BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

APPLICATION FOR REHEARING BY THE ENVIRONMENTAL LAW & POLICY CENTER, OHIO ENVIRONMENTAL COUNCIL, AND ENVIRONMENTAL DEFENSE FUND

I. INTRODUCTION

Pursuant to Ohio Revised Code ("R.C.") 4903.10 and Ohio Admin. Code 4901-1-35, the Environmental Law & Policy Center, Ohio Environmental Council, and Environmental Defense Fund hereby file this application for rehearing of the March 31, 2016 Opinion and Order ("Order") of the Public Utilities Commission of Ohio ("Commission") in this proceeding. The Commission's Order approved a Stipulated Electric Security Plan ("Stipulated ESP") proposed by the Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company (collectively "FirstEnergy Utilities" or "Companies"). A central element of the Stipulated ESP is a non-bypassable Retail Rate Stability rider ("Rider RRS") through which the FirstEnergy Utilities will recover the costs of power purchase agreements ("PPAs") to buy the output of generation owned by their affiliate FirstEnergy Solutions ("FES") and by the Companies themselves.

The Order is unlawful and unreasonable for the following reasons, as further explained in the accompanying Memorandum in Support:

1. The Order erroneously concluded that Rider RRS is not an "anticompetitive subsidy" inconsistent with R.C. 4928.02(H).

2. The Order erroneously approved Rider RRS as reasonable and consistent with R.C. 4928.02(A), despite the Companies' failure to solicit any alternative hedging offers or conduct any competitive procurement process to demonstrate that the underlying noncompetitive affiliate deal will not result in unreasonable prices for customers.

3. The Order unreasonably pre-approved a provision of the Stipulated ESP raising the cap on shared savings that the Companies may earn on energy savings from their efficiency programs.

4. The Order unreasonably failed to resolve the argument that the provision of the Stipulated ESP allowing customers to opt out of paying for the Companies' peak demand reduction programs while still receiving monetary credits under one such program violates R.C. 4928.6613.

5. The Order unreasonably failed to resolve the argument that allowing the FirstEnergy Utilities to receive lost distribution revenues for energy savings that do not occur as a result of the Companies' efficiency programs would be unreasonable and inconsistent with Commission precedent.

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Respectfully submitted,

/s/ Madeline Fleisher
Madeline Fleisher
Environmental Law & Policy Center
21 W. Broad St., Ste. 500
Columbus, OH 43215
P: 614-670-5586
F: 312-795-3730
mfleisher@elpc.org

Counsel for Environmental Law & Policy Center

/s/ Trent A. Dougherty
Trent A. Dougherty
Ohio Environmental Council
1145 Chesapeake Avenue, Suite I
Columbus, OH 43212
(614) 487-5823
tdougherty@theoec.org

Counsel for Ohio Environmental Council and Environmental Defense Fund

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I. INTRODUCTION

The Environmental Law & Policy Center, Ohio Environmental Council, and Environmental Defense Fund (collectively, "Environmental Intervenors") seek rehearing of the March 31, 2016 Opinion and Order ("Order") of the Public Utilities Commission of Ohio ("Commission" or "PUCO") in this case approving a Stipulated Electric Security Plan ("Stipulated ESP") proposed by the Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company (collectively "FirstEnergy Utilities" or "Companies") Among other things, the Order approved the Companies' request for retail recovery of the net impacts resulting from two cost-based power purchase agreements ("PPAs"). Those PPAs involve the Companies' purchase of the output from over 3000 MW of coal and nuclear units ("FirstEnergy PPA Units") owned by the FirstEnergy Utilities themselves and their affiliate FirstEnergy Solutions ("FES"). Pursuant to the Order, all of the FirstEnergy Utilities' distribution customers will be subject to a non-bypassable Retail Rate Stability Rider ("Rider RRS"), through which they will pay the full costs of the FirstEnergy PPA Units and a consistent return to FES of 10.38% on all fixed costs for its units. Customers will then receive the market revenues from selling the output of the FirstEnergy PPA Units. The Commission approved this arrangement as the "centerpiece" of the Stipulated ESP, based in large part on its asserted value "as a potential hedge or insurance on electricity rates" in light of the Companies' forecast of rising market prices for electricity. Order at 80.

Environmental Intervenors assert that, in making this determination, the Commission unreasonably and unlawfully failed to account for the fact that Rider RRS undisputedly centers on an affiliate deal between the FirstEnergy Utilities and FES. The Companies proposed this deal without any competitive vetting or consideration of alternatives to determine whether it would provide service to customers at a reasonable price. This type of non-competitive self-dealing violates Ohio regulatory policy as set forth in R.C. 4928.02(H), which establishes a policy of "[e]nsur[ing] effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing" between a noncompetitive retail electric service and a competitive retail electric service.

More fundamentally, the Commission's approval of Rider RRS as "reasonable" is inconsistent with the stipulation review standard and R.C. 4928.02(A), absent a serious evaluation of the rider on a level playing field with potential alternative hedging options. The Commission failed to evaluate whether Rider RRS forces the FirstEnergy Utilities' customers to take on unreasonable costs or risks in return for the asserted rate stability benefit. Without such an assessment, the Commission cannot adequately evaluate whether the price and risks that Rider RRS imposes on the Companies' customers are reasonable.

The Order was also unreasonable and unlawful in addressing three other aspects of the Stipulated ESP. First, the Order approved an increase in the cap on the "shared savings" incentive payments that the Companies may earn on their energy efficiency programs even though the FirstEnergy Utilities never met their burden to show this increase was justified. Second, the Order unreasonably failed to resolve Environmental Intervenors' argument that the Stipulated ESP violates Ohio law regarding customers' ability to opt out of paying for the Companies' energy efficiency and peak demand reduction programs by providing that opt-out customers may still receive benefits under one such program. Third, the Order erroneously failed to address the Environmental Intervenors' argument that it is unreasonable for the Companies to recover lost distribution revenues based on energy savings that result from independent customer action rather than any actions by the FirstEnergy Utilities.

II. ARGUMENT

A. Rider RRS Allows an Anticompetitive Subsidy Forcing the Companies' Distribution Customers to Cover the Costs of FirstEnergy Generating Plants Even If Those Plants Are Uneconomic on the Competitive Market.

1. R.C. 4928.02(H) Encompasses Rider RRS Regardless of Whether the Commission Categorizes that Rider as Part of the Companies' Distribution Service.

The standard for review of a stipulation requires the Commission to determine whether a proposed stipulation is "reasonable" considering three factors, including whether "as a package, [it will] benefit ratepayers and the public interest" and whether "the settlement package violate[s] any important regulatory principle or practice." Order at 39 (citing *In re Cincinnati Gas & Elec. Co.*, Case No. 91-410-EL-AIR, Order on Remand (Apr. 14, 1994)). In analyzing the latter factor, the Commission unlawfully concluded that Rider RRS is consistent with R.C. 4928.02(H). That provision declares that it is state policy to:

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

R.C. 4928.02(H). Further, under R.C. 4928.06, the Commission must "ensure that the policy specified in section 4928.02 of the Revised Code is effectuated."

The Order never adequately addressed the argument that Rider RRS provides an anticompetitive subsidy inconsistent with R.C. 4928.02(H). The Commission's only statement on the matter was confined to the specific concern "that the Companies will enter into bilateral contracts with an affiliate in order to give the affiliate a competitive advantage." Order at 110. On that front, the Commission concluded that its "annual prudency review process" would be "more than sufficient to protect against anticompetitive subsidies pursuant to R.C. 4928.02(H)."

Id. That holding, however, does not address the fact that the approval of Rider RRS itself permits the Companies to channel anticompetitive subsidies to FES regardless of how stringently the Commission scrutinizes the subsequent implementation of the underlying PPAs.

It may be that the Commission implicitly intended to rely on its holding that R.C. 4928.02(H) did not apply to a similar "PPA rider" approved in Ohio Power Company's most recent ESP proceeding, Case No. 13-2385-EL-SSO ("*AEP ESP 3 Case*"). In that case, the Commission reasoned that the PPA rider was not subject to R.C. 4928.02(H) because "the rider would not permit the recovery of generation-related costs through distribution or transmission rates . . . . [since it] would be considered a generation rate." *AEP ESP 3 Case*, Opinion and Order (Feb. 25, 2015) at 26. However, as Environmental Intervenors argued in our (still-pending) Application for Rehearing in that proceeding, such a narrow reading of R.C. 4928.02(H) is inconsistent with the provision's plain language. *AEP ESP 3 Case*, Environmental Intervenors' Rehearing Application (Mar. 27, 2015) at 3-6. The statute's prohibition on anticompetitive subsidies "*including* by . . . the recovery of any generation-related costs through distribution or transmission rates" (emphasis added) is simply a specific example of one type of subsidy barred by state policy. It is not the exclusive mechanism that might qualify as an anticompetitive subsidy violating R.C. 4928.02(H).

Notably, the Ohio Supreme Court did not dwell on the precise labels for particular rate mechanisms in *Elyria Foundry Co. v. PUCO*, where it applied a prior version of R.C. 4928.02(H) (at that time codified at R.C. 4928.02(G)). That prior version of the statute similarly established a state policy of ensuring "effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa." *Elyria Foundry Co. v. Pub. Util. Comm.,* 114 Ohio St.3d 305, 2007-Ohio-4164, 871 N.E.2d 1176, ¶ 48. In *Elyria*, the Court rejected a utility proposal to collect increases in generation-related fuel costs through its distribution rates as violating this policy, citing the requirement for each utility service component "to stand on its own" after Ohio's transition to unbundled electric service. It is that substantive goal – ensuring that competitive and non-competitive retail electric services each "stand on their own" – that must drive the Commission's application of the statute. In this case, the Commission has approved a non-bypassable rider funding only FirstEnergy-owned plants. The rider effectively allows the Companies to treat their distribution customers as a captive audience forced to pay for a purported financial hedge resting only on FirstEnergy's own generation business. The resulting anticompetitive effect is the same, regardless of how the FirstEnergy Utilities label Rider RRS, and violates the substantive policy of R.C. 4928.02(H).

The amendments to R.C. 4928.02(H) after *Elyria* do not alter this conclusion. In 2008, Senate Bill 221 added the following language to that provision's bar on anticompetitive subsidies between competitive and noncompetitive retail electric service: "including prohibiting the recovery of any generation-related costs through distribution or transmission rates." As noted above, the use of the term "including," along with the retention of the existing, broader language, reflects the legislature's intent to expand the policy against cross-subsidization through a prohibition on a particular type of cross-subsidy. There is no indication that it was meant to restrict the expansive scope of R.C. 4928.02(H) as applied in *Elyria*.

The Commission must therefore focus its inquiry under R.C. 4928.02(H) on whether Rider RRS implements an anticompetitive subsidy by effectively forcing all of the Companies' distribution customers to pay to support uneconomic FirstEnergy plants. The Commission unlawfully failed to undertake such an inquiry.

2. Rider RRS Is an Anticompetitive Subsidy.

Analysis of Rider RRS under R.C. 4928.02(H) shows that it does constitute an anticompetitive subsidy. The Companies admit that the costs of the FirstEnergy PPA Units may not be fully covered by their market revenues, and that market revenues have not historically provided the level of profit that FES will receive pursuant to the Stipulated ESP. Co. Ex. 28 at 2-4. Therefore, for at least some of its eight-year span Rider RRS is likely to provide out-of-market payments from the Companies' customers to cover the FirstEnergy PPA Unit costs and pay a significant profit on some of those costs to FES. Not only does this arrangement provide a financial subsidy by providing FES with money that it would not otherwise receive, it also insulates FES from market risk that its competitors must bear. The U.S. Supreme Court itself recently characterized such payments to generators outside the PJM wholesale market as "subsidies." *Hughes v. Talen Energy Marketing, LLC*, Case No. 14-614, slip op. at 1 (U.S. Apr. 19, 2016).

Rider RRS is not just a subsidy, it is a plainly anticompetitive one, in two separate respects. First, the Companies' decision not to consider any generation sources besides FirstEnergy-owned units for inclusion in Rider RRS means that no FES competitors ever had a viable opportunity to make alternative hedging offers. Although intervening party Exelon Corp. did present a potential competing offer in the final stage of this proceeding, it did so without a clear statement of the applicable criteria for evaluating such an offer and without the opportunity to discuss any relevant concerns or critiques with the Companies. *See* Exelon Exs. 4 and 5. Moreover, because the Companies themselves did not solicit any third-party offers, there was no opportunity to leverage the competitive process to ensure the submission of reasonably priced offers with the best terms for customers.

At the least, the Exelon offer shows that given a real opportunity to compete on a level playing field with FES, other market participants might have sought the same benefits as the Companies' affiliate by offering a PPA based on non-affiliate generation or demand-side resources, or even some other hedging mechanism altogether. Such offers could well have provided a better price or on better terms for the Companies' customers. Instead, the Companies gave only FirstEnergy-owned units this chance to be shielded from market risk, have their costs covered, and earn a guaranteed profit of 10.38% on all capital expenditures. That opportunity represents a significant competitive advantage if, as the Companies have represented, the FirstEnergy PPA Units would otherwise face the risk of premature retirement due to the market forces that their competitors still face. Co. Ex. 28 at 2-4.

Similarly, being forced to accept the Rider RRS "hedge" deprives the Companies' customers of the opportunity to shop freely among FES's competitors for their preferred hedging service. The Commission has already recognized that it undercuts the "development of the competitive market for generation" to require customers to pay twice for a generation-related service like Rider RRS, rather than allowing them to choose whether to receive that service from a competitive supplier instead. *In the Matter of the Application of The Cincinnati Gas & Electric Company to Modify its Nonresidential Generation Rates to Provide for Market-Based Standard Service Offer Pricing and to Establish an Alternative Competitive-Bid Service Rate Option Subsequent to the Market Development Period*, Case No. 03-93-EL-ATA, 2007 Ohio PUC LEXIS 703, at 83 (Oct. 24, 2007). In a stipulation offered by Duke regarding its SSO pricing, Duke sought Commission approval of an unavoidable charge designed to recover generation-related costs stemming from its provider of last resort obligation from all of its customers, including costs of compliance with environmental, tax, and other laws. *Id.* at 82. The Commission concluded that this proposal "would result in shoppers paying for this category of expenses [legal compliance costs] twice" since the generation service they obtained from competitive retail electric service providers would also incorporate compliance costs for the underlying plants. *Id.* at 83. Therefore, the Commission held that, "in order to continue encouraging the development of the competitive market for generation, . . . the environmental compliance, tax, and homeland security aspects of Duke's proposed POLR charge should be avoidable." *Id.* In the context of the hedging service considered here, the Commission has previously recognized that competitive suppliers are already seeking to provide some protections against price volatility. *AEP ESP 3 Case,* Opinion and Order at 24. Rider RRS thus undercuts the further development of a competitive market to provide hedges to customers who do want such a service in some form by forcing those customers to pay for the Companies' version of a hedge instead of freely choosing from among competing options.

Second, the Rider RRS subsidy may have additional anticompetitive effects in the future. The brief of Amicus Curiae PJM Interconnection, L.L.C. explained that if the FirstEnergy Utilities bid the output from the FirstEnergy PPA Units into the wholesale market at a level below their actual costs, the result could be to "artificially suppress prices in a manner that could constrain development of new generation in Ohio." PJM Amicus Curiae Br. at 5 (Feb. 16, 2016). The Order rightly notes the Commission is "mindful" of that risk. Order at 91. The Commission has asserted that it will guard against this possibility through annual reviews to determine whether the Companies' bidding behavior "is consistent with participation in a broader competitive marketplace comprised of sellers attempting to maximize revenues" and "prudent and in the best interest of retail ratepayers." Order at 91. However, this approach does not account for the fact that it might well be "in the best interest of retail ratepayers" to bid the PPA Units' output into the wholesale market below cost. The Companies could argue that such bidding behavior is a prudent measure to avoid the risk that the units do not clear and therefore fail to earn at least some market revenues to defray the costs of the FirstEnergy PPA Units. This potential bidding strategy could still artificially depress market prices and deter FES competitors from constructing new generation, to the extent it allows the PPA Units to continue to operate despite being more costly than potential alternative sources of energy and capacity.

The Order suggests that the same risk already exists given the ongoing participation of regulated generation with retail cost recovery in the PJM market. *Id.* However, utilities generally procure such regulated generation through some integrated resource planning ("IRP") process or competitive procurement process subject to a prudency review to ensure that the generation in question does not entail unreasonable costs beyond what the market would support. *See, e.g.*, Ohio Admin. Code 4981:5-5-01 (defining "[i]ntegrated resource plan" as a "plan or program . . . to furnish electric energy services in a cost-effective and reasonable manner consistent with the provision of adequate and reliable service, which gives appropriate consideration to supply- and demand-side resources and transmission or distribution investments . . . ."). For example, one instance of regulated generation participating in the PJM market that the Companies cited in this proceeding is that of electric utilities in Virginia. FirstEnergy Reply Br. at 120. That example perfectly illustrates the difference between the non-competitive affiliate PPA deal here and an IRP process for procuring generation resources in a regulated state, since the Virginia public utilities commission has explained that a utility must "adequately consider third-party market alternatives" as part of that state's IRP process. *In re Virginia Electric and Power Company's*

Integrated Resource Plan Filing, Case No. PUE-2011-00092, 2012 Va. PUC LEXIS 537, 8 (Oct. 5, 2012) ("[W]e find that market alternatives are appropriate for consideration in cases where Dominion seeks a certificate of public convenience and necessity for specific investments."). The non-competitive affiliate deal underlying Rider RRS offers no such reassurances that the FirstEnergy PPA Units could out-compete other hedging options for customers. Rather, it is uniquely structured to offer a subsidy to FirstEnergy-owned generation alone regardless of whether Rider RRS delivers a service to customers on reasonable terms.

3. The Rider RRS Subsidy Supports a Competitive Retail Electric Service through Revenues from Noncompetitive Retail Electric Service Customers.

Finally, the subsidy provided by Rider RRS flows from a "noncompetitive retail electric service" to "a competitive retail electric service" within the meaning of R.C. 4928.02(H). Distribution service is a noncompetitive retail electric service, *Indus. Energy Users-Ohio v. Ohio Power Co.*, 140 Ohio St.3d 509, 2014-Ohio-4271, 20 N.E.3d 699, ¶ 4, and all of the Companies' distribution customers pay the non-bypassable Rider RRS regardless of whether they shop for generation service.[1] The Commission itself, in holding that it has authority to approve Rider RRS under R.C. 4928.143(B)(2)(d), has characterized the rider as a "limitation on customer shopping." Order at 109. Thus, Rider RRS will have "the same impact on" both shopping and non-shopping customers, even if shopping customers might otherwise choose a different hedging mechanism or no hedge at all. Order at 110. Accordingly, the Companies and FES will receive revenue through Rider RRS by virtue of the FirstEnergy Utilities' provision of noncompetitive

[1] The Environmental Intervenors' Application for Rehearing in the *AEP ESP 3 Case* argued that the Commission in fact erred in approving the similar PPA rider as a non-bypassable rider. *See AEP ESP 3 Case,* Environmental Intervenors' Rehearing Application (Mar. 27, 2015) at 6-9. That issue is still pending in light of the Commission's May 28, 2015 Second Entry on Rehearing.

distribution service – not as a result of customers choosing to accept this hedge as a competitive service in an open marketplace.

The funds from Rider RRS, meanwhile, flow to support a generation service that qualifies as "competitive retail electric service." Under R.C. 4928.03, all "retail electric generation . . . services supplied to consumers within the certified territory of an electric utility are competitive retail electric services that the consumers may obtain subject to this chapter from any supplier or suppliers." In approving the similar PPA rider in the *AEP ESP 3 Case*, the Commission characterized that rider as "a *generation-related* hedging service that stabilizes retail electric service . . . ." *AEP ESP 3 Case*, Opinion and Order at 21 (emphasis added). Further, as a practical matter, the purported hedge offered by the Companies rests directly on a contract for the output of generating units, and the Commission has stated that "construction and maintenance of an electric generating facility are fundamental to the generation component of electric service." *In the Matter of the Application of Ohio Power Company for Approval of the Shutdown of Unit 5 of the Philip Sporn Generating Station*, Case No. 10-1454-EL-RDR, Finding and Order (Jan. 11, 2012) at 16. Thus, even if no other competitive suppliers were afforded the opportunity to offer to supply the "generation-related" hedging service ostensibly being provided by the Companies and FES under Rider RRS, it is a competitive service under Ohio statute and precedent.[2] Moreover, the Commission has acknowledged that competitive retail electric suppliers do offer a different type of hedging service in the form of fixed-price generation

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[2] If the "hedging" service provided by Rider RRS is in fact a noncompetitive retail electric service, then it has not been properly proposed by the Companies or approved by the Commission, since the FirstEnergy Utilities did not file an application for approval of the Rider RRS rate under R.C. 4909.18. Under R.C. 4928.15(A), "no electric utility shall supply noncompetitive retail electric distribution service in this state on or after the starting date of competitive retail electric service except pursuant to a schedule for that service that is . . . filed with the public utilities commission under section 4909.18 of the Revised Code."

contracts, indicating that Rider RRS should not be treated any differently. *See AEP ESP 3 Case*, Opinion and Order at 24.

The Commission never confronted the fact that, as long as Rider RRS is structured as an unavoidable charge, effectively requiring the Companies' distribution customers to subsidize FirstEnergy generation alone, it constitutes an anticompetitive subsidy for the FirstEnergy Utilities' generation affiliate. The Order thus failed to carry out the Commission's obligation to "ensure that the policy specified in section 4928.02 of the Revised Code is effectuated." Therefore, the Commission must reconsider its holding that its approval of Rider RRS is consistent with R.C. 4928.02(H).

B. The Order Did Not Adequately Justify the Approval of This Affiliate Deal as Reasonable and Consistent with Ohio Policy.

The Order also erroneously approved the Stipulated ESP as "reasonable" under the stipulation review standard despite the fact that its centerpiece, Rider RRS, forces customers to accept a purported hedging service based on a non-competitive affiliate deal without any analysis of alternative hedging options. The Order sanctioned the application of Rider RRS as a non-bypassable charge regardless of whether customers would choose that purported hedging service on their own. Now the Companies' customers must accept the Rider RRS "hedge" even if it duplicates a hedge they have already paid for from a competitive retail electric supplier or through the Companies' Standard Service Offer, if they do not want to receive a hedge based on subsidizing coal generation, or if they simply do not place much value on the rate stability allegedly offered by Rider RRS.

In reviewing the Stipulated ESP, the Commission must evaluate whether it is reasonable and benefits ratepayers and the public interest. *Supra* at 3. This standard is consistent with R.C. 4928.02(A), which codifies a state policy of "[e]nsur[ing] . . . reasonably priced retail electric service." The fundamental question here is whether that reasonableness review requires some heightened scrutiny for Rider RRS since it is based on a noncompetitive affiliate transaction, in order to guard against self-dealing that results in unreasonable rates for customers. Longstanding practice in Ohio and other jurisdictions indicates that the Commission should take such an approach and require a specific showing that an affiliate deal is reasonable in light of potential alternatives.

In current-day practice, this Commission has relied on a competitive process or consideration of alternatives to demonstrate the reasonableness of an affiliate transaction. For example, the Commission has allowed generation affiliates to supply power to their sister distribution companies only through a competitive auction process that ensures affiliates participate "in the same fair and nondiscriminatory manner as all other participants" without any "competitive advantage." *In re Application of the Dayton Power and Light Company for Approval of Its Electric Security Plan*, Case Nos. 12-426-EL-SSO *et al.*, Opinion and Order (Sept. 4, 2013) at 16; *In re Application of Duke Energy Ohio, Inc. for Authority to Establish a Standard Service Offer*, Case Nos. 11-3549-EL-SSO *et al.*, Opinion and Order (Nov. 22, 2011) at 13. Similarly, in the past the Commission has applied heightened scrutiny to affiliate fuel purchases under (now-defunct) R.C. 4905.01(F). *In re Electric Fuel Component*, No. 86-01-EL-EFC, 1986 Ohio PUC LEXIS 17, 22 (Nov. 12, 1986) ("The Commission finds it necessary to pay special attention to the cost of affiliate coal because the potential for abuse exists when the buyer and seller are essentially the same entity . . . . Ohio Power's reliance on affiliate coal heightens the amount of scrutiny that Ohio Power's affiliate operations will face with this Commission."). In both circumstances, a utility must show that an affiliate deal is reasonable in light of alternatives available from non-affiliates.

The Federal Energy Regulatory Commission has likewise concluded that heightened scrutiny is necessary for affiliate deals, holding that a utility must demonstrate the reasonableness of such transactions by offering specific evidence to rebut the presumption that affiliate abuse has occurred – for example, by showing there was competition between an affiliate and competing suppliers on a level playing field, or that the affiliate deal is consistent with benchmark evidence of similar transactions with non-affiliates. *Boston Edison Co. Re: Edgar Electric Energy Co.*, 55 F.E.R.C. ¶ 61,382, 62,168-62,169 (1991). Other state utility commissions have also applied heightened scrutiny to affiliate deals as part of their obligation to ensure just and reasonable rates are not sacrificed in order to profit affiliate shareholders. *See, e.g.*, *Entergy Louisiana*, Docket No U-27136, 2006 La. PUC LEXIS 281, at 102-103 (Aug. 29, 2006) (noting that "heightened scrutiny" applies to affiliate transactions given concerns about protecting ratepayers and "caus[ing] long-term harm to the wholesale competitive market" by "discourag[ing] non-affiliates from adding supply in the local area").

In this case, the Commission appears to have approved Rider RRS as reasonably priced without any heightened scrutiny, based solely on the Companies' proffered projection of the net rider impact. Order at 80. However, that reliance on the Companies' projection is unreasonable given the possibility that the FirstEnergy Utilities are using this noncompetitive affiliate deal to force their customers to subsidize FES where they would not otherwise choose to do so. Even the Commission acknowledges the Companies' rider projection may well prove wrong. *Id.* at 86. Furthermore, the near-term outlook for electricity prices suggests that the Companies' rider projection is based on an outdated and overoptimistic view of the market. Environmental Intervenors Initial Br. at 14-21. Yet the Order fails to analyze the magnitude of the risk to customers that Rider RRS does prove more costly than the Companies suggest. By contrast, the

Commission readily cited uncertainty about future market prices compared to plant costs as a basis for disbelieving the economic benefits of a competing offer made by Exelon.[3] Order at 99. The possibility that Rider RRS will turn out to be a significant charge is part of the merits of the deal, and the Commission's narrow focus on one potential outcome based on an outdated market price projection unreasonably disregarded that aspect of the rider.

Some competitive procurement process would have offered reassurances that the Companies' projection does in fact constitute a credible basis for determining the reasonableness of Rider RRS's impact. It might also have helped to ensure that the Companies' customers pay a reasonable price for the hedging service offered by the rider by revealing whether alternative options would provide better terms and prices for customers, or by enabling the Companies to leverage competing offers to improve the ultimate deal. The state legislature and the Commission have both recognized the benefits of such a competitive procurement process, particularly where the danger of self-dealing is present. For example, R.C. 4928.143(b) and (c) allow a utility to recover costs related to procurement of new generation to serve its customers through an ESP only where that generation is "sourced through a competitive bid process." In this very case, the Commission established a similar safeguard for the FirstEnergy Utilities' procurement of renewable generation in connection with the Stipulated ESP, "direct[ing] that the Companies demonstrate that bilateral opportunities were explored and that a competitive process was utilized to source and determine ownership of any project to be built." Order at 97. Because it did not apply that same approach here, the Commission failed to ensure that Rider RRS does not

[3] The Commission also cited the lack of collateral benefits from the Exelon offer in terms of reliability, transmission cost, and economic development considerations. Order at 99. However, the Commission at the same time suggested that its approval of Rider RRS "does not turn on such issues." *Id.* at 87.

result in unreasonable rates for customers consistent with the stipulation review standard and R.C. 4928.02(A).

C. The Order Unreasonably Pre-Approved Raising the Cap on Shared Savings that the Companies May Earn on Energy Savings from Their Efficiency Programs.

The Order approved a provision of the Stipulated ESP that would increase the cap on the shared savings that the Companies may earn on energy savings from their energy efficiency programs from $10 million to $25 million. Order at 95. The Companies themselves failed to provide any evidence or even any rationale to justify the shared savings cap increase. *See* ELPC Ex. 27. The Commission *sua sponte* cited two rationales for approving this stipulation provision: first, that "any programs eligible for shared savings must be cost-effective" and therefore "the increase in the shared savings cap is in the public interest because it encourages the Companies to seek to provide to their customers all available cost-effective energy efficiency opportunities"; and second, that the Companies have "committed to file an application to implement a decoupling mechanism in the form of SFV [straight-fixed variable] rate design." Both of these justifications for approving the increased cap are inconsistent with Ohio law, Commission precedent, and the record evidence in this case.

1. The Order Erroneously Concluded that Increasing the Shared Savings Cap Would Encourage the Companies to Provide Additional Energy Savings Opportunities to Customers.

The basic rationale for the Commission's conclusion that the shared savings cap increase would benefit ratepayers – that the opportunity for greater incentive payments will cause the Companies to "accelerate the delivery of cost-effective energy savings opportunities to their customers," Order at 95 – fails to account the current state of Ohio law. In 2014, the General Assembly enacted R.C. 4928.662. That provision states that a utility must count not only savings from utility energy efficiency programs toward its statutory targets, but also energy savings resulting from customer actions outside those programs, as when a customer replaces an incandescent lightbulb that fails with a more efficient CFL bulb. R.C. 4928.662(A). The Companies already have a "Customer Action Program" designed to measure such savings in their current program portfolio plan, and have included the same program in their latest portfolio plan filing. Tr. XXXVII at 7860-7865; *In re Application of FirstEnergy Utilities for Approval of Their 2017-2019 Program Plans*, Case No. 16-743-EL-POR, Application (Apr. 15, 2016) at 5-8. Additionally, under R.C. 4928.662(D), utilities also count savings from measures incentivized under its programs on a "gross" basis, *i.e.*, even if they would have happened without the utility paying for customer incentives. R.C. 4928.662(D). Both of these provisions allow the Companies to count energy savings that result from customer action alone rather than any utility efficiency program.

The record indicates that the Companies would count savings under both of these provisions as resulting from cost-effective utility programs even if those programs did not actually do anything to encourage the relevant efficiency improvements. Company witness Mikkelsen testified at hearing that the Companies consider the Customer Action Program to qualify as "cost effective." Tr. XXXVII at 7866. The Companies could also attribute "gross" savings to cost-effective programs aimed at promoting the relevant efficiency measure, even if the customer would have installed the measure without participating in the program. Therefore, both of these new statutory provisions increase the scope of energy savings eligible to trigger shared savings under the Stipulated ESP. Co. Ex. 154 at 11-12.

Accordingly, the Companies will be able to earn shared savings on energy savings even where their programs have done no more than measure the results of efficiency measures that customers have undertaken on their own. This means the FirstEnergy Utilities may be able to earn shared savings up to the new cap simply by diverting resources to expanding the scope of the Customer Action Program or other programs in areas where customers are already independently adopting more efficient technologies and behaviors. As a result, the additional shared savings payments authorized by the Order may not have the effect, intended by the Commission, of "accelerat[ing] the delivery of cost-effective energy savings opportunities to their [the Companies'] customers." Order at 95. Instead, customers will simply be paying more money to the FirstEnergy Utilities in order to have the Companies measure what those customers are already doing: becoming more efficient on their own. This potential perverse incentive is not something that existed in prior cases involving shared savings issues, and it warrants careful consideration before the Commission simply replicates the shared savings mechanisms approved in past contexts.

2. The Order Unreasonably Relied on the *AEP-Portfolio Case* to Determine the Outcome Here.

With respect to the approval of the specific requested increase of the Companies' shared savings cap to $25 million, the Order primarily relies on a prior Commission case regarding the FirstEnergy Utilities' prior energy efficiency and peak demand program portfolio plan, *In re FirstEnergy Utilities' Application for Approval of Their Energy Efficiency and Peak Demand Reduction Program Plans for 2013-2015*, Case No. 12-2190-EL-POR ("*FirstEnergy 2013-2015 Portfolio Case*"). In a 2013 Opinion and Order approving the FirstEnergy Utilities' 2013-2015 portfolio plan, the Commission set the Companies' shared savings cap at $10 million but stated "that, should FirstEnergy decouple distribution revenue from usage in the future, the cap on the amount of shared savings that may be collected shall increase to $20 million, which is the amount of the cap the Commission approved in the *AEP-Portfolio Case* [Case Nos. 11-5568-EL-

POR *et al*.].” *FirstEnergy 2013-2015 Portfolio Case*, Opinion and Order (Mar. 20, 2013) at 15. The Commission differentiated the two utilities by explaining that, as part of the stipulation proposing the $20 million cap for AEP, that company had “agreed to implement a throughput balancing adjustment rider on a pilot basis, while FirstEnergy collects lost distribution revenue.” *Id.* According to the Order, the provision in the Stipulated ESP for the FirstEnergy Utilities to seek to change residential rates to a SFV design is equivalent to the AEP throughput balancing adjustment rider, and therefore the Companies may now receive the same shared savings incentives as AEP.

However, the two cases are in fact quite different.[4] The provisions of the Stipulated ESP regarding SFV rate design are by no means equivalent to the AEP throughput balancing adjustment rider in terms of how they affect the implementation of cost-effective energy efficiency programs beyond the requirements of R.C. 4928.66. There are several material differences between the two rate designs that dictate against treating both as a reason to increase the utilities’ shared savings caps, as described below.

The first difference is that in the *AEP-Portfolio Case*, the Commission had great certainty regarding AEP’s finances and rate design. The Order itself states that the Stipulations commit the FirstEnergy Utilities to filing an application to switch to a straight-fixed variable rate design in April 2017, but that “the Stipulations provide for a separate proceeding where any interested party will have a full and fair opportunity to address whether the proposed SFV should be implemented and to raise any other issues specific to the Companies’ service territories.” Order at 94-95. Thus, unless the Commission in fact intended to pre-approve that SFV rate design – a

[4] Even if the *AEP-Portfolio Case* decision were applicable, the Order in this case approves an increase in the Companies’ shared savings cap to *$25 million*, not the $20 million contemplated in the *FirstEnergy 2013-2015 Portfolio Case*.

decision that would lack any basis in the record – it is not certain that the Companies' residential distribution rate will change from its current design, and if so what the timing and substance of that change will be. By contrast, the Commission had already approved the Pilot Throughput Balancing Adjustment Rider referenced in the *AEP-Portfolio Case* in *In re Columbus Southern Power Co. and Ohio Power Co.*, Case Nos. 11-351-EL-AIR *et al.* ("*AEP Distribution Rate Case*"), Opinion and Order (Dec. 14, 2011).at 9-10.Accordingly, raising the shared savings cap now may result in higher incentive payments to the Companies even as they continue to collect lost distribution revenues, with the result that they will in fact be paid more than AEP for the same level of performance.

The FirstEnergy Utilities have offered no evidence to indicate how those added payments would affect the overall cost-effectiveness of their program offerings, a key consideration given the Commission's concern about incentivizing "all available cost-effective energy efficiency." Order at 95. Likewise, the Companies have not presented any evidence that the current shared savings design is inadequate to encourage all cost-effective efficiency programs. Neither the record in this case nor the decision in the *AEP-Portfolio Case* are sufficient to demonstrate that paying the Companies up to $25 million a year in shared savings, *plus* lost distribution revenues, is justified to achieve the incremental energy savings that might result beyond the statutory benchmarks.

Second, the SFV provision in the Stipulated ESP is not synchronized with the Companies' energy efficiency plan implementation as AEP's decoupling rider was for its plan. Even if approved exactly as proposed, the SFV rate design contemplated in the Stipulations would not begin to phase in until January 1, 2019, based on an allocation of 25% fixed costs and 75% variable costs. That would shift to a 50% fixed/50% variable cost allocation in 2020, and a

75% fixed/25% variable cost allocation in 2021. Third Supplemental Stipulation at 12. Under that structure, the Companies would still collect lost distribution revenues for the variable portion of the rate. *Id.* at 13. Meanwhile, the Order raises the shared savings cap immediately as of 2017 – two years before the Companies would even start transitioning to SFV rate design. *Id.* at 12; Order at 95. The AEP decoupling rider, on the other hand, was in place as of calendar year 2012, before the shared savings cap increase approved by the Commission in the *AEP-Portfolio Case* took effect. *AEP Distribution Rate Case*, Opinion and Order at 7, 9-10. This poses the same problem as above, wherein the Companies' customers could end up paying more in shared savings even as the FirstEnergy Utilities continue to collect lost distribution revenues.

Finally, the SFV rate design described in the Stipulations is materially different from the throughput balancing adjustment rider in effect for AEP. Primarily, the two rate designs have potentially different effects on the overall costs of program implementation. As the FirstEnergy Utilities have themselves said of an SFV rate design:

> [W]ith a shift to SFV, the kWh or kW charge for distribution service will be reduced or eliminated. A byproduct of this change in distribution system rate design will be to reduce the savings that customers experience either through energy efficiency and/or peak demand reduction efforts. Customers will have less of an economic incentive to participate in energy efficiency or peak demand reduction programs resulting in an increase in the cost of the programs in order to achieve the statutorily required savings and reductions. . . . This will cause higher amounts to be recovered through Rider DSE, which are paid for by all customers.

In the Matter of Aligning Elec. Distribution Utility Rate Structure with Ohio's Public Policies to Promote Competition, Energy Efficiency and Distributed Generation, Case No. 10-3126-EL-UNC, Comments of the FirstEnergy Utilities (Feb. 11, 2011) at 7. Therefore, an SFV distribution rate may in fact make energy efficiency programs *less* cost-effective, cutting directly against the Commission's interest in encouraging the implementation of cost-effective demand-side resources. Order at 95. AEP's decoupling rider, operating through an annual true-up, has no such effect on customer incentives to undertake efficiency measures or the overall cost-effectiveness of programs. The AEP decoupling rider is therefore better tailored to encourage cost-effective energy efficiency, potentially warranting a greater opportunity to earn shared savings as part of the overall package proposed in the stipulation in the *AEP-Portfolio* case.

Additionally, the SFV rate design offers potentially more revenue to the Companies without commensurate benefits to its customers. By categorizing a majority of their distribution costs as fixed costs, the Companies will ensure that they recover those costs regardless of the level of customer electricity usage. But the Companies will have no obligation to refund any over-recovery to customers if they turn out to have overestimated the cost of distribution service, including if lower-than-predicted customer load results in lower-than-projected costs. By comparison, AEP's decoupling rider requires the utility to refund over-recoveries to customer in addition to ensuring the utility is able to true-up for any under-recoveries due to lower-than-anticipated customer load. *AEP Distribution Rate Case*, Opinion and Order at 7. Thus, an SFV rate design will offer the FirstEnergy Utilities potential payments over and above its cost of service, a benefit that AEP does not receive. Accordingly, there is less reason for the Companies to receive the same or even greater shared savings payments as an added incentive to implement cost-effective energy efficiency programs.

Finally, as part of its decoupling rider agreement, AEP agreed to forgo *all* lost distribution revenues from the subject rate classes. *AEP Distribution Rate Case*, Opinion and Order at 7. As noted above, under the Stipulations as approved the FirstEnergy Utilities will continue to collect lost distribution revenues from its residential rate class for any variable component of the distribution rate. Third Supplemental Stipulation at 13. This constitutes an additional incentive payment to the Companies in order to achieve the same level of performance as AEP.

In light of the above differences between distribution rates for AEP and the FirstEnergy Utilities, the Order unreasonably relied on the *AEP-Portfolio Case* as precedent for deeming the shared savings cap increase in the Stipulated ESP to be reasonable and in the public interest. Considering all of the relevant circumstances, the *AEP-Portfolio Case* does not provide a basis for approving an increase in the Companies' shared savings cap here.

Overall, the above examples reveal a number of discrepancies between the Commission's decision and the underlying law and evidence. Those discrepancies highlight the need for the Commission to consider the question of an appropriate shared savings cap for the Companies based on a full record in a case where the parties have the opportunity to adequately explore the reasons for and against – most immediately, the FirstEnergy Utilities' 2017-2019 portfolio plan application recently filed in Case No. 16-743-EL-POR. Meanwhile, the existing record in this case does not reasonably support the Order's conclusion that the increase in the FirstEnergy Utilities' shared savings cap benefits its customers or the public interest.

D. The Commission Unreasonably Failed to Address Whether Allowing the Companies' Customers to Opt Out of Paying for Peak Demand Reduction Programs While Still Receiving Monetary Credits for Participation in One Such Program Violates R.C. 4928.6613.

The Environmental Intervenors' Initial Brief raised the argument that Section A.1.6 of the Stipulation violates R.C. 4928.6613. That statute provides that if a customer opts out of paying for a utility's energy efficiency and peak demand reduction programs as permitted by R.C. 4928.6611, the customer is no longer "eligible to participate in, or directly benefit from, programs arising from" the utility's energy efficiency and peak demand reduction portfolio plan. The Stipulated ESP therefore violates R.C. 4928.6613 because it would allow certain utility customers to “opt out” of paying for the Companies’ energy efficiency and peak-demand reduction portfolio plan while still receiving benefits from that plan in the form of monetary credits through Rider ELR. Environmental Intervenors Initial Br. at 58-59. Although the Order referenced this issue, Order at 106-107, it did not ultimately provide any ruling on whether this provision of the Stipulation is consistent with R.C. 4928.6613. The Environmental Intervenors therefore request that the Commission address this issue on rehearing.

E. The Order Erroneously Failed to Address Whether It is Reasonable and Lawful for the FirstEnergy Utilities to Receive Lost Distribution Revenues for Energy Savings that Do Not Occur as a Result of the Companies’ Energy Efficiency Programs.

The Environmental Intervenors also argued in our Initial Brief that the Commission should not approve the Companies’ request to recover lost distribution revenues for their energy efficiency programs, including their “Customer Action Program” described above. Environmental Intervenors Initial Br. at 59-60. As explained in the Initial Brief, approving that request would allow the Companies to collect lost distribution revenues for a program that reflects baseline, business-as-usual efficiency improvements rather than the effects of a utility program. Such a result would be inconsistent with the Commission’s established position that lost distribution revenues are meant to reflect “the actual impact of [a utility’s efficiency programs] . . . upon energy savings.” *In the Matter of the Application of The Cleveland Electric Illuminating Company, Ohio Edison Company, and The Toledo Edison Company for Approval of Their EE/PDR Program Portfolio Plans for 2010 through 2012*, Case Nos. 09-1947-EL-POR *et al.*, Opinion and Order (Mar. 23, 2011) at 18. Although the Order referenced this issue, Order at 106-107, it did not ultimately provide any ruling on whether this aspect of the Stipulated ESP is consistent with existing regulatory principles. The Environmental Intervenors therefore request that the Commission address this issue on rehearing.

III. CONCLUSION

No party disputes that Rider RRS rests on a non-competitive affiliate deal that provides out-of-market payments to FirstEnergy-owned generation. However, the Commission failed to carry out its obligation under R.C. 4928.02(H) to ensure that Rider RRS does not therefore constitute an anticompetitive subsidy from the Companies' customers to its own affiliate competitive generation service. In fact, the non-bypassable Rider RRS constitutes just such an anticompetitive subsidy. It imposes a purported hedging contract on all distribution customers, who then have no option to reject the hedge or shop for a better hedge from a competitive supplier. More broadly, the Commission's review of Rider RRS failed to account for the self-dealing nature of this transaction by requiring the Companies to meet a heightened standard to demonstrate the reasonableness of the PPA transaction. For both those reasons, the Commission should reconsider its approval of Rider RRS as part of the Stipulated ESP package.

Additionally, the Commission erroneously approved a $15 million increase in the Companies' shared savings cap without support in the record. The Commission should retract that approval on rehearing so that the parties have an adequate opportunity to present relevant evidence on the issue in an appropriate future proceeding. Finally, the Commission should resolve the issues regarding participation in Rider ELR and the Companies' recovery of lost distribution revenues that were not addressed in the Order.

May 2, 2016

Respectfully submitted,

/s/ Madeline Fleisher
Madeline Fleisher
Environmental Law & Policy Center
21 W. Broad St., Ste. 500
Columbus, OH 43215
P: 614-670-5586
F: 312-795-3730
mfleisher@elpc.org

Counsel for Environmental Law & Policy Center

/s/ Trent A. Dougherty
Trent A. Dougherty
Ohio Environmental Council
1145 Chesapeake Avenue, Suite I
Columbus, OH 43212
(614) 487-5823
tdougherty@theoec.org

Counsel for Ohio Environmental Council and Environmental Defense Fund

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Application for Rehearing has been electronically filed with the Public Utilities Commission of Ohio and has been served upon the following parties via electronic mail on May 2, 2016.

/s/ Madeline Fleisher
Madeline Fleisher

PARTIES SERVED

Thomas.mcnamee@puc.state.oh.us
Thomas.lindgren@puc.state.oh.us
Ryan.orourke@puc.state.oh.us
mkurtz@BKLlawfirm.com
kboehm@BKLlawfirm.com
jkylercohn@BKLlawfirm.com
stnourse@aep.com
mjsatterwhite@aep.com
yalami@aep.com
joseph.clark@directenergy.com
ghull@eckertseamans.com
zkravitz@taftlaw.com
Schmidt@sppgrp.com
ricks@ohanet.org
tobrien@bricker.com
wttpmlc@aol.com
lhawrot@spilmanlaw.com
dwilliamson@spilmanlaw.com
Kevin.moore@occ.ohio.gov
sauer@occ.state.oh.us
leslie.kovacik@toledo.oh.gov
jscheaf@mcdonaldhopkins.com
marilyn@wflawfirm.com
matt@matthewcoxlaw.com
gkrassen@bricker.com
dborchers@bricker.com
mfleisher@elpc.org
selisar@mwncmh.com
Amy.Spiller@duke-energy.com
jeffrey.mayes@monitoringanalytics.com
mhpetricoff@vorys.com
laurac@chappelleconsulting.net

mjsettineri@vorys.com
mpritchard@mwncmh.com
cmooney@ohiopartners.org
joliker@igsenergy.com
mswhite@igsenergy.com
Bojko@carpenterlipps.com
Allison@carpenterlipps.com
hussey@carpenterlipps.com
barthroyer@aol.com
athompson@taftlaw.com
Christopher.miller@icemiller.com
Gregory.dunn@icemiller.com
Jeremy.grayem@icemiller.com
blanghenry@city.cleveland.oh.us
hmadorsky@city.cleveland.oh.us
kryan@city.cleveland.oh.us
tdougherty@theOEC.org
finnigan@edf.org
meissnerjoseph@yahoo.com
trhayslaw@gmail.com
TODonnell@dickinsonwright.com
dstinson@bricker.com
drinebolt@ohiopartners.org
Ccunningham@Akronohio.Gov
Jeanne.Kingery@dukeenergy.com
toddm@wamenergylaw.com
gthomas@gtpowergroup.com
stheodore@epsa.org
glpetrucci@vorys.com
gpoulos@enernoc.com
david.fein@constellation.com
asonderman@keglerbrown.com
msoules@earthjustice.org
mdortch@kravitzllc.com
sechler@CarpenterLipps.com
cynthia.brady@constellation.com
lael.campbell@exeloncorp.com
tony.mendoza@sierraclub.org
burkj@firstenergycorp.com
cdunn@firstenergycorp.com
jlang@calfee.com
talexander@calfee.com
dakutik@jonesday.com
sam@mwncmh.com
fdarr@mwncmh.com
rparsons@kravitzllc.com

ghiloni@carpenterlipps.com
callwein@keglerbrown.com
Ajay.kumar@occ.ohio.gov
larry.sauer@occ.ohio.gov
maureen.willis@occ.ohio.gov
William.michael@occ.ohio.gov
Kevin.moore@occ.ohio.gov
mkl@smxblaw.com
gas@smxblaw.com
rkelter@elpc.org

Attorney Examiners:
Gregory.Price@puc.state.oh.us
mandy.chiles@puc.state.oh.us
Megan.Addison@puc.state.oh.us