BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

APPLICATION FOR REHEARING OF THE OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP

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Pursuant to Section 4903.10, Revised Code (R.C.), and Rule 4901-1-35, Ohio Administrative Code (O.A.C), the Ohio Manufacturers' Association Energy Group (OMAEG) hereby respectfully requests rehearing of the Public Utilities Commission of Ohio's (Commission) March 31, 2016 Opinion and Order (Order) issued in the above-captioned matters regarding the electric security plan (ESP) proposed by Ohio Edison Company, the Cleveland Electric Illuminating Company and the Toledo Edison Company (the Companies). OMAEG contends that the Order is unlawful and unreasonable in the following respects:

A. In light of FERC's recent ruling, the Commission should hold that no costs associated with the Affiliate PPA can be flown through to customers under Rider RRS until the Affiliate PPA is reviewed and approved by FERC.

B. The Commission erred in determining that the Stipulated ESP IV is the product of serious bargaining among capable, knowledgeable parties as the evidence shows that the signatory parties are merely a redistributive coalition.

C. The Commission erred in finding that the Stipulated ESP IV benefits ratepayers and is in the public interest, failing to rely on record evidence to support its finding in contravention to Section 4903.09, Revised Code.

D. The Commission erred in finding that the Stipulated ESP IV aligns with important regulatory principles and practices and is not in violation of Ohio law.

1. The Commission erred in establishing Rider RRS as Rider RRS fails to meet the statutory requirements of Section 4928.143(B), Revised Code.

    i. The Commission erred in determining that Rider RRS functions as a limitation on customer shopping for retail electric generation service under Section 4928.143(B)(2)(d), Revised Code.

    ii. The Commission erred by unreasonably and unlawfully concluding that the Companies met their burden to demonstrate that Rider RRS will have the effect of stabilizing or providing certainty regarding retail electric generation service, as required by Section 4928.143(B)(2)(d), Revised Code.

2. The Commission erred in finding that Rider RRS is consistent with state policy given it operates as an anti-competitive subsidy that holds customers captive to an affiliate agreement subject to affiliate abuse.

3. The Commission erred in finding that Rider RRS is consistent with state policy as the affiliate agreement creates market deficiencies and market power in the wholesale market.

4. The Commission erred in approving Rider RRS and the recovery of legacy costs constituting transition revenues, or the equivalent thereof, in violation of Section 4928.38, Revised Code.

5. The Commission erred by unreasonably and unlawfully approving the continuation of Rider DCR and an expansion of Rider DCR through a $180 million increase in the revenue caps as there is no evidence that Rider DCR is necessary and the Commission's decision is in violation of Commission precedent.

6. The Commission erred in establishing Rider GDR as it is unreasonable and unlawful in violation of Commission precedent.

E. The Commission erred in determining that Rider RRS meets the Commission-adopted factors articulated in the AEP ESP III Order.

    1. The Commission erred by failing to address the financial need of the affiliate plants subject to the Companies' Affiliate PPA, as required by the established factors.

    2. The Commission erred in determining that the affiliate plants are necessary to maintain system reliability and support supply diversity.

    3. The Commission erred in finding that the Stipulated ESP IV contributes to or promotes economic development within the state of Ohio.

4. The Commission erred in determining that the Stipulated ESP IV appropriately distributes risk between the Companies and its customers.

F. The Commission erred in approving Rider NMB and the Rider NMB pilot program without modifications.

1. The Commission erred in expanding Rider NMB to include additional costs as they will increase costs for customers.

2. The Commission erred in failing to modify the Rider NMB pilot program to eliminate its discriminatory and anti-competitive effects.

G. The Commission erred in approving, without modifications, Rider ELR due to its discriminatory and anti-competitive effects.

H. The Commission erred in failing to find that providing specific payments to select beneficiaries contravenes customers' interests and the public interest.

I. The Commission erred in determining that the Stipulated ESP IV is more favorable in the aggregate than a Market Rate Offer (MRO) under Section 4928.143, Revised Code.

J. The Commission erred in failing to clearly define its modification to the Stipulated ESP IV directing the Companies to ensure that average customer bills do not increase for a period of two years.

For these reasons, and as further explained in the Memorandum in Support attached hereto, OMAEG respectfully requests that the Commission grant its Application for Rehearing.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

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I. INTRODUCTION AND PROCEDURAL HISTORY

On August 4, 2014, the Companies filed an application with the Commission to establish a standard service offer (SSO), in the form of a fourth electric security plan (ESP IV), to provide generation service pricing for the period of June 1, 2016 through May 31, 2019,[1] later modified to an eight-year term beginning June 1, 2016 through May 31, 2024.[2] OMAEG, which is comprised of many members with manufacturing facilities located in the Companies' service territories, was granted intervention in the above-captioned proceeding on December 1, 2014. Since the initial filing of ESP IV, the Companies have filed four stipulations, which collectively present a new ESP, termed the "Stipulated ESP IV" by the Companies.[3] A hearing on the ESP proposed in the Application commenced on August 31, 2015 and continued through October 29, 2015. A second hearing commenced on January 14, 2016 and concluded on January 22, 2016.

On March 31, 2016, the Commission issued its Order, approving the Companies Stipulated ESP IV, including Rider RRS, with little modification.[4] In its decision, the Commission, among other things, authorized the Companies to flow through Rider RRS (beginning June 1, 2016) the net effects of purchasing generation output from the W.H. Sammis plant and Davis-Besse Nuclear Power Station plant and FirstEnergy Solutions' (FES) entitlement to the output of the Ohio Valley Electric Corporation (OVEC) pursuant to a purchase power agreement between the Companies and its unregulated affiliate, FES (Affiliate PPA).[5]

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[1] Companies Ex. 1 at 3 (Application).

[2] Companies Ex. 154 at 7 (Third Supp. Stip.).

[3] As explained by the Third Supp. Stip. at 2, the Third Supp. Stip., together the "Prior Stipulations" (defined as the December 22, 2014 Stipulation, the May 28, 2013 Supplemental Stipulation, and the June 4, 2014 Second Supplemental Stipulation) form the "Stipulated ESP IV," which must be considered as a package.

[4] *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan,* Case No. 14-1297-EL-SSO, et. al., Opinion and Order (March 31, 2016).

[5] Order at 78-79.

Specifically, the Commission unreasonably and unlawfully averaged two witnesses' projections to determine that the Stipulated ESP IV benefits ratepayers and is in the public interest through a projected net credit to customers of $256 million under Rider RRS for the eight-year term of the ESP.[6] Additionally, the Commission incorrectly determined that continuation of the Delivery Capital Recovery Rider (Rider DCR) mechanism was "necessary and appropriate" in light of the proposed distribution rate freeze;[7] approved the establishment of the Government Directives Rider (Rider GDR) to be initially set at a rate of zero;[8] and permitted the continuation and expansion of the Non-Market Based Services Rider (Rider NMB), as well as the establishment of the Rider NMB pilot program.[9]

The record clearly shows that the Stipulated ESP IV, including Rider RRS, does not benefit ratepayers, will cause substantial harm to the economic development within the state of Ohio, and is both anticompetitive and unlawful under Ohio's state policy. As Dynegy witness Ellis explained, the legislature already decided to require market participants in the electric generating sector to "compete for sales and bear the risk of lost revenues if they do not competitively price their generation output."[10] By favoring the affiliate plants over other market participants, the Stipulated ESP IV will not only distort the competitive markets, but place the job and tax revenues associated with non-subsidized generating units at risk.[11] This will have the damaging and harmful effect of "encourag[ing] the continued operation of less efficient, less cost

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[6] Order at 78, 85.

[7] Id. at 92-93.

[8] Id. at 93.

[9] Id. at 94.

[10] Dynegy Ex. 1 at 7 (Ellis Direct).

[11] Id. at 4-5.

effective plants and discourage[ing] the modernization of generation sited in Ohio,"[12] thereby thwarting competition and deterring new entry into the state of Ohio economy.

Notwithstanding the host of problems associated with Rider RRS as a main component of the Stipulated ESP IV, the Commission's endorsement and authorization of the collection of costs associated with the Affiliate PPA through Rider RRS directly threatens competitive markets and competitive price signals.[13]

In a unanimous decision, the Federal Energy Regulatory Commission (FERC) recently granted a complaint filed by the Electric Power Supply Association (EPSA) and others and rescinded the Companies' "waiver as to the Affiliate PPA and [found] that, prior to transacting under the Affiliate PPA, [FES] must submit the Affiliate PPA for review and approval under *Edgar* and *Allegheny* in accordance with 18 C.F.R. § 35.39(b)."[14] It follows, therefore, that because the contract has not been approved by FERC, there can be no costs associated with the contract that can be flown through to customers under Rider RRS. Given this, the Commission should clarify on rehearing that the Companies are prohibited from seeking retail recovery through Rider RRS of any costs associated with the Affiliate PPA pending further FERC action. The Commission should, therefore, conclude that no costs associated with the Affiliate PPA can be collected from customers under Rider RRS beginning June 1, 2016.

[12] Id. at 5.

[13] Id., slip op. at 9, 12.

[14] *Electric Power Supply Assn., et. al. v. FirstEnergy Solutions Corp., et. al.,* 155 FERC ¶ 61,101 at P 53 (April 27, 2016).

II. ARGUMENT

A. In light of FERC's recent ruling, the Commission should hold that no costs associated with the Affiliate PPA can be flown through to customers under Rider RRS until the Affiliate PPA is reviewed and approved by FERC.

The FERC recently granted a complaint filed by the Electric Power Supply Association and others and rescinded the Companies' and FES's "waiver as to the Affiliate PPA and [found] that, prior to transacting under the Affiliate PPA, [FES] must submit the Affiliate PPA for review and approval under *Edgar* and *Allegheny* in accordance with 18 C.F.R. § 35.39(b)."[15] It follows therefore that because the Affiliate PPA has not been approved by FERC, no affiliate sales of electric energy or capacity can be transacted under the Affiliate PPA and no costs associated with the Affiliate PPA can be flown through to customers under Rider RRS. Given this, the Commission should clarify on rehearing that the Companies are prohibited from seeking retail recovery through Rider RRS of any costs associated with the Affiliate PPA pending further FERC action.

B. The Commission erred in determining that the Stipulated ESP IV is the product of serious bargaining among capable, knowledgeable parties as the evidence shows that the signatory parties are merely a redistributive coalition.

In evaluating the Stipulated ESP IV, the Commission incorrectly determined that the Stipulation met the three prongs of the Commission-established test for evaluating the reasonableness of a stipulation. As will be explained in further detail below, this determination is erroneous, unjust, and unreasonable.

In its Order, the Commission erroneously determined that the Stipulated ESP IV meets the first prong of the three part test.[16] The signatory parties represent an "ad hoc, collection of

[15] *EPSA Order* at P 53.

[16] Order at 43.

corporate and institutional interests that benefit directly from specific aspects of the Third Supplemental Stipulation or other stipulations comprising the Stipulated ESP IV. [They] only represent themselves and provide a façade of representational diversity."[17]

While the Stipulated ESP IV contains a number of signatory parties, there are "also numerous, active parties not supporting the Stipulation, representing a range of interests and customer groups as well as public policy perspectives."[18] For example, the Stipulated ESP IV is opposed by the Independent Market Monitor for PJM (an organization created to objectively monitor the competitiveness of PJM markets); OMAEG (a non-profit entity that represents a range of manufacturing and commercial customers that are an integral part of the state's economy); OCC (a state agency that represents and defends the interests of residential customers); the Ohio Hospital Association (a non-profit trade association that represents 219 hospitals and 55 healthcare systems); Wal-Mart Stores East, and Sam's East, Inc.; Northeast Ohio Public Energy Council (NOPEC) and Northwest Ohio Aggregation Coalition (NOAC) (coalitions representing approximately 185 communities that are opt-out governmental aggregators); the City of Cleveland; Ohio Schools Council (a regional council of governments comprised of approximately 197 school districts, educational service centers, joint vocational districts and developmental disabilities boards); the Cleveland Municipal School District (a political subdivision of the state of Ohio responsible for the operation of the public school system in the city of Cleveland); Sierra Club, Environmental Defense Fund, and Environmental Law & Policy Center (representing various environmental and alternative energy interests); Mid-Atlantic Renewable Energy Coalition (a coalition representing renewable energy interests); Energy Professionals of Ohio (a trade group comprised of licensed power brokers and

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

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

consultants); and several CRES providers and generators, such as PJM Power Providers, the Electric Power Supply Association, Retail Energy Supply Association, Direct Energy Services LLC, Exelon Generation Company, LLC, Constellation NewEnergy, Inc., and Dynegy, Inc. Just as the support of one particular class of customers is not required in order to meet the first prong of the three-part test,[19] the support of the Signatory Parties in and of itself is also insufficient to approve the Stipulated ESP IV given the extensive and broad opposition by a number of non-signatory parties.

In addition to the broad opposition to the Stipulation by a number of parties, the existence of a side agreement also raises questions regarding the seriousness of the bargaining process. The Supreme Court of Ohio has held that the existence of side agreements entered into around the time a stipulation is filed has a bearing on the integrity and openness of the bargaining process.[20] If a side agreement grants special considerations, it could give a party an unfair advantage in the bargaining process.[21] While the Commission correctly acknowledged that the existence of side agreements can taint the integrity of the bargaining process,[22] it erred in finding that the bargaining process was not tainted here.

Here, all parties (including the Signatory Parties) were not privy to the side-agreement between Interstate Gas Supply, Inc. (IGS) and the Companies. It was not until after the Stipulated ESP IV was executed by the other Signatory Parties and after the hearing on the Stipulated ESP IV had commenced, that it was revealed that the Companies had reached a side

[19] Order at 43.

[20] *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789, ¶ 85.

[21] Id. at ¶ 86.

[22] Order at 44.

deal with IGS, titled the "Competitive Market Enhancement Agreement."[23] This side agreement includes a request by IGS for the Commission to approve a retail competitive incentive mechanism, an agreement by the Companies to file and implement a customer referral program, and an agreement by the Companies to include a residential smart thermostat program in their next Energy Efficiency and Peak Demand Reduction Portfolio Plan, with IGS as the exclusive provider.[24] The terms of this deal were not disclosed to the parties during the bargaining process, which deprived all parties (including the Signatory Parties) of important information that could have been used to evaluate the impact of the Stipulated ESP IV on their respective interests. This raises a serious question regarding the transparency of the bargaining process and whether the Stipulated ESP IV was a product of serious bargaining, which "could be relevant to ensuring the integrity and openness of the negotiation process."[25]

Finally, a critical factor in assessing the first criterion of the three-part stipulation test was articulated by Commissioner Roberto in FirstEnergy's initial ESP case filed in 2008:

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

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[23] Tr. Vol. XXXVII at 7812-7813; OMAEG Ex. 24 (OCC Set-17-RPD-004, OCC Set-17-RPD-005, Competitive Market Enhancement Agreement).

[24] Id.

[25] See *Ohio Consumers' Counsel v. Pub. Util. Comm.,* 111 Ohio St.3d 300, 2006-Ohio-5789, ¶ 85.

> due as when an agreement arises within the context of other regulatory frameworks. As such, the Commission must review carefully all terms and conditions of this stipulation.[26]

When bargaining with utility companies in an ESP proceeding, the bargaining favors the utility as they have the ability to reject proposed modifications to the ESP.[27] Given the lack of knowledge regarding the existence of side agreements, the lack of knowledge regarding the expected cost assessments related to the various provisions in the Stipulated ESP IV, and the imbalance of power when bargaining with utility companies, the Commission clearly erred in finding that the Stipulated ESP IV was the product of serious bargaining among capable, knowledgeable parties.

C. The Commission erred in finding that the Stipulated ESP IV benefits ratepayers and is in the public interest, failing to rely on record evidence to support its finding in contravention to Section 4903.09, Revised Code.

The second part of the three-part test requires the Commission to find that the Stipulated ESP IV, as a package, benefits ratepayers and is in the public interest. The Commission erred in its determination that ratepayers are benefitted by the many provisions contained in the Stipulated ESP IV, including Rider RRS. Though providing an image of universal support, the redistributive coalition that signed the Stipulated ESP IV extracted benefits for their own personal interests, not ratepayers as a whole or the public interest.[28] "The major beneficiaries from the Stipulated ESP IV are FirstEnergy, its stockholders, and management."[29] Thus, the Commission should reverse its conclusion that this prong of the test has been met.[30]

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

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

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

[29] Id.

[30] Order at 53-54.

The Commission concluded in its Order that Rider RRS will result in a net credit to customers of $256 million over the eight-year term of the ESP.[31] In arriving at this estimate, the Commission considered one projection prepared by Companies witness Rose and one projection prepared by OCC witness Wilson,[32] settling on an average of the projection prepared by Companies witness Rose estimating a $561 million credit and one of the three scenarios prepared by OCC witness Wilson, estimating a $50 million charge.[33] Importantly, the Commission gives no credit to OCC witness Wilson's other two projections, including his projection that Rider RRS will result in a $3.6 billion net cost to customers.[34] In doing so, the Commission appears to have shifted the burden of proof onto OCC to rebut a presumption that the Companies' forecast is reliable. The Order accepts witness Rose's forecast, noting only that his firm is a "recognized leader in the field"[35] and then diverts into a lengthy criticism of OCC witness Wilson's methodology.[36] But the Companies, not OCC, bears the burden of proof to show that Rider RRS is worthy of approval. The Commission's assertion that "no other party has presented a full projection of energy prices and the net revenues under Rider RRS"[37] is misguided given the burden on the Companies to show that Rider RRS benefits ratepayers.

Additionally, the Commission erred by failing to include in its estimate the projection of net charges and credits under Rider RRS by Sierra Club witness Comings, stating that the projection issued by witness Comings is based on confidential information that could not be included in the Commission's estimate included in the Order without revealing such

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[31] Id. at 85.

[32] Id. at 80.

[33] Id. at 85.

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

[35] Id. at 80.

[36] Id. at 82-85.

[37] Id. at 81.

information.[38] While the confidentiality of Witness Comings' projection is currently being challenged in this proceeding, the fact that information was filed under seal with the Commission pursuant to the Commission's rules should in no way hinder the Commission's reliance on such information in its decision making process and should not prevent the Commission from including such projection, in the aggregate, in its estimate. To do so, unreasonably limits the information relied upon, encourages manipulation of the data claimed to be confidential, will unduly hinder the discovery process as parties debate whether information may be deemed confidential, and is inconsistent with Rule 4901-1-24(D), Ohio Administrative Code.

The subsidies arising out of Rider RRS will be damaging to ratepayers in two central ways. First, "losses incurred in the operation of the plants covered by the PPA are passed on to all electricity users in the Companies' service territories."[39] Second, the costs associated with the negotiated rate discounts, subsidies, and energy efficiency commitments "are not born by [the Companies], but instead * * * passed on to ratepayers that do not directly benefit."[40] Moreover, the harm to the competitive markets could be substantial. By approving Rider RRS, the Commission has used its own regulatory power to undermine market-determined outcomes, which could deter investment and new entry into the generating market and harm the long-term reliability of the electric system.[41] Ultimately, this will harm the "economic prospects for businesses that are not members of the redistributive coalition and of residents of the state of Ohio."[42] As testified by the Independent Market Monitor, this is "inconsistent with competition

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[38] Order at 85.

[39] Id.

[40] Id. at 8-9.

[41] Id. at 9.

[42] Id.

in the PJM wholesale power market."[43] A subsidy like Rider RRS will have a price suppression effect, which makes it difficult for unaffiliated generating units to compete.[44] Without proper market incentives, generating units without subsidies may never be built, thereby harming the overall reliability of the system.[45]

The range of purported public benefits associated with Rider RRS are based on several speculative assumptions.[46] For example, the Companies assume that if Rider RRS is not approved, the affiliate plants included in the Affiliate PPA will close. The Commission failed to recognize that no evidence was presented to show this will in fact occur.[47] If the Companies behave as they should with respect to economic management, the retirement issue and all of the public interest arguments connected to retirement of the plants become moot.[48] More importantly, if Rider RRS is used to prevent a retirement that should occur under market forces, utility customers will be unjustly forced to pay the cost difference to cover the affiliate plants' operating costs as well as legacy capital investment.[49] The resulting ratepayer losses will actually *harm* the local economies, impair new job creations, and impede overall economic development in the state. Thus, Rider RRS not only harms the public interest but could also result in a $3.6 billion cost to customers based on recent forward prices.[50]

Further, the provisions in the Stipulated ESP IV related to CO-2 reduction, battery technology investment, and an increase of 100 megawatts of wind or solar renewable resources

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[43] IMM Ex. 2 at 2 (Bowring Supplemental).

[44] Id. at 5.

[45] Id.

[46] OCC/NOPEC Ex. 8 at 34-35 (Kahal Supplemental).

[47] Id.

[48] Id.

[49] Id. at 36-37.

[50] Tr. Vol. XXXVIII at 8118-8119; Wilson Second Supplemental at 12.

are nothing more than goals of the Companies (or other Signatory Parties), rather than firm commitments to provide any customer benefits. Through the Stipulated ESP IV provisions, the Companies offer to reactivate energy efficiency programs in 2017;[51] however, they are required by law to do so, rendering the commitment meaningless. Although the Companies indicated a goal of reducing CO-2 emissions by at least 90% below the 2005 level, they have no plan to achieve this goal and have established no penalties for failure to meet this goal.[52] The provision related to battery technology states "[t]he Companies will *evaluate* investing in battery resources contingent on Commission approval that all investment for such resources shall be rate-based * * *".[53] However, the Companies currently have not identified the specific investments to be made.[54] Regardless, all costs associated with these Commission-approved investments in battery technology will be charged to and recovered from customers through Rider AMI.[55] Competitors, however, may be investing in these technologies without seeking or receiving ratepayer funds.

Additionally, the commitment to procure 100 megawatts of wind or solar is only triggered if the Staff determines such new renewable energy resources would be helpful for a future law or rule.[56] Thus, the Companies would have to make a filing with the Commission, at Staff's request, demonstrating the need to procure new renewable energy resources of 100 megawatts,[57] and the Commission would have to approve the application prior to the Companies actually procuring the resources.[58] Once approved, all costs would be recoverable from

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[51] Companies Ex. 154 at 11 (Third Supp. Stip.).

[52] Tr. Vol. XXXVI at 7528-7532.

[53] Companies Ex. 154 at 11(Third Supp. Stip.)(emphasis added).

[54] Tr. Vol. XXXVII at 7776.

[55] Tr. Vol. XXXVI at 7649.

[56] Id. at 7541.

[57] Id. at 7542-7543.

[58] Id.

customers through a newly established rider, Rider ORR.[59] All of these provisions, which are touted as public interest benefits, are merely illusory and contain no firm commitments by the Companies. The Commission erred in determining that these carious provisions provide concrete benefits to ratepayers.

The commitment to file a case to transition to straight-fixed-variable (SFV) rates for the residential class prior to April 3, 2017 is also not in the public interest.[60] First, these rate designs remove a large amount of price signals between use of electricity and cost of electricity, thereby undermining the cost incentive for efficiency programs and discouraging energy efficiency.[61] Thus, efficient users will spend similar amounts on electricity as inefficient users.[62] Ultimately, this provision could shift "energy efficiency focus away from the residential class to the business class in an inequitable manner."[63] Second, this issue is more appropriate for a base distribution rate case. The Commission even acknowledges in its Order that it would have "preferred to address implementation of SFV in FirstEnergy's next distribution rate case."[64] While the Commission subsequently notes that the Companies will be required to file an application in a separate proceeding specific to the proposed SFV,[65] the Commission seems to be pre-approving the implementation of a SFV rate design for distribution rates, noting "that it would not be in the public interest to delay implementation of SFV rate design until the end of the proposed eighth-year distribution rate freeze."[66]

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[59] Tr. Vol. XXXVII at 7777.

[60] Companies Ex. 154 at 12-13 (Third Supp. Stip.).

[61] OMAEG Ex. 28 at 14 (Seryak Supplemental).

[62] Id.

[63] Id.

[64] Order at 93-94.

[65] Id.

[66] Id. at 93.

As will be discussed in more detail below, the Commission's approval of the extension of Rider DCR and increase in revenue caps for the eight-year term of the ESP will also harm ratepayers.[67] Not only does this result in additional costs to customers of $2.59 billion dollars,[68] it also includes cost recovery of assets that are not directly related to maintaining the reliability of the distribution system, and, therefore, are not appropriately recoverable under Rider DCR.[69] This significant increased cost to customers is clearly not in the public interest.

The Commission failed to modify the expanded Economic Load Response (ELR) program to ensure that it is just, reasonable, and available to all similarly-situated customers. In its Order, the Commission states that "interruptible load programs provide reliability, economic and energy efficiency benefits to customers."[70] While interruptible programs offer benefits to customers, the interruptible program included in the Stipulated ESP IV is not designed properly to achieve the maximum benefit for all customers. As will be discussed in more detail below, the Commission failed to adequately address the proposed modifications to the ELR program advanced by OMAEG in contravention of Section 4903.09, Revised Code, and recent Supreme Court precedent.[71]

Although the Commission finds that the provisions of the Stipulated ESP IV are in the public interest and will benefit ratepayers,[72] the evidence shows that the Stipulated ESP IV will actually increase costs to ratepayers and harm economic development. Those harms will be felt most acutely in the manufacturing sector. Manufacturing industries are a critical part of the

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

[68] Tr. Vol. XXXVI at 7575.

[69] Staff Ex. 6 at 9 (McCarter Direct); OCC Ex. 18 at 19 (Effron Direct).

[70] Order at 94.

[71] Section 4903.09, Revised Code; *In re Comm. Rev. of Capacity Charges of Ohio Power Co.,* Slip Opinion No. 2016-Ohio-1607.

[72] Order at 92.

Ohio's economic base. Energy-intensive manufacturing industries "export their products from Ohio in return for dollars that are brought into the state, resulting in job creation."[73] If OCC witness Wilson's scenario materializes, predicting a potential cost to customers of $3.6 billion,[74] Ohio manufacturers will be faced with some tough decisions. Therefore, the Commission erred in determining that the Stipulated ESP IV benefits ratepayers and is in the public interest.

D. The Commission erred in finding that the Stipulated ESP IV aligns with important regulatory principles or practices and is not in violation of Ohio law.

The third and final prong of the test for evaluating the reasonableness of a stipulation requires an assessment of whether the stipulation violates important regulatory principles or practices. The Commission incorrectly determined that all provisions of the Stipulated ESP IV, including Rider RRS, are authorized under the Ohio Revised Code and do not violate important regulatory principles or practices, as well as the policies of the state of Ohio. This ruling is erroneous for several reasons.

1. The Commission erred in establishing Rider RRS as Rider RRS fails to meet the statutory requirements of Section 4928.143(B), Revised Code.

Rider RRS fails to meet the statutory requirements of the Ohio Revised Code. As the Commission stated in its Order, Chapter 4928, Revised Code provides for a system of regulation through provisions designed to "advance state policies of ensuring access to adequate, reliable, and reasonably priced electric service in the context of significant economic and environmental challenges."[75] When evaluating the proposed Rider RRS, the Commission must first determine whether the proposed mechanism is a permissible provision of an ESP, in accordance with

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[73] OMAEG Ex. 17 at 11 (Hill Direct).

[74] Wilson Second Supplemental at 12.

[75] Order at 12-13.

Section 4928.143(B), Revised Code. If the proposed Rider RRS does not fall within the categories specifically enumerated in Section 4928.143(B)(1) or (2), Revised Code, the Commission may not lawfully authorize the Companies to establish the rider, as "[t]he Commission has the authority to approve, as a component of an ESP, only items that are expressly listed in the statute."[76] As discussed herein, Rider RRS does not fall within the categories of items delineated in the statute; therefore, the Commission was incorrect in authorizing the Companies to establish Rider RRS. "The Commission is a creature of statute and can exercise only the authority conferred upon it by the General Assembly."[77]

i. The Commission erred in determining that Rider RRS functions as a limitation on customer shopping for retail electric generation service under Section 4928.143(B)(2)(d), Revised Code.

The Commission determined, without credible record support in contravention to Section 4903.09, Revised Code, that Rider RRS functions as a limitation on customer shopping for retail electric generation service pursuant to Section 4928.143(B)(2)(d), Revised Code. Specifically, Section 4928.143(B)(2)(D), states that an EDU may file an application for approval of an ESP, which may include:

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

[76] Order at 107.

[77] *Tongren v. Pub. Util. Comm.,* 85 Ohio St.3d 87, 88, 706 N.E.2d 1255 (1999).

In its Order, the Commission relies heavily on its ruling in the AEP Ohio ESP III Order to determine that Rider RRS is a financial limitation on customer shopping for retail electric generation service.[78] However, even setting aside the requirement that the terms, conditions, or charges must relate to limitations on customer shopping for retail electric generation service only in that event that such terms, conditions, or charges would have the effect of stabilizing or providing certainty regarding retail electric generation service, Rider RRS does not function as a limitation on customer shopping.

Under Am. Sub. S.B. 3, the Companies' customers, unless constrained by the terms of the mechanism under which they take service, are free to shop for retail electric generation service and obtain service under the standard service offer (SSO) or from a competitive retail electric service (CRES) provider. The Commission opines that "[a]lthough Rider RRS would have no impact on customers' physical generation supply, the consequence of Rider RRS is that the bills of all customers would reflect a price for retail electric generation service that is based in part on the retail market and in part on the cost of service of Sammis, Davis-Besse, and the OVEC plants."[79] The Commission concludes, therefore, that Rider RRS effectively functions as a financial restraint on complete reliance on market pricing for retail electric generation service.[80] This conclusion fails to consider several factors.

First, the "price" referenced by the Commission in its Order is not a true price associated with the provision of retail electric generation service. Rather, it is a credit or charge based on a calculation that requires netting the costs of operating certain generating units associated with an affiliate power purchase agreement against any revenue obtained from selling the proportionate

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[78] Order at 109.

[79] Id.

[80] Id.

output of the generating facility into the wholesale market. If the calculation results in net costs, there will be a charge reflected on customer bills. If the calculation results in net revenues, there will be a credit reflected on customer bills. Thus, Rider RRS is more of a mechanism that creates an additional charge (or credit), based upon a generator's cost and its performance in the wholesale market, rather than a price for retail electric generation service.

Second, the unknown potential of adding a credit or charge to a customers' distribution bill is in no way a "limitation," as advanced by the Commission[81] and OEG witness Baron.[82] Rider RRS does not limit the costs that the Companies may pass on to customers because there is no cap. Rather, the Companies will pass on to customers its share of whatever it costs to operate its affiliate's generating units as part of the "blended electric rate" that includes part PJM market revenue and part cost.[83] As Commissioner Haque recognized in his concurring opinion, "predictions of market prices beyond a few years are speculative."[84] Thus, Rider RRS does not function as a limitation on customer shopping, nor does it provide financial certainty for customers.

The law also requires that the "limitation on customer shopping" be on "retail electric generation service."[85] Rider RRS, however, is non-bypassable and has no bearing on retail electric generation service. The purported financial hedge is not related to the supply or provision of retail electric service to Ohio ratepayers. Equating a financial hedge assessed to all customers on their distribution bills to a limitation on retail electric generation service or

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[81] Order at 109.

[82] OEG Ex. 1 at 7 (Baron Supplemental).

[83] OEG Reply Brief at 3.

[84] Concurring Opinion of Commissioner Asim Z. Haque at 5.

[85] Section 4928.143(B)(2)(d), Revised Code.

shopping is a strained comparison. The Commission should not depend on such an unsupported analogy in order to authorize the Companies to establish Rider RRS.

In light of the aforementioned items, the Commission unreasonably determined that Rider RRS functions as a limitation on customer shopping for retail electric generation service per Section 4928.143(B)(2)(d), Revised Code.

ii. The Commission erred by unreasonably and unlawfully concluding that the Companies met their burden to demonstrate that Rider RRS will have the effect of stabilizing or providing certainty regarding retail electric generation service, as required by Section 4928.143(B)(2)(d), Revised Code.

In addition to the fact that the Commission unreasonably determined that Rider RRS functions as a limitation on customer shopping for retail electric generation service, the Commission also unreasonably and unlawfully determined that Rider RRS will stabilize and provide certainty regarding retail electric generation service. This portrayal of Rider RRS as a "financial hedging mechanism" that will allegedly temper market volatility is both unrealistic and inapposite.[86] In its Order, the Commission states the following:

> [C]onsidering the plain language of the statute, we find that there are three criteria with which Rider RRS must comply. Specifically, an ESP component approved under R.C. 4928.143(B)(2)(d) must first be a term, condition, or charge; next, relate to one of the enumerated types of terms, conditions, and charges; and, finally, have the effect of stabilizing or providing certainty regarding retail electric service.[87]

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[86] Order at 109.

[87] Id. at 108, citing, e.g. *In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to R.C. 4328.143, in the Form of an Electric Security Plan* (AEP ESP III Case), Case No. 13-2385-EL-SSO, Opinion and Order (Feb. 25, 2015) at 20; *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan* (ESP II Case), Case No. 11-346-EL-SSO, et al., Entry on Rehearing (Jan. 30, 2013) at 15-16; *In re Dayton Power and Light Company,* Case No. 12-426-EL-SSO, et al. (DP&L ESP Case), Opinion and Order (Sept. 4, 2013) at 21-22.

Pursuant to the language utilized by the Commission when interpreting the requirements of Section 4928.143, Revised Code, Rider RRS must have the effect of stabilizing or providing certainty regarding retail electric generation service. In its analysis of whether it may lawfully and reasonably establish Rider RRS, however, the Commission found merely that Rider RRS "is proposed to have the effect of stabilizing or providing certainty regarding retail electric service."[88] This outcome diverges from the Commission's interpretation, advanced in the Order, that the Rider RRS mechanism or component must comply with three criteria, including having the effect of stabilizing or providing certainty regarding retail electric generation service.[89] "Proposed" to have a particular effect or the fact that Rider RRS is "intended to mitigate, by design, the effects of market volatility" is insufficient.[90] Rider RRS is not properly or lawfully established unless or until the Companies demonstrate that it will have the effect of stabilizing or providing certainty regarding retail electric generation service. The Companies have failed to provide any evidence demonstrating this.

On the contrary, Rider RRS hinders price stability and certainty for customers given the projected costs associated with Rider RRS during the term outweighs any claimed benefits.[91] The Order ignores the fact that many customers, including SSO customers, do not rely on the fluctuations of the spot energy market for their retail electric generation service. For the term of the proposed ESP, most customers will have either entered into fixed-price contracts for retail electric generation service or will take service pursuant to the SSO, with the resulting price reflecting the product of negotiations with CRES suppliers or a competitively bid process

[88] Order at 109.

[89] Id. at 108.

[90] Id. at 109.

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

utilizing a laddering approach. For those customers with fixed-price generation contracts during various periods of time corresponding with the proposed ESP, Rider RRS will merely add unwanted charges to their electric distribution bills in a manner that will destabilize their otherwise fixed price. In the unlikely event that a credit occurs, from the Rider RRS calculation, there will be a credit assessed on the customers' distribution bills. Rider RRS will not, financially, or otherwise, alleviate or constrain customers' "reliance on the retail market for the pricing of retail electric generation service."[92] In fact, Rider RRS will adversely affect the overall benefits of fixed, known costs for which customers with fixed-price generation contracts bargained when negotiating those contracts. Rider RRS will actually have the effect of creating uncertainty for customers in their cost of electricity.

More specifically, for SSO customers, generation rates will be established through a blending of the results of multiple competitive auctions over varying terms for different products, which reflect forward prices and tend to be fairly stable.[93] The SSO rates will move based upon forward prices. But, the Rider RRS movement could move in the same or opposite direction of the changes in SSO rates.[94] Additionally, for customers who instead take service from a CRES supplier, an additional charge or credit might work counter to the decisions they already made regarding how they purchase their electric supply within the competitive market.[95] If the customer is on a fixed-rate contract, Rider RRS will undermine their otherwise fixed rate, creating uncertainty for those customers.

[92] Id.

[93] Id.

[94] Id. at 50.

[95] Id. at 51-52.

While the Commission's modification to the Stipulated ESP IV to require the Companies to file annual forecasted values subject to quarterly true-ups, rather than annual true-ups,[96] may minimize the magnitude of the variations of Rider RRS' charges or credits, Rider RRS will fluctuate quarterly, resulting in unstable, and uncertain variable rates for customers. Rider RRS will do nothing to promote predictable, stable rates over the term of the ESP. Even assuming Rider RRS could result in a charge to customers that works counter to rates that would otherwise increase, the impact of the offset is minimal compared to the potential cost to customers, which is estimated at $3.6 billion for the eight-year term of the ESP.[97]

Because the Companies did not satisfy its burden of demonstrating that Rider RRS will have the effect of stabilizing or providing certainty regarding retail electric generation service, the Commission's decision to authorize its establishment was unreasonable, erroneous, and unlawful, and should be reversed on rehearing.

2. The Commission erred in finding that Rider RRS is consistent with state policy given it operates as an anti-competitive subsidy that holds customers captive to an affiliate agreement subject to affiliate abuse.

Among other things, Section 4928.02, Revised Code, provides that it is the policy of the state of Ohio to do the following:

> (A) Ensure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service;[98]
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> * * *
>
> (H) Ensure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa, including by

[96] Order at 89-90.

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

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

> prohibiting the recovery of any generation-related costs through distribution or transmission rates[.][99]

In the course of this proceeding, the Companies have shown little attention to the cost impacts associated with the multiple riders proposed and advanced in its Stipulated ESP IV. The Companies' disregard for these cost impacts on several classes of customers demonstrates that the proposed ESP was not created in alignment with the policy of Section 4928.02(A), Revised Code, to ensure the availability of reasonably-priced retail electric service to its customers.

In its Order, the Commission states that it "is not convinced by the claims of several parties that Rider RRS is anticompetitive" as Rider RRS is non-bypassable and will have the "same impact on customers' bills on shopping customers as SSO customers."[100] However, this reasoning ignores the fact that by its very nature, Rider RRS operates as a customer subsidy of failing generating units of the unregulated corporate affiliate of the Companies, which is inconsistent with Ohio policy and affiliate sales restrictions.[101] This subsidy will distort pricing signals and impose an impediment to the proper functioning of the wholesale power markets.[102] The affiliate PPA and resulting Rider RRS threaten to harm competition in the wholesale markets by guaranteeing a revenue stream to aging and uneconomic generating units through a non-bypassable rider assessed to Ohio retail customers. This guaranteed revenue stream results in the subsidization of and retention of uneconomic resources that otherwise would have left the market. Thus, the PPA affiliate units will become agnostic to wholesale-market prices, distort wholesale-market price signals, and deter new entry from competitive generation suppliers. Rider RRS favors one generator, the Companies' affiliate, (FES) over all other generators in the

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

[100] Order at 110.

[101] 155 FERC ¶ 61,101 at 26 (April 27, 2016).

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

competitive markets; therefore, it is anti-competitive among competing generators operating in the same competitive markets.

Further, the approval of and collection of costs through proposed Rider RRS will amount to the recovery of generation-related costs through distribution rates, in contravention of state policy set forth in Section 4928.02(H), Revised Code.[103] Rider RRS is a not a distribution charge; it is a generation charge that will be assessed through regulated distribution utilities (i.e., the Companies) and collected from all distribution customers.[104] Any charges collected through Rider RRS provide additional revenue to one supplier, which other suppliers do not receive. It undermines the policy goals of FERC's affiliate restrictions because it charges retail customers in order to provide guaranteed cost recovery to the Companies' affiliate generation plant.[105]

FERC disagreed with the Commission in a recent decision and concluded that retail ratepayers are captive customers as they are unable to avoid the non-bypassable Rider RRS associated with the affiliate PPA.[106] Specifically, FERC held that although retail customers are free to choose their retail supplier, the Companies' retail ratepayers are "nonetheless captive in that they have no choice as to payment of the non-bypassable generation-related charged incurred under the Affiliate PPA."[107] FERC explained that these customers are considered "captive" as defined by Order No. 697 as Rider RRS could be used to further the type of affiliate abuse that was contemplated by the Commission when it established affiliate power sales restrictions.[108] Therefore, the Commission's reasoning that retail customers in retail choice

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

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

[105] Exelon Ex. 1 at 18 (Campbell Direct).

[106] 155 FERC ¶ 61,101 at 25 (April 27, 2016).

[107] Id.

[108] Id. at 24.

states are not captive because they can select a generation supplier of their choosing, and thereby bypass charges associated with an affiliate contract, is inconsistent with FERC's decision to rescind the Companies' waiver and review the affiliate PPA to ensure that wholesale sales of energy and capacity are just and reasonable and free from affiliate abuse..[109] FERC recognized that "[t]he Affiliate PPA raises the potential for cross-subsidization from [the Companies'] retail customers—who are captive in the sense that they cannot avoid the non-bypassable charge—to [the Companies'] Ohio Market Affiliates."[110]

Finally, the Affiliate PPA (and collecting associated costs of the Affiliate PPA through Rider RRS) not only results in an abuse of affiliate power, but also violates Section 4928.17(A) by failing to maintain corporate separation. The Ohio General Assembly requires utilities to separate their competitive retail electric generation assets from their non-competitive assets.[111] Although Section 4928.17 states that "no electric utility shall engage in this state, either directly or through an affiliate, in the businesses of supplying a noncompetitive retail electric service and supplying a competitive retail electric service…"[112] the Companies have intermingled their generation and distribution services through the terms of the Affiliate PPA and Rider RRS. Not only does this violate corporate separation policy, but it also contravenes the policy established in Section 4928.02(H), which requires competition in the retail electric service marketplace by avoiding anti-competitive subsidies from a non-competitive service to a competitive service, which is exactly what will occur under the approved Rider RRS.

Rider RRS requires all retail customers, including those who take service from a CRES supplier, to pay costs associated with the PPA. Therefore, insofar as the costs associated with

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[109] Id. at 26.

[110] Id. at 26-27.

[111] Section 4928.17, Revised Code.

[112] Id.

the PPA are concerned, all Ohio retail customers served by the Companies are captive. The Commission should grant rehearing and find that Rider RRS is inconsistent with the policy of the state as it operates as an anti-competitive subsidy that holds retail customers captive to an affiliate agreement that is subject to affiliate abuse.

3. The Commission erred in finding that Rider RRS is consistent with state policy as the affiliate agreement creates market deficiencies and market power in the wholesale market.

The Commission's Order found that it was in the interest of customers to bear the costs associated with a cost-based contract between the Companies and its affiliate, FES, through the Affiliate PPA. That finding is contrary to Section 4928.02(I), Revised Code, which provides that consumers should receive protection against market deficiencies and market power.

In deciding to rescind the waiver on affiliate sales restrictions that it previously granted to the Companies, FERC acknowledged its earlier precedent:

> Where customers are served under market-based regulation as opposed to cost-based regulation, it is presumed that the seller has no market power over a customer and that the customer has a choice of suppliers; thus there is less opportunity for a customer to involuntarily be in a situation in which its rates subsidize or support another entity.[113]

FERC found, however, that this presumption did not apply because Rider RRS subjected unwilling retail customers to charges arising out of a cost-based, affiliate contract. Where customers have no choice to avoid the costs of an affiliate contract, concerns about market power and affiliate abuse are at their highest because there is the very real "potential for a franchised public utility with captive customers to interact with a market-regulated power sales affiliate in ways that transfer benefits to the affiliates and its stockholders to the detriment of the captive

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[113] 155 FERC ¶ 61,101 at P 59 (April 27, 2016).

customers * * * ."[114] In the eyes of FERC, Rider RRS "could be used to effectuate precisely [that] type of affiliate abuse * * * ."[115]

The Commission's belief that customers will derive benefits from bearing the costs of the Affiliate PPA is incompatible with FERC's findings and, furthermore, cannot be reconciled with the policy of Section 4928.02(I), R.C. which is aimed at safeguarding customers from market power and market deficiencies. On rehearing, the Commission should reverse its ruling because it licenses the "cross-subsidization from [the Companies'] retail customers—who are captive in the sense that they cannot avoid the non-bypassable charge—to [FES]."[116]

4. The Commission erred in approving Rider RRS and the recovery of legacy costs constituting transition revenues, or the equivalent thereof, in violation of Section 4928.38, Revised Code.

In addition to all of the previously mentioned violations of Ohio regulatory principles and practices, Rider RRS also does not align with the statutory requirements of Section 4928.38, Revised Code. The Supreme Court of Ohio recently held that "R.C. 4928.38 bars the [C]ommission from authorizing the 'receipt of transition revenues or any equivalent revenues' after December 31, 2010."[117] In interpreting R.C. 4928.38, the Court explained that even where transition revenues are not explicitly sought, the statute still bars the receipt of revenues that amount to transition revenues, even if called by another name.[118]

Under the Stipulated ESP IV, Rider RRS is a charge to customers for the generation costs associated with the affiliate plants subject to the Affiliate PPA based on the plants inability to

[114] Id. at P 60.

[115] Id.

[116] Id. at P 65.

[117] *In re Application of Columbus S. Power Co.*, Slip Opinion No. 2016-Ohio-1608, ¶ 18.

[118] Id. at ¶ 21.

financially compete in the market.[119] These charges are the equivalent of transition revenues as any deficiency in the revenue to the affiliate plants when their output is sold into the PJM market will be made up by customers. Moreover, per the terms of the Stipulated ESP IV, Rider RRS will include recovery of legacy cost components, defined by Companies witness Mikkelsen as "any cost that arises from a decision or commitment or a contract entered into prior to December 31st of 2014."[120] As a result, previous decisions by an unregulated affiliate will now be passed on to customers through Rider RRS, without any clear definition of such potential costs.[121] Therefore, Rider RRS operates as a cost recovery mechanism that constitutes the receipt of the equivalent of transition revenues, which is forbidden under Section 4928.38, Revised Code.

5. The Commission erred by unreasonably and unlawfully approving the continuation of Rider DCR and an expansion of Rider DCR through a $180 million increase in the revenue caps as there is no evidence that Rider DCR is necessary and the Commission's decision is in violation of Commission precedent.

In its Order, the Commission approved continuation of the Delivery Capital Recovery Rider (Rider DCR), stating it is "necessary and appropriate" in light of continuation of the distribution rate freeze.[122] Not only does this provision of the Stipulated ESP IV extend Rider DCR for an additional eight-year term, it also increases the value of the revenue caps for Rider DCR by $30 million for the period June 1, 2016 through May 31, 2019; by $20 million for the period June 1, 2019 through May 31, 2022; and by $15 million for the period June 1, 2022 through May 31, 2024.[123] This nearly doubles the established revenue cap of $15 million per

[119] Companies Ex. 28 at 3 (Moul Direct).

[120] Tr. Vol. I at 160-161.

[121] OCC Ex. 25 at 4 (Rose Direct); Tr. Vol. I at 89.

[122] Order at 92-93.

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

year under the current ESP and increases the revenue caps by an additional $180 million.[124] While the Commission stated that Rider DCR is necessary to maintain distribution reliability by allowing the Companies to recover "reasonable investments in plant in service associated with distribution, subtransmission, and general and intangible plant" not included in the Companies' distribution rate case,[125] the Commission has provided no record evidence to support the purported necessity of Rider DCR. Moreover, the Commission failed to provide any evidence, or rationale, to support the $180 million in increased revenue caps. As previously discussed, this failure to adequately address substantive arguments advanced by a party to a proceeding or to provide record evidence in support of a decision contradicts Section 4903.90, Revised Code, and recent case precedent from the Supreme Court.[126]

Rider DCR should not be expanded to include assets recorded in "General, Other and Service Company Allocated" plant accounts given the nature of those assets are not directly related to maintaining reliability of distribution service and, therefore, are more appropriately considered for recovery in a distribution rate case.[127] Although the Companies purport to seek distribution-related expenses pursuant to Section 4928.143(B)(2)(h), Revised Code,[128] the costs sought to be recovered through Rider DCR by the Companies are not actually distribution expenses related to infrastructure modernization appropriate for an ESP.[129] Rather, the Companies seek to recover distribution, transmission, general and intangible plant costs (e.g., expenses associated with the general maintenance of a distribution system), which are more

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

[125] Order at 93.

[126] *In re Comm. Rev. of Capacity Charges of Ohio Power Co.,* Slip Opinion No. 2016-Ohio-1607 at 16-19.

[127] Staff Ex. 6 at 9 (McCarter Direct); OCC Ex. 18 at 19 (Effron Direct).

[128] Section 4928.143(B)(2)(h) states that an ESP may provide for, or include, among other items, provisions regarding distribution infrastructure and modernization incentives for the electric distribution utility.

[129] OCC Exhibit 27 at 16 (Williams Direct).

appropriately included within existing base distribution rates as part of a distribution rate case.[130] Section 4928.143(B)(2)(h), Revised Code, requires that electric distribution utility (EDU) and customer expectations about the EDU's distribution system must be aligned if the Commission is to include, for instance, a distribution investment rider in an ESP.[131] Despite this requirement, no evidence was provided to demonstrate that the Companies' expectations and the expectations of their customers are aligned as it relates to the distribution system.[132] Companies witness Mikkelsen testified that customer surveys conducted by the Companies between 2008 and 2013 did not specifically address whether customers agree with additional charges imposed for improved reliability or whether customers are satisfied with the cost of service.[133] Additional investments for improved reliability, absent research supporting the necessity of such investments, are not prudently incurred costs and should not be recoverable from ratepayers. In its Order, the Commission fails to adequately address the reasonableness of inclusion of these assets in Rider DCR and the continuation of Rider DCR.

Moreover, although the base distribution rate freeze will be extended to June 1, 2024, for a period of eight years, the Stipulated ESP IV provides for two exceptions to the base distribution rate freeze.[134] The first exception is an emergency pursuant to Revised Code Section 4909.16 and the second exception is based on an agreement with Staff.[135] Thus, the Commission's conclusion that Rider DCR is "necessary" in light of the eight-year base

[130] Id.

[131] Id.

[132] OCC Ex. 27 at 19-21 (Williams Direct).

[133] Tr. Vol. III at 613-614.

[134] Companies Ex. 154 at 13 (Third Supp. Stip.); Tr. Vol. XXXVII at 7778-7779.

[135] Id.

distribution rate freeze is unsupported by the record given the Companies could make a filing for new base distribution rates to go into effect prior to June 1, 2024 under one of the exceptions.[136]

The Commission also fails to provide any rationale, or even mention, its approval of the increased revenue caps under Rider DCR from those established in the Companies' ESP III case.[137] The increase in revenue caps, as well as extension of Rider DCR for an eight-year term, will result in charges to customers totaling $2.59 billion.[138] Further, since it has been seven years since the Companies last distribution rate case,[139] it is both unreasonable and imprudent for the Commission to approve continued incremental increases of a distribution rate, absent a review of those rates through a distribution rate case. The Companies provided no evidence to justify a $30 million revenue cap increase for three years or a $20 million revenue cap increase for an additional three years given the Companies have admitted they continue to meet their electric distribution targets under the current revenue caps and have not projected any major distribution capital projects.[140]

As the Office of the Ohio Consumers' Counsel (OCC) witness Effron states in his testimony, the purpose of Rider DCR should be to allow the Companies to avoid revenue deficiencies that may result from capital expenditures associated with distribution reliability, and not to augment excess earnings.[141] It is unnecessary and unreasonable for the Commission to approve additional Rider DCR increases if the Companies are earning returns that exceed their

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[136] Id.

[137] *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, in the Form of an Electric Security Plan,* Case No. 12-1230-EL-SSO, et. al. (ESP III Case).

[138] Tr. Vol. XXXVI at 7575.

[139] Tr. Vol. XX at 3901.

[140] Id.

[141] OCC Ex. 18 at 11 (Effron Direct).

actual costs of capital.[142] Rather than blindly approve revenue cap increases, the Commission should require the Companies to file a distribution rate case in order to establish the appropriate baseline against which rate changes under Rider DCR are measured. This would ensure that the effect of such rate increases would not be implemented merely to perpetuate or increase excess earnings for the Companies.[143]

Moreover, approval of Rider DCR is inconsistent with the Commission's own precedent. In a similar ESP case, the Commission denied AEP Ohio's request to incorporate general plant costs into a Distribution Investment Rider (Rider DIR).[144] The Commission stated that AEP Ohio's interpretation of distribution infrastructure exceeded the intent of the statute and resulted in a significant expansion of the rider, which "far exceeds the justification offered and accepted by the Commission in approving the original DIR."[145] Further, in response to AEP Ohio's request to increase revenue caps of $15 million per year to $30 million per year (as the Companies are requesting here with Rider DCR), the Commission stated that AEP Ohio's request would be better considered and reviewed in the context of a distribution rate case, where the Company's request could be balanced against the customers' right to reasonably-priced service.[146] Therefore, the Commission's approval of continuation of Rider DCR and an increase in the revenue caps is inconsistent with its own previous AEP ESP III Order.

Based on the evidence and testimony presented, the Commission's decision to approve continuation of Rider DCR and to allow the Companies to increase the revenue caps recoverable under Rider DCR by $180 million is both unreasonable and unlawful. As the record

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[142] Id.

[143] Id. at 19.

[144] AEP ESP III Order at 46.

[145] Id.

[146] Id.

demonstrates, Rider DCR does not meet statutory requirements and includes unnecessary and unsupported rate increases for customers. Further, the decision is inconsistent with prior Commission precedent from the AEP ESP III case. The Commission should reverse its ruling regarding Rider DCR.

6. The Commission erred in establishing Rider GDR as it is unreasonable and unlawful in violation of Commission precedent.

The Commission also approved establishment of the Government Directives Rider (Rider GDR), initially set at zero, which will permit the Companies to recover unforeseen expenses specific to government directives, including cyber and physical threats, other attacks on infrastructure, costs related to former manufactured gas plant (MGP) sites, or costs arising from implementing directives from the retail market investigation.[147] The Commission required the Companies to file an application in a separate proceeding to recover any costs under Rider GDR and to demonstrate that such costs are reasonable and just.[148]

In its Order, the Commission clarified that Rider GDR will be limited to federal and state government mandates enacted after the filing date of the application in the proceeding and no transmission or generation expenses will be recoverable under Rider GDR.[149] While this clarification provides some limitations to the potential breadth of Rider GDR, it is still overly broad and vague. For example, Companies witness Mikkelsen testified that "[i]t is too early to ascertain what, if any, directives may come from such efforts."[150] If it is too early to ascertain the types of expenses that may be recoverable under Rider GDR, it is also too early to ascertain the types of costs that will result from implementing those directives and from estimating the

[147] Companies Ex. 1 at 15 (Application).

[148] Order at 93.

[149] Id.

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

amount of costs to be recovered under the rider from customers. The Commission should not approve the establishment of or cost recovery under Rider GDR until the Companies actually incur costs and those costs are deemed prudent for recovery.

Moreover, the Commission's approval of Rider GDR is inconsistent with prior Commission precedent. In a similar ESP case involving AEP Ohio's request to implement a non-bypassable NERC compliance and cyber security rider (Rider NCCR), the Commission agreed with Staff and others and rejected the rider.[151] In that case, AEP Ohio sought to establish Rider NCCR at a value of zero, track associated costs from the date of adoption, and defer such costs until AEP Ohio filed an application and the Commission approved recovery of the NCCR costs.[152] The Commission denied AEP Ohio's request to establish Rider NCCR, stating the placeholder rider was premature and noting the lack of specificity of future potential costs for the Company.[153] Similar to Rider NCCR in that case, Rider GDR, as proposed, is premature and lacks specificity as an "open-ended recovery vehicle for any costs the Companies incur."[154] While the Commission opines that the AEP Ohio ESP case is distinguishable in that AEP Ohio had another means to recover such costs (e.g., a distribution rate case), the Companies' voluntary commitment to an eight-year based distribution rate freeze includes two exceptions.[155] Under one of these exceptions, the Companies could file for a base distribution rate prior to the end of the eight-year term of the ESP. Accordingly, the Companies may invoke an exception and file a distribution rate case (similar to AEP) to recover costs associated with state and federal government mandates if the need arises. The Commission's approval of Rider GDR, even with

[151] AEP ESP III Order at 62.

[152] Id. at 59-60.

[153] Id. at 62.

[154] Staff Ex. 6 at 5 (McCarter Direct).

[155] Companies Ex. 154 at 13 (Third Supp. Stip.); Tr. Vol. XXXVII at 7778-7779.

the clarification, is both unreasonable and unlawful given its request to recover open-ended costs and its inconsistency with a prior Commission order denying establishment of a similar rider.

E. The Commission erred in determining that Rider RRS meets the Commission-adopted factors articulated in the AEP ESP III Order.

Even assuming, arguendo, that Rider RRS meets the statutory requirements articulated in Section 4928.143, Revised Code, Rider RRS does not meet the Commission-adopted factors established in the AEP ESP III Order. In AEP Ohio's ESP III Case, AEP Ohio sought Commission approval to establish a similar non-bypassable PPA Rider based on AEP Ohio's contractual entitlement to the output from the Kyger Creek and Clifty Creek plants, which are owned by OVEC.[156] Under that proposal, AEP Ohio would purchase the output, capacity, energy and ancillary services, and sell the output into the wholesale markets operated by PJM.[157] If the market revenues exceeded the costs to produce the output, AEP Ohio would credit its customers through the PPA Rider.[158] Conversely, if the costs to produce the output exceeded the market revenues, AEP Ohio would charge its customers through the PPA Rider.[159]

The Commission established the following factors that AEP Ohio would be required, at a minimum, to address in its future filing. Given the similarities between Rider RRS proposed by the Companies and the PPA Rider proposed by AEP Ohio, the Companies and intervening parties also conducted an analysis of the Commission's established factors in reviewing the Companies' proposed ESP IV, including:

- The financial need of the generating plant;
- The necessity of the generating facility, in light of future reliability concerns, including supply diversity;

[156] Companies Ex. 1 at 5 (Application).

[157] AEP ESP III Order at 5.

[158] Id.

[159] Id.

- A description of how the generating plant is compliant with all pertinent environmental regulations and a compliance plan for all pending environment regulations;
- The impact that a closure of the generating plant would have on electric prices and the resulting effect on economic development within the state.
- Rigorous Commission oversight and a process for a periodic substantive review and audit;
- Commitment to full information sharing with the Commission and its Staff;
- An alternative plan to allocate the rider's financial risk between itself and its customers; and
- A severability clause in the event that a court of competent jurisdiction renders the rider invalid in any way.[160]

In approving the establishment of Rider RRS, the Commission found the Companies met the burden of addressing the relevant factors articulated by the Commission in the AEP ESP III case that were "important to consider."[161] This finding is unjust and unreasonable based on the record evidence in this case.

1. **The Commission erred by failing to address the financial need of the affiliate plants subject to the Companies' Affiliate PPA, as required by the established factors.**

Although the AEP ESP III Order clearly established the first relevant factor important to consider as an assessment of the financial need of the affiliate plants, the Commission chose not to address this particular factor in its Order regarding the Companies' Rider RRS. The Commission's failure to address the delineated factor without explanation is unreasonable and unlawful in violation of Section 4903.09, Revised Code and the Supreme Court's recent decision in *In re Comm. Rev. of Capacity Charges of Ohio Power Company.*[162] Based on the record in this case, it is clear that the Companies' affiliate plants are not in any financial need.

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[160] AEP ESP III Order at 25-26.

[161] Order at 87.

[162] *In re Comm. Rev. of Capacity Charges of Ohio Power Co.,* Slip Opinion No. 2016-Ohio-1607 at 16-19.

With the passage of Senate Bill 3, electric generation became a deregulated service in the state of Ohio, removing the governing power of the Commission in the area of generation services.[163] This deregulatory approach "provides for competition in the supply of electric generation services * * *."[164] Given this market construct, financial need of generating units must be assessed based on the revenues a generating unit receives in the competitive markets operated by PJM. Section 4928.38, Revised Code, states that a generating unit must be "fully on its own in the competitive market."[165] As stated by OCC witness Rose, "[b]eing on your own in the competitive market means that the Companies' unregulated generation efforts cannot be aided by a subsidy * * *."[166] Thus, market forces should be the ultimate determinate of a generating unit's financial need and financial need must be assessed in the context of a competitive market (i.e., using market forces).

As stated by both OCC witness Sioshansi and OMAEG witness Hill, if the Companies believe that the affiliate plants will become profitable (by $2 billion within 15 years) in the long run, it should follow that the Companies would be willing to make the necessary investments to keep the affiliate plants operating in the near term.[167] "The Companies should have no interest in prematurely shutting down assets that are likely to prove valuable."[168] Further, market logic indicates that if there is a high probability that the affiliate plants will recover costs within three years (as predicted by the Companies), the Companies should be able to obtain investments in

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[163] *IEU-Ohio v. Pub. Util. Comm.,* 117 Ohio St.3d 486, 20058-Ohio-990 at ¶ 6.

[164] *Migden-Ostrander v. Pub. Util. Comm.,* 102 Ohio St.3d 451, 2004-Ohio-3924 at ¶ 2.

[165] Section 4928.38, Revised Code.

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

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

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

the plants through the sale of bonds or other long-term financial instruments.[169] The Companies' arguments defy logic when, on one hand, they assert the affiliate plants' economic viability is in doubt and they may not survive, and, on the other hand, they request customers, who have no ownership interest in the affiliate plants, to pay costs associated with keeping those units operating because they are essential for future generation and will become profitable. The Companies' own witness Moul concedes that the Companies would be able to finance capital investments if the Economic Stability Program was not approved.[170]

Therefore, the Commission should have addressed the Companies' failure to adequately demonstrate the financial need of the affiliate plants as required by the AEP ESP III Opinion and Order.[171] This would have clearly demonstrated that the Companies failed to meet the first Commission-established factor as the generating units subject to the PPA are in no dire economic need.

2. The Commission erred in determining that the affiliate plants are necessary to maintain system reliability and support supply diversity.

The Commission erred in crediting the Companies' argument that the affiliate plants are necessary to maintain reliability and support supply diversity.[172] It should first be noted that system reliability and the need for generating units in a particular region is determined by the Regional Transmission Organization's (e.g., PJM) procedures for meeting reliability to ensure

[169] Id. at 10.

[170] Tr. Vol. X at 2199.

[171] AEP ESP III Order at 25.

[172] Order at 87.

customer demand.[173] Thus, decisions about system reliability should be made regionally by PJM, not on a plant-by-plant basis by the Commission.[174]

Even if this was a proper subject for the Commission to consider, the record emphatically shows that the Companies' warnings about the harms that would be inflicted on system reliability if the proposal is not approved are unfounded and, at best, overstated. In its Order, the Commission cites to estimates of transmission investments ranging from $400 million to $1.1 billion the Companies allege would be necessary in the event of plant closures.[175] However, in making this estimate, Companies witness Phillips assumes that all of the units at Davis-Besse or Sammis, or both, will retire.[176] This assumption discounts the possibility that only a limited number of generating units might retire, while the rest remain in service, which would have a different impact on the transmission system reliability.[177] Additionally, witness Phillips admits that when making his statements regarding the impact of natural gas generation on reliability, he did not consider the impact of the PJM Capacity Performance product.[178] Further, the 2016 load forecast released by PJM shows a reduction in forecast peak demand compared to earlier forecasts, indicating that there is no looming shortage of generating capacity.[179] In fact, PJM recently stated its markets have "succeeded in providing reliable, competitively priced wholesale electricity" to Ohio.[180]

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

[174] As one federal court recently explains, "PJM was created to ensure reliability by managing interstate transmission lines and, in more recent years, by designing and operating wholesale auctions." *PPL EnergyPlus, LLC v. Hanna,* 977 F.Supp.2d 372, 384 (D. N.J. 2013).

[175] Order at 87.

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

[177] Id.

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

[179] OMAEG Ex. 28 at 8-10 (Seryak Supplemental); OCC/NOPEC Ex. 9 at 6 (Wilson Second Supplemental)

[180] Id.

Companies witness Phillips uses the PJM regional transmission expansion plan (RTEP) 2019 base case model in his generation reliability analysis.[181] The RTEP 2019 base case model does not account for generation projects that have been added to the PJM queue, including a 960 MW natural gas-fired plant near Davis-Besse and 1,152 MW natural gas-fired plant near Sammis, which are scheduled to be in service in 2017 and 2020, respectively.[182] Additional generating plant locations have also been identified in Oregon, Middletown, Rolling Hills, Lordstown, Columbiana County and Avon Lake, Ohio.[183] These new generation resources, which were also noted by OCC witness Wilson,[184] could have a significant impact on the results of the model, especially considering the proximity in location to the Davis-Besse and Sammis plants.[185] The Companies' assertion that transmission upgrades will create a considerable cost for customers is speculative as it is PJM who is responsible for transmission planning and who ultimately determines cost allocation.[186] As Staff witness Choueiki stated, rather than provide an independent analysis of the impact of retirement of the affiliate plants, the Companies relied on an assessment conducted by two of their own engineers.[187] They did not provide an analysis to PJM nor did they seek an independent analysis from PJM, who would be in the best position to estimate the cost of transmission upgrades based on the needs and capabilities of the entire

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

[182] Id.

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

[184] OCC/NOPEC Ex. 5 at 10 (Wilson Supplemental).

[185] OCC/NOPEC Ex. 1 at 26 (Sioshansi Direct); Tr. Vol. XV at 3226-3232.

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

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

region.[188] Thus, the Commission's over-reliance on these estimates is misplaced and unjustified by the record.[189]

Even if the record showed the existence of a pending unit closure, PJM's reliability-must-run (RMR) arrangement is a tool that can be used to mitigate system impacts and capacity shortfalls caused by such a closure.[190] Once a generator notifies PJM of its intent to close a unit, PJM can enter into an RMR contract with the generator to provide specific payments for a fixed period of time to keep the unit running while the reliability need is addressed.[191] Further, if a generation owner chooses to continue to operate a generating unit that it planned to deactivate, the generation owner is entitled to file a cost-of-service recovery rate with FERC in order to recover the entire cost of operating the unit beyond its proposed deactivation date.[192] The Companies are certainly aware of this process given FES, an unregulated affiliate of the Companies, currently has generators that are the subject of RMR agreements and are receiving cost recovery under those agreements.[193]

In addition to the issue of reliability, the Commission also stated that Rider RRS and the Economic Stability Program will encourage resource diversity in the state of Ohio.[194] However, the Commission is mistaken that preserving the life of the units identified in Rider RRS will promote supply diversity.[195]

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

[189] See Order at 87.

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

[191] Id.

[192] Id.

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

[194] Order at 87.

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

By definition, diversity means of or relating to different types.[196] The primary energy source used for electricity generation in the state of Ohio is coal.[197] The affiliate generating plants and FES' OVEC entitlement include 3,319 MW of coal-fired generation capacity and 900 MW of nuclear power.[198] Thus, they do not increase the diversity of generation fuels in the state of Ohio because they are primarily coal generating stations. Further, in 2012, coal represented 59 percent of the generating capacity installed in the state and natural gas represented 29 percent of the generating capacity.[199] If the coal-fired generators included in the affiliate plants were to retire and be replaced with natural gas-fired generators, the result would be a more diverse supply and balanced portfolio.[200] The homogeneity brought by the coal-fired units in the affiliate plants do not contribute to supply diversity. Subsidizing coal-fired generating units through Rider RRS will only decrease the supply diversity, making Ohio heavily dependent on coal above all other fuel sources.

In its Order, the Commission focused its discussion of reliability on the Companies' commitments to energy efficiency programs, wind and solar procurement, advanced metering and smart grid infrastructure.[201] However, these promises contain no accountability measures and lack any cost-benefit analysis or assessment, as previously discussed.[202] These provisions, which the Commission indicates will encourage resource diversity, contain no firm commitments by the Companies and, if implemented, will result in additional costs to customers. Therefore,

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[196] Id.

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

[198] Id.

[199] Id. at 29.

[200] Id.

[201] Order at 87-88.

[202] Tr. Vol. XXXVII at 7795.

the Commission erred in determining that the provision of the Stipulated ESP IV, including Rider RRS, will contribute to reliability and promote resource diversity in the state.

3. The Commission erred in finding that the Stipulated ESP IV contributes to or promotes economic development within the state of Ohio.

The Commission stated in its Order with regard to the Companies' Economic Stability Program, including Rider RRS, being "an economic development program," that the plants have a "significant economic impact upon the regions in which the plants are located." [203] In making that determination, the Commission relied solely on the testimony of Companies' witness Murley.[204] This ignores a multitude of testimony from intervening parties' witnesses related to economic development, including extensive testimony by OMAEG witness Dr. Edward Hill, a Ph.D. in Economics and Regional Planning and published author of over 90 articles, with numerous other accomplishments and work related to economic development.[205]

The Commission's reliance on the Companies' analysis of the impact that closure of a generating plant would have on economic development within the state disregards the potential economic benefits that could result from closure of a plant.[206] Specifically, a plant closure could prompt the construction of a new, more efficient generating asset, which could create jobs, spur economic development, provide a strong tax base, and preclude the need for a ratepayer-funded subsidy.[207]

As stated by OMAEG witness Hill, contrary to the Companies' assertions, preserving the affiliate plants will actually harm economic development, and these harms will be felt most

[203] Order at 109.

[204] Id at 109-110.

[205] OMAEG Ex. 26A at 2-4 (Hill Corrected Third Supplemental).

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

[207] Id.

acutely in the manufacturing sector.[208] In 2010, Ohio had the highest level of manufacturing activity among the Midwestern states and the manufacturing sector is a prominent part of the state's economic base.[209] Many manufacturing industries export products from Ohio, bringing revenue into the state and creating jobs.[210] Moreover, the manufacturing sector is an energy-intensive industry, with the Companies' service territories having the highest proportion of electricity-intensive manufacturing in the state.[211] These energy-intensive industries are especially influenced by energy prices, with a correlation that higher electricity prices have a negative effect on manufacturing productivity.[212] Higher electricity prices could have a detrimental impact on the manufacturing industry currently in Ohio as well as the ability of the state to attract new business. Therefore, the Commission's reliance on the Companies' claim that closure of the affiliate plants would result in increased electric prices is over-exaggerated.

The proposed PPA and Rider RRS could harm the economic development of the state from an environmental perspective as well. As designed, the proposed PPA and Rider RRS will ensure the continued operation of the affiliate plants. However, due to both the age of the plants and the introduction of methane as an alternative fuel source, it may be uneconomic to continue operating those facilities.[213] Additionally, and as previously discussed, new regulations designed to reduce the amount of carbon released into the atmosphere from coal plants are currently pending, which will increase the cost of generating electric power from coal, making it less

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[208] OMAEG Ex. 17 at 5 (Hill Direct).

[209] Id.

[210] OMAEG Ex. 17 at 11 (Hill Direct).

[211] Id.

[212] Id. at 11-12.

[213] Id. at 6.

economical.[214] Existing levels of air pollution have an impact on the attraction, retention and expansion of businesses in the state's metropolitan areas, which ultimately impact the state's economic development.[215] Permitting the continued operation of uneconomic coal-based generating plants for electricity generation will likely lead to redistribution of economic activity away from Ohio to other states and cause local businesses to either move or close.[216]

Finally, as stated by OMAEG witness Hill, the proposed PPA and Rider RRS prevent a free market from evolving, which ultimately impacts overall economic development.[217] If the affiliate plants are operating at a loss, the costs to operate the facilities will be passed on to customers through Rider RRS, while FES will be fully compensated for its costs, thereby removing some of the price differential between FES and its competitors.[218] This thwarts competition in the marketplace and will deter new entrants from entering the power generation market because the market has been altered to their detriment.[219] The result of fewer market competitors is higher electricity costs and a less robust market to contribute to economic development.[220]

The Commission seems to have disregarded the evidence that demonstrated that the Companies themselves have advocated for the continuation of competitive markets in Ohio and explained that competitive markets work. Specifically, Executive Vice President, Markets and Chief Legal Officer of FirstEnergy Corp., Ms. Leila Vespoli, testified on behalf of the Companies to promote competitive markets, stating that:

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[214] Id.

[215] Id.

[216] OMAEG Ex. 17 at 16-17 (Hill Direct).

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

[218] Id. at 7.

[219] Id.

[220] Id.

> measures that restrict customer shopping or subsidize one electric generator over another are throw- backs to monopoly regulation. Such efforts that pick 'winners' and 'losers' in the energy market would create obstacles to private investment in generation and increase prices for customers.[221]

Additionally, Ms. Vespoli cautioned against restricting the development of "low-cost, domestic energy source in our state," such as new gas-fired generating plants that could lead to economic development within the state.[222] Ms. Vespoli concluded her testimony by stating the following:

> Ultimately, businesses and consumers should be allowed to make their own decisions on how to meet their specific energy needs. We cannot afford arbitrary and overly prescriptive requirements that raise electricity prices.[223]

The Commission failed to acknowledge that Ms. Vespoli's comments regarding low power prices and new generation supply options contradict the testimony provided by the Companies in this case. Interestingly, Ms. Vespoli cautioned against programs that would restrict the development of new energy sources in the state of Ohio, which is exactly what the proposed PPA and Rider RRS seek to do. Ms. Vespoli recognized the importance of electricity prices to "an energy-intensive manufacturing state like Ohio,"[224] yet proposed Rider RRS has been forecasted to result in *additional costs* to customers, including manufacturers, of up to $3.6 billion for the eight-year term of ESP IV based on updated market conditions.[225] If electric use is a "key indicator of economic success,"[226] as Ms. Vespoli testified, Rider RRS is both

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[221] IGS Ex. 13 at 8 and Attachment MW Ex. 1 at 2 (Testimony of Lela Vespoli, Competitive Markets Work, House Public Utilities Committee (Oct. 19, 2011)).

[222] Id. at 6.

[223] Id.

[224] Id. at 5.

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

[226] EWH Supplemental Attachment A to OMAEG Ex. 19 at 5 (Testimony of Leila Vespoli Before the Senate Public Utilities Committee (April 9, 2013)).

unreasonable and unlawful given it will distort the competitive market and inhibit economic growth and development in the state.

While the Commission upheld the attorney examiners' denial of the Companies' motion to strike portions of witness testimony regarding this legislative committee testimony of Ms. Vespoli and agreed with OMAEG "that these statements were determined to be relevant during the evidentiary hearing as they were made less than one year before the date the Companies filed their initial application in this proceeding,"[227] the Commission provided no consideration to Ms. Vespoli's testimony in its decision to approve Rider RRS. In authorizing Rider RRS, the Commission erred in disregarding record evidence that provided cautionary warnings from the Companies themselves related to distortions of the competitive market and impacts on economic development in the state, as well as the Companies' own testimony that showed that the Companies had significantly shifted their position with respect to regulation of the energy market.

4. The Commission erred in determining that the Stipulated ESP IV appropriately distributes risk between the Companies and its customers.

The Commission's modifications to the Stipulated ESP IV do not go far enough in protecting customers from financial risks. The Commission's directive to allocate the risk of Rider RRS is wholly unmet as ratepayers bear all the cost and economic risk under the Companies' proposed Rider RRS.[228] If the costs of the affiliate plants exceed market revenues, customers will be charged 100% of that difference through Rider RRS.[229] The customers though, do not own the plants, operate the plants, and are not responsible for bidding the plants'

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[227] Order at 32-33.

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

[229] Id. at 20.

output into the wholesale market. Those responsibilities fall squarely on the shoulders of the Companies, FES, and OVEC. The Commission's acceptance of the Companies' audit and review process is inadequate as a mechanism for allocating the financial risk of Rider RRS between the Companies and its customers.[230] The review process proposed by the Companies and approved by the Commission is far from rigorous and does not provide adequate prudency review of all costs that customers may incur under Rider RRS.

Additionally, the Companies and the Commission assert that credits provided for in the Stipulated ESP IV serve as additional risk sharing between the Companies and its customers.[231] Under this provision, customers would be provided up to $100 million in credits from the Companies, independent of any credits that may naturally occur, for the eight-year term of the ESP.[232] Although the Commission's attempt to provide additional assurances to customers are helpful,[233] these modifications still lack in sufficient risk sharing between the Companies and customers. Companies witness Mikkelsen concedes that the credit provision does not guarantee that Rider RRS will result in a credit to customers in any given year of the eight-year term and does not require that the Companies provide such a credit to customers if certain conditions are not met.[234] Moreover, if the Companies' projected credits over the last four years of Rider RRS are accurate, the Companies will not have to pay even $1 of the credits listed as part of the risk sharing element in the Stipulated ESP IV. Conversely, if the projections of Mr. Wilson are accurate, the cost to customers under Rider RRS will always be greater than the maximum credit

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[230] Order at 89.

[231] Companies Ex. 154 at 7-8 (Third Supp. Stip.); Companies Ex. 155 at 3-4 (Mikkelsen Fifth Supplemental); Order at 91.

[232] Tr. Vol. XXXVI at 7523.

[233] Order at 91-92.

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

provided by the Companies, resulting in the credit being applied. But, the customers will still always pay a net charge even after application of the credit.[235] Given the structure of Rider RRS, which passes all net costs to customers, there is no incentive for the Companies, or their affiliates, to contain costs or maximize revenues of the units from selling the output into the wholesale market.[236] The $100 million credit (if ever applied) merely reduces the cost to customers, but does not change the premise that net costs are passed to customers at 100%.[237] This is hardly a risk for the Companies.[238]

Finally, the Commission should have made the Order subject to refund. Although the Stipulated ESP IV includes a severability provision, the severability provision does not protect customers from the risk that Rider RRS will be over-turned and deemed unlawful.[239] In the event this occurs, the Stipulated ESP IV explicitly states that customers will not be entitled to a return of any collections already made under Rider RRS given case precedent in Ohio, which precludes retro-active ratemaking.[240] Under the Stipulated ESP IV, based on recent forward gas prices and the 2015 Annual Energy Outlook, which indicates that Rider RRS will result in a charge of $3.6 billion over the eight year term,[241] customers may pay costs under Rider RRS, which are then deemed unlawful with no recourse for recovery.[242] OMAEG appreciates the Commission's modification adding that the Commission may reevaluate or modify the

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

[236] Id. at 9.

[237] Id.

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

[239] OCC Ex. 20 at 27 (Ferrey Direct).

[240] Companies Ex. 154 at 9 (Third Supp. Stip.); See, e.g., *Keco Indus., Inc. v. Cincinnati Suburban Bell Tel. Co.,* 166 Ohio St. 254, 141 N. E.2d 465 (1957).

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

[242] Even the Companies' own projections in Mikkelsen Workpaper November 30, 2015 indicate a charge during the first three years of Rider RRS. Sierra Club Ex 89.

Stipulations in the event there is a change of PJM's tariffs or rules prohibiting the plants from being bid into the PJM auctions.[243] However, to foreclose any chance that customers could be required to pay for charges unlawfully collected through Rider RRS, the Commission should clarify on rehearing that Rider RRS is being implemented subject to refund particularly in light of the recent U.S. Supreme Court decision and the FERC decision regarding review and legality of the Affiliate PPA, which is the basis for the costs and credits associated with Rider RRS.[244]

The approved Stipulated ESP IV insulates the Companies from any risk and transfers all risk to ratepayers, who have no control over the operations and bidding of the affiliate plants. The Commission erred in determining that this alleged risk sharing was adequate, even with its modifications. Additionally, in the AEP Ohio PPA Order issued concurrently, the Commission removed this provision from the stipulation's severability provision, stating that "we find that the prohibition on refunds, in the event of an invalidation of the PPA rider proposals, should be removed from the stipulation, as it is a matter for determination by the Commission or reviewing court."[245] At a minimum, the Commission should remove the similar provision from the Companies' Stipulated ESP IV consistent with its decision in the AEP Ohio PPA Order.

F. The Commission erred in approving Rider NMB and the Rider NMB pilot program without modifications.

1. The Commission erred in expanding Rider NMB to include additional costs as they will increase costs for customers.

In its Order, the Commission approved adoption of the Non-Market-Based Services Rider (Rider NMB) pilot program, however, in its decision approving the expanded Rider NMB, the

[243] Order at 92.

[244] *Hughes*, Slip Op., 578 U.S. ___ (2016); 155 FERC ¶ 61, 101 (April 27, 2016).

[245] *In the Matter of the Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider, et al.*, Case No. 14-1693-EL-RDR, Opinion and Order at 87 (March 31, 2016).

Commission failed to address concerns regarding the inclusion of the additional costs recoverable through Rider NMB, including costs associated with balancing operating reserves and uplift charges.[246] The Commission's approval of, and failure to provide rationale for, inclusion of additional costs in Rider NMB is unjust, unreasonable, and unlawful pursuant to Section 4903.09, Revised Code and recent Supreme Court precedent.[247]

Rider NMB was designed to recover non-market-based costs, fees, and charges imposed on or charged to the Companies by FERC or PJM.[248] The Stipulated ESP IV includes a provision that proposes to change the billing responsibility for certain costs imposed by PJM, expanding the costs recoverable through Rider NMB to include an additional eleven PJM line items to be charged directly to the Companies rather than the Standard Service Offer (SSO) suppliers and Competitive Retail Electric Service (CRES) providers.[249] For example, the Companies propose to include costs associated with balance operating reserves, which are market-based costs that incentivize load serving entities to schedule power accurately. Removing such incentive from the cost-causer will instead socialize the costs among all ratepayers through Rider NMB. Uplift charges are also market-based costs that should remain the responsibility of the market participants and should not be shifted to the Companies and passed onto customers through Rider NMB. By moving uplift charges to the regulated rate through Rider NMB, the risk of suppliers' purchases and hedging strategies is shifted to customers. These additional charges, such as uplift charges and balancing reserves, are overly broad and vague and should remain the responsibility of the SSO suppliers and CRES providers,

[246] Order at 74, 112.

[247] *In re Comm. Rev. of Capacity Charges of Ohio Power Co.,* Slip Opinion No. 2016-Ohio-1607 at 16-19.

[248] Order at 19.

[249] Companies Ex. 14 at 12-16 (Stein Direct).

not customers.[250] According to the adopted Stipulated ESP IV, the Companies also have the ability, during the annual reconciliation filing, to modify Rider NMB based on market behavior, including "an unanticipated outcome caused by nonmarket-based forces," such as the polar vortex.[251] Thus, customers are continuously subject to unknown determinations at the Companies' discretion, which could significantly impact the cost of their electric service. Suppliers, not customers, are in the best positions to evaluate and price the risk. This adopted provision shifts costs associated with these risks to customers and includes additional costs recoverable through Rider NMB, with no reasoning or rationale from the Commission.

Moreover, although Companies witness Stein explained that the expectation is a dollar-for-dollar transition whereby Rider NMB would increase by the same amount that costs assessed to suppliers would decrease,[252] many of the costs requesting to be included in Rider NMB are already being recovered by CRES suppliers through their current rates and contracts. Further, the Companies admitted they have no cost estimated for the new charges to be incurred under Rider NMB.[253] Therefore, inclusion of some of these costs into non-bypassable Rider NMB could result in certain customers being charged twice if the costs are already included in the customers' CRES provider charges.[254] Customers should not bear the risk of compensating both their CRES suppliers and the Companies for the same charges.

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[250] Staff Ex. 7 at 11-12 (Hecker Direct).

[251] Tr. Vol. V at 1003-1004.

[252] Tr. Vol. V at 990.

[253] Id. at 974-976.

[254] Staff Ex. 7 at 13-14 (Hecker Direct).

2. The Commission erred in failing to modify the Rider NMB pilot program to eliminate its discriminatory and anti-competitive effects.

The purpose of the Rider NMB pilot program is to allow certain select customers to opt-out of Rider NMB and obtain all transmission and ancillary services from a CRES provider in order to determine if those customers who opt-out will benefit.[255] However, the pilot program is limited to select customers, including: members of the Industrial Energy Users (IEU), members of the Ohio Energy Group (OEG), Nucor Steel Marion, Inc., and Material Sciences Corporation,[256] all of whom are Signatory Parties or have agreed to not contest the Stipulation. Additionally, five additional Rate GT customers who otherwise would be ineligible for participation are permitted to participate in the pilot program.[257]

As approved, the pilot program is unduly limiting, unduly discriminatory, unjust, unreasonable and anti-competitive in clear contradiction of Section 4928.02(A), Revised Code, which states that is the policy of the state to "[e]nsure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service" (emphasis added). According to the terms of the approved pilot program, interested customers are excluded from participation simply because they did not sign the Stipulation (or be a named non-opposing party) and all eligible customers will not be permitted to avail themselves of the opportunity to participate equally in the pilot. Rather, participation is based on who signed the Stipulation or agreed to not oppose the Stipulation.

Additionally, while the Companies expanded the pilot program to include an additional five Rate GT customers, they provided no additional information related to how these customers could participate and what requirements, if any, they were required to meet. Contrary to the

[255] Companies Ex. 3 at 3 (Supp. Stip.).

[256] Supp Stip at 3-4.

[257] Third Supp Stip. at 16-17.

Commission's statements,[258] the Companies have the burden to prove, not RESA, that the Rider NMB pilot program is not unduly limiting, unduly discriminatory, unjust, unreasonable, or anti-competitive in violation of Section 4928.02(A), Revised Code. The Companies have failed to provide sufficient information on the record to delineate the number of GT customers that would be eligible to participate in the pilot program, but for their membership status in a specified association or named participant. The Companies have failed to demonstrate that allowing only five additional GT customers would not result in "any customers who wish to participate in, and would benefit from, the Rider NMB pilot program cannot do so because of the limits on the size of the pilot program."[259] The record is purposely vague of any details regarding the Rider NMB pilot program and the process for the inclusion of the additional GT customers.

Although not included in the Third Supplemental Stipulation that expanded the pilot program, the additional five GT customers would presumably need to notify the Companies in writing within 30 days of the approval of the Stipulated ESP IV as included in the provision establishing the pilot program for certain named parties.[260] However, even if a customer did this, there is no guarantee that a customer would be able to participate. There is no explanation of how the Companies will select who become the five additional GT customers if the Companies receive numerous notices during the 30-day notice period, which is likely to occur. There are no provisions to prevent unfair and discriminatory treatment in the Companies' selection of the five GT customers from the pool of GT customers who timely submitted the notice set forth in the Stipulated ESP IV.

[258] Order at 112.

[259] Id.

[260] Third Supplemental Stipulation at 17 (December 1, 2015); Supplemental Stipulation at 3 (June 4, 2015).

Contrary to assumptions in the Order,[261] there are no guarantees or protections in place in the Stipulated ESP IV to ensure that all customers that would like to participate in the Rider NMB pilot program will actually be able to participate. The limitation to five additional customers is unduly limiting and discriminatory and will result in anticompetitive effects to those GT customers who are not selected as one of the additional five to participate in the pilot program, or who are otherwise unable to participate because they are not a member of one of the named trade associations or signatory parties.

Also, contrary to the Order, the record fails to demonstrate that the pilot program is in fact designed in such a way "to keep the number of participants manageable in order to make some determination of the efficacy of the program being tested."[262] The pilot program does not limit participation to a defined number of GT customers as the Order implies; rather, the program is available to all customers that are members of two trade associations, plus seven additional GT customers (Nucor Steel Marion, Inc., Material Sciences Corp., and the 5 additional GT customers discussed above). Pilot participation is not limited to a finite group of customers who were members of the two trade associations at the time the Stipulation was executed. The pilot program is also not limited to accounts in existence at the time the pilot program was formed: "New and expanded accounts of an existing Pilot Participant shall also have the right to make such election regardless of whether the accounts are known or in existence by the election deadline specified herein."[263] Thus, any claimed rationale for limiting the pilot program to a finite, manageable number of participants is without merit as no such limitation exists by the terms of the pilot program itself.

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[261] Order at 112.

[262] Id.

[263] Supplemental Stipulation at 3-4 (May 28, 2015).

Moreover, the current design of the pilot program allows for potential unjust, unreasonable, and unlawful abuse. The specific named parties who are permitted to participate in the pilot program per the Stipulation may use their exclusive participation to lure other customers to become members of their organizations given the Stipulation does not limit participation to those customers who were members at the time the Stipulation was executed as explained above. Permitting certain trade associations to require membership (and extract membership dues) as a prerequisite to participating in a Commission-approved pilot program is unjust, unreasonable, discriminatory, and unlawful. This type of behavior is also anti-competitive among similarly situated customers and should not be sanctioned or encouraged by the Commission. Furthermore, a Commission-approved pilot program that entices customers to join one trade association over another violates important regulatory policies or practices. Therefore, the Commission should, on rehearing, deny approval of the Rider NMB pilot program as currently designed.

G. The Commission erred in approving, without modifications, Rider ELR due to its discriminatory and anti-competitive effects.

As previously noted, the Commission's approval and expansion of Rider ELR, without modification, does not benefit ratepayers and is not in the public interest given the additional costs associated with the rider. Further, Rider ELR is discriminatory and anti-competitive among numerous customers who are not provided the opportunity to participate.

Specifically, OMAEG noted in its initial brief that under the terms of the expanded Rider ELR, only certain customers will be eligible to participate in the ELR program, including customers currently taking service under Rider ELR and those historically eligible to take service under the

rider, up to an additional 136,250 kW of curtailable load.[264] Participating customers receive an interruptible credit of $10 per kW per month per unit of curtailable load in exchange for participation in the program and subjecting their load to interruption.[265] Two credit provisions comprise the total credit provision under Rider ELR - $5 per kW per month per unit of curtailable load recovered through Rider DSE1 and $5 per kW per month per unit of curtailable load recovered through Rider EDR(e).[266]

The approved Rider ELR will result in expanded costs recoverable from only certain classes of customers under the rider and limiting the alleged benefits for certain customers. For example, one of the ELR credits is collected from GP and GS customers only and then credited to customers taking service under Rider ELR.[267] If all customers in the Companies' service territories benefit from the interruptible programs,[268] it stands to reason that all customers would pay for the ELR credits. Further, customers taking service under Rider ELR may avoid charges collected under DSE1, while all other customers are subject to collection of said costs.[269] Additionally, the Companies retain 20 percent of the revenues received in the PJM market from bidding the demand response resources into PJM.[270] Thus, customers who pay the costs associated with the credits will not receive the full benefit or netting of the demand response resources bring bid into PJM.

Due to the limitations on who may participate in the ELR program, new customers that enter the service territory, including new building or new accounts of existing customers, will not be

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[264] Tr. Vol. II at 259; Companies Ex. 3 at 2 (Supplemental Stipulation).

[265] Id. at 7-8.

[266] Tr. Vol. II at 275.

[267] Id. at 274.

[268] Order at 94.

[269] Id. at 274-276.

[270] Id. at 240.

eligible to take service under the ELR program.[271] Even those customers with available curtailable load may not be permitted to participate in Rider ELR given the eligibility restrictions.[272] Admittedly, the Companies stated that five new customers, who have historically been eligible to take service under Rider ELR but are not currently taking service, have already notified the Companies they would like to participate in the program and these five customers will fully subscribe the 136,250 kW of curtailable load provided per the Stipulated ESP IV.[273] While this arrangement may provide benefits to those few participating customers taking service under Rider ELR, it is not widely available, not uniformly applied, and thus, not beneficial to all customers. The purported economic development benefits and job retention benefits accrue only to those limited number of customers participating under Rider ELR.[274] Moreover, with the extended eight-year term of the ESP IV, the incremental ELR credits will total $280 million, which will be borne substantially by GS and GP customers. [275] . This will unreasonably increase the costs of the Stipulated ESP IV to those classes of customers, negatively impacting their price of electricity and cost to do business in Ohio.

The Commission failed to appropriately address all of these arguments in its Order and provide record evidence for its decision in violation of Ohio law.[276] Section 4903.09, Revised Code, "require the commission to explain its decision and identify, in sufficient detail to enable review, the record evidence upon which its orders are based."[277] The Commission failed to

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[271] Id. at 261.

[272] Tr. Vol. III at 492-493.

[273] Tr. Vol. II at 265.

[274] Tr. Vol. III at 492.

[275] Tr. Vol. XXXVII at 7786.

[276] *In re Comm. Rev. of Capacity Charges of Ohio Power Co.,* Slip Opinion No. 2016-Ohio-1607.

[277] Id. at 17. *See also e.g. , MCI Telecommunications Corp. v. Pub. Util. Comm.,* 32 Ohio St. 3d 306, 312, 513 N.E.2d 337 (1987) (stating R.C. 4903.09 requires the commission to set forth the reasons for its decision and

adequately address the arguments advanced by OMAEG specific to Rider ELR, including that the ELR should be offered to similarly situated competing business, that the costs associated with interruptible programs be fairly allocated to all customers, and that the Companies be required to bid the capacity resources associated with the interruptible programs into PJM's capacity auctions and offset the revenues received from PJM against the costs of the interruptible programs.

H. The Commission erred in failing to find that providing specific payments to select beneficiaries contravenes customers' interests and the public interest.

In addition to the aforementioned arguments related to a number of regulatory principles, the Commission also erred in approving the Stipulated ESP IV as several provisions violate sound ratemaking principles and provide specific payments to select customers. Specifically, the Stipulated ESP IV violates cost-causation principles by passing costs along to customers that do not directly benefit. Under the established structure, "[i]f you are a member of the club that negotiated benefits to support the PPA politically, then you receive the benefits of membership while others pay for the privilege."[278]

While the Commission accepted the Companies' rosy portrayal of economic development incentives resulting from the Stipulated ESP IV, the incentives are actually "targeted price reductions and discounts that are being offered by the Companies through the regulatory process to only those customers or groups that have been invited to join the exclusive club formed by the Companies" with the majority of the costs, discounts and incentives being passed along to

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prohibits summary rulings and conclusions that do not develop the supporting rationale or record); *Indus. Energy Users-Ohio v. Pub. Util. Comm., 117 Ohio St.3d 486, 2008-Ohio-990, 885 N.E.2d 195, ¶30* (stating the commission abuses its discretion if it decides an issue without record support).

[278] Id. at 9.

ratepayers in the service territories.[279] For example, customers will be charged for energy efficiency programs for specific Signatory Parties through Rider DSE, the Commercial High Load Factor Experimental Time-of-Use Rate through Rider GCR;[280] the ELR credit through Riders DSE and EDR; and customers will pay up to $48 million over the eight-year term of the ESP associated with the Community Connections Program. [281] Additionally, customers will be charged $200,000 for the Association of Independent Colleges and Universities of Ohio (AICUO) Efficiency Resource Program and $240,000 for the Council of Smaller Enterprises (COSE) Ohio Energy Efficiency Resource Program through May 31, 2019.[282] The Companies then may seek approval from the Commission for recovery of an additional $200,000 and $300,000, respectively, which shall not be "unreasonably withheld."[283] Further, under the expanded NMB pilot program which includes up to five additional Rate GT customers, remaining ratepayers may face higher charges.[284] The result of the Stipulated ESP IV is that "[a]fter successfully extracting benefits from the Companies, the Signatory or Non-opposing Parties agree to recommend approval of the Companies' proposed ESP IV."[285] Therefore, some intervening parties who agree to the Stipulated ESP IV "will receive cash equivalents and other benefits that are to be paid by consumers who oppose the settlement."[286]

Using customer funds to pay parties to join the Stipulation is antithetical to sound ratemaking principles. As stated by OMAEG witness Dr. Hill:

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[279] Id. at 31.

[280] Tr. Vol. XXXVI at 7653-7654.

[281] Id. at 7654.

[282] Tr. Vol. XXXVII at 7789-7793.

[283] Companies Ex. 154 at 15 (Third Supp. Stip.); Tr. Vol. XXXVII at 7788-7794.

[284] Id. at 7656.

[285] OMAEG Ex. 19 at 5 (Hill Second Supplemental).

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

> Here, the Companies have assembled a coalition to promote a policy that benefits their affiliate, FirstEnergy Solutions, and the other coalition members.
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> * * *
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> The large heterogeneous group that has to pay for the majority of this proposed policy, as well as the other costs embedded in the stipulations, consists of the remaining commercial, industrial, and residential ratepayers of northern Ohio who are not members of the redistributive coalition. This large ratepayer group would be very difficult and expensive to organize for purposes of advocating the group's interests.[287]

I. The Commission erred in determining that the Stipulated ESP IV is more favorable in the aggregate than a Market Rate Offer (MRO) under Section 4928.143, Revised Code.

Before approving an ESP, the Commission must determine that the ESP is more favorable in the aggregate as compared to the expected results that would otherwise apply under an MRO ("the MRO test").[288] The Companies have the burden of demonstrating that their proposed ESP is, in fact, more favorable than an MRO and the Commission can consider both quantitative and qualitative factors in making this determination.[289] The Commission's finding that the Stipulated ESP IV is more favorable than an MRO is both unreasonable and unlawful.

The Commission relied upon the Companies' purported quantitative benefits of $256 million in net revenue from Rider RRS and $51.1 million in shareholder funding.[290] However, this fails to consider the Companies' reliance on stale information and old projections. OCC witness Wilson notes that the Companies only provided a revised estimate of benefits based on changes contained in the Third Supplemental Stipulation.[291] That is, the Companies revised their analysis

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

[288] Section 4928.143(C)(1), Revised Code; see also *In the Matter of the Application of The Dayton Power and Light Company for Approval of its Electric Security Plan,* Case No. 12-426-EL-SSO, Opinion and Order at 48 (September 4, 2013).

[289] Id.

[290] Order at 118-119.

[291] OCC/NOPEC Ex. 9 at 10 (Wilson Second Supplemental).

based on the new eight-year term of Rider RRS and an updated Return on Equity (ROE) of 10.38%; however, the Companies did not update their analysis to reflect more accurate energy price forecasts.[292] Companies witness Mikkelsen admitted in her testimony that the Companies' price projections contained in her November 30, 2015 workpaper were based on energy, capacity, natural gas, and CO-2 price forecasts that were each more than 17 months old.[293] Additionally, OMAEG witness Seryak noted that the Companies are using PJM's outdated 2014 load forecast in their estimates, but PJM has recently updated its load forecast, resulting in reductions to the projected load forecast.[294] Updating the stale load forecast data with the more recent forecasts will likely reduce the Companies' projected revenue received from the affiliate plants under the Affiliate PPA, resulting in additional costs to customers.[295] OMAEG witness Seryak also explained that introducing new energy resources through the Third Supplemental Stipulation "will have the effect of reducing electricity sales from traditional generation, reducing capacity sales from traditional generation, and will suppress prices in wholesale electric energy and capacity markets."[296] All of which will further modify the Companies' cost estimates.[297]

Further, costs associated with the provisions in the Third Supplemental Stipulation, which extend or expand specific riders and/or programs, are not included in the bill impact analyses accepted by the Commission.[298] These provisions include costs associated with the

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[292] Id.

[293] Tr. Vol. XXXVI at 7513.

[294] Id.

[295] Id.

[296] Id. at 11.

[297] Id.

[298] Order at 119.

extension of Rider DCR for an additional five years and expansion of the revenue cap;[299] costs related to new battery technology;[300] costs incurred for programs related to additional and expanded energy efficiency and demand response recovered through Rider DSE (including an increase in the after-tax shared savings cap);[301] costs associated with renewable resources;[302] costs associated with grid modernization initiatives;[303] costs related to additional and expanded low-income programs;[304] and costs related to Rider ELR and the High Load Factor tariffs.[305] These may result in significant additional costs to customers who do not participate under and do not receive the benefits of the particular provisions. Those customers, many of whom are manufacturers, will be forced to pay additional costs for programs that ultimately benefit only some customers.

It is also noteworthy that the quantitative benefits noted by the Commission include a $51.1 million shareholder-funded commitment to provide economic development funding, low income funding, and customer advisory agency funding.[306] While the Companies assert that this commitment is pursuant to the ESP and would not be made pursuant to an MRO, there is no prohibition that would preclude the Companies from making this commitment through an MRO.[307]

[299] Companies Ex. 154 at 13 (Third Supp. Stip.); Tr. Vol. XXXVII at 7797.

[300] Id. at 11; Id. at 7797-7798.

[301] Id. at 11-12, 15; Id. at 7797-7798.

[302] Id. at 12; Id. at 7797-7798.

[303] Id. at 9-10; Id. at 7799.

[304] Id. at 16-17; Id. at 7795.

[305] Id. at 14-15; Id. at 7799-7800.

[306] Order at 119.

[307] Tr. Vol. XXXVI at 7735-7736.

Moreover, the Commission also erred in determining that the Stipulated ESP IV is more favorable than an MRO from a qualitative perspective. As previously discussed, the Stipulated ESP IV does not protect customers from rate volatility, provide price stability, assist in modernizing the grid, or promote competition in the marketplace. Rider RRS does not enhance price stability or certainty for customers given that the projected costs associated with Rider RRS during the term of Rider RRS outweighs any claimed benefits.[308] As Company witness Ruberto admitted, the Companies' distribution system would have no change in reliability if the affiliate plants were to continue to operate as they do today.[309] In fact, witness Ruberto stated that he is uncertain as to what the actual impact would be if the Commission chose not to approve Rider RRS.[310] Further, access to reliable power is based on a much broader geographical footprint through wholesale electricity markets, namely PJM's RPM capacity construct.[311] As OCC witness Wilson states, "[w]hether or not the FE Companies choose to retire the Rider RRS Generation, there will be sufficient reliable capacity to serve Ohio * * * 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.[312]

The only benefit provided by Rider RRS is to the Companies, its affiliate, and parent company as owner of the generating facilities as Rider RRS will allow the generator to recover all costs associated with the Plants and OVEC entitlement units. Rather than provide a positive benefit to customers, the result of Rider RRS is a negative impact on the continuing effectiveness

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

[309] Tr. Vol. XIII pg. 2797- 2798.

[310] Tr. Vol. XIII at 2797.

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

[312] Id.

of the competitive wholesale and retail markets in PJM and Ohio.[313] As stated by Exelon witness Campbell: "The guaranteed subsidy FES will receive from ratepayers under Rider RRS will allow FES to make offers to customers that are not reflective of actual market prices, and will provide FES with a competitive advantage over other CRES providers that must procure their commodity supply at market prices."[314] Further, given the guaranteed cost recovery under Rider RRS, "there is no incentive for [the Companies] to offer the subsidized units into the wholesale market based on the variable costs of operating the units and other supply and demand fundamentals," which could have the effect of distorting wholesale market prices and de-incentivizing new generation in Ohio.[315]

The reality is many provisions of the Stipulated ESP IV will benefit some customers to the detriment of others. Moreover, while some of the provisions may seem desirable, they add more cost and shift risk from the Companies to the ratepayers, destroying benefits that result from competition in the market.[316]

Given the record evidence, the Commission erred in finding that the ESP IV is more favorable in the aggregate than an MRO. The evidence does not show that the benefits of the provisions contained in the Stipulated ESP IV outweigh the costs.[317] As stated by OMAEG witness Hill: "The costs associated with providing incentives to a group of parties, much of which are funded by ratepayers that have been excluded from the settlement, are far outweighed

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[313] Exelon Ex. 1 at 6 (Campbell Direct).

[314] Id. at 6-7.

[315] Id. at 7.

[316] OMAEG Ex. 26A at 33 (Hill Third Supplemental).

[317] Id. at 13.

by the returns."[318] The Commission should reverse its finding as it is unreasonable and unlawful pursuant to Section 4928.143, Revised Code.

J. The Commission erred in failing to clearly define its modification to the Stipulated ESP IV directing the Companies to ensure that average customer bills do not increase for a period of two years.

In its Order, the Commission recognized the risk of unpredictable charges to customers resulting from Rider RRS and modified the Stipulated ESP IV to include a mechanism that is intended to limit average customer bills so that the average customer bill will not see a total increase for a period of two years.[319] The Commission also authorized the Companies to "defer expenses for future recovery in an amount equivalent to the revenue reduction resulting from the implementation of the [limiting] mechanism."[320] While OMAEG supports limiting the effects of Rider RRS on average customer bills for the period of June 1, 2016 through May 31, 2017 and the period of June 1, 2017 through May 31, 2018,[321] OMAEG requests clarification regarding the mechanism, the costs that will be subject to the limitation, and how the limitations on average customer bills will be calculated so that "the average customer bill will see no total bill increase for two years."[322] Further, OMAEG requests additional clarification regarding the deferral of expenses for future recovery and when these deferral amounts will be collected from customers.

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[318] OMAEG Ex. 19 at 21 (Hill Second Supplemental).

[319] Order at 86.

[320] Id.

[321] Id.

[322] Id.

III. CONCLUSION

OMAEG respectfully requests that the Commission grant its application for rehearing of the issues set forth herein and find that the Stipulated ESP IV, including Rider RRS, is unjust, unreasonable, and unlawful, does not benefit customers, and is not in the public interest. The Commission should deny the implementation of Rider RRS, finding that an Affiliate PPA that provides subsidies to a generator threatens the competitive markets and impedes the development of new sources of generation in the state.[323] The Commission should also bar the Companies from flowing through the net effects of the Affiliate PPA to its retail customers until the affiliate agreement is reviewed and approved by FERC.

Respectfully submitted,

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[323] *Hughes,* Slip Opinion at 9, 12-14.; 155 FERC ¶61, 101 at P 26-27 (April 27, 2016).

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served upon the following parties via electronic mail on May 2, 2016.

/s/ Danielle M. Ghiloni__________
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Case No(s). 14-1297-EL-SSO

Summary: Application For Rehearing Of The Ohio Manufacturers' Association Energy Group electronically filed by Mrs. Kimberly W. Bojko on behalf of OMA Energy Group