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

REPLY BRIEF OF
THE OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP

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I. INTRODUCTION

Through the Stipulated ESP IV, The Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company (collectively, the Companies) request that the Public Utilities Commission of Ohio (Commission) approve a ratepayer-funded bailout of aging and uneconomic generating plants owned by its unregulated affiliate and impinge on the exclusive authority of the Federal Energy Regulatory Commission (FERC) to oversee the wholesale markets. Not only does the purchase power agreement (PPA) arrangement feature of the Stipulated ESP IV result in a re-regulation of generation services, thereby undermining the market-based directive established by the General Assembly's Senate Bill 3, it is packaged together with a multitude of rate discounts and payments that are to be enjoyed by a narrow class of beneficiary signatory or non-opposing parties (collectively, Signatory Parties) to the exclusion of other customers.

While the harms to the public interest and numerous classes of customers are significant, the damage caused by the Stipulated ESP IV is most detrimental to Ohio's manufacturers. The manufacturing class is one of the top consumers of electricity in the state, which means that any impacts arising from future increases to electricity prices will have a large and negative effect on their operations. Manufacturing in Ohio will suffer serious consequences in terms of productivity if the price of electricity is increased to fund Rider RRS.[1] Given the importance of manufacturing to the economy of the state of Ohio, this would have detrimental impacts not only on the manufacturing class, but the overall economy of the state as operating and production

[1] OMAEG Ex. 18 at 10 (Hill Supplemental).

costs increase.[2] Pursuant to R.C. 4928.02(N), the Commission should safeguard "Ohio's effectiveness in the global economy." Ensuring a competitive environment for Ohio's manufacturers will ensure that this policy directive is met and uphold Ohio's place in the global economy.[3]

One needs to look no further than the initial briefs submitted by PJM Power Providers (P3), the Electric Power Supply Association (EPSA), Dynegy Inc. , Constellation New Energy Inc. (Constellation), Exelon Generation Company LLC (Exelon), Retail Energy Supply Association (RESA), and the Independent Market Monitor for PJM (IMM) to see that adoption of the Stipulated ESP IV and accompanying Rider RRS is no more than a subsidized bailout of underperforming FirstEnergy Solutions' (FES) generating plants, which will have anticompetitive effects on the electric generation market in the state of Ohio.[4] Generators fear that adoption of the Stipulated ESP IV will discourage participation in SSO supply auctions and development of new independent gas-fired generation given the guaranteed cost-recovery to competitor-subsidized generating units.[5] Further, the IMM opines that Rider RRS will shift costs from shareholders to ratepayers and distort any incentives to competitively bid the output of the PPA generating plants into the PJM market.[6] The Companies argue that the Stipulated ESP IV enhances the competitive retail market through a number of retail market enhancements such as implementation of a web-based system to provide customer information to CRES providers and

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[2] Id. at 15.

[3] R.C. 4928(N).

[4] P3 Brief at 3; EPSA Brief at 3; Dynegy Brief at 15-17; Constellation Brief at 56-57; RESA Brief at 28-29; IMM Brief at 6-7; Exelon at 56-57.

[5] P3 and EPSA Joint Brief at 38.

[6] IMM Brief at 2-3.

modification of electric service regulations in the Companies' tariffs.[7] But these potential enhancements are far outweighed by the magnitude of damage that will occur if the Stipulated ESP IV, including Rider RRS, is approved. The demonstrated success of competition in the generating markets in introducing new, reliable sources of supply and in lowering electricity costs for the broadest group of manufacturers, households, and businesses should not be ignored or halted through the Companies' proposed Stipulated ESP IV.

Despite the Companies' efforts to convince the Commission otherwise, the Stipulated ESP IV does not promote system reliability, retail-rate stability, or economic development. Regardless of the complexity and multitude of issues the Companies have presented in an attempt to shift the focus and distract the Commission from the important issue regarding the energy future of the state of Ohio,[8] the real question is simple: should ratepayers be required to bail out a fleet of aging and uneconomic generating plants for the benefit of the Companies' unregulated affiliate and its shareholders? The answer is clearly no.

II. DISCUSSION

A. The Stipulated ESP IV fails to satisfy the three-prong test established by the Commission to assess the reasonableness of a settlement.

In evaluating the reasonableness of a proposed settlement, the Commission has established the following criteria:

1. The stipulation must be the product of serious bargaining among capable, knowledgeable parties;
2. The stipulation must, as a package, benefit ratepayers and the public interest; and

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[7] Companies Brief at 104-105.

[8] OMAEG Ex. 19 at 30 (Hill Second Supplemental).

3. The stipulation must not violate any important regulatory principle or practice.

Although the Companies describe the Stipulated ESP IV as a “reasonable resolution of issues,”[9] the Stipulated ESP IV can only be viewed as reasonable by those parties benefitting as a Signatory Party to the Stipulated ESP IV and only if those same parties ignore the billions of dollars of costs passed onto ratepayers associated with the Affiliate PPA. As described further herein and in OMAEG’s initial brief, the Stipulated ESP IV fails all prongs of the three-part test.[10]

First, the Stipulated ESP IV is not the product of serious bargaining among capable, knowledgeable parties, representing a diverse group of customers. Second, the Stipulated ESP IV cannot be viewed as a package that benefits ratepayers and is in the public interest. Finally, the Stipulated ESP IV violates several regulatory policies of the state of Ohio.

1. The Companies fail to show that the Stipulated ESP IV is the product of serious bargaining among capable, knowledgeable parties.

The Companies grossly overstate the robustness of the settlement process as well as the diversity of the Signatory Parties. Regardless of its contentions regarding multiple discussions and negotiations with intervening parties,[11] major flaws regarding the seriousness of the bargaining among capable and knowledgeable parties and diversity of the Signatory Parties still remain.

While the Companies are accurate in its portrayal of the Stipulated ESP IV in terms of the number of witnesses, length of evidentiary hearings and pages of hearing transcript, the sheer

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[9] Companies Brief at 36 .

[10] OMAEG Brief at 70-95.

[11] Companies Brief at 37.

length of this evidentiary hearing is not proof in and of itself that the Stipulated ESP IV is the product of serious bargaining.[12] In fact, the evidence demonstrates otherwise. At no point during the negotiations was it disclosed to *all* parties that the Companies had reach a side-agreement, titled the "Competitive Market Enhancement Agreement," with Interstate Gas Supply, Inc. (IGS). Under the terms of this side-agreement, IGS requests that the Commission approve a retail competitive incentive mechanism.[13] The Companies also agree to file and implement a customer referral program and include a residential smart thermostat program in its next Energy Efficiency and Peak Demand Reduction Portfolio Plan with IGS as the exclusive provider.[14] In return, IGS supports the Stipulated ESP IV, agrees to withdraw any testimony not supporting the issues in the agreement, and signs the Third Supplemental Stipulation.[15] The terms of this side-agreement were not disclosed until after the Third Supplemental Stipulation was executed by the Signatory Parties on December 1, 2015 and after the hearing on the Stipulated ESP IV had commenced, thereby depriving all parties (including the Signatory Parties) of important information that could have been used to evaluate the impact of the Stipulated ESP IV on their respective interests.[16] Given IGS's staunch opposition to the construct of the Companies' Rider RRS and ESP filing throughout this proceeding, it is no far stretch to infer that the "Competitive Market Enhancement Agreement," and the specific provision making IGS the exclusive provider of the residential smart thermostat program, forms

[12] Id. at 39.

[13] OMAEG Ex. 24 (OCC Set-17-RPD-004, OCC Set-17-RPD-005, Competitive Market Enhancement Agreement).

[14] Id.

[15] OMAEG Ex. 25; Tr. Vol. XXXVII at 7811-7812.

[16] Tr. Vol. XXXVII at 7812-7813

an implicit part of the bargain that motivated IGS to become a Signatory Party to the Stipulated ESP IV.

The failure to bring IGS and the Companies' side-agreement to the attention of the other intervening parties (and Signatory Parties) in a meaningful way and prior to the commencement of the Stipulated ESP IV hearing renders the Stipulated ESP IV unfit for adoption. Transparency and fair dealing are foundational elements under the first prong of the Commission's three-part test requiring serious bargaining among capable, knowledgeable parties. It is critical that in order for parties to be able to seriously negotiate over the terms of a deal, there must be transparency regarding the terms of that deal. The Supreme Court of Ohio has underscored the importance of "open settlement discussions" and explained that undisclosed side deals are "relevant to deciding whether negotiations were fairly conducted."[17] The problem with secretive agreements of the sort reached between the Companies and IGS is that it undermines the "integrity" of the negotiations and risks "one or more parties * * * gain[ing] an unfair advantage in the bargaining process."[18]

Applying this precedent, the Stipulated ESP IV must be rejected. The failure to disclose the side-agreement not only deprived the non-signatory parties of critical information they could have used to evaluate their positions, it also calls into question the "serious bargaining" among "knowledgeable parties" given that the Signatory Parties were not privy to all information when making their decision to sign the Stipulated ESP IV. This taints the integrity of the entire settlement process and calls into question whether any of the parties were truly knowledgeable regarding the terms of the settlement. General knowledge of and participation in prior

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[17] *Ohio Consumes' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789, ¶86.

[18] Id. at ¶ 85-86.

Commission proceedings does not satisfy the knowledge contemplated by the three-part test, as the Companies would like the Commission to believe.[19] Clearly, the Companies and IGS had been in settlement talks for more than one day and drafts of the side-agreement could and should have been circulated to the parties (or even the Signatory Parties), or, at a minimum, the disclosure of its existence. Publicizing a side-agreement after the Third Supplemental Stipulation was filed does not permit a party to meaningfully evaluate the disclosed information and its impact on the party's negotiating position. In this case, OMAEG had only a few hours to evaluate the disclosed side-agreement between IGS and the Companies before cross-examining the Companies' witness Mikkelsen regarding that agreement. While the Companies allege that "all intervenors were provided an opportunity to participate in discussions with the Companies and in the settlement process,"[20] failure to disclose the existence of this side-agreement prevents the Commission from finding that serious bargaining occurred among capable, knowledgeable parties. For this reason alone, the Stipulated ESP IV should not be approved. Additionally, having the opportunity to participate in discussions is insufficient.[21] In addition to the IGS side agreement, the other four settlement agreements were not circulated to the other parties prior to filing and in no way constituted "open settlement discussions" as envisioned by the Court.[22]

[19] Companies Brief at 39.

[20] Id. at 37.

[21] See *Time Warner AxS v. Pub. Util. Comm*., 75 Ohio St.3d 229 at 241 n.2 (1996) where the Supreme Court of Ohio stated: "However, in the interest of judicial economy and given the extensive briefing and arguments of the parties, we feel compelled to note our grave concern regarding the partial stipulation adopted in the case at bar. The partial stipulation arose from settlement talks from which an entire customer class was intentionally excluded."

[22] *Ohio Consumes' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789, ¶86.

Additionally, as explained by OMAEG and OCC in their initial briefs, one Signatory Party could not have been a knowledgeable, capable party as that entity did not even exist at the time of the signing of the Third Supplemental Stipulation.[23]

Moreover, the Companies' assertions that the Signatory Parties "represent a diverse group of interests * * *" are over exaggerated and wholly inaccurate.[24] Diversity of interests is an important component for determining if a stipulation is reasonable. The Commission has found that when diverse interests are present, there is strong support for the reasonableness of a settlement package.[25]

The Companies have listed various characteristics of the Signatory Parties in an attempt to persuade the Commission that they have met the interests of a diverse class of customers.[26] However, the Signatory Parties more accurately represent an "ad hoc, collection of corporate and institutional interests that benefit directly from specific aspects of the Third Supp. Stipulation or other stipulations comprising the Stipulated ESP IV. [They] only represent themselves and provide a façade of representational diversity."[27] In fact, only 17 intervenors (excluding the Companies) in a field of 54 were willing to sign the Stipulated ESP IV and one intervener (IEU-Ohio) only agreed to not oppose the settlement. Of the 17, four Signatory Parties are represented by the same counsel, one party is no longer in existence, and one party's support is "limited to the legal and policy bases supporting the RRS Rider" as that party has a similar request pending

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[23] OMAEG Brief at 71-72; OCC Brief at 46-49.

[24] Companies Brief at 38; Companies Ex. 155 at 8 (Mikkelsen Fifth Supplemental).

[25] *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).

[26] Notably, the Companies fail to address the fact that one of the Signatory Parties (the Consumer Protection Association), which they claim represents the interests of low-income residential customers, is no longer operational or functional. *See* OMAEG Brief at 71-74.

[27] OMAEG Ex. 26A at 7 (Hill Third Supplemental).

before the Commission.[28] While the Stipulated ESP IV contains a number of Signatory Parties, there are "also numerous, active parties not supporting the Stipulation, representing a range of interests and customer groups as well as public policy perspectives."[29] For example, the Stipulated ESP IV is opposed by the IMM (an organization created to objectively monitor the competitiveness of PJM markets); OMAEG (a non-profit entity that represents a range of manufacturing and commercial customers that are an integral part of the state's economy); OCC (a state agency that represents and defends the interests of residential customers); the Ohio Hospital Association (a non-profit trade association that represents 219 hospitals and 55 healthcare systems); Wal-Mart Stores East, LLP and Sam's East, Inc.; Northeast Ohio Public Energy Council (NOPEC) and Northwest Ohio Aggregation Coalition (NOAC) (coalitions representing approximately 185 communities that are opt-out governmental aggregators); City of Cleveland; Ohio Schools Council (a regional council of governments comprised of approximately 197 school districts, educational service centers, joint vocational districts and developmental disabilities boards); the Cleveland Municipal School District (a political subdivision of the state of Ohio responsible for the operation of the public school system in the city of Cleveland); Sierra Club, Environmental Defense Fund, and Environmental Law & Policy Center (representing various environmental and alternative energy interests); Mid-Atlantic Renewable Energy Coalition (a coalition representing renewable energy interests); Energy Professionals of Ohio (a trade group comprised of licensed power brokers and consultants); and several CRES providers and generators, such as PJM Power Providers, the Electric Power Supply Association, and Retail Energy Supply Association, Direct Energy Services LLC, Exelon

[28] See Companies. Ex. 154 at 22-24 (Third Supp. Stip. at 22-24 (including supplemental signature pages)).

[29] OCC/NOPEC Ex. 11 at 28 (Kahal Second Supplemental).

Generation Company, LLC, Constellation NewEnergy, Inc., and Dynegy, Inc. The support of the Signatory Parties in and of itself is insufficient to approve the Stipulated ESP IV given the extensive and broad opposition by a number of non-signatory parties.

Thus, the Stipulated ESP IV is not broadly supported by parties representing a diverse range of interests of customer classes.[30] The Companies fail to satisfy the first prong of the three-part test.

2. The various terms of the Stipulated ESP IV, as a package, do not benefit ratepayers and are not in the public interest.

The Stipulated ESP IV contains a number of unrelated terms that the Companies have described as a "bargained-for compromise."[31] In its initial brief, the Companies highlight the requirement that all provisions of a proposed ESP be considered as a "total package" in evaluating both the quantitative and qualitative benefits of an ESP, and assert that the Stipulated ESP IV is in the public interest.[32] For treatment as part of the stipulation package, a settlement should be comprised of terms that relate to one another and have a sufficient nexus to be considered by the Commission in the case as filed.[33] Isolated terms that benefit the Companies or specific Signatory Parties in an attempt to induce them to sign the Stipulated ESP IV should not be considered as part of the package that the Commission is evaluating and should not be confused with benefits to customers or in the general public interest regarding the application

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[30] OCC/NOPEC Ex. 8 at 11 (Kahal Supplmental).

[31] Companies Brief at 40.

[32] Companies Brief at 10 and 40.

[33] *In the Matter of the Application of Duke Energy Ohio to Adjust Rider DR-IM ad Rider AEU for 2012 Smart Grid Costs*, Case No. 13-1141-GE-RDR, Opinion and Order at 16-17 (April 9, 2014). (The Commission 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.)

pending before the Commission. As presented, the Stipulated ESP IV is nothing more than a series of independent benefits for members of a redistributive coalition at the expense of the greater public interest.[34]

Accordingly, for all of the reasons stated herein and in OMAEG's initial brief with respect to Rider RRS and the proposed PPA, as well as the provisions that are related to the Companies ESP, the Stipulated ESP IV does not benefit ratepayers and is not in the public interest.[35] Rather, the Stipulated ESP IV will cost customers billions of dollars. As the Office of the Ohio Consumers' Counsel (OCC) has estimated, the Affiliate PPA alone could cost customers $3.6 billion ($2.7 billion net present value).[36]

3. The Stipulated ESP IV violates several important regulatory principles and practices and violates the policy of the state of Ohio.

The third prong of the Commission's three-part test to determine whether a stipulation is reasonable is an assessment of whether the stipulation violates any important regulatory principles or practices.[37] The Companies' proposed PPA provides for the Companies' purchase of the capacity, energy and ancillary services output of the Davis-Besse Nuclear Power Station (Davis-Besse), the W.H. Sammis Plant (Sammis) (collectively, the Plants), and FirstEnergy Solutions' (FES) share of the generating plants owned and operated by the Ohio Valley Electric Cooperative (the OVEC units).[38] The Companies will then sell the output of the Plants and the OVEC units into the wholesale markets operated by PJM and net the revenues received from the

[34] OMAEG Ex. 26A at 7-8 (Hill Third Supplemental).

[35] For example, see OMAEG Brief at 85-95.

[36] OCC Brief at 71; OMAEG Brief at 51 (citing OCC/NOPEC Ex. 9 at 12 (Wilson Second Supplemental)).

[37] *See Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123,126 (1992). *See also Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.*, 68 Ohio St.3d 559 (1994).

[38] Companies Ex. 1 at 9 (Application).

PJM markets against the costs to be paid to the generator (FES), crediting or charging the difference to all customers (shopping and non-shopping) through a nonbypassable rider, Rider RRS.[39]

The Companies analyze its proposal under the AEP ESP 3 factors and conclude that if Rider RRS is designed to have the effect of stabilizing rates and providing certainty regarding retail electric service; it is authorized under Ohio law.[40] Not only does this overstate the alleged certainty and stability provided by Rider RRS, but this narrow interpretation of the Commission's opinion and order in the AEP ESP 3 case fails to take into account the numerous other important state policy considerations that are violated by the Stipulated ESP IV.

For example, Section 4928.02, Revised Code, provides that it is the policy of the state of Ohio to do the following:

> (A) Ensure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service;[41]
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> * * *
>
> (H) Ensure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa, including by prohibiting the recovery of any generation-related costs through distribution or transmission rates[.][42]

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[39] Id.

[40] Companies Initial Brief at 122.

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

[42] R.C. 4928.02(H).

As noted by OCC witness Williams, "Nothing in the FirstEnergy ESP IV Application addresses the affordability of rates for customers."[43] In the course of this proceeding, the Companies have shown little attention to the cost impacts associated with the multiple riders proposed and advanced in its Stipulated ESP IV. The Companies make broad sweeping statements regarding general benefits that will accrue to customers such as "rate stability," "job retention," "new business opportunities," and avoid[ing] transmission upgrades," with little regard for, or analysis of, the costs of those alleged benefits.[44] The Companies' disregard for these cost impacts on several classes of customers demonstrates that the proposed Stipulated ESP IV was not created in alignment with the state policy embedded in Section 4928.02(A), Revised Code to ensure the availability of reasonably-priced retail electric service to its customers.

Further, the approval of and collection of costs through proposed Rider RRS would amount to the recovery of generation-related costs through distribution rates, in contravention of the state policy set forth in Section 4928.02(H), Revised Code.[45] Despite the Companies' arguments to the contrary, any net costs that arise from the "financial hedge" proposed by the Companies through Rider RRS have their origins in the generation of electric service.[46] While the Companies contend that Rider RRS is authorized under state law given its operation as a rate-stabilization mechanism (which is arguable in and of itself),[47] the Companies fail to recognize that Rider RRS is a generation charge that will be assessed through regulated distribution utilities

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[43] OCC Ex. 27 at 6 (Williams Direct).

[44] Companies Brief at 123.

[45] Exelon Ex. 1 at 11 (Campbell Direct).

[46] Id.

[47] Companies Brief at 121-122.

(i.e., the Companies) and collected from all distribution customers.[48] The PPA results in ratepayers compensating one generator and providing a guaranteed revenue stream to that generator through the affiliated distribution company's Rider RRS. Simply put, Rider RRS amounts to a customer subsidy of an unregulated corporate affiliate of the Companies, which is inconsistent with the state policy.

Additionally, the terms of the proposed PPA directly contradict the deregulated market established by Senate Bill 3. The legislative goals of Senate Bill 3 were to deregulate the generation market and replace the use of cost-based rates for generation service in the state of Ohio with market competition as a means to determine the wholesale generation price for all electricity customers.[49] The result is removal of the Commission's governing power in the area of generation services[50] and a reliance on market forces to determine the economic vitality of generating plants. As stated by OCC witness Rose, "[b]eing on your own in the competitive market means that the Companies' unregulated generation efforts cannot be aided by a subsidy * * *."[51] Thus, market forces, should be the ultimate determinate of a generating unit's viability and financial need.

The Companies have transitioned to a competitive market and ratepayers have funded that transition. Ratepayers should not be asked to fund the transition twice.

Additionally, as recognized by witness Campbell: "The Rider RRS would make all customers, shopping and non-shopping, captive to paying a subsidy that would flow from the

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[48] OCC Ex. 25 at 22 (Rose Direct).

[49] Id. at 11.

[50] *IEU-Ohio v. Pub. Util. Comm.*, 117 Ohio St.3d 486, 2008-Ohio-990 at ¶ 6.

[51] OCC Ex. 25 at 9 (Rose Direct).

utility to its merchant affiliate, for the ultimate benefit of the affiliate."[52] Ratepayers should not be asked to shield a distribution company's unregulated, affiliated generating company from market risks and losses and guarantee profitability through a subsidy such as Rider RRS. This directly contradicts the deregulated market-based approach advanced by the General Assembly through Senate Bill 3 and has dire consequences for the electric generation future in the state of Ohio.

Finally, adoption of the Stipulated ESP IV would also violate several other important regulatory principles, which are included below and were discussed more fully in OMAEG's initial brief.

- The Stipulated ESP IV will have the effect of thwarting competition and deterring new entry into the electric generation market given the proposed Rider RRS subsidizes operating and capital costs of the Plants and OVEC units, which eliminates any incentives to reduce those costs.[53] Market participants considering locating in Ohio may decide, in view of the subsidies, that they cannot compete with the generating units and locate their operations elsewhere.[54] This outcome is contrary to the regulatory principles of a deregulated competition-based market.
- The Stipulated ESP IV could harm interstate commerce and out-of-state investment due to the interconnectedness of the PJM grid.[55] Ohio's demand will inevitably be tied to the Plants and OVEC units through a state-sponsored PPA, which may prevent those units from exiting the market and affect investment

[52] Exelon Ex. 1 at 19 (Campbell Direct).

[53] OCC/NOPEC Ex. 1 at 18 (Sioshansi Direct).

[54] Id. at 6.

[55] OMAEG Ex. 26A at 31 (Hill Third Supplemental).

decisions in generating capacity across the PJM grid resulting in a decrease in out-of-state production capacity. [56]

- The Stipulated ESP IV violates cost-causation principles by establishing an opaque system of income transfers and cross-subsidies among consumers.[57] Under the structure of the Stipulated ESP IV, "[i]f you are a member of the club that negotiated benefits to support the PPA politically, then you receive the benefits of membership while others pay for the privilege."[58] This is antithetical to sound ratemaking principles.
- The subsidy granted by Rider RRS would distort economic incentives of pricing mechanisms and imposes an impediment to the proper functioning of the wholesale power markets.[59] As the PJM Independent Market Monitor explained, Rider RRS creates a situation where "[t]he logical offer price for these resources in the PJM Capacity Market * * * would be zero."[60] Pricing signals would be distorted because market participants would be offering in at less than competitive levels, which in turn would have a price suppression effect on the markets.[61] These distortions to pricing signals caused by Rider RRS could deter both the retirement of aging, inefficient units as well as investment in new units.[62]

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[56] Id. at 31-32.

[57] Id. at 8.

[58] Id. at 9.

[59] Dynegy Ex. 1 at 6 (Ellis Direct).

[60] IMM Ex. 2 at 5 (Bowring Supplemental).

[61] Id.

[62] Id.

- The Stipulated ESP IV denies customer protections. In addition to shifting enormous costs and risk onto ratepayers, the Stipulated ESP IV provides that "[n]o amounts collected shall be refunded" in the event a court of competent jurisdiction invalidates "Rider RRS in whole or in part * * *."[63] The Supreme Court of Ohio's decision in *River Gas v. Pub. Util. Comm.* explains that the prohibition against retroactive ratemaking does not apply in a rider true-up case.[64] Because Rider RRS is proposed to be trued-up on a quarterly basis, customers would be entitled to a refund if a court of competent jurisdiction invalidated Rider RRS. Therefore, this provision is adverse to sound ratemaking principles and unreasonably denies customer protections.

Regardless of the Companies' assertions, the Stipulated ESP IV has a harmful and negative effect on several important regulatory policies and principles, which outweighs any of the alleged benefits. As such, the Commission should reject the Stipulated ESP IV.

B. The Companies have failed to demonstrate the financial need of the generating units subject to the proposed PPA.

In its initial brief, the Companies claim the Plants and OVEC units are "financially at-risk of closure" as revenues have been at "historic lows."[65] While the Commission stated in the AEP ESP 3 Order, that it would consider the "the financial needs of the generating plant,"[66] the Companies' claim does not align with other statements made by the Companies' own witness

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[63] Cos.Ex. 154 at 8-9 (Third Supp. Stip.).

[64] 69 Ohio St.2d 509, 433 N.E.2d 568 (1982).

[65] Id. at 125.

[66] AEP ESP 3 Order at 25.

indicating the Plants and OVEC units would be able to obtain financial capital investments if the Economic Stability Program and Rider RRS were not approved.[67]

If the Companies believe that the Plants and OVEC units truly will become profitable in the long run,[68] it should follow that the Companies would be willing to make the necessary investments to keep the Plants and OVEC units operating in the near term.[69] "The Companies should have no interest in prematurely shutting down assets that are likely to prove valuable."[70] Further, if the Companies' predictions are accurate and the generating units will be profitable, providing credits to customers after the first three years, the Companies should be able to obtain financial investments through the sale of bonds or other long-term financial instruments.[71] Even the Companies own witness Moul concedes that the Companies could finance necessary capital investments for the Plants and OVEC units.[72] Generating units in dire financial need, as claimed by the Companies, would be unable to secure such financial capital investments. The Companies' arguments defy logic when, on one hand, the Companies assert that the Plants' economic viability is in doubt and they may not survive, and, on the other hand, they request that ratepayers, who have no ownership interest in the Plants or OVEC units, pay costs associated with keeping those units operating because they are essential for future generation and will become profitable. Either the Plants and OVEC units are in financial need or they are positioned to compete in the market.

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[67] Tr. Vol. X at 2199.

[68] Companies Brief at 3.

[69] OCC/NOPEC Ex. 1 at 20 (Sioshansi Direct); OMAEG Ex. 18 at 9 (Hill Supplemental).

[70] OMAEG Ex. 18 at 9 (Hill Supplemental).

[71] Id. at 10.

[72] Tr. Vol. X at 2199.

Regardless of the discrepancies in the Companies' statements and arguments, given deregulation of generation service, it is important to assess financial need based on the revenues a generating unit receives or will receive in the competitive markets operated by PJM. Section 4928.38, Revised Code, states that a generating unit must be "fully on its own in the competitive market."[73] Thus, market forces, should be the ultimate determinate of a generating unit's financial need. In that context, market constructs dictate that these inefficient and uneconomic units (as claimed by the Companies) should retire and be replaced by more efficient units.

C. The Companies have not committed to rigorous Commission oversight, full information sharing or a risk-sharing mechanism.

In the AEP ESP 3 Order, the Commission stated its expectation that a PPA rider would allow for rigorous Commission oversight of the rider and provide a process for review and audit in order to justify cost recovery.[74] While the Companies indicate they "welcome rigorous Commission oversight of all costs and revenues included in Rider RRS," this is little more than an empty statement.[75] The two-step audit and review process is described by Companies witness Mikklsen in her testimony:

> Approval of this ESP IV shall be deemed as approval to recover all Legacy Cost Components through Rider RRS as not unreasonable costs.
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> * * *
>
> Rider RRS will be subject to two separate reviews. In the first review, the Staff will have from April 1 to May 31 to review the annual Rider RRS filing for mathematical errors, consistency with the Commission approved rate design, and incorporation of prior audit findings, if applicable. In the second review, the Staff will have the opportunity to audit the reasonableness of the actual costs (excluding Legacy Cost Components

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[73] Section 4928.38, Revised Code.

[74] AEP ESP 3 Order at 25.

[75] Companies Brief at 73.

> which shall not be included in this second review or challenged in any subsequent audit or review) contained in Rider RRS and the actual market revenues contained in Rider RRS.[76]

Based on record evidence, the proposed PPA associated with Rider RRS lacks appropriate regulatory oversight.[77] The proposed PPA does not provide for a Commission prudency review of legacy costs,[78] which includes previous decisions by the unregulated affiliate that will now be borne by ratepayers.[79] It also does not provide for a meaningful Commission prudency review of costs that will be incurred moving forward and passed through Rider RRS.[80] Additionally, any costs associated with the audit process will be passed to customers through Rider RRS, regardless of the findings of that audit.[81] If costs are determined to be unreasonable by the Commission, those disputed costs would continue to be recovered from customers through Rider RRS until the Companies received final resolution through a non-appealable order.[82] Conveniently, the Companies have yet to define the term "unreasonable." Moreover, reviews conducted by the Commission will not occur until after the bids and auctions have occurred and when the resulting revenue from the energy, capacity or ancillary services is realized, based on the facts and circumstances that were known at the time the offer was made.[83] The Commission has no authority to direct the Companies' offers made into the PJM capacity market and may

[76] Companies Ex. 7 at 14-15 (Mikkelsen Direct).

[77] OCC Ex. 25 at 4 (Rose Direct).

[78] Witness Mikkelsen defines legacy costs as "any cost that arises from a decision or commitment or a contract entered into prior to December 31st of 2014." (Tr. Vol. I at 160-161.)

[79] OCC Ex. 25 at 4 (Rose Direct); Tr. Vol. I at 67.

[80] Id.

[81] Tr. Vol. I at 69-70.

[82] Id. at 70-71.

[83] Tr. Vol. XXXVI at 7618.

only conduct a reasonableness review after-the-fact, providing somewhat of a safety net for the Companies. This is hardly the rigorous Commission review and oversight contemplated by the Commission in its AEP ESP 3 Order.

Pursuant to R.C. 4905.06, the Commission:

> has general supervision over all public utilities within its jurisdiction as defined in section 4905.05 of the Revised Code, and may examine such public utilities and keep informed as to their general condition, capitalization, and franchises, and as to the manner in which their properties are leased, operated, managed, and conducted with respect to the adequacy or accommodation afforded by their service, the safety and security of the public and their employees, and their compliance with all laws, order of the commission, franchises, and charter requirements. * * * The [C]omission, through the public utilities commissioners or inspectors or employees of the [C]omission authorized by it, may enter in or upon, for purposes of inspection, any property, equipment, building, plant, factory, office, apparatus, machinery, device, and lines of any public utility. The power to inspect includes the power to prescribe any rule or order that the commission finds necessary for protection of the public safety.

Similarly, R.C. 4095.15 requires that every "public utilities shall furnish to the [Commission], in such form and at such times as the [C]omission 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."

These two statutes clearly show that the Commission, and consequently its Staff, have authority to review, audit, and obtain information associated with the Companies' administration of Rider RRS regardless of whether the Stipulated ESP IV specifically includes a provision providing for information-sharing. Thus, the Companies have given up nothing in offering this provision and agreeing to full information-sharing and Commission oversight of Rider RRS. It is unreasonable to exclude intervenors from the oversight, review and information-sharing procedures regarding costs that those intervenors will be forced to pay pursuant to Rider RRS.

This provides yet another reason why the Stipulated ESP IV fails to satisfy the Commission's established criteria and should be rejected as unlawful and unreasonable.

The Companies also claim to commit FES to full-information sharing with the Commission and the Staff through provision V.B.3(b) of the Third Supplemental Stipulation, which states:

> FirstEnergy Solutions Corp. fleet information on any cost component will be provided pursuant to a reasonable Staff request (as determined by the Commission) as it conducts a reasonableness review of a specific cost component for the generation units included in the Economic Stability Program. * * *[84]

However, FES is not a party to the Stipulated ESP IV and, therefore, is not bound by such terms. The Companies also do not allow intervenors to participate in the process that allegedly protects ratepayers from imprudent conduct and misdealings.[85] This exclusionary procedure advanced by the Companies in no way furthers the public interest. If customers bear 100% of the risk of the Plants and OVEC unit's performance as well as 100% of the cost of Rider RRS, it is only reasonable that they be afforded an opportunity to obtain information for the purpose of examining whether the charges associated with Rider RRS are unjust or unreasonable as contemplated by R.C. 4905.22. If the Commission permits cost recovery under Rider RRS, intervenors should be authorized to review and evaluate the Companies' administration of Rider RRS, including the accompanying and associated costs.

Additionally, the Companies' commitment to full-information sharing of FES' information upon a "reasonable" Staff request is illusory. Such "commitment" by the

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[84] Companies Brief at 74.

[85] Id. at 73-76.

Companies is undefined and ignores the Commission's rules and regulation regarding corporate separation.[86]

Finally, the Companies also assert they have incorporated and committed to an additional risk-sharing mechanism through the provision of up to $100 million in credits to customers in Years 5 to 8 of Rider RRS.[87] Specifically, this credit would provide up to $10 million in Year 5 and increases in increments of $10 million per year through Year 8 for a total of $100 million to customers.[88] In its initial brief, the Companies describe the details related to how the credits will be administered, but fail to demonstrate how these credits actually allocate and share risk between the Companies and ratepayers. In fact, Companies witness Mikkelsen concedes that this provision does not guarantee that Rider RRS will result in a credit to customers in any given year of the eight-year term of Rider RRS and does not require that the Companies provide such a credit if certain conditions are not met.[89] If the Companies' projected credits over the last four years of Rider RRS are accurate, the Companies will never have to pay a penny to customers as part of the alleged risk-sharing provision in the Stipulated ESP IV. Conversely, if the projections of OCC witness Mr. Wilson are accurate, the cost to customers under Rider RRS will always be greater than the maximum credit provided by the Companies, resulting in the credit being applied, but the customers still paying a net charge even after application of the credit.[90] Given the structure of Rider RRS, which passes all net costs to customers, there is no incentive for the

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[86] R.C. 4928.17.

[87] Id. at 75.

[88] Id.

[89] Tr. Vol. XXXVI at 7523; Tr. Vol. XXXVI at 7595-7596.

[90] OCC/NOPEC Ex. 9 at 18-19 (Wilson Second Supplemental).

Companies, or their affiliates, to contain costs or maximize revenues of the units.[91] The $100 million credit (if ever applied) merely reduces the cost to customers, but does not change the premise that net costs are passed to customers at 100%.[92] This is hardly a risk for the Companies and is no commitment to risk-sharing with customers.[93]

D. The Stipulated ESP IV does not provide a balanced portfolio for the state of Ohio.

While OMAEG agrees that fuel diversity plays an integral role in maintaining resource adequacy and reliability, the Companies exaggerate the importance of maintaining existing coal generation plants to retain the status quo of coal as a fuel resource in the state of Ohio.[94] As stated by OMAEG witness Hill "Ohio's power supply mix will not be less diverse if the plants are retired. Ohio and, in fact, the Companies' service territories will still be able to be served by coal, nuclear, natural gas, renewable, and other generation sources in the event that the plants do not remain in service."[95] This overreliance on one fuel source is not in the public interest and does not contribute to fuel diversity.[96]

Ohio is already heavily invested in coal. The Plants and OVEC units include 3,319 MW of coal-fired generation capacity and 900 MW of nuclear power.[97] In 2012, coal represented 59 percent of the generating capacity installed in the state and natural gas represented 29 percent of

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[91] Id. at 9.

[92] Id.

[93] Tr. Vol. XXXVII at 7771-7772.

[94] Companies Brief at 26-27.

[95] OMAEG Ex. 18 at 9 (Hill Supplemental).

[96] Id.

[97] OCC/NOPEC Ex. 1 at 28 (Sioshansi Direct).

the generating capacity.[98] If the coal-fired generators included in the Plants and OVEC units were to retire and be replaced with natural gas-fired generators, the result would be a *more* diverse supply and balanced portfolio.[99] Moreover, coal would still be in a predominant position over all other fuel resources. Diversity is not served by favoring coal-fired units above all other resources and at the expense of furthering the market-based approach in Ohio. The best course of action to meet the state of Ohio's fuel needs is heterogeneity of resources, which includes coal, natural gas, renewable, and other resources.

Further, the Companies also exaggerate the reliability of coal over gas through its focus on a small period of time during the Polar Vortex of 2014.[100] While natural gas supply to natural gas units may have partially contributed to the performance problems associated with the Polar Vortex, so did outages of coal, nuclear, and other resources. Nonetheless, firm natural gas transmission contracts and FERC's adoption of the PJM Capacity Performance product helped to resolve these issues in the future. As proposed by PJM, the Capacity Performance product will "add an enhanced capacity product – Capacity Performance – to [the] capacity market structure and… ensure that the reliability of the grid will be maintained through the current industry fuel transition and beyond.[101] Thus, the reliability of the grid is more secure now than when the Companies first filed their Application in August 2014 and there is no "looming shortage of generating capacity."[102] The Companies reliance on fuel diversity to resolve any perceived

[98] Id. at 29.

[99] Id.

[100] Companies Brief at 26.

[101] OCC Brief at 125.

[102] OCC/NOPEC Ex. 9 at 5-6 (Wilson Second Supplemental).

reliability issues is overstated. A balanced portfolio of diverse fuel resources, rather than pursuing a coal-driven agenda, is the proper course of action for the Commission to take.

E. Transmission concerns are a regional issue that extend beyond the Companies' service territories.

The Companies argue that continued operation of the Plants and OVEC units is needed in order to support system reliability and avoid costly transmission upgrades.[103] In its arguments, the Companies fail to acknowledge one key fact: transmission is a regional issue. System reliability and the need for generating units in a particular region is determined by the Regional Transmission Organization's (e.g., PJM) procedures for meeting reliability to ensure customer demand.[104] As one federal court recently explained, "PJM was created to ensure reliability by managing interstate transmission lines and, in more recent years, by designing and operating wholesale auctions."[105] Thus, decisions about system reliability should be made regionally by PJM, not on a plant-by-plant or utility company-by-utility company basis by the Commission.[106] In fact, PJM recently stated its markets have "succeeded in providing reliable, competitively priced wholesale electricity" to Ohio.[107]

First, the Companies assert that the Plants and OVEC units are needed for fuel diversity to assist in alleviating system reliability concerns.[108] This argument was previously addressed in Section D; however, it is worth reiterating that while fuel diversity does contribute to system

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[103] Companies Brief at 55 and 67.

[104] OCC Ex. 26 at 6 (Rose Supplemental).

[105] *PPL EnergyPlus, LLC v. Hanna*, 977 F.Supp.2d 372, 384 (D. N.J. 2013).

[106] Id.

[107] OCC/NOPEC Ex. 9 at 6 (Wilson Second Supplemental).

[108] Companies Brief at 55-56.

reliability, the Companies have grossly exaggerated the fuel diversity issue in the state of Ohio. Retirement of the Plants and OVEC units will not make Ohio wholly dependent on natural gas.[109]

Second, the Companies argue that if Rider RRS is not approved, the loss in baseload generation will negatively impact the reliability of the transmission system, resulting in a significant cost to customers.[110] To support these assertions, the Companies use an example of recent generating plant retirements by FES and GenOn Energy Inc. that necessitated transmission system upgrades.[111] According to Companies witness Cunningham, between 2012 and 2015, approximately 3,900 MW of coal-fired power plants in Ohio were retired, resulting in 38 separate transmission system upgrades to maintain reliability.[112] However, those upgrades were also necessitated by the retirement of additional plants beyond those owned by FES and GenOn Energy.[113] Therefore, the Companies comparison is flawed.

The Companies conclude that estimated costs for transmission upgrades resulting from retirement of the Plants and OVEC units would range from $436.5 million to $1.1 billion, with a large amount of the costs being borne by the Companies' customers.[114] In making its estimate, the Companies failed to consider several important developments that could impact the estimated costs. For example, Companies witness Phillips assumes that *all* of the units at Davis-Besse or Sammis, or both, will retire.[115] This assumption discounts the possibility that only a limited

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[109] OMAEG Ex. 18 at 9 (Hill Supplemental).

[110] Companies Brief at 67.

[111] Id. at 68; Companies Ex. 39 at 6 (Phillips Supplemental).

[112] Companies Ex. 37 at 3 (Cunningham Direct).

[113] Tr. Vol. XV at 3241-3243.

[114] Companies Brief at 70.

[115] Sierra Club Ex. 67 at 5 (Lanzalotta Direct).

number of generating units might retire, while the rest remain in service, which would have a different impact on the transmission system reliability.[116] Additionally, the aforementioned PJM Capacity Performance product was developed to specifically deal with potential reliability issues and witness Phillips admits that when making his statements regarding the impact of natural gas generation on reliability, he did not consider the impact of the Capacity Performance product.[117]

Further, the future installation of generation currently being constructed in Ohio and the greater PJM region will ease concerns regarding potential reliability issues. For example, a 960 MW gas-fueled plant located in close proximity to Davis-Besse and a 1,152 MW gas-fueled plant located in close proximity to Sammis are scheduled to be in service in 2017 and 2020, respectively.[118] Moreover, work on an approximate 800 MW natural gas-fired generating plant has commenced in Oregon, Ohio, only 33 miles from Sammis[119] and a 700 MW natural gas-fired plant is already being built in Carrollton County, Ohio, only 23 miles from Davis-Besse.[120] Additional plant locations have been identified at Middletown, Rolling Hills, Lordstown, Columbiana County and Avon Lake, Ohio.[121] These new generation resources will mitigate any potential reliability concerns and, in the event the Plants and OVEC units retire, could serve as replacements.

Finally, the Companies fail to consider PJM's reliability-must-run (RMR) arrangement tool, which can also be used to mitigate system impacts and capacity shortfalls caused by a

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[116] Id.

[117] Tr. Vol. XVI at 3311-3312.

[118] OCC/NOPEC Ex. 1 at 26 (Sioshansi Direct).

[119] Sierra Club Ex. 95 at 11 (Comings Third Supplemental).

[120] Id.

[121] Tr. Vol. I at 137-138; OCC/NOPEC Ex. 9 at 5 (Wilson Second Supplemental).

generating unit closure.[122] Once a generator notifies PJM of its intent to close a unit, PJM can enter into an RMR contract with the generator to provide specific payments for a fixed period of time to keep the unit running while the reliability need is addressed.[123] If a generation owner chooses to continue to operate a generating unit that it planned to deactivate, the generation owner is entitled to file a cost-of-service recovery rate with FERC in order to recover the entire cost of operating the unit beyond its proposed deactivation date.[124] The Companies are certainly aware of this process given FES, an unregulated affiliate of the Companies, currently has generators that are the subject of RMR agreements and are receiving cost recovery under those agreements.[125]

The Companies' assertion that transmission upgrades will create a considerable cost for customers is speculative as it is PJM who is responsible for transmission planning and who ultimately determines cost allocation.[126] As Staff witness Choueiki stated, rather than provide an independent analysis of the impact of retirement of the Plants, the Companies relied on an assessment conducted by two of their own engineers.[127] They did not provide an analysis to PJM nor did they seek an independent analysis from PJM, which would be in the best position to estimate the cost of transmission upgrades based on the needs and capabilities of the entire region.[128] They have overstated reliability concerns, exaggerated the costs of transmission

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[122] Sierra Club Ex. 67 at 10 (Lanzalotta Direct).

[123] Id.

[124] Id.

[125] Exelon Ex. 1 at 16 (Campbell Direct).

[126] Tr. Vol. XV at 3238-3239.

[127] Staff Ex. 12 at 12 (Choueiki Direct).

[128] OCC/NOPEC Ex. 1 at 25 (Sioshansi Direct); Tr. Vol. XV at 3247-3248.

upgrades, and failed to consider additional developments taking place in Ohio and the PJM region that could impact system reliability.

F. Continuation and expansion of previous ESP provisions is not in the public interest.

In its initial brief, the Companies claim that the Stipulated ESP IV continues several provisions from the Companies' previous ESP, which demonstrates that those provisions and programs provide qualitative benefits to customers.[129] However, the mere fact that a specific provision was previously approved by the Commission does not mean the continuation of that provision is beneficial to customers or in the public interest.

Specifically, the Stipulated ESP IV provides for an extension and expansion of the Economic Load response Program rider (Rider ELR) through the eight-year term of the ESP.[130] Rider ELR and the interruptible load program provides a discounted rate to large customers who agree to take service subject to interruption for periods of time on short notice in the form of credits.[131] The Companies and Signatory Party, Ohio Energy Group (OEG), assert that continuation of Rider ELR provides increased reliability[132] and economic development.[133] The reality is that while this rider may provide additional benefits to Rider ELR customers, as well as the Companies who retain 20 percent of PJM revenues from selling those interruptible resources into the capacity market,[134] it does not benefit the large number of other customers who do not

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[129] Companies Brief at 18-21.

[130] Companies Ex. 154 at 14 (Third Supp. Stip.).

[131] Companies Ex. 8 at 11 (Mikkelsen Supplemental).

[132] Companies Brief at 19; OEG Brief at 23-25.

[133] Companies Brief at 20; OEG Brief at 25-26.

[134] Tr. Vol. XXXVII at 7890.

take service under Rider ELR but must continue to pay the costs associated with providing the ELR credits for a period of eight years.[135] The ELR Program will include up to $280 million in curtailable load interruptible credits, which will be charged to customers net any PJM revenues.[136] As previously stated, this type of ratemaking not only violates important regulatory policies, but it also harms the general economy by favoring certain customers and intervening parties who agree to the Stipulated ESP IV by providing "cash equivalents and other benefits that are to be paid by consumers who oppose the settlement."[137]

Specific to the assertion that Rider ELR provides reliability benefits; the Companies (and OEG's) reliability concerns are overstated, as described in Section D above. These concerns fail to take into account the availability of the PJM demand response program and the PJM Capacity Performance product, which also address reliability concerns on a regional level. Additionally, OEG argues that reliability resources like the ELR program will become increasingly important given upcoming plant retirements.[138] However, if the Stipulated ESP IV is approved, the Plants and OVEC units will remain operating, thereby *reducing* system reliability concerns.[139]

Regarding economic development in Ohio; Rider ELR provides lower discounted electric rates to those large customers taking service under the rider.[140] While this may facilitate economic development for those specific customers, this is done to the detriment of other customers (including other business and manufactures that are competitors) who must pay higher

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[135] Companies Ex. 154 at 14 (Third Supp. Stip.).

[136] Tr. Vol. XXXVII at 7782-7786.

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

[138] OEG Brief at 24.

[139] *FERC v. EPSA*, Case No. 14-840, et al., Slip Opinion at 15 (January 25, 2016).

[140] Companies Brief at 20.

rates to fund the interruptible load program. An assessment of economic development benefits should include considerations beyond just a limited geographic area of limited customers who purchase the electricity at a discounted rate.[141] It should also ensure that competing businesses are on equal footing. Rider ELR has far reaching impacts not only other large customers who are not afforded the opportunity to take a discounted rate under Rider ELR, but also on other manufacturers and customers, whose productivity and operating prices will increase in order to fund Rider ELR.

The Companies' request to count legacy ATSI Legacy MISO Transmission Expansion Plan costs (legacy MTEP costs) against its non-collection commitment in Rider NMB is harmful to customers, not in the public interest, and violates the terms of the settlement in the Companies' ESP II case. In the Companies ESP II case, the Companies committed to not seek recovery from retail customers of $360 million of PJM Legacy Regional Transmission Expansion Plan (RTEP) costs.[142] Specifically, the stipulation approved by the Commission in that case stated:

> All MTEP that are charged to the Companies shall be recovered from customers through Rider NMB. The Companies agree not to seek recovery through retail rates for MISO exit fees or PJM integration costs from retail customers of the Companies. 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, 201; 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.[143]

[141] OMAEG Ex. 18 at 10-13 (Hill Supplemental).

[142] In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison 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. 10-388-EL-SSO, Opinion and Order at 13 (August 25, 2010) (ESP II Case).

[143] Id.

Now, the Companies seek to change the terms of the deal and count legacy MTEP costs, which are not eligible for inclusion in the ATSI formula rate to be recovered from retail customers, against this commitment.[144] This is both unreasonable and harmful to retail customers.

First, the language of the stipulation that was approved by the Commission in the ESP II case does not mention legacy MTEP costs; it only mentions legacy RTEP costs.[145] The Companies now seek to change the terms of this stipulation and revoke their original commitment to customers established in the earlier settlement. Moreover, the Companies seek to change the terms of previous settlement with a group of Signatory Parties that are different from the Signatory Parties who agreed to the ESP II stipulation.

Second, it is premature to count these costs against the Companies' commitment as the Companies are not currently assessed those charges and therefore do not pass those charges on to customers.[146] Although witness Mikkelsen asserts that the Companies seek to maintain the "spirit" of the original commitment through providing customers the same benefit amount ($360 million) as originally committed,[147] the original commitment was clearly to provide customers a benefit by absorbing costs they would otherwise incur.[148] In fact, the Companies' own witness included foregone RTEP costs as a quantitative benefit in his ESP vs. MRO test analysis.[149] If the customers are not charged legacy MTEP costs through the ATSI tariff but those foregone

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[144] Companies Ex. 7 at 18 (Mikkelsen Direct).

[145] Id.

[146] Tr. Vol. I at 168.

[147] Companies Ex. 7 at 18 (Mikkelsen Direct); Companies Brief at 99.

[148] Companies Ex. 7 at 17 (Mikkelsen Direct).

[149] Direct Testimony of William R. Ridmann at 23-24 and WRR Attachment 1 in Case No. 10-388-EL-SSO (ESP II Case).

costs are being included as part of the Companies' non-collection commitment, no benefit is being provided to customers. The Companies should not be permitted to meet their legacy RTEP commitment by counting costs that they have not incurred and that customers cannot be charged unless FERC approves inclusion of those charges in the ATSI tariff.[150]

Therefore, the Companies' request to include MTEP legacy costs does not benefit customers and is not in the public interest as it ultimately allows the Companies to accelerate their recovery of costs under the terms of the ESP II stipulation, which may result in additional costs to customers. Further, the Companies' request violates the terms of the previously agreed-upon settlement and seeks to change the Companies' overall commitment.

Additionally, the continuation and expansion of the Delivery Capital Recovery Rider (Rider DCR), which significantly increases the amounts currently collected under Rider DCR, is unreasonable and not in the public interest.

According to the Stipulated ESP IV, the Companies seek to continue the Delivery Capital Recovery Rider (Rider DCR) under the same terms and conditions, with the proposed modification to increase the value of the revenue caps for Rider DCR by $30 million for the period June 1, 2016 through May 31, 2019; by $20 million for the period June 1, 2019 through May 31, 2022; and by $15 million for the period June 1, 2022 through May 31, 2024.[151] Not only does this provision extend Rider DCR an additional eight years, it also nearly doubles the established revenue cap of $15 million per year under the current ESP.[152] Over the proposed eight-year term of the ESP, Rider DCR increases could require customers to pay an additional

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

[151] Companies Ex. 154 at 13 (Third Supp. Stip.).

[152] Id.; Companies Ex. 1 at 13 (Application).

$240 to $330 million in revenues, for a total of $915 million in DCR charges.[153] The Commission should not overlook these quantitative charges and their impact on the public interest.

Further, Rider DCR includes a 10.5 percent return on equity. As admitted by Companies witness Mr. Fanelli, it has been seven years since the Companies' last distribution rate case.[154] Continued incremental increases of a distribution investment rider, absent a review of the distribution costs through a distribution rate case, is not reasonable or prudent.[155] Specifically, the Companies have not justified a $30 million revenue cap increase for three years or a $20 million revenue cap increase for an additional three years given that the Companies have admitted that they continue to meet their electric distribution targets under the current revenue caps and that they have not projected any major distribution capital project.[156]

In support of continuing and expanding Rider DCR, the Companies state these modifications will ultimately benefit customers through enhanced reliability of electric service.[157] As previously mentioned, the Companies' concerns related to system reliability are overstated and unfounded. Moreover, there is no convincing evidence that Rider DCR will function more efficiently and foster greater reliability than collecting costs through a base rate

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[153] OCC Brief at 57.

[154] Tr. Vol. XX at 3901.

[155] See OCC Brief at 56-59. OCC agrees with OMAEG that the Companies should be required to file a new base rate case in order to set the current cost of capital and correct the out of date and overstates rate of return associated with Rider DCR.

[156] Id.

[157] Companies Ex. 50 at 3-4 (Fanelli Direct); Companies Ex. 7 at 8 (Mikkelsen Direct); Companies Brief at 19.

case.[158] Thus, the Companies have failed to demonstrate that continuation and expansion of Rider DCR is in the public interest or beneficial to customers.

Finally, the Companies have also failed to demonstrate how the Government Directives Rider (Rider GDR) is in the public interest. The Companies argue that the proposed eight-year term of the Stipulated ESP IV makes it appropriate to establish Rider GDR as a cost recovery mechanism for possible future charges associated with governmental actions or directives.[159] However, as proposed, Rider GDR is overly broad and anticipatory in nature. Although Rider GDR would initially be set at zero and the Companies would have to file an application to either collect deferred costs or to defer and collect costs under the rider,[160] such a rider should not be established and costs should not be collected from customers unless or until the Companies incur those costs and the Commission deems them prudent for recovery. A more appropriate proposal would be for the Companies to file a rate case to recover any costs that would increase costs and cause a revenue deficiency.[161] Companies witness Mikkelsen admits that "[i]t is too early to ascertain what, if any, directives may come from such efforts."[162] Thus, it is also too early to ascertain the types of costs that will result from implementing those directives and from estimating the amount of costs to be recovered under the rider from customers. Similarly, it is premature to estimate costs associated with other regulatory proceedings or directives that may occur sometime in the future.

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[158] OCC/NOPEC Ex. 8 at 30-31 (Kahal Supplemental).

[159] Companies Brief at 89.

[160] Id. at 25-26.

[161] Staff Ex. 18 at 23 (Effron Direct).

[162] Companies Ex. 7 at 25 (Mikkelsen Direct).

The Companies have failed to demonstrate that the establishment of Rider GDR is anything more than an "open-ended recovery vehicle for any costs the Companies incur." Thus, it is not in the public interest, does not benefit ratepayers, and should be rejected by the Commission.

G. The Stipulated ESP IV neither empowers consumers nor enhances retail competition.

The Companies claim that the Stipulated ESP IV's grid modernization provision will empower consumers and promote customer choice in Ohio.[163] The Stipulated ESP IV provision for grid modernization initiatives include examples such as advanced metering infrastructure, distribution automation circuit reconfiguration, and VOLT/VAR.[164] While the Companies tout the grid modernization provision as an "important step" in modernizing the distribution system, they do not indicate any specific benefits from the provision.[165] Moreover, they have not provided an estimate of the actual costs to be charged to customers for these efforts,[166] nor have they provided a detailed description of the grid modernization business plan as it is still being developed.[167] Because this plan will be filed in a future case, the details related to the grid modernization business plan are vague and ambiguous. For example, while the Stipulated ESP IV states that the Companies will work with Staff to "attempt to remove any barriers for distributed generation,"[168] there is no identification of these barriers. Additionally, the provision

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[163] Companies Brief in 92-94.

[164] Companies Ex. 154 at 9 (Third Supp. Stip.).

[165] Companies Brief at 92.

[166] Tr. Vol. XXXVI at 7647-7649.

[167] Tr. Vol. XXXVII at 7847.

[168] Companies Ex. 154 at 9 (Third Supp. Stip.).

includes a commitment to implement VOLT/VAR initiatives;[169] however, the Companies have provided no information regarding deployment of VOLT/VAR technology.[170] As noted by witness Rabago, the evidentiary record in this case is "weak" for such important issues as grid modernization[171] and it is "inappropriate as a matter of sound regulation to prejudge such specific issues without the benefit of a full record and fair opportunity for all potential intervenors to participate in the process of rulemaking and ratemaking."[172] Thus, the Companies' claim that the grid modernization provision will empower customers is erroneous.

Similarly, the Stipulated ESP IV does little to enhance the competitive retail market. Section 4928.02(H) of the Revised Code holds that the state of Ohio'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 of service other than retail electric service, and vice versa, including by prohibiting the recovery of any generation-related costs through distribution or transmission rates.

The best way to "ensure effective competition" is to let the competitive market operate freely and efficiently. The non-bypassable Rider RRS proposed by the Companies, however, thwarts effective competition, creating subsidies for the Plants and OVEC units that are not available to any of the other unregulated market participants. These subsidies are damaging in two central ways. First, "losses incurred in the operation of the plants covered by the PPA are passed on to all electricity users in the Companies' service territories."[173] Second, the costs associated with the negotiated rate discounts, subsidies, and energy efficiency commitments "are not born by

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[169] Id. at 9-10.

[170] Tr. Vol. XXXVII at 7848-7849.

[171] Tr. Vol. XXXVIII at 8202-8203.

[172] ELPC Ex. 28 at 12 (Rabago Direct).

[173] OMAEG Ex. 26A at 7-9 (Hill Third Supplemental).

[the Companies], but instead * * * passed on to ratepayers that do not directly benefit."[174] Therefore, the Stipulated ESP IV impairs the competitive market's efficiency and increases retail electric service prices for customers. This in no way benefits customers or the public interest and actually impedes the ability of the market to operate in a competitive manner.

The Companies point to items such as implementing a web-based system to provide customer information to CRES providers and allowing CRES providers the opportunity to include their logos on utility bills as examples of enhancements to the competitive retail markets.[175] These examples pale in comparison to the potentially detrimental impacts on the competitive market and to state policy if the Commission approves Rider RRS.

H. The Stipulated ESP IV undermines economic development.

The Companies overstate the benefits associated with keeping the Plants and OVEC units operating and understate the value of new, more efficient natural gas generating units entering the market. Closure of the coal-fired Plants and OVEC units will not be the end to Ohio's coal industry as the Companies allege.[176] Coal will continue to be a fuel source in the electric industry no matter the outcome of this case. Additionally, entry from new gas-fired generating units could bring economic development in the form of employment and a strong tax base that could revitalize the local economies where the units are sited.[177] The limited economic analysis provided by Companies witness Murley is flawed and fails to consider these additional factors.[178]

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[174] Id. at 8-9.

[175] Companies Brief at 104-105.

[176] Companies Brief at 29.

[177] OCC/NOPEC Ex. 2 at 16 (Sioshansi Supplemental).

[178] *See* OMAEG Ex. 18 at 11-12 (Hill Supplemental) (Dr. Hill identifies four significant problems with witness Murley's input-output model used to estimate economic impacts).

Although economic development incentives can be beneficial to ratepayers if structured properly, the provisions contained in the Stipulated ESP IV are not true economic development incentives.[179] Rather, "the incentives are targeted price reductions and discounts that are being offered by the Companies through the regulatory process to only those customers or groups that have been invited to join the exclusive club or coalition formed by the Companies."[180] This type of structure has a negative impact on the economy as any potential benefits from the incentives are provided only to a narrow class of customers, often to the detriment of those who are not receiving the incentive. This may deter new businesses from entering the market and/or locating in the state of Ohio, which has a "much larger long-term economic threat to power reliability and competitive pricing than is posed by denying the proposed PPA."[181] For all of the Companies' claims regarding the economic development spurred by the Economic Stability Program, the evidence shows that, in reality, the proposed PPA and Rider RRS will actually have a negative impact on economic development.

III. CONCLUSION

Rider RRS will saddle captive customers with the generation costs of a fleet of aging and uneconomic generating units and threatens to erase the gains made by Ohio manufacturers and other consumers in the competitive market. That outcome is inconsistent with the General Assembly's market-based directive and will thwart the state's effectiveness in the global economy. The special benefits provided to a narrow class of Signatory Parties at the expense of

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[179] OMAEG Ex. 19 at 10-11 (Hill Second Supplemental).

[180] Id. at 11.

[181] OMAEG Ex. 18 at 6 (Hill Supplemental).

a large class of customers further exacerbates the multitude of problems associated with the Stipulated ESP IV. For all the reasons stated above, as well as those articulated in OMAEG's initial brief, the Commission should find that the Stipulated ESP IV is unjust, unreasonable, and not in the public interest. As such, OMAEG respectfully requests that the Commission reject the Stipulated ESP IV.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the Reply Brief of the Ohio Manufacturers' Association Energy Group was served via email on February 26, 2016 upon the following parties of record:

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