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 BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL AND NORTHWEST OHIO AGGREGATION COALITION

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APPLICATION FOR REHEARING
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AND NORTHWEST OHIO AGGREGATION COALITION

The Office of the Ohio Consumers' Counsel ("OCC") files this application for rehearing[1] to protect 1.9 million consumers from, inter alia, the dystopia of FirstEnergy's plan for charging above-market prices to bailout power plants. Consumers would be charged a lot of money through a power purchase agreement rider ("PPA Rider"). That plan was approved by the Public Utilities Commission of Ohio ("Commission" or "PUCO") in its March 31, 2016 Opinion and Order. More recently, the Federal Energy Regulatory Commission ("FERC") protected these Ohio consumers. FERC rescinded the waiver under which FirstEnergy claimed it could proceed with the power purchase agreement ("PPA") without FERC review. FERC explained that "no sales may be made

[1] This application for rehearing is authorized under R.C. 4903.10 and Ohio Adm. Code 4901-1-35.

with respect to the Affiliate PPA unless and until [FERC] approves the [PPA.]"[2] With no FERC approved PPA, Ohioans cannot be charged under PPA Rider.

In its Opinion and Order, the PUCO approved, with modifications, the electric security plan ("ESP") of FirstEnergy ("FE" or "Utility"), filed in these proceedings on August 4, 2014. Under the modified ESP FirstEnergy will collect increased rates from customers for the eight-year period starting June 1, 2016 through May 31, 2024.

The Opinion and Order was unreasonable and unlawful in the following respects:

The reasons in support of this application for rehearing are set forth in the accompanying Memorandum in Support. The PUCO should grant rehearing and abrogate or modify its Opinion and Order as requested by OCC and NOAC.

ERRORS

ASSIGNMENT OF ERROR 1: The PUCO erred in reviewing and approving the Utility's electric security plan after determining the charges were "cost effective."

ASSIGNMENT OF ERROR 2: It was unreasonable and unlawful (under R.C. 4928.141(B)) for the PUCO to apply the three-prong settlement standard when the Utility had unequal bargaining power, favor trading was rampant, and the stipulations addressed issues unrelated to the Utility's electric security plan filing.

ASSIGNMENT OF ERROR 3: To the detriment of customers, the PUCO unreasonably and unlawfully determined that that the settlements "appear to be" the product of serious bargaining among capable, knowledgeable parties.

A. To the detriment of customers, the PUCO unreasonably and unlawfully created a new (and more lenient) standard for determining whether to adopt a settlement.

B. The PUCO erred by not explicitly ruling that the Consumer Protection Association (as a defunct organization), will not receive any of the alleged benefits of the settlement, including fuel fund moneys allocated to the

[2] See *Electric Power Supply Association, et al. v. AEP Generation Resources, Inc., et. al*, Docket No. EL16-34-000 Order Granting Complaint at 19, n. 85 (April 27, 2016).

Citizens' Coalition and moneys directed to the Citizens' Coalition for the Customer Advisory Agency pilot program.

ASSIGNMENT OF ERROR 4: The PUCO erred in finding that the Stipulations benefit consumers and are in the public interest under Prong Two of the Three-Prong Test. (Prong 2 of the Three Prong Test

A. The PUCO should not find the Stipulation is a benefit to consumers and the public interest if Rider RRS would be a net charge to consumers over the eight-year ESP term. It was unjust and unreasonable for the PUCO to find that FirstEnergy consumers will receive a net credit from Rider RRS over the eight-year term of the ESP.

1. In its review of the Stipulation, the PUCO erred in accepting the outdated forecast of Witness Judah Rose. The PUCO should instead consider on rehearing the June 2016 EIA forecast results for the "reference case" that provide the most recent, unbiased forecast of the short term energy outlook.

2. In its consideration of the Stipulation, the PUCO erred in finding that certain of OCC witness Wilson's analyses showing that the PPA will harm consumers were unreliable (and given no weight).

a. The PUCO erred in dismissing OCC Witness Wilson's use of EIA data ‘High Oil and Gas Resource Case" when it has been the closest to the following year's reference case.

3. In its review of the Stipulation, the PUCO erred in disregarding EPSA/P3 witness Kalt's sensitivity analysis that found Rider RRS to be harmful to consumers.

4. In its consideration of the Stipulation, the PUCO erred in disregarding the analysis performed by Sierra Club witness Comings, simply because his analysis was based upon confidential information and was not publicly available.

B. It is unjust and unreasonable for the PUCO to find the distribution rate freeze to be a benefit for consumers.

1. It is unjust and unreasonable for a utility to go 17 years without a base rate review.

2. The PUCO's authorization of potentially $915 million in increased Distribution Capital Recovery Rider charges makes the customer benefits of a base distribution rate freeze illusory, and is unjust and unreasonable.

3. The PUCO's approval of the Governmental Directives Rider further erodes any alleged consumer benefits associated with a distribution rate freeze, and is therefore, unjust and unreasonable.

C. The PUCO erred in finding that the creation of a grid modernization program is in the public interest because the PUCO's finding was not supported by evidence, violating R.C. 4903.09.

ASSIGNMENT OF ERROR 5: The PUCO erred in finding that the stipulations do not violate any important regulatory principle or practice.

A. The PUCO's approval of the power purchase agreement rider is unreasonable and unlawful.

1. Rider RRS is an unlawful transition charge under R.C. 4928.37, 4928.38, 4928.39, and 4928.141(A).

2. The PUCO's ruling that Rider RRS was not a transition charge was against the manifest weight of the evidence, violating R.C. 4903.09.

3. The PUCO's ruling that Rider RRS was not a transition charge is not supported by evidence and lacked sound reasoning, violating R.C. 4903.09.

4. The PUCO erred in failing to address arguments that R.C. 4928.38 was violated because, under Rider RRS, the utility was not fully on its own in the competitive market.

5. The PUCO's determination that the Utility's PPA Rider may be included in an ESP under R.C. 4928.143(B)(2)(d) as a "financial limitation on customer shopping" is unlawful because it is not supported by record evidence, and contravenes legislative intent.

6. The PUCO erred in determining that the PPA is a term or condition that is includable in a utility's electric security plan because it relates to bypassability

7. The PUCO erred in determining that R.C. 4928.143(B)(2)(d) is satisfied because Rider RRS would "in theory" have the effect of stabilizing rates. Its determination is also against the manifest weight of the evidence.

8. The PUCO erred in determining that the PPA rider may be included in the Utility's electric security plan because it is part of

an economic development program under R.C.4928.143(B)(2)(i). The PUCO's finding violates R.C. 4928.38 and 4928.02(H). It also contravenes legislative intent.

9. The PUCO erred in approving the stipulation because Rider RRS provides an anti-competitive subsidy funded by customers which is to be avoided, not permitted, under R.C. 4928.02(H).

10. The PUCO unreasonably and unlawfully found that there are no captive retail customers in the FirstEnergy service territory because customers have the ability to choose a competitive generation supplier.

11. The PUCO unreasonably and unlawfully found that its review of bilateral contracts between FirstEnergy and its affiliate would protect against anticompetitive subsidies.

B. The PUCO erred in unreasonably and unlawfully finding that it can approve plans to implement straight fixed variable rate design through an electric security plan under R.C. 4928.143(B)(2)(h).

1. The PUCO unreasonably and unlawfully found that Rider RRS does not breach Ohio’s policy to ensure effective competition and protect consumers from market power and market deficiencies.

C. The PUCO’s Opinion and Order is unreasonable and unlawful because the Stipulation’s provision concerning energy efficiency is contrary to the public interest and governing law.

ASSIGNMENT OF ERROR 6: The PUCO unreasonably and unlawfully found that FirstEnergy's electric security plan, as modified, is more favorable in the aggregate to customers than a market rate offer.

A. The PUCO erred by unreasonably relying on FirstEnergy’s Rider RRS projections and disregarding projections by intervenors opposing Rider RRS.

B. The PUCO exceeded its authority in performing the more favorable in the aggregate test when it unlawfully considered qualitative benefits

C. The PUCO unreasonably and unlawfully failed to consider the delivery capital recovery rider revenues as quantifiable costs to customers under an electric security plan, causing the electric security plan costs to customers to be understated. The PUCO failed to base its finding on facts contained in the record in this proceeding, contrary to R.C. 4903.09

ASSIGNMENT OF ERROR 7: The PUCO unreasonably and unjustly modified the stipulations in a manner that harms consumers and is not in the public interest.

A. The PUCO erred by modifying the Stipulation implementing a mechanism to limit the increase to average customers' bills caused by Rider RRS during the first two years of the ESP in an unjust and unreasonable manner.

   1. The PUCO erred by authorizing the Utilities to defer expenses for future recovery under the mechanism it adopted to limit PPA Rider collections during year two of the ESP.

B. The PUCO erred by modifying the Stipulation in a manner that allows FirstEnergy to retain PJM capacity performance bonus payments thereby creating an unjust and unreasonable incentive for the Utilities not to offer the PPA units.

C. The PUCO erred by not modifying the Stipulation to protect consumers from the onerous severability provision.

   1. The PUCO erred by failing to modify the Stipulation's severability provision to allow a refund to consumers should the PPA be later overturned by a Court of competent jurisdiction.

   2. The PUCO's unjust and unreasonable modification to the Stipulation's severability provision only protects consumers in the unlikely circumstance PJM changes tariffs or rules that prohibit the PPA units from being bid into the PJM auction.

   3. The PUCO erred by modifying the Stipulation in a manner that unjustly and unreasonably allows the Utilities to not generate capacity revenues under a PJM rule or tariff modification.

   4. The PUCO erred by failing to modify the stipulation and required the competitive bidding of low-income programs.

D. The PUCO unlawfully and unreasonably modified the stipulation to create a zero-based rider to unbundle the costs FirstEnergy incurs to support the Standard Service Offer ("SSO").

ASSIGNMENT OF ERROR 8: The PUCO erred in unreasonably and unlawfully considering factors identified in the AEP ESP III proceeding

A. In considering factors from the AEP ESP III proceeding, the PUCO unreasonably and unlawfully denied consumers due process by relying upon a non-final order

B. The PUCO unreasonably and unlawfully considered the financial integrity of the Utility's affiliate owned plants as justification for approving the costly and unlawful purchase power agreement.

C. The "AEP" factors the PUCO considered in determining whether to approve the PPA are unreasonable to the extent that they are biased toward supporting the Utility's PPA Rider. The PUCO should have considered other factors to assess the benefit or determine of the PPA to FirstEnergy consumers. (AEP Rehearing 42).

ASSIGNMENT OF ERROR 9: The PUCO's Opinion and Order is unreasonable and should be modified so that charges under the PPA Rider are subject to refund.

A. In light of the pending FERC case and potential rule changes, the public interest and fundamental fairness necessitate that the PPA Rider be subject to refund.

B. Questions surrounding the PUCO's jurisdiction mean that the PPA Rider should be subject to refund.

ASSIGNMENT OF ERROR 10: The PUCO's Opinion and Order is unreasonable and should be modified so that charges under the PPA Rider are subject to refund.

A. In light of the pending FERC case and potential rule changes, the public interest and fundamental fairness necessitate that the PPA Rider be subject to refund.

B. Questions surrounding the PUCO's jurisdiction mean that the PPA Rider should be subject to refund.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

FERC recently acted to protect 1.9 million consumers from FirstEnergy above-market charges, by rescinding FirstEnergy's waiver from filing affiliate contracts with FERC for prior approval.[3] FERC recognized that the PPA Riders "present the potential for the inappropriate transfer of benefits from captive customers to shareholders and, thus, may frustrate the goal of the Commission's [FERC's] affiliate sales restrictions."[4] FERC explained that "no sales may be made with respect to the affiliate PPA unless and until the Commission [FERC] approves the affiliate PPA under governing law.[5] Without a FERC-approved PPA, there can be no charges to consumers through the PPA Rider.[6]

The PUCO still has an opportunity to protect the public from FirstEnergy charging billions of dollars to subsidize, via government regulation, old, inefficient, affiliate-owned, coal-fired and nuclear power plants. The plants cannot compete in the

[3] See *EPSA, et al.*, EL16-34-000 at¶ 53.

[4] Id. at ¶64.

[5] Id. at Footnote 91.

[6] Accordingly, the PUCO should dismiss this case.

market that was intended as deregulated by the Ohio General Assembly over sixteen years ago. To protect consumers and the public interest, the PUCO should rehear its decisions, consistent with this application for rehearing.

I. STANDARD OF REVIEW

Applications for rehearing are governed by R.C. 4903.10. The statute permits "any party who has entered an appearance in person or by counsel in the proceeding" to apply for rehearing in respect to "any matters determined in the proceeding." Applications for rehearing must be filed within thirty days of the PUCO's orders.

OCC filed a motion to intervene in this proceeding on August 14, 2014, which was granted by Entry dated December 1, 2014. OCC also filed testimony regarding FirstEnergy's electric security plan ("ESP"). OCC was an active participant in the evidentiary hearings.

R.C. 4903.10 requires that an application for rehearing must be "in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful." Additionally, Ohio Adm. Code 4901-1-35(A) states: "An application for rehearing must be accompanied by a memorandum in support, which shall be filed no later than the application for rehearing."

In considering an application for rehearing, R.C. 4903.10 provides that "the commission may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefor is made to appear." The statute also provides: "[i]f, after such rehearing, the commission is of the opinion that the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may abrogate or modify the same; otherwise such order shall be affirmed."

The statutory standard for abrogating some portions of the Opinion and Order and modifying other portions are met here. The PUCO should grant and hold rehearing on the matters specified in this Application for Rehearing, and subsequently abrogate or modify its Opinion and Order of March 31, 2016.

III. ERRORS

ASSIGNMENT OF ERROR 1: The PUCO erred in reviewing and approving the Utility's electric security plan after determining the charges were "cost effective."

The PUCO must ensure that every public utility furnishes necessary and adequate service and facilities, and that all charges for any service must be just and reasonable. R.C. 4905.22. And the PUCO is required to ensure that customers have reasonably priced retail electric service under R.C. 4928.02(a). But despite these laws, the PUCO reviewed the electric security plan under a new more lenient standard of review. It determined that it need only find that the charges to customers are "cost-effective."[7]

But the PUCO is a creature of statute. It has only the authority conferred on it by the General Assembly.[8] It cannot alter its duty to ensure "just and reasonable rates" and replace that with assuring "cost-effective rates." The PUCO erred. Rehearing should be granted.

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[7] See Opinion and Order at 98; see also Concurring Opinion of Commissioner Haque (at 12), claiming that the PUCO's mission is to assure ""safe, reliable, and cost-effective service."

[8] *Columbus S. Power Co. v. Pub. Util. Comm*. (1993), 67 Ohio St. 3d 535, 620 N.E.2d 835; *Pike Natural Gas Co. v. Pub. Util. Comm*. (1981), 68 Ohio St.2d 181, 22 Ohio Op.3d 410, 429 N.E.2d 444; *Consumers' Counsel v. Pub. Util. Comm.* (1981), 67 Ohio St.2d 153, 21 Ohio Op.3d 96, 423 N.E.2d 820; and *Dayton Communications Corp. v. Pub. Util. Comm*. (1980), 64 Ohio St.2d 302, 18 Ohio Op.3d 478, 414 N.E.2d 1051.

ASSIGNMENT OF ERROR 2: It was unreasonable and unlawful (under R.C. 4928.141(B)) for the PUCO to apply the three-prong settlement standard when the Utility had unequal bargaining power, favor trading was rampant, and the stipulations addressed issues unrelated to the Utility's electric security plan filing.

The PUCO, in its Opinion and Order, rigidly applied the three prong settlement standard, and found that all three prongs are met.[9] Then it concluded that the stipulations modifying the Utility's electric security plans should be approved.[10] In doing so, the PUCO unreasonably ignored significant and relevant factors, which when considered, provide good reason to reject use of the three prong test. And the PUCO, in approving the stipulation with issues that were totally unrelated to the application, deprived customers of the notice required under R.C. 4928.141(B) and O.A.C. 4901:1-35-04.

First, the PUCO failed to recognize the asymmetrical bargaining positions of the parties—where the Utilities have a superior bargaining position because they can reject the PUCO's order under the 2008 law.[11] Commissioner Roberto commented that, under such circumstances, "a party's willingness to agree with an electric distribution utility's application cannot be afforded the same weight due as when an agreement arises within the context of other regulatory frameworks." Second, the PUCO ignored the favor trading where the Utility funded financial inducements for signatures with other people's money. And third, the inducements to sign the stipulations bore no relationship to the core of the Utility's application, Rider RRS.

[9] Opinion and Order at 121.

[10] Id.

[11] The problems of unequal bargaining power are discussed in Commissioner Roberto's dissent in the PUCO's Order in FirstEnergy's initial electric security plan filed in 2008. See *In re FirstEnergy's 2008 ESP Case*, Case No. 08-935-EL-SSO, Second Opinion and Order, Opinion of Commissioner Cheryl L. Roberto Concurring in Part and Dissenting in Part (Mar. 25, 2009) at 1-2 (citations omitted).

The Commission erred. It should have found that the stipulation cannot pass the first prong of the three-prong test. It also should not have evaluated the stipulation as a package. Instead the Commission should have evaluated each provision of the stipulation on its own merits as OCC and others recommended.[12] In accepting and applying the three-prong standard, the PUCO allowed unreasonable and unlawful terms for customers, that standing on their own would not have withstood PUCO scrutiny. Rehearing should be granted.

ASSIGNMENT OF ERROR 3: To the detriment of customers, the PUCO unreasonably and unlawfully determined that that the settlements "appear to be" the product of serious bargaining among capable, knowledgeable parties.

The PUCO has adopted a three prong test for the evaluation of a settlement agreement between the parties.[13] The first prong of this test is whether the settlement is the product of serious bargaining among capable and knowledgeable parties.[14]

The PUCO found that the first prong of the stipulation test was met because the settlements "appeared" to be the product of serious bargaining among capable, knowledgeable parties.[15] As discussed in detail below, the PUCO's finding was unlawful and unreasonable. The PUCO should grant rehearing on this issue and find that the settlements do not meet the first prong of its settlement test.

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[12] See OCC/NOAC Ex. 11 at 7-8 (Kahal Second Supplemental Direct).

[13] *Office of Consumers' Counsel v Pub. Utilities Comm'n*, 64 Ohio St.3d 123, 126 (1992).

[14] Id.

[15] Opinion and Order at 43.

A. To the detriment of customers, the PUCO unreasonably and unlawfully created a new (and more lenient) standard for determining whether to adopt a settlement.

The PUCO unreasonably created a new standard when it determined that the settlement "appeared" to be the product of serious bargaining among capable, knowledgeable parties.[16] This is a different standard than what the PUCO has used in the past --whether the settlement <u>is</u> the product of serious bargaining among capable, knowledgeable parties.[17]

In creating a new standard, the PUCO failed to respect its prior holdings, violating the holding established by the Ohio Supreme Court.[18] *Cleveland Electric Illuminating* holds that the PUCO should, "respect its own precedents in its decisions to assure predictability which is essential in all areas of the law including administrative law."[19]

Additionally, *Cleveland Electric Illuminating* requires that while the PUCO may change its position, it must justify the change by showing there is a clear need for change and must show that the prior decisions are in error. The PUCO failed to do so here. The PUCO erred. Rehearing should be granted.

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[16] Order at 43.

[17] *Office of Consumers' Counsel*, 64 Ohio St.3d at 126.

[18] *Cleveland Elec. Illuminating Co. v. Pub. Util. Comm.*, 42 Ohio St.2d 403 (1975). *See also Office of Consumers' Counsel v. Pub. Util. Comm'n*, 10 Ohio St.3d 49, 50-51 (1984).

[19] *Cleveland Electric Illuminating*, 42 Ohio St.2d at 431.

B. The PUCO erred by not explicitly ruling that the Consumer Protection Association (as a defunct organization), will not receive any of the alleged benefits of the settlement, including fuel fund moneys allocated to the Citizens' Coalition and moneys directed to the Citizens' Coalition for the Customer Advisory Agency pilot program.

The PUCO ruled to remove the Consumer Protection Association as a signatory party,[20] ordered the filing of compliance reports for low-income programs and raised the prospect of a third party audit.[21] This ruling does not go far enough. It is unreasonable because it does not bar the dispersal of funds to an organization that is possibly defunct and under investigation.

The PUCO fashioned an incomplete solution to an issue that it recognized as a serious issue. [22] The PUCO simply required the filing of compliance reports by the Citizen's Coalition and Ohio Partners for Affordable Energy (OPAE) and raised the possibility of a third-party audit.[23] However, this does not go far enough to ensure that the funds distributed for fuel funds and the Consumer Advisory Agency Pilot program are not misused.

The solution to this issue is simple. The PUCO should bar any funds from being distributed to the Consumer Protection Association unless it is proven to the PUCO that the Association is not defunct and it is not under investigation for misuse of funds that are intended for the benefit of others.

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[20] Order at 45.

[21] Order at 97.

[22] Order at 45.

[23] Order at 96.

ASSIGNMENT OF ERROR 4: The PUCO erred in finding that the Stipulations benefit consumers and are in the public interest under Prong Two of the Three-Prong Test. (Prong 2 of the Three Prong Test

A. The PUCO should not find the Stipulation is a benefit to consumers and the public interest if Rider RRS would be a net charge to consumers over the eight-year ESP term. It was unjust and unreasonable for the PUCO to find that FirstEnergy consumers will receive a net credit from Rider RRS over the eight-year term of the ESP.

The PUCO analyzes Rider RRS from a false premise that Rider RRS serves as an insurance policy or hedge against rising market prices. The PUCO states in its Order that:

> Rider RRS will operate as a form of rate insurance. If energy market prices stay at the current low levels, customers will pay a charge under Rider RRS; however, if energy market prices rise from the current low levels, customers will begin to receive a credit under Rider RRS, which will mitigate the increases customers see on their bills (Co. Ex. 13 at 10,12,14-15; Co. Ex. 14 at 4; Tr. Vol I at 75; Tr. Vol. XVIII at 3650). The higher energy market prices rise, the greater the amount of credit customers will see.[24]

But the notion that Rider RRS is a hedge was refuted by OCC witness Wilson and FirstEnergy witness Mikkelsen.[25] The PUCO simply disregarded that record evidence.

The PUCO also discussed the necessity of choosing the most reliable projection to make a determination whether the Stipulation benefits consumers. The PUCO stated:

> We note at the outset that projections and forecasts are predictions. They are predictions of future conditions and are based upon what is happening now and multiple additional assumptions. Considering the nature of the proposed Rider RRS as a potential hedge or insurance on electricity rates, in making its determination

[24] Order at 80.

[25] See OCC/NOAC Initial Brief at 83-92.

> the Commission must choose from the most reliable of these projections and forecasts to make a determination of whether the Stipulations, as a package, benefit ratepayers.[26]

The only party projecting consumers will receive a credit through Rider RRS was the Utilities. The PUCO accepted the FirstEnergy energy forecast prepared by Judah Rose as reliable[27] despite the fact that Judah Rose had not conducted a sensitivity analysis[28] or updated his forecast to incorporate fresh data.[29]

The necessity of consumers receiving a credit from Rider RRS was noted by Commissioner Haque in his concurring opinion:

> Here's what I can say. After a period of charges, I expect to see credits from the PPA riders. I'm not going to give definitive timelines, but that is my expectation. If this mechanism is truly a hedge, wherein consumers will pay when market prices are low, but will be credited money back when market prices are high, then what exactly is the point of the hedge if ratepayers never experience the credits? If ratepayers never experience the credits, then the PPA rider mechanism would then act as a somewhat illusory insurance policy.[30]

The PUCO's reliance on the Utilities' forecast is inexplicable. There are at least two reasons why FirstEnergy's projections should be distrusted. First, because FES (and presumably shareholders and investors) is unwilling to bear that risk, there is no rational reason for why FirstEnergy's customers should be obligated to do so. Second, the benefit projected by FirstEnergy is based upon energy prices from August 2014, when the

[26] Order at 81.

[27] Order at 81.

[28] Order at 50-51.

[29] Order at 81.

[30] Concurring Opinion of Commissioner Haque at 4. Concurring Opinion of Commissioner Haque at 4. Concurring Opinion of Commissioner Haque at 4.

Application was filed. FirstEnergy witness Rose has not updated his market price estimates to reflect current activity.

The PUCO Staff recognized the great uncertainty and speculation inherent in projecting the net impact of FirstEnergy's proposed Rider RRS on customers on a long-term basis. To that point, Commissioner Haque in his concurring opinion went to great lengths to point out the many complexities to forecasting future energy prices. Commissioner Haque stated:

> Beyond those first few years, it is unclear whether the PPA riders will result in more charges to ratepayers, or if the riders will result in credits being applied to the bills of ratepayers. The utilities believe that the riders will create bill credits. The Ohio Consumers' Counsel and others believe that the riders will continue to create charges. The expert witnesses in the case have presented divergent data points that yielded very different projections. However, I've seen so many dynamic changes in the market since I've taken office that **it's hard for me to be convinced that any expert can truly project with accuracy beyond a few years out**. I've seen market changes due to weather (e.g. polar vortex), scientific and technological innovation (e.g. shale extraction and more cost-effective renewable development), market fixes (e.g. PJM's capacity performance product) environmental considerations (e.g. US EPA environmental regulations), and there are so many more drivers that could impact the market.[31]

There is uncertainty that is recognized in the ability to accurately forecast energy prices beyond a few years out. But the Utilities' expert's forecast and the significant credits projected to be passed through Rider RRS to consumers were accepted as reliable for the eight-year term of the ESP.[32] However, the PUCO's reliance on the FirstEnergy

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[31] Concurring Opinion of Commissioner Haque at 4 (emphasis added).

[32] Order at 81.

forecast was unjust and unreasonable FirstEnergy's forecast of net credits expected for customers from Rider RRS harms consumers and the public interest.

1. In its review of the Stipulation, the PUCO erred in accepting the outdated forecast of Witness Judah Rose. The PUCO should instead consider on rehearing the June 2016 EIA forecast results for the "reference case" that provide the most recent, unbiased forecast of the short term energy outlook.

FirstEnergy did not update its energy forecast projections during the case. The projections were prepared by Judah Rose prior to the filing of the Application in this proceeding in 2014.[33] However, the PUCO failed to criticize the Utilities for not updating the forecast despite the fact there were various opportunities throughout the course of the proceedings to do so. The PUCO stated:

> Therefore, it is likely that, even if Mr. Rose had updated his projection, the resulting higher electricity prices would have made Rider RRS appear to be more favorable to customers rather than less favorable.[34]

The PUCO withheld its criticism of FirstEnergy because in the EIA Annual Energy Outlook ("AEO") for 2015, delivered natural gas prices to electricity generators are lower in the first few years of the AEO 2014 report, but higher throughout most of the 2020s.[35]. There are other EIA forecasts that reflect expectations for future delivered natural gas prices to be declining even over the longer term.[36] The PUCO's decision that FirstEnergy's stale projections were reliable despite not being updated was harmful to consumers and not in the public interest.

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[33] Order at 81.

[34] Order at 81.

[35] Order at 81.

[36] FirstEnergy Ex. No. 167 (EIA Short Term Outlook Jan. 2016.

The EIA will be releasing its 2016 Energy Outlook in June 2016, and to be protective of consumers, the PUCO should require the Parties to update their energy projections. The trend has been falling prices. That trend is likely to be reflected in the EIA's ensuing report. And, if so, it will confirm the staleness of FirstEnergy's projections. In fact ICF recently released a report for INGAA with updated Henry Hub natural gas price forecast scenarios that are much lower than what Judah Rose used in his projections foe FirstEnergy.[37] Therefore, rehearing should be granted.

2. In its consideration of the Stipulation, the PUCO erred in finding that certain of OCC witness Wilson's analyses showing that the PPA will harm consumers were unreliable (and given no weight).

The PUCO took a much more critical approach with OCC witness Wilson's analysis of future energy prices. There were many criticisms of his analysis in favor of approving the PPA, which neither benefits consumers nor is in the public interest. . The PUCO's Order initially criticizes Mr. Wilson's analysis in the following respect:

> First, OCC witness Wilson's forecast is unreliable because it is internally inconsistent. Although Mr. Wilson changed the price of natural gas in FirstEnergy witness Rose's forecast to the price predicted by the EIA in the High Oil and Gas Resource case and changed the price of electricity to reflect that price of natural gas, Mr. Wilson failed to change all of the interrelated variables in FirstEnergy witness Rose's forecast and FirstEnergy witness Lisowski's model. First, although Mr. Wilson substituted his projected natural gas prices for Mr. Rose's forecasted natural gas prices, he did not change the implied heat rates, which are the ratio of electrical energy prices in the market to natural gas prices (Tr. Vol. XXII at 4545-46; Co. Ex. 151 at 10).[38]

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[37] http://www.ingaa.org/Foundation/Foundation-Reports/27958.aspx

[38] Order at 82.

The PUCO's findings are incorrect. Mr. Wilson that showed heat rates did not change with higher/lower natural gas in Judah Rose's analysis.[39] Mr. Wilson used Judah Rose's heat rates; therefore, no adjustment for heat rates was necessary The PUCO's criticism of Mr. Wilson's analysis was misplaced and should not have led to an ultimate determination that his analysis should be given no weight.

The PUCO, in its further criticisms of Mr. Wilson's analysis, seems to hold him to a higher standard and for a longer period of time than is required under the facts of this case. The PUCO stated:

> In other words, the claims by OCC and NOPEC, and other intervenors relying upon Mr. Wilson's testimony, that Rider RRS will cost consumers $2.7 billion rely upon a projection which assumes that the price of natural gas, electricity and oil will remain below 2013 prices (in 2013 dollars) for at least the next 15 years.[40]
>
> The Commission does not believe that the evidence supports OCC and NOPEC's prediction that we have entered a period of energy price Utopia where the price of natural gas, electricity and oil remains flat for a period of 15 years nor do we believe it would be responsible for the Commission to base its decision on such a prediction.[41]

The PUCO should be concerned with the reliability of the forecast analysis for the eight-year term of the ESP only. Any discussion of Mr. Wilson's analysis that extends beyond the eight-year term of the ESP is misplaced and constitutes a reach to find something to criticize. It is unreasonable to believe that the PUCO could find that Mr. Wilson has presented such unrealistic scenarios as to suggest that he has shown we have entered an "energy price utopia."

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[39] OCC/NOPEC Ex. No. 4 at JFW-2 (Wilson direct).

[40] Order at 83.

[41] Order at 83.

The Commission added criticism of Mr. Wilson's forward markets analysis scenario. The PUCO stated:

> The Commission notes that OCC/NOPEC witness Wilson based a second projection ("Scenario 3") on the prices of forward markets. Mr. Wilson considers this projection to be the "most likely and reasonable estimate" because it is based upon updated market conditions. (OCC/NOPEC Ex. 9 at 12.) However, although even FirstEnergy witness Rose concedes that forward market prices may be relied upon in the short term, for two or three years, the evidence in the record demonstrates that forward markets beyond three years are thinly traded and that forward market prices beyond three years do not necessarily reflect actual transactions but reflect offers which may or may not have been accepted instead (Co. Ex. 151 at 49-50).[42]
>
> …
>
> However, the current market data Mr. Wilson relies upon are very short term prices which were heavily influenced by warm weather conditions (Tr. Vol. XXXVIII at 8119-21; Co. Ex. 167 at 10). Accordingly, the Commission finds that the eight-year (and fifteen-year) projection based solely on forward market projections lacks sufficient reliability and should be given no weight by the Commission.[43]

The PUCO's criticism of Mr. Wilson's forward markets scenario is incorrect. The PUCO's statements apply to electric forwards prices, not natural gas forwards. Natural gas forwards are available and traded for several years into the future. Mr. Wilson used natural gas forwards not for just a few years, but for several years. The inflation factor was applied only to the last few out years.[44]

To give this scenario no weight harms those parties in opposition to the PPAs. The PUCO's reliance upon only that portion a record that makes the PPA appear beneficial to customers and in the public interest is instead harmful to consumers.

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[42] Order at 83-84.

[43] Order at 84.

[44] OCC/NOPEC Ex. No. 9 at 7 (Wilson Second Supplemental).

The PUCO included criticism of Mr. Wilson's use of the EIA reference case, but ultimately finds it to be reasonable and reliable. The PUCO stated:

> The third projection ("Scenario 1") prepared by OCC witness Wilson also substitutes the energy and natural gas prices forecast by FirstEnergy witness Rose with natural gas prices forecast by the EIA and with energy prices derived from such forecasts by Mr. Wilson based upon the relationship between natural gas and energy prices. Once again, Mr. Wilson prepared this projection twice: first, for the full 15-year term of Rider RRS initially proposed by the Companies, based upon the EIA Annual Energy Outlook for 2014 (Co. Ex. 60) and, second, for the eight-year term of Rider RRS provided for in the Third Supplemental Stipulation, based upon the EIA Annual Energy Outlook for 2015 (Co. Ex. 166).[45] We note that this projection shares the same flaw as OCC witness Wilson's other projections in that he did not modify either the implied heat rates projected by FirstEnergy witnesses Rose and Lisowski or the coal prices assumed by Mr. Rose to the coal prices predicted by the Reference case. However, these flaws are somewhat mitigated by the fact that the natural gas prices predicted by the Reference case are not abnormally low as in the High Oil and Gas Resource case. Further coal prices and production projections in the Reference case are generally more in line with projections published by ICF (Co. Ex. 60 at CP-16 through -17, Table CP7). Therefore, the Commission finds that Mr. Wilson's projection based upon the EIA Reference case is reasonable and reliable, and we will consider this projection in our determination of the estimated net credit or charge of Rider RRS.[46]

Mr. Wilson provided three scenarios and three projections all of which included the Rider RRS being a net charge to consumers. Scenario 1 EIA Energy Outlook Reference Case, net charge to consumers $50 million. Scenario 2 High Oil and Gas Resource Case, net charge to consumers $2.7 billion. Scenario 3 based on forward market prices, net charge to consumers $3.6 billion. The PUCO criticized all of these projections, but found Scenario 1 reliable enough to average Mr. Wilson's $50 million net charge to consumers

[45] Order at 84.

[46] Order at 84-85.

with FirstEnergy's projected $561 million credit to customers to find an average customer benefit of $256 million.[47]

The PUCO should not find the Stipulation is a benefit to consumers and the public interest if Rider RRS was a net charge to consumers over the eight-year ESP term. Mr. Wilson's analysis demonstrated the harm that Rider RRS could present to consumers. It was unjust and unreasonable for the PUCO to reject two of Mr. Wilson's three scenarios in reaching its conclusion that that Rider RRS would be a net credit for consumers. Therefore, the PUCO should grant rehearing and use all three of Mr. Wilson's scenarios as part of its estimate of the net credit or charge to customers under Rider RRS in order to more accurately determine whether the Stipulation benefits consumers and is in the public interest.

a. The PUCO erred in dismissing OCC Witness Wilson's use of EIA data 'High Oil and Gas Resource Case" when it has been the closest to the following year's reference case.

The PUCO offered further criticism of Mr. Wilson's High Oil and Gas case analysis as follows:

> The next flaw in OCC witness Wilson's second projection is that Mr. Wilson arbitrarily chose to use the High Oil and Gas Resource case out of the numerous other cases prepared by the EIA for both the 2014 and the 2015 Annual Energy Outlook.[48]
>
> …
>
> In addition, the High Oil and Gas Resource case is based upon the occurrence of several developments and improvements in oil and gas production (Co. Ex. 166 at 1, 21). The EIA cautions that "[t]here is still a great deal of uncertainty in the projections of U.S. tight oil production" (Co. Ex. 60 at IF-10). OCC witness Wilson, however,

[47] Order at 85.

[48] Order at 83.

> provides no evidence that such developments and improvements in oil and gas production have occurred or will occur (Tr. Vol. XXXVIII at 8157-58). Accordingly, we will place no weight on the projection prepared by Mr. Wilson which relies upon the ElA's High Oil and Gas Resource case.[49]

Again, the PUCO's findings are incorrect. Mr. Wilson provided an analysis that included three scenarios. The High Oil and Gas Resource case was one of those scenarios. To the contrary, it was not chosen arbitrarily, but rather because for many years now it has been a leading indicator of the [EIA] reference case. It has been by far the most accurate of all scenarios.[50]

The PUCO should not find the PPA to be a benefit to consumers and the public interest if Rider RRS would be a net charge to consumers over the eight-year ESP term. Mr. Wilson's analysis demonstrated the harm that Rider RRS could present to consumers. It was unjust and unreasonable for the PUCO to reject Mr. Wilson's analysis that relied upon the EIA High Oil and Gas Resource case in reaching its conclusion that that Rider RRS would be a net credit for consumers. It is widely accepted that the first few years the Rider RRS will be a net charge to consumers. However, the out years projected by FirstEnergy to yield net credits will likely not materialize. The updated EIA forecasts will bear that fact out. EIA forecasts that will be projecting future energy costs closer in time to the upcoming ESP period that begins June 1, 2016.

Therefore, the PUCO should grant rehearing and use all three of Mr. Wilson's scenarios including the EIA High Oil and Gas Resource case as part of its estimate of the

[49] Order at 83.

[50] Tr. XXXVIII at 8154 (Wilson).

net credit or charge to customers under Rider RRS in order to more accurately determine whether the Stipulation benefits consumers and is in the public interest.

3. In its review of the Stipulation, the PUCO erred in disregarding EPSA/P3 witness Kalt's sensitivity analysis that found Rider RRS to be harmful to consumers.

The PUCO should not find the Stipulation is a benefit to consumers and the public interest if Rider RRS would be a net charge to consumers over the eight-year ESP term. Dr. Kalt's analysis demonstrated the harm that Rider RRS could present to consumers. The PUCO took exception with the EPSA/P3 witness Kalt's analysis of the net charges projected to be passed through to customers through Rider RRS. Similar to the treatment received by OCC witness Wilson, Dr. Kalt's analysis was completely disregarded and excluded from the PUCO's determination of net charges or credits. The PUCO stated:

> Additional analysis was performed by EPSA/P3 witness Kalt. However, it should be noted that this analysis was a sensitivity analysis related to one variable, the price of natural gas, and was not intended to be a full projection of the costs to be recovered under Rider RRS (Tr. Vol. XLI at 8706-8707). Dr. Kalt demonstrates in his sensitivity analysis that, holding all other variables constant, if natural gas prices stay at current, historic low levels, it will substantially increase the costs to be recovered under Rider RRS. However, we are skeptical that all other variables will remain constant. The evidence in the record is that the prices of natural gas, electricity, coal, oil and other energy-related products are strongly correlated (Co. Ex. 166 at C-1 through C-12, D-1 through D-14). Thus, a sensitivity analysis solely on the price of natural gas is helpful to the extent that it demonstrates that revenues under Rider RRS will be strongly correlated to the price of natural gas, but it is of little value as a projection of the net credits or costs of Rider RRS over the eight-year term.[51]

[51] Order at 85.

Therefore, the PUCO should grant rehearing and use Dr. Kalt's analysis as part of its estimate of the net credit or charge to customers under Rider RRS in order to more accurately determine whether the Stipulation benefits consumers and is in the public interest.

4. In its consideration of the Stipulation, the PUCO erred in disregarding the analysis performed by Sierra Club witness Comings, simply because his analysis was based upon confidential information and was not publicly available.

The PUCO should not find the Stipulation is a benefit to consumers and the public interest if Rider RRS would be a net charge to consumers over the eight-year ESP term. Mr. Coming's projections demonstrated the harm that Rider RRS could present to consumers. The Sierra Club's witness Comings' projection was developed by FES, the owner of the generation assets that are the subject of its proposed transaction with FirstEnergy. The FES projection is closely analogous to the Rider RRS projection presented by the Utilities in this case. Nevertheless, the PUCO found a reason to disregard this projection as it had for Mr. Wilson's and Dr. Kalt's projections. The PUCO stated:

> Sierra Club witness Comings also produced a projection of net charges or credits under Rider RRS (Sierra Club Ex. 96C at 2, 6). This projection is based upon confidential information obtained from FES in discovery, subject to the reduction in the length of Rider RRS from 15 years to 8 years and the reduction in the ROE from 11.15 percent to 10.38 percent (Sierra Club Ex. 95 at 3; Sierra Club Ex. 96C at 3). As this projection is based upon confidential information, it is impossible for us to include this projection in our estimate of the net credit or charges to customers under RRS without confidential information being easily derived from the calculation.[52]

[52] Order at 85.

While the supporting data behind witness Comings projections may arguably be confidential, there is no reason that the aggregated total result of Mr. Comings' analysis could not have bene made public and used by the PUCO as part of their estimate of the net credit or charge to customers under Rider RRS. It was unjust and unreasonable to exclude Mr. Comings' analysis (based on FES data) solely on the basis of it being confidential.

Therefore, the PUCO should grant rehearing and use Mr. Comings' analysis as part of its estimate of the net credit or charge to customers under Rider RRS in order to more accurately determine whether the Stipulation benefits consumers and is in the public interest.

B. It is unjust and unreasonable for the PUCO to find the distribution rate freeze to be a benefit for consumers.

The PUCO determined that the distribution rate freeze for the eight-year term of the ESP is a benefit for consumers. The PUCO in its Order stated:

> The key provisions in the Stipulations related to distribution rates is the continuation of the base distribution rate freeze for eight years under ESP IV. The extension of the distribution rate freeze will promote stable rates, as base distribution rates will not rise during the term of ESP IV (Co. Ex. 155 at 3). The Commission notes that base distribution rates have not increased in the Companies' service territories since 2009. In re FirstEnergy, Case No. 07-551-EL-AIR et. al., Opinion and Order (Jan. 29, 2009). However, in light of the proposed distribution rate freeze, it is necessary and appropriate to continue the existing Rider DCR mechanism, which allows the Companies to recover reasonable investments in plant in service associated with distribution, subtransmission, and general and intangible plant, which was not included in the rate base oi the Companies' last distribution rate case.[53]

[53] Order at 92-93.

The PUCO's Order mistakenly finds value for consumers in a provision of the Stipulation that allows the Utilities to evade base rate review. And the Order mistakenly states that the freeze will promote stable rates in that base distribution rates will not rise during the ESP term. These benefits are illusory, and in reality are harmful to consumers and the public interest.

1. It is unjust and unreasonable for a utility to go 17 years without a base rate review.

As the PUCO points out in its Order, the Utilities have not undergone a base rate review since 2009, which involved the review of a case filed in 2007. Under the base distribution rate freeze contemplated in the Utilities' current ESP, there would be an additional eight-year term without a rate increase. The freeze would be in place until June 1, 2024.[54] That would mean the Utilities would go nearly 17 years between rate cases, if the Utilities filed at the earliest possible time allowed under the Stipulation.[55]

However, the true benefit for consumers from a base distribution rate case is that a Utility's complete distribution operations are reviewed and scrutinized. The case is about regulation of monopolies. And while there may be test year costs that increase, there may also be offsetting test year costs that decrease, and can restrict the total authorized increase. This point was supported by PUCO Staff testimony prior to their signing the Stipulation, when the ESP was subject to a three-year term. Staff Witness McCarter stated:

> At the time of ESP IV's expiration, approximately 10 years will have passed since the Companies' last rate case. Staff believes that a holistic, periodic review of each company's finances is necessary to ensure that all costs are being appropriately incurred and

[54] FirstEnergy Ex. 154 at 13 (Third Supplemental Stipulation) (December 1, 2015).

[55] FirstEnergy Ex. 154 at 13 (Third Supplemental Stipulation) (December 1, 2015).

> recovered. A rate case permits the overall earnings of the Companies to be reviewed along with all of its revenues and expenses. As such, Staff believes it is a prudent regulatory practice to gain a holistic understanding of the regulated distribution company on a regular basis. In an industry as dynamic as the electric utility industry, a number of significant changes can occur within 10 years.[56]

The necessity of a holistic review is even more pressing given the extended ESP period from three to eight years. It is unjust and unreasonable for the PUCO to approve a base distribution rate freeze that will allow the Utilities to further evade a review of their entire operations.

2. The PUCO's authorization of potentially $915 million in increased Distribution Capital Recovery Rider charges makes the customer benefits of a base distribution rate freeze illusory, and is unjust and unreasonable.

The PUCO found that base distribution rates will be stable, and not rise during the eight-year term of the ESP. That is mistaken. While the distribution rate freeze will prevent "base" distribution rates from rising, the freeze doesn't mean that the total rates that FirstEnergy's customers will pay for distribution service are stable or won't rise. Because in fact, the rates aren't stable. And the rates will significantly rise during the ESP because of the distribution capital recovery ("DCR") Rider.

The PUCO discussed in its Order certain aspects of the DCR program such as the annual audits and the requirement that the Utilities show that their spending was not unreasonable.[57] However, the PUCO did not discuss the increasing caps provided under the Stipulation. Rider DCR is intended to compensate the Utilities for the costs of additions to plant in service over and above the plant included in their base rates, at

[56] PUCO Staff Ex. 6 at 13 (McCarter Direct).

[57] Order at 93.

consumer expense. The Utilities propose that Rider DCR, which was approved originally as part of the Utilities' ESP II and extended as part of ESP III,[58] should be modified to increase the amount of dollars (the revenue cap) the Utilities can collect from customers.

Specifically, the Utilities propose to increase the Rider DCR revenue caps by up to $30 million per year for the first three years—an increase that was opposed by the PUCO Staff.[59] The new $30 million annual cap doubles the rate increase to consumers ($15 million per year) previously permitted under the current (and prior) ESPs. The Rider DCR cap will then increase by $20 million annually for the subsequent three years and $15 million annually for the final two years of the proposed eight-year ESP.

The total Rider DCR increases over the proposed eight-year term of the ESP could require customers to pay an additional $240 to $330 million in revenues, for a total of up to $915 million potentially in DCR charges over the eight-term of FirstEnergy's ESP.[60] These significant increases to the DCR revenue collections cannot be characterized as yielding stable rates for distribution service. Furthermore, customers do not benefit from an alleged rate freeze because of these significant increases to the cost of their distribution service, and in actuality, the distribution rate freeze would harm consumers by preventing a comprehensive review of FirstEnergy's distribution operations.

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[58] Order at 93.

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

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

3. The PUCO's approval of the Governmental Directives Rider further erodes any alleged consumer benefits associated with a distribution rate freeze, and is therefore, unjust and unreasonable.

Another provision of the Stipulation approved by the PUCO that may increase distribution costs to consumers is the Governmental Directives Rider ("GDR"). The PUCO stated in its Order:

> In addition, in light of the eight-year distribution rate freeze. Rider GDR will allow the Companies to request Commission authorization to recover unforeseen expenses related to government mandates imposed during ESP IV.[61]

Rider GDR is intended by the Utilities to be an open-ended collection mechanism. It is for any costs the Utilities incur, for anything the PUCO may order them to do which may have costs associated with it.

Rider GDR should not be authorized because it would permit the Utilities to charge customers for future costs related to programs required by legislative or governmental directives. The proposed rider is single-issue ratemaking at a time when the evidence shows substantial excess earnings by the Utilities.[62] Additionally, if the Utilities believe that programs required by legislative or governmental directives would increase costs and cause a revenue deficiency, then the Utilities have the ability to file a distribution rate case to seek to recover from customers the costs related to the directives.

Moreover, not only do the Utilities propose that the inclusion of capital costs be included in this rider, but they also propose to include any expenses the Utilities may incur when a PUCO order directs the Utilities to do anything. Rider GDR is another

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[61] Order at 93.

[62] See OCC Ex. 18 at 18 (Effron Direct).

attempt by the Utilities' to eliminate all cost recovery risks, and could result in significant cost increases to consumers. Rider GDR, while lacking in known costs, could erode the perceived benefit of the distribution rate freeze by authorizing the collection of subsequent distribution-related costs from consumers.

Moreover, Rider GDR is asymmetrical, against consumers. It does not require rate reductions to consumers if a governmental entity adopts a policy or passes a law that would result in cost savings to the Utilities, such as a tax decrease.

For the reasons stated above, it was unjust and unreasonable for the PUCO to consider the distribution rate freeze to be a benefit to consumers and to be in the public interest. They are not. The distribution rate freeze is illusory. There are (or potentially are) significant increases to the cost of distribution service already authorized by the PUCO under Rider DCR and Rider GDR. Therefore, the PUCO should grant rehearing.

C. The PUCO erred in finding that the creation of a grid modernization program is in the public interest because the PUCO's finding was not supported by evidence, violating R.C. 4903.09.

The PUCO found that the Utility's commitment to create a grid modernization program is in the public interest. [63] This stipulation provision commits FirstEnergy to propose a plan for full smart meter implementation, for specific terms related to data management and sharing, a specific rate treatment and return on equity, and provisions for semi-annual updates.[64]

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[63] Opinion and Order at 95.

[64] *See* FirstEnergy Ex. 154 at 9-10 (Third Supplemental Stipulation).

The PUCO's finding is not supported by evidence in the record in this proceeding. Thus, the PUCO acted contrary to R.C. 4903.09, which requires it to make findings of fact that are based on the record developed in the proceeding.

First, as mentioned, the Stipulation commits FirstEnergy to make a future filing with regards to its Grid Modernization plan. Thus, the main features of the program are contingent upon a future Commission decision in a different proceeding. Consequently, the program is outside the scope of this proceeding. If FirstEnergy wishes to propose a Grid Modernization plan it may do so at any point in the future. There are no grounds for determining that such a future contingent filing benefits the public and the public interest.

In addition, because FirstEnergy will file the plan in a future case it has failed in this proceeding to adequately explain the details of its proposed Grid Modernization program resulting in a vague and ambiguous proposal. In fact, FirstEnergy refused to divulge any documents relating to its Grid Modernization plan.[65] What FirstEnergy was willing to divulge was confirmation that it has not provided a description of benefits or potential benefits to customers from its proposed Grid Modernization business plan.[66] It has also not divulged, because it does not know how much its proposed Grid Modernization plan will cost consumers.[67] This is not a just and reasonable proposal for consumers.

Furthermore, the proposed return on equity for the Grid Modernization program is not in and of itself a just and reasonable proposal for consumers. The return on equity established by the stipulation for grid modernization is higher than the current ROE

[65] See ELPC Set 6-RPD-004, 005.

[66] See Hearing Tr. XXXVII at 7847 (Mikkelsen).

[67] See Hearing Tr. XXXVII at 7847 (Mikkelsen).

approved by the PUCO for the current SmartGrid modernization initiative. Indeed, the current return on equity approved for FirstEnergy's SmartGrid pilot is 10.5 percent, and the initial return on equity for any Grid Modernization pursuant to the Third Stipulation is 10.88 percent.[68] Yet, FirstEnergy provides little to know detail justifying why its proposed Grid Modernization program should receive such a high return on equity. The PUCO erred by approving and finding the Third Supplement Stipulation's provisions regarding grid modernization to be in the public interest.

ASSIGNMENT OF ERROR 5: The PUCO erred in finding that the stipulations do not violate any important regulatory principle or practice.

Under the PUCO's three prong test for evaluating stipulations, the stipulators must show and the PUCO must find, that the Stipulation does not violate any important regulatory principle or practice. The Commission here mistakenly concluded that the stipulations "in whole, and as modified herein, does not violate any important regulatory principles or practices and therefore, complies with the third criterion of the test for evaluating the reasonableness of stipulations."[69] This finding was unreasonable and unlawful as explained below.

[68] Tr. XXXVII at 7774-7775 (Mikkelsen).

[69] *In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to 4928.143, Revised Code in the Form of an Electric Security Plan*, Case No. 13-2385-EL-SSO, Opinion and Order at 104 (Feb. 25, 2015).

A. The PUCO's approval of the power purchase agreement rider is unreasonable and unlawful.

1. Rider RRS is an unlawful transition charge under R.C. 4928.37, 4928.38, 4928.39, and 4928.141(A).

Enacted as part of S.B. 3, R. C. 4928.37 provided each electric utility with a limited opportunity "to receive transition revenues that may assist it in making the transition to a fully competitive electric generation market." That opportunity permitted utilities to seek transition revenues up until the end of the market development period. After the market development period, the PUCO is prohibited from "authoriz[ing] the receipt of transition revenues *or any equivalent revenues* by an electric utility"[70](emphasis added). R.C. 4928.38 further provides that once the utility’s market development period ends, it “shall be fully on its own in the competitive market." R. C. 4928.39 of the Revised Code defines transition costs as costs unrecoverable in a competitive environment. R.C. 4928.141(A) prohibits previously approved transition costs from being collected in an electric security plan.

OCC Witness Dr. Ken Rose, worked for the Ohio Legislative Service Commission drafting what became S.B. 3.[71] He testified that Rider RRS is another attempt by the FirstEnergy Utilities[72] to collect "transition costs" or "equivalent revenues" from customers.[73] Dr. Rose concluded that FirstEnergy's claim that the revenues derived from the competitive marketplace are insufficient to cover the cost of operating the

[70] R.C. 4929.38 provides for limited exceptions which do not apply here.

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

[72] FirstEnergy during the market development period was permitted to collect approximately $7 billion from customers for their transition to competition. OCC Ex. 25 at 18.

[73] Id.

plants[74] is "the very definition of transition cost."[75] Dr. Rose also testified that "[b]eing full on its own in the competitive market means that the utility (and its affiliate) are not charging captive customers of regulated services for revenues" to underwrite deregulated power plants owned by the utility's affiliate.[76]

But the PUCO found that Rider RRS was not being used to collect transition charges.[77] In doing so, the PUCO erred in applying and construing the transition charge statutes, R.C. 4928.37, 4928.38, 4928.39, and 4928.141(A). The PUCO ignores the breadth of R.C. 4928.38, which bars the receipt of "transition revenues *or any equivalent revenues*" and requires a utility, after receiving transition revenues, "to be fully on its own in the competitive market."

The Ohio Supreme Court recently ruled that when the General Assembly inserted the words "any equivalent revenues" it demonstrated an intent to bar "not only transition revenues associated with costs that were stranded during the transition to market following S.B. 3 but also any revenue that amounts to transition revenue by another name."[78] Importantly, it held that a utility's "retail stability charge," which was intended to guarantee recovery of lost revenues (from sale of capacity and increased shopping), would allow the utility to collect the equivalent of transition revenue, in violation of R.C. 4928.38.[79]

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[74] See, e.g., Co. Ex. 28 at 2-4; Tr. X at 2184-85; Tr. XI at 2395; Tr. XXXII at 6541-42; Tr. XXXIII at 6818; Co. Ex. 143 at 5.

[75] Id. at 18.

[76] Id.

[77] Opinion and Order at 112.

[78] *In re: Application of Columbus S. Power Co.*, Slip Opinion 2016-Ohio-1608, ¶21.

[79] Id. ¶25.

The PUCO erred in approving Rider RRS because it permits FirstEnergy to recover unlawful "transition revenues," violating R.C. 4928.37, 4928.38, 4928.39, and 4928.141(A). The transition revenues are the lost revenues, guaranteed to the Utility's affiliate, FirstEnergy Solutions. The transition revenues will be collected from customers when revenues from the market are not sufficient to cover FirstEnergy Solutions' costs to operate the Rider RRS plants. Collection of "make whole" costs means, contrary to R.C. 4928.38, that the utility is not fully on its own in the competitive market. Rehearing should be granted.

2. The PUCO's ruling that Rider RRS was not a transition charge was against the manifest weight of the evidence, violating R.C. 4903.09.

The PUCO, in determining that Rider RRS did not allow collection of transition charges, ignored Dr. Rose's testimony. And yet, Dr. Rose was the only witness in this proceeding that testified on transition revenues. Dr. Rose worked for Ohio Legislative Services, helping to draft the very statutes that bar the collection of transition revenues after the market development period. In disregarding Dr. Rose's testimony, and reaching a contrary conclusion, the PUCO acted unlawfully by issuing a decision against the manifest weight of the evidence in the proceeding. In doing so, the PUCO violated R.C. 4903.09. See, e.g., *Cleveland Electric Illuminating Co. v. Pub. Util. Comm.*, 42 Ohio St.2d 403(the PUCO abuses its discretion when it issues a ruling that is against the manifest weight of the evidence). Rehearing should be granted.

3. The PUCO's ruling that Rider RRS was not a transition charge is not supported by evidence and lacked sound reasoning, violating R.C. 4903.09.

The PUCO found that FirstEnergy was not using Rider RRS to collect transition charges. The PUCO's reasoning was that Rider RRS "should" provide a net credit over its eight year term. Thus, "the costs which are included in the Rider RRS calculation are not 'unrecoverable in a competitive market.'"[80]

The PUCO's decision was not supported by evidence. Its conclusions lack citation to any record evidence. Its conclusions are mere assertions lacking justification or explanation. When the PUCO failed to provide such justification or citation to evidence in the record, it failed to fulfill its duties under R.C. 4903.09. See, e.g., *Cleveland Electric Illuminating Co. v. Pub. Util. Comm.*, 42 Ohio St.2d 403(the PUCO abuses its discretion when it issues a ruling that is clearly unsupported so as to show misapprehension, mistake, or willful disregard of duty).

Moreover, the PUCO's finding that the PPA was not a transition charge lacked sound reasoning. See, e.g., *In re: Columbus S. Power Co.*, Slip Opinion 2016-Ohio-1608, ¶¶35, 36 (the PUCO erred when it issued a decision lacking sound reasoning). The PUCO found that Rider RRS was not collecting transition charges on the basis that Rider RRS "should" provide a net credit over its eight-year term, and thus "the costs which are included in Rider RRS calculation are not 'unrecoverable in a competitive market'. [81] This reasoning is flawed.

First, it relies upon a forecast --the Utility's -- that there will be a credit to customers over the eight-year period. That forecast was controverted by the testimony of several witnesses, including OCC Witness Wilson. The certainty of a "credit" is only as good as the forecast, and only time will tell if a credit to customers will be achieved. Without the certainty of a credit, there is no certainty of "recoverablilty."

[80] Opinion and Order at 112.

[81] Opinion and Order at 112.

Second, the PUCO's reasoning appears to be circular and self-fulfilling. In order for the costs to be "recoverable" in a competitive market (and thus not "transition costs"), the PPA mechanism would have to be in place. This reasoning presumes the PPA is lawful, and therefore costs are recoverable in a competitive market. Such reasoning eviscerates the law. Rehearing should be granted.

4. The PUCO erred in failing to address arguments that R.C. 4928.38 was violated because, under Rider RRS, the utility was not fully on its own in the competitive market.

R.C. 4928.38 provides that once the utility's market development period ends, it "shall be fully on its own in the competitive market." Dr. Rose testified that "being on your own in the competitive market means that the Companies' unregulated generation efforts cannot be aided by a subsidy,-- especially one paid for by the Companies' captive distribution customers."[82] The subsidy Dr. Rose spoke of was Rider RRS. The customer-funded subsidy under Rider RRS means that R.C. 4928.38 is being violated. OCC raised these very arguments in its initial and reply briefs. Yet the PUCO did not address these claims. The PUCO, thus, acted unlawfully and unreasonably in failing to respond to these arguments. See, e.g., *In re: Columbus S. Power Co.*, Slip Op. 2016-Ohio-1607, ¶55 (the PUCO errs when it provides no record citations relevant to the pertinent issue, despite a claim that it reviewed all of the testimony). Rehearing should be granted.

[82] OCC Ex. 25 at 9.

5. The PUCO's determination that the Utility's PPA Rider may be included in an ESP under R.C. 4928.143(B)(2)(d) as a "financial limitation on customer shopping" is unlawful because it is not supported by record evidence, and contravenes legislative intent.

The PUCO found Rider RRS is permissible under the law.[83] Specifically, the PUCO ruled that Rider RRS is permissible under R.C. 4928.143(B)(2)(d), inter alia, because it is a "financial limitation on customer shopping for retail electric generation service."[84] But, contrary to R.C. 4903.09, this finding is not based upon the facts in the record in <u>this</u> proceeding.

Instead, the PUCO's findings appear to be lifted almost word for word from the AEP ESP III Order. The PUCO begins its journey away from the record in this proceeding by acknowledging its rulings in the AEP Ohio ESP III Order and the Duke ESP III Order. From there, the PUCO goes on to repeat the findings, almost verbatim, from the AEP ESP III Order, *but without citations to evidence in this record to support its findings.* The PUCO's conclusions that the rider constitutes a financial limitation on shopping that would help stabilize rates are unsupported by the record in this proceeding. But the PUCO is bound to make decisions here, based on the record developed in this proceeding. See R.C. 4903.09 requiring the PUCO to set forth "findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact." The PUCO violated R.C. 4903.09. Rehearing should be granted.

Moreover, the PUCO's finding that Rider RRS constitutes a limitation on customer shopping violates the legislative intent by adding words to the statute, R.C.

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[83] Opinion and Order at 108-109.

[84] Opinion and Order at 109.

4928.143(B)(2)(d). At a minimum, the word "financially" would have to be read into the statute, such that "limitations on customer shopping for retail electric generation service" would become "financial limitations on customer shopping for retail electric generation service." Indeed, in an attempt to make any sense of the PUCO's interpretation, one would have to change the entire wording of the statute from permitting "limitations of customer shopping" to permitting a ***financial restraint on complete reliance on the retail market.*** But under the rules of statutory construction in Ohio (including R.C. 1.47 and 1.49), effect must be given to the words expressly used in a statute, rather than inserting words not used. *State v. Taniguchi*, 74 Ohio St.3d 154, 156, 656 N.E.2d 1286 (1995).

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

6. The PUCO erred in determining that the PPA is a term or condition that is includable in a utility's electric security plan because it relates to bypassability

The PUCO found that Rider RRS fit into an ESP because it qualifies as a charge related to "bypassability."[85] When it drew this conclusion it erred. Its interpretation could lead to absurd results that are inconsistent with Ohio Supreme Court precedent that limits the provisions a utility can include and charge to customers under its electric security plan.[86]

[85] Opinion and Order at 108-109.

[86] See *In re Application of Columbus Southern Power Company, et al*., 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶32.

The term "bypassability" is not defined by the General Assembly. But if a statute is to be construed, it must be construed in a reasonable manner. That means the Ohio's Rules of Statutory Construction and the case law that has developed under those rules should be followed.

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

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

The mere fact that a charge proposed is non-bypassable does not make it charge “related to” bypassability. As the PUCO itself recognized, any charge may be "bypassable" or "non-bypassable,"[87]

This could not be what the General Assembly intended. Otherwise it could lead to unreasonable or absurd results rendering subsection (d) and the entirety of R.C. 4928.143(B)(2) virtually meaningless, contrary to R.C. 1.47 and 1.49. The PUCO's interpretation is contrary to the General Assembly's express intent (as construed by the

[87] Opinion and Order at 109. The PUCO explains that finding a charge relates to bypassability is insufficient to meet the second criterion of R.C. 4928.143(B(2)(d).

Ohio Supreme Court)[88] to place limits on the provisions that an electric utility may include in its ESP. The PUCO erred. Rehearing should be granted.

7. The PUCO erred in determining that R.C. 4928.143(B)(2)(d) is satisfied because Rider RRS would "in theory" have the effect of stabilizing rates. Its determination is also against the manifest weight of the evidence.

The PUCO determined that Rider RRS "*is proposed to* have the effect of stabilizing or providing certainty regarding retail electric service."[89] The PUCO found that Rider RRS "*is intended* to mitigate, by design, the effects of market volatility, providing customers with more stable pricing and a measure of protection against substantial increases in market prices."[90] The PUCO concluded that because the record reflects that "Rider RRS *would, in theory,* have the effect of subsidizing or providing certainty" the third criterion of R.C. 4928.143(B)92(d) is met.

The statute, R.C. 4928.143(B)(2)(d). however, requires more. The statute does not speak to proposed effects, intentions, and theories. The statute requires that the charges "*would have the effect* of stabilizing or providing certainty regarding electric service." A finding that Rider RRS would theoretically stabilize rates is not enough. Once again the PUCO is reading words into the statute, which it cannot do. Additionally, the evidence in the record supports the opposite conclusion. Instead of promoting stable rates, Rider RRS introduces volatility to rates by adding an unreliable component to SSO rates.[91] This is because changes in Rider RRS may move in the same

[88] *In re Application of Columbus Southern Power Company, et al.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶32.

[89] Opinion and Order at 109.

[90] Id.

[91] OCC/NOAC Initial Brief at 85.

direction as the SSO rates (set by the market) due to the reconciliation mechanism.[92] The so-called stability is only achieved on the chance Rider RRS moves in the opposite direction of market rates and works to provide monetary credits to consumers, which is not guaranteed by the Utilities. The PUCO erred. Rehearing should be granted.

8. The PUCO erred in determining that the PPA rider may be included in the Utility's electric security plan because it is part of an economic development program under R.C.4928.143(B)(2)(i). The PUCO's finding violates R.C. 4928.38 and 4928.02(H). It also contravenes legislative intent.

The PUCO found that the economic stability program, of which Rider RRS is a part, qualifies as provision that may be included in an ESP under R.C. 4928.143(b)(2)(i).[93] If the PUCO's holding means that Rider RRS qualifies as a separate provision under an ESP because it is an economic development plan under subsection (i), then the PUCO's holding is unreasonable and unlawful.

The statute, R.C. 4928.143(B)(2)(i), specifies that a utility may include "[p]rovisions under which the electric distribution utility may implement economic development, job retention, and energy efficiency programs***." The words of the statute are clear. They need no further interpretation. The statute speaks to the economic development efforts of an "electric distribution utility" that "may be implemented."

But the PUCO's holding appears to ignore these words, and construes the statute to extend to existing economic development related to plants not owned by the electric distribution company ("EDU"). In doing so, the PUCO construes the statute when it is unambiguous. This it cannot do.

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[92] OCC/NOAC Ex. 4 at 50-51(Wilson Direct).

[93] Opinion and Order at 109-110.

It is well settled that where the language of the statute is clear and unambiguous and coveys a clear and definite meaning, there is no need to apply rules of statutory construction. *Sears v. Weimer*, 143 Ohio St. 312, 55 N.E.2d. 413 (1944), ¶5, syllabus). An unambiguous statute is to be applied, not interpreted. *Meeks v. Papadopulos*, 62 Ohio St.2d 187, 190, 404 N.E.2d 159 (1980). Thus, legislative intent may be inquired into only if the statute is ambiguous on its face.[94]

And, after unlawfully construing the statute, the PUCO ends up with an unreasonable conclusion. Here, the economic development "engines" are Rider RRS plants[95] that are owned by an affiliate, not FirstEnergy, the EDU. The economic development program proposed by FirstEnergy is aimed at assisting the affiliate-owned plants, not FirstEnergy, the EDU. While the PUCO claims that nothing "in the statute" limits economic development programs from assisting affiliates of the EDU, it is overlooking other statutes that would prohibit such assistance. Those other statutes which preclude assistance being given to a utility's unregulated generation affiliates are R.C. 4928.38 and R.C. 4928.02(H).

Additionally, the plain language of R.C. 4928.143(B)(2)(i) pertains solely to *new* economic development implemented by the electric distribution utility. The statute

[94] See *Cline v. Ohio Bur. of Motor Vehicles*, 61 Ohio St.3d 93, 96-97, 573 N.E.2d 77 (1991), where this Court summarized the rules of statutory construction as follows: “Where the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no need to apply rules of statutory interpretation * * *. However, where a statute is found to be subject to various interpretations, a court called upon to interpret its provisions may invoke rules of statutory construction in order to arrive at legislative intent * * *. The primary rule in statutory construction is to give effect to the legislature's intention * * *. Legislative intent must be determined from the language of the statute itself * * *, as well as from other matters, see R.C. 1.49. In determining intent, it is the duty of the court to give effect to the words used, not to delete words used or insert words not used.” (Citations omitted).

[95] FirstEnergy Initial Brief at 123.

allows, "[p]rovisions under which the electric distribution utility *may implement* economic development, job retention, and energy efficiency programs***."

The affiliate-owned plants are not new tools of economic development. They are tools that exist today. And while there are statutory provisions that permit plants (and the costs of plants) to be included in an electric security plan (see, e.g., R.C. 4928.143(B)(2)(c),(i)), Rider RRS is not one of them. Rather, it is plainly related to *new* economic development, not current economic development that has been repackaged and given a fancy title like "the Economic Stability Program."

9. The PUCO erred in approving the stipulation because Rider RRS provides an anti-competitive subsidy funded by customers which is to be avoided, not permitted, under R.C. 4928.02(H).

The PUCO rejected the claims of numerous intervenors that Rider RRS is an anti-competitive subsidy that is barred by R.C. 4928.02(H).[96] The PUCO recognized concerns (raised by parties) that the bilateral contracts between FirstEnergy and FES could give FES a competitive advantage. Nonetheless, it found that the safeguards it imposed in the annual prudency review process would be sufficient to protect against anti-competitive subsidies.[97] The PUCO was wrong. The safeguards failed to adequately protect consumers or the competitive market.

The PUCO erred in unreasonably and unlawfully allowing (subject to alleged safeguards) an anti-competitive subsidy when the law plainly requires anti-competitive subsidies to be "avoided." Here the PUCO allowed anti-competitive subsidies. It did not avoid the anti-competitive subsidies as R.C. 4928.02(H) requires.

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[96] Opinion and Order at 110.

[97] Opinion and Order at 110.

Additionally, the so-called safeguards imposed in the annual prudency review process do little to protect against the anti-competitive subsidies. The PUCO's conclusion that safeguards it imposed are sufficient to protect customers is mistaken, lacks sound reasoning, and is controverted by the evidence in the record.

Dr. Rose testified that Rider RRS is an example of cross subsidization of generation service by distribution customers.[98] He testified that this non-bypassable charge only benefits one supplier, and provides additional revenue to that supplier that other suppliers in the market do not receive.[99]

The safeguards the PUCO allude to do nothing to address the underlying structure of the deal: generation is being subsidized by captive distribution customers, through a non-bypassable charge. That generation is being offered into the market and it competes against other generation not receiving subsidies. The underlying transaction is unlawful under Ohio law (R.C. 4928.02(H), (I), and 4928.38).

The consequences harm customers, and are inconsistent with the policies of the state (R.C. 4928.02(I)) to ensure that retail electric customers are protected against market deficiencies and market power. The customer-funded generation subsidy negatively affects the incentives to build new more efficient generation.[100] As the Independent Market Monitor testified, "[s]uch subsidies would negatively affect the incentives to build new generation in Ohio and elsewhere in PJM and if adopted by others would likely result in a situation where only subsidized units would ever be

[98] OCC Ex. XX at 23.

[99] Id.

[100] OCC/NOPEC Ex. 1 at 10.

built."[101] OCC Witness Sioshansi testified that in turn, customers may see higher energy prices in the long-run because investments are not being driven by true market fundamentals.[102] Thus, Rider RRS will likely cause market deficiencies – something the PUCO must protect customers from under 4928.02(I).

The PUCO erred. Rehearing should be granted.

10. The PUCO unreasonably and unlawfully found that there are no captive retail customers in the FirstEnergy service territory because customers have the ability to choose a competitive generation supplier.

In the Opinion and Order, the PUCO found that customers in FirstEnergy's service territories have the ability to choose a competitive supplier and will continue to benefit from choice in competitive suppliers.[103] In other words, the PUCO determined that customers in FirstEnergy's service territory are not captive for purposes of the Rider RRS. This determination was unreasonable and unlawful.

On April 27, 2016, the Federal Energy Regulatory Commission ("FERC") issued an Order, which directly held that FirstEnergy's customers are "captive" for purposes of the Rider RRS and its associated purchase power agreement.[104] Indeed, FERC stated:

> …we find that FE Ohio Regulated Utilities' retail ratepayers are captive to the extent they are subject to the non-bypassable charge associated with the Affiliate PPA. Retail choice protects customers from affiliate abuse only to the extent they have a choice to undertake generation costs. Where, as here, circumstances demonstrate that a retail customer has no choice but

[101] IMM Ex. 1 at 3.

[102] OCC/NOPEC Ex. 1 at 15.

[103] See *FirstEnergy PPA Order* at 79, 109.

[104] See *Electric Power Supply Association, Retail Energy Supply Association, Dynegy Inc., Eastern Generation, LLC, NRG Power Marketing LLC, and GenOn Energy Management, LLC v. FirstEnergy Solutions Corporation, Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*¸ 155 FERC ¶ 61,101 (2016).

> to pay the costs of an affiliate transaction, they effectively are captive with respect to the transaction.[105]

Accordingly, the PUCO decision regarding whether customers in the FirstEnergy service territory are captive for purposes of the Rider RRS and associated PPA is unlawful. Rehearing should be granted.

11. The PUCO unreasonably and unlawfully found that its review of bilateral contracts between FirstEnergy and its affiliate would protect against anticompetitive subsidies.

The PUCO found that it has imposed safeguards in the annual prudency review process to protect against anti-competitive subsidies.[106] The PUCO stated that any bilateral contracts between FirstEnergy and an affiliate will be stringently reviewed, and no presumption of management prudence will be assumed in a bilateral sale to an affiliate.[107] The PUCO's decision is unreasonable and unlawful because it does not have authority to review bilateral contracts between FirstEnergy and its affiliate.

R.C. 4928.02(H) provides that it is the state policy of Ohio to, "[e]nsure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa . . . ." FirstEnergy could flout this statute by entering into bilateral contracts with an affiliate in order to give the affiliate a competitive advantage.[108] For example, if capacity

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[105] *EPSA v. FirstEnergy*, 155 FERC ¶ 61,101 at P 61.

[106] See *FirstEnergy PPA Order* at 110.

[107] See *FirstEnergy PPA Order* at 110.

[108] See *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*, Joint Initial Brief of the PJM Power Providers Group and the Electric Supply Association at 29 (February 16, 2016).

does not clear in any PJM auction, FirstEnergy could seek to sell this capacity, at a below-market price, to an affiliate through a bilateral contract. Such a transaction would violate Ohio's prohibition on anticompetitive subsidies identified in R.C. 4928.02(H).

The PUCO's decision is unreasonable and unlawful because it does not have authority to review bilateral contracts between a utility and its affiliate. The PUCO only has authority to review bilateral contracts between a utility and an end-user. Under the Federal Power Act, the Federal Energy Regulatory Commission has exclusive authority to regulated "the sale of electric energy at wholesale in interstate commerce."[109] A wholesale sale is defined as a "sale of electric energy to any person for resale."[110] The Federal Power Act assigns to FERC responsibility for ensuring that "[a]ll rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission…shall be just and reasonable."[111] However, the States have sole jurisdiction to regulate "any other sale—most notable, any retail sale—of electricity."[112] That is, Ohio has the authority to review a contract between a utility and an end-user (i.e., retail sale), but it does not have authority to review a contract between a utility and a non-end-user (e.g., a FirstEnergy affiliate). Therefore, the PUCO unreasonably and unlawfully determined that it could safeguard against anticompetitive bilateral contracts between FirstEnergy and an affiliate by reviewing the bilateral contracts. The PUCO erred. Rehearing should be granted.

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[109] 16 U.S.C. § 824(b)(1).

[110] 16 U.S.C. § 824(d).

[111] 16 U.S.C. § 824d(a).

[112] 16 U.S.C. § 824(b).

B. The PUCO erred in unreasonably and unlawfully finding that it can approve plans to implement straight fixed variable rate design through an electric security plan under R.C. 4928.143(B)(2)(h).

The PUCO ruled that although it "may have preferred to address implementation of SFV in FirstEnergy's next distribution rate case ***R.C. 4928.143(B)(2)(h) specifically permits an ESP to include provisions for a revenue decoupling mechanism***. The PUCO's finding in this regard is unreasonable and unlawful because it misconstrues the statute's term "revenue decoupling mechanism" to include straight fixed variable rate design.

R.C. 4928.143(B)(2)(h) does allow an electric distribution utility to include as part of its ESP plan a "revenue decoupling mechanism," although it does not define what is meant by those words. However, in another section of the law, R.C. 4928.66, revenue decoupling is addressed at length. There, the revenue decoupling mechanism is set forth as part of initiatives to establish, expand, or continue energy efficiency or conservation programs. This provision clarifies that revenue decoupling is intended to go hand in hand with energy efficiency efforts by utilities, as part of reaching the energy efficiency benchmarks.

Straight fixed variable rate design has little to do with energy efficiency. ELPC noted that the proposed changes to institute straight fixed variable rate design, "directly undermines the benefits that the Companies allege customers will receive from their new energy efficiency offerings under Section E of the Third Supplemental Stipulation."[113] This is the same thing FirstEnergy said when it opposed straight fixed variable rate design, in comments filed in 2011. There, FirstEnergy claimed that if straight fixed

[113] ELCP Initial Brief at 47.

variable rates are adopted, customers, "will have less of an economic incentive to participate in energy efficiency or peak demand reduction programs resulting in an increase in the cost of the programs in order to achieve the statutorily required savings and reductions."[114]

The PUCO in using straight-fixed variable rate design and decoupling interchangeably was attempting to read into the statute something that was not there. In fact, reading straight fixed variable rate design into the statute is contrary to the General Assembly's directives under R.C. 4928.66 and other policy directives under R.C. 4928.02.[115] The PUCO erred. Rehearing should be granted.

1. The PUCO unreasonably and unlawfully found that Rider RRS does not breach Ohio's policy to ensure effective competition and protect consumers from market power and market deficiencies.

It is the policy of the State of Ohio to ensure effective competition in the provision of retail electric service.[116] It is also Ohio policy to protect retail customers from unreasonable sales practices, market deficiencies, and from a utility gaining excessive market power.[117] Accordingly, the PUCO has a duty to enforce, encourage, and preserve Ohio's competitive retail electricity market that was established in 1999 through Senate Bill 3.[118] The PUCO's approval of Rider RRS is unreasonable and unlawful because it does not ensure effective competition and does not protect retail customers in

[114] SJR Ex. 8 at 6-7.

[115] See, e.g. 4928.02(J).

[116] See R.C. 4928.02(H).

[117] See R.C. 4928.02(I).

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

the FirstEnergy service territory from market deficiencies nor from FirstEnergy acquiring excessive market power.

An inherent characteristic of a true and effective competitive market is that there are no predictable sources of revenue for the market participants.[119] Contrary to this basic tenant of a competitive electricity market, the Rider RRS will provide FirstEnergy and/or its unregulated generation-owning affiliate with a guaranteed source of revenue and a guaranteed return on equity.[120] Moreover, the Rider RRS, which is charged to consumers, would guarantee recovery of all costs by directly subsidizing the operating and capital costs of the PPA Units and FirstEnergy Solutions' entitlement to OVEC. FirstEnergy is ensured of these guaranteed profits regardless of whether the plants are economical in current wholesale markets or even whether they clear those markets. True competitive electricity markets do not work this way. Therefore, the Rider RRS is unlawful in that it does not ensure effective competition and it does not protect Ohio consumers from market deficiencies or market power.

The Rider RRS also violates Ohio policy because it distorts PJM's wholesale auction price signals. PJM's wholesale market is intended to provide revenues for economically efficient assets to recover their costs. If subsidized generators are allowed to participate in a wholesale market against unsubsidized assets it will destroy the short- and long-run efficiency benefits of the price signals provided by the market.[121] That is, the Rider RRS will allow economically inefficient FirstEnergy power plants to stay in the market to the detriment of newer, more economic power plants. This is a direct violation

[119] OCC Ex. 25 at 12.

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

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

Ohio's policy to ensure effective retail competition and protect retail customers from market deficiencies and market power.

Additionally, Rider RRS's distortion of PJM's price signals will unlawfully alter the prices that Ohio customers should ultimately pay for electricity service. As OCC witness Sioshansi states:

> By fully subsidizing the operating and capital costs of the Plants and OVEC (in addition to the guaranteed profit), the Program eliminates any incentives that the PJM-operated wholesale markets create to reduce operating and capital costs of the Plants and OVEC. This means that for the cost of supplying customers' energy and capacity needs using the Plants and OVEC may be higher than they otherwise would without the subsidy in place.[122]

In other words, generation sold into PJM that is insulated from the competitive forces that all other generation faces inherently distorts PJM's auction price signals.[123] The distorted operating and capital costs are subsidized by Ohio consumers. This will result in Ohioans paying more for electricity than they would of in a regular competitive market. Therefore, Rider RRS does not ensure effective competition and creates a market deficiency in violation of R.C. 4928.02(H) and 4928.02(I). The PUCO erred. Rehearing should be granted.

C. The PUCO's Opinion and Order is unreasonable and unlawful because the Stipulation's provision concerning energy efficiency is contrary to the public interest and governing law.

The Stipulation calls for the implementation of energy efficiency programs with a goal of saving 800,000 MWh of energy annually.[124] In addition, the Stipulations provide expanded energy efficiency funding for independent colleges and universities and for

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

[123] IMM Ex. 1 at 4 (Bowring Supplemental).

[124] See Opinion and Order at 94.

small businesses, including funding for energy efficiency audits for commercial and industrial customers.[125] It is ironic that FirstEnergy proposes to reactivate energy efficiency programs, through the Stipulation, that were previously suspended.[126] The Stipulation states that cost-effective energy efficiency programs will be eligible for shared savings, with after-tax annual cap increased from $10 to $25 million, which will continue to be recovered in Demand Side Management and Energy Efficiency Rider.[127] That is FirstEnergy will only earn shared savings if they implement cost-effective energy efficiency programs that produce energy savings in excess of the statutory mandates from the General Assembly.

The PUCO found the energy efficiency provisions benefit the public interest.[128] But the Ohio General Assembly determined in Senate Bill 310 that the public will benefit from freezing the energy efficiency and renewable energy mandates.[129] The Stipulation and PUCO Order run counter to this decision made by the General Assembly. The PUCO's decision approving it is therefore unreasonable and unlawful. The PUCO should grant rehearing.

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[125] See Opinion and Order at 94.

[126] *See* FirstEnergy Ex. 154 at 11 (Third Supplemental Stipulation).

[127] See FirstEnergy Ex. 154 at 11-12 (Stipulation).

[128] See Opinion and Order at 95.

[129] See S.B. 310.

ASSIGNMENT OF ERROR 6: The PUCO unreasonably and unlawfully found that FirstEnergy's electric security plan, as modified, is more favorable in the aggregate to customers than a market rate offer.

A. The PUCO erred by unreasonably relying on FirstEnergy's Rider RRS projections and disregarding projections by intervenors opposing Rider RRS.

The PUCO has unjustly and unreasonably determined that the ESP is more favorable in the aggregate than a Market Rate Offer (MRO). The PUCO reaches this conclusion principally on the basis that through its analysis, Rider RRS will generate a credit of $261 million through the eight-year term of the ESP. The PUCO reached this determination in an unreasonable manner that favorably relies on FirstEnergy's projection and dismissing projections prepared by intervenors in opposition to Rider RRS. The PUCO stated:

> Initially, the Commission finds that the proposed ESP IV is more favorable quantitatively than an MRO. As discussed above, the record m this case indicates that Rider RRS will generate $256 million in net revenue over the eight-year term oi ESP IV. As stated above, we are not persuaded by OCC/NOPEC witness Wilson's claims that Rider RRS will cost customers billions of dollars; OCC and NOPEC rely upon the assumption that prices for natural gas, electricity and oil will remain below 2013 prices (in real dollars) through 2030 and beyond.

The problem with the PUCO's analysis is that admittedly, there is great uncertainty and speculation inherent in projecting the net impact of FirstEnergy's proposed Rider RRS on customers on a long-term basis.[130] The PUCO noted that projections and forecasts are predictions.[131] And with that backdrop stated their task as: "[t]he challenge before the

[130] Dr. Choueiki testified that he had zero level of comfort on the forecasts past three years. Tr. XXX at 6258, 6260. He testified that the error of uncertainty for forecasts over three years is over a hundred percent.

[131] Order at 80.

Commission is to determine which projections are sufficiently reliable and how to harmonize the varying results of the projections which the Commission determines to be reliable."

How did the PUCO resolve that challenge? By finding the Utilities forecast to be 100 percent reliable, and one of Jim Wilson's three scenarios, (the most outdated and most aligned with FirstEnergy's) was found to be reliable. The PUCO then averaged those two projections only.

However, there were other projections that warranted PUCO consideration as discussed supra. Mr. Wilson's other two scenarios (the most likely to occur and the most costly scenarios for consumers) were found to be 100 percent unreliable. Similarly, the projections of EPSA/P3 witness Kalt and Sierra Club's witness Comings were both found to be 100 percent unreliable, because Dr. Kalt performed a sensitivity analysis and because Mr. Comings' analysis contained confidential information. The PUCO should grant rehearing and use Mr. Wilson's, Dr. Kalt's and Mr. Comings' analyses as part of its estimate of the net credit or charge to customers under Rider RRS in order to more accurately determine whether the FirstEnergy's ESP is more favorable in the aggregate than an MRO.

B. The PUCO exceeded its authority in performing the more favorable in the aggregate test when it unlawfully considered qualitative benefits

The PUCO found that the proposed ESP IV, as modified by the stipulations, is more favorable in the aggregate than the expected results of a MRO under R.C. 4928.142.[132] In reaching its conclusion, the PUCO unlawfully and unreasonably

[132] Opinion and Order at 118.

considered "qualitative" benefits of the electric security plan in the mix.[133] The outcome of the test should be determined using quantitative factors, not qualitative factors which are manipulated to reduce or cancel out a more objective quantitative analysis.[134] The Ohio Supreme Court ("Court") has limited the items that can be included in an ESP to those expressly listed in R.C. 4928.143(B), and the Court subsequently found that each of those items were "categories of cost recovery." Qualitative factors do not fit as part of "categories of cost recovery." The PUCO erred. Rehearing should be granted.

C. The PUCO unreasonably and unlawfully failed to consider the delivery capital recovery rider revenues as quantifiable costs to customers under an electric security plan, causing the electric security plan costs to customers to be understated. The PUCO failed to base its finding on facts contained in the record in this proceeding, contrary to R.C. 4903.09

In conducting the ESP v. MRO analysis, the PUCO considered quantitative factors.[135] As part of that analysis, the PUCO concluded that the costs of the distribution capital recovery rider (Rider DCR[136]) and the costs of a distribution rate case should be considered substantially equal and removed from the ESP v. MRO analysis.[137] The PUCO relied solely upon its previous determinations in the FirstEnergy ESP III cases.[138] The PUCO erred by relying upon general conclusions and facts that were not found in the

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[133] Id. at 119.

[134] Parties, including NOPEC, have challenged the PUCO's authority to apply the ESP vs. MRO test using qualitative factors. See *S. Ct. 2013-513*.

[135] Opinion and Order at 118.

[136] Rider DCR is intended to compensate the Utilities for the costs of additions to plant in service over and above the plant included in their base rates, at consumer expense.

[137] Opinion and Order at 119.

[138] Id. at 119, citing FirstEnergy ESP III Case, Opinion and Order (July 18, 2013) (sic) at 55-56; Entry on Rehearing (Jan. 30, 2013) at 22-23.

record in this proceeding, contrary to R.C. 4903.09. The PUCO also unreasonably and unlawfully ignored the specific record in this proceeding, particularly with respect to OCC Witness Effron's analysis of FirstEnergy's overearnings on the distribution portion of the Utility's business.

OCC Witness Kahal calculated the cost estimate of Rider DCR (for distribution cost recovery) to be approximately $240 to $330 million. The total Rider DCR increases over the proposed eight-year term of the ESP could require customers to pay an additional $240 to $330 million in revenues, for a total of $915 million in DCR charges over the eight-year term of FirstEnergy's ESP.[139]

Those are the quantitative facts that the PUCO overlooked when it relied upon its prior ruling in a previous FirstEnergy ESP case. OCC/NOPEC Witness Kahal testified that a general assumption that the DCR is a wash, does not hold true in this case for two key reasons. First, all three utilities are potentially substantially over-earning for distribution utility service, as shown in OCC Witness Effron's analysis.[140] In the Utilities' base rate cases, in which utility earnings are comprehensively reviewed, any excess earnings would serve as an offset for the new distribution costs that FirstEnergy would collect through increases to Rider DCR.[141]

Second, Rider DCR (and GDR) includes a stale 10.5 percent return on equity (and 8.48 percent overall return) that was set in a 2007 rate case. The cost of capital has declined substantially since 2007, when these returns were set.[142] A new base rate case

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

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

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

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

would set the current cost of capital based on financial market conditions at that time. Thus, the out of date and overstated rate of return associated with Rider DCR would likely be adjusted downward, saving customers money and providing at least a partial offset to new distribution investment costs. Rider DCR increases would only serve to perpetuate, or even increase, the excess return on the investment that customers would be unnecessarily required to fund.

Instead of relying upon the evidence placed in the record in this proceeding, the PUCO went back to FirstEnergy's 2012 ESP case. But that case did not contain evidence of massive overearning on distribution service, like the evidence showed in this case. And, the authorized rate of return (“ROR’) in the DCR is now far more outdated. Capital costs and rate of return awards (in Ohio) have been declining since 2012. Thus, while the staleness of the ROR embedded in Rider DCR may not have been perceived in 2012 as a serious problem, it clearly is today with the passage of time and persistence of low market capital costs.

The PUCO, however, failed to address this change The PUCO also did not take into account facts and the additional evidence presented in this proceeding, contrary to the requirements of R.C. 4903.09. It was unreasonable and unlawful for the PUCO to treat Rider DCR as a wash in the quantitative portion of the ESP v. MRO test. The PUCO erred. Rehearing should be granted.

ASSIGNMENT OF ERROR 7: The PUCO unreasonably and unjustly modified the stipulations in a manner that harms consumers and is not in the public interest.

A. The PUCO erred by modifying the Stipulation implementing a mechanism to limit the increase to average customers' bills caused by Rider RRS during the first two years of the ESP in an unjust and unreasonable manner.

The PUCO's Order included a provision that modified the Stipulation with the stated intent of ensuring that the average customer bill will see no total bill increase for two years.[143] The PUCO's Order states:

> Therefore, the Commission directs the [Utilities] to ensure for the period of June 1, 2016, through May 31, 2017, that average customer bills do not increase as compared to average customer bills for the period of June 1, 2015, through May 31, 2016, the last year of FirstEnergy's ESP III, taking into account any seasonal rate differential and any over and under recoveries of Rider RRS for prior periods. Further, the Commission directs the [Utilities] to ensure for the period of June 1, 2017 through May 31, 2018, that average •customer bills do not increase as compared to average customer bills for the period of June 1, 2015, through May 31, 2016, taking into account any seasonal rate differential and any over and under recoveries of Rider RRS for prior periods. FirstEnergy is authorized to defer expenses for future recovery in an amount equivalent to the revenue reduction resulting from the implementation of the mechanism for the period of June 1, 2017 through May 31, 2018.
>
> The mechanism limiting average customer bills shall be subject to certain limits. First, costs recovered for smart grid deployment will be excluded from consideration. Likewise, costs for renewable energy procurement and for Rider AER will be excluded from consideration. The impact on riders resulting from credits to customers due to a disallowance ordered by the Commission will also be excluded. This mechanism will not apply during periods where Rider RRS is a credit for customers.[144]

While the PUCO's provision is characterized as being protective of consumers, the reality is that for the period for which this provision is applicable (June 1, 2016

[143] Order at 86.

[144] Order at 86.

through May 31, 2018) the provision ensures consumers will be denied the lower market prices that currently exist in the generation market. To demonstrate this concern, recently, FirstEnergy's competitive bid process ("CBP") was conducted for the provision of standard service offer ("SSO") generation service to consumers. The auction resulted in a weighted average clearing price of $49.46/mwh (for delivery from 6/1/2016 through 5/31/2017).[145] This result compares very favorably to the weighted CBP clearing prices for FE's SSO customers has decreased of $70.39/mwh (for delivery from 6/1/2015 through 5/31/2016).[146] This represents a 29.74% reduction in the cost of procuring generation service by FE for its SSO customers.[147]

However, this 29.74 decrease in generation procurement costs will not be passed through to consumers. But rather, FirstEnergy will be able to fill any revenue deficiency between what was collected from customers relying on the $70.39/mwh and what would be collected from customers relying on the $49.46 generation procurement cost with collections through Rider RRS. These reductions in generation-related prices to consumers should be passed along to customers, but they instead will be used to collect from customers the potential costs of the PPA-Rider approved in the ESP.

[145] *In the Matter of Standard Service Offer Procurement,* Case No. 16-776-EL-UNC, Finding and Order at 2 (April 14, 2016).

[146] *In the Matter of Standard Service Offer Procurement,* Case No. 12-2742-EL-UNC, Finding and Order at 2 (January 28, 2015); Finding and Order at 2 (October 15, 2014); Finding and Order at 2 (January 29, 2014).

[147] 29.74% = 100% - (49.46 /70.39).

1. The PUCO erred by authorizing the Utilities to defer expenses for future recovery under the mechanism it adopted to limit PPA Rider collections during year two of the ESP.

The PUCO's modification to the Stipulation, which relies on a mechanism to limit the increase to average customers 'bills, is harmful to consumers and not in the public interest for two reasons. First, this mechanism only provides a limitation in the first year of the PPA Rider (June 1, 2016 through May 31, 2017). The mechanism fails to provide a benefit for consumers in the second year because any limit imposed on FirstEnergy (and impeding collection from customers) in the second year may be deferred, and subsequently collected from consumers.[148]

The second reason why the PUCO's modification to the Stipulation harms consumers is more subtle. Under the PUCO's modification, FirstEnergy can collect from consumers PPA-related costs during the first two years of the ESP as long as those PPA-related charges do not cause the average customers' bills to increase. So to the extent the competitive generation market costs otherwise would go down, FirstEnergy can fill any revenue reduction with PPA costs. But in addition, any second year PPA-related costs that are uncollected from consumers through Rider RRS they may be deferred and subsequently collected from consumers. These weaknesses in the limitation mechanism imposed by the PUCO generate limited consumer benefits and actually will most likely result in harm to customers.

Additionally, the creation of deferral authority does not benefit consumers. Unfortunately, the PUCO authorized this deferral during a time where deferral requests have become all too commonplace. The PUCO's decision to create deferrals is contrary to

[148] Order at 86.

PUCO policy that limits the creation of deferrals to extraordinary circumstances. Specifically, this Commission has stated:

> Further, **although this Commission is generally opposed to the creation of deferrals,** the extraordinary circumstances presented before us, which allow for AEP-Ohio to fully participate in the market in two years and nine months as opposed to five years, necessitate that we remain flexible and utilize a deferral to ensure we reach our finish line of a fully-established competitive electric market.[149]

The PUCO's rationalization for authorizing a deferral request in AEP's ESP II Case is incongruent with the rationalization for authorizing FirstEnergy's deferral. The PUCO stated in the AEP ESP II Case: the deferral was justified as a means to reach the finish line to a fully established competitive market. In the FirstEnergy ESP IV case, the deferral authority is intended to allow the Utilities to defer costs associated with the subsidized operation of generating units that instead should be operating in the fully developed competitive marketplace. The PUCO's creation of a deferral authority for FirstEnergy under this circumstance was unreasonable and unjust because deferrals create future costs to customers to subsidize deregulated generation and are not in the public interest. The PUCO erred. Rehearing should be granted.

B. The PUCO erred by modifying the Stipulation in a manner that allows FirstEnergy to retain PJM capacity performance bonus payments thereby creating an unjust and unreasonable incentive for the Utilities not to offer the PPA units.

The PUCO modified the stipulations to address capacity performance penalties and bonuses. The PUCO ruled that FirstEnergy will not be able to collect capacity

[149] *In the Matter of the Application of Columbus Southern Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan,* Case No. 11-346-EL-SSO, et al., Opinion and Order at 36 (August 8, 2012) (Emphasis added).

performance penalties from customers.[150] The PUCO also determined that capacity performance bonuses would be retained by the Utilities.[151] While it appears that the PUCO modifications were intended to be symmetrical (so as to protect consumers' and the Utilities' interests alike), the reality the effect of the PUCO's modification is not symmetrical. Instead the PUCO's modifications will create incentives that could cause customers to bear even more costs under Rider RRS. In this regard, the PUCO's Order is unjust and unreasonable.

What the PUCO has done is to create a perverse incentive for the Utilities not to clear the annual base residual auction ("BRA") for generation capacity with some (or all) of these poorer performing, more costly units in the FirstEnergy fleet. If FirstEnergy offers these units into the BRA, and these units clear the capacity market, they must perform when called upon by PJM to deliver energy. If they do not perform, then they will receive a stiff penalty. A penalty that the PUCO has ruled cannot be passed on to consumers.

If instead, FirstEnergy offers these costly units above the market clearing price so they don't clear, then the Utilities have evaded the potential penalties for non-performance. And under this scenario, the Utilities would labor to deliver that energy during shortage periods, when other capacity obligated units can't deliver the energy that they have committed. Then the Utilities would receive PJM bonus payments. And those bonus payments need not be shared with consumers according to the PUCO's Order.

[150] Order at 92.

[151] Id.

So if FirstEnergy behaves in the most risk averse manner, the Utilities can evade the potential for being assessed a penalties by PJM for non-performance. This behavior, however, will fail to maximize revenues to offset the costs otherwise passed onto customers through Rider RRS. And, if the units under that scenario do deliver during a shortage, the PJM bonus payments would be retained by the Utilities.

This construct created by the PUCO's Order results in a perverse incentive for FirstEnergy to not clear some (or all) of the PPA units in PJM's annual BRA for capacity. This behavior does not result in maximizing revenues for consumers. Instead, it will cause customers to pay even more under Rider RRS. The PUCO's modification to the Stipulation does not benefit consumers or the public interest. To protect to consumers by maximizing PPA revenues the PPA units should be required to clear as a price taker in PJM's annual BRA capacity auctions. Therefore, rehearing should be granted and the PUCO should reconsider its decision to permit FirstEnergy to retain capacity bonus payments.

C. The PUCO erred by not modifying the Stipulation to protect consumers from the onerous severability provision.

1. The PUCO erred by failing to modify the Stipulation's severability provision to allow a refund to consumers should the PPA be later overturned by a Court of competent jurisdiction.

The Stipulation contains a severability provision that included a prohibition on refunding amounts collected from customers should a court of competent jurisdiction invalidate the Rider RRS.[152] The PUCO's Order modified the severability provision, but failed to address this prohibition against refunds. The PUCO Order states:

[152] Stipulation at 8-9.

> The Commission finds that the severability provision requires modification in order to be in the public interest. Accordingly, we will modify the provision to add that we reserve the right to reevaluate and modify the Stipulations if there is a change to PJM's tariffs or rules which prohibits the plants from being bid into PJM auctions. The modification is consistent with our intent in requiring a severability provision in the AEP Ohio ESP III Order; thus, we find that the severability provision, as modified, adequately addresses our concern specified in the AEP Ohio ESP III Order.[153]

It was unjust and unreasonable for the PUCO not to find the severability provision is in the public interest when it still contained a provision that prohibits refunds..

The very same provision was included in the AEP PPA Case stipulation. But the PUCO there wisely removed that provision from the Stipulation.[154] It is unclear why the PUCO in the AEP Order would modify the Stipulation provision prohibiting refunds, but in the FirstEnergy Order fail to take that same action. It was unjust and unreasonable to not modify the FirstEnergy Stipulation consistent with the decision in the AEP PPA Case. The prohibition against refunds in not a benefit for consumers nor is it in the public interest. Therefore, the PUCO should grant rehearing on this issue and remove the prohibition against refunds from the Third Supplemental Stipulation.

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[153] Order at 92.

[154] Consistent with the PUCO's decision in 14-1693-EL-RDR Order at 87 ("With respect to the terms of the Stipulation's severability provision, we find that the prohibition on refunds, in the event of an invalidation of the PPA rider proposal, should be removed from the Stipulation, as it is a matter for determination by the [PUCO] or reviewing court."

2. The PUCO's unjust and unreasonable modification to the Stipulation's severability provision only protects consumers in the unlikely circumstance PJM[155] changes tariffs or rules that prohibit the PPA units from being bid into the PJM auction.

The PUCO’s modification to the severability provision of the Stipulation fails to adequately protect consumers or the public interest. The PUCO Order states that: “[a]ccordingly, we will modify the provision to add that we reserve the right to reevaluate and modify the Stipulations if there is a change to PJM's tariffs or rules which prohibits the plants from being bid into PJM auctions.” It is highly unlikely that PJM will change its tariffs or rules in such a manner that would "prohibit" these units from bidding into the market, so the provision will likely have no effect on the operation of the Stipulation or Rider RRS.

It is likely that PJM may <u>modify</u> its tariffs or rules to address the manner that these units are allowed to offer these units into the market. For example, to protect the competitive market, certain merchant generators filed a complaint at FERC seeking protection from the PPAs through a PJM tariff remedy.[156] The Complaint asks FERC to extend the application of PJM Minimum Offer Price Rule (“MOPR”) to existing, as opposed to just new, power plants. The existing power plants that would be subject to the MOPR change include affiliate-owned power plants that, by order of the PUCO, are to be subsidized by Ohioans under the PPAs. Such a tariff modification by PJM would be the more likely scenario for PJM to address the PPAs effects on the competitive market, and would not prohibit the PPA units from offering into the PJM auctions.

[155] PJM Interconnection, L.L.C. (“PJM”) is the regional transmission organization (“RTO”) and administrator of the wholesale power markets in Ohio.

[156] Calpine Corporation, et al. v. PJM Interconnection, LLC, FERC Docket No. EL-16-49-000.

Therefore, the PUCO's modification to the Stipulation will not likely provide an opportunity to reevaluate and modify the Stipulation based on future PJM action. Therefore, the PUCO's modification to the Stipulation does not benefit consumers and is not in the public interest, and rehearing should be granted.

3. The PUCO erred by modifying the Stipulation in a manner that unjustly and unreasonably allows the Utilities to not generate capacity revenues under a PJM rule or tariff modification.

As argued above, The PUCO's modification to the severability provision of the Stipulation fails to adequately protect consumers or the public interest. The PUCO has modified the Stipulation in a manner that allows the PUCO to reevaluate and modify the Stipulation only in the event PJM prohibits these units from [clearing] the auction.[157] Not likely to occur. However, as argued in Section B above, the more likely scenario created by the perverse incentive in the PUCO's order is that these units are not offered and cleared in the market because a units costs exceed the BRA clearing price, and do not maximize revenues to be flowed through Rider RRS for consumers. That scenario is one in which the PUCO should reserve its right to reevaluate and modify the Stipulation. As mentioned above, the PUCO to protect to consumers by maximizing PPA revenues, the PPA units should be required to clear as a price taker in PJM's annual auctions. If FERC adopts a policy preventing these units to clear the PUCO on rehearing should remove the units from the PPA and Rider RRS. However, because the PUCO has not properly protected consumers and the public interest through its reservation to reevaluate and modify the Stipulation, rehearing should be granted.

[157] Order at 92.

4. The PUCO erred by failing to modify the stipulation and required the competitive bidding of low-income programs.

The PUCO approved the creation of a number of programs that were included in the stipulation that providing funding for low-income programs. This included $1 million per year for Ohio partners for affordable energy (OPAE),[158] and $1.7 million for the Cleveland Housing Network.[159] The PUCO erred in not modifying the stipulation to ensure that these programs are competitively bid in order to ensure they are implemented as efficiently as possible.

PUCO Staff Witness Scheck expressed concerns about whether the Community Connections program had been implemented efficiently. He testified that the Staff did not know if savings that had been achieved under the program were achieved in the most cost-effective and efficient manner.[160] As a result, he recommended that the program be competitively bid to assure maximum savings to customers.[161] The PUCO erred by not taking the advice of Mr. Scheck. The Community Connections Program should be competitively sourced to maximize the savings from the program for Ohio consumers who pay to fund programs for the consumers who receive the benefits that others pay.

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

[159] Id.

[160] PUCO Staff Ex. 11 at 3-4 (Scheck Direct).

[161] Id.

D. The PUCO unlawfully and unreasonably modified the stipulation to create a zero-based rider to unbundle the costs FirstEnergy incurs to support the Standard Service Offer ("SSO").

The PUCO unlawfully erred in creating a zero-based rider ("IGS Rider") that attempts to unbundle the costs of supporting FirstEnergy's SSO. There is no evidence in the record to support the creation of a Rider. Yet, under R.C. 4903.09, the PUCO must show in its order, the facts in the record upon which its order is based. It failed to do this.

Furthermore, the creation of this Rider is inconsistent with the past findings of the PUCO in this matter, and thus inconsistent with Supreme Court precedent holding that the PUCO should "respect its own precedents in its decisions to assure predictability which is essential in all areas of the law including administrative law."[162] And because it changed its position, the had to justify the change by showing there is a clear need for change and must show that the prior decisions are in error. The PUCO failed to do so here. The PUCO erred. . Rehearing should be granted.

There is no evidence in the record that supports the creation of the IGS Rider. The PUCO relies on a single statement from Company witness Mikkelsen stating that this Rider could "potentially" incent shopping. However, aside from that statement, there is no actual record evidence that forms a basis for the PUCO to conclude that the rider is just and reasonable.

The PUCO attempts to deflect concerns regarding the creation of the IGS Rider, by stating that in order to implement the rider, that FirstEnergy must first file an application a separate proceeding. This is beside the point. It does not change the fact

[162] *Cleveland Electric Illuminating*, 42 Ohio St.2d at 431.

that the PUCO's approved the creation of an unsupported, unsubstantiated IGS Rider without record evidence to support the rider.

The IGS rider was originally proposed in the recent Retail Market Investigation. In that proceeding, the PUCO rightly rejected the proposal. The PUCO's decision in that case should be respected. The PUCO erred. Rehearing should be granted.

ASSIGNMENT OF ERROR 8: The PUCO erred in unreasonably and unlawfully considering factors identified in the AEP ESP III proceeding

As part of the PUCO's review, it looked at whether the stipulations, as a package, benefit customers and the public interest. In doing so, the PUCO extensively discussed Rider RRS and the Utility's so-called "Economic Stability Program."[163] After concluding that the Rider RRS would produce a $256 million credit to consumers, the PUCO turned to "other factors to be considered in determining whether Rider RRS is in the public interest."[164]

The other factors included the "relevant factors" the PUCO identified in the AEP Ohio ESP III Order.[165] In that proceeding, the PUCO identified four factors that AEP Ohio should address and that it "will balance, but not be bound by" in deciding whether to approve cost recovery under a power purchase agreement.[166] The limited "AEP factors" included the financial need of the generating plant; the necessity of the generating facility; a description of how the generating plant is compliant with

[163] See Opinion and Order at 80- 96.

[164] Id. at 86.

[165] Id. at 87.

[166] AEP ESP III, Case No. 13-2395-EL-SSO, Opinion and Order at 25.

environmental regulations; and the impact that closure of the plant will have on electric prices and economic development within the state.

The PUCO concluded that if the plants were to close, substantial transmission investment would be needed.[167] It also determined that under the economic stability program, resource diversity would be encouraged.[168] The PUCO noted that Rider RRS would support 2,200 MW in existing coal -fired generation capacity and 908 MW of existing nuclear generation. It also pointed to the significant economic impact the plants have on the regions that they are located in[169] The PUCO admitted that "[t]he economic impact of plant closures and the impact on local communities is a concern to the Commission. Rider RRS will provide support for the identified generation assets ***.[170] After considering these factors, the PUCO concluded that the modified ESP, including Rider RRS, met the three criteria for adoption of stipulations.[171]

A. In considering factors from the AEP ESP III proceeding, the PUCO unreasonably and unlawfully denied consumers due process by relying upon a non-final order

In its Opinion and Order here, the PUCO relied on its Opinion and Order from AEP Ohio's recent electric security plan case[172] for authority to establish the PPA Rider and the factors under which the rider will be evaluated.[173] Such reliance is unlawful. The Supreme Court of Ohio has previously stated its great concern over the wielding of power

[167] Opinion and Order at 87.

[168] Id.

[169] Id. at 88.

[170] Id.

[171] Id. at 121.

[172] Case No. 13-2385-EL-SSO ("ESP III").

[173] See generally Opinion and Order.

by administrative agencies in the absence of procedural integrity that satisfies due process requirements. Quoting *Ohio Bell Tel. Co. v. Pub. Util. Comm. Of Ohio* (1937), 301 U.S. 292, 304-305. The PUCO's prior orders do not support its actions included in the Order in this proceeding.

There is no final order in ESP III. Parties, including OCC, have filed applications for rehearing and those applications have not been substantively ruled upon. The PUCO should therefore reconsider its reliance on the ESP III Opinion and Order. It cannot rely on the ESP III Opinion and Order until it is a final appealable order and represents something more than an "interim" order that does not reflect the "ultimate" opinion of the PUCO.[174]

The PUCO itself has acknowledged that there is no final appealable order in ESP III and that the matter is still pending at the PUCO.[175] The ESP III order is not legal precedent. Relying on it deprives parties of their appeal rights and due process.[176]

In fact, the PUCO has skirted Supreme Court review of its Opinion and Order in ESP III by continually delaying issuing a final rehearing entry. OCC and other parties in ESP III filed applications for rehearing, pointing out errors and asking the PUCO to grant rehearing on many issues relating to the PPA Rider.[177] The PUCO granted OCC's (and others') applications for rehearing to allow more time to consider the issues raised in the

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[174] See PUCO's Motion to Dismiss in Supreme Court Case No. 2015-1225 at 4, 6

[175] *In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to 4928.143, Revised Code in the Form of an Electric Security Plan,* Sup. Ct. 2015-1225, Motion to Dismiss at 3.

[176] See *Atkinson v. Grumman Ohio Corp.*, 37 Ohio St. 3d 80, syllabus para. 1 (1988) ("The right to file an appeal, as it is defined in the Appellate Rules, is a property interest and a litigant may not be deprived of that interest without due process of law.").

[177] ESP III, OCC Application for Rehearing (March 27, 2015); IEU, OPAE, APJM, IGS, OMAEG, Constellation, Environmental Advocates, and RESA Applications for Rehearing (March 27, 2015).

applications.[178] Later, the PUCO issued a Second Entry on Rehearing and stated that it "will defer ruling on the assignments of error related to the PPA at this time."[179] It further stated:

> Given that R.C. 4903.10 and 4903.11 permit any party to file an application for rehearing of any order and appeal the order of the Commission within 60 days, no party's right to appeal will be adversely affected by our decision to defer ruling on these assignments of error.[180]

OCC and other parties then applied for rehearing of the PUCO's Second Entry on Rehearing and the PUCO, again, in its Third Entry on Rehearing, granted rehearing to allow further consideration on the matter raised in the applications for rehearing.[181]

IEU Ohio, OCC, and ELPC (jointly with OEC and EDF) filed appeals at the Ohio Supreme Court.[182] In response, the PUCO filed a motion to dismiss the appeals. It asserted: "[N]o order has been issued on those applications [for rehearing]. Thus, the matter is still pending at the Commission."[183] The Ohio Supreme Court dismissed all three appeals.

Since the Third Entry on Rehearing, no subsequent entry has been issued to resolve the pending issues on rehearing. The PUCO has done exactly what it said that it would not do - adversely affect, by it decision (to defer ruling), parties' rights to

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[178] Id. at Entry on Rehearing (April 22, 2015).

[179] Id. at Second Entry on Rehearing at ¶ 10 (May 28, 2015).

[180] Id.

[181] Id. Third Entry on Rehearing (July 22, 2015).

[182] Id. IE, OCC, and ELPC Notices of Appeal (Sept. 27, 2016).

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

appeal.[184] It is improper to rely on the ESP III Opinion and Order as legal precedent. The PUCO cannot simply treat its prior orders as precedent where, as here, it knows that adverse parties have been denied their due process rights to challenge them.

The PUCO should grant rehearing on this Assignment of Error.

B. The PUCO unreasonably and unlawfully considered the financial integrity of the Utility's affiliate owned plants as justification for approving the costly and unlawful purchase power agreement.

In AEP's recent ESP proceeding, the PUCO identified factors that "it may balance, but not be bound by" in deciding whether to approve future cost recovery requests associated with utility power purchase agreements.[185] One of these factors included the financial need of the plants.

FirstEnergy seized upon this factor and in fact made its entire case about the financial needs of the plants. Mr. Moul identified the PPA plants as plants whose "economic viability" "is in doubt."[186] He testified that market-based revenues for energy and capacity are insufficient to permit FES to continue operating the Plants and to make the necessary investments. According to Mr. Moul, the plants may not survive without Rider RRS.

The financial need of unregulated generation plants owned by a utility affiliate is not an appropriate factor for the PUCO to consider.[187] There is no provision under Ohio law that allows unregulated generators in the state to collect their costs from captive

[184] ESP III, Second Entry on Rehearing at ¶ 10 (May 28, 2015).

[185] AEP ESP III, Case No. 13-2395-EL-SSO. OCC and others sought rehearing on this and other issues related to the PPA. The PUCO has yet to rule substantively on these issues, after deferring its ruling on all assignments of error related to the PPA, through a Second Entry on Rehearing, issued May 28, 2015.

[186] Co. Ex. 28 at 2.

[187] OCC Ex. 25 (Dr. Rose Direct).

customers based on "financial need." Cost recovery based on financial need is inconsistent with a restructured market that aims to foster competition. Ohio law, as it stands today, establishes such a restructured market that aims to foster competition.

Not only is financial need of unregulated affiliate- owned power plants irrelevant under Ohio law, so too is the financial need of the electric distribution utility. There is no statute that permits the PUCO to consider the financial need of the electric distribution utility as part of an electric security plan.

It is not the responsibility of customers to ensure the financial integrity of the EDU or its affiliate-owned generation plants. Yet, that is what the PUCO had approved by requiring customers to pay hundreds of millions of dollars through Rider RRS. Quite simply, the law (R.C. 4928.38) prohibits that. .

Where there is no mandated competition for a utility's business—in Ohio, a utility's transmission and distribution operations—financial integrity can and should be considered in the rates that customers pay. For these regulated services there are statutes that establish rates and provide for the opportunity to earn a reasonable rate of return on investment (R.C. 4909.15). For these regulated services, there are also statutes that protect utilities from financial emergencies (R.C. 4909.16).

But the ESP statutes do not contain any similar statutory provisions. The PUCO has no jurisdiction to set ESP rates for generation service that allow a utility to charge customers hundreds of millions of dollars to ensure that a utility's affiliate owned generation units are financially sound. Deregulation, not reregulation, was the focus of S.B. 221. The Commission, accordingly, cannot reregulate FirstEnergy's generation business in the form of Rider RRS. The PUCO erred. Rehearing should be granted.

C. The "AEP" factors the PUCO considered in determining whether to approve the PPA are unreasonable to the extent that they are biased toward supporting the Utility's PPA Rider. The PUCO should have considered other factors to assess the benefit or determine of the PPA to FirstEnergy consumers. (AEP Rehearing 42).

In approving the placeholder PPA Rider, the Commission advised AEP Ohio, in its ESP III Case, as to additional factors it may balance but not be bound by, but to include in a “future filing” for a PPA rider. The factors include:[188]

1) Financial need of the generating plant;
2) Necessity of the generating facility, in light of future reliability concerns and, including supply diversity;
3) Description of how the generation plant is compliant with all pertinent environmental regulations and its plan for compliance;
4) The impact that a closure of the generating plant would have on electric prices and the resulting effect on economic development.

Reliance on these four factors alone appears to build a case that would support approval for the Utility-proposed PPA Rider.

Although the PUCO indicated that the PPA Rider must be shown to be reasonable and of benefit to customers,[189] it failed to require the Utility to address additional factors that would enable it to assess the benefits (or detriment) to customers. OCC/NOAC pointed out that the Commission’s list of factors was thus incomplete and unreasonable. It was skewed in favor of approving the PPA Rider without fully considering the PPA’s impact on customers. Accordingly, OCC seeks rehearing in order that the PUCO, in fairness to consumers, reconsider the additional factors that were recommended by OCC/NOAC in our brief.

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[188] *In Re AEP-Ohio ESP III*, Case No. 13-2385-EL-SSO, Opinion and Order at 25 (February 25, 2015).

[189] *In Re AEP-Ohio ESP III*, Case No. 13-2385-EL-SSO, Opinion and Order at 23 (February 25, 2015).

The PUCO's four factors are inadequate for consumer protection and should have been expanded. The PUCO should have additionally considered whether the PPAs and Rider RRS benefit customers. With the balanced consideration of benefits of the Rider RRS to First Energy and FES, as well as to consumer interests, the PUCO would be in a position to evaluate the *net* benefits of the PPA and Rider RRS and, thus, have determined whether the Rider RRS was in the public interest.[190] The additional quantitative factors the PUCO should have considered fell into two categories: (1) the Rider RRS's potential cost/detriment to consumers, and (2) the cost of achieving the same benefits that the PPA and Rider RRS provide compared to alternatives that could provide greater benefits.[191] Indeed, the PUCO's failure to have considered these additional factors did not benefit consumers and was not in the public interest, and should result in the PUCO granting rehearing on this issue.

ASSIGNMENT OF ERROR 9: The PUCO's Opinion and Order is unreasonable and should be modified so that charges under the PPA Rider are subject to refund.

A. In light of the pending FERC case and potential rule changes, the public interest and fundamental fairness necessitate that the PPA Rider be subject to refund.

The PUCO is well aware that the lawfulness of the PPA underlying the PPA Rider may be reviewed by FERC.[192] It is also well aware that PJM and FERC may address the threat posed by the PPA Rider through market rule changes.[193] Regarding the former, if FERC finds that the PPA is unlawful, it can order that FirstEnergy Solutions ("FES") pay

[190] See OCC/NOPEC Ex. 2 at 8-9 (Sioshansi Supplemental).

[191] See *In re: Ohio Power*, Case No. 13-2385-EL-SSO, Opinion and Order at 33.

[192] See, e.g., Opinion and Order at 112.

[193] See id. at 60; 90.

back to AEP Ohio money that it collects under the PPA. If FES is required to refund money to FirstEnergy, it would be against the public interest if FirstEnergy kept and did not refund that money to customers.

B. Questions surrounding the PUCO's jurisdiction mean that the PPA Rider should be subject to refund.

The PUCO is well-aware that its jurisdiction regarding the PPA Rider has been repeatedly called into question.[194] On April 27, 2016, the FERC spoke loud and clear that the waivers under which FirstEnergy presumed the PPA was exempted from FERC review was rescinded.[195] FERC's ruling should stop collection from Rider RRS in its tracks.[196] However, the public interest should not be sacrificed in the event the PUCO allows FirstEnergy to charge customers under a rider that the PUCO did not have jurisdiction to authorize in the first place. This is particularly so because the PUCO has declined to address the jurisdictional issue.

The PUCO has, in the past, ordered utility rates to be subject to refund, and the Ohio Supreme Court has approved such measures. In 1983, for example, the PUCO determined that a portion of the allowance related to Columbus & Southern Ohio Electric Company's construction work in progress for the Zimmer plant would be collected subject to refund to customers.[197] After the PUCO's action was upheld on appeal,[198] the

[194] See, e.g., Opinion and Order at 102-03.

[195] Electric Power Supply Association, et al. v. FirstEnergy Solutions, et al., FERC Docket No. EL-16-34-000, Order at 22 (April 27, 2016).

[196] Electric Power Supply Association, et al. v. FirstEnergy Solutions, et al., FERC Docket No. EL-16-34-000, Order at 19 (April 27, 2016). ("We note pursuant to this finding, no sales may be made with respect to the Affiliate PPA unless and until the [FERC] approves the Affiliate PPA under *Edgar* and *Allegheny*.")

[197] *In re Columbus & Southern Ohio Electric Co.*, Case No. 81-1058-EL-AIR, Entry (November 17, 1982).

[198] *Columbus & Southern Ohio Electric Co. v. Pub. Util. Comm.* (1984), 10 Ohio St.3d 12.

PUCO ordered the utility to refund approximately $4.5 million to its customers.[199] The PUCO ordered the collection to be subject to refund in order to protect customers in the event of a later decision that the utility was collecting more from customers than warranted by law, rule, or reason.

A more recent example of the PUCO collecting rates subject to refund was in the proceeding concerning the Ohio Supreme Court's remand of AEP Ohio's first electric security plan ("AEP ESP 1"). In the AEP ESP 1 Appeal, the Court determined that the provider of last resort ("POLR") rates approved in the AEP ESP 1 Order were not supported by record evidence, and remanded that issue to the PUCO for further consideration.[200] After the Court remanded the POLR issue (and the environmental carrying charges) to the PUCO, OCC and others requested that the PUCO either stay the collections of the POLR charge, or collect the charge subject to refund.[201] Though the PUCO first directed AEP Ohio to remove the rates from tariffs,[202] it subsequently ordered the charges collected subject to refund.[203]

Making collection of the Rider RRS subject to refund would help to protect consumers and the public interest. The PUCO might not be able to provide post hoc refunds because they may be considered to be retroactive ratemaking, which is prohibited

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[199] *In the Matter of the Application of Columbus & Southern Ohio Electric Company for Authority to Amend and Increase Certain of Its Rates and Charges for Electric Service, Amend Certain Terms and Conditions of Service and Revise its Depreciation Accrual Rates and Reserves*, Case No. 81-1058-EL-AIR, Order on Rehearing (May 1, 1984).

[200] *In re Application of Columbus S. Power Co.*, 128 Ohio St. 3d 512, 518, 2011-Ohio-1788, 947 N.E.2d 655.

[201] *In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Asset,* Case No. 08-917-EL-SSO, Motion (April 26, 2012).

[202] Id., Entry (May 4, 2012).

[203] Id., Entry (May 25, 2012).

under *Keco*.[204] Without a PUCO order that makes collection of the shared savings incentive subject to refund, any intervenor appealing the decision could win on the merits but customers could still lose because FirstEnergy might not have to refund monies collected from customers. For consumers, this would be "a somewhat hollow victory."[205]

Further, obtaining a stay from the Ohio Supreme Court is cost prohibitive because of the bonding requirement in R.C. 4903.16. The $19.75 million bond that would be required for a stay under the statute is likely to be beyond the means of any of the intervenors. The Court has recognized "the difficulty a public agency such as OCC faces in dealing with the bond requirement" under the statute.[206]

The PUCO's approval of Rider RRS should modified on rehearing to protect consumers from further harm while any court challenges are pending. To do this, the PUCO should make collection of the shared savings incentive in the Partial Settlement subject to refund. The PUCO erred. The PUCO should grant rehearing.

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[204] *Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co.* (1957), 166 Ohio St. 254, 2 O.O.2d 85, 141 N.E.2d 465.

[205] *In re Application of Columbus S. Power Co*., 128 Ohio St. 3d at 516.

[206] Id. at 517.

ASSIGNMENT OF ERROR 10: The PUCO's Opinion and Order is unreasonable and should be modified so that charges under the PPA Rider are subject to refund.

A. In light of the pending FERC case and potential rule changes, the public interest and fundamental fairness necessitate that the PPA Rider be subject to refund.

The PUCO is well-aware that the lawfulness of the PPA underlying the PPA Rider contracts may be reviewed by FERC.[207] It is also well-aware that PJM and FERC may address the threat posed by the PPA Rider through market rule changes.[208] Regarding the former, if FERC finds that the PPA is unlawful, it can order that FirstEnergy Solutions ("FES") pay back to AEP Ohio money that it collects under the PPA. If FES is required to refund money to FirstEnergy, it would be against the public interest were FirstEnergy not required to refund that money to customers. Regarding the latter, a change in the market rules could raise the level of costs collected from customers through Rider RRS. That is why the PUCO expressly reserved the right to reevaluate the PPA Rider if the market rules change.[209]

With notice of potentially fundamental change to the environment in which FirstEnergy would charge customers under the PPA Rider, and because it has passed on opportunities to wait and see if (and how) such changes play out,[210] the PUCO should make the PPA Rider subject to refund in the public interest and fundamental fairness.

[207] See, e.g., Opinion and Order at 46.

[208] See id. at 92.

[209] See Opinion and Order at 92.

[210] See OCC/NOAC Initial Brief at 24-25.

B. Questions surrounding the PUCO's jurisdiction mean that the PPA Rider should be subject to refund.

The PUCO is well-aware that its jurisdiction regarding the PPA Rider has been repeatedly called into question.[211] It has refused to decide the jurisdictional question.[212] If a court of competent jurisdiction finds that the PUCO had no jurisdiction to authorize the PPA Rider, customers should be refunded any money that they were charged under the PPA Rider. The public interest should not be sacrificed by allowing FirstEnergy to charge customers under a rider that the PUCO did not have jurisdiction to authorize in the first place. This is particularly so because the PUCO has declined to address the jurisdictional issue.

The PUCO should grant rehearing on Assignment of Error No. 10.

IV. CONCLUSION

The PUCO should grant rehearing on OCC's claims of error and modify or abrogate its March 31, 2016 Opinion and Order. Granting rehearing as requested by OCC is necessary to ensure that FE customers are not subject to unreasonable and unjust charges. Otherwise Ohio consumers could end up paying for a whole host of unreasonable and unlawful charges, including excessive profits, an ESP plan that does not produce lower prices than a market plan, and a government ordered subsidy of utility power plants by customers that under the law should be fending for themselves in the competitive generation market.

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[211] See, e.g., Opinion and Order at 102-03.

[212] See, e.g., id.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Application for Rehearing by the Office of the Ohio Consumers' Counsel and NOAC was served via electronic transmission, to the persons listed below, on this 2nd day of May 2016.

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