

**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	)	Case No. 14-1297-EL-SSO
a Standard Service Offer Pursuant to R.C.	)	
§ 4928.143 in the Form of an Electric	)	
Security Plan.	)	

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**REPLY BRIEF  
OF  
OFFICE OF THE OHIO CONSUMERS' COUNSEL  
AND  
NORTHWEST OHIO AGGREGATION COALITION (AND ITS INDIVIDUAL  
COMMUNITIES),  
CITY 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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**I. INTRODUCTION**

There is so much bad news for Ohioans in FirstEnergy's settlement that the problems compete with each other for attention. But FirstEnergy's case is getting ahead of a ruling by the Federal Energy Regulatory Commission ("FERC") on whether the power purchase agreement is legal. The Public Utilities Commission of Ohio ("PUCO") should defer its ruling until after FERC rules. It's time to hit the brakes to prevent the possibility of FirstEnergy collecting charges from Ohioans that would not be refunded if FERC later declares the charges to be unlawful. Another federal issue is that FERC may require the subsidized power plants to bid into markets at their cost. The result may be that these plants will not clear (and thus receive no revenues). That means that Ohioans would pay FirstEnergy much more than our projection of \$800 each.

The PUCO should overrule FirstEnergy's proposal for self-protection and let the markets operate for people without government-imposed subsidies. It has taken too long for the slow march to implement the 1999 law, to give Ohioans the benefits of markets for electric generation. Indeed Dr. Choueiki testified that granting a PPA rider is a move in the opposite direction.<sup>1</sup>

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<sup>1</sup> Proffer Tr. Vol. XXX 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).



The Ohio General Assembly intended for generation operations to be deregulated. In a competitive market it is survival of the fittest. If FirstEnergy's generating units are not fit for competition, then they should be sold or retired. But not subsidized on the backs of hard-working Ohioans.

## **II. STANDARD OF REVIEW**

OCC/NOAC and RESA included a comprehensive recounting of Ohio law and PUCO precedent that should be relied upon in the PUCO's review of FirstEnergy's stipulated electric security plan.<sup>2</sup> FirstEnergy has the burden of proof per section R.C. 4928.143(C)(1).<sup>3</sup>

FirstEnergy must demonstrate that Rider RRS meets the factors established in the *AEP ESP III Case*. The PUCO must determine whether FirstEnergy's ESP is more favorable in the aggregate than a MRO.<sup>4</sup> 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.<sup>5</sup> Because the ESP IV application has been modified, the PUCO must find that the Stipulated ESP passes the PUCO's three-prong test.<sup>6</sup> Finally, 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.<sup>7</sup>

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<sup>2</sup> OCC/NOAC Initial Brief at 8-11. See also RESA Initial Brief at 9-11.

<sup>3</sup> OCC/NOAC Initial Brief at 11.

<sup>4</sup> OCC/NOAC Initial Brief at 8.

<sup>5</sup> OCC/NOAC Initial Brief at 8.

<sup>6</sup> OCC/NOAC Initial Brief at 9-10.

<sup>7</sup> OCC/NOAC Initial Brief at 8-9.

OEG recommended using only the three-prong test to the exclusion of the ESP statute (R.C. 4928) or other PUCO precedent.<sup>8</sup> The PUCO Staff did not have a standard of review section in its brief. But the PUCO Staff analyzed the case only under the PUCO's three-prong test and the AEP ESP III factors, to the exclusion of the ESP vs. MRO test.<sup>9</sup> And FirstEnergy recommended the ESP v. MRO and the PUCO's three-prong test, to the exclusion of the AEP ESP III factors.<sup>10</sup>

The PUCO must rely on the law and PUCO precedent as OCC/NOAC have advised in evaluating FirstEnergy's proposal in order to protect consumers from FirstEnergy's proposal in this case.

### **III. RECOMMENDATIONS**

#### **A. The PUCO should adopt an MRO to give Ohio consumers the benefits of markets.**

FirstEnergy filed its case under R.C. 4928.143 as its fourth electric security plan ("ESP") case, in accordance with R.C. 4928.143.<sup>11</sup> As recommended by OCC/NOAC, 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.<sup>12</sup>

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<sup>8</sup> OEG Initial Brief at 3.

<sup>9</sup> See PUCO Staff Initial Brief.

<sup>10</sup> FirstEnergy Initial Brief at 9-11.

<sup>11</sup> FirstEnergy Initial Brief at 1.

<sup>12</sup> OCC/NOAC Initial Brief at 8.

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.<sup>13</sup>

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.

**B. There are many reasons to reject the Utilities' Electric Security Plan, in favor of a Market-Rate Offer for customers.**

**1. Federal law precludes the PUCO from approving an electric security plan with customers paying for a power purchase agreement (Rider RRS).**

Ignoring both the evidentiary record and governing law, the Ohio Energy Group (“OEG”) asserts that Rider RRS is not preempted.<sup>14</sup> The evidentiary record shows that Rider RRS sets the wholesale price for energy, capacity, and ancillary services received by the PJM market participant – FirstEnergy. Under governing law, a state program that sets the wholesale price for energy, capacity, and ancillary services received by the PJM market participant is preempted. The PUCO cannot approve an electric security plan with Rider RRS.

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<sup>13</sup> *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).

<sup>14</sup> OEG Initial Brief.

- a. OEG ignores the evidentiary record showing that Rider RRS sets the price for energy, capacity, and ancillary services received by the PJM market participant – FirstEnergy – and is therefore preempted.**

OEG ignores the evidentiary record whereby Rider RRS will set the price received by the PJM market participant – FirstEnergy – at the contract price for the PPAs.<sup>15</sup> FirstEnergy Witness Savage admitted that the PPAs and Rider RRS would be “financially neutral” to FirstEnergy.<sup>16</sup> There is one and only one way this could be the case – the amount received by FirstEnergy for the sale into the PJM markets is fixed at the contract price for the PPAs. But such price fixing is preempted.<sup>17</sup>

OEG characterized arguments--that Rider RRS will distort wholesale markets--as “merely theoretical.” OEG asserted that no witness has presented a study showing that “capacity prices [will change] by 1%, or 0.1% or 0.01% [].” OEG also ignores the record.<sup>18</sup> OEG is mistaken on all counts.

First, Rider RRS will set the price received by the PJM market participant – FirstEnergy – at the contract price for the PPAs. Under the federal construct, the price received by the PJM market participant must be set by the market. Thus, market distortion is concrete, not theoretical.<sup>19</sup> Second, both OCC Witness Sioshansi and the Independent Market Monitor testified that Rider RRS will distort PJM markets, and described how it would do so.<sup>20</sup>

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<sup>15</sup> See generally OCC’s Initial Brief at 15-16.

<sup>16</sup> Tr. XVII at 3640 (Savage).

<sup>17</sup> See *PPL EnergyPlus, LLC v. Nazarian*, 753 F.3d 467, 476-77 (4<sup>th</sup> Cir. 2014); *PPL EnergyPlus, LLC v. Solomon*, 766 F.3d 241, 252-54 (3<sup>rd</sup> Cir. 2014).

<sup>18</sup> See OEG’s Initial Brief at 19.

<sup>19</sup> See, e.g., *Nazarian*, 753 F.3d at 479 (explaining that the state program at issue “set the price received at wholesale” and “therefore directly conflict[s] with the auction rates approved by FERC.”)

<sup>20</sup> See OCC’s Initial Brief at 17-18.

That OEG criticizes Intervenors for not quantifying how much Rider RRS will change PJM market prices confirms that OEG does not understand the preemption issue. Because Rider RRS will set the price received by the PJM market participant – FirstEnergy – at the contract price for the PPAs, and distort wholesale markets, it does not matter how much Rider RRS will change PJM market prices.<sup>21</sup> The fact that prices will be fixed, and this will distort PJM markets, is important. The degree of distortion is not the issue.<sup>22</sup> As the Third Circuit has explained: “What matters is that the [state program has] set capacity prices in the first place.”<sup>23</sup>

- b. Rider RRS is preempted because the PUCO would be setting the wholesale price for energy, capacity, and ancillary services received by the PJM market participant – FirstEnergy.**
  - i. Where, as here, a state program fixes the price received by the PJM market participant, the state program is preempted.**

The undisputed evidence is that the PUCO, in setting FirstEnergy’s Rider RRS, would set the price received by the PJM market participant – FirstEnergy – at the contract price for the PPAs. Therefore, the preemption analysis is over. The Fourth Circuit has held that a state program where the PJM market participant (here, FirstEnergy) “receives a fixed sum for every unit of capacity and energy that it clears” is

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<sup>21</sup> See *Solomon*, 766 F.3d at 253.

<sup>22</sup> See *id.* at 252-54; *Nazarian*, 753 F.3d at 476-78.

<sup>23</sup> See *Solomon*, 766 F.3d at 253. What also matters, under well-established Ohio law, is that there must be record support for PUCO decisions. See, e.g., *Tongren v. PUC*, 85 Ohio St. 3d 87 (1999); See also R.C. 4903.09. Although OEG asserts that “cost-based compensation for generation is prevalent in PJM and has been since the inception of PJM’s capacity market in 2007[.]” it does not cite any record support for the assertion. See OEG’s Post-Hearing Brief at 18. In light of *Tongren* and R.C. 4903.09, the PUCO cannot possibly sanction OEG’s assertion. This is especially so since OEG has not provided the PUCO with any evidentiary support that the alleged “cost-based generation” it discusses is in any way comparable to FirstEnergy’s Rider RRS; the nature, extent, and scope of the regulatory structure of the states where the alleged “cost-based generation” operates; or if the alleged “cost-based generation” purportedly bid into PJM markets receives a state-fixed price for its bids regardless of the PJM clearing price, as FirstEnergy would were the PUCO to approve Rider RRS.

preempted.<sup>24</sup> There is preemption because such a program “effectively supplants the rate generated by the auction with an alternative rate preferred by the state.”<sup>25</sup>

In so holding, the Fourth Circuit rejected the argument – similar to that made here by OEG – that the state program at issue did not set the rate because it did not directly affect the terms of any transaction in the federal market.<sup>26</sup> The Court explained that where the market participant “receives a fixed price for every unit of energy and capacity it sells in the PJM auction, regardless of the market price[,]” the fact that the state program “does not formally upset the terms of a federal transaction is no defense, since the functional results are precisely the same.”<sup>27</sup>

Similarly, the Third Circuit held that the state program preempted because, under the program, the PJM market participant would receive a fixed price – not the price generated by the federally sanctioned auction.<sup>28</sup> In so holding, the Third Circuit rejected the argument – similar to that made here by OEG – that the state program at issue was merely a “hedge” to reduce risk.<sup>29</sup> The court agreed with the lower court that the state was essentially setting the price for wholesale energy sales.<sup>30</sup> And in rejecting the argument that the state program should be saved because FERC could still review the reasonableness of the prices set under the state program, the Third Circuit explained:

[T]his argument conflates the inquiry into [the state program’s] field of regulation with an inquiry into the reasonableness of the [state-set rates]. Here, whether the [state-set rates are] ‘just and

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<sup>24</sup> *Nazarian*, 753 F.3d at 476.

<sup>25</sup> *Id.*

<sup>26</sup> *See id.*

<sup>27</sup> *See id.* at 476-77.

<sup>28</sup> *See Solomon*, 766 F.3d at 252.

<sup>29</sup> *See id.* at 252-53.

<sup>30</sup> *See id.* at 253.

reasonable' capacity prices is beside the point. *What matters is that the [state program has] set capacity prices in the first place.*<sup>31</sup>

The state-action of the PUCO approving Rider RRS would fix the price received by the PJM Market participant – FirstEnergy – and is therefore preempted.

- c. A state program, such as Rider RRS, that fixes the price received by the PJM market participant (here, FirstEnergy) is preempted regardless of whether the generation attributes are from new or existing generation.**

OEG's effort to distinguish the Third and Fourth Circuits' decisions because they dealt with new generation, not existing generation, is meritless.<sup>32</sup> Nowhere in either decision did either court base its reasoning on that purported difference (or in any way suggest that their preemption analysis was confined to new generation). Instead, it was the principles just described – state programs setting the price received by the PJM market participant are preempted – that underlay their decisions.<sup>33</sup> Both the Third and Fourth Circuits went out of their way to cut through the type of formalistic distinctions that they were asked them to make to get at the substance of the state

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<sup>31</sup> See *id.* (emphasis added).

<sup>32</sup> See OEG's Post-Hearing Brief at 17.

<sup>33</sup> See *Nazarian*, 753 F.3d at 476-77 (“[W]e conclude that the [state program] is field preempted because it functionally sets the rate that the [PJM market participant] receives for its sales in the PJM auction.”); *Solomon*, 766 F.3d at 252-54. OEG's attempt to distinguish *Nazarian* and *Solomon* based on the Minimum Offer Price Rule (“MOPR”) is also misplaced. Again, neither decision was based on MOPR. The Fourth Circuit did not even discuss MOPR in connection with its field preemption analysis. See *Nazarian*, 753 F.3d at 474-78. Its discussion of MOPR in connection with its conflict preemption analysis resulted from Appellants asserting that MOPR *saved* the state program at issue (an assertion rejected by the court). See *id.* at 479. The Third Circuit in *Solomon* did not even discuss MOPR. See *Solomon*.

programs at issue.<sup>34</sup> The PUCO should do the same here with the formalistic distinctions OEG is trying to make.

**d. State regulation, such as Rider RRS, may not intrude into areas of exclusive federal authority.**

OEG discusses the role states play regarding generation.<sup>35</sup> Both the Third Circuit and the Fourth Circuit acknowledged that states have important roles to play regarding generation. But those roles end – and, in fact, are preempted – where the state program sets the wholesale price received by the PJM market participant.<sup>36</sup> “Even where state regulation operates within its own field, it may not intrude indirectly on areas of exclusive federal authority.”<sup>37</sup>

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<sup>34</sup> See, e.g., *Nazarian*, 753 F.3d at 476-77 (rejecting argument that the state program did not fix the rate that PJM actually paid to the market participant and explaining that “[t]he fact that [the state program] does not formally upset the terms of a federal transaction is no defense, since the functional results are precisely the same.”); *id.* at 476-77 (discussing authority that requires states to give full effect to FERC-mandated wholesale rates on the demand side and concluding that “it stands to reason that they are also required to do so on the supply side.”); *Solomon*, 766 F.3d at 253-54 (rejecting argument that state program was saved because aimed at state’s lawful exercise of authority to promote new generation resources, explaining that state could not do so by regulating wholesale rates); *id.* at 254 (rejecting argument that state program saved because it incorporated, rather than repudiated, PJM clearing prices notwithstanding that the state program “artfully steps around the capacity transactions facilitated by PJM.”).

<sup>35</sup> See OEG Post-Hearing Brief at 17. In this regard, OEG’s citation to 16 U.S.C. sec. 824.o(i)(3) is revealing. The statute reserves to states the authority to “take action to ensure the safety, adequacy, and reliability of electric service *within that State, as long as such action is not inconsistent with any reliability standard . . .*” 16 U.S.C. sec. 824.o(i)(3) (italics added). The statute is not implicated by Rider RRS. The statute applies to local distribution service, *not* wholesale markets or generators. See *id.*; See also 16 U.S.C. 824o(i)(2). As OEG admits, Rider RRS does not apply to local distribution service. OEG Post-Hearing Brief at 19 (“Under the Rider RRS construct, customers will still purchase 100% of their physical generation needs from CRES providers or through the SSO auctions just as they do today.”). Further, the PUCO cannot exercise its authority in a manner preempted by federal law, which it would be were it to approve Rider RRS. See *Nazarian*, 753 F.3d at 477 (“Although states plainly retain substantial latitude in directly regulating generation facilities, they may not exercise this authority in a way that impinges on FERC’s exclusive power to specify wholesale rates.”); *Solomon*, 766 F.3d at 253-54 (acknowledging state authority regarding constructing power plants, but emphasizing that such authority ends with setting the price received by the PJM market participant). For the same reasons, OEG’s reliance on R.C. 4928.02 is misplaced. See OEG’s Post-Hearing Brief at 17. That statute applies to retail service, not wholesale markets or generators. See R.C. 4928.02.

<sup>36</sup> See *Nazarian*, 753 F.3d at 477 (“Although states plainly retain substantial latitude in directly regulating generation facilities, they may not exercise this authority in a way that impinges on FERC’s exclusive power to specify wholesale rates.”); *Solomon*, 766 F.3d at 253-54 (acknowledging state authority regarding constructing power plants, but emphasizing that such authority ends with setting the price received by the PJM market participant).

<sup>37</sup> See *Nazarian*, 753 F.3d at 475-76 (quotations and citation omitted).



**e. Rider RRS is well-within the scope of governing federal law, which shows that Rider RRS is preempted.**

Contrary to what OEG would have the PUCO believe, the alleged limited scope of the Third and Fourth Circuits' decisions does not save Rider RRS.<sup>38</sup> Instead, those decisions show that Rider RRS is preempted.

The Fourth Circuit explained that the state program before it (like the program before the PUCO here):

strikes at the heart of [FERC's] statutory power to establish rates for the sale of electric energy in interstate commerce, by adopting terms and prices set by [the state], not those sanctioned by FERC.<sup>39</sup>

Likewise, the Third Circuit (unlike the Fourth) simply did not feel it necessary to decide if the state program before it was conflict preempted *because it was so clearly field preempted since it ( like Rider RRS) set the price received by the PJM market participant*.<sup>40</sup>

To the degree that the Third Circuit limited the scope of its field preemption analysis, it did so only by making the unremarkable comment that something more than an "incidental effect" on interstate commerce is required.<sup>41</sup> But it, like the Fourth Circuit, found that there was more than an incidental effect on interstate

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<sup>38</sup> See OEG Initial Brief at 18.

<sup>39</sup> *Nazarian*, 753 F.3d at 478. Here, as explained above based on FirstEnergy's own testimony, the price received by the PJM market participant (FirstEnergy) is fixed at the PPAs' contract price, regardless of the market price. See *supra*. The price sanctioned by FERC is the price resulting from the federally sanctioned auctions. See *id.* at 477 (state program preempted because PJM market participant "receives a fixed price for every unit of energy and capacity it sells in the PJM auction, regardless of the market price.").

<sup>40</sup> See *Solomon*, 766 F.3d at 254-55. OEG's block quote is misleading in this respect. See OEG Post-Hearing Brief at 18. The Third Circuit said it had no occasion to conclude that PJM's markets preempt any state act that might intersect a market rule (that is, no occasion to address conflict preemption) because the state program attempted to regulate an exclusively federal field and, thus, was field preempted. See *Solomon*, 766 F.3d at 254-55.

<sup>41</sup> See *id.* at 255.

commerce. The state program before it, like Rider RRS here, set the price received by the PJM market participant and was therefore preempted.<sup>42</sup>

**2. State law precludes the PUCO from adopting FirstEnergy's electric security plan for customers.**

**a. First Energy has the burden of proof under R.C. 4928.143(C), and they have not met that burden.**

Ohio law places the burden of proof on the electric distribution utility for an electric security plan.<sup>43</sup> The PUCO may only approve an ESP if it is “more favorable in the aggregate as compared to the expected results that would otherwise apply under section 4928.142 of the Revised Code.”<sup>44</sup> Therefore, FirstEnergy bears the burden of proving that its ESP is more favorable in the aggregate to customers when compared to an MRO. FirstEnergy failed that burden of proof.

When viewed in the aggregate, on quantitative factors,<sup>45</sup> FirstEnergy’s ESP provides only minimal benefits at great cost to the consumer. (The ESP would fail the test even if qualitative factors were considered. But qualitative factors are not lawful to

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<sup>42</sup> See *id.* at 252-54. OEG asserts that “Rider RRS will not affect either the supply of nor the demand for energy and capacity in the PJM market.” OEG Post-Hearing Brief at 17. Apparently trying to explain itself, OEG later asserts that the “generation supply bid into the PJM markets will not change if the Rider is approved[]” and the PPA Units “will continue to bid into those markets, regardless of whether Rider RRS is approved.” See *id.* at 19. Such assertions are meritless in light of *Nazarian* and *Solomon*. As explained in this section, the courts in each case held that a state program that fixes the price received by the PJM market participant, such as Rider RRS, is preempted. Period. OEG’s assertions are also contradicted by FirstEnergy Witness Moul’s testimony. He said that the “economic viability of the Plants is in doubt.” See Direct Testimony of Donald Moul (FirstEnergy Ex. 28, filed August 4, 2014) at 2:17. According to FirstEnergy Witness Moul, “the plants may not survive to See” better days. See *id.* at 2:21-22. The contradiction, which seriously calls into question the veracity of both OEG’s assertions and FirstEnergy Witness Moul’s testimony, is not the end of the story. Were OEG’s assertions believed, then FirstEnergy’s Rider RRS fails the first factor from the PUCO’s Opinion and Order in AEP Ohio’s ESP III case – financial need. See *In re Ohio Power*, Case No. 13-2385-EL-SSO, Opinion and Order at 25. If the Plants will continue to bid into the PJM markets irrespective of the outcome on Rider RRS, they obviously are not in financial need. Were FirstEnergy Witness Moul’s testimony believed, then there is a likelihood that supply *will* be effected if Rider RRS is not approved, undercutting the very premise of OEG’s assertions.

<sup>43</sup> See R.C. 4928.143(C)(1) (“The burden of proof in the proceeding shall be on the electric distribution utility.”)

<sup>44</sup> R.C. 4928.143(C)(1). Additionally, R.C. 4928.142 describes the Market Rate Offer (“MRO”).

<sup>45</sup> See *infra* at 17.

consider.<sup>46</sup>) As set forth below, the vast majority of FirstEnergy's touted benefits are fundamentally flawed. And the quantitative calculation shows that customers pay \$2.9 billion more under the ESP than they would pay under an MRO..<sup>47</sup> FirstEnergy has not met its burden of proof. In fact, the record shows that the Stipulated ESP is fundamentally flawed and should be rejected by the PUCO.

**b. Adopting FirstEnergy's electric security plan will not result in rates that are just and reasonable for customers consistent with R.C. 4905.22.**

FirstEnergy's electric security plan cannot be approved unless it results in rates that are just and reasonable under R.C. 4905.22.<sup>48</sup> OCC/NOAC demonstrated how<sup>49</sup> grid modernization,<sup>50</sup> Rider GDR,<sup>51</sup> Rider DCR,<sup>52</sup> the transition to a SFV rate design,<sup>53</sup> and certain cash and cash equivalents provided to signatory parties as inducement for settling the case, will not result in rates that are just and reasonable.<sup>54</sup>

P3 and EPSA also make this argument, pointing out because Rider RRS unreasonably transfers market risks to customers and is unlimited, R.C. 4905.22 is violated.<sup>55</sup>

We agree. 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

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<sup>46</sup> See OCC/NOAC Initial Brief at 51.

<sup>47</sup> See OCC/NOPEC Ex. 11 at 27 (Kahal Second Supplemental).

<sup>48</sup> OCC/NOAC Initial Brief at 163-171, See also OMA Initial Brief at 35.

<sup>49</sup> OCC/NOAC Initial Brief at 163-166.

<sup>50</sup> OCC/NOAC Initial Brief at 166.

<sup>51</sup> OCC/NOAC Initial Brief at 167.

<sup>52</sup> OCC/NOAC Initial Brief at 167 -169.

<sup>53</sup> OCC/NOAC Initial Brief at 169-170.

<sup>54</sup> OCC/NOAC Initial Brief at 171.

<sup>55</sup> P3/EPSA Initial Brief at 19.

reasonable. In this case, there are many provisions that would impose costs on customers. And while there are estimates for some of these costs, there are many costs that FirstEnergy has no estimate for. The potential costs to customers are unlimited as P3 and EPSA acknowledge. And a great majority of ESP costs that customers would pay under the stipulated ESP won't be known until some future time and some future proceeding.<sup>56</sup> With no ability for the PUCO to assess the justness and/or reasonableness of FirstEnergy's ESP proposal, the PUCO cannot find that R.C. 4905.22 is met and customers cannot be assured of just and reasonable rates during the eight-year ESP term.

**c. FirstEnergy's electric security plan is not more favorable in the aggregate to customers when compared to a market rate offer.**

FirstEnergy claims that the results of the Stipulated ESP result in a plan that is more favorable in the aggregate than a Market Rate Offer ("MRO").<sup>57</sup> But this is contradicted by the weight of the evidence.

As OCC/NOAC explained in their Initial Brief,<sup>58</sup> the MRO is more favorable in the aggregate than the stipulated ESP. The PUCO should reject FirstEnergy's stipulated ESP IV because it is not more favorable in the aggregate to customers than an MRO. FirstEnergy should be required, instead to file an MRO.

FirstEnergy's evaluation of the ESP versus MRO test is inherently flawed. It places an undue emphasis on the qualitative benefits, and minimizes the quantitative aspect of the analysis.<sup>59</sup> FirstEnergy gives a great deal of weight to a number of

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<sup>56</sup> Those provisions were expounded upon in OCC's/NOAC's Initial Brief, and will not be restated herein. See OCC Initial Brief at 163-171.

<sup>57</sup> FirstEnergy Initial Brief at 11.

<sup>58</sup> See OCC/NOAC Initial Brief at 50-67.

<sup>59</sup> FirstEnergy goes to great lengths to describe the qualitative benefits, but relies mostly on flawed Rider RRS numbers to provide the quantitative benefits. See, generally, FirstEnergy Initial Brief at 17-35.

qualitative factors and claims that these qualitative benefits should be included in the analysis.<sup>60</sup> However, the statute only includes nine “categories of cost recovery.”<sup>61</sup> These “categories of cost recovery” do not include qualitative factors. Under the statute and the precedents established by the Ohio Supreme Court, the comparison between an ESP and an MRO must be on an “aggregate” basis<sup>62</sup> and be a straight calculation of costs, a simple quantitative analysis.

Assuming the PUCO can consider the qualitative benefits, which OCC/NOAC dispute, the PUCO should not rely on FirstEnergy's analysis. FirstEnergy's qualitative analysis is flawed because it wrongly gives FirstEnergy credit for benefits that are in fact harmful to customers. The same can be said for FirstEnergy's flawed quantitative analysis: FirstEnergy is attempting to spin certain harmful provisions as customer benefits. The PUCO should not be fooled.

The PUCO should conduct a purely quantitative analysis of the benefits of the ESP versus an MRO relying on analysis independent of FirstEnergy's numbers. Under such an analysis, it is evident that the ESP versus MRO test does not provide sufficient benefits and is quantitatively more costly to consumers.<sup>63</sup> Therefore, the PUCO should require the Utilities to adopt an MRO.

**i. First Energy overstates and exaggerates the quantitative benefits for customers of the ESP IV.**

FirstEnergy's insufficient analysis of the quantitative benefits of the stipulated ESP are exaggerated. They do not account for the harm that could befall customers if

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<sup>60</sup> See FirstEnergy Initial Brief at 17-18.

<sup>61</sup> See R.C. 4928.143(B); *In Re Columbus Power Co.*, 128 Ohio St.3d 512, 519-520 (2011).

<sup>62</sup> R.C. 4928.143(C)(1).

<sup>63</sup> See OCC Initial Brief at 54.

this ESP was adopted.<sup>64</sup> Furthermore, other quantitative benefits that have been claimed are simply thinly disguised detriments to customers, like Rider DCR.

**(a) FirstEnergy's Retail Rate Stability  
Rider assessment is flawed and  
does not assess the real harm to  
customers.**

FirstEnergy uses witness Judah Rose's energy forecast numbers as inputs into the Rider RRS forecast used in the ESP versus MRO test.<sup>65</sup> Yet these numbers do not capture the totality of costs to be charged to consumers under Rider RRS. OCC/NOPEC witness Wilson's projections provide a much more realistic assessment of the probable costs to customers under Rider RRS. They are based on the most recent data available, unlike witness Rose's stale pre-August 2014 projections. These are projections the Utilities deliberately chose not to update.

**(i) OCC/NOPEC witness  
Wilson provides a more  
realistic assessment of the  
Rate Stability Rider when  
compared to Lisowski.**

OCC witness Wilson provides a more accurate assessment of Rider RRS that shows customers will pay between \$2.7 billion to \$3.6 billion over the eight-year term of Rider RRS.<sup>66</sup> This would force each of FirstEnergy's 1.9 million customers to bear an additional \$800 over the course of Rider RRS.<sup>67</sup>

FirstEnergy witnesses Rose and Lisowski came to sharply different conclusions. They concluded that customers will receive a \$561 million benefit.<sup>68</sup> This is based on Mr.

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<sup>64</sup> See OCC/NOPEC Exhibit Ex. 11 at 27 (Kahal Second Supplemental).

<sup>65</sup> See FirstEnergy Initial Brief at 15.

<sup>66</sup> OCC/NOPEC Ex. 9 at 8 (Wilson Second Supplemental).

<sup>67</sup> OCC/NOPEC Ex. 9 at 8 (Wilson Second Supplemental).

<sup>68</sup> See First Energy Initial Brief at 16.

Rose's forecasts that market prices and capacity prices will increase over the next eight years.<sup>69</sup> However, as OCC witness Wilson pointed out, Mr. Rose's forecasts are mostly based on the assumption that natural gas prices are rising.<sup>70</sup> Wilson goes on to explain how Mr. Rose's assumptions and scenarios are "speculative and unlikely[.]"<sup>71</sup> Furthermore, OCC witness Wilson's analysis provides that even though natural gas use may grow, production will grow to meet demand and there will continue to be moderately priced supply.<sup>72</sup>

This phenomenon has been borne out in the most recent auction for Dominion East Ohio's Standard Choice Offer. Those auction results indicated a retail price adjustment (RPA) that was five cents below the NYMEX market rate for natural gas.<sup>73</sup>

FirstEnergy continues to rely upon Mr. Rose's stale forecast that was produced prior to the Utilities' August 2014 filing. This forecast does not take into account recent forward prices.<sup>74</sup> Unpersuaded by facts, FirstEnergy stands by its forecasts that natural gas prices will increase throughout the eight-year term of the stipulated ESP.

OCC's witness Wilson presented more recent (updated) and accurate forecasts. That cost is incorporated into the quantitative analysis conducted by OCC Witness Kahal. OCC's quantitative analysis, that includes more recent energy forecast data, is the reason why the PUCO should conclude that the ESP is not more favorable to customers than an MRO.

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<sup>69</sup> See First Energy Initial Brief at 13-14.

<sup>70</sup> OCC/NOPEC Ex. 4 at 32-33 (Wilson Direct).

<sup>71</sup> OCC/NOPEC Ex. 4 at 35 (Wilson Direct).

<sup>72</sup> OCC/NOPEC Ex. 4 at 33 (Wilson Direct).

<sup>73</sup> See *In the Matter of the Application of The East Ohio Gas Company d/b/a Dominion East Ohio for Approval of a General Exemption of Certain Natural Gas Commodity Sales or Ancillary Services*, Case No. 07-1224-GA-EXM, Finding and Order at 3 (Feb. 3, 2016).

<sup>74</sup> OCC/NOPEC Ex. 9 at 11 (Wilson Second Supplemental).

**(ii) FirstEnergy's claims are unfounded that the Rate Stability Rider provides a hedge or long-term stability for customers.**

FirstEnergy claims that Rider RRS will provide a hedge for both shopping and non-shopping customers and provide long-term stability for market prices. But price stability can be more easily achieved by staggering and laddering the SSO Competitive Bid Products.

In fact, the PUCO Staff has suggested these approaches as a more effective way to mitigate price volatility when compared to the over-reaching approach of Rider RRS.<sup>75</sup> The PUCO itself has acknowledged that staggering and laddering are tools of price stability for customers.<sup>76</sup>

FirstEnergy's arguments are that staggering and laddering do not benefit shopping customers and that 4-year contracts are not long enough to hedge price volatility.<sup>77</sup> The record reflects that there are even longer contracts -- nine year contracts--that are available to consumers, as OCC/NOPEC Witness testified.<sup>78</sup> The Utilities' arguments should be recognized for what they are -- a convenient way to rationalize a more costly (and ineffective) approach that greatly benefits their affiliate, FES.

If the Commission believes the purchase power arrangement is needed to supplement other tools for stability, it should consider an arrangement where the contract would be competitively bid. Exelon, a competitor to FES, has offered to supply the same

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<sup>75</sup> See PUCO Staff Ex. 12 at 14 (Choueiki Direct).

<sup>76</sup> See *In the Matter of the Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143, in the Form of an Electric Security Plan*, Case No. 13-2385-EL-SSO, Opinion and Order at 24 (Feb. 25, 2015).

<sup>77</sup> FirstEnergy Initial Brief at 22.

<sup>78</sup> Tr. XXII at 4591 (Wilson).



amount of energy and capacity at prices that would save consumers between \$2 billion and \$2.5 billion over proposed Rider RRS term.<sup>79</sup> Dynegy, too has indicated it would, if given the opportunity, participate in a RFP for the capacity and energy that the Utilities wish to include in Rider RRS.<sup>80</sup>

To be clear, OCC/NOAC oppose Rider RRS and would continue to oppose it even if a non-affiliated supplier were substituted for FES as the seller.<sup>81</sup> Nonetheless, these additional offers remove any doubt as to the magnitude of the above-market costs that customers in the FirstEnergy's service territories would bear under Rider RRS. Assuming, *arguendo*, that the PUCO authorizes FirstEnergy to enter into a PPA and charge for Rider RRS, it would indisputably cost Ohioans billions of dollars relative to readily available market alternatives.

**(b) The Delivery Capital Recovery  
Rider will cost customers dearly  
and violates the requirements of  
Ohio law.**

Under the settlement, the Utilities seek to astronomically increase existing rates for Rider DCR. Under the DCR proposal, FirstEnergy customers would pay \$915 million more (over eight years) than they currently pay for increased distribution investment.<sup>82</sup> In total, over the extended eight year period, customers could pay \$2.5 billion under Rider DCR.<sup>83</sup> And they would pay this rider without the PUCO examining distribution rates to determine whether other expenses of the utility (and the rate of

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<sup>79</sup> See Exelon Ex. 4 at 6 (Campbell Second Supplemental).

<sup>80</sup> Dynegy Initial Brief at 20.

<sup>81</sup> The same is true of Exelon Generation Company, LLC ("ExGen"), one of the suppliers that made such an offer. See Exelon Ex. 4 at 2 (Campbell Second Supplemental) (stating that ExGen "is opposed to the [Third] Stipulation and Rider RRS in its entirety (including the [Affiliate PPA]), and believes that the [PUCO] should reject both outright").

<sup>82</sup> See OCC/NOPEC Ex. 11 at 24 (Kahal Second Supplemental).

<sup>83</sup> Tr. XXXVI at 7575 (Mikkelsen).

return) have decreased, thereby offsetting the need for customers to fully fund this massive \$2.5 billion distribution investment.

Conveniently, FirstEnergy claims that Rider DCR is quantitatively neutral when it comes to assessing its costs/benefits under the ESP v. MRO test. This claim is without evidence, and contrary to the record.<sup>84</sup> OCC's analysis shows that Rider DCR would result in an increase of \$90 to \$180 million when compared to the alternative of an MRO combined with a base rate case.<sup>85</sup>

OCC/NOPEC Witness Kahal testified that FirstEnergy has been receiving "substantial earnings on distribution service as compared to their Commission authorized rate of return."<sup>86</sup> The rate of return on Rider DCR was also last determined in 2008. It does not reflect the changes in the capital markets that have occurred since then.<sup>87</sup> In fact if Rider DCR were eliminated, then customers could see an annual savings of \$30 million a year under an MRO when compared to ESP and total savings of \$240 million.<sup>88</sup> Under any analysis, it becomes clear that Rider DCR is not quantitatively neutral under the ESP versus MRO test.

Furthermore, Rider DCR is required to meet the statutory test where a "long-term energy delivery infrastructure modernization plan" must "ensure that customers' and electric distribution utility's expectations are aligned."<sup>89</sup> OCC witness Williams explained that there is no alignment because customers are unwilling to pay more for distribution service, and the utilities want to charge more to increase reliability:

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<sup>84</sup> OCC/NOPEC Ex. 11 at 22 (Kahal Second Supplemental).

<sup>85</sup> OCC/NOPEC Ex. 11 at 22 (Kahal Second Supplemental).

<sup>86</sup> OCC/NOPEC Ex. 11 at 22 (Kahal Second Supplemental).

<sup>87</sup> See OCC Ex. 18 at 10-11 (Effron Direct); OCC Ex. 22 at 26-27.

<sup>88</sup> OCC/NOPEC Ex. 11 at 23 (Kahal Second Supplemental).

<sup>89</sup> R.C. 4928.14(B)(2)(h).

To the extent that the FirstEnergy customer perception survey indicates that the Utility's customers are unwilling to pay more to avoid non-major outages, customers' and FirstEnergy expectations concerning reliability are not aligned. Continuation and expansion of Rider DCR, as proposed by FirstEnergy is not warranted because it contradicts Ohio law.<sup>90</sup>

The PUCO must examine customer perception and compare it to the already reliable FirstEnergy system. To approve Rider DCR, the PUCO would need to find that FirstEnergy's customers are actually seeking even more reliability and are willing to pay for it. It cannot make such a finding based on the evidence (or lack of evidence) that FirstEnergy has provided. Rider DCR violates Ohio law<sup>91</sup> and is a quantitative detriment under the ESP versus MRO test. The PUCO should find that increases to the existing DCR program are not warranted or statutorily justified. And it should fully count the costs in the ESP v. MRO test, as proposed by OCC/NOPEC witness Kahal.

**ii. FirstEnergy claims a series of illusory qualitative benefits that do not benefit consumers.**

If FirstEnergy is allowed to (wrongly) count qualitative benefits under the ESP versus MRO test, the claimed qualitative benefits are not benefits at all. Rather, the purported benefits are harmful to FirstEnergy's customers. Consequently, even if qualitative benefits are counted (and they should not be), the purported qualitative benefits do not make the stipulated ESP more favorable in the aggregate for customers when compared to a MRO. As stated before, the PUCO should reject the Utilities' ESP and require them to file an MRO.

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<sup>90</sup> OCC Ex. 27 at 21 (Williams Public Direct).

<sup>91</sup> R.C. 4928.14(B)(2)(h) (ensuring that customer expectations and utility expectations are aligned).

**(a) The Rate Stability Rider's  
purported benefits to resource  
diversity are overstated.**

FirstEnergy claims that the plants included in the proposed transaction are necessary to ensure resource diversity and prevent Ohio from becoming overly reliant on natural gas. This s argument is simply a “red herring.”<sup>92</sup> As described by P3/EP SA witness Kalt and OCC/NOPEC witness Sioshansi, Ohio is already very dependent on coal-fired generation.<sup>93</sup> The majority of Ohio’s power already comes from coal-fired generation.<sup>94</sup> In fact, if Rider RRS is rejected, and the Rider RRS plants were retired and replaced with natural gas units, then Ohio’s generation mix would be more diverse -- 49% coal and 39% natural gas.<sup>95</sup>

Furthermore, as witness Kalt states, Ohio is part of PJM, and it is the regional portfolio and resource diversity that is important to Ohio.<sup>96</sup> PJM goes to great lengths to ensure reliability and will continue to ensure that reliability will not be sacrificed by a lack of fuel diversity.<sup>97</sup> FirstEnergy’s claimed qualitative benefits--which are provided by the resource diversity of Rider RRS--are self-serving and simply a diversion to seek cover for the subsidization of an affiliated unregulated company.

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<sup>92</sup> See P3/EP SA Ex. 1 at 36 (Kalt Direct).

<sup>93</sup> See P3/EP SA Ex. 1 at 37 (Kalt Direct); OCC/NOPEC Ex. 1 at 29 (Sioshansi Direct).

<sup>94</sup> P3/EP SA Ex. 1 at 37 (Kalt Direct).

<sup>95</sup> OCC/NOPEC Ex. 1 at 29 (Sioshansi Direct); For a greater discussion of this topic see OCC/NOAC Initial Brief at 112-114.

<sup>96</sup> P3/EP SA Ex. 1 at 37-38 (Kalt Direct); for a more in depth discussion of this topic See, supra III.B.3 (b).

<sup>97</sup> P3/EP SA Ex. 1 at 37-38 (Kalt Direct).

**(b) First Energy's other commitment  
to resource diversity are illusory.**

The Third Supplemental Stipulation adds a number of provisions under the dubious heading of "Resource Diversification."<sup>98</sup> These provisions do not provide any increased benefit to customers and should not be considered to be a qualitative benefit under the ESP versus MRO test.

The stipulated ESP IV makes non-binding commitments to reduce CO<sub>2</sub> emissions, to evaluate investments in battery technology, to restore previously deactivated energy efficiency programs, to a customer engagement program, to a modified Demand Side Management ("DSE") rider and to 100MW of new solar or wind technology.<sup>99</sup> However, these new provisions were simply dropped into the stipulation without any detail provided by the utilities. When Ms. Mikkelsen was cross-examined on these issues, it became clear that these provisions are toothless, represent goals and not commitments, and are contingent upon many, many factors.<sup>100</sup>

A good example of this is the provision on battery technology.<sup>101</sup> It lacks any specificity or details. FirstEnergy admits that the battery technology initiatives will be evaluated in a separate and future proceeding.<sup>102</sup> 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.<sup>103</sup> Further details regarding FirstEnergy's battery technology proposal are essentially non-existent in the record.

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<sup>98</sup> See FirstEnergy Initial Brief at 31-32; FirstEnergy Ex. 154 at 11-12 (Third Supplemental Stipulation).

<sup>99</sup> FirstEnergy Ex. 154 at 11-12 (Third Supplemental Stipulation).

<sup>100</sup> See Sierra Club Initial Brief at 118; OEC Initial Brief at 55.

<sup>101</sup> FE Ex. 154 at 11 (Third Supplemental Stipulation).

<sup>102</sup> Tr. XXXVII at 7775-7776 (Mikkelsen).

<sup>103</sup> Tr. XXXVII at 7775-7776 (Mikkelsen).

Indeed, FirstEnergy admits that it does not even know what investments or even potential investments will be included in these battery technology initiatives.<sup>104</sup> In addition, FirstEnergy provides no information about how evaluation of battery resources will be conducted. Any value to this program is likely only to accrue to FirstEnergy as public relations. Customer benefits simply cannot be found here.

As stated in OCC/NOAC's Initial Brief, these provisions were not proven to be of any benefit at all to customers.<sup>105</sup> And while FirstEnergy had the opportunity to prove the benefits, it could not because in truth the words on paper are not commitments. Therefore it would be inappropriate to now consider them a qualitative benefit under the ESP versus MRO analysis.

**(c) This stipulated ESP provides no qualitative benefits to the competitive market and in fact harms the competitive market that is supposed to benefit consumers.**

Harm to consumers has been detailed in our Initial Brief, regarding the problems for competitive markets from the implementation of Rider RRS.<sup>106</sup> By subsidizing a competitive generator, in FES, FirstEnergy makes it more difficult for the unsubsidized participants in the market to compete effectively.<sup>107</sup> This will harm consumers and outweigh any benefits provided by the retail market enhancements described in the stipulation.

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<sup>104</sup> Tr. XXXVII at 7776 (Mikkelsen);ELPC Ex. 28 at Attach. KRR-3, ELPC Set 6-RPD-007 (Rabago Direct).

<sup>105</sup> See OCC/NOAC Initial Brief at 156-157.

<sup>106</sup> See OCC/NOAC Initial Brief at 102-117.

<sup>107</sup> Exelon Ex. 1 at 12 (Campbell Direct).

**(d) FirstEnergy touts a base rate distribution freeze that will harm, not benefit, customers.**

FirstEnergy touts a base distribution freeze as providing “relatively certain, stable and predictable” rates.<sup>108</sup> Under the provision, distribution rates set in 2008 would be in effect until 2024.<sup>109</sup> Instead of benefitting customers, as FirstEnergy claims, it will harm customers. Customers will be paying rates to FirstEnergy that guarantee FirstEnergy will be overearning excess profits at consumer expense. As OCC witness Effron has testified, FirstEnergy is already earning a return in excess of its authorized cost of capital through its 2008 distribution rates. In fact, these are calculated in the table below:<sup>110</sup>

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%

A base distribution rate case freeze when the utility is earning in excess of its earned return on equity only ensures that it will keep reaping profits on the backs of its customers. OCC Witness Kahal testified that the rate freeze means that the PUCO cannot examine (and adjust) distribution rates that customers will pay for sixteen years:

A base rate case investigation is long overdue for the FE Utilities. The new Stipulation means that there will be no detailed rate case-type review of cost of service and rate of return for at least 16 years, i.e., 2008 to 2024. Such a delay in examining the reasonableness of distribution rates and rate of return is an

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<sup>108</sup> FirstEnergy Initial Brief at 18.

<sup>109</sup> FirstEnergy Initial Brief at 18.

<sup>110</sup> OCC Ex. 18 at 13-14 (Effron Direct). This table is simply a representation of data that is stated in OCC Ex. 18 (Effron Direct).

improper departure from cost-based ratemaking and is unfair to customers.<sup>111</sup>

FirstEnergy claims that a base distribution freeze benefits customers by providing stability and consistency. But FirstEnergy is consistently overcharging its customers for these distribution costs. Rates should be decreased -- not kept at the same level.

**(e) Straight-Fixed Variable rate  
design will harm, not benefit,  
customers.**

There is a sad irony for Ohioans in FirstEnergy's new-found attraction to straight-fixed variable ("SFV") rate design. No less than 4 years ago FirstEnergy vehemently fought against SFV and high fixed charges to customers. FirstEnergy's comments at the PUCO are replete with claims that SFV rate design will harm customers and should not be adopted.<sup>112</sup> But regulatory principles quickly give way to profit objectives for FirstEnergy.

To barter for a PPA, FirstEnergy largely ignores its previous comments against SFV. Instead, it claims that it is offering a transition to straight-fixed variable rate design that is consistent with the principle of gradualism,<sup>113</sup> FirstEnergy's new-found interest in SFV rate design does not overcome the serious issues raised by it and others previously at the PUCO.<sup>114</sup>

FirstEnergy previously articulated that shifting cost recovery using straight-fixed variable rate design could harm at-risk populations by placing a greater burden on low-income, low-use customers and increasing the costs to the USF Rider.<sup>115</sup> This is

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<sup>111</sup> OCC/NOPEC Ex. 11 at 25 (Kahal Second Supplemental).

<sup>112</sup> See OCC/NOAC Initial Brief at 160-163.

<sup>113</sup> See FirstEnergy Initial Brief at 32-33.

<sup>114</sup> OCC Ex. 35 at Attachment SJR 8, page 7-8 (Rubin Supplemental).

<sup>115</sup> OCC Ex. 35 at Attachment SJR 8, page 7-8 (Rubin Supplemental).



inconsistent with the policies articulated in Ohio law.<sup>116</sup> SFV also undermines price signals and disincentivizes conservation and peak-demand reduction.<sup>117</sup> Additionally, SFV places a greater burden on low-usage customers.<sup>118</sup> OCC has discussed these harms at length in its Initial Brief.<sup>119</sup> These are not benefits of the stipulated ESP. It would be unreasonable for the PUCO to adopt this provision.

**(f) FirstEnergy’s other claimed qualitative benefits are overstated or non-existent for customers.**

In addition to the dubious benefits discussed above, FirstEnergy claims a number of additional qualitative benefits that follow the pattern of being either non-existent, overstated or harmful to customers. These various touted “benefits” include avoided transmission costs,<sup>120</sup> grid modernization,<sup>121</sup> increased environmental compliance,<sup>122</sup> and economic development.<sup>123</sup> These supposed benefits are discussed in greater length at other portions in the brief. These provisions do not provide the alleged qualitative benefits to consumers and should be discounted as part of the ESP versus MRO test.

With almost no qualitative benefits, a large amount of qualitative detriments, and a quantitative cost of nearly \$3 billion,<sup>124</sup> the PUCO should reject the stipulated ESP and require FirstEnergy to file an MRO.

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<sup>116</sup> OCC Ex. 35 at Attachment SJR 8, page 7-8 (Rubin Supplemental).

<sup>117</sup> OCC Ex. 35 at Attachment SJR 8, page 6 (Rubin Supplemental).

<sup>118</sup> OCC Ex. 35 at Attachment SJR 8, page 7-8 (Rubin Supplemental).

<sup>119</sup> See OCC/NOAC Initial Brief at 160-162.

<sup>120</sup> See, *supra*, III.B.3.b.

<sup>121</sup> See, *supra*, III.B.4.a.ii.

<sup>122</sup> See, *supra*, III.B.3.c.

<sup>123</sup> See, *supra*, III.B.3.d.

<sup>124</sup> See OCC/NOPEC Ex. 11 at 27 (Kahal Second Supplemental).

**d. The power purchase agreement (Rider RRS) is not an authorized provision that FirstEnergy can use to charge customers under Ohio law.**

In responding to the third prong of the stipulation (that the stipulation does not violate principles and practices), FirstEnergy, OEG, and NUCOR assert that Rider RRS is authorized under Ohio law.<sup>125</sup> These signatory parties rely heavily on the PUCO's Order in AEP's recent electric security plan case, Case No. 13-2385-EL-SSO.<sup>126</sup> That reliance is misplaced. The PUCO has evaded Supreme Court review to date, because it has delayed issuing a ruling on rehearing.

OCC, along with others (including IEU Ohio, OPAC, IGS<sup>127</sup>), filed an Application for Rehearing asking the PUCO to grant rehearing on numerous PUCO findings related to AEP Ohio's purchase power agreement rider ("PPA Rider").<sup>128</sup> Included in OCC's application for rehearing were claims that the PUCO erred in determining the PPA Rider is a "financial limitation on customer shopping" (under R.C. 4928.143(B)(2)(d)) and that the PPA rider provides rate stability or certainty as required under that statute.<sup>129</sup> IEU made similar and additional claims against AEP Ohio's PPA Rider.<sup>130</sup>

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<sup>125</sup> See FirstEnergy Initial Brief at 115-121; OEG Initial Brief at 9; NUCOR Initial Brief at 28.

<sup>126</sup> *In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to 4928.143, Revised Code in the Form of an Electric Security Plan*, Case No. 13-2385-EL-SSO, Opinion and Order (Feb. 25, 2015).

<sup>127</sup> IEU Ohio, OPAC and IGS have apparently overcome their opposition and objections to purchase power agreements. IEU filed a letter of non-opposition to the stipulations. See correspondence of May 28, 2015. OPAC is a signatory party to the Third Supplemental Stipulation. And IGS reached a side agreement with FirstEnergy.

<sup>128</sup> *In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to 4928.143, Revised Code in the Form of an Electric Security Plan*, Case No. 13-2385-EL-SSO, OCC Application for Rehearing (Mar. 27, 2015); IEU Application for Rehearing (Mar. 27, 2015).

<sup>129</sup> *In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to 4928.143, Revised Code in the Form of an Electric Security Plan*, Case No. 13-2385-EL-SSO, OCC Application for Rehearing at 2.

<sup>130</sup> *Id.*, IEU Application for Rehearing at 11-52.

Initially, the PUCO granted OCC's (and others') application for rehearing, to allow it to further consider matters specified in the applications.<sup>131</sup> In a subsequent entry on rehearing ("Second Entry on Rehearing"), issued May 28, 2015, the PUCO determined that it "will defer ruling on the assignments of error related to the PPA at this time."<sup>132</sup> OCC (and others) applied for rehearing on the PUCO's decision to defer ruling on the earlier applications for rehearing of the PPA Rider issues.<sup>133</sup> The PUCO (in a Third Entry on Rehearing) granted rehearing, once again, to allow further consideration on matters raised in the applications.<sup>134</sup> Since July 22, 2015, no subsequent PUCO entry has been issued to resolve the pending issues on rehearing.

Nonetheless, three notices of appeals were filed of the PUCO's decision. IEU Ohio, OCC, and ELPC (together with OEC and EDF) all filed appeals. The PUCO however, moved to dismiss the appeals, arguing, inter alia, that its decision is an "interim Order" and does not reflect its "ultimate decision."<sup>135</sup> The Supreme Court agreed, and dismissed all three appeals.<sup>136</sup>

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<sup>131</sup> *In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to 4928.143, Revised Code in the Form of an Electric Security Plan*, Case No. 13-2385-EL-SSO, Entry on Rehearing (Apr. 22, 2015).

<sup>132</sup> *In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to 4928.143, Revised Code in the Form of an Electric Security Plan*, Case No. 13-2385-EL-SSO, Second Entry on Rehearing at ¶10 (May 28, 2015).

<sup>133</sup> *In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to 4928.143, Revised Code in the Form of an Electric Security Plan*, Case No. 13-2385-EL-SSO, OCC Application for Rehearing (June 29, 2015).

<sup>134</sup> *In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to 4928.143, Revised Code in the Form of an Electric Security Plan*, Case No. 13-2385-EL-SSO, Third Entry on Rehearing (July 22, 2015).

<sup>135</sup> *In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to 4928.143, Revised Code in the Form of an Electric Security Plan*, Sup. Ct. 2015-1225, Motion to Dismiss at 4, 6 (Sept. 4, 2015).

<sup>136</sup> *In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to 4928.143, Revised Code in the Form of an Electric Security Plan*, Sup. Ct. 2015-1225, Order (granting motion to dismiss) (Oct. 28, 2015).

The AEP ESP Order cannot be relied upon, given the PUCO's rulings, and the ruling of the Ohio Supreme Court. Thus, the PUCO cannot give its AEP Ohio Order the precedential weight urged by the signatory parties. The signatory parties' claims must stand on their own, based upon the record developed in this case. And the claims, considered on their own, must fail.

While OCC/NOAC concede that the Rider RRS is likely to qualify as a "term, condition or charge" under R.C. 4928.143(B)(2)(d), it fails to meet the other two criteria under R.C. 4928.143(B)(2): that it is a charge that is defined under the statute,<sup>137</sup> and it stabilizes and provides certainty regarding retail electric service.

The signatory parties allege that Rider RRS is a "limitation on customer shopping," and is related to "bypassability" and "default service."<sup>138</sup> These, however, are not cogent arguments. The PUCO should not accept them. Additionally, the PUCO should not accept the Utilities' claim that Rider RRS will stabilize and provide certainty regarding retail electric service. Finally, the PUCO should reject claims that Rider RRS may be included in an electric security plan because it is a provision "under which the electric distribution utility may implement economic development" under R.C. 4928.142(B)(2)(i). These claims will be discussed in detail below.

**i. Rider RRS is not a financial limitation on shopping by customers**

The signatory parties spend very little time explaining how Rider RRS constitutes a "limitation on customer shopping" under R.C. 4928.143(B)(2)(d). Apart from discussing the non-final AEP Ohio Order, there is no record cite that supports this claim.

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<sup>137</sup> The charge must relate to "limitations on customer shopping for retail electric generation service, bypassability, standby, back-up, or supplemental power service, default service, carrying costs, amortization periods, and accounting or deferrals, including future recovery of such deferrals."

<sup>138</sup> OEG Initial Brief at 8-10, FirstEnergy Initial Brief at 117-122.

While FirstEnergy provides a transcript cite (Tr. I at 43;18-44)<sup>139</sup> for its claim, that cite only provides Ms. Mikkelsen's thoughts on how Rider RRS amounts to a charge. Ms. Mikkelsen never testified that Rider RRS is a "limitation on customer shopping."

The PUCO is bound to make decisions here, based on the record developed in this proceeding. See R.C. 4903.09 requiring the PUCO to set forth "findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact." There are no facts or evidence in the record here that Rider RRS is a "limitation on customer shopping." Instead there are legal arguments, presented for the first time on brief, unsupported by facts or testimony. The PUCO should on this basis alone reject Rider RRS. But there are also more reasons to do so.

Key to the determination of whether Rider RRS constitutes a "limitation on customer shopping" is the interpretation of these words. Specifically, the issue is whether the phrase "limitation on customer shopping" contemplates a "physical" or a "financial" limitation.

Resolution of this issue requires a determination of legislative intent. In this regard, R.C. 1.42 provides:

Words and phrases shall be read in context and construed according to the rules of grammar and common usage. Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly.

Initially, it must be observed that the Ohio Revised Code, as well as the Commission's and Ohio Supreme Court's precedent, are replete with references that use the term

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<sup>139</sup> FirstEnergy Initial Brief at 117.

“shopping” synonymously with the word “switching.”<sup>140</sup> Common usage dictates that the term “customer shopping” refers to customers who physically “switch” to marketers.

To accept FirstEnergy's interpretation, the PUCO is required to read the word “financially” into the statute. Indeed, in an attempt to make any sense of FirstEnergy's interpretation, the PUCO would have to change the entire wording of the statute from permitting “limitations of customer shopping” to permitting a **financial restraint on complete reliance on the retail market.**

Recently addressing the rules of statutory construction in PUCO proceedings, the Ohio Supreme Court noted that it must rely upon the specific language in the statute and must give effect to those words:

When interpreting a statute, a court must first examine the plain language of the statute to determine legislative intent. *Cleveland Mobile Radio Sales, Inc. v. Verizon Wireless*, 113 Ohio St.3d 394, 2007-Ohio-2203, 865 N.E.2d 1275, ¶ 12. The court must give effect to the words used, **making neither additions nor deletions from the words chosen by the General Assembly.** *Id.* See, also, *Columbia Gas Transm. Corp. v. Levin*, 117 Ohio St.3d 122, 2008-Ohio-511, 882 N.E.2d 400, ¶ 19. Certainly, had the General Assembly intended to require that electric distribution utilities prove that carrying costs were “necessary” before they could be recovered, it would have chosen words to that effect.<sup>141</sup> [Emphasis added.]

FirstEnergy's addition of the word “financial” to the statute contravenes the statute's plain meaning. Thus, the proper interpretation of the phrase at issue is that an ESP may include a provision relating to limitations on customers switching to a marketer. FirstEnergy's interpretation that permits the statute to be expanded to include a “financial” limitation on customer shopping contravenes legislative intent, as determined

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<sup>140</sup> See, e.g., R.C. 4928.40(A)(1); *In Re Ohio Consumers' Counsel*, 109 Ohio St.3d, 206-Ohio-2110, 847 N.E.2d 1184, ¶ 21; *In Re Elyria Foundry*, 114 Ohio St.3d 305, 2007-Ohio-4146, 871 N.E.2d 970, at ¶ 72.

<sup>141</sup> *In Re Columbus S. Power*, 138 Ohio St.3d 448, 2014-Ohio-462, 9 N.E.3d 1064, ¶ 26.

by R.C. 1.42, and is unlawful. And since a "financial limitation on customer shopping" is not a term expressly included in the items listed in R.C. 4928.143(B)(2)(d), it cannot justify including it in an electric security plan. See, e.g., *In re Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655.

**ii. Rider RRS is not related to bypassability**

In another attempt to shoehorn Rider RRS into the statute, FirstEnergy argues that Rider RRS is related to "bypassability."<sup>142</sup> The term "bypassability" is not defined by the General Assembly. But if a statute is to be construed, it must be construed in a reasonable manner. That means the Ohio's Rules of Statutory Construction and the case law that has developed under those rules should be followed.

One of Ohio's Rules of Statutory Construction is R.C. 1.49. Under R.C. 1.49 when a statute is ambiguous, a court or agency may consider, inter alia, the consequences of a particular construction in determining the intent of the Legislature. If the interpretation of the statute produces unreasonable or absurd results, it should be avoided. *State ex rel. Bolin v. Ohio Environmental Protection Agency*, 82 Ohio App.3d 410, 413, 612 N.E.2d 498 (1992) (holding that a strong presumption exists in favor of statutory construction which avoids absurd results).

Another Ohio Rule of Statutory Construction is R.C. 1.47. Under R.C. 1.47, the entire statute is intended to be effective.

FirstEnergy urges the PUCO to find that Rider RRS is related to bypassability because it is a non-bypassable charge. But since all utility charges must either be "bypassable" or "non-bypassable," under FirstEnergy's interpretation, all charges would relate to "bypassability."

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<sup>142</sup> FirstEnergy Initial Brief at 118.

This could not be what the General Assembly intended. Otherwise it could lead to unreasonable or absurd results rendering subsection (d) and the entirety of R.C. 4928.143(B)(2) virtually meaningless, contrary to R.C. 1.47 and 1.49. FirstEnergy's interpretation, if accepted, would open the floodgates to all sorts of charges. This is contrary to the General Assembly's express intent (as construed by the Ohio Supreme Court)<sup>143</sup> to place limits on the provisions that an electric utility may include in its electric security plan. For these reasons, FirstEnergy's argument that Rider RRS relates to bypassability should be rejected.

**iii. Rider RRS is not related to default service provided to customers.**

FirstEnergy also claims that Rider RRS is related to "default service" under R.C. 4928.143(B)(2)(d), " i.e. the companies proposed SSO."<sup>144</sup> But this interpretation is wrong because it assumes standard service offer means the same thing as default service, when it does not.

Both the PUCO<sup>145</sup> and the Ohio Supreme Court<sup>146</sup> have recognized that "default service" is related to a utility's provider of last resort obligations as provided in R.C. 4928.14. Specifically, the Court explained that provider of last resort costs are "charges incurred by an incumbent electric distribution utility for risks associated with its statutory obligation under R.C. 4928.14(C), as the default provider, or provider of last resort, for

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<sup>143</sup> *In re Application of Columbus Southern Power Company, et al.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶32.

<sup>144</sup> FirstEnergy Initial Brief at 119.

<sup>145</sup> *In re the Application of Columbus Southern Power Company for Approval of an Electric Security Plan*, Case No. 08-917-EL-SSO, Order on Remand at 18 (Oct. 3, 2011).

<sup>146</sup> *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.*, 117 Ohio St.3d 486, 2008-Ohio-990, 885 N.E.2d 195; *In re Application of Columbus Southern Power Company, et al.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶¶22-30; *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 114 Ohio St.3d 340, 2007-Ohio-4276, 872 N.E.2d 269, ¶¶18-26.



customers who opt for another provider who then fails to provide service."<sup>147</sup> As also noted by the Court, default service (provider of last resort) can have competitive and non-competitive components.<sup>148</sup>

A standard service offer is a term that is much more than "default service." In R.C. 4928.141, the General Assembly defined the standard service offer in broad terms as "all *competitive* retail electric services necessary to maintain essential electric service to customers, including a firm supply of electric generation service." (emphasis added). Nonetheless, despite its broad nature, it can only consist of "competitive" components of retail electric service, unlike default service.

The two terms -- standard service offer and default service -- are not synonymous. But FirstEnergy's would have the PUCO treat them that way. This defies the clear definitions of those terms under the statute. Default service under the statute means provider of last resort. Default service does not mean the standard service offer.

And FirstEnergy has made no claim that the costs charged to customers though Rider RRS are comprised of cost that FES incurs to be the provider of last resort. Yet the PUCO has ruled that in order to collect POLR charges, the utility must produce measurable and verifiable evidence of its provider of last resort costs.<sup>149</sup>

There is no statutory justification for approving Rider RRS under R.C. 4928.143(B)(2)(d). FirstEnergy's arguments should be rejected.

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<sup>147</sup> *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 114 Ohio St.3d 340, 2007-Ohio-4276, 872 N.E.2d 269, ¶4, footnote 2 (citation omitted).

<sup>148</sup> *Indus. Energy Users-Ohio v. Pub. Util. Comm.*, 117 Ohio St.3d 486, 492, 2008-Ohio-990, 885 N.E.2d 195, ¶27 (Court found that the PUCO may allow a distribution utility's non-competitive costs associated with POLR, and determined that the PUCO's approval must be given for those charges under R.C. Chapters 4905 and 4909).

<sup>149</sup> See *In re: the Application of Columbus Southern Power Company for Approval of an Electric Security Plan*, Case No. 08-917-EL-SSO, et al., Order on Remand at 29 (Oct. 3, 2011) (holding that POLR costs should be readily measurable and verifiable).

**iv. The Retail Rate Stability Rider does not have the effect of stabilizing or providing certainty for customers regarding retail electric service.**

As discussed supra, Rider RRS is not a provision related to limitations on customer shopping, default service, or bypassability. Assuming the PUCO determines otherwise, despite OCC/NOAC's arguments to the contrary, FirstEnergy must still prove that the rider stabilizes or provides certainty for customers regarding retail electric service. R.C. 4928.143(B)(2)(d). It does not, as discussed in OCC/NOAC's Initial Brief.<sup>150</sup>

Rather than promote stable rates, Rider RRS introduces volatility to rates by adding an unreliable component to SSO rates.<sup>151</sup> This is because changes in Rider RRS may move in the same direction as the SSO rates (set by the market) due to the reconciliation mechanism.<sup>152</sup> The so-called stability is only achieved on the chance Rider RRS moves in the opposite direction of market rates.

And as explained, under the current competitive bid process, the rates SSO customers pay are already stable, as they reflect forward prices over one to three-year periods.<sup>153</sup> OCC/NOPEC also explained<sup>154</sup> (and the PUCO Staff acknowledges<sup>155</sup>) there

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<sup>150</sup> OCC/NOAC Initial Brief at 83-92.

<sup>151</sup> OCC/NOAC Initial Brief at 85.

<sup>152</sup> OCC/NOAC Ex. 4 at 50-51 (Wilson Direct).

<sup>153</sup> OCC/NOPEC Ex. 4 at 49 (Wilson Direct).

<sup>154</sup> OCC/NOAC Initial Brief at 85-86.

<sup>155</sup> PUCO Staff Ex. 5 at 4 (Strom Direct).

are current tools (laddering and staggering) that provide stable rates without huge costs to customers.<sup>156</sup> Rider RRS could only be considered at best a supplement to those tools.

And even if Rider RRS is found to be a tool for stable and certain rates for customers, contrary to OCC/NOAC/NOPEC's arguments otherwise, the question the PUCO must grapple with is: Is the price for stability too much for customers to pay?

Yes. The price for stability, including all the future risks the utilities seek to shift onto customers, away from shareholders, is much too high for customers. Quantitatively, our best estimate is that customers will pay \$3.6 billion above market prices for Rider RRS. This cost alone (without any of the other ESP charges) translates to \$800 per residential customer over the term of the electric security plan. And this estimate does not (and cannot) possibly account for costs associated with pending federal environmental regulations—costs Professor Ferrey extensively discussed.<sup>157</sup> Professor Ferrey warned that now is not the time to make a long-term commitment to purchase coal-fired power, especially on a cost-plus basis, as required under Rider RRS.<sup>158</sup> The PUCO should not turn a deaf ear to consumers' cries for reasonable and affordable rates, (what consumers are entitled to under the law and what they will not get if Rider RRS is adopted).

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<sup>156</sup> The Commission itself has found that staggering and laddering provide a significant hedge against price volatility to rate stability. *In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to 4928.143, Revised Code in the Form of an Electric Security Plan*, Case No. 13-2385-EL-SSO, Opinion and Order at 25 (Feb. 25, 2015) .

<sup>157</sup> OCC/NOPEC Ex. 20 at 19 – 25 (Ferrey Direct).

<sup>158</sup> OCC/NOPEC Ex. 20 at 19.

**v. The Retail Rate Stability Rider is not a provision that qualifies as an economic development program under R.C. 4928.143(B)(2)(i).**

FirstEnergy claims that the economic stability program under the stipulated electric security plan falls under R.C. 4928.143(B)(2)(i) by supporting economic development.<sup>159</sup> In other words FirstEnergy claims that Rider RRS is permitted under Ohio law because it qualifies as an economic development program under the statute. FirstEnergy claims that under the “Economic Stability Program” (AKA the Retail Stability Rider) retail electric prices from the RRS plants will produce \$561 million in benefits to customers (derived from Ms. Mikkelsen’s projections under the ESP v. MRO analysis).<sup>160</sup> FirstEnergy also claims that Ohio’s economy will benefit from the program and it will lead to job retention and creation.<sup>161</sup> FirstEnergy alleges that the rate stabilizing and cost avoidance effects (all which OCC/NOAC dispute) will spur economic development. Indeed, FirstEnergy claims that the Rider RRS plants themselves are “engines of economic development.”<sup>162</sup>

But, the precise wording under R.C. 4928.143(B)(2)(i) must be considered. Under that section a utility may include “[p]rovisions under which the electric distribution utility *may implement* economic development, job retention, and energy efficiency programs\*\*\*.” The plain language provides for new economic development—economic development that a utility “may implement,” not existing economic development.

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<sup>159</sup> FirstEnergy Initial Brief at 122.

<sup>160</sup> Citing, in part, FirstEnergy Ex. 155 at 12 (Mikkelsen Fifth Supplemental).

<sup>161</sup> FirstEnergy Initial Brief at 122.

<sup>162</sup> FirstEnergy Initial Brief at 123.

The engines of economic development here, as acknowledged by FirstEnergy, are the Rider RRS plants themselves. But those plants are not new tools of economic development. They are tools that exist today. There is nothing new about these plants.

And while there are statutory provisions that permit plants (and the costs of plants) to be included in an electric security plan (see, e.g., R.C. 4928.143(B)(2)(c), R.C. 4928.143(B)(2)(i)), Rider RRS is not one of them. Rather, it is plainly related to *new* economic development, not current economic development that has been repackaged and given a fancy title like “the Economic Stability Program.” The PUCO should not be fooled by slick packaging FirstEnergy offers that masks the true nature of its proposal. That proposal is to collect billions of dollars from customers for FirstEnergy's old, uneconomic coal plants and to shift all unwanted risks and unidentified future costs away from shareholders onto customers. The PUCO should instead focus on the letter of the law that does not support FirstEnergy's proposal.

**3. Adoption of an electric security plan containing the Retail Rate Stability Rider is inconsistent with the AEP ESP III Order.**

In *AEP ESP III*<sup>163</sup> the PUCO granted Ohio Power Company's (“AEP Ohio”) request to establish a Rider (“PPA Rider”) set at zero for a purchase power agreement similar to FirstEnergy's proposed Rider RRS.<sup>164</sup> The PUCO further identified a set of conditions, which AEP Ohio had to satisfy before the PUCO would approve cost recovery for the PPA Rider.<sup>165</sup> As discussed *supra*, the AEP ESP III Order should not be relied upon,

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<sup>163</sup> *In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to § 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 13-2385-EL-SSO, Opinion and Order at 24-25 (Feb. 25, 2015) (“AEP ESP III”).

<sup>164</sup> See *AEP ESP III* at 25.

<sup>165</sup> See *AEP ESP III* at 25.

given the PUCO's rulings, and the ruling of the Ohio Supreme Court. It should not be given precedential weight because it lacks finality.

However, the PUCO has determined that the factors it identified in the AEP ESP III Order should be addressed by parties in this case.<sup>166</sup> Accordingly, parties including OCC/NOPEC submitted testimony addressing those four factors. But OCC/NOPEC, in testimony<sup>167</sup> and OCC/NOAC in its Initial brief,<sup>168</sup> urged using a wider scope of factors to evaluate Rider RRS. The following arguments address the factors delineated in AEP ESP III Order. But those factors are inadequate for consumer protection. And our arguments are made with the fundamental caveat that our views on the AEP Order (as to all PPA issues) include that it is non-final and thus not "precedent."

FirstEnergy states that the four AEP ESP III Order factors “are to be considered if the net benefits of the proposed hedge, standing alone, are insufficient to establish that the rider would have the effect of stabilizing retail electric service.”<sup>169</sup> This is not true. Indeed, FirstEnergy does not cite to any case law or identify any other support for this assertion. As Staff explains, the AEP ESP III Order factors “are a set of necessary conditions that, at a minimum, must be satisfied in order for the Commission to consider approving a PPA Rider charge.”<sup>170</sup> FirstEnergy has failed to satisfy any of these required factors and therefore its Rider RRS should not be approved by the PUCO.

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<sup>166</sup> See PUCO Entry at 2-4 (Mar. 23, 2015).

<sup>167</sup> See OCC/NOPEC Ex. 2 (Sioshansi Supplemental).

<sup>168</sup> See OCC/NOAC Initial Brief at 135-146.

<sup>169</sup> FirstEnergy Initial Brief at 124.

<sup>170</sup> Staff Initial Brief at 13.

**a. FirstEnergy did not satisfy the first factor in the AEP ESP III Order because the Sammis and Davis-Besse plants “do not have a financial need for Rider RRS.”**

The first AEP ESP III Order factor is whether there is a financial need for the PPA.<sup>171</sup> FirstEnergy alleges that it satisfies this condition for several reasons.<sup>172</sup> First, FirstEnergy and other signatories allege that the economic viability of the plants is in doubt<sup>173</sup> due to short term needs of the plants. FirstEnergy attempts to support its argument by claiming that “revenues have been at historic lows and are insufficient to cover the Plants’ costs, and thus to continue to operate the Plants, and make necessary investments.”<sup>174</sup> FirstEnergy claims that the projected short-term losses that the Plants will experience may require the Plants to close even if long-term projections of market prices show significant increases.<sup>175</sup>

FirstEnergy apparently defines financial need as being related not just to the Rider RRS units, but more generally to the financial needs of FirstEnergy Solutions. Mr. Moul testified that sufficient revenues mean that FES would be collecting fully loaded costs.<sup>176</sup> The fully loaded costs of FES include, as part of the Rider RRS proposal, a guaranteed return subsidized by captive customers.

But, there are a number of reasons why FirstEnergy's claims should be rejected. One primary reason is that financial need is not an appropriate factor for the PUCO to

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<sup>171</sup> See *AEP ESP III* at 25.

<sup>172</sup> FirstEnergy Initial Brief at 125-128.

<sup>173</sup> FirstEnergy Initial Brief at 125; Material Sciences Corp. Initial Brief at 4.

<sup>174</sup> FirstEnergy Initial Brief at 125.

<sup>175</sup> FirstEnergy Initial Brief at 125.

<sup>176</sup> Tr. XI at 2191(Moul).

consider when evaluating Rider RRS.<sup>177</sup> This factor suggests that unregulated generators in the state would be able to recover their costs based on “financial need.” Cost recovery based on financial need is inconsistent with a restructured market that aims to foster competition. Ohio law, as it stands today, establishes a restructured market that aims to foster competition.

Financial need is not an appropriate factor to consider under a regime where competition and not regulation is the law. In competitive markets returns are not guaranteed -- they are earned if entities are successful in the competitive market. OCC Witness Dr. Rose testified in competitive markets if a generating unit cannot clear its output in the wholesale market (PJM), by producing a price-competitive product, then it will be replaced by lower offers for generation in the wholesale market and by other retail suppliers in the retail market.<sup>178</sup>

But in this case, rather than leaving the fate of Rider RRS plants to the market, Rider RRS would bailout the inefficient generation. Under Rider RRS, these Plants would earn above-market revenues through a subsidized charge to captive monopoly distribution customers. The PUCO should not be persuaded that FirstEnergy's unregulated affiliate, FES, must receive a cost plus return guarantee for deregulated power plants it owns because FES is concerned about its earnings.<sup>179</sup>

Assuming arguendo that financial need should be considered, FirstEnergy's claims of financial need should be rejected. FirstEnergy failed to provide any evidence demonstrating that the financial condition of FES would preclude it from withstanding a short-term loss on the Plants, in order to reap a long-term gain (provided FirstEnergy

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<sup>177</sup> OCC Ex. 25 (Dr. Rose Direct ).

<sup>178</sup> OCC Ex. No. 26 at 6 (Rose Supplemental).

<sup>179</sup> See Tr. X at 2203 (Moul).



witness Mr. Judah Rose is right). Instead, the record reflects that FES is well positioned to withstand the short term losses that Mr. Rose projects for the units.

FirstEnergy is a master of double-speak. While it pleads for money from the PUCO, it presents a far different (rosier) financial picture to Wall Street and the investment community.

For example, in the 2014 FirstEnergy Corp. Annual Report, FirstEnergy proclaims that it projects that its competitive business (generation provided by FES) will be self-sustaining over the short term (2015-2018), contradicting its entire case before the PUCO:

FirstEnergy continues to focus on maintaining the value of its competitive business given continued challenging conditions within the PJM market. The business is projected to be self-sustaining over the next several years, with positive cash flow over the 2015-18 period. While it cannot predict if or when power price recovery may occur, FirstEnergy believes it has taken appropriate action over the last several years to reposition this business for such recovery.<sup>180</sup> CES [Competitive Energy Services] expects to sell its output through a combination of retail and wholesale sales, while maintaining 10-20 million MWHs for spot wholesale sales in order to optimize risk management and market upside opportunities.<sup>181</sup>

In addition, in that same annual report, FirstEnergy detailed its 2015-2018 Internal Cash Flow Improvement Program. Mr. Moul provided detailed testimony, on cross examination, on that program.<sup>182</sup> He explained that FirstEnergy Corporation has undertaken an Internal Cash Flow Improvement project which anticipates cash flow

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<sup>180</sup> The repositioning referred to was discussed at length with Mr. Moul. See Tr. X at 2203- 2214. The repositioning refers to FirstEnergy's efforts to reduce risks, provide greater certainty, and limit potential downside. Tr. X at 2207. It did so by various methods including discontinuing sales efforts in the medium commercial industrial market and increasing its wholesale transactions in the marketplace. Tr. X at 2209. Mr. Moul testified that the repositioning was done in response to the polar vortex and reduces FES's exposure to weather sensitive load. Tr. X at 2213.

<sup>181</sup> OCC Ex. No. 3 at 9 (FirstEnergy 2014 Annual Report).

<sup>182</sup> Tr. XXXII at 6575-6585.

improvement savings of \$453 million over the 2015 through 2017 period largely for the competitive generation segment of FES.<sup>183</sup>

This program was launched in April of 2015, by a team of senior executives.<sup>184</sup> It has been approved by executive management at FES.<sup>185</sup> Over a 12-week period of time, FirstEnergy executives identified projects that would lead to sustainable cash savings for the competitive generation services. The Cash Flow Improvement Project identifies savings that are expected to be achieved by reducing O&M expenses at the competitive generation plants, reducing nuclear and fossil fuel expenses, reducing labor expenses, reducing shared-service expenses, reducing contractor and consulting expenses, and reducing miscellaneous expenses.<sup>186</sup>

The Internal Cash Flow Improvement project along with the statements made in FirstEnergy's Annual Report belie FirstEnergy's claim that there is a dire short term financial need for funds to cover FES, and specifically the Rider RRS plants. A \$453 million improvement in cash flow for FES over the 2015 through 2017 period should go a long way toward curing any short term financial need for FES. In fact, if \$453 million improvement in cash flow is made, it will more than cover the projected losses that Mr. Rose assumes for the RRS units. Coupled with the actions FirstEnergy has taken in repositioning its competitive market segment, it would appear that, despite statements filed with the PUCO, FES is ready to weather the next several years. Indeed that is at least what FirstEnergy is reporting to its investors.

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<sup>183</sup> Id. at 6576-6577.

<sup>184</sup> Id. at 6576.

<sup>185</sup> Id. at 6583-6584.

<sup>186</sup> Id. at 6578-6581.

It is incumbent upon the PUCO to look to the Utilities in times of financial hardship to see what the Utilities can do to weather such a storm, before looking to the consumers to be the safety net. In this Case, FirstEnergy has taken the necessary steps to address the financial need in order for the entire FES competitive generation business segment to be “self-sustaining” during the projected period of financial need. For the PUCO to approve Rider RRS in light of this information merely benefits FirstEnergy’s shareholders to the detriment of consumers. Consumers who should have no skin in this game.

In addition to the steps that FirstEnergy has taken to improve cash flows and the financial performance of the Plants, the PJM market has taken steps which should improve cash flows. First, PJM’s Capacity Performance product was recently approved by FERC.<sup>187</sup> The Capacity Performance Product has been projected to result in a significant increase in the capacity price<sup>188</sup> and an increase in capacity revenues for generators. The increase in capacity revenues will cause a corresponding decrease in a generator’s financial need for a subsidy in order to operate.

The Utilities have failed to demonstrate that the Plants have a financial need that warrants the extreme and controversial approval of Rider RRS. The competitive market will produce good years and bad years for the merchant generators participating in the PJM wholesale market. If these Plants cannot become economic, then they should be retired or sold to an entity that can improve their economics and operate them at a profit. But they should not remain in the hands of the Utilities unregulated affiliate propped up by customers paying Rider RRS.

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<sup>187</sup> *PJM Interconnection, L.L.C.*, 15 FERC ¶ 61,208 (2015) (“Capacity Performance Order”).

<sup>188</sup> Tr. VII at 1487 (Rose).

**b. FirstEnergy did not satisfy the second factor of the AEP ESP III Order because the Sammis and Davis-Besse plants “are not needed in light of future reliability concerns.”**

The second factor that FirstEnergy must address under the AEP ESP III Order is the necessity of the plants, in light of future reliability concerns, including supply diversity.<sup>189</sup> FirstEnergy and Material Sciences Corp. claim that the second AEP ESP III Order factor has also been met because the plants are needed given future reliability concerns, including the preservation of sufficient generation resource diversity.<sup>190</sup> This is simply not true.

First and foremost, it is important to clarify that the issue of reliability is a red herring in this proceeding because, as PJM states, FirstEnergy is not responsible for reliability or resource adequacy in Ohio or the region.<sup>191</sup> As multiple parties including PJM, have noted, and FirstEnergy has admitted, this responsibility falls to the Federal Energy Regulatory Commission, the North American Electric Reliability Corporation, and PJM.<sup>192</sup> And as FirstEnergy witness Phillips admitted at hearing, these various entities would continue to be responsible for the reliability of the electric system whether or not Sammis and Davis-Besse are retired.<sup>193</sup> Therefore, FirstEnergy has no responsibility to address reliability in Ohio, making the issue irrelevant.

Even if reliability was relevant in this proceeding, FirstEnergy’s claim that the plants meet a pressing reliability need in the PJM region to maintain generation diversity

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<sup>189</sup> See AEP ESP III Order at 25.

<sup>190</sup> FirstEnergy Initial Brief at 128-131; Material Sciences Corp. Initial Brief at 5.

<sup>191</sup> See PJM Amicus Brief at 9-12 (“PJM is ultimately responsible for reliability of the bulk electric system in the PJM Region which includes Ohio and the other 13 jurisdictions where PJM operates.”)

<sup>192</sup> See OCC/NOPEC Ex. 1 at 21-24 (Sioshansi Direct); See also OEC/EDF Ex. 2 at 3-4, 6 (Roberto Supplemental); Tr. XV at 3253-3254 (Phillips) (Public); See PJM Amicus Brief at 9-12.

<sup>193</sup> Tr. XV at 3254 (Phillips) (Public).

is simply not true.<sup>194</sup> As PJM itself stated, there is no reliability concern in the PJM region.<sup>195</sup> Indeed, as numerous witnesses testified, resource adequacy is very healthy in PJM.<sup>196</sup> Therefore, the retirement of the plants would not impact reliability in the region. In fact, as several witnesses noted, the retirement of the Plants would allow customers to be served by more efficient power plants, lowering their overall costs.<sup>197</sup> As OCC witness Wilson stated:

Whether or not the FE Companies choose to retire the Rider RRS Generation, 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 RPM construct. If the plants are retired, new resources, which may be new power plants, demand response, or energy efficiency, will be developed; if the plants are not retired, it is likely that some new resources will be delayed.<sup>198</sup>

Moreover, the potential retirement of the plants will not impact reliability in PJM. As FirstEnergy admits, a generator must notify PJM when it wishes to retire a power plant.<sup>199</sup> PJM will then run a series of studies to determine how that power plant's retirement will impact the PJM system.<sup>200</sup> If PJM determines that the Plants are needed for reliability reasons, then PJM could implement a must-run requirement. Under a must-run requirement a generator is paid to keep the Plants open.<sup>201</sup> This arrangement would be kept in place as long as necessary to alleviate any reliability concern.<sup>202</sup> However, as

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<sup>194</sup> FirstEnergy Initial Brief at 129-130.

<sup>195</sup> See PJM Amicus Brief at 9-12 (PJM stating that reliability concerns are "categorically unfounded").

<sup>196</sup> OCC/NOPEC Ex. 5 at 8-12 (Wilson Supplemental).

<sup>197</sup> See OEC/EDF Ex. 2 at 6 (Roberto Supplemental); Sierra Club Ex. 67 at 9-10 (Lanzalotta Supplemental).

<sup>198</sup> OCC/NOPEC Ex. 4 at 53 (Wilson Direct).

<sup>199</sup> See Tr. XV at 3249 (Phillips) (Public).

<sup>200</sup> See Tr. XV at 3249-3250 (Phillips) (Public).

<sup>201</sup> See Tr. XV at 3249-3251 (Phillips) (Public).

<sup>202</sup> See OEC/EDF Ex. 2 at 4 (Roberto Supplemental).

FirstEnergy admitted, PJM has not performed such an analysis or study on the potential impact of Sammis and Davis-Besse's retirement.<sup>203</sup> Indeed, FirstEnergy did not request PJM to perform the study.<sup>204</sup>

FirstEnergy also claims that the Plants are needed to prevent an overreliance on natural gas in the PJM region. This is factually incorrect. According to P3/EPSCA witness Kalt, 70 percent of Ohio's electricity is generated using coal-fired facilities.<sup>205</sup> 15.5 percent and 13.3 percent are obtained from natural gas and nuclear resources, respectively.<sup>206</sup> Similarly, PJM's resource mix during 2014 contained 43.5 percent coal, 34.3 percent nuclear, and 17.3 percent natural gas.<sup>207</sup> Therefore, these plants do not increase the diversity of generation technologies and fuels used in the state of Ohio or PJM.<sup>208</sup>

FirstEnergy also alleges that the Plants must be kept open because coal and nuclear power plants are more reliable in extreme weather such as the January 2014 Polar Vortex.<sup>209</sup> This is factually incorrect. Coal and nuclear-fueled power plants were not immune from the reliability issues brought about by the Polar Vortex. As OEC/EDF witness Roberto concluded otherwise:

when put to the test of the Polar Vortex on January 7, 2014, 13, 700 MW of coal-fired generation failed to deliver as a result of "forced outages"; i.e. out of service when it had been committed.

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<sup>203</sup> See Tr. XV at 3251-3252 (Phillips) (Public).

<sup>204</sup> See Tr. XV at 3251-3252 (Phillips) (Public).

<sup>205</sup> P3/EPSCA Ex. 5 at 37 (Kalt Direct).

<sup>206</sup> P3/EPSCA Ex. 5 at 37 (Kalt Direct).

<sup>207</sup> OCC/NOPEC Ex. 5 at 24 (Wilson Supplemental ) citing Monitoring Analytics LLC, 2014 *State of the Market Report for PJM*, March 12, 2015, Volume 1, p. 17.

<sup>208</sup> OCC/NOPEC Ex. 1 at 28 (Sioshansi direct); OMAEG Ex. 26A at 9 (Hill Supplemental).

<sup>209</sup> See FirstEnergy Brief at 130.

Nuclear plants were not immune either when in during the same event 1,400 MW of nuclear generation failed.<sup>210</sup>

FirstEnergy also implies that the Plants are necessary because natural gas generators may face fuel supply challenges, like they did during the Polar Vortex, in the coming years that would make them less reliable.<sup>211</sup> This is not true. As OCC witness Wilson testified, PJM has proposed new tariff rules to ensure that the power plants it relied upon for winter reliability have firm fuel supplies.<sup>212</sup> Mr. Wilson explains that the new rules will require capacity providers to arrange firm fuel supply in order to be considered “capacity performance” resources eligible for capacity payments, and will impose substantial penalties for non-performance.<sup>213</sup> Therefore, in the future gas-fired generators needed for reliability will have firm fuel arrangements and will not endure the issues seen during the Polar Vortex.<sup>214</sup>

FirstEnergy also claims that the Plants are needed because they, unlike renewable energy power plants, are “bedrock units” that can operate in all seasons and at all time of day or night.<sup>215</sup> This claim implies that, without the Plants, the region would have a reliability issue due to the remaining available generation mix. As shown above, this is not true. There will be no reliability issue if FES chooses to close the Plants. In addition, if anything, Ohio is overly dependent on coal.<sup>216</sup>

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<sup>210</sup> OEC/EDF Ex. 2 at 4 (Roberto Supplemental).

<sup>211</sup> FirstEnergy Initial Brief at 129.

<sup>212</sup> OCC/NOPEC Ex. 4 at 53-54 (Wilson Direct) citing PJM, *Reforms to the Reliability Pricing Market (RPM) and Related Rules in the PJM Open Access Transmission Tariff (“Tariff”) and Reliability Assurance Agreement Among Load Serving Entities (“RAA”)*, filed December 12, 2014 in FERC Docket No. ER15-623.

<sup>213</sup> OCC/NOPEC Ex. 4 at 54 (Wilson Direct).

<sup>214</sup> OCC/NOPEC Ex. 4 at 54 (Wilson Direct).

<sup>215</sup> FirstEnergy Initial Brief at 128-129.

<sup>216</sup> See P3/EPSCA Ex. 5 at 37 (Kalt Direct).

FirstEnergy also alleges that the Plants have reliability benefits because they are located close to FirstEnergy's load.<sup>217</sup> Specifically, FirstEnergy states that increasing the distance between generation and load centers increases the potential for outages on the transmission system that affect reliability at the load center.<sup>218</sup> This, again, is not true. As explained earlier, PJM is responsible for monitoring and ensuring reliability in the region. Indeed, when asked at the hearing whether PJM had raised this issue as a concern, FirstEnergy witness Phillips stated that he was not aware of PJM doing so.<sup>219</sup> In fact, Mr. Phillips admitted that PJM will maintain reliability irrespective of the distance between generation centers and the load.<sup>220</sup> In addition, as OCC witness Wilson states, there are currently a number of new power plants under construction or proposed in Ohio.<sup>221</sup> And, as FirstEnergy confirmed at the hearing, these new power plants could provide reliability assistance if needed.<sup>222</sup>

FirstEnergy also alleges that if the Plants retire and more generation is imported from out of state this will decrease reliability.<sup>223</sup> This is not true. The fact that a state is a net importer of energy does not directly correlate to a decrease in reliability. In fact, there seems to be very little correlation if any at all. Point in fact, as FirstEnergy freely admits, Ohio has been a net importer of electric power every year from 1990 to 2013.<sup>224</sup> Yet, at

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<sup>217</sup> FirstEnergy Initial Brief at 130-131.

<sup>218</sup> FirstEnergy Initial Brief at 130-131.

<sup>219</sup> Tr. XVI at 3293-3296 (Phillips) (Public).

<sup>220</sup> Tr. XVI at 3296-3297 (Phillips) (Public).

<sup>221</sup> OCC/NOPEC Ex. 5 at 10-11 (Wilson supplemental).

<sup>222</sup> Tr. XVI at 3289-3292 (Phillips) (Public).

<sup>223</sup> FirstEnergy Initial Brief at 130-131.

<sup>224</sup> OCC Ex. 14 Table 10 (Supply and disposition of electricity 1990-2013, Ohio); Tr. XVI at 3301 (Phillips) (public) (FirstEnergy witness Phillips admitting that Ohio has been a net importer of energy every year from 1990 to 2013).



the same time Ohio is not and has not been a state with electric reliability concerns.

Therefore, there is no reliability issue if the Plants retire.

Therefore, FirstEnergy has not satisfied the second factor of the AEP ESP III Order.

**c. FirstEnergy did not satisfy the third factor of the AEP ESP III Order because the Sammis and Davis-Besse plants do not comply with all pertinent and pending environmental regulations.”**

The third factor that FirstEnergy must address under the AEP ESP III Order is a description of how the Plants are compliant with all pertinent environmental regulations and its plan for compliance with pending environmental regulations.<sup>225</sup> FirstEnergy maintains that it satisfies the third factor of the AEP ESP III Order because the Plants are compliant with all existing environmental regulations and have plans to comply with pending or known future environmental regulations.<sup>226</sup> This is not true because there is still a great amount of uncertainty regarding Sammis’ compliance with a number of environmental regulations.

First, as FirstEnergy admits, the Coal Combustion Residuals (“CCR”)<sup>227</sup> Rule and the Effluent Limitations Guidelines (“ELG”)<sup>228</sup> could require FirstEnergy to make modifications to Sammis, requiring additional expenditures by FES (expenditures which under the stipulated ESP customers would pay). FirstEnergy maintains that treatment for selenium required by the ELGs would cost \$8 to \$18 million spread over three to four

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<sup>225</sup> See AEP ESP III Order at 25.

<sup>226</sup> FirstEnergy Initial Brief at 131-140.

<sup>227</sup> FirstEnergy Initial Brief at 132-133.

<sup>228</sup> FirstEnergy Initial Brief at 139-140 (FirstEnergy states that additional costs are not expected to be significant or material).

years<sup>229</sup> and that it would cost \$3 to \$5 million to address the bottom ash waste stream, including lining of a bottom ash pond, under the ELG and CCR rules.<sup>230</sup> However, as Sierra Club notes in its Initial Brief, FirstEnergy has provided no basis or support for such cost estimates or for the suggestion that those estimates are the total that Sammis would be required to expend to achieve compliance with the ELG and CCR rules. In fact, FirstEnergy acknowledged that it has never produced a study of ELG compliance methods or costs.<sup>231</sup> Further, FirstEnergy admits that its CCR rules analysis will not be completed until 2017.<sup>232</sup> Therefore, FirstEnergy has failed to carry its burden in demonstrating that its plants are in compliance with all pertinent or pending environmental regulations.

FirstEnergy and Material Sciences claim that the U.S. Environmental Protection Agency's ("EPA") October 2015 reduction of the national ozone standard from 75 parts per billion ("ppb") to 70 ppb will not affect Sammis.<sup>233</sup> FirstEnergy states that Sammis, while in a county that is designated nonattainment (or below minimum standards), is in an area within that county that is currently in attainment with the 2015 ozone standard.<sup>234</sup> However, as OCC witness Ferrey states, the U.S. EPA's Science Advisory Committee ("CASAC") had concluded that there was scientific evidence warranting further reductions to the ozone standard to a tighter 60-70 ppb concentration.<sup>235</sup>

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<sup>229</sup> Sierra Club Initial Brief at 45 citing Tr. XXXIII at 6788.

<sup>230</sup> Sierra Club Initial Brief at 45 citing Tr. XXXIII at 6794.

<sup>231</sup> Sierra Club Initial Brief at 45 citing Tr. XXXIII at 6787.

<sup>232</sup> Sierra Club Initial Brief at 45 citing Tr. XIX at 3800-02.

<sup>233</sup> FirstEnergy Initial Brief at 135; Material Science Corp. Initial Brief at 18.

<sup>234</sup> FirstEnergy Initial Brief at 135.

<sup>235</sup> OCC Ex. 14 at 14 (Ferrey Direct).

In fact, as Professor Ferrey notes, the CASAC suggested that maintaining an adequate margin of safety could require a reduction in the ozone standard to less than 60 ppb.<sup>236</sup> Therefore, while the U.S. EPA's latest regulations only lowered the standard to 70 ppb, Professor Ferrey's testimony shows that the standard could be lowered further in the near future. If this occurs, Sammis and the surrounding area could be in a non-compliance, which would require FES to installing additional control measures. Again under the stipulated ESP, FirstEnergy's customers would pay for these expenditures.

There is also uncertainty regarding Sammis' compliance with the U.S. EPA's Clean Power Plan. FirstEnergy admits that the Clean Power Plan is uncertain in that its full impact on Ohio will not be known until 2018-2022.<sup>237</sup> It also states that the Clean Power Plan is not source specific so it imposes no obligations specifically on Sammis.<sup>238</sup> For that reason, FirstEnergy states that no compliance plan has been developed.<sup>239</sup>

FirstEnergy arguments has proven our point -- that in the middle of the 8-year term of Rider RRS, the Clean Power Plan could go into effect. This leaves a considerable amount of uncertainty as to Sammis' compliance with a major environmental regulation.<sup>240</sup> It could also result in Sammis becoming economically inefficient to continue operating<sup>241</sup> and under the stipulated ESP, the economic inefficiencies of the plant become the problem of customers, not shareholders. As Professor Ferrey notes, implementation of the Rider RRS should be postponed until these pending federal

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<sup>236</sup> OCC Ex. 14 at 14 (Ferrey Direct).

<sup>237</sup> FirstEnergy Initial Brief at 137-138.

<sup>238</sup> FirstEnergy Initial Brief at 137-138.

<sup>239</sup> FirstEnergy Initial Brief at 137.

<sup>240</sup> OMAEG Initial Brief at 35-36.

<sup>241</sup> OMAEG Initial Brief at 35-36.

regulations are better able to be determined.<sup>242</sup> This would allow the PUCO to obtain critical pieces of information before making a decision.<sup>243</sup>

**d. FirstEnergy did not satisfy the fourth factor of the AEP ESP III Order because closing the Sammis and Davis-Besse plants “would not have a negative effect on the electric prices or economic development within the state.”**

The fourth factor the PUCO set forth in the AEP ESP Order is the impact that the closure of the plants would have on electric prices and the resulting effect on economic development within the state.<sup>244</sup> FirstEnergy and other signatories claim that the fourth AEP ESP III Order factor is satisfied because closing the plants would have a significant negative impact on electric prices and retail rate stability, with a resulting negative impact on economic development.<sup>245</sup> In support of this claim, FirstEnergy states that the PJM IMM, Dr. Bowring, “admitted at hearing, this fact is a matter worthy of Commission concern.” This is simply not true. Dr. Bowring only admitted that the closure of generation plants would have an impact on electric prices, not necessarily a negative impact.<sup>246</sup>

On the contrary, the predominant message throughout this proceeding has been that approving the Rider RRS and forcing customers to subsidize economic generation is

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<sup>242</sup> OCC Ex. 14 at 34 (Ferrey Direct).

<sup>243</sup> OCC Ex. 14 at 34 (Ferrey Direct).

<sup>244</sup> See AEP ESP III Order at 25.

<sup>245</sup> FirstEnergy Initial Brief at 140-144; Material Sciences Corp. Initial Brief at 19.

<sup>246</sup> See Tr. XXIV at 5039 (Bowring) (public)

(Q. Do you further agree that the impact of closure of generation plants and the impact that it would have on electric prices and the resulting effect on economic development within the state is a similarly and appropriate factor for the Commission to consider?

A. Sorry. "Similarly and appropriate" is what you said?

Q. Yes.

A. Yes).

what would have a significant negative impact on Ohio. As OCC/NOPEC witness Rose put it: “Allowing a special class of generation owners to pass their above-market costs through to customers will simply increase prices within the state, discourage entry by other suppliers, and not help develop a functioning retail market that would benefit the state in the long run.”<sup>247</sup> Alternatively, allowing uneconomic generation to exit the market and be replaced by new and more efficient generation would be a positive occurrence for Ohio and its customers.

FirstEnergy alleges that if the Plants close customers would have to pay for transmission upgrades that could increase prices by \$1.7 to \$4.1 billion.<sup>248</sup> This claim is misleading at best. First, it is important to note that FirstEnergy did not request PJM, the entity obligated to conduct transmission impact studies, to conduct or assist it in conducting a transmission impact study in this proceeding.<sup>249</sup> In fact, despite the Stipulation’s assertion to the contrary,<sup>250</sup> there is no evidence in the record that FirstEnergy utilized any independent consultant to conduct the transmission impact study. The two witnesses that offered testimony on the transmission impact study were

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<sup>247</sup> OCC Ex. 25 at 8 (Rose Supplemental); See also OEC/EDF Ex. 2 at 7 (Roberto Supplemental) (“Any subsidy would harm the regional wholesale market because it would tend to drive away plant operators who do not receive subsidies for their plants. Driving away competition through uncertainty (whether certain operators will receive anti-competitive subsidies) would tend to result in higher prices over the long run. Moreover, the Companies customers would have to pay higher prices because they would have to pay for the subsidies.”).

<sup>248</sup> FirstEnergy Initial Brief at 67-71, 140; NUCOR Initial Brief at 26; Material Sciences Corp. Initial Brief at 19-24.

<sup>249</sup> Tr. XV at 3247-3248 (Phillips) (Public) (When asked by Attorney Examiner Price if he had consulted with PJM regarding the types of upgrades that may be necessary if Sammis and Davis-Besse are retired, FirstEnergy witness Phillips answered, “No.”).

<sup>250</sup> See FirstEnergy Ex. 154 at 17 (Third Supplemental Stipulation).

both employed by FirstEnergy Service Company.<sup>251</sup> These facts alone show the unreliability of and potential for biased results in FirstEnergy's study.

It is also important to note at the outset that FirstEnergy has never stated that the Plants will close if Rider RRS is not approved. But the economic development study assumes otherwise. It assumes that both Sammis and Davis-Besse would close in full for purposes of its transmission impact study.<sup>252</sup> Thus, the study assumed that all seven units at the Sammis plant would close at the same time.<sup>253</sup> The chances of this occurring are remote.

In addition, the assumption that all the plants will retire discounts the possibility that, if retirements were to occur, only a limited number of generating units at Sammis might retire, and the rest would remain in service.<sup>254</sup> Such scenarios should be evaluated by the PUCO in order to give some additional perspective to FirstEnergy's "all or nothing evaluation of transmission cost impact."<sup>255</sup> As Sierra Club witness Lanzalotta explains:

scenarios in which only a portion of the Sammis units retired are likely to have smaller resultant transmission system overloads than would be the case if all of the Sammis were retired at once, and might avoid the need for some of the transmission reinforcements needed if all the units are retired at once.<sup>256</sup>

Therefore, FirstEnergy's study is an extreme scenario that is not worthy of any serious consideration in this proceeding.

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<sup>251</sup> See FirstEnergy Ex. 37 at 1 (Cunningham Direct) (Mr. Cunningham was employed by FirstEnergy Service Company as Manager of Market Planning and Analysis); FirstEnergy Ex. 39 at 2 (Phillips Supplemental) (Mr. Phillips was employed by FirstEnergy Service Company).

<sup>252</sup> Tr. XV at 3224 (Phillips) (public).

<sup>253</sup> Tr. XV at 3224-3225 (Phillips) (public).

<sup>254</sup> Sierra Club Ex. 67 at 5 (Lanzalotta Supplemental).

<sup>255</sup> Sierra Club Ex. 67 at 5 (Lanzalotta Supplemental).

<sup>256</sup> Sierra Club Ex. 67 at 5 (Lanzalotta Supplemental).

Additionally, FirstEnergy's study does not take into the account the possibility for new generation to take the place of retiring generation. This is a fatal error because, as Mr. Lanzalotta aptly notes, "If those plants retired, but a new generating unit came online that was connected to the grid at an appropriate location, that could reduce the need for some of the transmission upgrades" cited by FirstEnergy.<sup>257</sup> At the hearing FirstEnergy witness Phillips either denied knowledge of or admitted that certain power plants, which are under various phases of construction in Ohio, were not included in FirstEnergy's transmission impact study.<sup>258</sup> Such an oversight leaves an inaccurate and incomplete study.

In addition, the cost estimates associated with FirstEnergy's transmission impact study are not reliable. The estimate provided by FirstEnergy witness Cunningham to recondutored all overloaded transmission lines was \$436.5 million. FirstEnergy witness Phillips produced an estimate of \$1.1 billion based on rebuilding all the overloaded transmission lines. Mr. Phillips supports this conclusion by saying that some lines will need to be rebuilt, not recondutored.<sup>259</sup> However, the likelihood that all the transmission lines would need to be rebuilt is very small.<sup>260</sup>

In addition, FirstEnergy's study does not appear to take into account the fact that some of these transmission lines may have already outlived their useful life and would require repair or replacement regardless of whether the Plants retire.<sup>261</sup> Typical transmission structures have service lives of 40-50 years.<sup>262</sup> Some of the lines identified

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<sup>257</sup> Sierra Club Ex. 67 at 6 (Lanzalotta Supplemental).

<sup>258</sup> Tr. XV at 3260-3261 (Phillips) (public).

<sup>259</sup> FirstEnergy Ex. 39 at 8 (Phillips Supplemental).

<sup>260</sup> See Sierra Club Ex. 67 at 7 (Lanzalotta Supplemental).

<sup>261</sup> See Sierra Club Ex. 67 at 7 (Lanzalotta Supplemental).

<sup>262</sup> See Sierra Club Ex. 67 at 7 (Lanzalotta Supplemental).

by FirstEnergy as needing reconductoring or replacement may be at the end of that life. Therefore, not all the costs of transmission line maintenance would be attributable to the retirement of the Plants.

Finally, there is no reliable estimate of how much of the transmission reliability costs would be allocated to FirstEnergy's customers. Mr. Phillips states that it is difficult to predict how such costs would be allocated among customers because the ultimate combination of new facilities and re-conducted or rebuilt facilities is unknown.<sup>263</sup> FirstEnergy witness Mikkelsen attempts to determine these costs but provides no basis for whether or why FirstEnergy ratepayers would be responsible for the stated proportion of the costs.<sup>264</sup>

FirstEnergy also claims that the alleged risk of higher, more volatile and unstable electric rates are a threat to economic development.<sup>265</sup> FirstEnergy is wrong.<sup>266</sup> Rider RRS would not necessarily lead to more stable rates for shopping or non-shopping customers.

OCC witness Wilson explained that the rate that non-shopping customers pay is based on the blending of multiple auctions and tends to reflect forward prices at the time of the auction plus a markup.<sup>267</sup> As Mr. Wilson states, the rate paid by non-shopping customers will tend to be stable over time because forward prices tend to be fairly stable.<sup>268</sup> Rider RRS charges will be reconciled on an annual basis. Thus, Rider RRS will result in a customer charge or credit depending upon whether market prices were

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<sup>263</sup> FirstEnergy Ex. 39 at 10 (Phillips Supplemental).

<sup>264</sup> See Sierra Club Ex. 67 at 9 (Lanzalotta Supplemental).

<sup>265</sup> FirstEnergy Initial Brief at 141.

<sup>266</sup> See, e.g., OCC/NOAC Initial Brief at 83-92.

<sup>267</sup> See OCC/NOPEC Ex. 4 at 50 (Wilson Direct).

<sup>268</sup> See OCC/NOPEC Ex. 4 at 50 (Wilson Direct).



relatively high or low in the prior year. Therefore, “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 opposite direction to SSO rates. It cannot be assumed, therefore, that Rider RRS will tend to hedge or stabilize SSO customers’ rates.”<sup>269</sup>

Customers who are served by Marketers will pay prices that fluctuate or stabilize depending on the choices they make that reflect their preferences.<sup>270</sup> But Rider RRS could work against the wishes of many customers. OCC witness Wilson sums it up by stating: “Customers supplied by Marketers have made decisions about how they wish their electric supply to be priced as market prices rise and fall, balancing cost, risk, and other considerations. Rider RRS would add an additional element that might work counter to customers’ desires and choices.”<sup>271</sup>

In addition, Staff Witness Choueiki explains that Rider RRS is not necessary because the staggering and laddering approach that the PUCO has used in past SSO auctions mitigates price volatility. In addition, Dr. Choueiki explains that “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.”<sup>272</sup>

FirstEnergy claims that the Plants themselves provide significant economic benefit in the way of jobs, tax revenue, and economic activity.<sup>273</sup> In an attempt to support

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<sup>269</sup> OCC/NOPEC Ex. 4 at 50 (Wilson Direct).

<sup>270</sup> See OCC/NOPEC Ex. 4 at 50 (Wilson Direct).

<sup>271</sup> OCC/NOPEC Ex. 4 at 51-52 (Wilson Direct).

<sup>272</sup> Staff Ex. 12 at 14 (Choueiki Direct).

<sup>273</sup> FirstEnergy Initial Brief at 141.

this conclusion, FirstEnergy points to a study conducted by FirstEnergy witness Murley that was purported to show the economic impact that Plants currently have and the impact of their retirement.<sup>274</sup> The Utilities' economic impact study is overstated and unreliable. First and foremost, the study is, implicitly, a comparison between the effects of the Plants closing and staying open. Yet, FirstEnergy has not provided affirmative evidence showing that the Plants will not be able to recoup their future avoidable costs and, consequently, be a legitimate retirement risk. Therefore, the study is not relevant.

Another major problem with FirstEnergy's economic impact study is that it assumes all economic output, employment, and tax collections associated with continued operations of the facilities is lost to Ohio and replaced by electricity imported from other states if the facilities close.<sup>275</sup> This assumption ignores the economic benefits that Ohio would receive if replacement generation were constructed in the state.<sup>276</sup> Moreover, the study ignores the fact that the loss of production from the Plants would most likely result in an increase in production at existing Ohio plants.<sup>277</sup> Such a scenario would generally redirect any lost economic benefits from the plants closure back into Ohio.

Another flaw in the economic impact study is that it completely ignores the costs associated with retiring the Plants.<sup>278</sup> This would include the costs to perform the necessary permitting, engineering, deconstruction, waste containment, and disposal activities.<sup>279</sup> As P3/EPSCA witness Kalt states, the Nuclear Regulatory Commission estimates the costs to decommission, deconstruct and decontaminate a single reactor,

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<sup>274</sup> FirstEnergy Initial Brief at 141-144.

<sup>275</sup> P3/EPSCA Ex. 5 at 30 (Kalt Supplemental).

<sup>276</sup> P3/EPSCA Ex. 5 at 30 (Kalt Supplemental).

<sup>277</sup> P3/EPSCA Ex. 5 at 30 (Kalt Supplemental).

<sup>278</sup> P3/EPSCA Ex. 5 at 31 (Kalt Supplemental).

<sup>279</sup> P3/EPSCA Ex. 5 at 31 (Kalt Supplemental).

such as Davis-Besse, to be approximately \$300 to \$400 million.<sup>280</sup> Dr. Kalt also explains that under FirstEnergy's economic impact study, such spending accrues as economic benefits to the affected region.<sup>281</sup> The omission of this fact further shows that the study is not reliable.

Moreover, the economic impact study is flawed because it did not consider the costs or benefits of changes in electricity prices.<sup>282</sup> As shown above, OCC witness Wilson projects that customers will pay much higher rates if Rider RRS is approved. On the contrary, FirstEnergy projects that customers will pay lower rates over the long-run.<sup>283</sup> However, FirstEnergy did not include Rider RRS's effect on electricity prices in its economic impact.<sup>284</sup> At the hearing, FirstEnergy admitted that while such an analysis was possible, "a more appropriate approach would be a cost/benefit analysis."<sup>285</sup> Yet, when asked if it had done a cost/benefit analysis FirstEnergy admitted: "I did not do a cost benefit analysis."<sup>286</sup> Omitting such analyses from the economic impact study in this proceeding further proves that the study is inaccurate and unreliable.

Lastly, the study fails to account for costs avoided assuming that the Plants would close because it emphasizes economic output as a primary indicator of economic impacts. As a measure of economic impact, economic output represents gross effects, as opposed to net effects. As Dr. Kalt explains:

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<sup>280</sup> P3/EP SA Ex. 5 at 31 (Kalt Supplemental) citing <http://www.nrc.gov/reading-rm/doc-collections/fact-sheets/decommissioning.html>, accessed on May 8, 2015.

<sup>281</sup> P3/EP SA Ex. 5 at 31 (Kalt Supplemental).

<sup>282</sup> Tr. XV at 3090-3091, 3186 (Murley) (Public).

<sup>283</sup> See FirstEnergy Ex. 13 at 17 (Strah Direct).

<sup>284</sup> Tr. XV at 3090-3091, 3186 (Murley) (Public).

<sup>285</sup> Tr. XV at 3090-3091, 3186, 3188-3189 (Murley) (Public).

<sup>286</sup> Tr. XV at 3189 (Murley) (Public).

For example, the cost of purchased coal at Sammis is included by Ms. Murley as economic output of the electricity industry in the region of Ohio she studies. The coal at issue, however, is sourced from a variety of mines outside of Ohio. The loss of coal sales would impact the coal producing region outside of the state, but not the coal-consuming region to any significant degree. Thus, economic output overstates the presumed economic impact of plant closure.<sup>287</sup>

Therefore, the FirstEnergy economic impact study is unreliable and FirstEnergy has failed to demonstrate that closing the Plants would have a negative economic impact on Ohio.

**e. FirstEnergy failed to satisfy additional factors for approval of Rider RRS that the PUCO identified in the AEP ESP III Order.**

**i. FirstEnergy failed to provide for rigorous PUCO oversight of Rider RRS.**

As Staff witness Dr. Choueiki stated, the four AEP ESP III Order factors identified above are necessary but not sufficient for granting a PPA.<sup>288</sup> Dr. Choueiki testified that the AEP ESP III Order identified additional necessary conditions that a utility must address before the PUCO should approve a PPA Rider.<sup>289</sup> One of the additional necessary conditions that the PUCO identified must be satisfied in order for it to approve Rider RRS is rigorous PUCO oversight of the Rider.<sup>290</sup> Various Intervenors state in their Initial Brief that the Stipulation satisfies this requirement.<sup>291</sup> Yet, the evidence in the record shows that the contemplated Stipulation does not provide for rigorous PUCO oversight..

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<sup>287</sup> P3/EPSC Ex. 5 at 32 (Kalt Supplemental).

<sup>288</sup> Staff Ex. 30 at 10 (Choueiki Direct).

<sup>289</sup> Staff Ex. 30 at 10-11 (Choueiki Direct).

<sup>290</sup> See AEP ESP III Order at 25.

<sup>291</sup> See Staff Initial Brief at 14-15; FirstEnergy Initial Brief at 73-76.

For example, the Stipulation allows the PUCO only a specific review of revenue and cost data used in determining the PPA Rider.<sup>292</sup> However, to pursue prudence or rate issues related to the PPAs, the PUCO would be forced to complain to FERC.<sup>293</sup> Such a scenario does not give the PUCO enough control or oversight over the proposed Rider.

FirstEnergy also states that it, not customers, would be responsible for amounts disallowed for recovery through Rider RRS.<sup>294</sup> But, as OCC/NOAC noted in its Initial Brief, 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.<sup>295</sup> In the event of a cost disallowance by the PUCO or any termination, these costs would be borne not by FES but by FirstEnergy. And while the Utilities would not be able to pass these costs on to customers through Rider RRS, they would be financially 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.<sup>296</sup> FirstEnergy's obligation would harm its financial solvency and decrease its ability to provide reliable service. Accordingly, the PUCO's practical ability to ensure reasonable rates to customers is seriously compromised by the PPA's review clause, even if it has rigorous oversight (which it does not as discussed earlier).

In addition, a cost disallowance by the PUCO could also impact customers through the Significantly Excessive Earnings Test ("SEET"). Under R.C. 4928.143(F), at the end of each annual period of the ESP, the Utility has the burden to show that its

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<sup>292</sup> See FirstEnergy Ex. 154 at 8 (Third Supplemental Stipulation).

<sup>293</sup> See Staff Ex. 12 at p. 15 (Choueiki Direct).

<sup>294</sup> FirstEnergy Initial Brief at 74.

<sup>295</sup> "...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).

<sup>296</sup> See FirstEnergy Ex. 154 at 8 (Third Supplemental Stipulation).

earnings were not significantly excessive. Significantly excessive earnings are determined “by whether the earned return on common equity of the electric distribution utility is significantly in excess of the return on common equity that was earned during the same period by publicly traded companies, including utilities, that face comparable business and financial risk.”<sup>297</sup> If the PUCO finds that such adjustments, in the aggregate, did result in significantly excessive earnings, it shall require the utility to return to consumers the amount of the excess by prospective adjustments.<sup>298</sup> As FirstEnergy admitted, if FirstEnergy experiences losses through disallowances under Rider RRS, those losses will be factored into the utility’s statutory SEET.<sup>299</sup> That is, if FirstEnergy experiences losses it will decrease FirstEnergy’s return on equity. If FirstEnergy has a lower return on equity then it will be more likely to pass the SEET review. And, if FirstEnergy passes the SEET review then customers will not receive a refund from SEET as is statutorily required.

Finally, the PUCO Staff claims that the “Stipulation will provide that the PPA units are managed efficiently and bid competitively in the PJM market with full Commission oversight to assure compliance.”<sup>300</sup> However, there is no language on page eight of the Stipulation, which Staff cites to in its Initial Brief, that addresses or provides for such assurances.<sup>301</sup> The assurance provided from FirstEnergy regarding its bidding strategy is that it “will evaluate market conditions at the time offers are made and will implement a strategy that attempts to maximize revenue.”<sup>302</sup> This statement cannot be

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<sup>297</sup> R.C. 4928.143(F).

<sup>298</sup> R.C. 4928.143(F).

<sup>299</sup> Tr. XXXVI at 7606-7607 (Mikkelsen) (Public).

<sup>300</sup> Staff Initial Brief at 8-9, citing to FirstEnergy Ex. 154 at 8 (Stipulation).

<sup>301</sup> See FirstEnergy Ex. 154 at 8 (Stipulation).

<sup>302</sup> OCC/NOPEC Ex. 4 at 60 (Wilson Direct) citing FirstEnergy response to NUCOR set I INT-51.b.

seen as a serious commitment or legally binding obligation to operate the Plants contemplated in Rider RRS in a just and reasonable way. And, it should not be seen as a commitment that bolsters the PUCO's alleged oversight of the proposal.

**ii. FirstEnergy failed to “commit to full information sharing with PUCO and its Staff” regarding Rider RRS.**

An additional condition identified in the AEP ESP III Order is a commitment to full information sharing with the PUCO and its staff.<sup>303</sup> FirstEnergy and PUCO Staff state that FirstEnergy will provide Staff, upon reasonable request, with FES's fleet information on any cost component to assist Staff as it conducts its review of Rider RRS.<sup>304</sup> This commitment is not equivalent to “full information sharing.”

First, Staff does not have a *right* to a full information review. Staff must determine what information it wants to receive and then request that information from FirstEnergy.<sup>305</sup> FirstEnergy might then refuse to share the information. This is not compliant with full information sharing.

Second, the information that Staff can review is limited to FES's fleet information on “any cost component.” This is not a “full information” review. In compliance with R.C. 4905.15, FirstEnergy should be required to furnish to the PUCO, in such form and at such times as the PUCO 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.<sup>306</sup> Thus, the PUCO will not have the ability to fully review all purchasing and expenses of FES.

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<sup>303</sup> See AEP ESP III order at 25.

<sup>304</sup> See FirstEnergy Initial Brief at 74; Staff Initial Brief at 15.

<sup>305</sup> See FirstEnergy Ex. 154 at 8; PJM/EPSC Initial Brief at 29.

<sup>306</sup> See R.C. 4905.15.

In addition, FirstEnergy admitted that not all information related to the proposed Rider RRS will necessarily be available. As several intervenors state and FirstEnergy witness Mikkelsen admitted, OVEC has made no commitment to share information with the PUCO.<sup>307</sup> Indeed, Ms. Mikkelsen confirmed that the information sharing commitment in the Stipulation does not extend to information that's solely in the possession of OVEC.<sup>308</sup>

Next, as P3/EP SA state, the Stipulation does not provide for information sharing related to any bilateral contracts between FirstEnergy and third parties.<sup>309</sup> Nothing under the Stipulation precludes FE from entering into bilateral contracts with third parties.<sup>310</sup> Under the Stipulation, Staff would not have access to information related to that contract because Section V.3.b. only applies to FES' fleet information.<sup>311</sup>

Therefore, the Stipulation does not commit to full information sharing. And FirstEnergy's approach to avoiding regulatory scrutiny of its re-regulatory plan should be denied.

**iii. FirstEnergy failed to provide a legitimate alternative plan to "allocate Rider RRS's financial risk between FirstEnergy and customers."**

Another necessary condition that the PUCO identified must be satisfied in order for it to approve Rider RRS is a risk-sharing mechanism of the rider's risk between FirstEnergy and its customers.<sup>312</sup> As FirstEnergy states, the Stipulation contemplates a

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<sup>307</sup> Tr. XXXVI at 7521 (Mikkelsen) (Public); RESA Initial Brief at 33-34.

<sup>308</sup> Tr. XXXVI at 7521 (Mikkelsen) (Public).

<sup>309</sup> P3/EP SA Initial Brief at 29.

<sup>310</sup> P3/EP SA Initial Brief at 29.

<sup>311</sup> P3/EP SA Initial Brief at 29.

<sup>312</sup> See AEP ESP III Order at 25.



risk-sharing mechanism that potentially provides up to \$100 million in credits to customers for years five through eight of Rider RRS.<sup>313</sup> For example, through the risk sharing mechanism customers will receive a credit in Year 5 of \$10 million in the aggregate.<sup>314</sup> If Rider RRS produces an aggregate credit of \$6 million, FirstEnergy will contribute an additional \$4 million to consumers.<sup>315</sup> If Rider RRS produces a credit of \$15 million, FirstEnergy does not have an obligation to provide an additional credit to consumers.<sup>316</sup> Therefore, the benefit to customers is not guaranteed. This is not true risk sharing between FirstEnergy and its customers.

FirstEnergy's risk is capped at \$100 million while customers' risk is not capped. OCC witness Wilson has projected that Rider RRS will cost Ohioans approximately \$3.6 billion. FirstEnergy's risk-sharing proposal would only potentially cover a paltry \$100 million of this cost. That would leave \$3.5 billion to be paid by customers. And while the final expenses could be even higher for customers, FirstEnergy's risk will never exceed \$100 million. This is not a just and reasonable deal for consumers.

As discussed by OCC witness Wilson, a reasonable risk-sharing proposal would modify Rider RRS so that it is cost-neutral for customers, at least in an ex ante, forecast expected value sense, and so that the actual net cost or benefit of the Plants would be shared between FirstEnergy and customers.<sup>317</sup> Such a sharing rule would provide customers some protection, and would also restore some of the incentives to FirstEnergy to maximize revenues and minimize costs that Rider RRS, as proposed, eliminates.<sup>318</sup>

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<sup>313</sup> FirstEnergy Initial Brief at 75.

<sup>314</sup> FirstEnergy Ex. 154 at 7-8 (Third Supplemental Stipulation).

<sup>315</sup> FirstEnergy Ex. 154 at 7-8 (Third Supplemental Stipulation).

<sup>316</sup> FirstEnergy Ex. 154 at 7-8 (Third Supplemental Stipulation).

<sup>317</sup> OCC/NOPEC Ex. 4 at 65 (Wilson Direct).

<sup>318</sup> OCC/NOPEC Ex. 4 at 65 (Wilson Direct).

**iv. The AEP ESP III Order factors are not adequately focused on utility customers and should require FirstEnergy to demonstrate compliance with additional factors for the benefit of consumers.**

FirstEnergy asserts that it satisfies the factors established by the PUCO in the AEP ESP III Order.<sup>319</sup> Yet, as OCC/NOAC stated in its Initial Brief, the AEP ESP III Order factors are inadequate for consumer protection and should be expanded.<sup>320</sup> OCC/NOAC recommends that the PUCO additionally consider whether the PPAs and Rider RRS benefit customers. With the balanced consideration of benefits of the Rider RRS to FirstEnergy 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.<sup>321</sup> 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.<sup>322</sup> Indeed, failure to consider these additional factors could result in unreasonable rates and violations of state policy.<sup>323</sup>

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<sup>319</sup> See FirstEnergy Initial Brief at 124.

<sup>320</sup> See OCC/NOAC Initial Brief at 135-146.

<sup>321</sup> See OCC/NOPEC Ex. 2 at 8-9 (Sioshansi Supplemental).

<sup>322</sup> See AEP ESP III Order at 33.

<sup>323</sup> See R.C. sec. 4928.02(A).

**4. The individual provisions of the electric security plan, as modified by the stipulations, standing on their own, are not reasonable and do not benefit customers.**

The practice of shopping for signatures should not be countenanced by the PUCO. It is all the worse where utilities, such as here, fund their financial inducements for signatures with other people's money.

This practice also contributes to the failure of these inducements to have a nexus to the utility's core issue before the PUCO. These onerous terms are harmful to FirstEnergy's customers who would be asked to pay Rider RRS plus all the inducements to the other signatory parties. For that reason, the PUCO should not consider the Stipulation as a package under the second and third prongs.

Because the signatures on the settlement were obtained through financial inducements, and financed with other people's money--being Ohioans' hard-earned money the PUCO should not accept at face value that the first prong of the PUCO's settlement standard has been met. The settlement was not negotiated in a give-and-take exchange yielding the best result (for consumers) at the settlement's conclusion. The Stipulation should not be evaluated under the three-prong test. At a minimum, it should not be viewed as a package.

Furthermore, because the inducements to sign the Stipulation bear no relationship to the core of FirstEnergy's Application, Rider RRS, the Stipulation should not be viewed as a package with regards to the PUCO's second and third prongs of the test.<sup>324</sup> Finally, it was argued that these unrelated terms that induced others to sign the Stipulation should

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<sup>324</sup> OCC/NOAC Initial Brief at 28-32.

be evaluated on their own merits, and not under the three-prong test for this Stipulation.<sup>325</sup>

Not surprising, the signatories who filed a brief found the three-prong test to be a comfortable and familiar path for them to follow in order to argue for the Stipulation's approval to the PUCO.<sup>326</sup> However, PUCO precedent has cautioned that such settlements where signatory parties receive cash and cash equivalents will not be looked upon favorably.<sup>327</sup> The PUCO should follow its guidance in this regard, and not view the Stipulation in this case as a package. Because there are provisions that are unrelated to the core issue in this case (the PPA and Rider RRS), and also because for many of the specific giveaways 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."<sup>328</sup>

- a. 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.<sup>329</sup> For treatment as a package, a settlement should have terms that, in the

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<sup>325</sup> OCC/NOAC Initial Brief at 28-32.

<sup>326</sup> See, FirstEnergy Initial Brief at 36 – 107; OEG Initial Brief at 3-20; PUCO Staff Initial Brief 2-12.

<sup>327</sup> *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).

<sup>328</sup> OCC/NOPEC Ex. 11 at 7-8 (Kahal Second Supplemental Direct).

<sup>329</sup> OCC/NOPEC Ex. 11 at 6-10 (Kahal Second Supplemental). ("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.")

context of an application, have a sufficient nexus between each other and can be lawfully and reasonably considered in the case as filed.<sup>330</sup> Stipulation terms pertaining to implementing federal advocacy and a transition to SFV rate design have no connection to the PPA or Rider RRS. Terms that are merely inducements to join the settlement and the IGS side deal lack a reasonable nexus to the subject of the case, the PPA and Rider RRS, 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 the terms induced others to sign.

OCC’s/NOAC’s position was shared by ELPC witness Rabago who recommended that the PUCO give no weight to the settlement terms that supplement or expand the Utilities’ Application because so many of those terms have no direct relationship to FirstEnergy’s proposal.<sup>331</sup> Furthermore, RESA witness Kalt said that if the PUCO would give the stipulation deference as a “package” it would allow for terms that are unreasonable or even outrageous for consumers to be accepted, in the name of considering the package without items having to individually withstand PUCO scrutiny.<sup>332</sup> It should not be done. As RESA witness Kalt further recommends, each provision should be taken head on and reviewed on its own merits.<sup>333</sup>

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).

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<sup>330</sup> *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.)

<sup>331</sup> ELPC Ex. 28 at 6-7 (Rabago Direct).

<sup>332</sup> OCC/NOAC Initial Brief at 34.

<sup>333</sup> Tr. XLI at 8717 (Kalt).

This should not be confused with benefits to customers generally or the public interest. This section of the brief does not address the merits (or lack thereof) of these various unrelated provisions, but rather addresses why they do not belong as part of a settlement package for the PUCO to review in its deliberations of this proceeding.

**i. The Stipulation’s federal advocacy provision holds no nexus to Rider RRS.**

The Third Supplemental Stipulation includes a provision that “requires the Companies to engage in advocacy at the federal level to promote market enhancements such as a longer term capacity product or similar market improvements.”<sup>334</sup> Under the Third Supplemental Stipulation, prior to making any filings related to such advocacy, the Companies will inform Staff of their intentions. In addition, during the eight year term of Stipulated ESP IV, the Companies will provide the Commission with a public, quarterly update regarding the Companies’ take on the state of wholesale electricity markets.<sup>335</sup> FirstEnergy’s Initial Brief does not discuss or elaborate as to how this provision benefits customers or the public interest. There is no discussion as to how this provision relates to the core issue in this case – the PPA or Rider RRS. In fact the quarterly updates FirstEnergy provides to the PUCO, is “from the [Utilities’] perspective,”<sup>336</sup> not the customers’ perspective. Therefore, this provision should not be included as part of the package being evaluated by the PUCO in this case.

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<sup>334</sup> FirstEnergy Ex. 154 at 9 (Third Supplemental Stipulation).

<sup>335</sup> FirstEnergy Ex. 154 at 9 (Third Supplemental Stipulation), See *also*, FirstEnergy Initial Brief at 110-111.

<sup>336</sup> FirstEnergy Ex. 154 at 9 (Third Supplemental Stipulation).

**ii. Imposing upon consumers the transition to a straight fixed variable rate design is not appropriate for inclusion in the package of this Stipulation.**

FirstEnergy argues that Stipulated ESP IV provides for the Companies to file a case before the PUCO to transition to a proposed straight fixed variable (“SFV”) cost recovery mechanism for residential customers’ base distribution rates. FirstEnergy alleges that this qualitatively benefits customers by giving the PUCO and interested parties a proposed decoupling mechanism to evaluate, **an opportunity they would not have absent Stipulated ESP IV.**<sup>337</sup> This statement is patently untrue. FirstEnergy could propose a straight fixed variable rate design in its next distribution rate case.

The PUCO instituted a proceeding to review possible changes in electric distribution rate design (Case No. 10-3126-EL-UNC) (“Distribution Rate Design Proceeding”).<sup>338</sup> In that proceeding FirstEnergy filed comments that included a discussion of SFV rate design. In those comments, FirstEnergy generally opposed the use of SFV rates, and recommended that **"any efforts to implement a straight fixed variable approach for electric utilities not move forward until the electric utility's filing of its next base distribution rate case."**<sup>339</sup> In that same proceeding, the PUCO issued an Entry that made it clear that it has "determined that **the most appropriate proceeding for additional opportunities for input would be in each electric utility's next distribution rate case,** where implementation of SFV rate design should be considered. ... Nothing in the Order precludes any party from commenting on or

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<sup>337</sup> FirstEnergy Initial Brief at 32 (emphasis added, citations omitted).

<sup>338</sup> OCC Ex. 35 at 9 (Rubin Supplemental).

<sup>339</sup> OCC Ex. 35 at 12 (Rubin Supplemental) (emphasis added).

presenting evidence regarding a specific rate design that is proposed as part of a utility's distribution rate case by the utility, Staff or any other party."<sup>340</sup>

The PUCO's Distribution Rate Design Proceeding demonstrated that the inclusion of the SFV rate design as a provision in the Stipulation in this proceeding was unnecessary. Transitioning to a Straight Fixed Variable rate design from both FirstEnergy's and the PUCO's perspectives would be more appropriately addressed in the Utilities' next distribution rate case. Therefore, because the Straight Fixed Variable rate design has no nexus to Rider RRS, this provision should be evaluated on its own merits in the Utilities' next base distribution rate case, and should not be considered as part of a package for the consideration of the Stipulation under the PUCO's three-prong test.

**iii. Cash and cash equivalents paid to signatory parties to promote providers and their programs for low-income customers, energy efficiency and economic development have no relationship to the core issue in this case – the PPA and Rider RRS.**

The Third Supplemental Stipulation proposed that the PUCO authorize paying 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.<sup>341</sup> 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."<sup>342</sup> In total, 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

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<sup>340</sup> OCC Ex. 35 at 11 (Rubin Supplemental) (original emphasis).

<sup>341</sup> FirstEnergy Ex. 154 at 17 (Third Supplemental Stipulation).

<sup>342</sup> FirstEnergy Ex. 154 at 17 (Third Supplemental Stipulation).



year of the ESP for a total of \$13.6 million.<sup>343</sup> Accordingly, OP&E and Cleveland Housing Network's signatures on the settlement were obtained through financial inducements financed with other people's money--being Ohioans' hard-earned money.

PUCO Staff Witness Scheck expressed concerns about whether the Community Connections program had been implemented efficiently. He testified that the Staff did not know if savings that had been achieved under the program were achieved in the most cost-effective and efficient manner.<sup>344</sup> As a result, he recommended that the program be competitively bid to assure maximum savings to customers:

- Q. What would you recommend the Companies do with respect to the Community Connections low income program?
- A. The Staff does not believe that the Community Connections Program has been competitively sourced in the past. The Staff recommends that the Community Connections Program be competitively bid out as a way to achieve the maximum of savings per dollar spent by the Companies to acquire the benefits of reducing low income customers' bills. In many cases, low income customers are percentage of income payment plan (PIPP) customers as well, so reducing their costs through the Community Connections Program would also net a reduction in the costs paid by all other customers who pay into the universal service fund that funds the PIPP Program.<sup>345</sup>

The PUCO should heed the advice of Mr. Scheck. If the Stipulation is approved and the Community Connections Program funded, it should be competitively sourced to maximize the savings from the program for Ohio consumers who pay to fund programs for the consumers who receive the benefits that others pay.

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<sup>343</sup> FirstEnergy Ex. 154 at 17 (Third Supplemental Stipulation).

<sup>344</sup> PUCO Staff Ex. 11 at 3-4 (Scheck Direct).

<sup>345</sup> Id.

FirstEnergy is also funding (\$8 million over eight years) for a pilot Customer Advisory Agency to “ensure the preservation and growth of the competitive market in Ohio.”<sup>346</sup> Finally, FirstEnergy has included in the Stipulation a provision to promote economic development programs in its service territory by supplying \$3 million per year (for 8 years).<sup>347</sup>

FirstEnergy has included the economic development funding, low-income funding and consumer advisory agency funding provisions in their Initial Brief as quantitative benefits.<sup>348</sup> The Utilities highlight the fact that they will not seek to recover the costs associated with these items from customers.<sup>349</sup> However, the small scale of these provisions help demonstrate why they should not be included as part of a settlement package. In total FirstEnergy is funding these programs over the 8-year term of the ESP at \$52.04 million. Contrast that with the estimated \$3.6 billion (or more) potential cost to consumers if Rider RRS is approved by the PUCO. The PUCO should not consider these small provisions, which served to induce certain parties to sign the Third Supplemental Stipulation, as part of a settlement package.

The proposed Customer Advisory Agency consists of FirstEnergy allocating funding to the CHN, CPA, and CEOGC to presumably inform customers about competitive choices.<sup>350</sup> The work of the proposed Customer Advisory Agency appears to be duplicative of the efforts of the OCC and the PUCO in advancing state competitive policies as enumerated in R.C. 4928.02.<sup>351</sup> Both agencies provide resources to help Ohio

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<sup>346</sup> FirstEnergy Ex. 2 at 14 (Stipulation).

<sup>347</sup> FirstEnergy Ex. 154 at 17 (Third Supplemental Stipulation).

<sup>348</sup> FirstEnergy Initial Brief at 17.

<sup>349</sup> FirstEnergy Initial Brief at 17.

<sup>350</sup> FirstEnergy Ex. 2 at 14 (Stipulation).

<sup>351</sup> See FirstEnergy Ex. 154 at 16 (Third Supplemental Stipulation).

consumers understand competitive choices that might be available.<sup>352</sup> Duplication is not necessary and begs the question of whether the Customer Advisory Agency is just intended to become another future signatory for FirstEnergy settlements.

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. Again, this further demonstrates these low income programs to be more window dressing than a serious provision that should be included in a package of benefits in support of the Third Supplemental Stipulation.

And the financial inducements continue. COSE and AICUO are being provided with \$0.54 million and \$0.4 million, respectively, in association with the Ohio Energy Efficiency Resource Program.<sup>353</sup> Akron is receiving the unquantified benefit of FirstEnergy agreeing to keep its headquarters in the Akron area for the length of the proposed ESP.<sup>354</sup>

It should not be lost on the PUCO that none of these signatory parties that received the cash and cash equivalents discussed above filed an initial brief in support of the Utilities' proposal in this case. The PUCO should not include the cash and cash equivalent provisions of the Third Supplemental Stipulation when it is considering the merits of the stipulation. These pay outs merely served as inducements in exchange for signatures on the settlement, to be included as a package of benefits for resolving this case. It is bad public policy.

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<sup>352</sup> FirstEnergy Ex. 2 at 14 (Stipulation).

<sup>353</sup> FirstEnergy Ex. 154 at 15 (Third Supplemental Stipulation).

<sup>354</sup> FirstEnergy Ex. 154 at 17 (Third Supplemental Stipulation).

**iv. The Side Deal with IGS is shameful, not even part of the Stipulation, and should not be included in the package of benefits analyzed by the PUCO in resolution of this case.**

The IGS side deal with FirstEnergy is just that, a side deal. It is not part of the Third Supplemental Stipulation, and thus has no nexus to the core issue in this case. No other signatories to the Third Supplemental Stipulation signed the side deal. If one wondered how much worse for consumers could a case get that already used billions of dollars of Ohioans' money for a power purchase agreement, IGS and FirstEnergy provided an answer. Their idea is to increase the standard offer that consumers pay. For shame. The side deal is intended to eliminate the standard offer from the consumers' shopping cart. However, the standard offer is required under R.C. 4928.141.<sup>355</sup> In fact, the PUCO has previously rejected this awful idea to diminish the consumer protection of the standard offer, and should reject it again.

No other signatory parties offer support of the standard offer increase, in testimony or their briefs. FirstEnergy doesn't address it in testimony or brief.<sup>356</sup> However, to demonstrate the fact that this side deal is unneeded the PUCO need look no further than FirstEnergy's Initial Brief where it touts "the [Utilities'] territories have the highest shopping levels in the State."<sup>357</sup>

The PUCO should also note that IGS had made this or a similar proposal in the PUCO's investigation of Ohio's retail Electric Service Market (Case No. 12-3151-EL-

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<sup>355</sup> The side deal's attempt to eliminate the standard service offer in contravention of R.C. 4928.141 is a violation of the regulatory principles and practices prong of the PUCO's test.

<sup>356</sup> IGS Side Deal ("IGS agrees to advocate in its brief in Case 14-1297-EL-SSO for the [PUCO] to include in the [Utilities'] ESP a retail incentive rider set at zero and the [Utilities] agree not to oppose.")

<sup>357</sup> FirstEnergy Initial Brief at 104..

COI). In that Case, the PUCO rejected IGS's proposal to eliminate the SSOP as the default service. IGS stated in comments:

IGS disagrees with Staffs conclusion and asserts that the current SSO structure severely inhibits customer awareness and participation in competitive markets, making awareness and participation unlikely to increase if the current default rate structure is maintained. IGS urges the Commission to take affirmative and immediate steps to transition beyond the current default rate structure and to allow customers to choose immediately a non-SSO product when they sign up for distribution service.<sup>358</sup>

The PUCO rejected it IGS proposal instead deciding:

as recommended by Staff and supported by the majority of conunenting stakeholders, that the SSO should remain the default service at present. As discussed in the Work Plan, the auction process has, to date, been successful in producing competitive prices and benefits for even those customers who currently choose not to shop for their own supplier.<sup>359</sup>

IGS has tried unsuccessfully to eliminate the standard offer in the 12-3151 PUCO market investigation case. The side deal is merely a repackaging of its prior proposal in the 12-3151 case. Therefore, the doctrines of res judicata and collateral estoppel operate to preclude the relitigation of a point of law or fact that was at issue in a former action between the same parties and was passed upon by a court of competent jurisdiction. The doctrine of collateral estoppel has been applied to administrative proceedings.<sup>360</sup>

The side deal should not be considered part of the package that the PUCO evaluates in deliberation of this case.

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<sup>358</sup> PUCO's investigation of Ohio's retail Electric Service Market, Case No. 12-3151-EL-COI, Finding and Order at 17 (March 26, 2014).

<sup>359</sup> PUCO's investigation of Ohio's retail Electric Service Market, Case No. 12-3151-EL-COI, Finding and Order at 17 (March 26, 2014).

<sup>360</sup> See, e.g., *Ohio Consumers' Counsel v. Public Util. Comm.* (2006), 110 Ohio St.3d 394, 399; 853 N.E.2d 1153; 2006-Ohio-4706.

**v. The base distribution rate freeze has no bearing or relationship on the PPA or Rider RRS, and should not be included a part of a settlement package.**

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.<sup>361</sup> The benefits of a distribution rate freeze have no relationship to the PPA and Rider RRS, and are illusory because during this same 8-year term, FirstEnergy will be increasing its spending caps for Rider DCR by \$30 million per year (between June 1, 2016 and May 31, 2019), \$20 million per year (between June 1, 2019 and May 31, 2022), and \$10 million per year (between June 1, 2022 and May 31, 2024).<sup>362</sup>

In addition, Wal-Mart noted how complex FirstEnergy’s distribution rates are.

Wal-Mart stated:

The Companies' rates are inordinately complex, and the Companies' proposal here does not lessen that complexity. In fact, the Companies' proposal in this case makes changes to nine existing rate riders, creates two new rate riders, and eliminates six other rate schedules, riders, or portions thereof, while leaving nearly 30 other rate schedules and riders unchanged. For a commercial customer such as Walmart who wishes to engage in a bill analysis, it must examine more than 30 rates schedules or riders as well as applicable base rates to determine the billing impact. As a company who operates throughout the United States, Walmart deals with numerous electric utilities. In Walmart's experience, the Companies' rate schedules require more extensive analysis than most other utilities with which it does business. The situation with the Companies is, simply put, untenable, and it is quite frankly unreasonable to force customers to undertake such a complex and confusing review of the Companies' rate and rider framework simply to understand their monthly electric bills.<sup>363</sup>

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<sup>361</sup> FirstEnergy Ex. 154 at 13 (Third Supplemental Stipulation); See *also*, FirstEnergy Ex. 50 at 7 (Fanelli Direct): Tr. XX at 3930 (Fanelli).

<sup>362</sup> FirstEnergy Ex. 154 at 13 (Third Supplemental Stipulation).

<sup>363</sup> Wal-Mart Initial Brief at 3-4.

Wal-Mart's recommended solution is for the Utilities to file a base distribution rate. Wal-Mart stated:

Accordingly, the Commission should take this opportunity to evaluate ways to simplify the Companies' rate structure. In pertinent part, the Commission should require the Companies to file a base rate case timed to coincide with the conclusion of the initial proposed ESP term so the multitude of cost elements reflected in the currently overwhelming number of (current and as proposed) rates and riders can be examined and potentially rolled into base rates.<sup>364</sup>

The distribution rate freeze is without a nexus to the PPA and Rider RRS. It perpetuates the complexity that is built into FirstEnergy's rate structure. Therefore, the PUCO should not include this provision as part of a settlement package when evaluating the PPA and Rider RRS in this case.

**5. Even if the PUCO uses the three-prong test to evaluate the stipulated electric security plan, contrary to OCC/NOAC's recommendations, the electric security plan fails customers.**

The PUCO should adopt OCC/NOAC's recommendation to review the Stipulation outside of the three-prong test, as explained earlier in this brief. If the PUCO declines to do so, then it should accept our recommendations<sup>365</sup> which elaborate on why the stipulated electric security plan should fail under all three of the prongs of the PUCO's three prong test.

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<sup>364</sup> Wal-Mart Initial Brief at 4.

<sup>365</sup> See OCC Initial Brief at 34-118.

**a. The parties to the Stipulations did not represent diverse interests.**

OCC/NOAC explained in their Initial Brief why the stipulations are not representative of a diversity of interests.<sup>366</sup> Rather, it is the non-signatory parties who have unique and diverse interests, but are united in their opposition to the Utilities' stipulated electric security plan. The non-signatories represent a wide range of interests that should not be discounted: marketers and power producers,<sup>367</sup> environmental interests,<sup>368</sup> aggregators,<sup>369</sup> the independent market monitor, residential customers, and various manufacturers. The fact that so many divergent and important interests are not represented speaks volumes. The PUCO should listen.

In addressing the diversity of interests criterion, several of the signatory parties allege that residential customers (beyond low-income customers) were represented by the signatory parties. And there are claims that that the PUCO Staff represents all customers and the public interest.<sup>370</sup> These claims are untrue. They lack record support.

With respect to the notion that low-income customers are represented in the settlement process, the PUCO should consider the fact that at least one of those low income signatory parties, the Consumer Protection Association, is defunct. That information has been proffered by OMA. The Attorney Examiner precluded OMA Witness Professor Hill from submitting pertinent information on this issue.

The proffered evidence raises questions about the settlement process. If the concerns regarding the Consumer Protection Association are true, then it is an

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<sup>366</sup> OCC/NOAC Initial Brief at 37-39.

<sup>367</sup> Dynegy, Direct Energy, PJM Power Producers, EPSA, Exelon, Constellation.

<sup>368</sup> Sierra Club, Environmental Defense Fund, and ELPC.

<sup>369</sup> NOPEC and NOAC.

<sup>370</sup> FirstEnergy Initial Brief at 38, relying upon FirstEnergy Ex. 155 at 2-3, 8 (Mikkelsen Fifth Supplemental Testimony).



understatement to request that the PUCO should give no weight to the Consumer Protection Association's December 1, 2015 signature on the Third Supplemental Stipulation. And a PUCO inquiry about its settlement process should include: (1) that a signatory cannot be considered a capable knowledgeable party, with regards to the first-prong of the test, if it has shut its doors in August, and is no longer providing services to Ohioans? (2) that the Consumer Protection Association would be challenged if it is defunct; (3) that it is questionable how the Consumer Protection Association could sign the Third Supplemental Stipulation with FirstEnergy if it was defunct? And (4) how will the settlement funding for the so-called Consumer Protection Association (and any money it would receive) be addressed regarding the Third Supplemental Stipulation?

Furthermore, the PUCO should reverse the Attorney Examiner's ruling that excluded Professor Hill's testimony on the Consumer Protection Association. If this information is true, as Professor Hill alleges,<sup>371</sup> then these entities have parlayed three signatures (now should only be two if the Consumer Protection Association is defunct) into four, further deluding the alleged diversity of interest in the Stipulation, under the first prong. The number of "consumer" parties that make up the "Citizen Coalition" (if that organization should be considered, on its own, as a signatory party) is reduced by one, because Consumer Protection Association is defunct. Note also, regarding the leveraging of signatures, that the Cleveland Housing Network (a signatory party) is also a member of OPAE<sup>372</sup> (another signatory party). Given these inter-relationships between

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<sup>371</sup> OCC/NOAC Initial Brief at 46-49.

<sup>372</sup> Ohio Partners for Affordable Energy Motion to Intervene and Memorandum in Support at 2 (Aug. 14, 2014), (OPAЕ states that they provide a list of their membership on their website, and Cleveland Housing Network is listed at <http://www.Ohiopartners.org/index.php?page=membership>).

those signatory parties, the clarity of the diversity of interest under the PUCO's first-prong is blurred.

There are other issues raised by the signatory parties that bear upon questions of who the signatory parties really represent. NUCOR claims that "moderate income residential customers" were represented by signatory parties, citing to FirstEnergy Ex. 155, the Fifth Supplemental Testimony of Witness Mikkelsen at 2-3.<sup>373</sup> But when Ms. Mikkelsen's testimony is examined, no such claim is found. Similarly, the PUCO Staff claims that the city of Akron represents residential customers,<sup>374</sup> but Akron's motion to intervene suggests otherwise.<sup>375</sup>

And while FirstEnergy claims that the PUCO Staff represents all customers and the public interest,<sup>376</sup> the record is silent on this fact. FirstEnergy's reliance on witness Mikkelsen is misplaced.. Tellingly, the PUCO Staff itself does not make this bold claim.

**i. Prong One: The settlements were not the product of serious bargaining among capable, knowledgeable parties with diverse interests.**

As explained in the OCC/NOAC Initial Brief, the settlement agreements that modified the ESP were not the product of serious bargaining among knowledgeable parties with diverse interests.<sup>377</sup> For one matter, there is unequal bargaining due to the superior bargaining position that FirstEnergy holds. Under R.C. 4928.143(C)(2)(a), if the PUCO modifies FirstEnergy's application, FirstEnergy may withdraw its application if

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<sup>373</sup> NUCOR Initial Brief at 7.

<sup>374</sup> PUCO Staff Initial Brief at 4. The PUCO Staff also believes residential customers are represented by the Consumer Protection Association, an organization that is defunct. PUCO Staff Brief at 4.

<sup>375</sup> City of Akron Motion to Intervene, Memorandum in Support at 4 (Oct. 1, 2014).

<sup>376</sup> FirstEnergy Initial Brief at 38, relying upon FirstEnergy Ex. 155 at 2-3, 8 (Mikkelsen Fifth Supplemental Testimony).

<sup>377</sup> OCC Initial Brief at 35-37.

the PUCO modifies it. A utility's ultimate power to withdraw its application if it does not agree with any modification is an insurmountable obstacle to engaging in serious negotiations.<sup>378</sup> This explains why the stipulations only minimally modified the core provisions of the Utilities' application and Rider RRS. And it explains why the PUCO Staff concessions were enormous--nothing short of a complete reversal of its principled opposition to much of FirstEnergy's electric security plan, including Rider RRS.

Several signatories to the Stipulations presented minimal arguments that the first prong of the stipulation was met. In this regard the PUCO Staff claimed that the Stipulation results from serious bargaining among knowledgeable parties is "obvious."<sup>379</sup> If it's so obvious, then it should be easy to explain – but the Staff did not do so. In fact, relatively little is known about FirstEnergy's bargaining with the PUCO Staff. Kroger also summarily claimed (without argument or citation) that the first prong of the test has been met.<sup>380</sup> NUCOR claimed that “hard” and “good faith negotiations” took place, referring to FirstEnergy Witness Mikkelsen's testimony of Dec. 22, 2014. NUCOR Initial Brief at 7. In that testimony though, Ms. Mikkelsen was only referring to negotiations related to the December 2014 stipulation. And most importantly, Ms. Mikkelsen did not use the words “hard” or “good faith” to describe the negotiations. NUCOR's embellished claim is not supported by the record, and accordingly, should be given little if any weight. See also NUCOR Brief at 8 where NUCOR alleges that there can be no question that there was extensive bargaining and give and take among the parties to the stipulation. Again, NUCOR provides no evidence to support this allegation.

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<sup>378</sup> See 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 at 1-2 (Mar. 25, 2009) (citations omitted).

<sup>379</sup> Staff Initial Brief at 5.

<sup>380</sup> Kroger Brief at 2.

These allegations, provided without record support or reasoning, should be given no weight.

Other parties including the Utilities, Ohio Energy Group, NUCOR, and Material Sciences weighed in, all concluding that there were serious negotiations<sup>381</sup> with knowledgeable parties, representing diverse interests.<sup>382</sup> These claims will be addressed seriatim.

**a. Serious bargaining did not occur.**

Several of the signatory parties stressed that the negotiations were lengthy, occurring over a series of months, where all had the opportunity to participate.<sup>383</sup> NUCOR also alleges that serious bargaining is present because, inter alia, there was a "persistent effort put forth by FirstEnergy and the other parties to get more parties to join along after the initial Stipulation was filed."<sup>384</sup> OEG claims that parties were able to work sincerely to reach such a reasonable resolution.<sup>385</sup>

Meetings did occur, discussions did take place, parties had an opportunity to speak with FirstEnergy, and there were continuous efforts by FirstEnergy to solicit (or induce) additional signatories. But here the opportunity to negotiate does not equate to the ability to meaningfully negotiate.

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<sup>381</sup> NUCOR claimed that "hard" and "good faith negotiations" took place, referring to FirstEnergy Witness Mikkelsen's testimony of Dec. 22, 2014. NUCOR Initial Brief at 7. In that testimony though, Ms. Mikkelsen was only referring to negotiations related to the December 2014 stipulation. And most importantly, Ms. Mikkelsen did not use the words "hard" or "good faith" to describe the negotiations. NUCOR's embellished claim is not supported by the record, and accordingly should be given little if any weight. See *also* NUCOR Brief at 8 where NUCOR alleges that there can be no question that there was extensive bargaining and give and take among the parties to the stipulation. Again, NUCOR provides no evidence to support this allegation. The PUCO should disregard this claim as well.

<sup>382</sup> Utilities Initial Brief at 37-39; Ohio Energy Group Initial Brief at 21-22; NUCOR Initial Brief at 7-8; Material Sciences Initial Brief at 46.

<sup>383</sup> See, e.g., FirstEnergy Initial Brief at 37; Material Sciences Initial Brief at 46.

<sup>384</sup> NUCOR Initial Brief at 7-8.

<sup>385</sup> OEG Initial Brief at 22.

The PUCO should acknowledge (and solve) the problem with its settlement process where there is unequal bargaining power between bargainers. The utility (here FirstEnergy) has superior bargaining power. Accordingly, the PUCO should discount and reject arguments that the first prong of the settlement standard has been met.

**b. Signatory parties that sign a settlement for terms paid with other people's (customers) money should not count in the PUCO's analysis of diversity of interest.**

The Third Supplemental Stipulation is replete with signatory parties who were induced to sign the settlement, in exchange for cash and cash equivalents. These inducements by and large are paid with other people's money. In those circumstances, the PUCO should not count that signatory party, whether a party representing low-income consumers or a large corporate customer, in the analysis of diversity of interests under prong one.

The PUCO's requirement for serious bargaining should not be considered satisfied where the settlement outcome is that the utility induced a party to sign by giving the party cash or cash equivalents to be paid by another party. For the public interest and fair government, the PUCO should end what Professor Hill (for OMAEG) termed the "redistributive coalition"<sup>386</sup> in PUCO settlements where money/wealth is transferred from one party (those in "the club")<sup>387</sup> to another because "they can" in PUCO negotiations.<sup>388</sup>

This practice of offering cash and cash equivalents to obtain signatures also contributes to the failure of various settlement terms to have a nexus to the utility's core

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<sup>386</sup> See OMAEG Ex. 18 at 14 (Hill Supplemental); OMAEG Ex. 19 at 18-24.

<sup>387</sup> See OMAEG Ex. 19 at 11.

<sup>388</sup> OMA Ex. 19 at 23.

issue before the PUCO. Thus, the settlement includes a hodgepodge of issues that should require separate applications or cases to be fairly heard in a public process.

For instance, low-income programs should be addressed (and funded) in a more generic manner than the utility case approach. Utility cases involving issues of great consequence to millions of Ohioans should not be manipulated according to utility inducements for the signature of a small fraction of consumers to take a utility desired action.

**ii. Prong Two: The electric security plan, as modified by the stipulations, does not benefit customers and the public interest.**

In OCC/NOPEC's Initial Brief, we explained that any benefits to customers under the stipulations pale in comparison to harms that will be inflicted upon them.<sup>389</sup> This is because there are numerous and wide reaching provisions that will compel all customers to pay, for the next eight years, billions of dollars above- market based rates. The additional costs spring from, inter alia, Rider RRS,<sup>390</sup> the Distribution Capital Recovery Rider,<sup>391</sup> and the Governmental Directives Rider.<sup>392</sup> And to be clear, the Utilities have not identified the universe of costs customers will likely bear under the electric security plan. The Utilities conveniently have no answers for what future costs lie ahead for customers under initiatives they are asking (or will be asking) the PUCO to approve: grid

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<sup>389</sup> OCC/NOAC Initial Brief at 49-102.

<sup>390</sup> OCC Witness Wilson testified that the estimated costs to customers for Rider RRS is \$3.6 billion. OCC/NOPEC Ex. 9 at 7 (Wilson Second Supplemental).

<sup>391</sup> OCC/NOPEC Witness Kahal testified that over the eight year term of the ESP customers could be required to pay \$915 million in distribution capital recovery charges. OCC/NOPEC Ex. 11 at 23-24 (Kahal Supplemental Direct); Ex. 11A (Kahal errata).

<sup>392</sup> OCC/NOPEC Ex. 11 at 26-27 (Kahal Second Supplemental).

modernization, governmental directives cost recovery, resource diversification, and straight fixed variable rate design.

As OCC/NOPEC's Initial Brief explains, all customers will also suffer under provisions in the stipulations that unreasonably and unlawfully shift risks (and costs) away from the utility and onto their backs.<sup>393</sup> As noted by the Independent Market Monitor, FirstEnergy has not demonstrated and cannot demonstrate why customers should bear these costs and take these risks, if a well-informed generation owner is not willing to do so.<sup>394</sup> We agree with the Independent Market Monitor that "[i]t is not in the interest of Ohio customers to assume the risks associated with the RRS Assets for the same reasons that FirstEnergy seeks through the Rider RRS to avoid such risks for its shareholders."<sup>395</sup>

And there are provisions in the stipulations that specifically harm residential customers by shifting costs to them to pay for the financial inducements flowing freely to other signatory parties.<sup>396</sup> These provisions favor a select few signatories at the expense of the overwhelming majority of other customers.<sup>397</sup>

While the Utilities tout the benefits of these and other provisions of the stipulated ESP, the benefits are overstated, vague, or unsupported.<sup>398</sup> To the contrary, many of the so-called benefits are far more likely to harm customers.<sup>399</sup>

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<sup>393</sup> OCC/NOAC Initial Brief at 69-77.

<sup>394</sup> Independent Market Monitor Initial Brief at 3.

<sup>395</sup> Id.

<sup>396</sup> OCC/NOAC Initial Brief at 95-99.

<sup>397</sup> OCC/NOPEC Ex. 8 at 7-8 (Kahal Second Supplemental).

<sup>398</sup> See OCC/NOAC Initial Brief at 49-69.

<sup>399</sup> OCC/NOAC Initial Brief at 77 -81; 81-83; 92-95.

The Utilities claim that ESP IV provides qualitative and quantitative benefits that it identified in the ESP v. MRO calculation.<sup>400</sup> OEG chimes in, arguing that the stipulation provides beneficial modifications to FirstEnergy's power purchase agreement proposal.<sup>401</sup> The PUCO Staff offers meager support for the stipulations when it summarily opines (without record support) that the benefits are "large and broad,"<sup>402</sup> "touch many customers," and "are self-explanatory."<sup>403</sup>

Much of the Utilities' claims center upon its idyllic view of its Rider RRS. The notion that Rider RRS will greatly benefit customers is disabused in OCC/NOAC's Initial Brief.<sup>404</sup> Additionally, OCC/NOAC address many of the so-called benefits of Rider RRS in a later section of this Reply Brief. The PUCO should wonder, if Rider RRS is such a great benefit to customers, why did FirstEnergy have to offer so many incentives to so many parties to induce them to endorse (or not oppose) it?

This only serves to highlight the important point that both RESA Witness Kalt and ELPC Witness Rabago advanced at the evidentiary hearing:<sup>405</sup> the PUCO should consider Rider RRS (and all stipulation provisions) on its own individual merit-- not as part of a package. OCC/NOAC's Initial Brief discussed this position in detail.<sup>406</sup> Further arguments are also presented in another section of this Reply Brief.

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<sup>400</sup> FirstEnergy Initial Brief at 40.

<sup>401</sup> OEG Initial Brief at 22.

<sup>402</sup> PUCO Staff Initial Brief at 6.

<sup>403</sup> PUCO Staff Initial Brief at 8.

<sup>404</sup> OCC/NOAC Initial Brief at 69-92; 102-144.

<sup>405</sup> Tr. XLI at 8717-18 (Kalt); Tr. XXXVII at 8203 (Rabago).

<sup>406</sup> OCC/NOPEC Initial Brief at 28-34.



The Utilities claim a multitude of benefits exists under the electric security plan as modified by the Stipulations.<sup>407</sup> We address settlement assertions as follows:

- FirstEnergy Assertion: Continuation of the successful competitive bid process approved by the PUCO<sup>408</sup>

The competitive bid process has been successful in allowing SSO customers to benefit from historically low prices for capacity and energy. However, under the stipulations, customers will be paying subsidies over and above the prices paid under the competitive bid process. And under the ESP customers will be paying for many different provisions that have not been shown to benefit them. OCC/NOAC support the pure competitive bid process offered as a market rate offer, enabled under R.C. 4928.142.

- FirstEnergy Assertion: Ensures reasonably priced and reliable distribution service<sup>409</sup>

As explained in detail in OCC/NOAC's Initial Brief, adding \$900 million to customers' distribution bills is not consistent with reasonably priced and reliable distribution service. Additionally, as testified by OCC Witness Effron, all three utilities are potentially overearning substantially for distribution utility service.<sup>410</sup> This is due in part to distribution rates (and Rider DCR) incorporating a stale 10.5% return on equity<sup>411</sup>--a return which is not reasonable under current market conditions.<sup>412</sup>

Allowing the Utilities to freeze distribution rates at 2007 levels does not little to ensure reasonably priced and reliable distribution service. The PUCO should reject outright the notion that distribution rates set over nine years ago are appropriate for

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<sup>407</sup> FirstEnergy Initial Brief at 76-113.

<sup>408</sup> FirstEnergy Initial Brief at 76-79.

<sup>409</sup> FirstEnergy Initial Brief at 80-92.

<sup>410</sup> OCC Ex. 18 at 17 (Effron Direct).

<sup>411</sup> OCC/NOPEC Ex. 11 at 22-23; Ex. 11A (Kahal Supplemental, Errata).

<sup>412</sup> OCC Ex. 22 at 14 (Woolridge Direct).

customers today. And it should not even consider holding those outdated distribution rates at 2007 levels for the next eight years.

The PUCO should instead heed the advice of PUCO Staff Witness McCarter who testified that the utilities should file a distribution rate case no later than May 31, 2018.<sup>413</sup> Ms. McCarter conveyed the PUCO Staff's principle that a "holistic periodic review of each company's finances is necessary to ensure that all costs are being appropriately incurred and recovered."<sup>414</sup> She explained that a rate case permits the overall earnings of utilities to be reviewed along with all expenses and revenues.<sup>415</sup> Ms. McCarter further declared that "Staff believes it is a prudent regulatory practice to gain a holistic understanding of the regulated distribution company on a regular basis." This sound advice demonstrates the detrimental effect of the distribution rate provisions of the stipulations.

- FirstEnergy Assertion: Grid Modernization will empower customers<sup>416</sup>

The Utilities claim that the grid modernization provisions of the stipulation will benefit customers. They claim that certain initiatives, if implemented, "should lead to customer savings and promote retail competition in the state of Ohio."<sup>417</sup>

FirstEnergy did not reveal its grid modernization plan to the stipulating parties. It did not reveal its grid modernization plan to the non-stipulating parties. And it did not reveal its grid modernization plan to the PUCO. Instead, it insists that the grid

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<sup>413</sup> PUCO Staff Ex. 6 at 13 (McCarter Direct).

<sup>414</sup> Id.

<sup>415</sup> Id.

<sup>416</sup> FirstEnergy Initial Brief at 92-94.

<sup>417</sup> FirstEnergy Initial Brief at 92.

modernization plan will be revealed in time -- 90 days after the filing of the stipulated ESP.

So the PUCO and customers are being asked to trust First Energy that, inter alia, 1) there will be more than theoretical benefits to customers; 2) that the benefits of the undefined program will exceed the costs; 3) that the costs will be reasonable and 4) the provisions of the program will be acceptable to the PUCO and will be implemented. This simply is too much to ask. The PUCO, because of the inherent uncertainty of the grid modernization program, should give it no weight.<sup>418</sup>

R.C. 4909.15 contains a ratemaking process that is based on the science of regulating monopoly distribution utilities for the protection of captive distribution customers. In the public interest, the PUCO should use that process for considering utility investment and related charges, and it should dispense with FirstEnergy's approach.

- FirstEnergy Assertion: Significant commitment is made to resource diversification<sup>419</sup>

FirstEnergy claims it is making "an unprecedented commitment to the promotion of future resource diversity in Ohio."<sup>420</sup> But the provisions are toothless, being either subject to contingencies or unenforceable. And the provisions defy the freeze on alternative energy enacted by the Ohio General Assembly in Senate Bill 310 (with which FirstEnergy would be well acquainted). Further it should be noted that FirstEnergy is, in essence, selling back to the state and Ohioans, *at a premium*, renewables and energy

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<sup>418</sup> See, e.g., *In the Matter of the Application of Ohio Power and Columbus Southern Power Company for Authority to Establish a Standard Service Offer*, Case No. 11-346-EL-SSO, Opinion and Order at 30-31 (Dec. 14, 2011) (PUCO held that discounted capacity prices could not be considered a benefit under ESP v. MRO test because discount for capacity price was never certain).

<sup>419</sup> FirstEnergy Initial Brief at 94-96.

<sup>420</sup> *Id.* at 94.

efficiency that were frozen in Senate Bill 310. The FirstEnergy premium includes higher shared savings on energy efficiency (meaning higher FirstEnergy profits to be paid by Ohioans). And the premium includes customers now having to subsidize the PPA power plants for the privilege of receiving FirstEnergy's alternative energy proposals.

- FirstEnergy Assertion: Benefits from Straight Fixed Variable Cost Rate Design<sup>421</sup>

As explained in OCC/NOAC Initial Brief, utilizing a straight fixed variable rate design for residential customers would harm, not benefit customers.<sup>422</sup> FirstEnergy acknowledged this in comments docketed at the PUCO in 2011.<sup>423</sup>

- FirstEnergy Assertion: Reasonably priced and reliable transmission service<sup>424</sup>

The Utilities claim that under the stipulated electric security plan, it will continue its commitment to not seek recovery from retail customers of certain legacy PJM Regional Transmission Expansion Plan ("RTEP") costs.<sup>425</sup> The Utilities also claim that the updates to Rider NMB will result in lower overall costs for customers.<sup>426</sup> FirstEnergy asserts that this will occur because of two factors: 1) the changes reduce the risk premium for SSO suppliers and 2) customers will only pay the non-market based costs without risk adders or mark-ups.<sup>427</sup> NUCOR claims the Rider NMB pilot program allowing pilot participants to opt out of paying the rider "has the potential to provide benefits to customers participating in the pilot, as well as to non-participating customers by lowering

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<sup>421</sup> FirstEnergy Initial Brief at 96.

<sup>422</sup> OCC/NOAC Initial Brief at 169-171.

<sup>423</sup> OCC Ex. 19 at 12.

<sup>424</sup> FirstEnergy Initial Brief at 97-102.

<sup>425</sup> FirstEnergy Initial Brief at 97.

<sup>426</sup> FirstEnergy Initial Brief at 99.

<sup>427</sup> FirstEnergy Initial Brief at 102.

the overall cost of the system and maintaining reliability."<sup>428</sup> These claims are easily debunked.

FirstEnergy is obliged to provide adequate service to each and every Ohioan. This obligation extends to furnishing "necessary and adequate service and facilities" that are "adequate and in all respects just and reasonable." R.C. 4905.22. This means that furnishing reasonably priced and reliable transmission service should not be considered as an added benefit to the stipulation. FirstEnergy is obliged under the law to do so. The PUCO should not require customers to buy, at a premium, adequate service that FirstEnergy is required under law to provide and that consumers are already paying.

Specifically, with respect to the RTEP costs, it should be noted that FirstEnergy is already bound to continue its commitment not to seek recovery from retail customers of legacy RTEP costs. This is because the Utilities signed a stipulation, which was approved by the PUCO, that continues that commitment until "*the longer of*" of May 31, 2016 or when a total of \$360 million of RTEP costs have been paid by the Utilities.<sup>429</sup> Ms. Mikkelsen testified that the Utilities "have made payments of just over \$80 million."<sup>430</sup> The sun has not set on FirstEnergy's commitment. The PUCO should not consider this prior existing commitment as a new benefit of this electric security plan.<sup>431</sup>

Ironically, even though the Utilities would have the PUCO believe their RTEP proposal benefits customers, they are at the same time seeking to diminish its value. They do so by counting other costs (MISO Transmission Expansion Plan costs -Legacy

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<sup>428</sup> NUCOR Initial Brief at 27-28.

<sup>429</sup> OCC Ex. 19 at 4-5 (Hixon Direct).

<sup>430</sup> OCC Ex. 19 at 5 (Hixon Direct), citing to FirstEnergy Ex. 7 at 17 (Mikkelsen Direct).

<sup>431</sup> See, e.g., *In the Matter of the Application of Ohio Power and Columbus Southern Power Company for Authority to Establish a Standard Service Offer*, Case No. 11-346-EL-SSO, Opinion and Order at 30 (Dec. 14, 2011) (PUCO refused to consider a prior commitment to remove POLR charges as a benefit to customers because the utility was already required to do so by prior PUCO Order).

MTEP") toward their commitment not to charge Ohioans \$360 million of Legacy RTEP costs.<sup>432</sup> OCC Witness Hixon testified against FirstEnergy's proposal because it is contrary to the commitment FirstEnergy made in the stipulation.<sup>433</sup>

With respect to Rider NMB, the record reflects that the Rider NMB could harm, not benefit customers. Recall Staff Witness Hecker's testimony that opposed Rider NMB.<sup>434</sup> Mr. Hecker maintained that the shifting of costs into Rider NMB "could result in certain customers being charged twice for these costs."<sup>435</sup>

Moreover, claims that Rider NMB *will* lower costs to customers are not supported by record evidence. FirstEnergy's claim that costs to customers will be lowered presumes that SSO suppliers and CRES will pass cost reductions through to customers. There is no requirement or guarantee that this will happen as a result of the changes FirstEnergy proposes. And the PUCO has no authority to require SSO suppliers to reduce charges to customers.

NUCOR's claim of benefits, like many of the claims in its Initial Brief, is made without record citation or support. In fact, when Ms. Mikkelsen was cross-examined on this issue, she testified that under the NMB pilot program there could be no change to the remaining customers who pay Rider NMB, there could be a higher charge to remaining customers, or there could be a lower charge to customers.<sup>436</sup> In other words, it is anybody's guess as to what impact the pilot program will have on the costs other customers pay. NUCOR claim of benefits is thus illusory.

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<sup>432</sup> FirstEnergy Ex. 7 at 17 (Mikkelsen Direct).

<sup>433</sup> OCC Ex. 19 at 4-5; See also OCC/NOAC Initial Brief at 92-94).

<sup>434</sup> PUCO Staff Ex. 7 at 10-14 (Hecker Direct).

<sup>435</sup> Id. at 13-14.

<sup>436</sup> Tr. XXXVI at 7656 (Mikkelsen).

- FirstEnergy Assertion: Promotes economic development<sup>437</sup>

To a large extent, OCC/NOAC have already addressed these claims in their Initial Brief.<sup>438</sup> As discussed, these claims should not be given substantial weight because they are not supported by the record. For instance, for FirstEnergy's economic development analysis to ring true, one would have to assume that Davis Besse and WH Sammis (the Rider RRS plants) *will be retired* if Rider RRS is not approved. But, *there was no evidence presented that establishes that FES will retire these units if Rider RRS is not approved*. Accordingly NUCOR's claim that Rider RRS will preserve jobs at Sammis and Davis Besse<sup>439</sup> should be given no weight.

Additionally, as OCC Witness Sioshansi testified, the economic benefits touted by FirstEnergy are overstated because they fail to consider the effect of keeping potentially inefficient plants running and potential entry of new generating or transmission assets if the Rider RRS units are retired.<sup>440</sup> OCC/NOPEC Witness Wilson also testified that Rider RRS will result in higher retail rates for customers. These charges will mean that FirstEnergy's customers will have less disposable income available. Yet FirstEnergy's economic development analysis did not consider this effect. Such countervailing effects would diminish the positive economic impact results that FirstEnergy presents. OCC/NOAC also address these arguments in more detail in a later section in this brief.

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<sup>437</sup> FirstEnergy Initial Brief at 102-104.

<sup>438</sup> See OCC/NOAC Initial Brief at 62-64, 129-130, 141-142.

<sup>439</sup> NUCOR Initial Brief at 26.

<sup>440</sup> See OCC/NOPEC Ex. 2 at 14-16 (Sioshansi Supplemental).

- FirstEnergy Assertion: Enhances the competitive retail market<sup>441</sup>

FirstEnergy alleges that its stipulated ESP IV will continue the factors that led to the highest shopping levels in the state.<sup>442</sup> FirstEnergy also alleges that it will provide retail market enhancements that further the development of the retail market.<sup>443</sup>

OCC/NOAC addressed these claims in its Initial Brief.<sup>444</sup> At the outset, it should be noted that having “the highest shopping levels” is not in and of itself, the objective for consumer benefits. The objective includes consumers saving money with their choices.

FirstEnergy fails to mention, however, that a key and unprecedented feature of its ESP IV is Rider RRS. And Rider RRS will have a detrimental effect on competition, as discussed in OCC/NOAC's Initial Brief<sup>445</sup> and iterated in later portions of this Reply Brief.

Indeed, the Independent Market Monitor, an organization created to objectively monitor the competitiveness of PJM markets<sup>446</sup> opposed Rider RRS because of its negative impacts. Witness Bowring<sup>447</sup> concluded that Rider RRS was a subsidy which provides incentives for non-competitive offers and is inconsistent with competition in the PJM wholesale markets.<sup>448</sup> Mr. Bowring testified that Rider RRS would constitute a subsidy analogous to the subsidies proposed in New Jersey and Maryland, both of which

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<sup>441</sup> FirstEnergy Initial Brief at 104-106.

<sup>442</sup> FirstEnergy Initial Brief at 104.

<sup>443</sup> FirstEnergy Initial Brief at 104-105.

<sup>444</sup> See OCC/NOAC Initial Brief at 77-81.

<sup>445</sup> OCC/NOAC Initial Brief at 77-81.

<sup>446</sup> See Motion to Intervene at 3 (Oct. 1, 2014).

<sup>447</sup> Independent Market Monitor Ex. 2 at 2 (Bowring First Supplemental); Independent Market Monitor Ex. 1(Bowring Direct).

<sup>448</sup> Independent Market Monitor Ex. 2 at 7 (Bowring First Supplemental).



were found to be inconsistent with competition in wholesale markets.<sup>449</sup> Mr. Bowring testified that the subsidy would have price suppressive effects, making it difficult or impossible for generating units without subsidies to compete in the market.<sup>450</sup>

The Independent Market Monitor is not alone in opposing Rider RRS because it is anti-competitive.

The PUCO Staff claims that although anti-competitive claims may be made, no quantitative analysis on either a wholesale or retail basis has been provided.<sup>451</sup> This claim has little merit. To suggest that the PUCO should discount the anti-competitive claims on this basis would be a derogation of its duty, among other things, to ensure effective competition by avoiding anti-competitive subsidies. And it seems schizophrenic to only consider quantitative analysis in this regard, when the PUCO has whole-heartedly endorsed counting qualitative benefits in these proceedings.

- FirstEnergy Assertion: FirstEnergy Assertion: Supports low income customers<sup>452</sup>

As OCC/NOAC discussed in its Initial Brief, the low income support provided under the stipulation does little to offset the \$3.6 billion increase that will come with Rider RRS.<sup>453</sup> Low income customers will still be forced to pay an additional \$800 per customer for that charge, in addition to other charges embedded in the stipulated plan. Additionally, if a straight fixed variable rate design is implemented, as planned under the

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<sup>449</sup> Independent Market Monitor Ex. 1 at 3 (Bowring Direct Testimony).

<sup>450</sup> Id.

<sup>451</sup> PUCO Staff Initial Brief at 9.

<sup>452</sup> FirstEnergy Initial Brief at 106-107.

<sup>453</sup> OCC/NOAC Initial Brief at 99-102.

stipulations, low income customers are likely to be negatively impacted, a fact FirstEnergy itself concedes.<sup>454</sup>

- FirstEnergy Assertion: Provides numerous other benefits<sup>455</sup>

FirstEnergy alleges there are numerous other miscellaneous benefits of the stipulated ESP. Several of these benefits are occurring already as a result of existing mechanisms that continue on their own impetus. For instance, timely recovery for compliance with renewable mandates is something other PUCO proceedings address. The same can be said for the recovery of lost distribution revenues and SEET adjustments.

Both NUCOR and OEG extol the benefits of the interruptible service provisions of the stipulation which, by no coincidence, are subsidies that NUCOR and OEG will receive courtesy of other customers paying.<sup>456</sup> OEG argues that the expansion of Rider ELR (for interruptible service) for the eight year term of the ESP benefits customers and does not impose unreasonable costs on customers who must pay for the program.<sup>457</sup> In this regard, OEG points out that the cost of the expanded ELR program will be offset by 80% of the revenue received from PJM for bidding the interruptible load into capacity auctions.

But the PUCO should understand that the costs customers may pay for the ELR program for the next eight years may be very costly for FE Utilities' customers, as OCC/NOPEC Witness Kahal warned.<sup>458</sup> While OEG would have the PUCO believe that

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<sup>454</sup> See FirstEnergy Comments, Case No. 10-3126-EL-UNC (Feb. 11, 2011), OCC Ex. 35, SJR-8 (Rubin Supplemental).

<sup>455</sup> FirstEnergy Initial Brief at 107-113.

<sup>456</sup> NUCOR Initial Brief at 9-21; OEG Initial Brief at 23-28.

<sup>457</sup> OEG Initial Brief at 26.

<sup>458</sup> OCC/NOPEC Ex. 11 at 13 (Kahal Second Supplemental Direct).

customers will pay little due to the revenue credit received under the auctions, the facts get in the way of this argument.

In reality the offsetting revenues will deflect only about 40% of the customers' cost of the ELR program: Customers will be paying \$10/kw-month to support the ELR program.<sup>459</sup> Using the base residual auction results for the next three years,<sup>460</sup> the credits to FirstEnergy customers for capacity costs will be as follows:

2016/2017:	\$3.26
2017/2018:	\$3.69
2018/2019:	\$4.01 <sup>461</sup>

This means that customers will continue to pay (over the next three years at least) around \$6/kw-month to subsidize ELR participants such as NUCOR and OEG's members.

Moreover, the level of Rider ELR has not been proven to be either reasonable or necessary to encourage entities to participate in load response reduction. Rider ELR participants will be receiving payments funded by customers under two forms: a \$10/kw-month payment from FirstEnergy and 20% of the revenue from the PJM load response program.<sup>462</sup> Thus, beyond the 20% incentive payment, under the proposed ELR, customers will be funding an additional \$6 incentive. This program is another example

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<sup>459</sup> First Stipulation and Recommendation filed December 23, 2014 at pages 7-8.

<sup>460</sup> Rebuttal Testimony of Judah L. Rose filed October 20, 2015 at pages 21-22.

<sup>461</sup> These figures were derived by taking the PJM capacity auction results that are in MW-day, dividing by 1,000 to get it to kW-day, multiplied by 365 to get it to kW-year, divided by 12 to get it to kW-month and then multiplied by 80%.

<sup>462</sup> AEP's interruptible tariff (IRP-D) requires all of the revenue from the PJM load response activity to be fully credited to the Rider. See In the Matter of . . . . ., Case No. 13-2385-EL-SSO, Opinion and Order at 40 (Feb. 25, 2015) ("AEP Ohio should also bid the additional capacity resources associated with the IRP-D into PJM's base residual auctions held during the ESP term, *with any resulting revenues credited back to customers through the EE/PDR rider*") (emphasis added).

of a financial inducement that brought parties to the stipulation, paid for by others, including non-signatories.

Kroger argues that the rate design of Rider RRS and the HLF experimental rate will benefit ratepayers and the public interest.<sup>463</sup> Kroger notes that originally the Utilities proposed allocating the RRS rider based on demand, and then converting the allocated revenue requirement to an energy charge. In the stipulations this rate design was modified to be based on billing demand only. Kroger insists that such a modification properly aligns costs and is consistent with cost causation. This argument seems aimed at convincing the PUCO that stipulated Rider RRS allocation is less harmful to customers than the filed application. And while this may or may not be true, it fails to affirmatively prove that the stipulation is in the public interest.

Kroger also argues that the HLF experimental rate should be supported because it benefits high load factor customers and will enable them to improve their consumption profile during peak periods, which "will potentially result in more cost-efficient energy consumption by these customers."<sup>464</sup> The problem with this argument is, as Kroger admits, this is only a potential benefit.

Kroger also argues that the HLF experimental rate will benefit the public interest because it will "encourage high load factor customers that participate in the program to find ways to further improve their load profile, which results in a reduction in demand levels during peak periods."<sup>465</sup> Again, Kroger mixes up the potential with the actual. There is no (nor can there be) guaranteed reduction in demand level for this program which has one participant, Kroger.

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<sup>463</sup> Kroger Initial Brief at 3-5.

<sup>464</sup> Kroger Initial Brief at 4.

<sup>465</sup> Id. at 5.

**iii. Prong Three: The Stipulations violate important regulatory principles and practices which harms customers.**

OCC/NOAC discussed (in their Initial Brief) the numerous ways that the stipulated electric security plan violates Ohio law, along with policies and regulations that were intended to provide consumers benefits from the competitive market.<sup>466</sup> Further discussion is also presented in this Reply brief.

A number of signatory parties allege that the Stipulation satisfies the third prong.<sup>467</sup> Both Kroger and the PUCO Staff allege that none of the individual provisions is inconsistent with or violates any important Commission principles or policies.<sup>468</sup> But their analysis, like other signatory parties' analysis, is far from complete.

What the signatory parties do not address is more telling than what they do. Neither Kroger nor the PUCO Staff bothered to address arguments over the many statutes violated by the stipulations, as briefed by OCC/NOAC. Those statutes violated by the stipulated electric security plan include R.C. 4928.38, 4928.02(A), 4928.02(C), 4928.02(H), and 4928.02(N). And like all the other signatory parties, they failed to address the Utilities' failure to meet the "four AEP factors"--factors that Dr. Choueiki described as necessary, but not sufficient for the PUCO to authorize Rider RRS.<sup>469</sup> They, like the other signatory parties, do not address the sufficient factors -- additional factors that should be met in order to approve a mechanism like Rider RRS. Nor did PUCO Staff, Kroger, or any of the signatory parties explain how the Government Directives Rider, the excessive return on equity, the grid modernization provisions, the resource

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<sup>466</sup> OCC/NOAC Initial Brief at 102-117.

<sup>467</sup> FirstEnergy Initial Brief at 113-124; PUCO Staff Brief at 9; Kroger Brief at 2; OEG Brief at 4.

<sup>468</sup> PUCO Staff Brief at 9; Kroger Brief at 2.

<sup>469</sup> PUCO Staff Ex. 12 at 10-11.

diversification provisions, and the move to straight fixed variable rate design are consistent with PUCO policy or practice. They are not. And the Signatory Parties failed to address the unjust and unreasonable rates customers will have to pay, in violation of R.C. 4905.22. To take the signatory parties' word that the stipulation does not violate provisions of the stipulation would be folly.

FirstEnergy, OEG and NUCOR put forth more effort than both the Staff and Kroger in this regard, but still come up short in proving that the stipulated ESP does not violate PUCO policies and precedent.<sup>470</sup> A common theme among the briefs of these three signatory parties is that Rider RRS is authorized under Ohio law.<sup>471</sup> This argument was addressed in this brief earlier and will not be repeated here.

OEG also alleges that Rider RRS is not preempted by FERC's jurisdiction.<sup>472</sup> These arguments as well are addressed in a separate portion of this brief.

OEG's remaining arguments are that Rider RRS is not an anti-competitive subsidy that is prohibited by 4928.02(H), and that the PUCO has authority under R.C. 4928.02 to ensure the adequacy and reliability of electric service in Ohio.<sup>473</sup> The PUCO should not be persuaded by such arguments as they are not well founded and are contradicted by the record in this case.

While OEG claims that there is no subsidy because customers are getting something,<sup>474</sup> that argument is not well made. The definition of a subsidy is money that is paid usually by a government to keep the price of a product or service low or to help a

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<sup>470</sup> OEG Initial Brief at 9-19; NUCOR Initial Brief at 28-29.

<sup>471</sup> NUCOR Initial Brief at 28; OEG Initial Brief at 9; FirstEnergy Initial Brief at 115-121.

<sup>472</sup> OEG Initial Brief at 17-19.

<sup>473</sup> OEG Initial Brief at 11-14.

<sup>474</sup> OEG Initial Brief at 11.

business or organization to continue to function.<sup>475</sup> Here the PUCO (government) would require customers to pay for the full price of generation (vs. market price) so that FirstEnergy Solutions (unregulated subsidiary of FirstEnergy) can continue to operate Davis Besse and WH Sammis. The fact that customers may receive something in return for \$3.6 billion worth of subsidies does not change the fact that this is a subsidy. A subsidy is a subsidy. Rather any "benefits," if they occur, weigh into whether the subsidy can in some sense be considered "reasonable." And OCC/NOAC have presented arguments explaining how benefits from Rider RRS are overstated, illusory, or harmful. Thus, the subsidy exists and is not reasonable, contrary to OEG assertions otherwise.

OEG's claim that the subsidy is not anti-competitive<sup>476</sup> because it does not impact the SSO auctions is wrong. The record in this case reflects that even though Rider RRS is a financial transaction, where the physical supply of power will be unaffected, it has an indisputable impact on offerings into the PJM market. IMM Witness Bowering identified the subsidy as a mechanism making it difficult or impossible for other generating units (without subsidies) to compete in the market.<sup>477</sup>

Neither R.C. 4928.02 nor any other provision of the Ohio Revised Code gives the PUCO authority to approve Rider RRS. While the PUCO may take actions to ensure adequacy and reliability of electric service, its actions must be grounded in specific statutory authority and must not conflict with other laws. As explained in another section of this Brief, the law does not permit Rider RRS to be approved. The PUCO should not meddle in wholesale transactions. And approving Rider RRS conflicts with other

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<sup>475</sup> <http://www.merriam-webster.com/dictionary/subsidy>.

<sup>476</sup> Initial OEG Brief at 9.

<sup>477</sup> Independent Market Monitor Ex. 1 at 3 (Bowering Direct Testimony).

statutory provisions, including, but not limited to, R.C. 4928.38. The PUCO should reject Rider RRS.

**C. The Commission should not rule on FirstEnergy’s electric security plan proposal, in accordance with OCC’s/NOAC’s recommendations to protect Ohio consumers until FERC makes a relevant determination regarding the proposed PPA transaction.**

OCC/NOAC recommended that the PUCO not rule on the FirstEnergy ESP Case until the FERC rules on the January 27, 2016, Electric Power Supply Association, et al. filed complaints against FirstEnergy and FES,<sup>478</sup> as well as, AEP Generation Resources and Ohio Power Company<sup>479</sup> (“EPSA Complaints”). 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.

OEG anticipated that parties opposing Rider RRS might make such arguments. To counter such arguments, OEG proposed the PUCO make the following express findings:

Some parties argue that the PPA may violate FERC’s Edgar standards for affiliate transactions, alleging that the costs of the PPA are higher than what FirstEnergy would pay at market. In fact, on January 27, 2016, a complaint was filed at FERC collaterally attacking this proceeding by requesting that FERC rescind FirstEnergy Corporation’s affiliate power sales waiver and undertake the same review process to allegedly protect Ohio consumers as this Commission). The FERC complainants, many of whom are also parties to this case, apparently feel that this Commission is ill-equipped to protect Ohio customers through the conditions it imposes for RRS Rider approval. It is important that this Commission demonstrate to the public, to FERC, and to the courts that its review and approval process is consistent with state law and will result in rates that are stable, just, and reasonable. To that end, and in addition to all of the other benefits contained in the

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<sup>478</sup> *EPSA, et al. v. FES and , Ohio Edison, Cleveland Electric Illuminating Company and Toledo Edison*, FERC Case No. EL-16-34-000.

<sup>479</sup> *EPSA, et al. v. AEP Generation Resources and Ohio Power Company*, FERC Case No. EL-16-33-000.



Stipulation, FirstEnergy's projections demonstrate that the costs of the PPA are estimated to be below-market over the eight-year term of the PPA. Consequently, the Commission should make an express finding that the most credible evidence demonstrates that the long-term costs of the PPA are projected to be below-market. Similarly, the Commission should make two additional findings to avert potential Edgar arguments. First, the Commission should make an express finding that FirstEnergy's customers are not "captive" given that there is retail competition in Ohio. Second, the Commission should expressly find that FirstEnergy's Rider RRS proposal is consistent with Ohio corporate separation laws and that there is no definitive evidence of affiliate abuse within the record of this case.<sup>480</sup>

The PUCO should not make such express findings, and instead await FERC action in the EPSA Complaints.

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 core responsibility is to: "guard the consumer from exploitation by non-competitive electric power companies."<sup>481</sup> Naturally, FERC does not need to concern itself with affiliate abuse when "non-traditional" affiliates without captive customers are involved.<sup>482</sup> However, that is not the situation in this case, and is contrary to the express findings OEG asks the PUCO to make.

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<sup>480</sup> OEG Initial Brief at 32-33 (citations omitted).

<sup>481</sup> OCC/NOAC Initial Brief at 25.

<sup>482</sup> *USGen Power Servs., L.P.*, 73 FERC ¶ 61,302 at 61,846 (1995).

**1. The most credible evidence does not show that the long-term costs of the PPA will be below market.**

OEG implores the PUCO to find that the most credible evidence demonstrates that the long-term costs of the PPA are projected to be below market.<sup>483</sup> For the PUCO to make such a finding requires the PUCO to rely on FirstEnergy's projections. That reliance would be unjust and unreasonable.

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 before August 2014, when the Application was filed. FirstEnergy witness Rose has not updated his market price estimates for more current activity.

With regards to projections, Staff witness Choueiki had an interesting observation on forecasts and their reliability after three years. His observation underlied his filed recommendation to limit customers exposure to Rider RRS to no more than three years. position that limited the On cross-examination Dr. Choueiki stated:

Q. If the projections show that there is no net benefit -- no net financial benefit to customers over the initial three years of the ESP of the -- of the rider, what is the basis for your recommendation that the rider should be cut off at the end of three years?

A. Because I'm not sure -- I have zero --the level of comfort and the forecast past three years, the error on uncertainty is

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<sup>483</sup> OEG Initial Brief at 32.

over a hundred percent in my mind that I -- although there might be a cost the first three years, I see more danger in future years. So I'm not weighing anything on the credits that would be -- would show up in the future. So I am limiting the exposure by three years.

Q. Okay. When you read the order in these cases in preparing your testimony, you gave no consideration -- you don't think it's important to consider whether the -- whether the projections show that the rider will produce any net financial benefit to the customers, and you are simply looking at these other considerations that the Commission should take into account in any event?

A. Okay. So in my mind, the first three years I can give you a forecast within plus or minus 3 percent. My group does that all the time, and I commend them on that. Their accuracy is very well in predicting SSO clearing prices. The minute you go past or we don't know anything about what their transparent capacity price is, the error goes up by 100 percent. So I am not willing to go past that.<sup>484</sup>

In Dr. Choueiki's opinion, FirstEnergy's forecasts are soon to be three years old, and subject to significant errors going forward. FirstEnergy had ample opportunity to update its projections, but chose not to. Therefore, the PUCO should not rely on FirstEnergy's projections for Rider RRS charges/credits.

In contrast, OCC witness Wilson has updated his estimated cost to consumers and found that cost 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. In other words consumers pay the full costs of these units, with no incoming revenues to offset those costs.

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

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<sup>484</sup> Tr. Vol. XXX at 6258, 6260 (Choueiki).

inherent subsidy the PPA arrangement provides.<sup>485</sup> If these uneconomic unit are bid in at cost, it is likely 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.

OCC's witness Wilson has projected Rider RRS cost to consumers, under the best case scenario (the PPA Units clear), to be \$3.6 billion. Mr. Wilson's 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 no capacity (as well as energy) revenues from the market to offset the costs and guaranteed profit of those units. The costs to consumers could skyrocket. Therefore, FirstEnergy's projections cannot be the most credible evidence the PUCO has to rely upon in this case.

**2. FirstEnergy's customers are captive, and subject to significant unwarranted charges through Rider RRS.**

OEG has proposed that the PUCO make a finding the FirstEnergy's customers are not captive given there is retail competition in Ohio.<sup>486</sup> However, this is an issue of importance to FERC, and cannot be as easily determined by the PUCO, as OEG suggests. Because despite the presence of retail competition, Rider RRS is non-bypassable and by its nature creates captive customers. As such, OEG's statement is irreconcilable with the facts in this case and reality.

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<sup>485</sup> IMM Ex. 2 at 6-7 (Bowring First Supplemental).

<sup>486</sup> OEG Initial Brief at 32.

Rider RRS is non-bypassable.<sup>487</sup> All FirstEnergy customers must pay a charge through Rider RRS.<sup>488</sup> Therefore, customers cannot avoid this charge by leaving FirstEnergy's SSO rate and taking generation service from a Marketer. As EPSA stated in its Complaint against FirstEnergy and FES, "[t]hese retail customers could not be more captive with respect to costs of the Affiliate PPA if they were locked in a cage with a greedy tiger."<sup>489</sup>

This issue is important to FERC's analysis, because to protect against affiliate abuse, FERC's market-based rate regulations expressly provide that "no wholesale sale of electric energy or capacity may be made between a franchised public utility with captive customers and a market-regulated power sales affiliate without first receiving Commission authorization for the transaction under section 205 of the [Federal Power Act]."<sup>490</sup> For purposes of these restrictions, "captive customers" are "wholesale or retail electric energy customers served by a franchised public utility under cost-based regulation."<sup>491</sup> FES received a waiver under FERC's market based rate authority. Apparently, however, this was because FirstEnergy had no captive retail customers. This

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<sup>487</sup> FirstEnergy Ex. 13 at 6 (Strah Direct).

<sup>488</sup> Application at 9 ("The costs and revenues will then be netted, and the outcome of the acquisition and sale of the generation -- credit or cost -- would be included in the proposed Retail Rate Stability Rider ("Rider RRS") that would be applicable to all customers.")

<sup>489</sup> *EPSA, et al. v. FES and, Ohio Edison, Cleveland Electric Illuminating Company and Toledo Edison*, FERC Case No. EL-16-34-000 at 18 (January 27, 2016).

<sup>490</sup> 18 C.F.R. § 35.39(b) (2015).

<sup>491</sup> 18 C.F.R. § 35.36(a)(6) (2015). Retail customers electing to take cost-based service from a franchised public utility acting as a provider of last resort ("POLR") "are not considered captive customers because, although they may choose not to do so, they have the ability to take service from a different supplier whose rates are set by the marketplace." *Market-Based Rates for Wholesale Sales of Elec. Energy, Capacity & Ancillary Servs. by Pub. Utils.*, Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 480 ("Order No. 697"), *on reh'g*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 ("Order No. 697-A"), *on reh'g*, Order No. 697-B, FERC Stats. & Regs. ¶ 31,285 (2008), *on reh'g*, Order No. 697-C, FERC Stats. & Regs. ¶ 31,291 (2009), *on reh'g*, Order No. 697-D, FERC Stats. & Regs. ¶ 31,305 (2010), *clarified*, 131 FERC ¶ 61,021 (2010), *aff'd sub nom. Montana Consumer Counsel v. FERC*, 659 F.3d 910 (9th Cir. 2011), *cert. denied Pub. Citizen, Inc. v. FERC*, 133 S. Ct. 26 (2012).

is generally the case in states, like Ohio, with retail choice., In Ohio customers can purchase their power requirements at market-based rates from competitive electric retail suppliers.

But FERC's granting of the waiver, did not (and could not have) contemplated the PPA, and its non-bypassable collection mechanism – Rider RRS. Rider RRS was not in existence when FES received its waiver. But now, FirstEnergy's distribution customers will be subject to Rider RRS.

But for the overwhelming number of FirstEnergy's 1.9 million customers there is no escape from Rider RRS – they are captive, and that is reality. For purposes of FERC's analysis, these customers are all captive. OEG's urging that the PUCO find otherwise is disingenuous, and contrary to the unrefuted facts in this case. Therefore, the PUCO should not rule on the PPA until FERC rules on the EPSA Complaints.

**3. It is premature for the PUCO to expressly find no evidence of affiliate abuse in this case.**

OEG further recommends the PUCO expressly find that FirstEnergy's Rider RRS proposal is consistent with Ohio corporate separation laws and that there is no definitive evidence of affiliate.<sup>492</sup> Again, OEG is trying to get out in front of FERC, and send the federal regulator a message that all is well in Ohio. Nothing could be further from the truth.

Since the inception of its market-based rate program, FERC has recognized the risk of self-dealing and other affiliate abuse that exists when a franchised utility transacts with its affiliates. Accordingly, it has made clear that “it is essential that ratepayers be protected and that transactions be above suspicion in order to ensure that the market is

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<sup>492</sup> OEG Initial Brief at 32-33.

not distorted.”<sup>493</sup> To protect against affiliate abuse, the Commission’s market-based rate regulations expressly provide that “no wholesale sale of electric energy or capacity may be made between a franchised public utility with captive customers and a market-regulated power sales affiliate without first receiving Commission authorization for the transaction under section 205 of the [FPA].”<sup>494</sup>

FERC has also long recognized that, absent adequate safeguards, a “power marketer could sell power to its affiliated franchised public utility at an above market price, and that affiliated utility could then pass those costs through to its captive customers.”<sup>495</sup> That is precisely what is occurring here: FES will be selling power to the FirstEnergy at an above-market price, and the FirstEnergy will then pass those costs through to their captive customers. Indeed, this case effectively involves what FERC has previously described as an “extreme example” of such affiliate abuse: “a holding company that siphons funds from a franchised public utility to support its failing market-regulated power sales affiliate . . . .”<sup>496</sup>

This case presents a textbook opportunity for affiliate abuse. And the PUCO has no bases to find otherwise. There is merely a term sheet between FES and FirstEnergy governing the PPA. FirstEnergy testified there is no final executed agreement.<sup>497</sup> So the term sheet could be subsequently modified upon the negotiation of a final PPA, at this time, the PUCO has not seen the PPA. If the term sheet is approved and subsequently

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<sup>493</sup> *Edgar*, 55 FERC ¶ 61,382 at 62,167 (footnote omitted). See also *Southern Power Co.*, 153 FERC ¶ 61,068 at P 15 (2015) (“*Southern*”) (same); *Allegheny*, 108 FERC ¶ 61,082 at P 18 (same).

<sup>494</sup> 18 C.F.R. § 35.39(b) (2015).

<sup>495</sup> *Illinova Power Mktg., Inc.*, 88 FERC ¶ 61,189 at 61,649 (1999) (“*Illinova*”).

<sup>496</sup> Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at n.280.

<sup>497</sup> As Companies’ witness Strah acknowledged, he does not know “what the exact contract is going to look like or the exact words putting forth those provisions in the term sheet.” Tr. IV at 869-70. Likewise, although witness Moul insisted that the term sheet provisions would be included in the final PPA, he acknowledged that additional provisions could potentially be added to the contract. Tr. XI at 2332.

modified in the final PPA, there could be affiliate abuses within the executed contract. Therefore, at this stage of the process, it is impossible, and premature for the PUCO to definitively find that under the PPA there is no evidence of affiliate abuse. It is incredulous for OEG to request the PUCO to decide otherwise.

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 the PUCO's order authorizing the PPA is invalidated.<sup>498</sup> 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 (or a court of competent jurisdiction) invalidating the PUCO's order.

#### **IV. CONCLUSION**

FirstEnergy's Settlement and Application would cost Ohio's retail customers a projected \$3.6 billion (\$800 per customer) over the eight-year PPA term. The cost to Ohioans would be "dramatically" more money if federal officials require the power plants to bid into markets at their cost and the plants receive no revenue to offset the consumer subsidies under FirstEnergy's proposed PPA. Additionally, the settlement's re-regulatory proposal would diverge from Ohio's policy for using markets to determine electric generation prices (instead of government regulators imposing subsidies). The

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<sup>498</sup> FirstEnergy Ex. 154 at XXX (Third Supplemental Stipulation).



PUCO should take a stand for Ohio policy, markets and the consumer protection that state policy for markets provides to 1.9 million residential FirstEnergy consumers.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

It is hereby certified that a true copy of the foregoing Reply Brief was served upon the persons listed below via electronic transmission this 26<sup>th</sup> day of February, 2016.

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