BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

JOINT MEMORANDUM CONTRA

OF

THE PJM POWER PROVIDERS GROUP

AND

THE ELECTRIC POWER SUPPLY ASSOCIATION

May 12, 2016

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I. Introduction

The PJM Power Providers Group ("P3")[1] and the Electric Power Supply Association ("EPSA")[2] have participated in this proceeding for almost two years enduring the cost and expense of rounds of discovery, depositions, 41 days of hearing and hundreds of pages of briefing. Throughout the last 21 months, P3 and EPSA have been hampered by procedural rulings that, among other things, allowed the hearings and briefing for a second major case pending at the Commission to overlap with this proceeding. P3 and EPSA have repeatedly outlined numerous significant legal and policy concerns with Ohio Edison Company's, The Cleveland Electric Illuminating Company's and The Toledo Edison Company's (collectively, "FirstEnergy") proposal to implement the Retail Rate Stability rider ("Rider RRS") in the companies' next electric security plan. P3 and EPSA also presented an eminently qualified expert witness who conducted multiple analyses of Rider RRS and FirstEnergy's forecasts, and testified on multiple occasions in this proceeding. Virtually all has been ignored or categorically rejected by the Commission.

The Federal Energy Regulatory Energy Commission ("FERC"), however, recognized the significant legal and policy concerns that P3 and EPSA have been arguing about Rider RRS from the very beginning. The FERC put a stop to FirstEnergy's attempt to use a no-bid, affiliate

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[1] P3 is a non-profit organization whose members are energy providers in the PJM Interconnection LLC ("PJM") region, conduct business in the PJM balancing authority area, and are signatories to various PJM agreements. Altogether, P3 members own over 84,000 megawatts ("MWs") of generation assets, produce enough power to supply over 20 million homes, and employ over 40,000 people in the PJM region, representing 13 states and the District of Columbia. This joint memorandum contra does not necessarily reflect the specific views of any particular member of P3 with respect to any argument or issue, but collectively presents P3's positions.

[2] EPSA is a national trade association representing leading competitive power suppliers, including generators and marketers. Competitive suppliers, which collectively account for 40 percent of the installed generating capacity in the United States, provide reliable and competitively priced electricity from environmentally responsible facilities. EPSA seeks to bring the benefits of competition to all power customers. This joint memorandum contra does not necessarily reflect the specific views of any particular member of EPSA with respect to any argument or issue, but collectively presents EPSA's positions.

power purchase agreement ("PPA") as the basis for Rider RRS.[3] The FERC found that a potential for affiliate abuse existed and revoked FirstEnergy's affiliate waiver as to the PPA with FirstEnergy Solutions Corp. ("FES"). The FERC Order effectively ended Rider RRS and FirstEnergy's attempt to shift the market risks of its affiliate's electric generating plants to the ratepayers.

FirstEnergy remains undeterred, however, and now is admittedly attempting to use the Commission's application for rehearing process to circumvent the FERC Order. For the first time in this proceeding, FirstEnergy introduced earlier this month a novel means of providing itself with additional revenue that is fundamentally different from anything that was presented and considered in the 21-month (and counting) proceeding. As FirstEnergy admits, the notion of a PPA between FES and FirstEnergy, which was the entire basis of Rider RRS, is no longer part of the proposal. Replacing the PPA in FirstEnergy's new proposal is nothing more than a vague payment stream from the companies' ratepayers to FirstEnergy that is somehow related to the 2014 projected costs and revenues of two power plants and FES' Ohio Valley Electric Corporation entitlement. All the while, FES will be free to run its plants. Together, this creates two independent revenue streams for FirstEnergy's parent corporation as opposed to just the one stream (Rider RRS) as approved by the Commission on March 31, 2016.

FirstEnergy, however, has made a mistake in how it presented its new PPA proposal to this Commission. By law, the Commission only has jurisdiction over assignments of error that are raised in an application for rehearing. *See* Ohio Revised Code Section ("R.C.") 4903.10. FirstEnergy did not include or mention its new proposal in its application for rehearing, robbing the Commission of jurisdiction over the proposal in this proceeding. This means that the

[3] *Electric Power Supply Association, et al. vs. FirstEnergy Solutions Corp., et al.,* 155 FERC ¶61,101, Order Granting Complaint (April 27, 2016).

Commission cannot grant rehearing on the proposal and contrary to its May 11, 2016 action, cannot reopen this proceeding to allow discovery on the proposal. The proposal is dead on arrival and the Commission must follow the law by not exercising jurisdiction through rehearing.

As to FirstEnergy's listed assignment of errors in its application for hearing, none warrant rehearing.

- FirstEnergy's claim in its eighth assignment of error that the Commission acted unreasonably by not considering the FERC Order is both factually and jurisdictionally defective.

- FirstEnergy is not correct in its third assignment of error that Rider RRS is authorized under R.C. 4928.143(B)(2)(d) as a charge relating to "default service" because the rider applies to all customers and not just standard service offer ("SSO") customers.

- The Commission appropriately placed the burden of capacity performance penalties on FirstEnergy, contrary to FirstEnergy's argument in its sixth assignment of error.

- Contrary to FirstEnergy's claims in its seventh assignment of error, the Commission did not unreasonably prohibit cost recovery of PPA plant outages greater than 90 day because it prohibited cost recovery of *forced* PPA plant outages.

- The Commission's description of the circumstances under which the return on equity was changed was not erroneous, contrary to FirstEnergy's fourth assignment of error.

- Contrary to FirstEnergy's claim in its first ground for rehearing, the Commission's decision does not unlawfully restrict FirstEnergy's ability to withdraw its ESP IV application and the law precludes FirstEnergy from withdrawing its application on appeal.

- FirstEnergy's second assignment of error requesting clarification regarding the renewable resources is solely an attempt to re-write the Commission's conclusion.

- FirstEnergy's fifth assignment of error related to unbundling of distribution rates improperly asks the Commission to accept a side agreement on which the Commission expressly reserved judgment for a future proceeding.

Most of FirstEnergy's application for rehearing can hardly be considered an application for rehearing at all. Instead of applying for "rehearing in respect to any matters determined in

the proceeding," FirstEnergy has introduced its new proposal, which as noted above is not only jurisdictionally defective but also an attempt to circumvent a FERC Order. The Commission should not be complicit in this blatant attempt, which seeks to twist Commission rules and practice simply to create a new revenue stream. But if the Commission concludes that it will consider the new modified Rider RRS proposal on rehearing even though it could have been presented earlier in the proceeding, there are multiple reasons for rejecting it as being unjust and unreasonable. Lastly, in the event that the Commission rules that the hearing record should be reopened for consideration of the new modified Rider RRS proposal, a fair and reasonable schedule should be implemented that ensures the due process rights of all parties and avoids another procedural steamroll that favors FirstEnergy.

II. The Commission does not have jurisdiction to consider the modified Rider RRS proposal because FirstEnergy failed to include the modified Rider RRS proposal in its application for rehearing.

The Commission does not have jurisdiction to consider FirstEnergy's modified Rider RRS proposal. The Supreme Court of Ohio has explained that "setting forth specific grounds for rehearing is a jurisdictional prerequisite for [its] review." *Office of Consumers' Counsel v. Pub. Util. Comm.*, 70 Ohio St. 3d 244, 247, 1994-Ohio-469. An appellant must specifically raise an issue in its application for rehearing. R.C. 4903.10; *Disc. Cellular, Inc. v. Pub. Util. Comm.*, 112 Ohio St. 3d 360, 374-375, 2007-Ohio-53 ("[w]e have held that when an appellant's grounds for rehearing fail to specifically allege in what respect the PUCO's order was unreasonable or unlawful, the requirements of R.C. 4903.10 have not been met * * *.").[4]

FirstEnergy made no reference to its new proposal in its application for rehearing. Instead, FirstEnergy only discussed its new rider proposal in its memorandum in support when

[4] *See, also, Cameron Creek Apts. v. Columbia Gas of Ohio, Inc.*, 136 Ohio St. 3d 333, 338, 2013-Ohio-3705 ("failure to set forth specifically those arguments on rehearing as required by R.C. 4903.10 deprives this court of jurisdiction over Columbia's first proposition of law").

addressing three assignments of error including FirstEnergy's eighth assignment of error. That assignment of error states "[t]he Order is unreasonable because it does not reflect the ruling by the Federal Energy Regulatory Commission Order issued on April 27, 2016 in Docket Number EL16-34-000." Nothing in that assignment of error or any other part of FirstEnergy's application for rehearing mentions or discusses the new Rider RRS proposal. This is a jurisdictional defect that precludes this Commission from exercising jurisdiction over the proposal through rehearing.

It makes no difference that FirstEnergy referenced the proposal in its memorandum in support. The proposal is not referenced in FirstEnergy's application for rehearing and the memorandum in support is a legally insufficient manner for presenting a ground for rehearing. *See, In Re Settlement Agreement in Case No. 07-564-WW-AIR and the Standards for Waterworks Companies and Sewage Disposal System Companies*, Case No. 08-1125-WW-UNC, 2009 Ohio PUC LEXIS 854, *8-9 (Oct. 14, 2009) (finding that an application that merely requests a rehearing and refers to the memorandum in support for specific grounds did not substantially comply with the statutory requirements of specificity); and *In Re Columbus Southern Power Company and Ohio Power Company*, Case No. 04-169-EL-UNC, 2005 Ohio PUC LEXIS 704, *30-31 (finding that arguments in an introductory section were not identified as assignments of error or specific grounds for rehearing, as required by R.C. 4903.10).

The Supreme Court of Ohio has recognized the importance of including an alternative proposal in the actual application for rehearing. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St. 3d 300, 302, 2006-Ohio-5789. There, the Court upheld the Commission's granting of rehearing on an alternative proposal that was stated in the utility's application for rehearing.

Id. at ¶ 13 (holding that the Commission properly considered an alternative proposal by Cincinnati Gas & Electric Company that was made "[i]n its application" for rehearing).

R.C. 4903.10 must be followed to perfect grounds for rehearing. FirstEnergy failed to include the modified Rider RRS proposal in its application for rehearing and, as such, the modified Rider RRS proposal has not been perfected as an assignment of error under R.C. 4903.10. The Commission therefore does not have jurisdiction to hear the proposal through rehearing and cannot consider it in the rehearing proceedings.

III. FirstEnergy's eighth assignment of error should be rejected because the Commission's March 31, 2016 decision cannot be unreasonable for not "reflecting" a ruling issued by the Federal Energy Regulatory Commission nearly four weeks *after* the Commission's decision was issued and, FirstEnergy has failed to perfect the assignment of error.

In nonsensical fashion, FirstEnergy's eighth ground for rehearing claims that the Commission's March 31, 2016 decision "is unreasonable because it does not reflect the ruling by the Federal Energy Regulatory Commission Order issued on April 27, 2016 in Docket Number EL16-34-000."[5] It is plainly obvious that the Commission's earlier decision could not reflect the FERC's later decision. Moreover, this ground for rehearing lacks the required specificity to qualify as an assignment of error. Again, R.C. 4903.10 requires applications for rehearing to specifically set forth the ground or grounds on which the applicant considers the order to be unreasonable or unlawful. As presented, FirstEnergy's eighth ground for rehearing does not specify what part of the Commission's decision is unreasonable.

The eighth ground for rehearing also does not meet the specificity requirement of R.C. 4903.10 because it is conclusory. As noted above, setting forth specific grounds for rehearing is

[5] *Electric Power Supply Association, supra.*

a jurisdictional prerequisite for review. *Consumers' Counsel, supra,* 70 Ohio St. 3d 244, 247, 1994-Ohio-469; *Disc. Cellular, Inc. v. PUC, supra.*[6]

Simply stating that "[t]he Order is unreasonable because it does not reflect the ruling by the Federal Energy Regulatory Commission Order issued on April 27, 2016 in Docket Number EL16-34-000" does not set forth specific grounds describing *how* the Commission acted unreasonably or unlawfully with respect to its March 31, 2016 decision, as is required by R.C. 4903.10. FirstEnergy's eighth ground for rehearing is entirely conclusory in nature, and the Supreme Court of Ohio has found that assignments of error that "are broad and general and state no more than a conclusion," are improper and should not be considered. *Marion v. Public Utilities Com.*, 161 Ohio St. 276, 278 (Ohio 1954) (the statute requires a specific statement of the grounds on which an order of the Commission is deemed unreasonable or unlawful).[7] As a matter of law, the Commission does not have jurisdiction and cannot consider FirstEnergy's eighth ground for rehearing because it does not set forth specific grounds and is conclusory in nature.

There is another jurisdictional basis upon which FirstEnergy's eighth ground for rehearing should be rejected. R.C. 4903.10 states that a party to a Commission proceeding "may apply for a rehearing in respect to **any matters determined in the proceeding.**" (Emphasis added.) FirstEnergy's eighth ground for rehearing does not address a matter determined by the Commission in this proceeding – rather, it refers to the FERC's April 27 decision which was

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[6] *See, also, Cameron Creek Apts. v. Columbia Gas of Ohio, Inc.*, 136 Ohio St. 3d 333, 338, 2013-Ohio-3705 ("failure to set forth specifically those arguments on rehearing as required by R.C. 4903.10 deprives this court of jurisdiction over Columbia's first proposition of law").

[7] *See, In re Petition of CSX Transportation, Inc.,* 2009 Ohio PUC LEXIS 1171, *4-6 (denying motion for rehearing where the Township failed to set forth specifically the ground or grounds on which it considers the opinion and order to be unreasonable or unlawful; instead, the Township merely stated that it wanted to give a fuller account of the four topics listed); *In the Matter of the Complaint of XO Ohio, Inc.* v. *City of Upper Arlington,* 2003 Ohio PUC LEXIS 293, *7-8 (denying the third ground for rehearing because the application did not set forth specifically any ground or grounds upon which the entry was unreasonable or unlawful, instead it merely adopted prior arguments in other motions by reference).

never part of this Commission's proceeding and could not have been part of the Commission's proceeding because it did not exist. As the FERC Order was indisputably issued after the record in this case closed and after the Commission issued its decision on March 31, 2016, FirstEnergy's eighth ground for rehearing does not object to any matters determined in the proceeding.

FirstEnergy proposes, in the memorandum in support of its eighth ground for rehearing, a new retail rider based on a brand new construct that was never proposed or considered during the 21 months of proceedings, 4,100 discovery requests, and 41 days of hearing that FirstEnergy claims were expended in this proceeding. Again, a party may only "apply for a rehearing in respect to any matters determined in the proceeding." R.C. 4903.10. Neither the FERC Order nor FirstEnergy's new rider charge were presented or discussed, considered, or determined at any time during the many months leading up to the Commission's decision. For that reason, the Commission cannot exercise jurisdiction over FirstEnergy's attempt to circumvent the FERC Order by imposing a new rider on its ratepayers.[8]

In short, R.C. 4903.10 provides procedures that must be followed to perfect grounds for rehearing and places limits on what an application for rehearing can address. FirstEnergy's eighth ground for rehearing has not been perfected under R.C. 4903.10, and the Commission therefore cannot consider it in the rehearing proceedings. FirstEnergy's eighth ground for rehearing should be rejected as a matter of law.

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[8] Accord, *In the Matter of the Complaint of S. G. Foods, Inc., Pak Yan Lui, and John Summers, et al.*, 2006 Ohio PUC LEXIS 270, *8 (denying a rehearing on matters determined by the attorney-examiner and never considered by the Commission); and *In the Matter of the Joint Application of The Ohio Bell Telephone Company and Ameritech Mobile Services, Inc. for Approval of the Transfer of Certain Assets*, 1990 Ohio PUC LEXIS 1359, *2-4 (denying application for rehearing in which the application would involve an "extra-record review," which falls outside R.C. 4903.10).

IV. Rider RRS is not authorized under R.C. 4928.143(B)(2)(d) and it does not "relate to default service" and, therefore, FirstEnergy's third assignment of error should be rejected.

FirstEnergy claims in its third assignment of error that the Commission's decision is unlawful and unreasonable because the Commission failed to find that Rider RRS is authorized under R.C. 4928.143(B)(2)(d) on the ground that it relates to default service. R.C. 4928.143(B)(2)(d) states that an ESP plan may include:

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

The Commission found it unnecessary to address the argument of whether the rider related to default service because it had found that Rider RRS otherwise satisfied the statute.[9] For the many reasons argued by P3/EPSA in their joint application for rehearing,[10] Rider RRS does not comply with R.C. 4928.143(B)(2)(d). Rider RRS specifically does not relate to default service because it will apply to all of FirstEnergy's ratepayers regardless of whether they are current or future SSO customers. The proposed tariff language makes that abundantly clear.[11] FirstEnergy claims, however, that Rider RRS relates to default service because it applies to the SSO customers and will mitigate SSO price increases. Both claims ignore the fact that Rider RRS applies on a non-bypassable basis and as such, is applicable to all ratepayers irrespective of whether they are SSO customers. In other words, Rider RRS is not dependent on SSO rates, receipt of SSO service, or anything else related to the provision of SSO service. In short, the

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[9] Opinion and Order at 109.
[10] P3/EPSA Joint Application for Rehearing at 2-3, 10-17.
[11] FirstEnergy Ex. 1 at Attachment 4, Proposed Tariff Sheet 127 states: "Applicable to any customer who receives electric service under the Company's rate schedules. * * * This Rider is not avoidable for customers during the period the customer takes electric generation service form a certified supplier."

Rider has nothing to do with FirstEnergy's default service and, as a result, it does not "relate to default service." There was no error as a result of the Commission not addressing this argument.

V. The Commission properly concluded that FirstEnergy must bear the burden of any capacity performance penalties and not flow them through Rider RRS and, therefore, FirstEnergy's sixth assignment of error should be rejected.

FirstEnergy claims in its sixth ground for rehearing that the Commission improperly required the companies to bear the burden for any capacity performance penalties. FirstEnergy argues that this ruling "upsets the balance of competing interests when the negotiation process is viewed as a whole" and is not supported by the record.[12] These arguments ignore that ratepayers will be exposed to untold amounts of the capacity performance penalties under Rider RRS as proposed and under the Stipulation.[13] Likewise, FirstEnergy's claim ignores the clear and convincing evidence of the complete shift of risks that will occur with Rider RRS and fundamental unfairness of forcing ratepayers to pay for capacity performance penalties due to FirstEnergy's actions or FES' actions. The Commission properly weighed *all* of the competing interests (not just those of the Stipulating Parties) and properly concluded that capacity performance penalties should be borne by FirstEnergy.

VI. The Commission properly reserved the right to prohibit cost recovery under Rider RRS for any forced PPA unit outages greater than 90 days and, therefore, FirstEnergy's seventh assignment of error should be rejected.

FirstEnergy claims in its seventh assignment of error that the Commission unreasonably prohibited cost recovery for PPA plant outages greater than 90 days, again arguing that the balance of competing interests is upset. However, the Commission did not actually prohibit cost recovery for outages greater than 90 days. Instead, the Commission reserved the right to do so

[12] FirstEnergy Memorandum in Support at 13.
[13] FirstEnergy Ex. 156 at 2-3, 14; FirstEnergy Ex. 154 at 8; Tr. Vol. 8 at 2809; Tr. Vol. 36 at 7707.

for *forced* outages greater than 90 days.[14] Thus, the Commission will consider in the future whether cost recovery should be precluded under the circumstances that exist at the time. There is no error with this conclusion – it discourages lengthy forced outages and may minimize ratepayer exposure to costs for plants that are not operating. The Commission properly reserved the opportunity to examine recovery under Rider RRS during such situations.

VII. Based on the record, changes in the return on equity were negotiated as part of the process intended to resolve this proceeding and, therefore, FirstEnergy's fourth assignment of error should be rejected.

FirstEnergy argues in its fourth ground for rehearing that the Commission wrongly described[15] the change in the return on equity ("ROE") in the PPA as being the product of the settlement negotiations relating to the ESP IV. FirstEnergy claims that that ROE change was solely in the PPA term sheet (resulting from negotiations between FirstEnergy and FES), and separate from the bargaining with the Signatory Parties.[16] The evidence in the record indicates that the changes in the return on equity were negotiated as part of the overall process in November 2015 used to resolve the issues in this proceeding.[17] The Commission should note as well the fact that it did not receive or review the actual PPA, and instead only received a summary term sheet and a worksheet related thereto.[18]

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[14] Opinion and Order at 92.
[15] This Commission statement was made at page 44 of the Opinion and Order.
[16] FirstEnergy Memorandum in Support at 9-10.
[17] FirstEnergy Ex. 155 at 7.
[18] FirstEnergy Ex. 156; Sierra Club Ex. 89.

VIII. The Commission's decision does not restrict the statutory authority set forth in R.C. 4928.143(C)(2)(a), and that authority does not extend through the appeals process and, therefore, FirstEnergy's first assignment of error should be rejected.

FirstEnergy claims in its first ground for rehearing that the Commission's decision unlawfully restricts the Companies' right to withdraw its ESP IV application. FirstEnergy points to two sentences wherein the Commission declared:[19]

- The filing of tariffs by May 1, 2016, will be deemed to be acceptance of the decision and modifications, even though FirstEnergy has the right to seek rehearing.[20]

- The filing of tariffs and finalizing the power purchase agreement ("PPA") will be acceptances of the Rider RRS limiting mechanism.[21]

FirstEnergy contends that the Commission should clarify that the filing of tariffs will be "subject to the rehearing and appeal process and that the Companies' right to withdraw from the ESP as modified will not lapse until the conclusion of that process."[22]

The Commission did not err on this point. First and foremost, nothing in the Commission's decision can restrict the statutory ability for a utility to withdraw an ESP application.[23] Moreover, the Commission expressly acknowledged that FirstEnergy has the option to reject the Commission's modifications and withdraw the application for an ESP.[24] The Commission also acknowledged the right to seek rehearing.[25]

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[19] FirstEnergy Memorandum in Support at 2-4.
[20] Opinion and Order at 99.
[21] Opinion and Order at 86.
[22] FirstEnergy Memorandum in Support at 4.
[23] The Commission, as a state agency, can only exercise that authority which has been specifically delegated to it by the General Assembly. *Tongren v. Pub. Util. Comm.* (1999), 85 Ohio St.3d 87, citing *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 O.O.3d 410, 429 N.E.2d 444; *Consumers' Counsel v. Pub. Util. Comm.* (1981), 67 Ohio St.2d 152, 21 O.O.3d 96, 423 N.E.2d 820; and *Dayton Communications Corp. v. Pub. Util. Comm.* (1980), 64 Ohio St.2d 302, 18 O.O.3d 478, 414 N.E.2d 1051. The Commission's statutory authority does not allow it to restrict a utility's ability to withdraw an ESP application.
[24] Opinion and Order at 86.
[25] Opinion and Order at 99.

The right to withdraw the ESP, however, cannot be as indefinite as FirstEnergy suggests. FirstEnergy claims that the right to withdraw extends throughout the appeal process. Nothing in R.C. 4928.143(C)(2)(a) expresses that right. Moreover, R.C. 4928.143(C)(2)(b) suggests otherwise because the existing ESP is expected to continue if the ESP application is disapproved by the Commission or terminated by the utility, which will occur much sooner than any conclusion from an appeal:

> If the utility terminates an application pursuant to division (C)(2)(a) of this section or if the commission disapproves an application under division (C)(1) of this section, the commission shall issue such order as is necessary to continue the provisions, terms, and conditions of the utility's most recent standard service offer, along with any expected increases or decreases in fuel costs from those contained in that offer, until a subsequent offer is authorized pursuant to this section or section 4928.142 of the Revised Code, respectively.

If the right to terminate the ESP application extended/continued through the appeals process, as FirstEnergy claims in this first ground for rehearing, the Ohio General Assembly would not have prefaced the above language with only the utility terminating the application or the Commission disapproving the ESP application. The Ohio General Assembly would have also recognized that the utility's most recent SSO etc. would have to be continued during that appeal process because the utility could terminate during that time period as well.

Since no such express acknowledgements were included in R.C. 4928.143(C)(2)(a) or (b), FirstEnergy cannot add language to the statute to justify its interpretation.[26] Nor can FirstEnergy negate other provisions of the statute to justify its interpretation of one provision.[27] As a result, the Commission should find that its decision does not restrict FirstEnergy's right to

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[26] *In re Application of Columbus S. Power Co.*, Slip Opinion No. 2016-Ohio-1608, ¶ 49 ("[I]n construing a statute, we may not add or delete words."), citing *State ex rel. Cincinnati Bell Tel. Co. v. Pub. Util. Comm.*, 105 Ohio St.3d 177, 2005-Ohio-1150, 824 N.E.2d 68, ¶32.

[27] R.C. 1.47 makes clear that the entire statute is intended to be effective. This requires the Commission to give meaning to all of the words of the statute. *Accord, City of Huron v. Ohio Edison Company*, Case No. 03-1238-EL-CSS et al., Opinion and Order at 12 (May 10, 2006) and Entry on Rehearing at 6 (June 28, 2006).

withdraw and terminate the ESP IV application as permitted in R.C. 4928.14(C)(2)(a) and also find that the right to withdraw and terminate does not extend/continue through any subsequent appeal.

IX. The Commission's ruling for additional renewable resources is not unreasonable and, therefore, FirstEnergy's second assignment of error should be rejected.

FirstEnergy claims in its second assignment of error that the Commission's decision is "unclear," and thus unreasonable, regarding the Companies' obligation to procure 100 megawatts ("MWs") of wind or solar resources. In this regard, the Stipulation proposed:

> To the extent Staff deems it helpful to comply with a future federal or state law or rule, and, to the extent such federal or state law or rule has not fostered the development of new renewable energy resources, including wind and solar, the Companies shall procure at least 100 MW of new Ohio wind or solar resources as part of a strategy to further diversify Ohio's energy portfolio.

The Commission ruled:[28]

> The Commission first encourages that bilateral contracting opportunities be explored to provide support for the 100 MW of renewables. To the extent that bilateral opportunities are not available, we encourage that the cost recovery filing to be made subsequently with the Commission focus first on enhancing solar opportunities. We also direct that the Companies demonstrate that bilateral opportunities were explored and that a competitive process was utilized to source and determine ownership of any project to be built. Further, we will modify the Stipulations to eliminate any requirement that the procurement must be related to the enactment of new Federal or state environmental laws or regulations.

FirstEnergy seeks multiple "clarifications" in its application for rehearing:[29]

- Approve both conditions as set forth in Stipulated ESP IV.
- Direct FirstEnergy, upon satisfaction of these conditions, to seek Commission approval to attempt to procure 100 MWs of wind and solar resources through bilateral contracts not to exceed the term of Stipulated ESP IV.

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[28] Opinion and Order at 97.
[29] FirstEnergy Memorandum in Support at 6-7.

- Once contractually secured, this output should be offered into the PJM wholesale markets, using such strategies as determined solely by the Companies.

- Subsequently, the resulting costs and revenues should be netted through Rider ORR, initially set at zero as a placeholder rider.

- If bilateral contracts are not available, then FirstEnergy should apply for preapproval of a wind or solar facility and recovery of all related costs, in accordance with findings of "need" for any proposed facility.

FirstEnergy seeks to re-write the Commission's conclusions on this point because it is not satisfied with the Commission's decision. FirstEnergy, however, has not set forth specific detailed reasons why the Commission should modify its ruling as required by R.C. 4903.10. Instead, FirstEnergy simply points out that the Stipulating Parties agreed to specific terms that trigger the renewable resources provisions. This is, however, insufficient to justify a revision on rehearing.

X. FirstEnergy fails to demonstrate that it should not be required to file an unbundling application and, therefore, FirstEnergy's fifth assignment of error should be rejected.

FirstEnergy argues in its fifth ground for rehearing, that the decision is unreasonable because it appears to contemplate an "unbundle" of distribution rates. The Commission did not contemplate an "unbundle" – upon considering the evidence presented, it ordered that an unbundling application be filed.[30] FirstEnergy, however, seeks to not comply, but instead to file an application for a competitive incentive mechanism (an add-on charge for non-shopping customers) per the side agreement that it reached with Interstate Gas Supply Inc. ("IGS").[31] That side agreement was not submitted to the Commission for approval in this proceeding, nor is the Commission obligated to agree with or enforce that side agreement. The Commission

[30] Opinion and Order at 98.
[31] IGS filed a letter expressing a similar position on May 2, 2016.

specifically noted that it would consider any program contemplated by the side agreement when an appropriate application is filed.[32]

Through this fifth assignment of error, FirstEnergy seeks to only submit an application corresponding to the side agreement (the competitive incentive mechanism) and not the Commission-ordered unbundling application. FirstEnergy's position is that, since it settled with IGS via the side agreement, it should not have to comply with the Commission's directive. That is an insufficient basis for reversing the Commission's ruling on rehearing. Moreover, the Commission should not allow parties to dictate the content of the Commission's decisions because they chose to execute a side agreement and not present it to the Commission for approval.

Parties questioned the propriety of the side agreement.[33] Now, FirstEnergy is attempting to rely on that side agreement that it deliberately chose not present as part of the settlement in this case in order to change the Commission's decision. It would be unfair and unreasonable, under those circumstances, to revise the decision in this case based on a side agreement that the Commission is not willing to approve or enforce. As a result, this ground for rehearing should be rejected.

[32] Opinion and Order at 44-45.
[33] *See, e.g.*, Exelon Initial Brief at 63-65; RESA Initial Brief at 42-44.

XI. If the Commission determines that FirstEnergy has appropriately raised the modified Rider RRS proposal as a ground for rehearing, the Commission should nonetheless reject this brand new proposal.

First Energy seeks to replace the approved Rider RRS with nothing more than an imaginary PPA, which creates additional risks for ratepayers and creates an even greater over recovery of revenues by FirstEnergy. A brief comparison between the two proposals is as follows:

Original Rider RRS	Modified Rider RRS
• Written agreement with FES	• No written agreement with FES
• 8 years	• 8 years
• Based on actual generation levels of the plants	• Based on projected generation levels in the record
• Based on actual costs of PPA plants	• Based on projected proxy costs in the record
• Based on actual cleared capacity	• Based on projected-to-clear capacity
• Based on actual revenues received from sale of output from PPA plants	• Based on projected revenues using projected-to-clear capacity, forecasted day-ahead locational marginal price energy prices and actual capacity prices
• Adjusted quarterly based on actual costs and revenues	• Adjusted quarterly based on actual day-ahead, locational marginal prices
• Monies collected from ratepayers flow to FES	• Monies collected from ratepayers flow to FirstEnergy, while FES continues to run the plants and receive all revenues

As detailed below, the proposal is unjust and unreasonable and should be rejected outright.

A. The modified Rider RRS will not provide a more reliable "hedging function" to ratepayers.

FirstEnergy claims that the modified Rider RRS will act as a hedge and reduce risk for ratepayers.[34] That "hedging function" is simply illusory under the modified Rider RRS proposal due to its reliance on assumed or "proxy" values. The ratepayers and FirstEnergy are not

[34] FirstEnergy Memorandum in Support at 17.

protected from the risk or benefit that plant costs may be different than projected because the modified Rider RRS proposal is based on the estimated costs projected by FirstEnergy in the ESP IV case and the proposal eliminates the actual cost reconciliation. Similarly, ratepayers and FirstEnergy are not protected from the risk or benefit that the actual plant capacity amounts will turn out to be different than the plant capacity amounts estimated by FirstEnergy in the ESP IV case. Additionally, ratepayers and FirstEnergy are no longer protected from the risk or benefit that the actual amount of energy generated by the plants will turn out to be different than the amount of energy generated by the plants estimated by FirstEnergy in the ESP IV case. Under the proposal, these components are not guaranteed to provide a hedge to ratepayers. They are now fixed constructs based on 2014 projections in a virtual PPA with the only variables being actual capacity prices and actual energy prices.

B. The modified Rider RRS proposal amounts to a significant transfer of wealth from ratepayers to FirstEnergy and potentially other affiliates.

Under the modified Rider RRS, a massive wealth transfer still takes place. Monies from ratepayers will be given to FirstEnergy, which effectively accomplishes the same transfer of regulated revenues as under the original proposal. The dollars flowing through the new illusory PPA proposal will enable FirstEnergy to radically change the credit profile of the utilities and their parent, reduce the amount of capital needed to be supplied to the utilities, and enable a shift of the capital to FES. Additionally, there is nothing presented in the modified Rider RRS proposal that would restrict FirstEnergy from sending all amounts collected from the modified Rider RRS and other utility revenues directly up to the FirstEnergy parent by means of dividends. This demonstrates that the new modified Rider RRS proposal is not about securing power supplies as a hedge. What FirstEnergy is proposing has nothing to do with the stated goals of stabilizing retail prices for customers, addressing future volatility and retail price

increases, and promoting economic development and job retention efforts in the state. Instead, this new effort would allow FirstEnergy to collect cash as soon as possible in order to support its parent company's credit metrics so as to avoid a ratings downgrade and dilution of the common stock of the parent.

C. The modified Rider RRS may still be subject to Commission review, but a double recovery will occur and ratepayers will not be protected.

First Energy claims that the new modified Rider RRS proposal will still permit the Commission to review Rider RRS, but that overlooks the fact that, at the same time, FES would continue its operations – collecting revenues for the designated MWs of generation while FirstEnergy collects revenues based on the same MWs. This creates two revenue streams for the parent corporation – one from FES' actual sales into the markets and the other being from FirstEnergy through the modified Rider RRS. **This is a double recovery.**

Also, nothing in the proposal mandates that FES remain the owner of the generating plants. Likewise, nothing precludes the sale of the generating plants during the ESP IV. If the generating plants were sold to a third party, the monies received could flow to the shared parent, and all the while, the ratepayers are required to pay the modified Rider RRS, based on those no-longer-owned MWs. In the event a sale occurs, the new ownership arrangement will not protect FirstEnergy's ratepayers. This is another reason to quickly reject FirstEnergy's proposal.

FirstEnergy states that the monies it collects could be used to carry out the commitments in the ESP IV, such as modernizing the distribution infrastructure.[35] There is no actual commitment for such and thus any such claim of benefits is hollow.

Additionally, once the modified Rider RRS switches from a charge to a credit, FirstEnergy no longer has an incentive to keep the rider because FirstEnergy will already have

[35] FirstEnergy Memorandum in Support at 19.

received the money it wants during the time period when the rider is a charge. It can terminate the rider and ratepayers will not receive any credits. Meanwhile, FES could continue to run the plants and receive revenues from the markets. Simply put, FirstEnergy's proposal is not only an end-run around the FERC Order, it is a clever gambit to give its parent corporation as much revenue as possible. The Commission does not have jurisdiction to grant rehearing on the proposal, but if it does exercise jurisdiction, it should reject the proposal outright.

D. If the Commission determines that FirstEnergy has appropriately raised the modified Rider RRS proposal, the Commission cannot take additional evidence on it during rehearing because the modified Rider RRS mechanism could have been presented earlier.

An obvious point is that this new proposal could have been offered during the original hearing – FirstEnergy chose not do so. It now, however, wants to present the proposal for the first time on rehearing, and even proposed a schedule for testimony and additional hearings. R.C. 4903.10 states that the Commission **shall not** take evidence on rehearing on matters that with reasonable diligence could have been offered in the original hearing. That is precisely the situation here. FirstEnergy could have presented the modified RRS mechanism earlier, but it did not. The statute provides a clear prohibition against taking additional evidence on this new modified Rider RRS proposal.

E. If the Commission determines that FirstEnergy has appropriately raised the modified Rider RRS proposal and that additional evidence will be taken, FirstEnergy's proposed schedule is baseless, unfair and contrary to due process rights.

FirstEnergy proposed to re-open the hearing, as necessary, for review of its modified Rider RRS proposal. It presented an expedited schedule on the theory that the proposal only changes one component.[36] That schedule is:

- May 9, 2016 – Intervenor Pre-filed Testimony;

[36] FirstEnergy Memorandum in Support at 21.

- May 11, 2016 – Hearing;
- May 16, 2016 – Oral Arguments held or Brief filing date;
- May 25, 2016 – Opinion and Order issued by the Commission; and
- May 26, 2016 – File Rider RRS with effective date of June 1, 2016.

If the Commission determines that it will re-open the hearing to hear the new proposal (which it should not), it should not proceed under such brief timeframes. The FirstEnergy electric distribution utilities are not in an emergency situation and FirstEnergy has presented a brand new proposal that was not considered by any of the witnesses who testified in this proceeding. In the event the Commission grants rehearing and decides to re-open the hearing, a reasonable time frame, with an adequate opportunity for notice, full discovery on this new proposal and time to prepare for hearing must be provided to all of the parties. During that time, FirstEnergy's existing ESP III can continue to operate on and after June 1, 2016.

In sum, FirstEnergy's modified Rider RRS proposal provides no hedging benefit or protections to the ratepayers. Instead, this new proposal imposes payment obligations on the ratepayers with just as much risk if not more than the prior proposal. The Commission should reject the proposal.

XII. Conclusion

For all of the foregoing reasons, the Commission cannot exercise jurisdiction over FirstEnergy's new rider proposal and FirstEnergy's application for rehearing should be rejected.

Respectfully submitted,

Michael J. Settineri (0073369), Counsel of Record
Gretchen L. Petrucci (0046608)
Vorys, Sater, Seymour and Pease LLP
52 E. Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
614-464-5462
614-719-5146 (fax)
mjsettineri@vorys.com
glpetrucci@vorys.com

Counsel for PJM Power Providers Group and the Electric Power Supply Association

CERTIFICATE OF SERVICE

The Public Utilities Commission of Ohio's e-filing system will electronically serve notice of the filing of this document on the parties referenced on the service list of the docket card who have electronically subscribed to the case. In addition, the undersigned certifies that a courtesy copy of the foregoing document is also being served (via electronic mail) on the 12th day of May 2016 upon all persons/entities listed below:

burkj@firstenergycorp.com
cdunn@firstenergycorp.com
jlang@calfee.com
talexander@calfee.com
dakutik@jonesday.com
cmooney@ohiopartners.org
drinebolt@ohiopartners.org
tdoughtery@theoec.org
ghull@eckertseamans.com
sam@mwncmh.com
fdarr@mwncmh.com
mpritchard@mwncmh.com
mkurtz@BKLlawfirm.com
kboehm@BKLlawfirm.com
Marilyn@wflawfirm.com
blanghenry@city.cleveland.oh.us
hmadorsky@city.cleveland.oh.us
kryan@city.cleveland.oh.us
bojko@carpenterlipps.com
gkrassen@bricker.com
dstinson@bricker.com
dborchers@bricker.com
stheodore@epsa.org
mdortch@kravitzllc.com
rparsons@kravitzllc.com
dparram@taftlaw.com
callwein@keglerbrown.com
mkimbrough@keglerbrown.com
rkelter@elpc.org
jkylercohn@BKLlawfirm.com
larry.sauer@occ.ohio.gov
Maureen.grady@occ.ohio.gov
joliker@igsenergy.com
schmidt@sppgrp.com
ricks@ohanet.org
tobrien@bricker.com
stnourse@aep.com
mjsatterwhite@aep.com
yalami@aep.com
jfinnigan@edf.org
wttpmlc@aol.com
mkl@smxblaw.com
gas@smxblaw.com
mkimbrough@keglerbrown.com
mfleisher@elpc.org
matt@matthewcoxlaw.com
todonnell@dickinsonwright.com
jeffrey.mayes@monitoringanalytics.com
twilliams@snhslaw.com
sechler@carpenterlipps.com
gpoulos@enernoc.com
charris@spilmanlaw.com
dwolff@crowell.com
rlehfeldt@crowell.com
dfolk@akronohio.gov
ghiloni@carpenterlipps.com
lhawrot@spilmanlaw.com
dwilliamson@spilmanlaw.com
meissnerjoseph@yahoo.com
trhayslaw@gmail.com
lesliekovacik@toledo.oh.gov
cynthia.brady@exeloncorp.com
david.fein@exeloncorp.com
lael.campbell@exeloncorp.com
christopher.miller@icemiller.com
gregory.dunn@icemiller.com
jeremy.grayem@icemiller.com
BarthRoyer@aol.com
athompson@taftlaw.com
mhpetricoff@vorys.com
mjsettineri@vorys.com
glpetrucci@vorys.com
thomas.mcnamee@puc.state.oh.us
thomas.lindgren@puc.state.oh.us
sfisk@earthjustice.org
msoules@earthjustice.org
tony.mendoza@sierraclub.org
laurac@chappelleconsulting.net
gthomas@gtpowergroup.com
Kevin.moore@occ.ohio.gov
William.michael@oc.ohio.gov
rsahli@columbus.rr.com
ajay.kumar@occ.ohio.gov
kristin.henry@sierraclub.org

Gretchen L. Petrucci

Summary: Memorandum -- Joint Memorandum Contra electronically filed by Mrs. Gretchen L. Petrucci on behalf of PJM Power Providers Group and Electric Power Supply Association