi Direct).

[253] OCC/NOPEC Ex. 1 at 13(Sioshansi Direct).

[254] OCC/NOPEC Ex. 1 at 14 (Sioshansi Direct).

[255] OCC/NOPEC Ex. 1 at 14(Sioshansi Direct).

Plants and OVEC generation will *de facto* remain in the PJM system, regardless of whether lower-cost alternatives may exist or enter the market.[256] In other words, even though it may be long-run efficient for the Plants and/or OVEC to retire and be replaced by lower-cost alternatives, they would be allowed remain in the system, against the economic will of the market, due to the guaranteed customer subsidy.[257] This would translate into higher customer costs than would occur without the Program.[258]

The Utilities' offering strategies on wholesale market prices could also threaten to undermine the long-run efficiency benefits of the PJM market.[259] As explained earlier, the subsidy inherent in the Program can result in the Plants and OVEC being offered into the PJM-operated markets at or below their true costs. This could have a negative effect on market prices because PJM markets ensure long-run efficiency of the electric power system by allowing generators to enter and exit the market based on profits and revenues earned.[260] If the Plants and OVEC are offered into the market below their true costs and are dispatched by PJM in place of lower-cost generators, this will suppress market prices, which can lead to lower cost more efficient generation deciding not to enter the market.[261]

Conversely, if the Plants and OVEC are offered at cost and above the market clearing price, the units will fail to clear the markets, which results in no revenues to

[256] OCC/NOPEC Ex. 1 at 14 (Sioshansi Direct).

[257] OCC/NOPEC Ex. 1 at 14- 15 (Sioshansi Direct).

[258] OCC/NOPEC Ex. 1 at 14 (Sioshansi Direct).

[259] OCC/NOPEC Ex. 1 at 14 (Sioshansi Direct).

[260] OCC/NOPEC Ex. 1 at 10 (Sioshansi Direct).

[261] OCC/NOPEC Ex. 1 at 10 (Sioshansi Direct).

offset PPA unit's costs. Under the plan there are potentially no offsetting revenues to costs from, the PPA Units. Nonetheless these units are guaranteed a profit from captive retail customers and also result in higher costs from generators that must be dispatched in their place.

PJM's wholesale electricity markets are also intended to ensure long-run efficiency of the electric power system.[262] Long-run efficiency of the generation mix is achieved by allowing generation assets to freely enter and exit the market. When lower-cost generation alternatives exist, the higher cost alternatives are driven out of the market because these assets cannot recover their costs through market revenues.[263] Conversely, long-run efficient technologies will continue to flourish because they are able to recover their capital and operating costs through market revenues.[264] To allow the Plants and OVEC to offer into the PJM market on the basis of anything but true cost distorts the signals provided for long-term investment.[265]

As the PJM Independent Market Monitor stated:

> 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

[262] OCC/NOPEC Ex. 1 at 10:4-5 (Sioshansi Direct).

[263] OCC/NOPEC Ex. 1 at 10:5-10 (Sioshansi Direct).

[264] OCC/NOPEC Ex. 1 at 10:10-12 (Sioshansi Direct).

[265] OCC/NOPEC Ex. 1 at 15:9-12 (Sioshansi Direct).

> would likely result in a situation where only subsidized units would ever be built.

This means that customers may see higher energy prices in the long-run because long-term investments are not being driven by true market fundamentals.[266] As noted earlier, however, if the PPA units' costs exceed market clearing prices customers are still stuck with the bill guaranteeing their profits.

4. Consumers will not have the protection of cost control incentives due to a lack of regulatory oversight regarding cost of service pricing.

Rider RRS should not be authorized because the PUCO will have very limited regulatory oversight regarding an arrangement that purports to be "cost of service" pricing. Under the arrangement, customers must pay cost of service rates for generation resources that are not in the retail rate base. This can lead to a problem of cost control incentives and the possibility of abuse by the affiliate to the detriment of utility customers.

Under a cost of service PPA, FES has little incentive to aggressively control costs. And FES can increase its profits by increasing capital investments in the power plants. As OCC Witness Dr. Sioshansi states, "Rider RRS eliminates any incentives for the Utilities and FES to only make economically prudent investments, because those costs and a guaranteed profit are ensured." [267] The FirstEnergy Utilities, as the buyers under the PPAs, would have little incentive to vigilantly review the reasonableness of the FES costs at those power plants. Even if they were to vigilantly review the reasonableness of capital

[266] OCC/NOPEC Ex. 1 at 15:12-14 (Sioshansi Direct).

[267] OCC/NOPEC Ex. 1 at 19 (Sioshansi Direct).

expenditures, it is clear under the term sheet that the final determination of whether to make those expenditures lies with FES.[268]

Further, while the stipulation allegedly creates a “rigorous review” by the PUCO Staff, this is no different than the review process set forth in the application.[269] It is not clear whether this review would be open to all intervenors, or whether the scope would be limited for any PUCO determinations on prudence and cost recovery.[270] The stipulation simply allows for adjustments based on whether the costs were unreasonable.[271] Also, there exists no criteria as to what constitutes a reasonable decision. Therefore, a FirstEnergy decision not to clear in the markets (because a unit’s costs exceeds the market clearing price) would be argued by FirstEnergy to be reasonable—which would leave customers paying for the entirety of the unit’s PPA costs and profits.

Furthermore, any information necessary to determine the prudence of those actions will be held behind an iron curtain of confidentiality. The PUCO Staff will be required under the stipulation to treat “any and all such information, ***regardless of its content,*** as if it is highly sensitive, proprietary, trade secret information and Critical Energy Infrastructure Information [Emphasis added].”[272] It seems likely that this would prevent any intervenors from having any opportunity to determine the prudency of these costs for customers. Consumers would have little to no protection from profligate spending by FES that would be conducted under the guise of “good utility practice.”

[268] Tr. I at 80-81 (Mikkelsen)(public).

[269] FirstEnergy Ex. 154 at 8 (Third Supplemental Stipulation and Recommendation).

[270] FirstEnergy Ex. 7 at 14-15 (Mikkelsen Direct).

[271] FirstEnergy Ex. 154 at 8 (Third Supplemental Stipulation).

[272] FirstEnergy Ex. 154 at 8 (Third Supplemental Stipulation).

Finally, there are no guarantees under the “rigorous review” standard as to how the decisions governing cost allocations between the PPA units and FES’s other generation facilities will be audited. One can only assume the worst that, when presented with a decision as to how to allocate the higher of two costs, the greater of the two costs will be allocated to the PPA units, which have both a guaranteed cost recovery and profit. For example, if FES has a contract for $100/ton coal and $50/ton coal, the concern is that the $100/ton coal will be allocated to the PPA units. These actions driving up the PPA units’ costs will only exacerbate the market-clearing and withholding problem identified above. The PUCO must separate the true value that is lacking for customers under the “rigorous review” standard from the public relations value of FirstEnergy’s choice (misuse) of words here and elsewhere in the settlement.

The PUCO may only act within its jurisdiction. That is why it cannot simply require FES to allow inspections and document review. But the PUCO cannot circumvent its jurisdictional limits. This attempt is simply an *ultra vires* act and void ab initio. Thus, it is meaningless.

5. The RRS Rider for PPA charges to consumers would not have the effect of stabilizing or providing certainty regarding retail electric service to customers. There are less costly and more effective methods of providing stability to customers such as staggering and laddering of the already existing SSO auctions (if stability is an objective).

The PUCO is asked to approve a proposal that effectively places all of the risk of operating and maintaining the Sammis, Davis-Besse and OVEC entitlement on customers. In support of this proposal, FirstEnergy states that the proposed transaction will "safeguard customers from volatility and retail price increases."[273] Specifically, the Utilities state that Rider RRS should be non-bypassable because all distribution customers (shoppers and non-shoppers) will benefit from the price stability.[274] It is the Utilities' opinion that Rider RRS is a mechanism to hedge all consumers in their service areas against market volatility. But, Rider RRS will not have this effect.

SSO customers are served through long-term one-year and three-year full requirements contracts based on forward prices at the time of the auction plus a markup. As a result of this process, the rates SSO customers will pay will be established through blending the results of multiple auctions held months or years in advance of delivery. And, the rates will tend to be fairly stable over time. This has been the case in the auctions held over the past several years to serve various Ohio utilities' SSO customers. Rider RRS will be reconciled on an annual basis. OCC witness Wilson disagrees with FirstEnergy's assertions that Rider RRS will stabilize customers' rates. Mr. Wilson addresses this issue stating:

> Rider RRS would not necessarily lead to more stable rates for SSO customers. Under the ESP, SSO customers will be served by one- to three-year full requirements contracts resulting from competitive auctions. As a result of this process, the rates SSO customers will pay will be established through blending the results of multiple auctions held months or years in advance of delivery. The rate resulting from each auction will tend to reflect forward prices at the time of the auction plus a markup. Forward prices for delivery periods several months or a few years out tend to be fairly stable. Consequently, the rates paid by SSO customers will tend to be fairly stable over time. This has been seen in the auctions held over the past several years to serve various Ohio utilities' SSO customers.[275]

[273] FirstEnergy Ex. 1 at 2 (Application).

[274] FirstEnergy Ex. 13 at 6 (Strah Direct)

[275] OCC/NOPEC Ex. 4 at 49 (Wilson Direct).

Staff witness Choueiki is in alignment with Mr. Wilson's opinion. Dr. Choueiki states:

> Staff agrees with the Companies that the energy prices in the PJM footprint have been quite volatile recently, especially during certain hours in January and February of 2014 (the Polar Vortex period). The Companies claim that Rider RRS will provide a hedge for consumers against such market volatility. Staff prefers the staggering and laddering approach that the Commission has adopted in administering past SSO procurement auctions for mitigating price volatility. Additionally, unless a particular customer is a very large energy user that has on staff professional energy experts that can purchase energy in the day-ahead and real-time hourly markets, customers that shop often hedge their risk by purchasing fixed rate contracts for a one year, or longer, period. These fixed rate contracts help customers reduce their exposure to the high volatility that may be observed in the day-ahead and real-time hourly markets.[276]

Rather than stability, volatility will be reflected in Rider RRS, by adding a relatively non-stable component to the SSO customers' rates that, but for the PPA, otherwise do not include such a rider charge. As SSO customers' rate changes from year to year reflecting movements in forward prices, the changes in the Rider RRS amounts may move the same direction or the opposite direction to SSO rates. Because of this, it cannot be assumed that the Rider RRS will tend to 'stabilize' or add certainty to SSO customers' rates. Moreover, Rider RSS may only result in a net charge to customers through its eight-year term, consequently only guaranteeing higher prices to consumers. Therefore, Rider RRS will not provide the Utilities' customers the desired price stability. The current staggering and laddering approach used by the Utilities in their SSO auction is viewed as preferable to Rider RRS.

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[276] Staff Ex. 12 at 14 (Choueiki Direct).

The Staff is so in favor of the auction results from the staggering and laddering approach that Staff witness Strom proposes expanding this approach. Mr. Strom stated:

> I recommend that the auction laddering and blending process continue past the end date of the proposed ESP period. This would allow transition from this currently proposed ESP to the next ESP without the rate volatility impact that could be associated with a sudden end, followed by a re-start, of the auction laddering and blending process. An example of how this could occur is presented in Exhibit RWS-1.[277]

An ongoing staggering and laddering approach that was not constrained by the terms of the ESP could provide consumers the desired rate stability without the risks associated with Rider RRS.

There are also differing opinions on whether Rider RRS will truly serve consumers as a hedge against price volatility in the market place. In order for Rider RRS to serve as a hedge, and deliver the alleged benefits to customers, Rider RRS's impact on customers' bills must move counter to the market. That is if electric energy prices are low, then customers will see a charge on their bills, but if market prices are rising, then customers would see a credit on their bills. However Rider RRS is not guaranteed to operate in this manner, and thus should not be accepted as a hedge. OCC witness Wilson made this point in his direct testimony. Mr. Wilson stated:

> Customers who are instead served by competitive retail suppliers may be exposed to market price fluctuations, or may pay fairly stable rates, depending upon the choices they make that reflect their preferences. The potential impact of the proposed Rider RRS on the trajectory of such customers' rates would also depend on the extent to which the Indicated Generation net costs in one year are uncorrelated or anti-correlated with the costs at which the customer will be supplied in the following year, when the Indicated Generation net costs will be collected through Rider RRS. To the

[277] Staff Ex. 5 at 4 (Strom Direct).

> extent Rider RRS amounts might be uncorrelated with market price fluctuations and tend to stabilize some customers' bills, they would do so primarily for those customers who have by their choices indicated a preference for market-based prices rather than stable prices. Again, the proposed Rider RRS would be lagged one year, so its amounts could move in the same direction or opposite direction to the rates shopping customers are paying at any time.[278]

Interestingly, on cross-examination, FirstEnergy witness Mikkelsen conceded this very same point.

> Q. If rider RRS is approved, customers will have -- residential customers will have no choice but to participate in that program because the charge is non-bypassable, correct?
>
> A. Yes.
>
> Q. And if rider RRS is approved as proposed and as market prices go down or stay low, customers will have no choice but to pay the charge when revenues do not exceed the costs, correct?
>
> A. Yes.
>
> Q. And would you agree that a hedge is an instrument that typically addresses a single risk, such as market prices?
>
> A. I think a hedge is designed to address the risk associated with adverse changes in market prices, * * *.
>
> Q. But rider RRS has different components in it, correct, besides just revenues?
>
> A. The charges or credits included in rider RRS are comprised of the net between the market revenues associated with selling the output of the plants into the market and the costs associated with the negotiated purchase price for that contract.
>
> Q. And to the extent costs exceed revenues, rider RRS will always be a charge to customers, correct?

[278] OCC/NOPEC Ex. 4 at 51 (Wilson Direct).

> A. To the extent that costs exceed revenues, rider RRS will be a charge in the period that costs exceed revenues, not necessarily always thereafter.
>
> Q. And regardless which way the market is going, if costs exceed revenues, customers will receive a charge, correct?
>
> A. If costs exceed revenues, rider RRS would be a charge.[279]

So, as Mr. Wilson points out in testimony, and Ms. Mikkelsen acknowledged on the witness stand, Rider RRS, as structured, cannot be considered a hedge. Because Rider RRS' outcome for consumers is not solely dependent upon market prices – which is supposedly what is being hedged. No matter what revenues are received through the market, if costs exceed those revenues, customers receive a charge. That holds true whether electric energy prices are falling or rising. Therefore, the Rider RRS mechanism is cannot be considered a hedge.

Further evidence confounding FirstEnergy's allegations that Rider RRS is a hedge can be found in the annual reconciliation process. As OCC Wilson explains:

> Rider RRS will be reconciled on an annual basis. Therefore, it will result in a bill credit or charge in each year depending upon whether market prices were relatively high or low in the prior year. The Rider RRS amounts to be collected from customers in one year will tend to be positive [or negative] when PJM market prices were relatively low [or high] in the *prior* year, which would generally occur due to the peculiar weather and other conditions of that year. Thus, as SSO customers' rates change from year to year reflecting movements in forward prices, the changes in the Rider RRS amounts may move the same direction or the opposite direction to SSO rates. It cannot be assumed, therefore, that Rider RRS will tend to hedge or stabilize SSO customers' rates.[280]

[279] Tr. XXXIV at 7031-7033 (Mikkelsen) (emphasis added).

[280] OCC/NOPEC Ex. 4 at 50-51 (Wilson Direct).

Therefore, it cannot be assumed that the Rider RRS will tend to 'stabilize' SSO customers' rates, especially in light of the fact that Rider RSS may never result in a credit to consumers. Even so, FirstEnergy's efforts to deny consumers the possibility of lower (but more volatile) market charges in favor of paying higher (less volatile) charges to subsidize the PPA should be seen as much more about FirstEnergy benefiting from a customer-funded subsidy than consumers benefiting from stability.

Mr. Wilson raises the concern that electric energy prices will not rise as high as FirstEnergy projects. In that event, the important point is that Rider RRS is likely to result in a charge to customers, and to be very costly to customers over the long term (Mr. Wilson estimates $3 billion over the 15-year term)[281] (Mr. Wilson updated his estimates as a result of the Third Supplemental Stipulation and now estimates the costs to $3.6 billion over the 8-year term.)[282] Therefore, any impact Rider RRS may have on the year-to-year "stability" of rates is likely to be relatively unimportant to SSO customers.[283]

Professor Ferrey raised additional concerns on the cost side of Rider RRS. Professor Ferrey's concerns are with pending additional federal environmental regulations that could have a significant impact on, in particular, coal-fired power generation facilities, even where such facilities comply with current federal and state environmental regulations. As OCC witness Professor Ferrey stated: Given the level of uncertainty with regard to pending environmental regulations, this is not the time to make

[281] OCC/NOPEC Ex. 4 at 46 (Wilson Direct).

[282] OCC/NOPEC Ex. 9 at 8 (Wilson Second Supplemental).

[283] OCC/NOPEC Ex. 4 at 51 (Wilson Direct).

a long-term commitment to purchase coal-fired power, especially if the purchase is on a cost-plus basis.[284]

Because several of these new pending regulations will require a not-yet-determined, state-regulatory component and will also regulate neighboring state emissions, one cannot with certainty currently determine the impact of these regulations on generation operations, costs, maintenance expenses, or ability to be dispatched. This uncertainty is a significant risk factor in approving any new contracts for power purchased from coal-fired generation facilities until the regulations, plans, and effects of these several pending regulations are known and manifest in subsequent state and federal decisions.[285]

Given that three of FirstEnergy's proposed plants are coal plants (Sammis, Kyger Creek and Clifty Creek), it is very likely that these plants will see an equivalent increase in their cost of production if energy prices rise as a result of carbon regulations. Thus, while customers may see an increase in energy prices, Rider RRS will provide no additional protection because the cost of coal generation could increase as well.

In addition, there could be opportunities for consumers to enter into longer term arrangements with a Marketer or with a Governmental Aggregator to provide for

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[284] OCC/NOPEC Ex. at 20 at 19 (Direct Testimony of Professor Steven Ferrey) (May 11, 2015). Specifically, Professor Ferrey was discussing the following environmental regulations: (1) The EPA pending limit on existing facility CO2 emissions will cause states to limit CO2 emissions and will cause some coal plants to limit or change operations, or close. (2) Pending lower NAAQS standards for ozone will cause many regions of states to lose attainment with Clean Air Act requirements, putting pressure on continued operation of coal-fired power plants. (3) With CSAPR being upheld by the Supreme Court in 2014, this places additional EPA pressure on upwind states, such as Ohio, to decrease their emissions of particulate matter, NOx, and ozone, particularly from coal-fired plants. (4) The MATS standards will affect coal plant operations by specifically targeting mercury associated with coal combustion. (5) Pending EPA adjustment of sampling stations and protocol for SO2 emissions from power plants will put more pressure on coal-fired power plants.

[285] OCC Ex. 20 at 3 (Ferrey Direct) (May 11, 2015).

stabilizing or providing certainty with regards to electricity prices. For example, NOPEC has a nine-year arrangement for its customers as was explained by OCC witness Wilson. Mr. Wilson on redirect examination stated:

> Q. Okay. Now, counsel at some point this afternoon asked you about whether you're familiar with CRES contracts. Do you recall those questions?
>
> A. Yes.
>
> Q. And what was your response at that time?
>
> A. That I was familiar with the terms of one such arrangement, the arrangement between NOPEC and FES.
>
> Q. And can you explain to me what your familiarity is with that arrangement?
>
> A. Yeah. My understanding it was a nine-year contract initiated in the end of 2010, early 2011 and that it's pegged to the price to compare with residential customers getting 4 -- 6 percent and commercial customers getting 4 percent off of the price to compare for a full requirements-type contract.[286]

Finally, implementing a PPA is not the only alleged solution to stabilizing rates for long-term ratepayers. Many generators offer various products and services that are designed to help stabilize rates, including long-term contracts.

The PUCO should not accept the argument that, if approved, Rider RRS will stabilize or hedge electric energy prices for FirstEnergy's customers. Customers choosing competitive retail electric service would select among the available offerings according to their preferences (and risk tolerances), and could choose offerings that hedge prices and provide greater stability to the extent that is desired. SSO customers are

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[286] Tr. Vol. XXII at 4590-4591 (Wilson) (October 2, 2015).

protected by the current staggering and laddering approach inherent to the auctions, an approach that could be extended beyond the ESP term for additional consumer protection. For such customers, Rider RRS, which will be updated annually, and through the reconciliation process, could potentially move contrary to, or in the same direction as, the market-based prices they pay at any time. Given the further uncertainty regarding FirstEnergy's energy price and costs forecasts, the potential for the proposed Rider RRS to act as a hedge of volatile market prices or contribute to price stability is doubtful. Therefore, Rider RRS should be rejected by the PUCO.

6. Allowing FirstEnergy to count legacy transmission costs for MISO Transmission Expansion Plan against its $360 million commitment for Regional Transmission Expansion Plan does not benefit (but harms) customers and the public interest and violates a prior settlement.

Until and unless FERC approves recovering legacy MISO Transmission Expansion Plan ("MTEP") charges through the tariff of American Transmission Systems, Inc. ("ATSI"), FirstEnergy's transmission affiliate,, any attempt to collect those costs from Ohio customers is premature. That includes the Utilities' attempt in this proceeding to count those costs against its commitment to not collect $360 Million of Legacy Regional Transmission Expansion Plan ("RTEP") costs. MISO Transmission Expansion Plan costs ("Legacy MTEP") are costs that have been charged to ATSI by MISO.[287]

In FirstEnergy's ESP II case, the Utilities agreed not to seek recovery through retail rates of $360 million of PJM Legacy Regional Transmission Expansion Plan costs ("Legacy RTEP").[288] The Utilities are now seeking to count ATSI's Legacy MTEP costs

[287] See FirstEnergy Ex. 7 at 17 (Mikkelsen Direct).

[288] Opinion and Order at 13, August 25, 2010, Case No. 10-388-EL-SSO ("ESP II Case").

against this commitment.[289] This proposal is wrong. First, FirstEnergy does not have the agreement or support of all the original signatories to the settlement that included this term years ago. FirstEnergy's proposal is a betrayal of the bargain struck in its earlier settlement.

Second, as OCC Witness Hixon testified, these charges have not been charged to the Utilities by ATSI because FERC has yet to approve their inclusion in PJM's FERC approved ATSI tariff.[290] However, FirstEnergy's proposal to count these Legacy MTEP costs against their commitment for the non-collection of Legacy RTEP costs is an attempt to circumvent PJM's FERC approved ATSI Tariff. The proposal is anti-consumer, counter to the Utilities' previous commitment to the PUCO, and should not be approved by the Commission.

Until FERC approves these costs for inclusion in the ATSI Tariff, they have not been incurred by the Utilities, they cannot be charged by ATSI to the Utilities, and by extension, not to the customers of those Utilities.[291] The Utilities' should not be allowed to meet their Legacy RTEP non-collection commitment by counting costs they have not incurred, costs that are not their responsibility, and costs that cannot be charged to Ohio retail customers. If the PUCO were to allow the counting of these costs against the Legacy RTEP non-collection commitment made previously in ESP II, then it would also allow FirstEnergy to meet their Legacy RTEP non-collection commitment sooner and begin charging customers Legacy RTEP costs sooner.[292] The Utilities overestimated the

[289] See FirstEnergy Ex. 7 at 18 (Mikkelsen Direct).

[290] OCC Ex. 19 at 7-8 (Hixon Direct).

[291] OCC Ex. 19 at 10 (Hixon Direct).

[292] OCC Ex. 19 at 10-11 (Hixon Direct).

amount of Legacy RTEP that they would incur and are now seeking to accelerate their recovery of these costs.[293]

Furthermore, FirstEnergy witness Mikkelsen's argument that the "spirit" of the stipulation in the ESP II Case allows for Legacy MTEP to meet the Legacy RTEP non-collection commitment has no basis in the language of the stipulation and the subsequent testimony of William Ridmann supporting the stipulation in that case.[294] The stipulation states:

> The Companies agree not to seek recovery through retail rates of legacy RTEP costs for the longer of: (1) during the period of June 1, 2011 through May 31, 2016; or (2) when a total of $360 million of legacy RTEP costs have been paid by the Companies and have not been recovered by the Companies through retail rates from Ohio Consumers.[295]

There is no mention of how Legacy MTEP costs are to be included in that stipulation; the sole focus is Legacy RTEP costs.[296] It is improper for First Energy to try and engage in a *post-hoc* rationalization of FirstEnergy's ESP II stipulation to the detriment of consumers. FirstEnergy is betraying its commitment to consumers in an earlier settlement. The PUCO should reject the Third Supplemental Stipulation, which adopts FirstEnergy's proposal to count ATSI's Legacy MTEP costs against the Utilities Legacy RTEP non-collection commitment.

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[293] For example, in ESP II, FirstEnergy estimated they would incur over $240 Million in Legacy MTEP costs by May 2015 (See Attachment WRR-1, Direct Testimony of William Ridmann, Case No. 10-388-EL-SSO, April 1, 2010), instead they have only incurred $124 million through the time of Ms. Mikkelsen testimony at hearing (September 2015) (Tr. I at 171(Mikkelsen)(Public)).

[294] Supplemental Testimony of William Ridmann at 2, Case No. 10-388-EL-SSO, July 23, 2010.

[295] Opinion and Order at 13, August 25, 2010, Case No. 10-388-EL-SSO ("ESP II Case").

[296] *See id.*

7. The Utilities financial inducements to signatory parties for their signature on the settlement push costs onto other customers thereby harming them.

FirstEnergy claims that the Stipulation, including the as-filed Application, benefits ratepayers and serves the public interest.[297] However, when analyzed, the Stipulation in this proceeding favors a select few signatories at the expense of the overwhelming majority of other customers.[298] Therefore, the customers who are not benefiting are forced to fund or subsidize the programs for the small amount of customers who are receiving a benefit. That is, the Stipulation allows a small amount of consumers to receive a windfall at the expense of the rest of the consumer population. Such a proposal does not serve the public interest and is not just and reasonable for the vast majority of consumers.

The Third Supplemental Stipulation leaves many features of the as-filed Application, which has already been shown to not be in the public interest,[299] fundamentally unchanged.[300] Additionally, except Rider RRS, the new Third Supplemental Stipulation exacerbates these harmful initiatives by extending the term of the ESP from three to eight years. The Third Supplemental Stipulations new provisions, that modify the Application, are relatively minor with respect to the interests of the majority of FirstEnergy's ratepayers as a whole.[301]

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[297] *See* FirstEnergy Ex. 155 at 10 (Mikkelsen Fifth Supplemental).

[298] *See* OCC/NOPEC Ex. 8 at 7-8 (Kahal Second Supplemental).

[299] See, e,g, OCC/NOPEC Ex. 1 (Sioshansi Direct); OCC/NOPEC Ex. 8 (Kahal Supplemental); OCC/NOPEC Ex. 11 (Kahal Supplemental).

[300] OCC/NOPEC Ex. 8 at 27:6-8 (Kahal Supplemental).

[301] OCC/NOPEC Ex. 8 at 27:9-11 (Kahal Supplemental).

Specifically, the City of Akron ("Akron"), the Counsel of Smaller Enterprises ("COSE"), Material Science Corporation ("Material Science"), the Association of Independent Colleges and Universities of Ohio ("AICUO"), Cleveland Housing Network ("CHN"), the Citizens Coalition, Consumer Protection Agency ("CPA"), and the Council for Economic Opportunities in Greater Cleveland ("CEOGC") are all named as direct beneficiaries of monetary contributions from FirstEnergy in order to support various programs that may benefit a small portion of Ohio consumers.[302] These new provisions are the paying of financial inducements to sign, to a select few consumers, largely funded with other people's money. Such provisions will simply push costs onto the great majority of Ohio customers. That is a bad deal for consumers.

For example, the Third Supplemental Stipulation proposed to pay OPAE $1,000,000 per year from 2016 to 2023, for a total of $8,000,000, to fund a "fuel fund" to be administered by OPAE.[303] The provision gives no explanation of the "fuel fund." Meanwhile, two million Ohioans who are FirstEnergy customers will pay for such terms as OPAE's $8,000,000 over the next eight years. OPAE will also receive five percent of the $6,000,000 per year for 8 years for the Community Connections program, which will be charged to customers through Rider DSE or other applicable rider, as an "administrative fee."[304] That is, OPAE will receive $2,400,000 under the Stipulation. Additionally, the Cleveland Housing Network will be allocated $1.7 million of this annual funding for each year of the ESP for a total of $13.6 million.[305]

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[302] *See* FirstEnergy Ex. 2 at 10-15 (Stipulation).

[303] FirstEnergy Ex. 154 at 17 (Third Supplemental Stipulation).

[304] FirstEnergy Ex. 154 at 17 (Third Supplemental Stipulation).

[305] FirstEnergy Ex. 154 at 17 (Third Supplemental Stipulation).

COSE and AICUO are being provided with $0.54 million and $0.4 million, respectively, in association with the Ohio Energy Efficiency Resource Program.[306] Akron is receiving the unquantified benefit of FirstEnergy agreeing to keep its headquarters in the Akron area for the length of the proposed ESP (which seems a highly questionable guarantee were FirstEnergy acquired by another corporation).[307] As with other components of the settlement, that term may be more public relations than public interest.

It is not clear how the public interest is to be served by FirstEnergy funding ($8 million over eight years) for a pilot Customer Advisory Agency to "ensure the preservation and growth of the competitive market in Ohio."[308] No word yet on the organizational structure, staffing, salaries, training, accountability, strings attached to FirstEnergy, and anything else about giving $ 8 million for the new "agency." Will the new Customer Advisory Agency become a future signatory for FirstEnergy settlements? The PUCO should be worried about oversight of funding on this one.

Again, the public relations value (to FirstEnergy) of various settlement terms must be separated (and discarded) from what is supposed to be real value under the PUCO's settlement test. This settlement is epic for its anti-competitive consequences for the market and consumers; there should be no thought that the settlement (and consumers) are saved by the so-called Customer Advisory Agency to "ensure" the competition that the PPA is undermining. And the above sentence from the "Agency's" purpose does not even mention consumers.[309]

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[306] FirstEnergy Ex. 154 at 15 (Third Supplemental Stipulation).

[307] FirstEnergy Ex. 154 at 17 (Third Supplemental Stipulation).

[308] FirstEnergy Ex. 2 at 14(Stipulation).

[309] FirstEnergy Ex. 2 at 14(Stipulation).

Furthermore, the proposed Customer Advisory Agency consists of FirstEnergy allocating funding to the CHN, CPA, and CEOGC to presumably inform customers about competitive choices.[310] But, ironically, the three agencies predominately provide assistance to low-income Ohioans who may be *ineligible* to make competitive choices for an energy supplier if they are on the PIPP Plus program.

In addition, the retention and 75 MW expansion of Rider Economic Load Response is not in the public interest. The Rider ELR proposal has a potential cost, in terms of credits or discounts, of up to $27 million above and beyond current levels.[311] Yet, not every customer is eligible to receive the benefit.[312] This above-market credit for Rider ELR comes at too steep a cost to utility customers who are not receiving the discount and, therefore, will be forced to subsidize the program.[313]

The new provisions in the settlement do not "redeem" or mitigate the very harmful ESP IV filed by the FE Utilities.[314] Furthermore, the Stipulation provisions, such as Rider ELR, that are not available to the vast majority of customers will result in customers funding programs for other customers. This is not a benefit to ratepayers or in the public interest.

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[310] FirstEnergy Ex. 2 at 14(Stipulation).

[311] OCC/NOPEC Ex. 8 at 27:19-21(Kahal Supplemental).

[312] FirstEnergy Ex. 2 at 14(Stipulation).;Tr. XXI at 4038:11-23 (OEG witness Dennis W. Goins, PhD. testifying that the ELR benefits will not be available to new customers).

[313] OCC/NOPEC Ex. 8 at 25:10-12(Kahal Supplemental).

[314] OCC/NOPEC Ex. 8 at 27:1-3 (Kahal Supplemental).

8. The Application does not provide sufficient benefits to at-risk customers.

a. First Energy serves economically distressed areas and their application does not provide sufficient benefits to low-income customers.

The Utilities serve many economically distressed areas. Their ESP and proposed stipulation do not provide sufficient benefits to customers in regards to affordability or protecting at-risk populations. Under state law, Ohio has set forth policy concerning electric service that includes providing "reasonably priced retail electric service,"[315] and "protecting at-risk populations."[316] The ESP as currently proposed and further amended by the Third Supplemental Stipulations simply does not provide the necessary benefits to conform to state policy as articulated above, and is not in the public interest.

Poverty levels in Cleveland, Akron and Toledo, the major cities served by the Utilities have all grown since 1999.[317] Additionally, in the counties served by the Utilities there are significant amounts of customers who are only slightly above the Federal Poverty Level. These customers are also an at-risk population who could be negatively affected by a rate increases.[318] As OCC Witness Williams testifies, little has been proposed in the ESP application to help these at-risk consumers:

> Increases in the cost of electric service have to be absorbed in budgets that are already stretched thin. But, other than committing to continue weatherization assistance through the Community Connections Program, which is only available to CEI customers, there is no indication in the Application that FirstEnergy is making an effort to protect the at-risk population from the proposed rate increases. In fact, FirstEnergy neither proposes to continue the

[315] R.C. 4928.02(A).

[316] R.C. 4928.02(L).

[317] OCC Ex. 27 at 7 (Williams Direct).

[318] OCC Ex. 27 at 9 (Williams Direct).

> Percentage of Income Payment Plan ("PIPP") Plus discount nor to fund the bill payment assistance programs that were included in the prior ESPs.[319]

While the Third Supplemental Stipulation did provide certain funds to help with affordability concerns in the service territory like the Community Connections program and the fuel funds program (identified earlier),[320] these programs do not offset the $3.6 billion increase that has been identified through Rider RRS.[321] These customers are still forced to suffer a non-bypassable surcharge in Rider RRS, which is projected at $800 per customer.[322]

OCC Witness Williams also testified that FirstEnergy proposed continuing and increasing the amount of money collected from customers through the Rider Distribution DCR and adding a new GDR that ultimately increases customer electric bills.[323] These investments in which First Energy plans to seek recovery through the Rider DCR are also not supported under Ohio Law. While Ohio law narrowly supports expedited cost recovery for certain distribution infrastructure modernization initiatives,[324] it is considerably different from the distribution, transmission, general, and intangible plant investments that FirstEnergy is seeking authority for under Rider DCR.[325]

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[319] OCC Ex. 27 at 8 (Williams Direct).

[320] See FirstEnergy Ex. 154 at 17 (Third Supplement Stipulation and Recommendation).

[321] OCC/NOPEC Ex. 9 at 7 (Wilson Second Supplemental).

[322] OCC/NOPEC Ex. 9 at 12 (Wilson Second Supplemental).

[323] OCC Ex. 27 at 22 (Williams Direct).

[324] R.C. 4928.143(B)(2)(h).

[325] OCC Ex. 27 at 16 (Williams Direct).

Furthermore, the five-year average reliability performance of each of the FirstEnergy operating utilities exceeds the PUCO mandated reliability standards.[326] Nevertheless, the Rider DCR will increase customer bills. However, there may not be an alignment between customer and distribution utility expectations concerning reliability as required pursuant to Ohio Law.[327] Therefore, there is no statutory authority for continuing and expanding the Rider DCR.

b. The amount of customers whose electric service was terminated for non-payment may increase if the Application is approved and utility rates increase.

The number of customers whose electric service is terminated for non-payment will increase if the Application is approved and utility rates increase. As demonstrated by OCC Witness Williams in his direct testimony, a large number of FirstEnergy customers who are disconnected for non-payment are not getting their services restored or reconnected.[328] While many factors can affect the reconnection rate, the high poverty level and large number of Ohioans whose incomes are near poverty adds to the problem. Cuyahoga County, which is served by CEI, has a population of approximately 1.2 million where 36.4 percent have incomes close to the poverty level.[329] Cuyahoga also has a 66 percent reconnection rate, meaning the other 33 percent are not being reconnected. Even worse, Lucas County served by TE has a population of approximately 430,000 where

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[326] OCC Ex. 27 at 19 (Williams Direct).

[327] See R.C. 4928.143(B)(2)(h).

[328] OCC Ex. 27 at 13 (Williams Direct).

[329] OCC Ex. 27 at 13-14 (Williams Direct).

40.4 percent have incomes close to the poverty level.[330] The 65 percent reconnection rate in that county is compelling evidence that reflects the dire affordability issues confronting those customers located in the FirstEnergy service territories.

Customers face serious health, safety, and financial consequences when their electric service is terminated for non-payment. Any additional increase in electric rates can have an adverse impact by further increasing the number of FirstEnergy residential customers who are disconnected and are unable to have services restored—including at-risk customers. Therefore, the Application and Third Supplemental Stipulation will result in higher electric bills and will not benefit the majority of at-risk customers or the public interest. FirstEnergy's proposals should be denied.

E. The settlement package violates important regulatory principles and practices.

1. Authorization of the rider for Retail Rate Stability would violate state law, policies and regulations that were intended to provide consumers benefits from the competitive market.

a. Authorization of the rider to charge consumers for Retail Rate Stability would be inconsistent with Senate Bill 3.

OCC witness Dr. Rose explained the background of Senate Bill 3 ("S.B. 3"). S.B. 3 became the law in Ohio in 1999,[331] and the specific provisions pertaining to stranded investment, R.C. 4928.38 and 4928.39, remain applicable today.[332] The Legislative goals of S.B. 3 were to deregulate the generation market and end the use of cost-based rates for

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[330] OCC Ex. 27 at 13-14 (Williams Direct).

[331] As Passed by the Ohio 123rd General Assembly, 1999.

[332] OCC Ex. 25 at 11 (Rose Direct) (12/22/14).

generation services in the state of Ohio.[333] Cost-based regulation was to be replaced by market competition as a means to determine the wholesale and retail generation price for all electricity customers.[334] Consequently, after the enactment of S.B. 3, market forces are to determine which power plants should be operated and which power plants should be retired if they are inefficient and uneconomic.[335]

The test for economic viability of a generation facility, for example operating in Ohio, is whether the PJM market prices are sufficiently high to cover the supplier's average variable costs, i.e., costs that vary with output. But under the Utilities' proposal, consumers will be charged the full embedded costs of generation plant including a return on and a return of legacy capital. Thus, it is entirely possible that Rider RRS would "produce" a "loss" that consumers pay for (meaning full cost of service exceeds PJM revenue from the generation) even though the PJM market prices are still high enough to cover average variable costs. Thus, the fact that the Rider RRS produces a loss for consumers does not mean that absent that rider the Plants covered under Rider RRS would or should be retired.[336]

The fundamental idea behind S.B. 3 is that retail customers should not now be asked to protect Ohio electric utilities from competitive generation market risks or losses. (For example, utilities are now to be on "their own" in the competitive market, per R.C. 4928.38.) A market development period was provided under S.B. 3 to provide electric utilities in Ohio time to prepare for a competitive environment. That market development

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[333] OCC Ex. 25 at 11 (Rose Direct), citation to Legislative Service Commission, Final Analysis, Am. Sub. S.B. 3, 123rd General Assembly, 1999.

[334] OCC Ex. 25 at 11 (Rose Direct).

[335] OCC Ex. 25 at 11 (Rose Direct).

[336] OCC Ex. 25 at 12 (Rose Direct).

period ended nearly a decade ago, and it is no longer the consumers' obligation to cover the operating generating costs and guarantee a return on generating assets owned by the Utilities' unregulated affiliate whether those generating assets are uneconomic or less competitive in the marketplace. The Utilities are now "wholly responsible" for whether they are in a competitive position in the generation market. Customers should not be asked to guarantee the profitability of the Utilities' affiliate-owned generation units.[337] Such a guarantee is a subsidy.

In 2011 FirstEnergy Executive Leila Vespoli was critical of a mechanism that subsidized generation in Pennsylvania and New Jersey. Ms. Vespoli stated:

> The real problem with subsidized generation is that regulators would be picking the "winners" and "losers" in the energy market. We've been down that road before, and the results weren't pretty. For example, in the past our utilities in Pennsylvania and New Jersey were required to purchase power from Non-Utility Generators with contracts extending up to two or three decades. In our Pennsylvania service area alone, customers have paid $1.5 billion over market prices for this subsidized generation. At a time when Ohio is exploring every opportunity to create jobs and grow our economy, we simply cannot afford similar missteps that would saddle our customers with higher-than-market prices for electricity.[338]

It is hypocritical for the Utilities to now find a customer-funded subsidy for the Sammis, Davis-Besse and OVEC entitlement generation to be acceptable or in the public interest. It appears if FirstEnergy's "utility" generation is picked to be a winner (and the utilities unregulated affiliate is the recipient of the subsidy) through an 8-year arrangement, then

[337] OCC Ex. 25 at 13 (Rose Direct).

[338] IGS Ex. 11 at Ex. 1 (Matt White Supplemental Direct); Competitive Markets Work House Public Utilities Committee, Leila Vespoli (10/19/11).

that subsidy could be OK. However if Rider RRS is approved, customers will be the losers as were the Pennsylvania customers for whom Ms. Vespoli felt compassion.

From a policy perspective, the Utilities' proposed Rider RRS and its associated PPA is based on the premise that captive retail customers should make up the potential "losses" of certain generation assets owned and operated by the Utilities' unregulated affiliate, FES, and ultimately, the Utility's parent company, FirstEnergy Corp. This is contrary to Ohio's policy direction since 1999. The proposed RRS charge is an attempt to re-introduce revenue and profit guarantees for the specified unregulated (and currently uneconomic) generation assets.[339]

As Dr. Rose points out, Rider RRS can be viewed as either (1) a continuation of transition or "stranded" cost recovery for those power plants, which as explained above should no longer be permitted or (2) a loosely-designed cost-based regulation that incorporate a revenue guarantee for those generation plants. This is problematic because the "cost" (or PPA contract price) of the specific generation assets is determined through bilateral contracts between affiliated Utilities, and the "cost" (or contract price) are not set by FERC or the PUCO.[340]

Under the proposed Rider RRS, the regulated distribution utilities would be collecting additional revenues (that are above market price) from captive distribution customers. And then the revenues would be transferred to the unregulated subsidiary, FES (the entity that actually owns the generation assets that are no longer price-regulated by the State of Ohio). By doing so, FES will receive a guaranteed return on some of its

[339] OCC Ex. 25 at 13-14 (Rose Direct).

[340] OCC Ex. 25 at 14 (Rose Direct).

generation capital investments. These revenues would provide FirstEnergy Corp., or its unregulated subsidiary FES, additional dollars that it allegedly otherwise cannot collect by selling generation services in the competitive wholesale or retail market.

This scheme is contrary to the legislative intent of S.B. 3 to create a competitive generation market in the state. If the proposed Rider RRS were granted by the PUCO, some of FirstEnergy's generation plants would receive this additional revenue in the form of a guaranteed return, even outside the purview of the excessive earnings test. But other non-affiliated electric suppliers would not receive any similar guaranteed return for their competing in the market. As Ms. Vespoli bemoaned, in that Pennsylvania case, the PUCO will be picking "winners" and "losers" and the past results of that scenario "weren't pretty."

Therefore, the approval of the Rider RRS and implementation of its associated PPA will place unregulated generators other than FES at a competitive disadvantage in the market. Thereby, Rider RRS will impair the operation of the competitive markets that are intended to provide generation pricing for Ohio electric customers. Such an outcome is contrary to the intentions of S.B. 3, and should not be authorized by the PUCO. Outcomes at the PUCO are supposed to be "nondiscriminatory," per R.C. 4928.02(A), but the PPA is discriminatory.

It is important to note also that S.B. 221, while creating, for example, provisions for rate "stability" and utility fuel cost recovery did not alter the fundamental purpose of S.B. 3—to create a competitive retail market for electricity. The Utilities and the PUCO cannot change that legislative goal without specific legislative approval.

b. Authorization of the rider to charge consumers for Retail Rate Stability would violate the prohibition against collection of transition revenues from customers or its equivalent under R.C. 4928.38.

Under R.C. 4928.38 an electric utility may receive transition revenues from the starting date of competitive retail electric service through the end of the market development period; however, that time period expired on December 31, 2005.[341] R.C. 4928.38 provides that once the utility's market development period ends, it "shall be fully on its own in the competitive market." Section 4928.39 of the Revised Code defines transition costs as costs unrecoverable in a competitive environment, and should no longer be collected from consumers now.

In this proceeding, FirstEnergy is once again claiming that revenue derived from a competitive marketplace is insufficient to cover the cost of operating the plants. That the cost of generation plants exceeds the market price is essentially the very definition of transition cost. During the market development period, FirstEnergy charged customers billions of dollars to adjust to market conditions. Specifically, the PUCO's Order that approved the FirstEnergy stipulation stated the amount that the Utilities can collect from customers: "Pursuant to Section 4928.39, Revised Code, the total allowable transition costs for the FirstEnergy operating Utilities are $2,527,579,833 for Ohio Edison,

[341] It should be noted that the "Generation Transition Charge" (GTC) ended at the end of 2005, but, for "regulatory transition charges" (RTC), the end dates were extended, per the PUCO-approved stipulation. Specifically, the stipulation indicates that the RTC recovery periods will not extend beyond December 31, 2006 for Ohio Edison, June 30, 2007 for Toledo Edison, and December 31, 2008 for CEI except in some limited circumstances. See *In the Matter of the Application of FirstEnergy Corp. on Behalf of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of Their Transition Plans and for Authorization to Collect Transition Revenues*, PUCO Case Nos. 99-1212-EL-ETP, 99-1213-EL-ATA, and 99-1214-EL-AAM, Opinion and Order (July 19, 2000). p. 11".

$3,017,813,280 for CEI, and $1,366,034,515 for Toledo Edison."[342] Indeed, the Utilities were once compensated approximately $7 billion for their transition to competition.[343] Further compensation is unjust and unreasonable, and contrary to Ohio law.

The law is very clear that "[w]ith the termination of that approved revenue source, the utility shall be fully on its own in the competitive market"[344] and that the PUCO "shall not authorize the receipt of transition revenues or any equivalent revenues" after the termination of the market development period.[345] From December 31, 2005 forward, prices were supposed to be determined based on market factors. That is, neither the utility nor its affiliate can charge captive customers of regulated services for revenues to support deregulated power plants. Here, that is precisely what is occurring because Rider RRS, if approved, would essentially amount to a bail-out funded by captive retail consumers for two of FES's unregulated generation plants.[346] This is not good public policy and it is contrary to the legislative mandate that utilities are to be on their own in the competitive market.[347] FirstEnergy's prolonged transition to competition, which began with the 1999 law, should be at an end. The PUCO should deny FirstEnergy's proposal to charge customers for the unrecovered costs of the Plants and OVEC entitlement as proposed by

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[342] *In the Matter of the Application of FirstEnergy Corp. on Behalf of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of Their Transition Plans and for Authorization to Collect Transition Revenues*, PUCO Case Nos. 99-1212-EL-ETP, 99-1213-EL-ATA, and 99-1214-EL-AAM, Opinion and Order (July 19, 2000), p. 71.

[343] OCC Ex. 25 at 18-19 (Rose Direct) (12/22/14).

[344] R.C. 4928.38.

[345] R.C. 4928.38.

[346] OCC Ex. 25 at 8 (Rose Direct).

[347] See R.C. 4928.38, requiring that after the market development period is over, the utility is to no longer receive transition revenues and "shall be fully on its own in the competitive market." AEP Ohio's market development period ended on December 31, 2005. See In the Matter of the Application of Columbus Southern Power of Company and Ohio Power Company for Approval of a Post Market Development Period Rate Stabilization Plan, Case No. 04-169-EL-UNC. Opinion and Order of January 26, 2005 at 5, 14.

the Utilities. If the Plants and OVEC cannot compete in the competitive markets then they should close as would any other generating facility that cannot be profitable—however, this is the generation owners' decision now, and no longer the state's utility regulator.

Therefore, the Utilities' proposal violates Ohio law; and therefore, should be rejected by the PUCO to the benefit of consumers that have already paid too long and too much for these deregulated facilities.

c. Authorization of the rider to charge consumers for Retail Rate Stability would not ensure the availability of reasonably priced retail electric service under R.C. 4928.02(A) to FirstEnergy's customers.

The Utilities' proposal also violates the policy provisions of Chapter 4928. R.C. 4928.02(A) states that it is the policy of the state of Ohio to "[e]nsure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service." The proposed transaction and Rider RRS included in the Utilities ESP application are in violation of this statute.

First, the Rider RRS will unnecessarily and unreasonably increase the prices paid by captive consumers for deregulated generation facilities. The Utilities admit that during the first three years of the ESP consumers are expected to pay $464 million under the proposed Rider RRS.[348] And, as OCC/NOPEC witness Wilson testified in his second supplemental direct written testimony that Rider RRS could cost Ohio consumers approximately $3.6 billion over the life of the eight-year ESP term[349]

[348] FirstEnergy Ex. 33 (Ruberto Direct) See JAR-1 (Revised).

[349] OCC/NOPEC Ex. 9 at 7 (Second Supplemental Testimony of James Wilson).

The best way to ensure "reasonably priced retail electric service" is to let the competitive market operate freely and efficiently. However, the non-bypassable Rider RRS creates subsidies for the Plants and OVEC entitlements that are not available to any of the other unregulated market participants. Therefore, this proposal impairs the competitive market's efficiency and unreasonably increases the price of retail electric service to FirstEnergy's customers.

Second, the ESP will not ensure reliable electric generation service because the PPA's will not impact that reliability. Reliability is ensured through various other means administered by PJM. Reliability is not dependent on authorization of Rider RRS. Therefore, the Rider RRS, if authorized, would be in violation of R.C. 4928.02(A).

It should also be noted that ensuring reliability of the PJM system for customers is not within the direct purview of the Utilities or the PUCO. FERC has designated the North American Electric Reliability Corporation ("NERC") as the Electric Reliability Organization.[350] In addition, PJM operates and modifies its markets, including the RPM and other planning and operational procedures in concert with reliability mandates promulgated by the FERC and NERC.[351] Moreover, Dr. Sioshansi supported this point in his Direct Testimony. Dr. Sioshansi stated:

> PJM maintains reliability of the electric power system within its footprint through market-based mechanisms. As I outline in my response to Q14, this is achieved by allowing generators and other capacity resources to freely enter and exit the system based on revenues earned in the market. When capacity resources in the system become scarce and the system has less flexibility to reliably serve customers in the event of unanticipated generator or

[350] OCC Ex. 29, PUCO House Public Utilities Committee Briefing.

[351] OCC/NOPEC Ex. 1 at 10-12 (Sioshansi Direct).

transmission failures or load spikes, prices in the market rise. This price increase is known as a scarcity rent, and provides a strong economic incentive for generators to enter the market and address the reliability issue. Conversely, if the system has too much capacity and customers can be reliably served even if some assets exit the market, prices fall. This provides an economic incentive for the least efficient generators to exit the market, because inefficient capacity sources may not clear the auction or may clear the auction but, nevertheless, not be able to recover their entire costs through market revenues.

PJM supplements the energy and ancillary service revenues generators earn in the day-ahead and real-time markets through its RPM capacity market. The RPM makes capacity commitments three years ahead and is designed to create supplemental long-term price signals to attract needed investments in reliability for the PJM system footprint. The RPM market provides incentives for existing efficient sources of capacity to remain in the system and to attract new investments. The RPM market includes performance criteria for participating generators. To receive capacity payments, generators must clear the competitive auction and be available to deliver capacity and energy when called upon by PJM. Otherwise, non-compliant generators face financial penalties for non-performance.

The design of the RPM market has evolved over time and PJM has been vigilant in modifying the market to address changing reliability needs of customers. * * * PJM is currently proposing further revisions to the RPM market to address potential reliability issues raised by the extremely cold weather experienced in January and February of 2014.[352] This includes new requirements that generators have sufficient fuel available to produce energy when called upon by PJM.

The Companies list reliability benefits of the Plants and OVEC as a rationale behind the proposed Rider RRS. The Plants and OVEC may indeed be efficient sources of capacity for the PJM system. If they are, they will clear the RPM auctions, and the revenues earned through the capacity payments and in other PJM-operated markets will cover their capital and operating costs. If, on the other hand, the Plants and OVEC are not able to recover their costs through the market, this means they are not efficient sources of capacity or the system has unneeded excess capacity that should be retired.

[352] The "Capacity Performance" has been approved and the first auctions (base and transition auctions) have been held and the results are in now. Which means even more money for generation capacity owners.

> Customer-funded [subsidies] of the Plants and OVEC for reliability related reasons is inappropriate, as it would undermine the PJM-operated markets efficiently ensuring system reliability.[353]

Rider RRS neither ensures the availability of reasonably priced electric service nor reliable electric service. Rider RRS does not guarantee any delivery of energy or capacity from the PPA Units, because that energy and capacity is not acquired for the SSO load. Thus even if there is a reliability benefit, there is no guarantee of FirstEnergy's SSO customers seeing that. Rider RRS would work counter to the anticipated benefit of the market to use efficient generation to serve customer demands. Therefore, the PUCO should reject FirstEnergy's proposed PPA and Rider RRS because it is contrary to state law and policy articulated in R.C. 4928.02(A).

d. Authorization of the rider to charge consumers for Retail Rate Stability would not ensure the diversity of electricity supplies and suppliers under RC 4928.02(C).

R.C. 4928.02(C) states that it is the policy of the state of Ohio to "[e]nsure diversity of electricity supplies and suppliers, by giving consumers effective choices over the selection of those supplies and suppliers and by encouraging the development of distributed and small generation facilities." To "ensure diversity," it is important to have a level playing field for all suppliers to compete.

Ohio's generation mix currently is predominantly 68 percent coal-fired.[354] FE's proposed transaction seeks to keep the Sammis and OVEC entitlement coal-fired generating plants from retiring. However, retiring the units will actually lead to more diversity of supply because natural gas-fired plants will likely be added to replace the

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[353] OCC/NOPEC Ex. 1 at 23 (Sioshansi Direct).

[354] Tr. XXX at 6206 (Choueiki).

retiring coal-fired generation.[355] Gas plants make sense because they should be able to take advantage of Ohio's low-cost and abundant shale formations of Marcellus and Utica natural gas reserves. In addition, natural gas plants are more in line with proposed environmental laws.

However, the Utilities' proposed transaction would not ensure fuel diversity. And in fact could inhibit the development of distributed and small generation facilities that are encouraged by this policy provision in the law. A real life example of the adverse impacts subsidized generation can have on fuel diversity was provided by Ms. Vespoli in her testimony before the House Public Utilities Committee. She stated:

> Let me offer a final example of the unintended consequences of subsidized generation. FirstEnergy Solutions is currently reviewing a plan to transform an old limestone mine in Norton, Ohio, into a Compressed Air Energy Storage, or CAES, facility. With the volume of nine Empire State Buildings, the site was identified by a leading developer of natural gas storage facilities as the best among more than 70 potential sites in the nation for supporting CAES technology. It would be scalable – from approximately 270 megawatts all the way up to 2,700 megawatts – and, more important, would support the operation of intermittent renewable sources such as wind by compressing air at night and standing ready to serve load on peak. **However, it is highly unlikely that we would consider moving forward with this project if the plant would have to compete against subsidized generation in Ohio.**[356]

A proposal which favors coal-fired generation in a state that has 68 percent generation provided from coal resources is not positively influencing supply diversity in an appropriate way.

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[355] There are new generation facilities in the generation queue and they are all natural gas fired units: Tr. 15 at 3230 (Oregon Clean Energy Plant – 799 Mw); Tr. Vol. XV at 3229-3230 (Carroll County Energy Facility 670 Mw); Tr. 15 at 3231-3232 Lordstown Ohio Natural Gas Facility 800 Mw; Tr. XV at 3260-3261 Rolling Hills Natural Gas Facility 610 Mw.

[356] IGS Ex. 11 at Ex. 1 (White Supplemental Direct) ; Competitive Markets Work House Public Utilities Committee, Leila Vespoli (10/19/11) (emphasis added).

As OCC/NOPEC witness Dr. Sioshansi opined, if Sammis and the OVEC units retired and that generation was replaced by natural gas-fired generation, the resulting supply mix would be more diverse. Dr. Sioshansi stated: if the 3,319 MW of coal-fired generators included in the Plants and OVEC were retired and replaced with 3,319 MW of natural gas-fired generators instead, coal and natural gas would instead represent 49 percent and 39 percent of the installed generation mix. This would have been a more balanced and diversified portfolio of generation technologies than maintaining the coal-fired generators in the Plants and OVEC. This is consistent with state policy as stated under R.C. 4928.02(C), which requires the PUCO to ensure diversity of supplies and suppliers.[357]

The proposed transaction and Rider RRS will prevent the competitive market from determining the replacement of uneconomic coal-fired generation, in favor of more economic non-coal-fired generation resources. Therefore, the proposed transaction and Rider RRS should be rejected.

e. Authorization of the rider to charge consumers for Retail Rate Stability would not ensure the avoidance of anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail service and other policies under RC 4928.02(H).

OCC witness Dr. Rose opined on the anticompetitive subsidies that flow from the proposed transaction and Rider RRS. R.C. 4928.02(H) states that the state's policy is to:

> [e]nsure 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,

[357] OCC/NOPEC Ex. 1 at 29 (Sioshansi Direct).

> and vice versa, including by prohibiting the recovery of any generation-related costs through distribution or transmission rates.

Dr. Rose explained that this is often referred to as cross-subsidization, which includes, for example, having non-competitive services, such as distribution, subsidize competitive services, such as generation. Here, Rider RRS is a non-bypassable generation charge assessed through FirstEnergy and collected from all captive distribution customers, and, therefore, it is an example of cross-subsidization of generation service by distribution customers. Accordingly, an approval of the Rider RRS is a violation of this state policy. The non-bypassable charge collected through Rider RRS only benefits one generation supplier, and provides additional revenue to that supplier, that other competitive suppliers in the market do not receive.[358]

Supreme Court of Ohio cases of *Indus. Energy Users-Ohio v. Pub. Util. Comm.*,[359] and *Elyria Foundry Co. v. Pub. Util. Comm.*[360] support the principle articulated in R.C. 4928.02(H). While those cases predated other changes made in Senate Bill 221, R.C. 4928.02(H) was not changed. The holdings of those cases are thus, intact. In *Indus. Energy Users-Ohio*, the Supreme Court of Ohio reversed a PUCO finding authorizing the use of distribution revenues to subsidize the cost of a generation facility.[361] And in *Elyria Foundry*, fuel costs in a standard service offer were not

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[358] OCC Ex. 25 at 22-23 (Rose Direct).

[359] 2008-Ohio-990, 117 Ohio St. 3d 486, 487-88, 885 N.E. 2d 195, 198. The Supreme Court's references in the case to R.C. 4928.02(G) are to the same language now in R.C. 4928.02(H) due to the 2008 addition, in Senate Bill 221, of R.C. 4928.02(F).

[360] 2007-Ohio-4164, 114 Ohio St. 3d 305, 315, 871 N.E. 2d 1176, 1188.

[361] 2008-Ohio-990, 117 Ohio St. 3d 486, 487-88, 885 N.E. 2d 195, 198.

permitted to be deferred for later recovery through a non-bypassable distribution charge, i.e., a charge applicable to all customers.[362]

Similarly, in the instant case, the costs of the Plants and the OVEC entitlement (or the credit), which varies from market prices, are proposed to be flowed back to all customers through Rider RRS. But such a charge to customers would subsidize the utility's generation costs. Rider RRS would be a subsidy of the cost of the Plants and the OVEC entitlement generation facilities by all captive monopoly distribution service customers. Indeed, both SSO and shopping customers would be subjected to the charge although neither is directly receiving the generation output from OVEC or the Plants through FirstEnergy.

Furthermore, the PUCO's decision in the *Sporn Case*[363] supports OCC/NOAC's position that Rider RRS is not authorized by the law. In that case the PUCO found "no statutory basis within Section 4928.143, Revised Code, or anywhere else in the Revised Code" for the recovery of plant closure costs. The PUCO's *Sporn* decision also found that collecting a generation-related cost such as a "plant closure cost" from all customers would violate R.C. 4928.02(H). This rationale applies to the costs that Rider RRS seeks to collect from FirstEnergy's customers. Those costs result from generation sold to PJM, but funded by all of FirstEnergy's captive distribution customers. The PUCO should find that FirstEnergy's Rider RRS would be an unauthorized charge to customers violating R.C. 4928.02(H).

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[362] 2007-Ohio-4164, 114 Ohio St. 3d 305, 315, 871 N.E. 2d 1176, 1188.

[363] *In the Matter of the Application of Ohio Power Company for Approval of the Shutdown of Unit 5 of the Philip Sporn Generating Station and to Establish a Plant Shutdown Rider*, Case No. 10-1454-EL-RDR, Finding and Order at 19 (January 11, 2012).

R.C. 4928.02 (H) prohibits anticompetitive subsidies flowing from a noncompetitive retail electric service (such as the default SSO option) to a competitive retail electric service (such as bilateral marketer offers). The PUCO should deny Rider RRS. Generation service is defined as a competitive retail electric service by R.C. 4928.03. Distribution service is a noncompetitive monopoly service. FirstEnergy's proposal is against this law that was designed to protect Ohio utility customers.

f. Authorization of the rider to charge consumers for Retail Rate Stability would not ensure the facilitation of the state's effectiveness in the global economy under RC 4928.02(N).

Under R.C. 4928.02(N) it is the policy of the state to"[f]acilitate the state's effectiveness in the global economy." A good way to help Ohio be competitive in the global economy is to allow Ohio's residential, commercial, and industrial customers to have competitively priced generation services. The non-bypassable charge collected through the proposed Rider RSS will be equivalent to an electricity tax, approximately $3.6 billion over eight years which would undoubtedly reduce the disposable incomes of the Utilities' many residential consumers, and increase the energy costs of the industrial and commercial consumers. Simply put, subsidies paid to an affiliate supplier through non-bypassable charges do not help minimize the impact on retail electricity prices in the State. In addition, Rider RRS gives FES a competitive advantage that would prevent investment in new generation in the State. Therefore, the approval of Rider RSS will likely hurt, and not help the economy and employment in the State of Ohio.

Even FirstEnergy has projected customers will be charged $464 million over the first three years of the ESP. Those PPA-related charges to consumers do not assist Ohio compete in the global marketplace. In fact the Proposed Transaction and Rider RRS are moving in the opposite direction that FirstEnergy Executive, Leila Vespoli, explained the competitive market was taking Ohio in 2011. Ms. Vespoli stated:

> Today, every customer of FirstEnergy's Ohio utilities is getting the benefits of competition for electric generation. Our utilities conduct wholesale auctions in which many suppliers compete to provide generation at the lowest price for customers who choose not to shop. In addition, customers are free to shop with competitive suppliers and get an even better price – and many customers are choosing to do that. These customers saved an estimated $100 million in 2010 through competitive markets for electric generation. Right now, 2.3 million Ohioans – including more than 200,000 businesses – are saving money through electric competition. In addition, competitive suppliers are lining up to do more, with more than 40 registered suppliers in Ohio standing ready to bring additional savings to customers.[364]

FirstEnergy's protracted transition to competition, which began with the 1999 law, should be at an end. The PUCO should deny FirstEnergy's request to charge customers for the costs of operating and maintaining, in addition to a guaranteed profit, for outdated and inefficient generating units. To do so would be inconsistent with the policy of Ohio to facilitate Ohio's effectiveness in the global economy.

2. The Four Factors identified in the AEP Ohio ESP Order for considering power purchase agreements have not been met.

Rider RRS and the purchase power agreement are not new concepts. AEP Ohio first introduced this concept in its third ESP.[365] In that case AEP Ohio sought the PUCO's approval of a PPA based on its OVEC commitment.[366] AEP Ohio also sought PUCO authority to expand the Rider RRS during the ESP term, for future PPAs involving AEP

[364] IGS Ex. 11 at Ex. 1 (White Supplemental Direct); Competitive Markets Work House Public Utilities Committee, Leila Vespoli (10/19/11) (emphasis added).

[365] *In re: Ohio Power*, Case No. 13-2385-EL-SSO.

[366] *In re: Ohio Power*, Case No. 13-2385-EL-SSO, Opinion and Order at 8.

Ohio's affiliates. Notably, no parties in that proceeding supported AEP Ohio's proposal other than OEG, whose support was conditioned on its clients being able to opt out of the PPA.[367]

The PUCO denied AEP Ohio's PPA Rider, but permitted AEP Ohio to establish a placeholder PPA Rider, at an initial rate of zero, for the term of the ESP.[368] The PUCO determined that all of the implementation details with respect to the placeholder rider would be determined in a future proceeding. The PUCO directed AEP Ohio to address, at a minimum, certain factors, which "the Commission will balance, but not be bound by":

> (1) the financial need of the generation plant; (2) the necessity of the generating facility; (3) a description of how the generating plant is compliant with all pertinent environmental regulations and its plan for compliance with pending environmental regulations; and (4) the impact that a closure of the generating plant would have on electric prices and the resulting effect on economic development within the state.[369] The PUCO also required AEP Ohio to provide for rigorous PUCO oversight of the rider, and an alternative plan to allocate the rider's financial risk between both the Utility and its ratepayers.[370] Finally, AEP Ohio was directed to include a severability provision that recognizes that all other provision of the ESP will continue even if the PPA is invalidated.

a. The PUCO's first factor has not been met. FirstEnergy has not demonstrated that there is a "financial need" for the PPA Units.

The PUCO's four factors for assessing PPA's are addressed as follows. But the PUCO should find that its four factors are inadequate for assessing whether consumers are appropriately served and protected.

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[367] *In re: Ohio Power*, Case No. 13-2385-EL-SS), Opinion and Order at 11 (Feb. 25, 2015).

[368] Accord, *In re: Duke*, Case No. 14-841-EL-SSO, Opinion and Order at 47 (authorizing Duke to establish a placeholder PSR, at an initial rate of zero, for the term of the ESP).

[369] *In re: Ohio Power*, Case No. 13-2385-EL-SS), Opinion and Order at 25.

[370] Id.

The Plants do not have a financial need for Rider RRS, and therefore the first PPA factor is not met. As stated earlier, FirstEnergy predicts, contrary to a majority of the other witness' predictions, that the Program will cost customers $364 million during the first 31-month period but, produce a $561 million credit for Ohio customers over the life of the PPA. [371] Yet FirstEnergy also warns, without providing any hard evidence, that the plants are uneconomic and, if the Program is not approved, **may** have to be closed in the next couple of years.[372] If the plants are truly going to produce high amounts of income over the life of the PPA, then the plants are not in danger and there is no financial need for a customer-based subsidy. FirstEnergy can simply preserve the plants, during a short ESP term, until they begin to make a profit. Therefore, the Plants have no proven financial need for the Rider RRS.

i. The impact of FirstEnergy's proposal on customers cannot be determined with reasonable certainty.

In this proceeding there were many estimates of the impact of FirstEnergy's PPA proposal on customers using a variety of different scenarios. These impacts were calculated by OCC Witness Wilson and FirstEnergy witness Rose.

[371] Sierra Club Ex. 89.

[372] FirstEnergy Ex. 13 at 17 (Strah Direct).

Long Term Costs (2016-2024) ( ) = net benefit to customers

	OCC	FirstEnergy
AEO 2015 Reference Case	$50 million[373]	($561 million)[374]
AEO 2015 High Oil and Gas Resource Case	$2.71 billion[375]	
Based on Recent Forward Prices	$3.61 billion[376]	

OCC's cost estimates for the PPA term (2016 through 2024) ranged from $50 million to $3.61 billion net cost to customers. The fact remains that there is great deal of at least uncertainty on how the plants included in the PPA will perform.

There is no disagreement that there will likely be a net cost to customers for Rider RRS during the originally filed three-year ESP period.[377] And, the Utilities concede that only over the longer timeframe (eight years) will customers perhaps benefit from a credit under the rider.[378]

But the remote possibility of a future credit to customers means that the PUCO would be gambling with customers' money that the Utilities' projections are right. This is a gamble the PUCO should not force onto utility consumers. The risk associated with this gamble is appropriately placed on the deregulated generation business venture, not on captive retail customers. The fact that the Companies are willing to transfer virtually 100

[373] OCC/NOPEC Ex. 9 at 8 (Wilson Second Supplemental).

[374] OCC/NOPEC Ex. 9 at 7 (Wilson Second Supplemental).

[375] OCC/NOPEC Ex. 9 at 8 (Wilson Second Supplemental).

[376] OCC/NOPEC Ex. 9 at 8 (Wilson Second Supplemental).

[377] OCC/NOPEC Ex. 4 at 45-46 (Wilson Second Supplemental); Sierra Club 36; FirstEnergy Ex. 34 (Ruberto errata); Tr. VIII at 1769.(Lisowski) (Confidential).

[378] Sierra Club Ex. 89.

percent of the risk/benefit to captive consumers reflects the Utilities' own lack of confidence in their forecasts of PPA/Rider RRS long-term customer benefits.

Moreover, there is great uncertainty and speculation inherent in projecting the net impact of FirstEnergy's proposed Rider RRS on customers on a long-term basis.[379] This is evident under the divergent long-term projections in the record: OCC projects a $3.6 billion net cost to customers; and the Utilities' project a $561 million net benefit. The PUCO should conclude, as it did in the AEP Ohio ESP proceeding, that it "is unable to reasonably determine the rate impact of the rider"[380] and any tangible customer benefit and deny the Rider RRS.

ii. FirstEnergy has not shown customers will receive a benefit that is commensurate with the rider's potential cost.

In the AEP Ohio ESP III proceeding, the PUCO rightfully determined that the evidence did not persuade it that AEP Ohio's proposal "would provide customers with sufficient benefit from the rider's hedging mechanism or any other benefit that is commensurate with the rider's potential cost."[381] The evidence in this proceeding compels the same conclusion with respect to the Utilities' proposal--there is no evidence that shows that FirstEnergy's proposal would provide customers with sufficient benefits from the hedging or any other benefit that is commensurate with the rider's cost.

As discussed supra, there is no dispute that in eight-year ESP term, Rider RRS, will cost customers hundreds of millions of dollars, with OCC estimating a cost to

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[379] Dr. Choueiki testified that he had zero level of comfort on the forecasts past three years. Tr. XXX at 6258, 6260. He testified that the error of uncertainty for forecasts over three years is over a hundred percent.

[380] *AEP ESP III* , Case No. 13-2385, Opinion and Order at 24.

[381] *AEP ESP III*, Case No. 13-2385-EL-SSO, Opinion and Order at 25.

customers of $3.6 Billion. This exorbitant eight-year cost alone should make it difficult for the PUCO to find that the benefits of the Rider are commensurate with the costs. And when one considers the uncertain and speculative cost/benefit of the Rider over the long term, there is no way to square the projections submitted by OCC, FES, and the Utilities. If OCC is right, customers could pay up to $3.6 billion for the alleged benefits of Rider RRS. To be clear, the Utilities have not identified $3.6 billion of alleged benefits from Rider RRS.

In the end the PUCO is left with conflicting evidence as to the rider's potential cost/benefit. And that conflicting evidence makes it impossible for the PUCO to judge whether the benefits provided are commensurate with the rider's potential cost--the standard the PUCO applied in the AEP Ohio proceeding. For this reason, the PUCO should reject FirstEnergy's proposed Rider RRS, just like it rejected AEP Ohio's proposed Rider RRS and rule on the side of protecting consumers, not shareholders.

b. The PUCO's second factor has not been met. FirstEnergy did not prove that the "PPA Units are necessary in light of future reliability concerns, including fuel diversity."

This PUCO's guideline (second factor) should not even be evaluated considering generation reliability in a restructured state is FERC's jurisdiction, not that of the PUCO's. [382]

FirstEnergy has not proven that the continued operation of the plants is necessary in light of future reliability and fuel diversity concerns, and therefore the second factor is not met. Initially, it is important to note that FirstEnergy has not even shown that there is

[382] OCC Ex. 29 (PUCO House Public Utilities Committee Briefing) (March 4, 2015).

a current or future reliability concern in Ohio and/or PJM that needs to be remedied.[383] It also has not presented a reliability study conducted by an independent party, which would provide a demonstration of the reliability needs of the plants and a description of the methodologies and findings in the underlying studies. Therefore, without going doing any more analysis it is not currently possible to conclude that a reliability issue exists much less that the Plants are necessary to mitigate such an issue.

However, assuming a reliability and fuel diversity issue exists, the Plants are not necessary in light of such concerns because the Plants impact on reliability and fuel diversity is marginal. Regardless of whether Rider RRS is approved or not, customers will obtain their physical power supply from the more than 20,000 MW of capacity resources provided by the PJM wholesale market.[384] In no way does the Program change that nor does it "earmark" the reliability and fuel diversity of the plants for FirstEnergy's customers. The customers ultimately get their fuel diversity and reliability from the pool of PJM resources, of which the Plants are a small percentage. [385]

Additionally, the Plants are not necessary for, and will not provide the benefit of, reliability and fuel diversity because Rider RRS and the Program are a purely financial arrangement. The more than 3,000 MW of baseload capacity involved is to be sold into the PJM markets, with market revenues offsetting the cost of service PPA charges.[386] There will be no actual physical change in the way that the plants operate, including power supply reliability and fuel diversity. The only way in which reliability and fuel

[383] OCC/NOPEC Ex. 4 at 53 (Wilson Direct).

[384] OCC/NOPEC Ex. 4 at 53 (Wilson Direct).

[385] OCC/NOPEC Ex. 4 at 53 (Wilson Direct).

[386] OCC/NOPEC Ex. 1 at 5-6 (Sioshansi Direct).

diversity would be impacted is if the Program affected the retirement decisions for the plants, which, as explained here, is not a reasonable concern.

Furthermore, even if: (1) there was a reliability issue to be solved in Ohio; *and* (2) the plants were currently scheduled to retire without authorization to implement Rider RRS, the Plants would still not be necessary to ensure reliability and fuel diversity because of other the programs and processes currently in place.

For example, the Plants are not necessary to ensure reliability in Ohio because PJM has a target reserve margin of 15 percent with an actual reserve margin of 20 percent projected through the end of the decade. The generation provided by the Plants is a negligible amount in the pool of resources included in PJM's reserves and thus could be lost with a trivial effect on reliability.

Additionally, the aforementioned Capacity Performance product that was proposed by PJM and accepted by FERC was designed, in part, to specifically deal with potential reliability issues, and there is no "looming shortage of generating capacity."[387] As PJM stated, the proposal will "add an enhanced capacity product—Capacity Performance—to [the] capacity market structure and …reinforce the existing definition of the Annual Capacity product to ensure that the reliability of the grid will be maintained through the current industry fuel transition and beyond." [388] Thus, the reliability of the grid is even more secure than FirstEnergy could have possibly contemplated when it original filed its Application in August 2014.

[387] OCC/NOPEC Ex. 9 at 5-6 (Wilson Second Supplemental).

[388] PJM Capacity Performance Proposal Whitepaper, at 4 (August 20, 2014).

The continued development of the electric-gas market coordination program will see the entire energy market become increasingly resilient and more reliable. Therefore, the Plants alleged role in maintaining reliability will become less relevant as time passes.

Furthermore, the future installation of similar amounts of generation that are currently being constructed in Ohio and the PJM region will ease any potential for reliability or fuel diversity issues. A 960 MW gas-fueled generation plant is scheduled to go into service in 2017 in close proximity to Davis-Besse and a 1,152 MW gas-fueled generation plant is scheduled to go into service in 2020 in close proximity to Sammis.[389]A 700 MW natural-gas fired plant is currently being built by Carroll County Energy in Carrollton County, Ohio, just 23 miles from Davis-Besse. [390] Work on an 800 MW natural gas-fired electric generating plant has begun in Oregon, Ohio, just 33 miles from Sammis.[391] NRG Energy is planning on converting its 725 MW coal-fired Avon Lake power plant to gas. Clean Energy Future-Lordstown, LLC, is proposing to build an 800 MW gas-fired plant in Trumbull County. And there are many more to come. Thus, if the Plants are retired they would shortly be replaced with other generation, which would negate any potential reliability issues.

The new plants would also negate any potential fuel diversity issues as well. In 2013, the state of Ohio had 19,268 MW and 9,461 MW of generating capacity that used coal and natural gas, respectively, as its primary fuel source.[392] These represented 59 percent and 29 percent of the generating capacity installed in the state, respectively. If the

[389] Sierra Club Ex. 95 at 11 (Comings Third Supplemental).

[390] Sierra Club Ex. 95 at 11 (Comings Third Supplemental).

[391] Sierra Club Ex. 95 at 11 (Comings Third Supplemental).

[392] Table 4, Ohio Electricity Profile, U.S. Energy Information Agency *available at* http://www.eia.gov/electricity/state/Ohio/xls/sept04oh.xls.

3,319 MW of coal-fired generators included in the Plants and OVEC were retired and replaced with 3,319 MW of natural gas-fired generators instead, coal and natural gas would instead represent 49 percent and 39 percent of the installed generation mix. This would be a more balanced and diversified portfolio of generation technologies than maintaining the coal-fired generators in Sammis, Davis-Besse and OVEC.

Finally, reliability and fuel diversity are not appropriate issues for individual generators or EDU's to be concerned with. As explained in more detail later, they are issues that are the responsibility of PJM and NERC. Therefore, it is not appropriate to justify the reasonableness or necessity of a PPA on reliability.

c. The PUCO's third factor has not been met. The plants are "not compliant with all pertinent and pending environmental regulations."

FirstEnergy has not shown that the Plants are or will be compliant with all environmental regulations, and therefore the PUCO's third factor is not met for evaluating whether to adopt a PPA. There are several environmental regulatory changes that are either recently instituted or will likely be instituted in the upcoming years. The pending EPA regulations will focus on power generation operations to improve air quality by reducing the following emissions: (1) carbon; (2) sulfur dioxide and nitrogen oxides; (3) particulate matter; (4) ozone; and (5) hazardous air pollutants (e.g., mercury).[393]

While these regulations are not specifically designed to single out coal-fired generation, compliance with these pending regulations will undoubtedly significantly affect the future operation and economics of coal-fired generation, such as Sammis,

[393] OCC Ex. 20 at 4 (Ferrey Direct).

because coal generation emits more of the regulated and targeted air emissions in these pending regulations than other widely used fossil fuels per MWh of power generated. [394]

OCC Witness Steven Ferrey states: Coal generation emits more of the regulated and targeted air emissions in these pending regulations than other widely used fossil fuels per megawatt-hour (MWh) of power generated ceteris paribus. Coal is the most carbon-intensive fossil fuel, releasing approximately 29 percent more carbon per unit of energy generated than does oil, and 80 percent or more carbon than natural gas. Coal-fired power plants also emit significantly more SO2, NOx, and particulate matter (which make up three of the six Clean Air Act EPA-regulated criteria pollutants) per MWh generated compared to natural gas and oil-fired plants with similar controls. And coal-fired power generation units also emit more hazardous air emissions, such as mercury, compared to other fossil fuel plants. In fact, existing coal units typically yield greater emissions per unit of energy produced than newer coal-fired technologies. [395]

The PUCO has directed parties to address how the plants included in FirstEnergy's proposed Rider RRS are compliant with existing and pending environmental regulations. It is noteworthy that coal-fired generation constitutes the majority of generation capacity committed under the FirstEnergy proposal. Specifically, FirstEnergy has proposed to include 2,220 megawatts of coal-fired generation at Sammis and 115.95 megawatts of coal-fired generation at Kyger Creek and Clifty Creek. [396]

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[394] Id.

[395] Id. p. 5. (*See* U.S. EPA, "Reducing Toxic Pollution from Power Plants: EPA's Proposed Mercury Standards," March 16, 2011).

[396] Id. at 6.

Given the uncertainty caused by the pending environmental regulations, the PPA as proposed by FirstEnergy shifts too much of the risk to its customers. Therefore, it is unreasonable, not in the public interest, and does not benefit customers, and should not be approved by the PUCO. Therefore, the third factor is not satisfied.

d. The PUCO's fourth factor has not been met. FirstEnergy has not proven t "the impact that a closure of the generating plants would have on electric prices and the resulting effect on economic development economic development in the state of Ohio."

FirstEnergy has also not adequately demonstrated that the closure of the plants would have an effect on economic development in the State of Ohio, and thus not met the burden imposed by the fourth factor the PUCO announced for considering a power purchase agreement. FirstEnergy never gives a clear explanation about what seems to be its insinuation that, absent the PPA, the two power plants will be retired and, consequently, jobs will be lost. FirstEnergy's logic is flawed for a variety of reasons.

First, the PPA would deter competitors from building new generation in Ohio, which would deter new jobs. Also, deterring those plants could mean that Ohio natural gas could have been used but won't be, which again is not good for jobs.

Second, the PPA—at a projected cost up to $3.6 billion or more ($800 for each of 1.9 million customers over eight years) will remove that money from consumer expenditures in the economy. That is bad for economic development.

Third, FirstEnergy's entire premise is contradicted by FirstEnergy witness Ruberto's direct testimony. As OCC Witness Matthew Kahal stated in his direct testimony, if one incorporates Mr. Ruberto's study and the market price curves from FirstEnergy witness Roses' direct testimony, then the original supposition of Mr. Ruberto is contradicted. Specifically, the combination of inputs results in the plants earning market revenue as merchant plants that fully covers all operating costs, provide FES with an 11.15 percent return on equity on both legacy and new capital, plus a revenue surplus of $2 billion. [397] Based on FirstEnergy's projections, the two plants will earn much more revenue than needed to be economically viable and, thus, would not need to be retired.

However, if the PUCO were to deny the PPA it would not be beneficial to FES to close the plants because it would leave a significant amount of stranded capital. Specifically, closing the plants would not allow for recovery of the capital outlay of $1.8 billion invested at Sammis in 2010 for environmental controls or of the several hundred million dollars invested in Davis-Besse in 2014 to replace a steam generator. Further, the Utilities' are currently seeking to extend Davis-Besse's Nuclear Regulatory Commission ("NRC") operating license, which expires in 2017, until 2037. [398] Consequently, FirstEnergy's actions demonstrate that it has no intentions of closing these plants. And, even if FES was forced to close, it would make much more economic sense for it to sell the plants and recoup some of its losses. This, in turn, would also allow the plants to stay open, which would avoid any alleged effect on the economic development in the state.

Finally and as stated above, even if FES decided to close the plants, as mentioned above, there are many new power plants scheduled to open within the next several years, which would mitigate any lost jobs as well as any other direct or indirect economic impact that could potentially result from the Plants closure. In fact, several of these new

[397] OCC Ex. 7 at 37 (Kahal Direct) ("Mr. Ruberto's study is presumably based on the Utilities' estimates of 2016-2031 plant operating costs and capital additions. One must also assume that the market price curves sponsored by Mr. Rose reflect the Utilities' outlook. This combination of inputs results in Sammis and Davis-Besse earning market revenue as merchant plants that fully covers all operating costs, provides FES with an 11.15 percent return on equity on both legacy and new capital, plus a revenue surplus of $2 billion.").

[398] FirstEnergy Ex. 30 at 3, 4 and 10 (Harden Direct).

plants are within very close proximity to Sammis and Davis-Besse. In other words, the new plants would negate a large majority if not all of the economic effect felt by the Plants closures.

Therefore, there is no evidence that retirement of the plants will or needs to have any effect on Ohio's economy.

e. FirstEnergy's vague promises of allowing a limited review of revenue and cost data do not satisfy the requirement of providing FES with rigorous government oversight, thus increasing consumer risk.

FirstEnergy's proposal allows the PUCO only a specific review of revenue and cost data used in determining the PPA Rider.[399] To pursue prudency or rate issues related to the PPAs, the PUCO would be forced to complain to FERC.[400] OCC/NOAC agrees with Staff's filed testimony that FirstEnergy has failed to prove that its Amended Application will provide the PUCO with the degree of rigorous oversight required. The Joint Stipulation does not cure this deficiency. But even an agreement to permit more rigorous review of FirstEnergy's, and even FES's, revenue and cost data would not afford the PUCO meaningful oversight of FirstEnergy's proposal.

The PUCO, in theory, has the authority to disallow recovery of certain costs through Rider RRS. But the PPA has an early termination clause that would permit FirstEnergy to terminate the PPA if the PUCO were to discontinue or disallow retail rate recovery.[401] In the event of a cost disallowance by the PUCO or any termination, these

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399 *See* FirstEnergy Ex. 154 at 8 (Third Supplemental Stipulation and Recommendation).

400 *See* Staff Ex. 12 at p. 15 (Choueiki Direct).

401 "…in the event that Seller learns that a required Government Approval is lacking and after reasonable effort is not and will not be forthcoming…then Seller may upon ten (10) days written notice to Buyers terminate the Agreement." FirstEnergy Ex. 156 at 10 (IEU Set 1-INT-25 Attachment 1, Revised).

costs would be borne not by FES but by the fully regulated Utilities. And while the Utilities would not be able to pass these costs on to customers, they would be financial harmed by the non-recovery of these costs, while their competitive affiliate and thus shareholders are ensured a guaranteed recovery of the PPA charges/costs to the Utilities.[402]

These provisions would likely have a chilling effect on the PUCO's oversight considering that, if it were to make a substantial disallowance, FirstEnergy would be on the hook for these costs. More likely, it is FirstEnergy's customers who would bear these costs because their enormity would harm FirstEnergy's financial solvency and decrease its ability to provide reliable service. Accordingly, the PUCO's practical ability to ensure reasonable rates to FirstEnergy's customers is seriously compromised by the PPA's review clause, even if it has rigorous oversight (which it does not as discussed earlier).

f. FirstEnergy's commitment to share "pertinent aspects of the Power Purchase Agreement with FES" does not meet the requirement of full information sharing, thus increasing consumer risk.

FirstEnergy and FES did not commit to "full information sharing" with the PUCO and Staff, but committed only to sharing "information on any cost component."[403] Thus, the PUCO will not have the ability to fully review all purchasing and expenses of FES. What FirstEnergy wants is to re-fashion regulation as it would imagine it to work for ensuring corporate profit. But it would do so without what it would consider the unwelcome side effects of government review to ensure protection of the people

[402] *See* FirstEnergy Ex. 154 at 8 (Third Supplemental Stipulation and Recommendation).

[403] *See* FirstEnergy Ex. 154 at 8 (Third Supplemental Stipulation and Recommendation).

(Ohioans) paying the profit. In a real regulatory framework (contrasted with FirstEnergy's construct), there would be a requirement for complete PUCO access to records such as what appears in R.C. 4905.15:

> Each public utility shall furnish to the public utilities commission, in such form and at such times as the commission requires, such accounts, reports, and information as shall show completely and in detail the entire operation of the public utility in furnishing the unit of its product or service to the public.

FirstEnergy's approach to avoiding regulatory scrutiny of its re-regulatory plan should be denied.

g. The potential for disallowing Power Purchase Agreement costs does not constitute the sharing of financial risks for the protection of consumers.

To be sure, the PPA and PPA Rider completely transfer all risks associated with the continued operation of the PPA Units to FirstEnergy's captive customers. FirstEnergy attempts to justify the proposal, in part, by projecting that the PPA Rider will result in a $560 million credit to customers over the initial eight-year period.[404] This purported credit is based on an analysis using a set of PJM market price and load assumptions that are unlikely to materialize. Indeed, credible evidence of record shows that FirstEnergy's customers will be charged the staggering amount of $2.7 billion over the same eight-year period.[405] Thus, FirstEnergy customers will fully bear all of the cost and economic risk of the PPA Units through the PPA Rider. Such transfer of risk to captive monopoly customers is improper in a restructured market for deregulated generation services.

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[404] *See* OCC/NOPEC Ex. 9 at 7 (Wilson Second Supplemental).

[405] *See* OCC/NOPEC Ex. 9 at 7 (Wilson Second Supplemental).

FirstEnergy's claim that the PPA could produce a $560 million credit to ratepayers over its term is difficult to accept *prima facie*. FirstEnergy admits that the PPA Units may not be able to recover their costs from PJM market revenues today. If FirstEnergy believes its own analysis, that the PPA Units are likely profitable over the PPA Rider's term, one would expect that FES would invest capital to keep the PPA Units operating. Because FES (and presumably shareholders and investors) is unwilling to bear that risk, there is no rationale for why FirstEnergy's customers should be obliged to do so. The only assumption that is guaranteed to come to fruition throughout the course of the PPA is the ongoing (and most likely uneconomic) profits for the PPA Units. Under this proposal, these profits would be guaranteed by FirstEnergy's captive customers.

It is against this backdrop that the PUCO required FirstEnergy to include in its Third Supplemental Stipulation a plan to allocate Rider RRS's financial risk between FirstEnergy and its customers.[406] FirstEnergy cavalierly suggests that it has complied with the risk-sharing requirement as the PUCO would be permitted to disallow the recovery of specific costs.

[406] *See* FirstEnergy Exhibit 154 at 7-8 (Third Supplemental Stipulation).

3. The PUCO's guidelines are not adequately focused on utility customers and should require FirstEnergy to demonstrate compliance with additional factors for the benefit of consumers before even considering approving the Amended Application/Modified Amended Application.

The PUCO's Order in AEP Ohio's ESP established guidelines that the PUCO would use to evaluate AEP's next PPA filing (but not be bound by).[407] The Attorney Examiner in this proceeding issued a procedural entry on March 23, 2015, providing parties additional time to conduct discovery and offer supplemental testimony addressing the AEP Order.[408] OCC Witnesses Sioshansi and Rose addressed the AEP Ohio factors and concluded that the factors were insufficient[409] and not appropriate for numerous reasons, as discussed below.[410]

But along with these factors, the PUCO is to consider the ultimate conclusions it reached on AEP Ohio's PPA, and the regulatory principles and standards that supported those conclusions. When the guidelines of the AEP Ohio Order are applied to this case, it is clear that FirstEnergy's PPA should be rejected -- for the very same reasons AEP Ohio's proposal was rejected.

The PUCO's factors are inadequate for consumer protection and should be expanded. The PUCO should additionally consider whether the PPAs and Rider RRS

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[407] OCC and other parties applied for rehearing on the PUCO's findings in the AEP ESP case, challenging, inter alia, the factors. See OCC Application for rehearing at 42-46 (June 29, 2015). The PUCO on May 28, 2015, issued an Entry on Rehearing deferring ruling on all assignments of error related to the PPA. OCC and others applied for rehearing of the PUCO's May 28, 2015 Entry. The PUCO granted rehearing to allow itself more time to consider the applications. Entry on Rehearing (July 22, 2015). No substantive entry on rehearing has been issued to date.

[408] Entry at ¶5 (Mar. 23, 2015).

[409] OCC/NOPEC Ex. 2 at 8-9 (Sioshansi Supplemental).

[410] OCC Ex. 26 at 2-8 (Rose Supplemental).

benefit customers. With the balanced consideration of benefits of the Rider RRS to First Energy and FES, as well as to consumer interests, the PUCO will be in a position to evaluate the *net* benefits of the PPA and Rider RRS and, thus, determine whether the Rider RRS is in the public interest.[411] The additional quantitative factors the PUCO should consider fall into two categories: (1) the Rider RRS's potential cost/detriment to consumers and (2) the cost of achieving the same benefits that the PPA and Rider RRS provide compared to alternatives that could provide greater benefits.[412] Indeed, failure to consider these additional factors could result in unreasonable rates and violations of state policy.[413]

a. The PUCO must consider the Rider RRS's potential costs/detriments to customers.

Under the first five of the additional factors, consideration would be given to potential costs or detriments to FirstEnergy's customers. These include:

i. FirstEnergy should be required to submit to an independent (PUCO hired)_ assessment of the Power Purchase Agreement and Rider RRS under independently produced future price scenarios so consumer interests are adequately protected.

As a threshold matter, the PUCO in its AEP ESP III Opinion and Order reserved the right to select an independent third party to perform a study of pricing issues as they relate to the Rider RRS.[414] To support its pricing analysis in this proceeding, FirstEnergy

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[411] *See* OCC/NOPEC Ex. 2 at 8-9 (Sioshansi Supplemental).

[412] *See In re: Ohio Power,* Case No. 13-2385-EL-SSO, Opinion and Order at 33.

[413] *See* R.C. sec. 4928.02(A).

[414] *See In re: Ohio Power,* Case No. 13-2385-EL-SSO, Opinion and Order at 25.

did not ask the PUCO to engage the services of an independent third party, nor did it even rely on independently produced pricing data.

Conversely, OCC Witness Wilson conducted an independent analysis of the PPAs and Rider RRS using, among other factors, the updated Energy Information Agency ("EIA") Annual Energy Outlook 2015 reference case which was prepared in early 2015.[415] Using these price forecasts, which are consistent with recent market data, he demonstrated that the Rider RRS would result in a charge to FirstEnergy's customers of $3.6 Billion over the eight-year period of the PPA.[416]

This vast difference in results using First Energy's in-house witness (based on in-house assumptions) and the results provided by OCC Witness Wilson's independent analysis (based on market-derived prices) shows that the net impact of the PPAs and Rider RRS on customers is highly sensitive to input parameters. To accurately gauge the Rider RRS's net impact on customers, the PUCO should select an independent third party (with the PUCO Staff as the client that the third-party would report to) to conduct a pricing study, as contemplated in the AEP ESP III Opinion and Order. But in this proceeding, in the absence of such an independent analysis, the PUCO should adopt the analysis of OCC Witness Wilson because it is based on independently produced market data.

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[415] OCC/NOPEC Ex. 9 at 6 (Wilson Second Supplemental).

[416] *See* OCC/NOPEC Ex. 9 at 12 (Wilson Second Supplemental).

ii. The PUCO also should consider how FirstEnergy's offer strategy into PJM affects customers.

The subsidy inherent to the Rider RRS could result in FirstEnergy and FES adopting offer strategies into the PJM-operated markets that could undermine the markets' ability to ensure the short- and/or long-run efficiency of the electric power system. Further, the participation of affiliated generation assets in the PJM-operated markets also complicates the choice of offer strategy employed. As explained in detail earlier, FirstEnergy could adopt strategies to offer the Sammis and Davis-Besse Units into the PJM market at a unit's respective cost that may exceed the clearing price or under a unit's costs. The offer strategies employed may undermine the short and/or long-run efficiency of the PJM-operated markets, could be anti-competitive and be harmful to customers.[417]

The record in this proceeding does not disclose the offer strategies that FirstEnergy will use for the Sammis and Davis-Besse Units, and FirstEnergy provides no guarantee, or means to verify, that its offer strategies will not have anti-competitive effects on the PJM wholesale electric markets to the detriment of Ohio consumers. This critical omission supports the PUCO's rejection of the Third Supplemental Stipulation.

While the PPA Units participating in the PJM markets is bad, the worst case scenario for Ohio's consumers is that the PPA Units are offered into the PJM markets and do not clear. This could occur if the PPA Units were offered into the PJM Capacity Market at a competitive offer, instead of a zero offer, and did not clear the market because the offer was too high. As the PJM IMM warned:

[417] *See* OCC/NOPEC Ex. 2 at 11-13 (Sioshansi Supplemental).

> If FirstEnergy were required to offer the units at the competitive level and the units do not clear in the capacity market as a result of a competitive offer, there would be no market revenues and customers would receive no offset to the costs they would be required to pay under the Rider RRS.[418]

In other words, if the PPA Units do not clear the markets and produce offsetting revenues then customers would be forced pay for all of FirstEnergy's costs of the PPA. This is a legitimate concern because FirstEnergy has repeatedly admitted that the PPA Units are uneconomic. And, if that is true and the PPA Units are too uneconomic to offer and clear at cost, that increases the likelihood that these units will not produce needed revenues, and the worst case scenario for consumers becomes a reality.

iii. The PUCO should consider the incentives, or lack thereof, for FirstEnergy to control the cost of Sammis, Davis-Besse and OVEC so consumer interests are protected.

The Rider RRS permits 100 percent pass through of Sammis and Davis Besse's actual fixed and variable costs (net of revenues) to FirstEnergy's captive customers. In addition, FirstEnergy is guaranteed to earn a return on investment through the PPA terms. As discussed previously, the design of the PPAs and Rider RRS significantly reduces any incentives for FES to control or reduce the capital or operating costs of the PPA Units.[419]

The proposed PPA will destroy any incentive to keep energy and capacity prices relatively low levels. Given that FirstEnergy has a substantial amount of generation in the PJM footprint, the company already has strong incentives to attempt to raise energy

[418] IMM Ex. 2 at 6-7 (Supplemental Direct Testimony of Joseph E. Bowring).

[419] *See* OCC/NOPEC Ex. 2 at 13 (Sioshansi Supplemental).

and capacity prices.[420] Because the revenues associated with a part of the portfolio can be passed through to customers through the Rider RRS, the incentive to not clear these resources in PJM's markets would be strengthened.[421] That is, by fully subsidizing the operating and capital costs of the PPA Units, in addition to the guaranteed profit, the PPAs eliminate any incentives that the PJM-operated wholesale markets create to reduce operating and capital costs of the PPA Units.[422] This means that the cost of supplying customers' energy and capacity needs using the PPA Units may be higher than they otherwise would be without the Rider RRS subsidy.[423] This is an unjust and unreasonable proposal and outcome for consumers.

iv. The PUCO should consider the incentives, or lack thereof, for FirstEnergy and FES to make rational market-based retirement decisions pertaining to the PPA Units so consumer interests are protected.

When a plant no longer appears likely to recover its going forward costs over any future time frame (in the short- or long-term), the owner would retire or repower it. That is how markets work. And that is how Ohio works under the General Assembly's law. But the guaranteed cost recovery (from Ohioans) in the PPAs eliminates any incentives for FES to retire the PPA Units. Thus, even if the PPA Units are not economically viable, in the sense that they cannot recover their costs, there is no incentive mechanism within the proposed PPAs for these assets to be retired, regardless of how costly or uneconomic they may be. This retirement issue might not ordinarily be an issue for

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[420] *See* OCC/NOPEC Ex. 2 at 11-13 (Sioshansi Supplemental).

[421] *See* OCC/NOPEC Ex. 2 at 11-13 (Sioshansi Supplemental).

[422] *See* OCC/NOPEC Ex. 2 at 11-13 (Sioshansi Supplemental).

[423] *See* OCC/NOPEC Ex. 2 at 11-13 (Sioshansi Supplemental).

discussion in a PUCO case. But here the Utilities want consumers to subsidize a power plant even if the plant is uneconomic to operate.

Indeed, the PPA provides that retirement decisions regarding the PPA Units must be made by mutual agreement between FirstEnergy and FES. Considering that FES's costs plus a return on investment are fully covered by the PPA, FES has a disincentive to agree to any PPA Unit retirement.

The PPA even entices FES and FirstEnergy to keep the units operational because FES would continue to receive a guaranteed return, paid by customers. This could result in higher costs to customers, because lower-cost alternatives may not be able to enter the market due to the subsidized PPA Units not being retired. Therefore, any proposed PPA should be evaluated based on whether it provides incentives for owners to make rational retirement decisions. As stated above, 100 percent pass-through of costs and a guaranteed return on investment provides no incentive (or even disincentives) for rational, economic, and cost-efficient decision making inherent to and consistent with either traditional ratemaking principles or under a competitive market structure. This result, therefore, is detrimental to both consumers and competitive markets, and is not in the public interest.[424]

v. The PUCO should consider the economic impact of higher retail rates that would be imposed on FirstEnergy's captive customers.

Any economic analysis should take into account the costs of keeping potentially inefficient plants running. Additionally, such an analysis should take into account the

[424] *See generally* OCC/NOPEC Ex. 2 at 14 (Sioshansi Supplemental).

economic development associated with the potential entry of new generating or transmission assets if the PPA Units are retired. That is to say, if the PPA Units are retired they most likely will be replaced with new more efficient generating assets that will create employment, spur economic development, and provide a strong tax base for the local region and the state, which does not potentially require costly customer-funded subsidies. Thus, the PPA may have detrimental effects on economic development, job retention, and the local and statewide tax base that are not captured at all in the limited analysis provided by FirstEnergy.[425]

For example, Rider RRS would result in higher retail rates for FirstEnergy's customers. OCC Witness Wilson's analysis of the PPA costs under alternative price scenarios shows that it will likely result in net charges to FirstEnergy's captive customers.[426] These charges ultimately mean that FirstEnergy's customers have less disposable income available for consumption, investment, and other economic activity. If Rider RRS results in a net charge to FirstEnergy's captive customers, the associated loss of economic activity may result in greater economic harm, ancillary job losses, and lost tax revenues than any economic benefits that may be provided by maintaining and operating inefficient plants. Similarly, potentially higher retail rates could also reduce the competitiveness of Ohio businesses in regional, national, and international markets, contrary to state policy.[427]

The PUCO should take into account the costs of keeping inefficient plants running. Additionally, such an analysis should take into account the economic

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[425] *See* OCC/NOPEC Ex. 2 at 14-16 (Sioshansi Supplemental).

[426] *See* OCC/NOPEC Ex. 9 at 8 (Wilson Second Supplemental).

[427] *See* R.C. sec. 4928.02(N); OCC/NOPEC Ex. 2 at 14-16 (Sioshansi Supplemental).

development associated with the entry of new generating or transmission assets if the PPA Units are retired. Thus, in sum, the PPAs will have detrimental effects on economic development, job retention, and the local and statewide tax base that are not captured at all in the limited analysis provided by FirstEnergy.[428]

b. The PUCO should consider the cost of achieving the same benefits that the PPAs and Rider RRS provide compared to alternatives that could provide greater benefits to consumers.

Of equal importance to whether the PPAs and Rider RRS impose costs/detriments on FirstEnergy's customers is the question of whether alternatives are available that could deliver greater benefits at the same or lower cost than the PPAs and Rider RRS. If so, these alternatives should be pursued and FirstEnergy's Third Supplemental Stipulation rejected. This is especially true if alternatives exist that do not rely on anti-competitive and inefficient captive customer-funded subsidies.[429] We are not here endorsing subsidy programs as reasonable or lawful. But, given the PUCO's apparent interest in subsidies, OCC/NOAC notes that FirstEnergy presents no lower cost alternatives to the proposed PPAs.

i. **The PUCO could consider an analysis of a least-cost combination of new and e**xisting generation and/or transmission assets to protect **consumer interests.**

Proper consideration of the Rider RRS should include an analysis of what combination of existing/new transmission and generation assets could be added to the electric power system to deliver the claimed benefits of the PPAs and Rider RRS. As

[428] *See* OCC/NOPEC Ex. 2 at 14-16 (Sioshansi Supplemental).

[429] *See* OCC/NOPEC Ex. 2 at 19-20 (Sioshansi Supplemental).

demonstrated above, the PJM-operated markets are designed to incent the construction of building generation and transmission assets to address cost stability, reliability, and other issues without the need for potentially anti-competitive and inefficient customer-funded subsidies such as the Rider RRS.[430]

ii. The PUCO could consider the cost of achieving price stability through competitive solicitation to protect consumer interests.

SSO customers of FirstEnergy already have access to a price-stabilizing mechanism. This is achieved by having the supply needs of SSO customers met through one- to three-year full-requirements contracts that result from competitive auctions. The rates that SSO customers pay are established through the blending of multiple auctions held months to years in advance of delivery. The rate resulting from each auction tends to reflect the then-prevalent forward price plus a markup. Because the forward prices for delivery months to years ahead tend to be relatively stable over time. Consequently, these auctions already stabilize prices paid by SSO customers.[431]

iii. Competitive Suppliers have offered alternatives to the PPA that have touted guaranteed savings to Ohioans.

In his testimony, Lael Campbell described Exelon Generation's quote for an eight-year bundled fixed price for energy and capacity delivered to ATSI from 100 percent zero carbon resources, with Exelon Generation maintaining 100 percent of the PJM capacity performance risk. Mr. Campbell further elaborated that Exelon Generation would commit for a maximum fixed price to which the company would provide a fixed

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[430] *See generally* OCC/NOPEC Ex. 2 at 19-20 (Sioshansi Supplemental).

[431] *See* OCC/NOPEC Ex. 2 at 20-21 (Sioshansi Supplemental).

quantity product of anywhere up to 3000MW (i.e., the combined nameplate capacity of the Davis Bessie and Sammis plants) of unforced capacity ("UCAP") and around-the-clock ("ATC") energy for the same eight-year period as the proposed PPAs. Mr. Campbell noted that Exelon Generation's competitive offer will provide well-over $2 billion in savings for Ohio customers if adopted by the Commission.[432]

On January 12, 2016, Dynegy announced two counter-proposals to the proposed Ohio PPAs that it believes will save Ohio consumers billions of dollars over the next eight years, promote and protect Ohio jobs, aid in Ohio's compliance with the Clean Power Plan, and encourage consumer and business growth. Specifically, Dynegy maintains that its first proposal would save Ohio consumers and businesses $5 billion by providing the same amount of power promised under the FirstEnergy and AEP power purchase agreements (PPAs) at lower prices, $2.5 billion each in the FirstEnergy and AEP territories, over the 8-year term of the proposed PPAs. The power provided by Dynegy would be generated by Ohioans, at Ohio plants. Furthermore, Dynegy avers that the power plants will use the region's vast fuel supplies, including clean natural gas, providing further benefits to the state.

As a second alternative to the proposed PPA rates, Dynegy would replace the plants being subsidized under FirstEnergy's and AEP's PPAs by building 6,300 MW of new, clean natural gas powered generation in Ohio, which it maintains would bring new jobs to the state, increasing economic activity and development, and providing reliability and resource adequacy for decades. Dynegy states that it believes that these two counter-

[432] Exelon Ex. 4 at 6 (Campbell Second Supplemental).

proposals are uniformly better for Ohio consumers and businesses than the AEP and FirstEnergy PPAs, by keeping and creating jobs in the state that stimulate economic growth and development rather than weakening Ohio's competitive position.[433]

4. Authorizing the Utilities to charge consumers for Government Directives Rider and Delivery Capital Rider violate regulatory practice and/or principles.

Approving Rider GDR and increasing the revenue caps for Rider DCR would increase costs to customers at a time when the FirstEnergy utilities are earning well above their PUCO-authorized returns. Therefore, the PUCO should not adopt of Rider GDR and against continuing and increasing Rider DCR.

Rider GDR should not be authorized because it would permit the Utilities to charge customers for future costs related to programs required by legislative or governmental directives. The proposed rider is single-issue ratemaking at a time when the evidence shows substantial excess earnings by the Utilities.[434] Additionally, if the Utilities believe that programs required by legislative or governmental directives would increase costs and cause a revenue deficiency, then the Utilities have the ability to file a distribution rate case to seek to recover from customers the costs related to the directives. The Utilities should not be able to charge customers the costs "associated with the legislative or governmental directives absent a showing that any such costs actually cause

[433] http://www.dynegy.com/news/news-release?newsurl=http%3A%2F%2Fphx.corporate-ir.net%2Fphoenix.zhtml%3Fc%3D147906%26amp%3Bp%3DRssLanding%26amp%3Bcat%3Dnews%26amp%3Bid%3D2128549

[434] *See* OCC Ex. 18 at 18 (Effron Direct).

revenue deficiencies."[435] Furthermore, PUCO staff contends that this rider GDR should be denied since it is both premature and vague.[436]

However, if the PUCO were to approve Rider GDR, it should make the following changes: (1) the operation of the rider should be symmetrical, (2) it should be subject to a materiality threshold and (3) each government directive should be a discrete component of the GDR.[437] As OCC Witness Effron explains in his testimony, a symmetrical rider would not only allow recovery of incremental expense increases, but would also credit customers for any expense reductions resulting from legislative or governmental directives.[438] A materiality threshold would prevent the Utilities from modifying their rates for legislative or governmental directives that have no material effect on their expenses or income.[439] Finally, requiring the Utilities to discretely track each directive as a component of the GDR would ensure proper accountability in the recovery of these costs.[440]

OCC Witness Effron testified that FirstEnergy is already earning a return in excess of its authorized cost of capital and, therefore, implementing DCR or GDR would only serve to perpetuate, or even to increase, the excess return on the investment in rate base used to provide service to customers. The excess returns that the Utilities are earning are shown in the table below:[441]

[435] OCC Ex. 18 at 23 (Effron Direct).

[436] Staff Ex. 6 at 6 (McCarter Direct).

[437] OCC Ex. 18 at 24 (Effron Direct).

[438] OCC Ex. 18 at 24-25 (Effron Direct).

[439] OCC Ex. 18 at 25 (Effron Direct).

[440] OCC Ex. 18 at 25-26 (Effron Direct).

[441] OCC Ex. 18 at 13-14 (Effron Direct). This table is simply a representation of data that is stated in OCC Ex. 18.

Utility	Earned Return on Rate Base	Authorized Return on Rate Base	Earned Return on Equity	Authorized Return on Equity
Ohio Edison	11.2%	8.48%	16.0%	10.5%
Cleveland Electric Illuminating	11.7%	8.48%	17.1%	10.5%
Toledo Edison	10.7%	8.48%	15.1%	10.5%

Approval of rate increases under riders GDR and DCR is not appropriate until it can be shown that these rate increases do "not serve to perpetuate or augment excess earnings."[442]

Rider DCR is intended to allow the Utilities to charge customers for the revenue requirement related to additions to plant in service over and above the plant included in their rate bases in the most recent rate cases. Additionally, since the Utilities seek authority to charge customers up to $915 million through Rider DCR for an eight-year term,[443] issues of customer affordability are created and possible increases in customer disconnections. [444] R.C. 4928.143(B)(2)(a) limits distribution expenses in an ESP to those related to "infrastructure modernization," which is different than what FirstEnergy proposes for Rider DCR.[445] Thus, the proposed Rider DCR violates the statute, which restricts the collection of distribution expenses. Furthermore, OCC Witness Effron has

[442] OCC Ex. 18 at 19 (Effron Direct).

[443] OCC/NOPEC Ex. 11 at 12-13 (Supplemental Kahal).

[444] OCC Ex. 27 at 15 (Williams Direct).

[445] Id. at 16 (citing R.C. 4928.143(B)(2)(a)).

identified an entire series of accounting issues that should be further investigated by the PUCO.[446]

Additionally, there is no evidence to suggest that without this rider FirstEnergy will be unable to make the needed distribution investment. FirstEnergy did not allege it could not make the needed infrastructure investments absent rider charges to customers. In fact both FirstEnergy witness Fanelli and Staff witness Turkenton testified that there is reason to believe that FirstEnergy would be permitted to collect its distribution investment in a distribution rate case.[447]

FirstEnergy's stated rationale for proposing Rider DCR is to enhance customer reliability and align the customers' and the Utilities' expectations with respect to reliability.[448] However, FirstEnergy has met their reliability standards, and the filed case makes no further commitment to improve reliability with the proposed extension of and increase to Rider DCR.[449] Moreover, OCC Witness Williams testified that "customers are unwilling to pay more to avoid non-major outages" and therefore customer and utility expectations on this issue "are not aligned."[450] In other words, Rider DCR fails to meet the statutory test of R.C. 4928.143(B)(2)(h) which requires, inter alia, that distribution infrastructure modernization be allowed if customer and utility reliability expectations are aligned.

[446] OCC Ex. 18 at 19-22 (Effron Direct).

[447] FirstEnergy Ex. 50 at 7 (Fanelli Direct); Tr. XXIX at 6073-6074 (Turkenton).

[448] OCC Ex. 27 at 19-21 (Williams Direct) (citing R.C. 4928.143).

[449] OCC Ex. 27 at 17(Williams Direct).

[450] OCC Ex. 27 at 21(Williams Direct).

If Rider DCR is allowed, prior to the implementation of any further Rider DCR rate increases, the PUCO should require the Utilities to file a distribution rate case to establish the appropriate baseline against which any Rider DCR rate changes should be measured.[451] A distribution rate case would provide the PUCO data to determine the extent to which the Utilities are currently earning returns in excess of a reasonable cost of capital.[452] Further, the PUCO should at least reduce the revenue caps, as recommended by Staff witness McCarter, and correctly value the rider in the statutory test.[453] This means that the quantifiable cost of Rider DCR ($240 to $330 million) should be counted in the statutory test with no offsetting qualitative benefit.[454] Therefore, the PUCO should reject the stipulation for violating regulatory principles by increasing costs to Rider DCR.

5. The FE proposed ROE is in violation of regulatory practice and/or principles.

The profit or return on equity ("ROE") proposed by the Utilities in this proceeding for the PPA and Rider RRS is unreasonable, detrimental to the consumers who pay it, not in public interest, and violates important regulatory principles and practices. First of all, any level of guaranteed ROE to be included in the PPA or Rider RRS will only benefit FES, the Utilities' unregulated generation affiliate. Allowing FES to receive any level of guaranteed ROE through Rider RRS will create an uneven playing filed and distort the competitive wholesale generation market in Ohio. Moreover, such guaranteed generation profits billed to captive consumers would not be subject to the

[451] OCC Ex. 18 at 19 (Effron Direct).

[452] OCC Ex. 18 at 19 (Effron Direct).

[453] Staff Ex. 6 at 7-10 (McCarter Direct). Staff also recommended that there be a rate case but not until May 31, 2018. This implicitly recognizes the problem of authorizing unnecessary DCR rate increases but delays the steps necessary to mitigate the problem . *See* Staff Ex. 6 at 13 (McCarter Direct).

[454] OCC/NOPEC Ex. 11 at 23 (Kahal Supplemental).

significantly excess earnings test (“SEET”) because generation is <u>deregulated</u> in Ohio. If the PUCO would like to set a guaranteed ROE for the PPA and Rider RRS, it should adopt an ROE, as recommended by OCC witness that is no higher than 8.7 percent.[455]

The ROE of 10.38 percent that has been put forth by FirstEnergy has been pulled from thin air and has no support, and should not be used by the PUCO in this proceeding because there is no generation risk for the PPA as retail customers have been saddled with 100 percent of that risk. FirstEnergy has failed to provide even a modicum of the necessary support or conduct the basic and necessary financial analyses to demonstrate that their proposed ROE of 10.38 percent is reasonable for an electric company in 2015. First Energy Solution’s assessment of its own risk does not comport with the guaranteed recovery that is offered by Rider RRS.

a. The Utilities have provided no basic financial analysis to demonstrate that the proposed ROE of 10.38 percent is appropriate.

The ROE amount recommended in this proceeding is not reasonable because it is completely unsupported by any evidence in this case and was simply dropped in to the stipulation.[456] An ROE in a case of this magnitude should be determined independently. It should not be arbitrarily pulled from a hat simply because it may seem appropriate. FirstEnergy has additionally failed to provide a cost of capital study to show this ROE is appropriate for their company in this period.[457]

In contrast to the meager support offered for First Energy’s ROE, OCC Witness Dr. Woolridge conducts a full cost of capital study in order to support his proposed cost

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[455] OCC Ex. 22 at 7 (Woolridge Direct).

[456] FirstEnergy Ex. 156 at 13 (IEU Set 1, INT-25 Revised).

[457] OCC Ex. 22 at 10 (Woolridge Direct).

of capital. Dr. Woolridge provides a proxy group of utilities to estimate the equity cost for the Utilities.[458] Dr. Woolridge then analyzed the Capital structure of the Utilities and adjusted the proposed capital structure to 55 percent long-term debt and 45 percent common equity.[459] Finally Dr. Woolridge conducted both and Discounted Cash-flow analysis and a Capital pricing model analysis to arrive at a suggested equity cost rate of 8.7 percent.[460] It is clear from the record that FirstEnergy never went to this level of analysis to determine the reasonableness of its ROE.[461]

b. FirstEnergy Solutions has low risk because of the nature of Rider RRS and that lower risk should be reflected in the ROE applicable Rider RRS.

Because the return on Capital and ROE are collected through a Rider and not a base generation rate, this presents a much lower risk when compared to traditional ratemaking. FirstEnergy's analysis does not mention this decreased risk and in fact states that there is a higher risk simply because First Energy Solutions is a merchant Generator.[462]

When a company collects an ROE through traditional ratemaking practices, it is only provided an opportunity, and not guaranteed to earn an authorized ROE.[463] As Dr. Woolridge points out in his testimony:

> Actually earning the authorized ROE by a utility depends on many factors, including the number of customers, the efficiency of

[458] OCC Ex. 22 at 27-31(Woolridge Direct).

[459] OCC Ex. 22 at 32 (Woolridge Direct).

[460] OCC Ex. 22 at 32 (Woolridge Direct).

[461] See FirstEnergy Ex. 155 at 7 (Mikkelsen Fifth Supplemental).

[462] See FirstEnergy Ex. 156 at 13 (IEU Set 1, INT-25 Revised); FirstEnergy Ex. 155 at 7 (Mikkelsen Fifth Supplemental).

[463] OCC Ex. 22 at 18 (Woolridge Direct).

> management, operating and maintenance costs, fuel costs, demand for service, and other factors.[464]

However, under Rider RRS, the return on capital for the plants is effectively guaranteed since it is included as a rate rider. Dr. Woolridge goes on to point out that this has an impact on FE's risk, that "recovery of capital costs through a rider is less risky than through traditional ratemaking."[465] OCC's analysis, conducted by Dr. Woolridge takes this factor into account, when he calculates his 8.7 percent ROE. Therefore, if the PUCO were to adopt Rider RRS, it should use OCC's proposed ROE.

6. The Grid Modernization provisions are not in the best interest of consumers and are in violation of regulatory practices and principles.

Section V.D. of the Stipulation refers to a Grid Modernization plan to be filed by FirstEnergy at the PUCO at a certain unspecified date in the future.[466] It commits FirstEnergy to propose a plan for full smart meter implementation, for specific terms related to data management and sharing, a specific rate treatment and return on equity, and provisions for semi-annual updates.[467] Such a proposal is not in the public interest and violates regulatory principles and practices in a variety of ways.

First, as mentioned, the Stipulation commits FirstEnergy to make a future filing with regards to its Grid Modernization plan. Thus, the main features of the program are contingent upon a future Commission decision in a different proceeding. Consequently, the program is outside the scope of this proceeding. If FirstEnergy wishes to propose a

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[464] OCC Ex. 22 at 18 (Woolridge Direct).

[465] OCC Ex. 22 at 18 (Woolridge Direct).

[466] *See* FirstEnergy Ex. 154 at 9-10 (Third Supplemental Stipulation).

[467] *See* FirstEnergy Ex. 154 at 9-10 (Third Supplemental Stipulation).

Grid Modernization plan it may do so at any point in the future. There are no grounds for why the proposal should be included in a Stipulation in this proceeding.

In addition, because FirstEnergy will file the plan in a future case it has failed in this proceeding to adequately explain the details of its proposed Grid Modernization program resulting in a vague and ambiguous proposal. For example, the Stipulation states that FirstEnergy will work with Staff on removing any barriers for distributed generation.[468] Yet, FirstEnergy never identifies what barriers it is referring to. Additionally, FirstEnergy's proposal includes a commitment to implement VOLT/VAR initiatives.[469] Yet, FirstEnergy refused to produce documents in this proceeding relating to its assessments of potential VOLT/VAR deployment.[470] In fact, FirstEnergy refused to divulge any documents relating to its Grid Modernization plan.[471] What FirstEnergy was willing to divulge was confirmation that it has not provided a description of benefits or potential benefits to customers from its proposed Grid Modernization business plan.[472] It has also not divulged, because it does not know how much its proposed Grid Modernization plan will cost consumers.[473] This is not a just and reasonable proposal for consumers. Indeed, as Mr. Rabago so aptly states, "[i]t is inappropriate as a matter of sound regulation to prejudge such specific issues without the benefit of a full record and

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[468] *See* FirstEnergy Ex. 154 at 9 (Third Supplemental Stipulation).

[469] *See* FirstEnergy Ex. 154 at 9-10 (Third Supplemental Stipulation).

[470] See Hearing Transcript Vol. XXXVII at 7848-7849 (Mikkelsen); See also ELPC Set 6-INT-015.

[471] See ELPC Set 6-RPD-004, 005.

[472] See Hearing Transcript Vol. XXXVII at 7847 (Mikkelsen).

[473] See Hearing Transcript Vol. XXXVII at 7847 (Mikkelsen).

fair opportunity for all potential intervenors to participate in the process of rulemaking and ratemaking."[474]

Curiously, the lack of details for the main features of the proposal has not stopped the signatory parties from agreeing to the specific rate treatment and ROE provisions associated with the Grid Modernization initiatives.[475] Determining the rate of return for a program that has no details is inherently wrong and misguided. As ELPC Witness Rabago put it, "setting [return on equity] in isolation with all the other uncertainties associated with the plans and the execution and all those other factors at the same time makes it per-se wrong because we don't have the evidence that tells us whether it's right."[476]

Moreover, the proposed return on equity for the Grid Modernization program is not in and of itself a just and reasonable proposal for consumers. The return on equity established by the stipulation for grid modernization is higher than the current ROE approved by the PUCO for the current SmartGrid modernization initiative. Indeed, the current return on equity approved for FirstEnergy's SmartGrid pilot is 10.5 percent, and the initial return on equity for any Grid Modernization pursuant to the Third Stipulation is 10.88 percent.[477] Yet, FirstEnergy provides little to know detail justifying why its proposed Grid Modernization program should receive such a high return on equity. Without more information the PUCO should not approve this Stipulation for consumers.

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[474] ELPC Ex. 28 at 12 (Rabago Direct).

[475] *See* FirstEnergy Ex. 154 at 9-10 (Third Supplemental Stipulation).

[476] Tr. XXXVIII at 8190-8191 (Rabago).

[477] Tr. XXXVII at 7774-7775 (Mikkelsen).

7. The Resource Diversification provisions are not in the best interest of consumers and are in violation of regulatory practices and principles. (Moore 02.03.16)

Section E of the Stipulation allegedly commits FirstEnergy and/or its affiliates to a variety of "resource diversification" initiatives. Specifically, the Stipulation states the Utilities will commit to a non-binding CO_2 emissions reduction goal, to evaluation of investments in battery technology, to restore and offer previously deactivated energy efficiency programs, to a customer engagement program, to treatment of energy efficiency costs through a modified Demand Side Management ("DSE") Rider, and to procure 100 MW of new Ohio wind and solar resources under certain limited conditions.[478] The PUCO should deny the Stipulation because these provisions, when considered with the rest of the package, violate regulatory principles and practices and have not been shown to be in the public interest.

The first reason FirstEnergy's resource diversification provisions, when considered with the rest of the package, do not pass the three-prong stipulation test is because the proposal lacks necessary details. For example, the Stipulation states that FirstEnergy will commit to reducing CO_2 emissions.[479] However, the Stipulation does not provide detail about the goal (other than a percentage benchmark), provisions for its enforceability, mechanisms to address costs, nor the extent to which the Economic Stability Program and continued operation of coal plants will conflict with the goal and how those conflicts will be resolved.[480] In fact, in discovery, FirstEnergy asserted that the current carbon emission rates for the Sammis, Kyger Creek, and Clifty Creek plants were

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[478] *See* FirstEnergy Ex. 154 at 11-12 (Third Supplemental Stipulation).

[479] *See* FirstEnergy Ex. 154 at 12 (Third Supplemental Stipulation).

[480] *See* ELPC Ex. 28 at 15, Attach. KRR-3 (Rabago Direct) citing ELPC Set 6-INT-020, -21.

beyond the scope of this proceeding.[481] Without such necessary details, no weight can be given to FirstEnergy's CO_2 emission proposal because it is nothing more than an empty promise.

FirstEnergy's knowledge about the battery technology provisions in its proposed Stipulation are similarly lacking in specificity and details. FirstEnergy admits that the battery technology initiatives will be evaluated in a separate and future proceeding.[482] Accordingly, FirstEnergy confirms it would seek to charge customers only if the evaluation of the battery technology proves fruitful and the PUCO approves the program.[483] Further details on the record are regarding FirstEnergy's battery technology proposal are essentially non-existent. Indeed, FirstEnergy admits that it does not even know what investments or even potential investments will be included in these battery technology initiatives.[484] In addition, FirstEnergy provides no information about how evaluation of battery resources will be conducted.

Without more details regarding FirstEnergy's proposals it is not possible to determine whether it would be beneficial or non-beneficial, when considered with the rest of the package, to customers and the rest of the public. What is clear is that such a proposal, which includes such scant amount of details, is not in line with regulatory practice and principles of providing a full and clear record for the PUCO's consideration.

[481] *See* ELPC Ex. 28 at 15, Attach. KRR-3 (Rabago Direct) citing ELPC Set 6-INT-023, -24.

[482] Tr. Vol. XXXVII at 7775-7776 (Mikkelsen).

[483] Tr. Vol. XXXVII at 7775-7776 (Mikkelsen).

[484] Tr. Vol. XXXVII at 7776 (Mikkelsen);ELPC Ex. 28 at Attach. KRR-3, ELPC Set 6-RPD-007 (Rabago Direct).

FirstEnergy also proposes to reactivate energy efficiency programs that were previously suspended.[485] Yet, the EE provisions do not include an enforceable commitment to any quantitative savings benchmark.[486] It also does not preclude FirstEnergy from counting energy savings from independent customer action rather than utility programs and does not represent any commitment to additional incremental efforts. In addition, FirstEnergy states that details about the EE programs are yet to be determined or approved.[487] Furthermore, the settlement creates a higher level of shared savings than was approved by the PUCO under the state mandates.[488] There was no record, and FirstEnergy provides no justification for this increase in shared savings except by claiming that it is part of the negotiated settlement.[489]

FirstEnergy also proposes to procure wind and solar resources in order to implement wind and solar projects in Ohio.[490] The proposal requires all costs incurred from the renewable energy projects to be recovered through a non-bypassable rider, the Ohio Renewable Resources Rider ("Rider ORR"), by selling the resource (energy and renewable energy credits ("RECs")) into the market. FirstEnergy will then charge or credit the difference between the all-in price and the comparable wholesale price received

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[485] *See* FirstEnergy Ex. 154 at 11 (Third Supplemental Stipulation).

[486] *See* FirstEnergy Ex. 154 at 11-12 (Third Supplemental Stipulation).

[487] ELPC Ex. 28 at 16 (Rabago Direct).

[488] The settlement raised the settlement cap from $10 million to 25 million. FirstEnergy Ex. 154 at 11-12 (Third Supplemental Stipulation).

[489] ELPC Ex. 28 at 17 (Rabago Direct).

[490] *See* FirstEnergy Ex. 154 at 12 (Third Supplemental Stipulation).

from the market to customers.[491] There are many issues with this proposal and Rider ORR.

However, this will not be an Ohio utility's first attempt to bring renewable energy to Ohioans through an ESP application that other customers would pay for. In AEP's ESP II case, AEP proposed the $20,000,000 Turning Point solar project.[492] In a subsequent proceeding, the PUCO rejected a stipulation between AEP Ohio and Staff, stating, "[T]here is no basis upon which we can find that the Turning Point provision of the stipulation benefits AEP Ohio's ratepayers."[493] The PUCO should once again reject an Ohio Utility's wind and solar proposal in this proceeding. Under Ohio law, markets, not government regulators, should determine outcomes for such projects.

In addition, many business and other customers in Ohio already purchase renewable energy. These businesses and customers, in effect, will be paying twice for their renewable energy.[494] First, for their own project or purchase, and second, for FirstEnergy's proposed Rider ORR.[495] In addition, Rider RRS could force a business, which has developed a renewable energy project, to subsidize its competitors in the REC market.[496] When a business develops a renewable energy project, it can keep or sell its RECs. As OMAEG witness Seryak states:

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[491] *See* FirstEnergy Ex. 154 at 12 (Third Supplemental Stipulation).

[492] *See, e.g., In the Matter of the Application of Ohio Power Company and Columbus Southern Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 11-346-EL-SSO Opinion and Order at pp. 38-40 (December 14, 2011).

[493] *In the Matter of the Long-Term Forecast Report of the Ohio Power Company and Related Matters*, Case No. 10-501-EL-FOR Opinion and Order at p. 26.

[494] OMAEG Ex. 28 at 15 (Seryak Supplemental Direct).

[495] OMAEG Ex. 28 at 15 (Seryak Supplemental Direct).

[496] OMAEG Ex. 28 at 15-16 (Seryak Supplemental Direct).

> If RECs are kept, the business may bypass paying its CRES provider for compliance for the present-day Renewable Energy Portfolio Standard (RPS"), or future Clean Power Plan compliance. Without bypassability, a business would subsidize other ratepayers if Rider ORR includes renewable energy. If a business sells its RECs, the market price of RECS may be unfairly influenced by ratepayer subsidization of the Companies' renewable energy projects.[497]

As Mr. Seryak continues, Rider ORR is very different than RPS. An RPS creates a market and atmosphere where information about market prices for RECs is transparently communicated between buyers and sellers.[498] This marketplace often results in lower prices. In contrast, FirstEnergy has confirmed that the Stipulation does not include the requirement that Rider ORR be competitive.[499] Therefore, Rider ORR would serve to undercut the market by greatly limiting the number of buyers and sellers. It would also allow the buyer and seller to be affiliated, which would remove risk from the buyer and seller and transfer it to the ratepayer. Such a situation would also increase the potential for price manipulation. These issues are assuming that FirstEnergy procures the renewable energy because, as it has admitted, it cannot be certain that it will be able to procure the necessary resources.[500]

8. The Transition to Charge Consumers for Straight Fixed Variable rates violates regulatory policy.

The Third Supplemental Stipulation proposed to implement Revenue decoupling by transitioning FirstEnergy to a straight-fixed-variable rate design in a manner that does not benefit consumers, as stated previously in this brief. This provision violates

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[497] OMAEG Ex. 28 at 16 (Seryak Supplemental Direct).

[498] OMAEG Ex. 28 at 16 (Seryak Supplemental Direct).

[499] Tr. Vol. XXXVII at 7777-7778 (Mikkelsen).

[500] Tr. Vol. XXXVII at 7777-7778 (Mikkelsen).

regulatory principles by including a provision outside of the original filed application of FirstEnergy and binds FirstEnergy to support a policy that it has acknowledged may not be in the best interests of its customers.

The proposed Third Supplemental Stipulation goes beyond FirstEnergy's filed application in creating this requirement that FirstEnergy must file a case "to transition to the proposed straight fixed variable cost recovery mechanism for residential customers' base distribution rates."[501] This was not a provision that was even contemplated in the application for this ESP as filed by FirstEnergy. As was stated by ELPC witness Rábago:

> These are non-core and non-germane issues that do not relate to the PPA, or any other issues in the original ESP filing. These issues have not been fairly and fully addressed in an administrative record. Instead, these non-core terms have been designed and shaped through a negotiation process aimed at reaching a settlement.[502]

Witness Rábago goes on to detail how including this "completely novel" proposition is a violation of regulatory policy:

> The Decoupled Rates provision of the Stipulation exemplifies the most serious problems associated with allowing electric regulatory policy to be proposed in the settlement process of an unrelated application topic: the provision appears to be completely novel in the latest form of the settlement, and therefore the Commission lacks any evidentiary basis to evaluate its merits or its potential consequences.[503]

The Third Supplemental Stipulation seeks to undermine regulatory policy by reaching out beyond the ESP to determine an issue that is more properly decided in a full base distribution case, if it ever needs to be addressed. However, the Third Supplemental

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[501] FirstEnergy Exhibit 154 at 13 (Third Supplemental Stipulation and Recommendation).

[502] ELPC Ex. 28 at 5 (Rabago Direct).

[503] ELPC Ex. 28 at 17-18 (Rabago Direct).

Stipulation creates an 8-year distribution rate freeze and prevents the company from coming in to distribution rate case,[504] which is exactly the sort of proceeding this sort of monumental rate design change should be decided. While the stipulation does allow for some sort of other type of application, the acceptance of this stipulation would make the acceptance of straight fixed variable rate design a *fait accompli*.

FirstEnergy itself has acknowledged that a transition to a straight fixed variable rate design can create problems for its residential consumers. Their own comments identify how an SFV decoupling mechanism can harm low-income customers and result in other problems for the Universal Service Fund (USF):

> A…consequence of a SFV [Straight Fixed Variable] decoupling mechanism is the unanticipated harm that could arise from going to a design that includes a much higher customer charge. This will negatively impact low use customers the most. The shifting of cost recovery may also be seen as inconsistent with R.C. 4928.02(L), which is the policy statement to protect at-risk populations. To the extent these low use customers are also low income customers and these low use customers are already participants in the PIPP program, shifting revenue responsibility will not increase their obligation to pay, but will simply shift more dollars into the USF rider that all customers pay. Further, substantially increasing the cost for low income customers that qualify for PIPP, but that do not currently participate in the PIPP program may well drive substantially more customers to join the PIPP program, thereby increasing the USF Rider even more and further shifting the burden to other customers.[505]

FirstEnergy has succinctly identified one of the key concerns for residential consumers that arise from the shift to straight fixed variable rates. It is regulatory policy as outlined by the revised code, to protect at-risk populations. Shifting additional costs onto residential customers will have the effect of leading to higher customers' bills, more

[504] FirstEnergy Exhibit 154 at 13 (Third Supplemental Stipulation and Recommendation).

[505] OCC Ex. 35 at Attachment SJR 8, page 7-8 (Rubin Supplemental).

customers being unable to pay their bills and higher USF fees.[506] To set the stage for these vast changes without a detailed investigation, base rate case and full evidentiary records is inappropriate and inconsistent with Ohio regulatory policy.

F. Rates set under the electric security plan, as modified by the settlement, are not just and reasonable for consumers to pay.

R.C. 4905.22 requires that every public utility furnish necessary and adequate service and facilities, and that all charges for any service must be just and reasonable. Of course, FirstEnergy, as the applicant, bears the burden of proof.[507] In this case, there are significant provisions that cost estimates have been provided, but there are others in which the cost to consumers is unknown, and won't be known until some future time and some future proceeding. That is unjust and unreasonable for consumers in this proceeding.

1. The Power Purchase Agreement and Rider RRS are a bad deal for consumers and should be rejected by the PUCO.

OCC witness Wilson has estimated the cost to consumers to be $3.6 billion ($800 per customer) over the 8-year term. This; however, is a best case scenario. The worst case scenario for consumers is the PPA units are offered into the market and they don't clear. OCC's $3.6 billion estimated cost to consumers presumes a revenue stream to offset the PPA unit costs. That eventuality (the PPA units do not clear) would mean that there are

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[506] OCC Ex. 35 at Attachment SJR 8, page 7-8 (Rubin Supplemental).

[507] *See, e.g.*, R.C. sec. 4928.143(C)(1); *In the Matter of the Application of The Ohio Bell Telephone Company for Authority to Amend Certain of its Intrastate Tariffs to Increase and Adjust its Rates and Charges and to Change its Regulations*, 1985 Ohio PUC Lexis 7, 91 (PUCO Case No. 84-1435-TP-AIR); *In the Matter of the Application of the Ottoville Mutual Telephone Company for Authority to Increase its Rates and Charges and to Revise its Tariffs on an Emergency and Temporary Basis Pursuant to Section 4909.16 Revised Code*, 1973 Ohio PUC Lexis 3, 4 (PUCO Case No. 73-356-Y) ("Although the applicant must shoulder the burden of proof in every application proceeding before the Commission, this burden takes on an added dimension in the context of an emergency rate case.").

no capacity (as well as energy) revenues from the market to offset the costs and guaranteed profit of those units. Thereby increasing the estimated costs charged to consumers through the PPA Rider.

The PJM Independent Market Monitor has included arguments in his testimony that the PPA units should be offered at cost to protect the competitive market from the inherent subsidy the PPA arrangement provides.[508] To the extent these units are uneconomic to bid them in at cost, increases the likelihood that these units will not clear, and the worst case scenario for consumers becomes a reality. Either scenario represents an unjust and unreasonable outcome for consumers that should not be approved by the PUCO.

The PUCO noted in the AEP ESP III Order that it was not persuaded that the PPA Rider would provide a benefit to consumers**. The PUCO stated:**

> In sum, the Commission is not persuaded, based on the evidence oi record in these proceedings, that AEP Ohio's PPA rider proposal would provide customers with sufficient benefit from the rider's financial hedging mechanism or any other benefit that is commensurate with the rider's potential cost.[509]

The PUCO will find itself in a similar situation in this proceeding. There are alternative projections. OCC witness Jim Wilson has estimated a significant expense is waiting for consumers if Rider RRS is approved. FirstEnergy relies upon future energy prices provided by their witness Judah Rose, leading to the projection that over the eight-year term consumers will receive a credit.

[508] IMM Ex. 2 at 6-7 (Bowring First Supplemental).

[509] AEP ESP III, Case No. 13-2385-EL-SSO, Opinion and Order at 25 (Feb. 25, 2015).

However, there are at least two reasons why FirstEnergy's projections should be surrounded in distrust. First, because FES (and presumably shareholders and investors) is unwilling to bear that risk, there is no rational reason for why FirstEnergy's customers should be obligated to do so. If a couple years of losses could lead to a $420 million benefit, there is no rational reason why the shareholders would not insist on keeping that for themselves. Second, the benefit projected by FirstEnergy is based upon energy prices from August 2014, when the Application was filed. FirstEnergy witness Rose has not updated his market price estimates for more current activity.

Therefore, the potential costs of Rider RRS could far outweigh any associated benefits; and, the PUCO should reject FirstEnergy's Rider RRS proposal because it would place upon consumers charges that are unjust and unreasonable.

The further expansion of Grid Smart technology in FirstEnergy service territory should not be approved by the PUCO without first using traditional ratemaking standards (including used and useful under R.C. 4909.15) and filing a business case at the PUCO.[510]

The Stipulation provides for the implementation of grid modernization. The Stipulation includes the following provision:

> In addition to promoting stable customer rates through Rider RRS, the Companies agree to empower consumers through grid modernization initiatives that promote customer choice in Ohio. Examples include: Advanced Metering Infrastructure, Distribution Automation Circuit Reconfiguration, VOLT/VAR, working with Staff to attempt to remove any barriers for distributed generation, and consulting with Staff on net-metering tariffs.[511]

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[510] *See* Staff Ex. 8 at 2-3 (Benedict Direct) (Staff Witness Benedict testified that FirstEnergy should file a business case for future implementation of smart grid technologies).

[511] FirstEnergy Ex. 154 at 9 (Third Supplemental Stipulation).

When FirstEnergy says it will "empower" customers, actually it means charge customers lots of money for profit and costs of the Smartgrid which has questionable and unquantifiable benefits for consumers. The Smartgrid should be advanced, if at all, in a separate PUCO proceeding.

2. Within 90 days of the filing of this Third Supplemental Stipulation, the Utilities shall file a grid modernization business plan highlighting future initiatives for Commission consideration and approval.[512]

Grid modernization initiatives are very costly to consumers, and the benefits for consumers are not necessarily proven or even clearly articulated. Utilities, on the other hand, get the benefit of investing with a return on equity (profit) and a return of investment (depreciation) that is all but guaranteed by the government. This Stipulation follows that formula. There are no cost estimates provided in the record. There are no customer benefits quantified on the record. The determination of these matters will be initiated within 90 days of the Stipulation being filed (December 1, 2015). That means on or about March 1, 2016 FirstEnergy will initiate another proceeding, by filing a business plan. It is anticipated that at the time the PUCO renders a decision in this case, facts regarding the implementation of grid modernization may just be coming to light; a time too late in this proceeding to determine if this provision benefits consumers and is just and reasonable.

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[512] FirstEnergy Ex. 154 at 9 (Third Supplemental Stipulation) (December 1, 2015).

3. Authorizing a mechanism for collecting unsubstantiated government-related costs from consumers is unjust and unreasonable.

FirstEnergy proposed a Government Directives Recovery Rider ("Rider GDR") would permit timely collection of future costs arising from implementation of programs required by legislative or governmental directives from customers.[513] The Utilities do not currently have any costs to include in this cost recovery mechanism. However, the Utilities have stated that an example of costs that might be included are for manufactured gas plant remediation costs. Such costs can be very expensive for consumers.[514]

Once again, the Utilities have provided no costs associated with this cost collection mechanism on the record. There are no indications from FirstEnergy as to when a proceeding might be initiated to collect any such costs from consumers. It is anticipated that at the time the PUCO renders a decision in this case, there will be no ability for the PUCO to assess the reasonableness of this proposal.

4. Approving Rider DCR for eight more years without requiring a base distribution rate case to assure consumers are not over-paying for distribution service is unjust and unreasonable.

FirstEnergy has proposed the continuation of its delivery capital recovery rider for the 8-year term of the ESP. The Stipulation states:

> Delivery Capital Recover Rider (Rider DCR): The revenue caps for Rider DCR will increase annually in accordance with the following:
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> > $30 million for the period June 1, 2016 through May 31, 2019

[513] FirstEnergy Ex. 7 at 24-26 (Mikkelsen Direct).

[514] See generally *Duke Energy Ohio Rate Case,* Case No. 12-1685-GA-AIR, Order at 73 (November 13, 2013).

> > $20 million for the period June 1, 2019 through May 31, 2022
> >
> > $15 million for the period June 1, 2022 through May 31, 2024
>
> The audit schedule set forth on Page 14 of the Application shall be amended to provide audits for the entire term of the Stipulated ESP IV. The amended language shall read:
>
> > The independent auditor shall be selected by Staff. The audit shall include a review to confirm that the amounts for which recovery is sought are not unreasonable and will be conducted following the Companies' December 31 filing during the term of the Companies' ESP IV, and one final audit following the Companies' final June 30 reconciliation filing.[515]

While the ultimate costs to be charged to consumers, through Rider DCR, is not known to the PUCO, the caps that provide a worst case scenario are known, those spending levels are not good for consumers. OCC witness Matthew Kahal has calculated the annual cost estimate of Rider DCR to be approximately $240 to $330 million.[516] That significant level of spending on top of what consumers already pay through base distribution rates is not just and reasonable.

FirstEnergy has extended the base distribution rate freeze through the 8-year term of the ESP, assuming that base rate cases and the DCR rider create a "wash" where the cost increases under both are presumed to be the same.[517] But OCC/NOPEC Witness Kahal testified that such a general assumption does not hold true in this case for two key reasons: (1) all three utilities are potentially substantially over-earning for distribution

[515] FirstEnergy Ex. 154 at 13 (Third Supplemental Stipulation).

[516] OCC/NOPEC Ex. 11 at 26-27 (Kahal Second Supplemental).

[517] FirstEnergy Ex. 50 at 7 (Fanelli Direct): Tr. XX at 3930(Fanelli).

utility service,[518] and (2) Rider DCR (and GDR) includes a stale 10.5 percent return on equity (and 8.48 percent overall return) that was set in a 2007 rate case.[519] It is unjust and unreasonable for the PUCO to treat Rider DCR as equal to the outcome of an unfiled and undetermined rate case.

5. A transition to a straight fixed variable rater design would be unjust and unreasonable for consumers.

FirstEnergy has agreed in the settlement to transition to a straight fixed variable ("SFV") rate design for residential consumers. The Stipulation states:

> The Companies agree to file a case before the Commission by April 3, 2017, to transition to the proposed straight fixed variable cost recovery mechanism for residential customers' base distribution rates:
>
> a. The mechanism shall be phased in over a three year term, beginning January 1, 2019.
>
> b. Cost recovery shall be based on an allocation of 75 percent fixed costs and 25 percent variable costs. The phase in will occur as follows:
>
> i. Year 1: 25% fixed costs and 75% variable costs
>
> ii. Year 2: 50% fixed costs and 50% variable costs
>
> iii. Year 3: 75% fixed costs and 25% variable costs
>
> All lost distribution revenue shall continue to be recovered in its current fashion up to the time that any decoupling mechanism is implemented. If the Commission approves a decoupling mechanism, lost distribution revenue associated with the decoupled rates after the effective date shall be recovered for the variable portion of the rate, and all other riders shall continue and revenue will be decoupled to the level of weather adjusted base distribution revenue and lost distribution revenue and kWh sales as of the twelve month period ended September 30, 2018.

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[518] OCC Ex. 18 at 17 (Effron Direct), see also OCC/NOPEC Ex. 8 at 30 (Kahal Supplemental). .

[519] See OCC/NOPEC Ex. 11 at 22-23 (Kahal Second Supplemental); OCC/NOPEC Ex. 8 at 31 (Kahal Supplemental).

> When proposing the straight fixed variable decoupling mechanism, the Companies agree to be cognizant of the principle of gradualism and the effect of decoupling on various usage levels.[520]

As argued above, FirstEnergy has acknowledged that a transition to a straight fixed variable rate design can create problems for its residential consumers. FirstEnergy is on record stating that an SFV decoupling mechanism can harm low-income customers and result in other problems for the Universal Service Fund (USF). In addition, FirstEnergy identified one of the key concerns for residential consumers that arise from the shift to straight fixed variable rates. It is regulatory policy as outlined by the revised code, to protect at-risk populations. Shifting additional costs onto residential customers will have the effect of leading to higher customers' bills, more customers being unable to pay their bills and higher USF fees.[521]

Once again, the Utilities have provided no costs associated with this transition to a straight fixed variable rate design. It is anticipated that at the time the PUCO renders a decision in this case, there will be no ability for the PUCO to assess the reasonableness of this proposal.

Furthermore, for these vast changes a detailed investigation is necessary to adequately protect consumers. As such, a base rate case and full evidentiary records is appropriate and consistent with Ohio regulatory policy. To proceed differently to a transition to a decoupled residential rate design is unjust and unreasonable.

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[520] *See* FirstEnergy Ex. 154 at 13 (Third Supplemental Stipulation).

[521] OCC Ex. 35 at Attachment SJR 8, page 7-8 (Rubin Supplemental).

6. Extending certain cash and cash equivalent provisions for settlement signatories for the eight- year term is unjust and unreasonable for the consumers who will pay for the provisions.

The settlement is a hodgepodge of onerous terms for consumers to pick up the tab, many of them unrelated to the core of the Utilities' Application in this case. In fact, this settlement includes, as a result of the deal-making, far-ranging provisions that are not logically connected to the ESP and should not be reviewed by the PUCO as a package.

These terms include rate design provisions for Rider ELR, the Automaker Credit, Commercial High Load Factor Experimental Time of Use Rate, Energy Efficiency and Demand Response. These provisions provide discounts and credits for certain signatory parties that are in turn paid for by other consumers. However, instead of consumers being on the hook for these rate design inducements for three years (as originally negotiated in the December 22, 2014 Stipulation), consumers now have these additional charges to look forward to for eight years instead.

G. The PUCO should reverse rulings where the Attorney Examiner erred in denying the admission of OCC Exhibits 30 and 31 into the record.

The Attorney Examiner determined the past testimony of Staff witness Choueiki in the ESP cases of Duke Energy Ohio and the Ohio Power Company[522] would be excluded when it was proffered by OCC. Ohio Adm. Code 4901-1-15(F) allows a party to seek reversal of an Examiner ruling by "discussing the matter as a distinct issue in its initial brief…." Accordingly, reversal of the rulings denying admission of Exhibits 30 and 31 is herein sought. Exhibit 30 is Choueiki prefiled testimony in the Duke ESP Case,

[522] Tr. XXX at 6218, 6327 (Choueiki).

Case No. 13-841-EL-SSO Exhibit 31 is Choueiki prefiled testimony in AEP ESP III, Case No. 13-2385-EL-SSO. The relevant pages from the transcript are attached.

The Attorney Examiner erred in excluding past PUCO Staff testimony (OCC Ex. 30 and 31) from the record. The past statements are admissible as evidence that is directly relevant to the issues involved in the case and are not unduly prejudicial. OCC proffered certain past testimony of the PUCO staff in similar cases, in an attempt to establish certain facts and past positions of the PUCO staff.[523] The Attorney Examiner denied OCC's motion citing the fact that the evidence was "unduly prejudicial, confusing and misleading."[524] However, it strains credulity for the past testimony of the staff of the PUCO to be "confusing and misleading."

Under the PUCO's own rules, a party that has been adversely affected by the ruling may raise the propriety of that ruling to the PUCO in its initial brief.[525] Furthermore, the under Ohio Law, the PUCO is bound to develop a complete and accurate record of all contested hearings, and the exclusion of Staff's previous testimony would hinder that objective.[526] The Ohio Rules of Evidence allows for relevant evidence to be inadmissible "if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or ***of misleading the jury*** [Emphasis added]."[527]

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[523] Tr. XXX at 6218 (Choueiki).

[524] Tr. XXX at 6327 (Choueiki).

[525] Admin. Code. §4901-1-15(F).

[526] R.C. §4903.09.

[527] Ohio R. Evid. 403 (A).

However, the PUCO is not a lay jury that is easily misled by the facts, but rather a regulatory authority that is intended to have the capability and expertise to give the proper weight to evidence. To exclude evidence from the record because it might be "unduly prejudicial or confusing" is unwarranted in this case before such a regulatory body. The PUCO itself has acknowledged the special nature of its administrative hearings. With regards to the pre-hearing exclusion of evidence, the PUCO has found that motions in limine are not necessary, because the PUCO is not a lay jury, but rather a body with considerable expertise in the issues before it.[528]

This is especially true in regards to the evidence that was excluded. Both of those cases involve similar underlying issues regarding the approval of a rider to recover costs for Power Purchase Agreements. This evidence is directly relevant to trace the evolution of the policy positions on these issues. Furthermore, the notion that the past testimony of the PUCO Staff (that was earlier admitted in evidence by a PUCO attorney examiner) is confusing or misleading to the Commission seems unreasonable and unexpected as a basis for such a ruling. Therefore, the PUCO should reverse the Attorney Examiner's ruling and admit past testimony of Staff witness Chouieki in OCC Exhibits 30 and 31 into the record.

[528] "As the respondents and intervenors assert, the primary reason for imposing a blanket, prehearing exclusion of evidence and arguments is to ensure that a jury is shielded from potentially prejudicial information that is ultimately determined not to be relevant to the case. In this proceeding, there is no such concern because a jury is not involved in this administrative hearing/decision process." Opinion at 3-4, August 31, 1999, In the Matter of the Complaint of The Cleveland Electric Illuminating Company, v. American Electric Power Company, Inc., American Electric Power Service Corp., and Ohio Power Company, Case No. 95-458-EL-UNC, 1999 Ohio PUC LEXIS 182.

VI. CONCLUSION

The PUCO should reject the power purchase agreement, in the interest of Ohio and Ohioans. And the PUCO should modify the ESP to a market-rate offer, to give 1.9 million Ohioans the benefit of markets as intended by the Ohio General Assembly. This result will protect Ohioans from paying up to (or more than) $3.6 billion in total charges (up to $800 per customer or more), just for the PPA.

The cost to Ohioans will be dramatically more money if federal officials require the power plants to offer and clear in the PJM markets at or above their true costs and the plants thus receive no revenue to offset the consumer subsidies under FirstEnergy's proposed PPA. Additionally, the settlement's re-regulatory proposal would undermine Ohio's policy for using markets to determine electric generation prices (instead of government regulators imposing prices as FirstEnergy now seeks). The PUCO should take a stand for Ohio policy, markets and the consumer protection that state policy for markets provides to serve 1.9 million FirstEnergy consumers. The PUCO should say yes to lower-priced, competitive electric prices for Ohio consumers and no to subsidized bailouts for electric utilities at consumer expense.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing Initial Brief was served upon the persons listed below via electronic transmission this 16th day of February, 2016.

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BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

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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

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PROCEEDINGS

before Mr. Gregory Price, Ms. Mandy Chiles, and Ms. Megan Addison, Attorney Examiners, at the Public Utilities Commission of Ohio, 180 East Broad Street, Room 11-A, Columbus, Ohio, called at 9:00 a.m. on Friday, October 16, 2015.

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and the Duke proceeding, you presented the staff's position through written testimony, correct?

A. I did, I did.

Q. And you testified in AEP's -- let me strike that. In those cases -- strike that.

MS. WILLIS: Your Honor, at this time, I would like to mark for identification purposes OCC Exhibits 30 and 31 the testimony of Dr. Hisham Choueiki in Case No. 14-841-EL-SSO and the testimony of Dr. Hisham Choueiki in Case No. 13-2385. Your Honor, just for the record, 30 would be Mr. Choueiki's testimony in the Duke case, and Exhibit 31 would be Dr. Choueiki's testimony in the Ohio Power case.

(EXHIBITS MARKED FOR IDENTIFICATION.)

Q. (By Ms. Willis) Dr. Choueiki, do you have what has been marked for identification purposes as OCC Exhibits 30 and 31?

A. Yes.

Q. And do you recognize that as your prefiled testimony in those proceedings?

MR. KUTIK: Objection.

EXAMINER PRICE: Grounds?

MR. KUTIK: Friendly cross.

EXAMINER PRICE: Well, she is just asking if he has seen it, so let's go ahead and see if he has seen it.

MR. KUTIK: I object to any questions relating to this document, relating to what his testimony was from this -- from this Council.

EXAMINER PRICE: Ms. Grady, care to respond?

MS. WILLIS: Your Honor, I think many witnesses in this proceeding have been cross-examined on prior testimony that they submitted. I am asking Mr. Choueiki about his prior testimony. I do believe there has been a change in Mr. Choueiki's testimony, as I will get to, and this is foundational, Dr. Choueiki was philosophically opposed --

EXAMINER PRICE: Okay. Let me follow up with that.

Dr. Choueiki, do you work as a member of the staff of the Public Utilities Commission?

THE WITNESS: Yes.

EXAMINER PRICE: As a member of the staff, are you obligated to follow the broad policy outlines enumerated by the Commission?

THE WITNESS: Yes.

EXAMINER PRICE: His testimony has no relevancy. He has to follow what the Commission says. Commission sets its policy in these cases. It is prejudicial. It's unfair to hold that against him. None of the other parties in this case are in the unique situation of the staff which is independent from the staff who ultimately has to follows the staff -- follow the Commission's policy guidance.

MS. WILLIS: Understood, your Honor; however, Mr. Choueiki as a staff member presented a staff position on issues that --

EXAMINER PRICE: I understand that, and the Commission did not agree. You struck the key five minutes ago when you said he was philosophically opposed. The bottom line is, he is a member of the staff: The staff has to follow the Commission's broad policy outcomes.

MS. WILLIS: And, your Honor, I would be cross-examining Mr. Choueiki on his opinions that the staff's position on specific issues related to the purchase power agreement.

EXAMINER PRICE: Which I just indicated would be unfair and irrelevant.

MS. WILLIS: Your Honor, are you ruling I may not --

EXAMINER PRICE: Yes.

MS. WILLIS: I would like to have a proffer at this point, your Honor. I object.

EXAMINER PRICE: Be my guest.

MS. WILLIS: Would your Honors like me to go through all the questions and answers for the proffer?

EXAMINER PRICE: No, you can proffer his testimony. It's fine.

MR. KUTIK: May I be heard on your ruling?

EXAMINER PRICE: You may.

MR. KUTIK: Your Honor, I don't think it's unfair or improper for a counsel to question the witness about inconsistencies in positions. What I -- what my objection is based upon is that this -- she has not set up in any way an inconsistency with his testimony.

She needs to establish first that there is -- there is a position that he's taken. And then if she wants to try to impeach him, that would be I think the proper procedure. So I am not sure -- I didn't want you to think that my objection was based upon relevance. It is based upon friendly cross.

EXAMINER PRICE: I did not think your objection was based on relevance, and I may have jumped the gun, but I can see where this is going and I know how this chapter's going to end. It is going to end with the same ruling from me which is, as a staff member, he is obligated to follow the policy guidance of the Commission, and the Commission made its policy call in AEP and in Duke.

So I believe it's unfair to this witness to try to impeach him for doing his job. Once again, the staff is in a unique position. They are independent from the Commission, but at the same time, they have to follow the Commission's policy guidance, and that's all Mr. -- that's all Dr. Choueiki has done in this case.

MR. KUTIK: Well, I guess, your Honor, we may have to revisit this when it's my turn.

EXAMINER PRICE: Fair enough.

MS. WILLIS: And I would note, your Honor, that indeed was my -- my line of cross was going to the change in position and was delving into the reason for the change in position, and if the reason for the change in position is, as you say, because of the Commission order, then I'll accept that, but I would like to --

EXAMINER PRICE: You can ask him that one question.

Q. (By Ms. Willis) Dr. Choueiki --

MS. WILLIS: Your Honor, I would have to ask a couple to get there, I'm afraid.

Q. (By Ms. Willis) Dr. Choueiki, in your --

EXAMINER PRICE: Let me cut it off then. Let me try to ask it in a succinct way.
Dr. Choueiki, would any perceived change in your opinion of your testimony from the previous cases to today be based upon the Commission's findings in the Duke SSO and the AEP SSO case?

THE WITNESS: That was the only reason that it changed.

Q. (By Ms. Willis) So but for --

MS. WILLIS: If I may, your Honor.

Q. (By Ms. Willis) But for the Commission's order, you would still have maintained a position in this case that was consistent with the opinions that you --

EXAMINER PRICE: Now you are asking friendly cross. Now you are asking friendly cross. You got your answer.

Q. Let me turn to your testimony on page 9, lines 15 through 17.

MR. KUTIK: 15 through 17?

Q. Oh, I'm sorry. That would be page --

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PROCEEDINGS

before Mr. Gregory Price, Ms. Mandy Chiles, and Ms. Megan Addison, Attorney Examiners, and Commissioner Asim Z. Haque at the Public Utilities Commission of Ohio, 180 East Broad Street, Room 11-A, Columbus, Ohio, called at 9:00 a.m. on Wednesday, January 20, 2016.

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guaranteeing the rate of return at 10.38 percent, and in the stipulations there's another transmission rider, which I believe would end up with a guaranteed rate of return of 10.8 percent, and then there's also hints of another affiliate PPA for alternative energy.

Because those are nonavoidable, the Commission will have created a risk-free financial instrument. That's a subsidy. So that would mean that the 10.38 percent would be an extraordinarily high risk rate -- risk-free rate of return from market risk, and that's a direct subsidy.

So if you compare a 10.38 percent rate of return on a -- on an instrument that's financially risk-free with the rate of return on a government bond of similar length of time, it's extraordinarily high.

MR. ALEXANDER: Your Honor, could I have that question and answer reread, please.

EXAMINER CHILES: You may.

(Record read.)

MR. ALEXANDER: Thank you.

Q. (By Ms. Bojko) Do you recall questions from counsel about the redistributive coalition and signatory parties --

A. I do.
Q. -- constituting the redistributive coalition?
A. I do.
Q. And you were also asked about how diverse does the class have to be. Do you recall that?
A. I do.
Q. With regard to the signatory parties and the diversity of the class, have you learned anything about the signatory parties that would affect your position on what diverse means in the context of the signatory parties and redistributive coalition?
A. Yeah. Some concern, I first noticed that some of the signatory parties, particularly those that -- or those that deal with anti-poverty issues and low-income households, were represented by the same attorney, so I was wondering about the independence of the signatories.
And I am very familiar with two of the three signatories. In fact, I'm a fan -- I am a large fan of the Cleveland Housing Network. It's an extraordinary group. And I am optimistic about the recovery from the financial problems and leadership problems that the Council for Economic Opportunities in Greater Cleveland had. So that was good.

But I was really puzzled -- I'm from Cleveland, just moved down, civically active, and I hadn't heard of the Consumers Protection Association, so that led me to look at the Consumers Protection Association so I could learn more of it to see what function it provided.

And I first went to the website and found out the website for the organization was down. Then I did a news search to look at its activity, and the news search revealed that the organization closed its doors on August 15 and is subject to a federal investigation, and its funding by the Social Security Administration has been lifted and the ADAMH Board, the director of the ADAMH Board is on tape stating that starting in 2011, the organization had managerial problems, and he also stated that there's probably -- that there was fraud in the administration of the organization.

So the question is, the Consumer Protection Association still may exist as a legal entity, but as a direct service organization representing low-income households, the fact that it's being subject to a federal investigation leads me to really wonder what group it's currently representing.

The other part that I found really confusing was I went to the Council for Economic Opportunities' website where they listed the -- the -- oh, what was that group? The citizens' group? I have to go and check one more signatory to make certain I get this right.

Oh, that's it, the Citizens Coalition because that's another group I had never heard of it. Now, the Citizens Coalition is represented by the same attorney, and the members of that coalition are the other signatories, so CEOG, the Cleveland Housing Network, and the Consumer Protection Association form the Consumers Coalition. So, in reality, they managed to sign twice, with one-third of that coalition currently being in very difficult straits of operation.

So I had -- so if you think about -- and it's also interesting that the C -- well, I want to make sure I get it right, the Council for Economic Opportunities in Greater Cleveland lists the Citizens Coalition as a partner organization when really it's them.

So this amount of confusion makes it really interesting to me as to who is representing the interest of low-income renters and occupants in

Cleveland since this is a large portion of the notion of diversity of interests. So I admit I was confused and disappointed at the scrutiny that the signatory parties were put through.

MS. BOJKO: Thank you.

MR. ALEXANDER: Your Honor, I have a motion to strike. I move to strike that entire response on three grounds. The first ground, that's beyond the scope of my cross-examination. I didn't ask him about any of those parties or this concept.

Two, even if it was within the scope of my cross-examination, this is not any information within the direct knowledge of Dr. Hill. This is hearsay.

And, three, even if this was not hearsay, even if he had the ability to present this evidence, this is evidence that would -- should have been presented in his direct case. Redirect is not the appropriate time for new evidence of this type, particularly when it is beyond the scope of cross.

EXAMINER CHILES: Ms. Bojko.

MS. BOJKO: First of all, it is not beyond the scope. He asked about the redistributive coalition. He asked about who was included, who wasn't. Then he went on a series of questions asking about how diverse the class has to be.

The redirect is, is one class of customers of the signatory parties truly a diverse class if the members don't represent different entities and if they are represented by the same person or if they don't exist at all.

I think that this information, although it just came to light, is very important to this Commission's decision, that a signatory party had closed its doors yet they somehow managed to sign a document. I think that is something that the Commission would want to know and should know, and it absolutely goes into the diversity of class and whether the low-income class is truly being represented

And Mr. Alexander did, in fact, touch on this and raise questions about the residential class, the muni class, and industrial class, so it's very responsive to the cross-examination.

MS. WILLIS: Your Honor, I might add that he had a whole section of cross on diversity of interest. That's what we are talking about, and that's what this witness is answering questions on redirect about.

EXAMINER CHILES: Anyone else want to

weigh in before Mr. Alexander's last word?

MR. ALEXANDER: Yes, your Honor. On this topic the redistributive coalition, I asked the witness about COSE, whether you needed an entire 100 percent of the class to be included. The witness said no. What mattered was whether you negotiated for diversity of interest. And I asked the same question throughout about the City of Akron. None of these entities were mentioned. The words low-income customers were never used. This is simply a last-minute attempt to get new facts into the record.

EXAMINER CHILES: Thank you. The motion to strike will be granted on the basis it was beyond the scope of the cross-examination.

MS. BOJKO: Thank you, your Honor. I have no further questions, your Honor.

EXAMINER CHILES: Thank you, Ms. Bojko.

Recross, Ms. Fleisher?

MS. FLEISHER: No questions, your Honor.

EXAMINER CHILES: Mr. Dougherty?

MR. DOUGHERTY: No questions.

EXAMINER CHILES: Mr. Mendoza?

MR. MENDOZA: No questions, your Honor.

EXAMINER CHILES: Ms. Willis?

MS. WILLIS: No questions, your Honor.