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

MEMORANDUM CONTRA OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY'S APPLICATION FOR REHEARING ON BEHALF OF THE OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP

Kimberly W. Bojko (0069402)
Danielle M. Ghiloni (0085245)
Carpenter Lipps & Leland LLP
280 Plaza, Suite 1300
280 North High Street
Columbus, Ohio 43215
Telephone: (614) 365-4100
Email: Bojko@carpenterlipps.com
Ghiloni@carpenterlipps.com
(willing to accept service by email)

Counsel for OMAEG

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

MEMORANDUM IN SUPPORT

Kimberly W. Bojko (0069402)
Danielle M. Ghiloni (0085245)
Carpenter Lipps & Leland LLP
280 Plaza, Suite 1300
280 North High Street
Columbus, Ohio 43215
Telephone: (614) 365-4100
Email: Bojko@carpenterlipps.com
Ghiloni@carpenterlipps.com
(willing to accept service by email)

Counsel for OMAEG

TABLE OF CONTENTS

I. INTRODUCTION AND PROCEDURAL HISTORY

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

On March 31, 2016, the Commission issued its Order, which, among other things, approved the Companies' Stipulated ESP IV, including Rider RRS, with little modification.[4] In its decision, the Commission authorized the Companies to flow through Rider RRS (beginning June 1, 2016) the net effects of purchasing generation output from the W.H. Sammis plant and Davis-Besse Nuclear Power Station plant and FirstEnergy Solutions' (FES) entitlement to the

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

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

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

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

output of the Ohio Valley Electric Corporation (OVEC) pursuant to a purchase power agreement between the Companies and its unregulated affiliate, FES (Affiliate PPA).[5] Specifically, the Commission unreasonably and unlawfully determined that the Stipulated ESP IV benefits ratepayers and is in the public interest through a projected net credit to customers of $256 million under Rider RRS for the eight-year term of the ESP.[6]

On May 2, 2016 the Companies, OMAEG, and numerous other parties filed applications for rehearing of various aspects of the Commission's Order. The Companies raised a number of specific objections to the Commission's Order as it relates to the Companies' commitment to procure 100 MWs of solar and wind renewable resources, several features and components of Rider RRS,[7] and a recent ruling by the Federal Energy Regulatory Commission (FERC), which rescinded the Companies' "waiver as to the Affiliate PPA and [found] that, prior to transacting under the Affiliate PPA, [FES] must submit the Affiliate PPA for review and approval under *Edgar* and *Allegheny* in accordance with 18 C.F.R. § 35.39(b)."[8] Additionally, the Companies unlawfully proposed a new Rider RRS proposal, couched as a modified mechanism, which will operate to charge customers significant costs in the name of "retail rate stabilization benefits."[9]

Notwithstanding the host of problems associated with the new Rider RRS proposal, the Companies blatant disregard for regulatory process and regulations specific to filing and amending an ESP should not be tolerated by the Commission. Given the underlying PPA

[5] Order at 78-79.

[6] Order at 78, 85.

[7] *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, Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company's Application for Rehearing (May 2, 2016) (Companies Application for Rehearing).

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

[9] Id. at 17.

contract has not been approved by FERC, there can be no costs associated with the contract that can be flown through to customers under Rider RRS. The Companies acknowledge this fact, stating that "without the modified Rider RRS proposal, the Companies would no longer be permitted to implement Rider RRS in a timely fashion."[10]

Nonetheless, in an attempt to circumvent the FERC decision and process, as well as the Commission's process, the Companies concocted a new proposal to remove the unlawful PPA and introduce an entirely new mechanism for Commission review that is beyond the scope of the current proceeding and is not supported by record evidence. Accordingly, approval of such a new proposal would constitute a violation of Section 4903.09, Revised Code, because the issue was not presented to the Commission for evaluation in these proceedings even though it could have been.[11] OMAEG hereby files its memorandum contra several of the specific objections asserted in the Companies' application for rehearing as well as the Companies' new Rider RRS proposal.

II. ARGUMENT

A. The Companies request to clarify the Order to confirm the Companies' withdrawal rights lacks merit.

In its first assignment of error, the Companies request that the Commission clarify its Order to state that the Companies' right to withdraw its ESP application will not expire until after the rehearing and appeals process concludes.[12] The Companies assert that the Commission has infringed on its statutory right to withdraw its ESP application[13] by requesting the Companies file tariffs complying with the Commission's order and stating that the filing of such

[10] Companies Application for Rehearing at 16.

[11] Sections 4903.09 and 4903.10(B), Revised Code.

[12] Companies Application for Rehearing at 4.

[13] Section 4928.143(C)(2)(a), Revised Code.

tariffs constitutes voluntary acceptance of the Order and its modifications. This argument is is without merit and must be rejected.

Pursuant to Section 4928.143(C)(1), Revised Code, the Commission may do one of three things when considering an ESP application: (1) "approve," (2) "modify and approve," or (3) "disapprove" the application.[14] If the Commission issues an order that "modifies and approves an application," the utility "may withdraw the application, thereby terminating it, and may file a new standard service offer."[15] Additionally, under Section 4903.10(B), Revised Code, if the Commission determines upon rehearing that its "original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the [C]omission may abrogate or modify the same."[16]

In this case, the Commission exercised its statutory right to modify and approve the Companies' Stipulated ESP IV over the objections of several parties. These modifications also included a requirement that the Companies file compliance tariffs by a date certain, which would result in "voluntary acceptance" of the Commission's modifications to the Stipulated ESP IV.[17] The Companies, therefore, have the option to accept the Commission's modifications and file tariffs, withdraw the ESP pursuant to Section 4928.143(C)(2)(a), Revised Code, or wait to file tariffs until the completion of the rehearing process. The Companies cannot, on the one hand, file tariffs in order to implement certain favorable provisions to the Companies contained in the Stipulated ESP IV (e.g., collection of increased rates from customers), and, on the other hand, preserve their right to withdraw their ESP if they do not like the outcome of other

[14] Section 4928.143(C)(1), Revised Code.

[15] Section 4928.143(C)(2)(a), Revised Code.

[16] Section 4901.10(B), Revised Code.

[17] Order at 86.

provisions upon rehearing. Essentially, this would permit the Companies to recover costs from ratepayers pursuant to certain terms of the ESP, and then allow them to withdraw their ESP if it becomes unfavorable sometime in the future. In the interim, customers would be paying costs that the Companies assuredly will later claim to be nonrefundable.

The Companies cite to a Supreme Court case involving Ohio Power Company's (AEP Ohio) request for approval of a phase-in recovery rider (PIRR) in support of their argument that the Commission has precluded them from exercising their statutory right to withdraw a modified ESP.[18] However, that case is distinguishable given the Commission modified a term of the ESP to reduce AEP Ohio's long-term-cost-of-debt rate *after* the ESP had expired.[19] The Supreme Court agreed with AEP Ohio that the Commission's modification after the ESP expired "ma[de] it impossible for [AEP Ohio] to exercise its statutory right to withdraw the modified ESP" in violation of Section 4928.143(C)(2)(a).[20] In the present case, the Commission's modifications to the Companies' Stipulated ESP IV were made prior to the commencement of the ESP, and not after its expiration. Therefore, the Commission's order is not unlawful as it does not preclude the Companies' from exercising their right to withdraw the Stipulated ESP IV after it was modified.

The Companies stated: "it is only upon the completion of the rehearing and the appeal process that the ESP, as ultimately modified by the Commission and any appeal, can be known. For the Companies' statutory right of withdrawal to have any meaning, that right can only be exercised after the entire substance of the ESP is completely known."[21] Under the Companies'

[18] Companies Application for Rehearing at 4; See *In re Application of Ohio Power Co.,* 2015-Ohio-2056 at ¶ 26.

[19] *In re Application of Ohio Power Co.,* 2015-Ohio-2056 at ¶ 10.

[20] Id. at ¶ 26.

[21] Companies Application for Rehearing at 3.

theory, the Companies cannot lawfully implement any provision of its ESP until the appeal process has run, including collecting costs associated therewith from customers. Alternatively, under the Companies' theory, the ESP can only be implemented pending appeal if it is subject to refund.

B. The Companies' request to modify the Order to adopt conditions precedent to procuring 100 MWs of wind and solar and to establish recovery of costs incurred through Rider ORR should be denied.

In its application for rehearing, the Companies request the Commission clarify a number of points related to its purported commitment to procure 100 MWs of wind and solar resources, which it included in the Stipulated ESP IV.[22] These requested "clarifications" are directly contradictory to the Commission's explicit finding in its Order and are unreasonable as they place additional restrictions on when the Companies will, if ever, make these alleged commitments. The Companies' arguments only strengthen OMAEG's previous arguments that the alleged commitments were never "bona fide commitments" as touted by the Companies.[23]

The Companies included in their Stipulated ESP IV a purported commitment to procure at least 100 MW of new Ohio wind or solar resources as part of a strategy to further diversify Ohio's energy portfolio."[24] This purported commitment by the Companies contained two conditions precedent to procuring the additional resources, including: (1) Staff deems the procurement of wind or solar resources helpful to comply with future federal or state laws; and (2) Federal or state laws or rules have not already furthered the development of new renewable energy resources.[25] The Companies placed further limitations on its purported commitment by

[22] Companies Application for Rehearing at 4.

[23] Id. at 5; see also OMAEG's Initial Br. at 76-77.

[24] Companies Ex. 154 at 12 (Third Supp. Stip.)

[25] Id.

requiring that the 100 MW of wind and solar be procured for a period no longer than the Stipulated ESP IV, the Companies make a filing with the Commission (at Staff's request) demonstrating the need to procure new renewable energy sources, the Commission approve the Companies' request, and all costs are recovered through a newly established Ohio Renewable Resources Rider (Rider ORR).[26] Although the Companies tout this particular provision in the Stipulated ESP IV as a significant contribution to resource diversification and a benefit to customers,[27] the proliferation of restrictions and limitations regarding when and how the new resources will be procured only demonstrates that this provision and commitment is unenforceable and provides no real benefit to ratepayers.

Given the numerous conditions that would need to be satisfied before the Companies actually procure any renewable resources, as well as the limited timeframe during which the Companies would actually procure the additional resources, the Commission's Order explicitly and clearly eliminates the requirement that procurement be related to the enactment of new Federal or state laws or regulations.[28] The Commission's purposeful modification of the Stipulated ESP IV to remove conditions precedent to the procurement of renewable resources was reasonable in light of the rationale and purported benefits for adopting such a provision as articulated by the Commission in its Order (e.g., support for construction of new renewables in the state; enhance diversity of generation). Any clarification or reversal of the Commission's modification is unwarranted and should be rejected.

Additionally, the Companies' request to clarify that all costs and revenues resulting from the bilateral contracts to procure wind and solar resources, using strategies determined solely by

[26] Id.

[27] Companies Reply Brief at 256-257.

[28] Order at 97.

the Companies, be netted and paid by customers through Rider ORR is unreasonable.[29] Requiring ratepayers to pay costs associated with the Companies' procurement of generation sources through a non-bypassable rider with no approval or review of said costs provides no benefit to ratepayers. Moreover, the Companies should not be permitted to use their purported commitment to procure wind and solar resources to their benefit as a term in the Stipulated ESP IV, when they are simply shifting costs, and risks, from themselves to their customers.[30]

Additionally, the Commission should deny the Companies' request for preapproval of cost recovery through Rider ORR and the determination of need for a wind or solar facility in the event bilateral contracts are unavailable.[31] This request is an attempt to bypass or thwart the statutory process for the construction of new generation facilities by an electric distribution utility with the costs for such facilities passed on to ratepayers. The Companies' request is unlawful and further dilutes any purported benefit provided by this provision.

As the evidence demonstrates, the Companies' purported commitment to procure 100 MW of wind or solar is not a firm or meaningful commitment that provides any benefit to customers. The Companies cannot on the one hand argue that the commitment to procure wind and solar resources is evidence satisfying the second prong of the three-part settlement test as it provides a benefit to ratepayers and promotes resource diversification,[32] while on the other hand add a plethora of conditions that will never lead to the development of these new renewable resources. The Companies' request for rehearing regarding the obligation to procure 100 MWs of wind or solar resources should be denied.

---

[29] Id.

[30] RESA Ex. 6 at 8-9 (Bennett Direct).

[31] Companies Application for Rehearing at 7.

[32] Companies Reply Brief at 256-257.

C. The Companies' request for a determination that Rider RRS relates to default service is unreasonable and unlawful and should be rejected as none of the generation associated with Rider RRS is being used to serve the retail load.

The Companies argue that the Commission's Order is unlawful and unreasonable because it failed to find that Rider RRS is authorized under the second statutory condition of Section 4928.143(B)(2)(d), Revised Code, as it relates to default service.[33] The Companies' request for a determination that Rider RRS relates to default service should be rejected as none of the generation associated with Rider RRS is being used to serve the retail load and, therefore, does not relate to default service.

Under Senate Bill 3, the General Assembly provided for the deregulation of competitive retail electric service, enabling customers to purchase generation service from a competitive retail supplier. Pursuant to Section 4928.14, Revised Code, if a supplier fails to provide retail service, the suppliers' customers default[] to the utility's standard service offer * * * until the customer chooses an alternative supplier."[34] This makes the utility the provider of last resort (POLR). As the POLR, the utility company may recover POLR costs, defined as costs incurred by the utility "for risks associated with its legal obligation as the default provider, or electricity provider, of last resort, for customers who shop and then return to [the utility] for generation service."[35]

The Supreme Court of Ohio has instructed the Commission to "carefully consider" the costs attributed to a distribution utility's POLR obligations and placement of those costs in generation-service versus distribution-service tariffs.[36] In a case involving the authorization of

[33] Companies Application for Rehearing at 7-8.

[34] Section 4928.14, Revised Code.

[35] *In re Application of Columbus S. Power Co.,* 128 Ohio St.3d 512, 2011-Ohio-1788, ¶ 23 (April 19 2011) (citing *Constellation NewEnergy, Inc. v. Pub. Util. Comm.,* 820 N.E.2d 885, ¶ 39, n5 (Dec. 17, 2004)).

[36] *Ohio Consumers' Counsel v. Pub. Util. Comm.,* 872 N.E.2d 269, ¶ 26 (Sept. 5, 2007).

new standard service offer rates for AEP Ohio, the Court reversed and remanded the Commission's authorization of a POLR charge totaling over $500 million over the term of the ESP.[37] While the Commission described the POLR rider as a recovery of costs associated with carrying the risk of being the POLR provider, the Court stated that the Commission's characterization lacked record support and evidence demonstrating that the charge is in fact related to costs that AEP Ohio would incur as the POLR.[38] Specifically, AEP erroneously relied on a formula it called the "Black-Scholes model" to support its POLR charge; however, this formula attempted to quantify the value of the customers' right to switch retail electric suppliers and be protected under the ESP rate, not estimate the costs associated with AEP's POLR obligation.[39] The Court determined that there was no record evidence to demonstrate that the POLR charge was based on costs incurred to provide default service, finding that a benefit or "[v]alue to customers (what the model shows) and cost to AEP (the purported basis of the order) are simply not the same thing."[40] Similarly, the Companies failed to provide any evidence to support its assertion that Rider RRS relates to the costs associated with providing default service pursuant to Section 4928.143(B)(2)(D), Revised Code, as the POLR. The mere fact that Rider RRS allegedly operates as a rate stability mechanism for SSO customers does not support the much broader assertion that it relates to costs associated with carrying the risk of providing default service. As currently designed, Rider RRS is non-bypassable and therefore applies to both shopping and non-shopping customers, those who take retail generation service from a competitive retail electric service (CRES) supplier and those who take retail generation

[37] *In re Application of Columbus S. Power Co.,* 128 Ohio St.3d 512, 2011-Ohio-1788, ¶ 24.

[38] Id. at ¶ 24, 25.

[39] Id. at ¶ 25, 26.

[40] Id. at ¶ 27, 29.

service through the Companies under the SSO. There is no evidence to support that the charges related to Rider RRS are associated with the risk premium of operating as the POLR.

Moreover, although the Commission has stated that Rider RRS *may* provide a benefit to shopping and non-shopping customers in the form of a financial hedge against market prices, this purported benefit or value does not demonstrate that Rider RRS relates to the costs associated with the provision of default service.[41] Further, even assuming that the Companies have accurately priced the financial hedge option, the amount a customer would be willing to pay for rate stability does not necessarily establish the Companies' costs to bear the risks of providing default service.

Therefore, the Companies have failed to provide any evidence to demonstrate that Rider RRS relates to default service. The Companies' application for rehearing regarding this issue should be denied.

D. The Companies' sixth and seventh assignments of error alleging that the Commission's modifications to Rider RRS specific to requiring the Companies to bear the burden of capacity performance penalties and prohibiting cost recovery for plant outages greater than 90 days should be denied as unlawful and unreasonable.

1. The Companies' sixth and seventh assignments of error should be denied as a matter of law as they do not meet the requirements of Section 4903.10, Revised Code.

Under Section 4903.10, Revised Code, an application for rehearing "shall be in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful.[42] If the application fails to specifically allege how the Commission acted unreasonably or unlawfully, makes only a conclusory statement, or is too

[41] See supra n.43.

[42] Section 4903.10, Revised Code.

broad or general, it fails to satisfy the requirements of Section 4903.10, Revised Code.[43] The Supreme Court of Ohio has strictly construed the specificity test,[44] noting that the General Assembly clearly intended "to deny the right to raise a question on appeal where the appellant's application for rehearing used a shotgun instead of a rifle to hit that question."[45]

Here, the Companies' sixth and seventh assignments of error are nothing more than general conclusory statements that the Commission's Order is unreasonable.[46] They contain no factual information, evidentiary support, or legal authority to support these statements or provide the specific grounds upon which the Order is allegedly unreasonable. In fact, they are void of any references to the specific portions of the Commission's Order that contain these purported errors. As explained more fully below, the general claim that the provisions that the Commission modified were not part of the Companies' Application or Stipulations is inconsistent with the record in the proceeding as the costs associated with capacity performance penalties and plant outages were included in the total costs proposed to be passed on to customers through Rider RRS and were issues specifically raised and addressed by other parties in the proceeding.[47] Nonetheless, a general claim that the provisions were not in the Application or Stipulations is also insufficient to overcome the requirements of Section 4903.10, Revised Code.

[43] *Discount Cellular, Inc. v. Pub. Util. Comm*., 112 Ohio St.3d 360, ¶59-60 (2007); *City of Marion v. Pub. Util. Comm.*, 161 Ohio St. 276, 278, 119 N.E.2d 67 (1954).

[44] *Consumers' Counsel v. Pub. Util. Comm.,* 70 Ohio St.3d at 248, 638 N.E.2d 550.

[45] *Cincinnati v. Pub. Util. Comm.*, 151 Ohio St. 353, 378 (1949).

[46] Companies Application for Rehearing at 12.

[47] See e.g., Initial Brief of the Retail Energy Supply Association at 27-28; Initial Brief of Constellation NewEnergy, Inc. and Exelon Generation Company LLC at 41-42; Joint Initial Brief of The PJM Power Providers Group and The Electric Power Supply Association at 11-12; Initial Post-Hearing Brief of the Sierra Club at 38-39; Tr. Vol. XXXVI at 7715; Tr. Vol. XIII at 2809.

These assignments of error are not appropriately specified in accordance with Section 4903.10, Revised Code and therefore should be denied by the Commission as a matter of law.

2. The Companies' sixth and seventh assignments of error should be denied as they are unreasonable and do not upset the "balance of competing interests in the negotiating process" as asserted by the Companies.

Even if the Commission considers the Companies' sixth and seventh assignments of error, although unlawful in form, the Commission should deny the Companies' requests as unreasonable based on the record evidence in this case.

In its Order approving Rider RRS, the Commission stated that "the Stipulations do not properly allocate risk in light of PJM's new capacity performance standard."[48] Therefore, the Commission modified the Stipulations to state that "[u]nder no circumstances will capacity performance penalties be considered recoverable under Rider RRS" and that "the Commission reserves the right to prohibit recovery of any costs related to any unit for any period exceeding 90 days for any forced outage during the term of ESP IV."[49] The Companies allege that these modifications are unreasonable as they were not part of the original Application or Stipulations, upset the balance of competing interests in the negotiating process, and are not supported by the record or explained by the Commission.[50] These assertions are erroneous.

First, pursuant to Section 4928.143(C), Revised Code, "the commission by order shall approve or modify and approve an application filed under division (A) of this section."[51] In this proceeding, the Companies filed an Application for an SSO in the form of an ESP under Section

[48] Order at 92.

[49] Id.

[50] Companies Application for Rehearing at 12.

[51] Section 4928.143, Revised Code.

4928.143 on August 4, 2014.[52] The Commission can modify this Application in its order pursuant to Section 4928.143(C). Therefore, the Companies' assertion that these specific modifications are unreasonable because they were not part of their original Application or any of the Stipulations has no merit as the Commission has a statutory right to modify a distribution utility's application for an ESP.

Second, the Companies' claim that the provisions that the Commission modified were not part of the Companies' Application or Stipulations is incompatible with the record as the costs associated with capacity performance penalties and plant outages were included in the total costs proposed to be passed on to customers through Rider RRS and were issues specifically raised and addressed by other parties in the proceeding.[53] Parties argued that these provisions were not in the public interest and did not contribute to "retail stability" as claimed by the Companies given they shifted the risk of performance from the generating units to the ratepayers and made ratepayers responsible for a cost over which they have no control.[54] Per the terms of the Third Supplemental Stipulation, and as explained by witness Mikkelsen, ratepayers will be forced to pay for any disallowed capacity performance penalties netted against any capacity performance bonuses.[55] Thus, the Companies are able to avoid any capacity performance penalties and pass those costs on to ratepayers.

[52] Companies Application.

[53] See e.g., Initial Brief of the Retail Energy Supply Association at 27-28; Initial Brief of Constellation NewEnergy, Inc. and Exelon Generation Company LLC at 41-42; Joint Initial Brief of The PJM Power Providers Group and The Electric Power Supply Association at 11-12; Initial Post-Hearing Brief of the Sierra Club at 38-39; Tr. Vol. XXXVI at 7715; Tr. Vol. XIII at 2809.

[54] See e.g., Initial Brief of the Retail Energy Supply Association at 27-28; Initial Brief of Constellation NewEnergy, Inc. and Exelon Generation Company LLC at 41-42; Joint Initial Brief of The PJM Power Providers Group and The Electric Power Supply Association at 11-12; Initial Post-Hearing Brief of the Sierra Club at 38-39.

[55] Companies Ex. 154 at 8; Tr. Vol. XXXVI at 7715.

Third, these modifications do not "upset[] the balance of competing interests in the negotiating process" as asserted by the Companies.[56] While it is difficult to understand what the Companies mean by this statement given they have provided no explanation, evidence, or legal authority to support this conclusory statement, it should be noted that in general there exists an imbalance of power in the negotiating process, which favors the utilities. This was articulated by Commissioner Roberto in FirstEnergy's initial ESP case filed in 2008:

> In the case of an ESP, the balance of power created by an electric distribution utility's authority to withdraw a Commission-modified and approved plan creates a dynamic that is impossible to ignore. I have no reservation that the parties are indeed capable and knowledgeable but, because of the utility's ability to withdraw, the remaining parties certainly do not possess equal bargaining power in an ESP action before the Commission. The Commission must consider whether an agreed-upon stipulation arising under an ESP represents what the parties truly view to be in their best interest – or simply the best that they can hope to achieve when one party has the singular authority to reject not only any and all modifications proffered by the other parties but the Commission's independent judgment as to what is just and reasonable. In light of the Commission's fundamental lack of authority in the context of an ESP application to serve as the binding arbiter of what is reasonable, a party's willingness to agree with an electric distribution utility application cannot be afforded the same weight due as when an agreement arises within the context of other regulatory frameworks. As such, the Commission must review carefully all terms and conditions of this stipulation.[57]

Thus, when bargaining with utility companies in an ESP proceeding, the bargaining favors the utility as they have the ability to reject proposed modifications to the ESP.[58] Given this unequal negotiating power, it is difficult to envision that these two specific modifications by the Commission have created an entire imbalance of interests as asserted by the Companies. To argue such is a gross overstatement.

---

[56] Companies Application for Rehearing at 12.

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

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

Fourth, the Companies' assertion that these specific modifications to Rider RRS are unsupported by the record and not explained by the Commission is erroneous.[59] Prior to explaining its modifications, the Commission stated:

> The Commission will clarify and modify the Stipulations in order to ensure that additional financial risk under the Stipulations is properly avoided and in the public interest.
>
> * * *
>
> We also agree with PJM that the Stipulations do not properly allocate risk in light of PJM's new capacity performance standard.

Thus, the Commission explains that the two modifications requiring the Companies to be responsible for any capacity performance penalties and permitting the Commission to reserve the right to prohibit recovery of costs for plant outages greater than 90 days assist in more appropriately allocating risk between the Companies and its customers, which was a consideration of the Commission in reviewing and approving Rider RRS under the factors included in the AEP ESP III Order.[60] The Commission dedicated an entire section to its Order addressing the AEP ESP factor related to financial risk sharing, which included these modifications.[61] Thus, the Commission explained these modifications, with record support, and the modifications more appropriately allocate risk between the Companies and its customers. The Companies have provided no justifiable reason why these modifications are unreasonable.

Therefore, the Commission should deny the Companies' application for rehearing specific to these assignments of error as they are unlawful under Section 4903.10, Revised Code, and unreasonable based on the facts presented.

---

[59] Companies Application for Rehearing at 12.

[60] Order at 39-40; *In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143, in the Form of an Electric Security Plan, et.al.,* Case No. 13-2385-EL-SSO, et.al., Opinion and Order at 25 (February 25, 2015).

[61] Order at 91-92.

E. The Companies' eighth assignment of error should be denied as unlawful.

As previously discussed, Section 4903.10, Revised Code requires that an application for rehearing "shall be in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful."[62] An application that fails to provide, with specificity, how the Commission acted unreasonably or unlawfully, should be denied.[63]

In its application for rehearing, the Companies' assert that the Commission's Order is unreasonable because it does not reflect the recent FERC order rescinding the Companies' affiliate waiver with FES and requiring the Companies to obtain prior approval of the Affiliate PPA before implementing Rider RRS.[64] The FERC order was issued on April 27, 2016, almost a month after the Commission issued its Order in this proceeding.

Although the Companies' argument is replete with broad, conclusory statements that the Commission's Order is unreasonable and contains no specific record evidence demonstrating such, the Companies' rehearing request is nonsensical. It would be impossible for the Commission's March 31, 2016 Order to "reflect the ruling by the [FERC] Order issued on April 27, 2016 in Docket Number EL16-34-000."[65] Given the impossibility, it would similarly be impossible for the Companies to specifically state the ground or grounds on which they consider the Commission's Order unreasonable or unlawful as required by Section 4903.10, Revised Code. Thus, on its face, this ground for rehearing fails and should be denied.

[62] Section 4903.10, Revised Code.

[63] *Discount Cellular, Inc. v. Pub. Util. Comm*., 112 Ohio St.3d 360, ¶59-60 (2007); *City of Marion v. Pub. Util. Comm.*, 161 Ohio St. 276, 278, 119 N.E.2d 67 (1954).

[64] Companies Application for Rehearing at 16.

[65] Id. at 2, 12.

The FERC order referenced by the Companies rescinded the waiver on affiliate sales restrictions previously granted to the Companies and its unregulated generating affiliate, FES.[66] In that order, FERC declared that "no sales may be made with respect to the Affiliate PPA unless and until the [FERC] approves the Affiliate PPA under *Edgar* and *Allegheny*."[67] FERC further opined that although Ohio customers continue to have the right to choose their competitive retail supplier, customers are captive as they have no choice but to pay the non-bypassable generation-related charges related to the Affiliate PPA and passed through Rider RRS.[68] This arrangement could result in an improper transfer of funds from ratepayers to shareholders, thereby abusing FERC's affiliate transactions restrictions.[69] Given FERC's order, there is no dispute that the costs of the Affiliate PPA cannot be passed through to customers through Rider RRS. Thus, Rider RRS as proposed in the Companies' Application and the Stipulated ESP IV cannot be implemented as approved by the Commission.

Except as set forth in the Companies' assignments six and seven with regard to two modifications to Rider RRS, the Companies are not seeking rehearing of the adoption of Rider RRS and the overall approval of Rider RRS. Rather, under the façade of the unlawful eighth assignment of error, the Companies improperly seek to introduce a new proposed Rider RRS in order to bypass or frustrate the FERC order. Under the new Rider RRS mechanism, the Companies will remove the underlying PPA contract between the Companies and FES (which was the stated basis for the need for Rider RRS), but will retain the financial mechanism to collect from customers the projected costs associated with the previous underlying PPA. The

---

[66] FERC Order at P 53.

[67] Id. at fn. 91.

[68] Id. at P 55.

[69] Id.

charges and any credits would flow from customers to the Companies based on fixed proxy costs and projected generation output determined by the Companies' forecasts, and actual base residual auction (BRA) pricing.[70] Although the Companies characterize the new Rider RRS proposal as a "narrow change" and "alternative mechanism" for a "modified Rider RRS structure,"[71] it is a new proposal that is not supported by the record evidence. The new proposal is not only unlawful, it is unjust and unreasonable and should be denied.

1. The Companies new proposed Rider RRS is unlawful under Section 4903.10, Revised Code, and should be stricken from the record along with supporting testimony.

Given that the Commission approved Rider RRS, stating that Rider RRS "form[s] the centerpiece of the proposed ESP IV,"[72] the Companies cannot argue that the Commission's Order with respect to Rider RRS is unreasonable or unlawful. Moreover, the Companies' new Rider RRS proposal does not relate to any of the Commission's modifications to Rider RRS; rather, it is an attempt to introduce an entirely new proposal to the Commission, disguised as a modification and raised through the Companies' application for rehearing in contravention of the requirements in Section 4903.10, Revised Code. This is an inappropriate use of the Commission's procedural process to advance the Companies' own agenda regarding Rider RRS and introduce entirely new testimony and evidence into the record for the Commission's consideration. Section 4903.10, Revised Code requires that an application for rehearing "shall be in writing and shall set forth specifically the ground or grounds on which the applicant

[70] Id. at 18-19.

[71] Companies Application for Rehearing at 16-17.

[72] Order at 78.

considers the order to be unreasonable or unlawful."[73] An application that fails to provide, with specificity, how the Commission acted unreasonably or unlawfully, should be denied.[74]

The Companies have failed to submit an alternative proposal to the Commission's modifications of Rider RRS.[75] Rather, they are submitting an entirely new proposal, with an entirely new rate design based on new calculations and new testimony, which are not responsive to the Commission's Order. The new proposal is not based upon the underlying record and Commission decision. It is purely a financial transaction, with no record support, and is merely an indirect PPA with the same legal problems presented in the FERC holding. The Companies have attempted to circumvent the FERC order by removing the underlying PPA and removing the requirement that revenues are shared with FES;[76] however, there is no evidence to show that they will not ultimately accomplish the same goal of unlawfully subsidizing their affiliate generating company by flowing payments directly to the parent company, which will then be used to subsidize or support the generation in FES.

The existing record cannot be relied upon to justify the Companies' new proposal. In apparent recognition of this fact and in an attempt to ignore process and procedure, the Companies filed rehearing testimony simultaneous with their application for rehearing to explain the new proposal. The testimony of Companies witness Mikkelsen is extra record evidence, containing new information that should not be considered by the Commission.

The Companies' suggestion that the record does not need to be reopened except as to "explain the modified Rider RRS" given all of the information is in the record should be

[73] Section 4903.10, Revised Code.

[74] *Discount Cellular, Inc. v. Pub. Util. Comm*., 112 Ohio St.3d 360, ¶59-60 (2007); *City of Marion v. Pub. Util. Comm.,* 161 Ohio St. 276, 278, 119 N.E.2d 67 (1954).

[75] *Ohio Consumers' Counsel v. Pub. Util. Comm.,* 111 Ohio St.3d 300, 2006-Ohio-5789, ¶ 13 (Nov. 22, 2006).

[76] Companies Application at 6-7.

rejected as unjust and unreasonable.[77] While the parties to this proceeding have already participated in extensive discovery, filings, and days of hearing, it is noteworthy that the record was developed and evidence received for a completely different purpose with different parameters, and different underlying intentions. The record was developed regarding Rider RRS as proposed by the Application and Stipulations, and the Commission adopted Rider RRS based upon the record before it, including the claimed benefits regarding the underlying PPA and generating facilities. These facts cannot be ignored.

The new proposed Rider RRS, and accompanying testimony of witness Mikkelsen are not appropriate evidence for the Commission's consideration given they do not meet the requirements of Section 4903.10, Revised Code. Therefore, the new proposed Rider RRS should not be considered in the Companies' application for rehearing. Rather, this new proposal should arise out of a new ESP filing, subject to the requirements of Section 4928.143, Revised Code.

Additionally, pursuant to Section 4903.10, Revised Code, in the event that rehearing is granted and additional evidence is permitted, that Commission "shall not upon such rehearing take any evidence that, with reasonable diligence, could have been offered upon the original hearing."[78] Nothing in the Companies' new proposal was precluded from being offered at the original hearing. Therefore, the Companies are prohibited from raising issues and presenting testimony on rehearing that could and should have been presented in the original hearing. Any attempts to reopen the record on rehearing and place new testimony in the record on a new proposal that could have been presented previously should be rejected.

[77] Id. at 21.

[78] Section 4903.10(B), Revised Code.

2. The new proposed Rider RRS contains a number of significant modifications from the originally proposed Rider RRS, which are unjust, unreasonable, and not in the public interest.

The Companies' new Rider RRS proposal contains three main changes related to the calculation of costs and revenues, namely, that the actual costs, actual generation output, and actual capacity cleared in the PJM capacity market will be replaced with projected costs, projected generation output, and the capacity projected to clear, which the Companies assert are all part of the record created to support a completely different propsoal.[79] Interestingly, offsetting revenues (if any) will not be based on a calculation utilizing the projected market prices that are part of the record and which projected a $256 million credit that was relied on by the Commission,[80] but will be calculated by multiplying the projected capacity MWs by the actual BRA pricing.[81]

These changes are not "modest modifications" to the calculations of the costs and revenues that will be flowed through Rider RRS and charged or credited to customers,[82] but significant alterations that result in an entirely new proposal. OMAEG, and several intervening parties, have expressed concerns with the projections that were relied upon by the Commission in approving Rider RRS in their applications for rehearing.[83] And, those projections were based on the facts and circumstances of the operation of the PPA, including the purchase and sale of generation output from generating facilities located in Ohio, and the resulting costs that would

[79] Companies Application for Rehearing at 20.

[80] Order at 78 and 85.

[81] Companies Application for Rehearing at 20.

[82] Id. at 20.

[83] See e.g., Application for Rehearing of the Ohio Manufacturers' Association Energy Group at 13 (May 2, 2016); Application for Rehearing by the Office of the Ohio Consumers' Counsel and Northwest Ohio Aggregation Coalition at 9-16 (May 2, 2016); Sierra Club's Application for Rehearing at 20-21 (April 29, 2016); Application for Rehearing of the Retail Energy Supply Association at 45 (April 29, 2016); Application for Rehearing by the Environmental Law & Policy Center, Ohio Environmental Council, and the Environmental Defense Fund at 13-14 (May 2, 2016).

flow through the originally proposed Rider RRS. Thus, any reliance on questionable projections to set proxies for the new Rider RRS proposal is misplaced. The new proposal is a completely different structure without the underlying PPA and facts and circumstances that gave rise to the purported benefits of the last proposal.

Further, the Companies state that "because of [the structure] change, certain other provisions are no longer needed."[84] However, the Companies do not include details regarding these changes in their application for rehearing; rather, they rely on the improper rehearing testimony of witness Mikkelsen to explain the number of changes, including:

- Staff will no longer need to request FES fleet information pursuant to the full information sharing provision of the Third Supplemental Stipulation;[85]
- Simplification of the rigorous review process contained in the Third Supplemental Stipulation;[86]
- Removal of the early termination provision in the Third Supplemental Stipulation;[87]
- Withdrawal of the triggering language in the Commission's Order directing the Companies to file tariffs and that the filing of tariffs will be construed by the Commission as acceptance of the mechanism limiting average customer bills;[88]
- Calculation of the risk-sharing mechanism referenced by the Commission in accordance with without reliance on actual revenues and costs of the Plants;[89]
- Withdrawal of the Commission's modification requiring the Companies to bear the burden of all capacity non-performance penalties;[90]
- Withdrawal of the Commission's modification reserving the right to prohibit cost recovery for Plant outages greater than 90 days;[91]
- Withdrawal of the Commission's right to reevaluate and modify the Stipulations if there is a change to PJM"s tariffs or rules which prohibits the Plants from being offered into the PJM auctions;[92] and

[84] Companies Application for Rehearing at 21.

[85] Id. at 9.

[86] Id.

[87] Id.

[88] Id. at 13

[89] Id. at 13-14.

[90] Id. at 14.

[91] Id.

[92] Id.

- Withdrawal of the provision stating that the Commission may terminate the specific charge/credit of Rider RRS for any Plant generation unit upon its sale or transfer.[93]

This multitude of changes can hardly be considered "modest modifications." Rather, this shows that the Companies have proposed an entirely new Rider RRS, which requires, extensive discovery, testimony, and a hearing to afford intervening parties the opportunity to obtain additional information and present evidence regarding the new proposed Rider RRS.

Therefore, the Commission should deny the Companies request for rehearing specific to Rider RRS as the Companies failed to satisfy the statutory requirements for an appropriate assignment of error, included improper extra record evidence to support their new proposal in the form of impermissible testimony by witness Mikkelsen and late-filed correspondence, and requested a number of unreasonable changes to several provisions in the Stipulated ESP IV, which should not be considered by the Commission on rehearing.

3. The Companies unlawfully submitted correspondence to the Commission in furtherance of their new proposed Rider RRS, which did not meet the filing deadline and should not be considered by the Commission on rehearing.

In addition to failing to meet the statutory requirements specific to an application for rehearing, the Companies also submitted unlawful extra record evidence in the form of correspondence filed with the Commission on May 4, 2016 to support the new proposed Rider RRS. This is improper and should be stricken and not considered by the Commission.

The correspondence filed by the Companies on behalf of the Signatory Parties failed to meet the statutory deadline for filing an application for rehearing in this proceeding, which was

[93] Id. at 14-15.

due May 2, 2016.[94] Additionally, Rule 4901-1-35-03(D), Ohio Administrative Code, authorizes parties to "only file one application for rehearing to a commission order within thirty days following the entry of the order upon the journal of the commission."[95] The correspondence either constitutes a late application for rehearing submitted by the Signatory Parties without requesting leave in contravention of Ohio law and the Commission's rules, or it constitutes a second application for rehearing filed by the Companies out of time, also in contravention of Ohio law and the Commission's rules. OMAEG supports the pending motion to strike[96] as the filing is unlawful, unjust, unreasonable, and prejudicial to the record. The Commission should strike the correspondence and give it no weight.

III. CONCLUSION

Based on the aforementioned arguments, OMAEG respectfully requests the Commission deny the Companies' application for rehearing and grant the application for rehearing filed by OMAEG on May 2, 2016. The Companies' requests for rehearing are unreasonable and unlawful under Ohio law and the Commission's rules. Further, the Companies' proposal to establish a new Rider RRS, which contains substantial changes, amounts to an entirely new recovery mechanism. It is not a simple modification of the original Rider RRS as stated by the Companies.

[94] Section 4903.10, Revised Code, states, in relevant part, that "After any order has been made by the public utilities commission, any party who has entered an appearance in person or by counsel in the proceeding may apply for a rehearing in respect to any matters determined in the proceeding. Such application shall be filed within thirty days after the entry of the order upon the journal of the commission."

[95] Rule 4901-1-35-03, Administrative Code.

[96] 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*, Case No. 14-1297-EL-SSO, Joint Motion to Strike FirstEnergy's May 4, 2016 Correspondence (May 5, 2016).

For all of the reasons discussed herein, OMAEG requests that the Commission deny the Companies' application for rehearing, including the Companies' new proposed Rider RRS. In the event the Commission believes it is lawful and appropriate to grant rehearing, OMAEG respectfully requests the Commission establish a more reasonable procedural schedule and provide appropriate limitations regarding the evidence the Companies can provide, precluding any evidence that could have been offered at the original hearing in accordance with Section 4903.10, Revised Code.

Respectfully submitted,

/s/ Danielle M. Ghiloni
Kimberly W. Bojko (0069402)
Danielle M. Ghiloni (0085245)
Carpenter Lipps & Leland LLP
280 Plaza, Suite 1300
280 North High Street
Columbus, Ohio 43215
Telephone: (614) 365-4100
Email: Bojko@carpenterlipps.com
Ghiloni@carpenterlipps.com
(willing to accept service by email)

Counsel for OMAEG

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served upon the following parties via electronic mail on May 12, 2016.

/s/ Danielle M. Ghiloni
Danielle M. Ghiloni

stnourse@aep.com
mjsatterwhite@aep.com
dconway@porterwright.com
maureen.grady@occ.oh.gov
edmund.berger@occ.ohio.gov
joseph.serio@occ.ohio.gov
dboehm@BKLlawfirm.com
mkurtz@BKLlawfirm.com
jkylercohn@BKLlawfirm.com
kboehm@bkllawfirm.com
sam@mwncmh.com
fdarr@mwncmh.com
mpritchard@mwncmh.com
werner.margard@puc.state.oh.us
devin.parram@puc.state.oh.us
Katherine.johnson@puc.state.oh.us
tobrien@bricker.com
dborchers@bricker.com
tsiwo@bricker.com
ricks@ohanet.org
Rocco.dascenzo@duke-energy.com
Elizabeth.watts@duke-energy.com
Philip.Sineneng@ThompsonHine.com
haydenm@firstenergycorp.com
jmcdermott@firstenergycorp.com
scasto@firstenergycorp.com
judi.sobecki@aes.com
joseph.clark@directenergy.com
whitt@whitt-sturtevant.com
campbell@whitt-sturtevant.com
williams@whitt-sturtevant.com
BarthRoyer@aol.com
Gary.A.Jeffries@dom.com
vparisi@igsenergy.com
lfriedeman@igsenergy.com
mswhite@igsenergy.com
gpoulos@enernoc.com
mhpetricoff@vorys.com
glpetrucci@vorys.com
myurick@taftlaw.com
zkravitz@taftlaw.com
NMcDaniel@elpc.org
swilliams@nrdc.org
Stephanie.Chmiel@ThompsonHine.com
Stephen.Chriss@walmart.com
tshadick@spilmanlaw.com
dwilliamson@spilmanlaw.com
lhawrot@spilmanlaw.com
tdougherty@theOEC.org
jfinnigan@edf.org
Schmidt@sppgroup.com
cloucas@ohiopartners.org
cmooney@ohiopartners.org
msmalz@ohiopovertylaw.org
plee@oslsa.org
greta.see@puc.state.oh.us
sarah.parrot@puc.state.oh.us

Summary: Memorandum Memorandum Contra Ohio Edison Company, The Cleveland Electric Illuminating Company, And the Toledo Edison Company's Application for Rehearing on Behalf of the OMAEG electronically filed by Mrs. Kimberly W. Bojko on behalf of OMA Energy Group