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FILE

IN THE SUPREME COURT OF OHIO

In re the Application of Ohio Edison)
Company, The Cleveland Electric) Supreme Court Case No. 2017-1664
Illuminating Company, and The Toledo)
Edison Company for Authority to Provide) On Appeal from the Public Utilities
for a Standard Service Offer Pursuant to) Commission of Ohio
R.C. 4928.143 in the Form of an Electric)
Security Plan.) PUCO Case No. 14-1297-EL-SSO

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NOTICE OF APPEAL
BY
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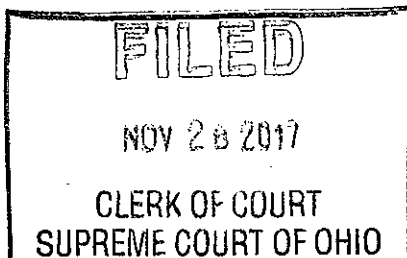
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NOTICE OF APPEAL

Appellant, Northeast Ohio Public Energy Council ("NOPEC"), consistent with R.C. 4903.11 and 4903.13, and S.Ct.Prac.R. 3.11(B)(2), 3.11(D)(2), and 10.02, hereby gives notice to this Court and to the Public Utilities Commission of Ohio ("PUCO") of this appeal from decisions of the PUCO issued in the electric security plan ("ESP") proceedings of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, the "Companies"), Case No. 14-1297-EL-SSO. The decisions being appealed are the PUCO's Opinion and Order entered in its Journal on March 31, 2016 (Attachment A), and the PUCO's Entries on Rehearing entered in the PUCO's Journal on October 12, 2016 (Fifth Entry on Rehearing) and August 16, 2017 (Eighth Entry on Rehearing) (Attachments B and C)¹ in Case No. 14-1297-EL-SSO.

NOPEC was a party of record in the above-referenced PUCO case.

On May 2, 2016, NOPEC filed, in accordance with R.C. 4903.10, an Application for Rehearing from the PUCO's March 31, 2016 Opinion and Order. By Entry dated May 11, 2016, the PUCO granted rehearing (First Entry on Rehearing) to hold further hearing on the Companies' proposed revisions to the ESP and for further consideration of the matters specified in NOPEC's (and numerous other parties') applications for rehearing. After additional hearing, the PUCO issued its Fifth Entry on Rehearing,² entered into its Journal on October 12, 2016. In

¹ Per S.Ct.Prac.R. 10.02(A)(2), the decisions being appealed are attached.

² The PUCO approved FirstEnergy's tariffs implementing the March 31, 2016 Opinion and Order by Finding and Order entered into the PUCO's Journal on May 25, 2016 ("Tariff Order"). The PUCO's Second and Third Entries on Rehearing, Entered into the PUCO's Journal on June 29 and July 6, 2016, addressed other parties' applications for rehearing related to the Tariff Order and other matters. The PUCO's Fourth Entry on Rehearing was entered into its Journal on August 16, 2016, and granted a party's application for rehearing of the Third Entry on rehearing for the purpose of further consideration of the matters raised therein.

its Fifth Entry on Rehearing, the PUCO modified the stipulation among certain parties that was approved in the March 31, 2016 Opinion and Order, and denied NOPEC's first Application for Rehearing.

In accordance with R.C. 4903.10, NOPEC filed its second Application for Rehearing on November 14, 2016 from the PUCO's Fifth Entry on Rehearing. This application for rehearing was limited to the PUCO's new findings pertaining to the Fifth Entry on Rehearing. On December 7, 2016, the PUCO granted rehearing (Sixth Entry on Rehearing)³ for further consideration of the matters specified in NOPEC's second Application for Rehearing. The PUCO denied NOPEC's second Application for Rehearing by its Eighth Entry on Rehearing entered in the PUCO's Journal on August 16, 2017.

The Companies filed an Application for Rehearing of the PUCO's Eighth Entry on Rehearing on September 15, 2017. By its Ninth Entry on Rehearing entered into its Journal on October 11, 2017 the PUCO denied the Companies' application for rehearing (Attachment D). No party filed an application for rehearing of the PUCO's October 11, 2017 Ninth Entry on Rehearing, which was the PUCO's final order in PUCO Case No. 14-1297-EL-SSO.

Appellant files this Notice of Appeal, subsequent to the PUCO's final order in its Ninth Entry on Rehearing, complaining of errors in the PUCO's March 31, 2016 Opinion and Order, and the October 12, 2016 and August 16, 2017 Entries on Rehearing (collectively, the "ESP Orders"). NOPEC alleges that the ESP Orders are unlawful and unreasonable in the following respects, all of which were raised by NOPEC's applications for rehearing:

1. The ESP Orders are unlawful, unreasonable and against the manifest weight of the evidence because the Distribution Modernization Rider ("Rider DMR") does

³ The PUCO's Seventh Entry on Rehearing, entered into the PUCO's Journal on February 1, 2017 denied an application for rehearing that a party took from the PUCO's Sixth Entry on Rehearing.

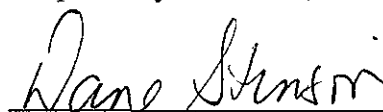
not fall within any of the provisions of R.C. 4928.143(B). *In Re Application of Columbus Southern Power Co., et al.*, 128 Ohio St. 3d 512, 2011-Ohio-1788, 945 N.E.2d 655, ¶¶ 31-35.

- a. The ESP Orders are unreasonable and unlawful because Rider DMR is not a “grid modernization incentive” under R.C. 4928.143(B)(2)(h) (NOPEC second Application for Rehearing at 4-6 (November 14, 2016)).
 - b. The ESP Orders are unreasonable and unlawful because Rider DMR was authorized to provide “credit support” for the benefit of the Companies’ parent company, FirstEnergy Corp; “credit support” is not one of the items that can be included in an ESP under R.C. 4928.143(B) (NOPEC second Application for Rehearing at 3-4 (November 14, 2016)).
 - c. The ESP Orders are unreasonable and unlawful because Rider DMR forces the Companies’ Ohio customers to fix the Companies’ parent company’s, FirstEnergy Corp, credit problems although these credit problems were caused by the Companies’ unregulated affiliate, FirstEnergy Solutions Corp. (NOPEC second Application for Rehearing at 6-7 (November 14, 2016)).
2. The ESP Orders are unlawful, unreasonable and against the manifest weight of the evidence because the Government Directives Rider (“Rider GDR”) does not fall within any of the provisions of R.C. 4928.143(B). *In Re Application of Columbus Southern Power Co., et al.*, 128 Ohio St. 3d 512, 2011-Ohio-1788, 945 N.E.2d 655, ¶¶ 31-35 (NOPEC first Application for Rehearing at 23-24 (May 2, 2016)).
 3. The ESP Orders are unlawful and unreasonable because Rider DMR violates R.C. 4928.02(H) and forces the Companies’ captive distribution customers to pay for the credit problems of the Companies’ unregulated affiliates (NOPEC second Application for Rehearing at 7-8 (November 14, 2016)).
 4. The ESP Orders are unlawful and unreasonable because they authorize the collection of transition, or equivalent, revenues in violation of R.C. 4928.38, et al. (NOPEC second Application for Rehearing at 9-12 (November 14, 2016)).
 5. The ESP Orders are unlawful and unreasonable because they find the Companies’ ESP, on a quantitative basis, is more favorable than the market rate option (“MRO”) available under R.C. 4928.142.
 - a. The ESP Orders failed to quantify Rider GDR (NOPEC first Application for Rehearing at 30-32 (May 2, 2016)).
 - b. The ESP Orders erroneously concluded that revenues equivalent to those collected under Rider DMR also could be collected under an MRO (NOPEC second Application for Rehearing at 12-19 (November 14, 2016)).

6. The ESP Orders are unreasonable, unlawful, and against the manifest weight of the evidence because the stipulation approved does not benefit ratepayers or the public interest, and violates important regulatory principles and practices (NOPEC second Application for Rehearing at 20 (November 14, 2016)).

WHEREFORE, NOPEC respectfully submits that the PUCO's March 31, 2016 Opinion and Order and its two Entries on Rehearing are unreasonable, unlawful and against the manifest weight of the evidence, and should be reversed or modified with instructions to the PUCO to correct the errors complained of herein.

Respectfully submitted,



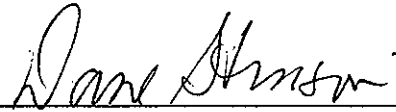
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Notice of Appeal by the Northeast Ohio Public Energy Council* was served upon the Chairman of the Public Utilities Commission of Ohio by leaving a copy at the Office of the Chairman in Columbus and upon all parties of record via electronic transmission this 28th day of November 2017.



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CERTIFICATE OF FILING

I hereby certify that a Notice of Appeal of the Northeast Ohio Public Energy Council was filed with the docketing division of the Public Utilities Commission of Ohio as required by Ohio Adm. Code 4901-1-02(A) and 4901-1-36.

A handwritten signature in black ink, appearing to read "Dane Stinson", is written over a horizontal line.

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Public Energy Council

ATTACHMENT A
PUCO OPINION AND ORDER
(March 31, 2016)

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) Case No. 14-1297-EL-SSO
to Provide for a Standard Service Offer)
Pursuant to R.C. 4928.143 in the Form of)
an Electric Security Plan.)

OPINION AND ORDER

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The Commission, considering the above-entitled application and the record in this proceeding, hereby issues its Opinion and Order in this matter.

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OPINION:

I. INTRODUCTION

It has long been the mission of the Public Utilities Commission of Ohio (PUCO) to ensure consumers are provided electricity in a reliable, cost effective and safe manner. This mission requires the complex task of balancing the interests of Ohio's public utilities companies, other vital businesses, and hard working citizens.

These principles remain the same today, but the challenges confronting electric utilities continue to evolve. Apparent from the participation in this docket, electric utilities, customers, suppliers and many others are concerned about those challenges. They are also interested in the many opportunities to meet them through integrating technology, assuring a diverse mix of resources, and providing the infrastructure and incentives for customers to be engaged in how they consume electricity.

Thousands of pages of testimony, briefs, letters, as well as emails, have been filed with the Commission in this proceeding. Lawyers, expert witnesses, staff, and individuals providing public testimony listened and litigated in hearing rooms at the Commission for countless days. The record before us also contains input from diverse interests, including, but not limited to, customers---residential, commercial and industrial, both large and small---competitive suppliers of retail electric services, and electric generation providers in Ohio and beyond.

Although it bears no weight in the decision of this Commission, we must note that we do not check our sense of the real world at the door. The subject of this proceeding has become part of a larger public dialogue about the provision of electricity service in our state and beyond.

We also note that the Opinion and Order in this proceeding is being released simultaneously with the Opinion and Order in Application of Ohio Power Company, Case Nos. 14-1693-EL-RDR, et al. While these decisions are similar in that they involve retail

rate stability, we emphasize the decisions involve different companies and different types of cases—the current proceeding pertains to an entire electric security plan (ESP) while the other pertains to only a retail rate stability rider. In addition, the cases involve stipulations with different terms and different signatory parties. Consequently, neither the format nor the substance of the decisions is identical.

The role of the Commission is to decide these cases in a manner consistent with the law while balancing many interests. This Opinion and Order describes the positions of numerous parties not only to summarize the complexity of the record, but to demonstrate the depth of stakeholder concern and the myriad of suggestions made to assist the Commission in our decision.

It is against this backdrop that we issue this Opinion and Order.

II. HISTORY OF THE PROCEEDINGS:

Ohio Edison Company (Ohio Edison), The Cleveland Electric Illuminating Company (CEI), and The Toledo Edison Company (Toledo Edison) (collectively, FirstEnergy or the Companies) are electric distribution utilities (EDUs) as defined in R.C. 4928.01(A)(6) and public utilities as defined in R.C. 4905.02 and, as such, are subject to the jurisdiction of this Commission. On August 4, 2014, FirstEnergy filed an application pursuant to R.C. 4928.141, to provide for a standard service offer (SSO) to establish generation pricing for the period of June 1, 2016, through May 31, 2019. The application is for an electric security plan (ESP), in accordance with R.C. 4928.143, and the application includes four stipulations and recommendations agreed to by various parties regarding the terms of the proposed ESP (ESP IV), filed on December 22, 2014, as modified by errata filed on January 21, 2015 (First Stipulation), on May 28, 2015 (Supplemental Stipulation), on June 4, 2015 (Second Supplemental Stipulation), and on December 1, 2015 (Third Supplemental Stipulation) (stipulations, collectively, "Stipulations"; application and stipulations collectively, "Stipulated ESP IV"). In the Stipulations, FirstEnergy represents that it and numerous other parties engaged in a wide range of discussions over a period of time related to the development of the Stipulated ESP IV. The Companies' three prior ESPs were approved in Case Nos. 12-1230-EL-SSO (*ESP III Case*), 10-388-EL-SSO (*ESP II Case*), and 08-935-EL-SSO (*ESP I Case*).

By Entry issued August 13, 2014, the attorney examiner established a procedural schedule, pursuant to which a technical conference was held on August 27, 2014. Thereafter, the evidentiary hearing was scheduled and rescheduled multiple times, and was finally set to commence on August 31, 2015.

On December 1, 2014, the attorney examiner granted motions to intervene filed by Ohio Energy Group (OEG); Industrial Energy Users-Ohio (IEU-Ohio); Ohio Power

Company (AEP Ohio); Ohio Partners for Affordable Energy (OPAE); Ohio Consumers' Counsel (OCC); Sierra Club; Direct Energy Services, LLC, Direct Energy Business, LLC, and Direct Energy Business Marketing, LLC (collectively, Direct Energy); Interstate Gas Supply, Inc. (IGS); the Kroger Company (Kroger); The Energy Professionals of Ohio (EPO); Ohio Hospital Association (OHA); Ohio Manufacturers' Association Energy Group (OMAEG); Nucor Steel Marion, Inc. (Nucor); The Cleveland Municipal School District (CMSD); Material Sciences Corporation (MSC); Association of Independent Colleges and Universities of Ohio (AICUO); Wal-Mart Stores East, LP, and Sam's East, Inc. (jointly, Wal-Mart); the city of Cleveland (Cleveland); The Consumer Protection Association, the Cleveland Housing Network, and The Council for Economic Opportunities in Greater Cleveland (collectively, Citizens Coalition); Dynegy, Inc. (Dynegy); Environmental Law and Policy Center (ELPC), Ohio Environmental Council, and Environmental Defense Fund (collectively, Environmental Groups); the Northwest Ohio Aggregation Coalition and its individual communities, the city of Toledo, the Lucas County Board of Commissioners, the city of Northwood, the city of Sylvania, the city of Maumee, the village of Waterville, the village of Holland, the village of Ottawa Hills, and the Lake Township Board of Trustees (collectively, NOAC); International Brotherhood of Electrical Workers Local 245 (IBEW 245); Council of Smaller Enterprises (COSE); Mid-Atlantic Renewable Energy Coalition (MAREC); Northeast Ohio Public Energy Council (NOPEC); NextEra Power Marketing, LLC (NextEra); city of Akron; Ohio Schools Council (OSC); Monitoring Analytics, LLC (IMM); Ohio Advanced Energy Economy (OAE); PJM Power Providers Group and Electric Power Supply Association (jointly, P3/EPSC); Retail Energy Supply Association (RESA); EnerNOC, Inc. (EnerNOC); Ohio School Boards Association, Buckeye Association of School Administrators, Ohio Schools Council, and Ohio Association of School Business Officials (collectively, Power4Schools); Exelon Generation Company, LLC, and Constellation NewEnergy, Inc. (jointly, Exelon); and Hardin Wind, LLC, Champaign Wind, LLC, and Buckeye Wind, LLC (collectively, Wind Farms). Thereafter, on December 2, 2014, the attorney examiner granted a motion to intervene filed by Duke Energy Ohio (Duke). Additionally, at a pretrial conference held on March 31, 2015, the attorney examiner verbally granted a motion to intervene filed by CPV Shore, LLC (CPV).

Motions for admission *pro hac vice* were granted regarding Garret Stone, Owen Kopon, Michael Lavanga, Madeline Fleisher, Jeffrey Mayes, Tony Mendoza, Michael Soules, Shannon Fisk, Derrick Price Williamson, Robert Kelter, Kristin Henry, Richard Lehfelddt, Carrie Harris, Todd Williams, and David Rinebolt.

The initial portion of the hearing commenced, as rescheduled, on August 31, 2015, and continued through October 29, 2015. Fifty-seven witnesses testified at the initial portion of the hearing, with seventeen testifying in favor of the first three stipulations, and the remainder testifying in opposition to the first three stipulations or certain provisions therein. Six witnesses testified on rebuttal in the initial hearing. The attorney examiner established a briefing schedule requiring initial briefs by November 30, 2015, and reply

briefs by December 22, 2015. Thereafter, on November 19, 2015, the attorney examiner granted Staff's motion to extend the briefing schedule, requiring initial briefs by December 30, 2015, and reply briefs by January 22, 2016.

Subsequently, on December 1, 2015, the Companies, along with several other parties, filed the Third Supplemental Stipulation, along with additional testimony. Thereafter, multiple parties filed motions to reopen the hearing and/or establish a procedural schedule.

Accordingly, on December 9, 2015, the attorney examiner found that an additional hearing should be held regarding the Third Supplemental Stipulation and set an additional procedural schedule, including scheduling the evidentiary hearing to recommence on January 14, 2016. Further, the attorney examiner vacated the existing briefing schedule.

On December 29, 2015, PJM Interconnection, LLC (PJM) filed a motion for limited intervention, noting the need for clarification regarding Paragraph V(B)(3)(a) of the Third Supplemental Stipulation, which discusses the compliance reviews of actions taken by FirstEnergy when selling generation output into the PJM market and whether those actions were reasonable. PJM argued that such clarification was needed in order to ensure that FirstEnergy's actions in bidding the affected units into the PJM market is undertaken in a manner to support a competitive wholesale market and the development of new generation. PJM contended that its request satisfied the requirement of "extraordinary circumstances" and also argued that because it administers the wholesale market and FirstEnergy's tariffs to bid into the market, no other party could adequately protect its interest. On January 4, 2016, FirstEnergy filed a memorandum contra PJM's motion for limited intervention, arguing that the time for intervention had passed and PJM was attempting to circumvent the scope of the Third Supplemental Stipulation, as well as the jurisdiction of the Commission. FirstEnergy also contended that any concerns raised by PJM could sufficiently be represented by IMM. By Entry issued January 13, 2016, the attorney examiner *denied PJM's motion for limited intervention, stating that PJM failed to provide any extraordinary circumstances warranting such an untimely intervention and PJM's concerns would be adequately addressed by IMM or other parties to this proceeding.* However, the attorney examiner invited PJM to file an amicus brief as a non-party for the limited purpose of addressing the concerns raised in its motion for limited intervention, noting that PJM has historically been very informative on matters involving its reliability, transmission planning, and market operation functions.

The second portion of the hearing commenced, as scheduled, on January 14, 2016, and continued through January 22, 2016. Twelve witnesses testified at the second portion of the hearing, with one testifying in favor of the Third Supplemental Stipulation and the remainder testifying in opposition to the Third Supplemental Stipulation or provisions

therein. The attorney examiner established a briefing schedule requiring initial briefs by February 12, 2016, and reply briefs by February 22, 2016.

Initial briefs were filed by MSC; Nucor; Staff; Cleveland; Sierra Club; Wal-Mart; PJM; IMM; RESA; Exelon; IGS; Kroger; Dynegy; CMSD; FirstEnergy; P3/EPSCo, jointly; OHA; OEG; Power4Schools; NOPEC; Environmental Groups; OCC/NOAC, jointly; and OMAEG. Additionally, an initial brief and motion for leave to file an amicus curiae brief was filed by Oregon Clean Energy, LLC (Oregon). FirstEnergy filed a memorandum contra the motion for leave to file an amicus brief on February 23, 2016. Reply briefs were filed by MSC; Nucor; Staff; Sierra Club; IMM; RESA; Exelon; IGS; Dynegy; CMSD; FirstEnergy; P3/EPSCo, jointly; OEG; NOPEC; Environmental Groups; OCC/NOAC, jointly; OMAEG; Citizens Coalition; and Noble Americas Energy Solutions LLC (Noble Solutions).

On February 26, 2016, FirstEnergy filed motions to strike portions of the initial briefs filed by OCC/NOAC, OMAEG, PJM, NOPEC, and RESA. Further, on March 4, 2016, FirstEnergy filed motions to strike portions of the reply briefs filed by OCC/NOAC, OMAEG, NOPEC, Exelon, and Noble Solutions. On March 7, 2016, RESA filed a memorandum contra FirstEnergy's motion to strike portions of its initial brief. Thereafter, on March 11, 2016, PJM filed a memorandum contra FirstEnergy's motion to strike its initial brief. Additionally, on March 14, 2016, NOPEC, OCC/NOAC, and OMAEG all filed memoranda contra FirstEnergy's motions to strike their initial briefs. On March 17, 2016, Exelon filed a memorandum contra FirstEnergy's motion to strike its reply brief. On March 18, 2016, FirstEnergy filed replies in support of its motions to strike the initial briefs of NOPEC, OCC/NOAC, OMAEG, and PJM. Also, on March 18, 2016, OMAEG filed a memorandum contra FirstEnergy's motion to strike its reply brief. Thereafter, on March 21, 2016, OCC filed a memorandum contra FirstEnergy's motion to strike its reply brief. Finally, on March 24, 2016, FirstEnergy filed replies in support of its motions to strike the reply briefs of OMAEG, OCC, and Exelon. Also on March 24, 2016, Noble Solutions filed an untimely memorandum contra FirstEnergy's motion to strike its reply brief.

A large number of public comments were filed in the docket of this case. The vast majority opposed the proposed ESP IV; however, a significant number filed by government entities, employees of Davis-Besse and Sammis, and FirstEnergy suppliers supported the proposed ESP IV.

III. DISCUSSION:

A. Applicable Law

R.C. Chapter 4928 provides an integrated system of regulation in which specific provisions were designed to advance state policies of ensuring access to adequate, reliable, and reasonably priced electric service in the context of significant economic and

environmental challenges. In considering these cases, the Commission is cognizant of the challenges facing Ohioans and the electric power industry and is guided by the policies of the state as established by the General Assembly in R.C. 4928.02, as amended by Am.Sub.S.B. 221 (S.B. 221).

In addition, S.B. 221 amended R.C. 4928.14, which provides that, beginning January 1, 2009, electric utilities must provide customers with an SSO, consisting of either a market rate offer (MRO) or an ESP. The SSO is to serve as the electric utility's default service. R.C. 4928.143 sets forth the requirements for an ESP. Additionally, R.C. 4928.143(C)(1) provides that the Commission is required to determine whether the ESP, including its pricing and all other terms and conditions, including deferrals and future recovery of the same, is more favorable in the aggregate as compared to the expected results that would otherwise apply under R.C. 4928.142.

B. Summary of the Application

The major components of FirstEnergy's application, as filed, entitled "Powering Ohio's Progress", include the following: (1) a continued freeze of base distribution rates through the end of the proposed ESP IV; (2) continuation of supply to non-shopping customers of generation through a competitive bid process (CBP) using a ladder approach to smooth generation prices and mitigate rising retail rates; (3) continuation of customers' options to shop for competitive retail electric suppliers; (4) provision of funds for economic development, energy efficiency, and low-income customers; (5) continued investment in the Companies' delivery system; and (6) implementation of an Economic Stability Program, which the Companies contend will help safeguard customers from volatility and retail price increases. (Co. Ex. 1 at 2-3.) The application expounds the benefits of the plan to the public interest; specifically, that the plan will keep Ohio strong by providing a safety net against retail volatility and market price increases, while enhancing reliability, protecting jobs, and promoting the state's economic growth and development.

The Economic Stability Plan requests approval of a nonbypassable rider, the Retail Rate Stability Rider (Rider RRS), which the Companies assert is designed to help stabilize pricing for all retail customers. The Economic Stability Program contemplates the Companies acquiring generation output of specified generation plants through a purchased power transaction with FirstEnergy Solutions (FES). The plants proposed to be included in the purchased power transaction include Davis-Besse Nuclear Power Station (Davis-Besse), the W.H. Sammis Plant (Sammis) (collectively, "Plants"), and FES' entitlement to the output of the Ohio Valley Electric Corporation (OVEC). The acquired generation will then be sold into the PJM Interconnection LLC (PJM) markets. Thereafter, costs and revenues will be netted, and the resulting cost or credit will be included in proposed Rider RRS, which will be applicable to all customers, both shopping and non-

shopping, as the rider is nonbypassable. FirstEnergy asserts that, as market prices increase over the long term or periods of volatility occur, market revenues are projected to exceed costs. Thus, during these periods, FirstEnergy contends that customers would receive a Rider RRS credit that would offset higher prices. (Co. Ex. 1 at 9; Co. Ex. 33 at 3.)

C. Summary of the Stipulations

In this proceeding, four stipulations were submitted by multiple parties. According to the Stipulations, the signatory parties agree to and recommend that the Commission approve and adopt all terms and conditions contained within the Stipulations. Below is a summary of the provisions agreed to by the stipulating parties, which is not inclusive of all provisions in the Stipulations and is not intended to replace or supersede the Stipulations.

1. First Stipulation

The First Stipulation includes, among other things, the following provisions:

- (1) The Economic Load Response Program Rider (Rider ELR)¹ will renew June 1, 2016, and shall expire May 31, 2019, with participation limited to customers taking service under Rider ELR during the ESP III, and up to 75,000 kW of additional curtailable load for customers who have historically been eligible for Rider ELR. The Interruptible Credit Provision Economic Development Rider² (Rider EDR(b)) will continue during the ESP IV and expire May 31, 2019. Rider ELR will be available to shopping and non-shopping customers. The Automaker Credit Provision (Rider EDR(h)) and Automaker Charge Provision (Rider EDR(i)) will continue during the ESP IV and expire May 31, 2019. The General Service - Transmission (Rate GT) Provision will be modified to be \$8.00; \$6.00; and \$4.00 per kVA of billing demand from June 1, 2016, through May 31, 2017; June 1, 2017, through May 31, 2018; and June 1, 2018, through May 31, 2019, respectively, with all

¹ Rider ELR is available for customers who will be obligated to designate a contract firm load, and then be subject to interruption or required to buy power at market prices during a buy-through period.

² Rider EDR contains nine provisions including a residential non-standard credit provision, an interruptible credit provision, a non-residential provision, a general service transmission provision, a standard charge provision, a school credit provision, an infrastructure improvement provision, an automaker credit provision, and an automaker charge provision.

dollars to be returned to Rate GT customers via the Rider EDR(d) credit. (Co. Ex. 2 at 7-9.)

- (2) The Generation Cost Reconciliation Rider (Rider GCR)³ will shift recovery through a nonbypassable charge if the balance of Rider GCR exceeds 10 percent of the projected generation expense in two consecutive quarters (Co. Ex. 2 at 9).
- (3) The Delta Revenue Recovery Rider (Rider DRR)⁴ will be modified to provide that costs recovered will be allocated to rate schedules based on a percentage of base distribution charges under the Companies' distribution schedules (Co. Ex. 2 at 9-10).
- (4) Rider RRS rate for GS, GP, GSU, and GT customers will be based on billing demand. The Rider RRS rate for residential and lighting schedules will be a kWh charge (Co. Ex. 2 at 10).
- (5) The Time-of-Day Option under the Generation Service Rider (Rider GEN)⁵ will continue during ESP IV (Co. Ex. 2 at 10).
- (6) The Companies will provide funding to the city of Akron to achieve its energy efficiency and sustainability goals to be used only for the benefit of Ohio Edison customers in Akron in the amount of \$100,000 each year for the first three years of the ESP, with amounts recovered through the Demand Side Management and Energy Efficiency Rider (Rider DSE)⁶ (Co. Ex. 2 at 10).
- (7) The Companies will contribute \$170,000; \$25,000; \$25,000; and \$20,000 (unrestricted payment) in 2016, 2017, 2018, and 2019, respectively, to COSE's Ohio Efficiency Resource Program to encourage the advancement of energy efficiency for COSE members, with amounts recovered through Rider DSE. The

³ Rider GCR recovers the generation cost difference that the Companies pay suppliers as compared to the costs recovered from customers.

⁴ Rider DRR is a nonbypassable rider that recovers the difference in revenue from the application of rates in the otherwise applicable rate schedule and the result of any reasonable arrangement, governmental special contract, or unique arrangement approved by the Commission.

⁵ Rider GEN is a bypassable rider that recovers generation charges including energy and capacity obtained through the CBP.

⁶ Rider DSE recovers costs incurred by the Companies associated with energy efficiency, peak demand reduction, and demand side management programs.

COSE unrestricted payment will serve as "seed money" to provide upfront loans to members of COSE to invest in energy efficiency projects. Additionally, the Companies will pay up to \$1,000,000 in administrator compensation during the term of the ESP IV, to be paid out in project-specific installments, upon COSE submitting a mercantile or utility-sponsored commercial and industrial application and receiving Commission approval for specific projects (restricted payment). The restricted payment will be equal to the amounts for administrator compensation approved by the Commission in Case No. 09-553-EL-EEC. The energy savings and peak demand reductions from COSE's Ohio efficiency resource program will be committed to and counted toward the Companies' statutory requirements. All costs the Companies incur associated with the program, including the unrestricted and restricted payments, shall be recovered through Rider DSE. Further, the Companies agree to partner with COSE to bring greater awareness to this program. (Co. Ex. 2 at 10-11.)

- (8) The Companies commit to perform 58, 100, 100, and 42 American Society of Heating, Refrigerating, and Air-Conditioning Engineers (ASHRAE) Level II Energy Efficiency Audits for commercial and industrial customers in 2016, 2017, 2018, and 2019, respectively. COSE shall designate the commercial and industrial COSE members located in the Companies' service territory eligible for the audits and identify facilities where audits should be conducted. All costs the Companies incur to conduct the audits shall be recovered through Rider DSE. (Co. Ex. 2 at 11-12.)
- (9) The Companies will contribute \$50,000 each year for 2016, 2017, 2018, and 2019, to encourage the advancement and education of energy efficiency for members of AICUO (unrestricted payment). Further, the Companies will pay up to \$1,000,000 in administrator compensation during the term of the ESP IV, to be paid out in project-specific installments, upon AICUO submitting a mercantile or utility-sponsored commercial and industrial application and receiving Commission approval for specific projects (restricted payment). The restricted payment will be equal to the amounts for administrator compensation approved by the Commission in Case No. 09-553-EL-EEC. The energy savings and peak demand reductions from AICUO's Ohio efficiency resource

program will be committed to and counted toward the Companies' statutory requirements. All costs the Companies incur associated with the program, including the unrestricted and restricted payments, will be recovered through Rider DSE. Further, the Companies agree to partner with AICUO to bring greater awareness to the program. (Co. Ex. 2 at 12.)

- (10) The energy efficiency/demand response programs recommended by the stipulating parties are intended for inclusion in the Companies' amended portfolio plan pursuant to Case No. 12-2190-EL-POR (Co. Ex. 2 at 13).
- (11) The Companies commit to assisting low-income customers in the CEI service territory by continuing a fuel fund in the amount of \$1,390,000 to be spent in each calendar year from 2017 through 2019, with Citizens' Coalition to receive \$463,333 per year, with \$46,300 used to administer the fuel fund and \$417,033 used for low-income funding. Such fuel fund shall be available only to distribution customers of CEI. As a condition of receiving the funds, any organization receiving funds from the Companies shall provide the Companies and the Commission's Staff with an annual accounting of how the dollars were disbursed and will agree to an audit of those dollars if requested by the Companies or the Commission's Staff. If the Stipulation is rejected or modified due to court or regulatory action and terminated by the Companies, the Companies will have no obligation to continue the fuel fund for periods after the termination date. (Co. Ex. 2 at 13-14.)
- (12) The Companies will contribute \$1,000,000 in each year from 2017 through 2019 to the Citizens Coalition for use in establishing a Customer Advisory Agency, for additional CEI fuel fund program funding, or for energy efficiency in the CEI territory. The Customer Advisory Agency will be a pilot program that will be evaluated at the end of the ESP IV term. (Co. Ex. 2 at 14.)
- (13) MSC agrees that Toledo Edison will collect a charge of \$4.00 per kVa of billing demand under Rider EDR(d), Rate GT Provision, for service June 1, 2016, through May 31, 2019 (Co. Ex. 2 at 14-15).

- (14) The administrator for the Community Connections program, which will be continued under the ESP IV, will be selected by the Companies (Co. Ex. 2 at 15).
- (15) If the Stipulation is inconsistent with the Commission's rules, the Signatory Parties request waivers of those rules to the extent the Commission deems necessary to approve and implement this Stipulation (Co. Ex. 2 at 15).

2. Supplemental Stipulation

The Supplemental Stipulation includes, among other things, the following provisions:

- (1) Rider ELR will renew for service rendered June 1, 2016, and shall expire with service rendered May 31, 2019, with the following modifications: (1) participation is voluntary and limited to customers taking service under Rider ELR during the ESP III, and up to 136,250 kW of additional curtailable load for customers who have historically been eligible for Rider ELR, with no participant exceeding the historical curtailable load cap; (2) the aggregate curtailable load cap of new Rider ELR customers that have provided the Companies written notice of intent to participate in the program on or before May 31, 2015, shall not exceed 136,250 kW. The curtailable load cap of new customers that have provided notice to participate on or before May 1, 2015, shall be approved. The curtailable load cap of new customers that provide notice to participate after May 1, 2015, but on or before May 31, 2015, will be approved to participate in Rider ELR on a pro rata basis so that the aggregate total curtailable load of all such new Rider ELR customers does not exceed 136,250 kW; and (3) the interruptible credit provisions will continue during ESP IV and expire on May 31, 2019. The Rider ELR credit will be \$5.00 per kW per month by unit of curtailable load. This credit will be recovered through the DSE 1 component of Rider DSE. The Rider EDR(b) credit will be \$5.00 per kW per month by unit of curtailable load as defined in Rider ELR. The Rider EDR(b) credit will be recovered in Rider EDR(c) in the same manner as was recovered in the ESP III. (Co. Ex. 3 at 2-3.)
- (2) The Companies will deploy a small-scale pilot program offering an alternative means for customers to obtain and pay

for services through the Non-Market-Based Services Rider (Rider NMB).⁷ The purpose of the program is to explore whether certain customers could benefit from opting out of the Companies' Rider NMB and obtaining all transmission and ancillary services through the Open Access Transmission Tariff and other PJM governing documents approved by the Federal Energy Regulatory Commission (FERC), in effect from time to time, as modified by FERC, and applicable to the zone in which the end user is located or whether the administrative burden to the Companies, and the cost and risk to the customer, would render this option impractical. The pilot program is limited to IEU-Ohio, OEG, Nucor, and MSC. (Co. Ex. 3 at 3-4.)

3. Second Supplemental Stipulation

The Second Supplemental Stipulation includes the following provision:

- (1) The Companies agree to deploy a Commercial High Load Factor Experimental Time-of-Use (HLF/TOU) rate proposal for commercial customers with headquarters located in Ohio, with at least 30 facilities in the Companies' combined service territory, with each facility consuming at least 1.5 GWh annually, having refrigeration as a major portion of the load, and with interval metering at each individual facility. Further, participating customers must have an average monthly load factor during the preceding twelve months of seventy percent or higher, and must otherwise be served under the Companies' GS or GP rate schedules. The Commercial HLF/TOU rate proposal will give the Companies' commercial customers an opportunity to determine whether TOU rates could reduce their overall energy bills. Once a facility qualifies for the Commercial HLF/TOU rate and is enrolled in the rate, that facility may remain on that rate notwithstanding any subsequent change in the load characteristics of the facility or reduction in energy consumption by the facility. (Co. Ex. 4 at 1-2.)

⁷ Rider NMB is a nonbypassable rider designed to recover non-market-based transmission-related costs, such as Network Integration Transmission Service charges, which are charged to the Companies by the Federal Energy Regulatory Commission or PJM Interconnection, LLC.

4. Third Supplemental Stipulation

The Third Supplemental Stipulation includes, among other things, the following provisions:

- (1) The Companies agree to modify the proposed three-year term of the ESP IV to an eight-year term commencing June 1, 2016, and concluding May 31, 2024 (Co. Ex. 154 at 7).
- (2) The Companies agree to modify the term of Rider RRS from the proposed fifteen-year term to an eight-year term commencing June 1, 2016, and concluding May 31, 2024. Rider RRS is limited to the eight-year term of the Companies' ESP IV with a sunset day of May 31, 2024 (subject to reconciliation). The Companies agree that the Commission may proceed to terminate the specific charge/credit of Rider RRS for any generation unit upon its sale or transfer pursuant to R.C. 4905.26. (Co. Ex. 154 at 7.)
- (3) Notwithstanding the payments of credits by the Companies in the first four years of the ESP IV, the Companies agree that customers shall receive a credit from Rider RRS in the fifth year of the ESP IV of \$10 million in the aggregate. The Companies' commitment to provide customer credits under Rider RRS shall then be increased by \$10 million each additional year through the remainder of the ESP IV (Co. Ex. 154 at 7-8).
- (4) The Companies agree to review of Rider RRS, including:
 - (a) Rigorous review of Rider RRS including an annual compliance review before the Commission to ensure that actions taken by the Companies in selling the output from generation units included in Rider RRS into the PJM market were not unreasonable. The Companies, not their customers, would be responsible for the adjustments made to Rider RRS based on actions deemed unreasonable by the Commission, including any costs (after proper consideration of such costs and netting of any bonus payments) associated with performance requirements in PJM's markets. Any determination that the costs and revenues included in Rider RRS are unreasonable shall be made in light of the facts and circumstances known at the time such costs were committed and market revenues were received. In

addition, the calculation of Rider RRS will be based on the sale of power into PJM;

- (b) Full information sharing of FES' fleet information on any cost component pursuant to reasonable Staff requests (as determined by the Commission) as it conducts a reasonableness review of a specific cost component for the generation units included in the Economic Stability Program. Staff shall treat any and all such information, regardless of its content, as if it is highly sensitive, proprietary, trade secret information, and Critical Energy Infrastructure Information. In addition, such information shall not be subject to a public information request and shall be protected indefinitely;
- (c) Severability provision in the event a court of competent jurisdiction invalidates Rider RRS, in whole or in part. In such an event, the Companies will permit any part of the Stipulated ESP IV that has not been invalidated to continue while a good faith effort is made by the Signatory Parties to restore the invalidated provision to its equivalent value. The Signatory Parties will work in good faith to cure any court-determined deficiency and the Companies will then file modified Rider RRS for expedited approval. The Companies' agreement to permit the stipulated provisions to go into effect in this manner is contingent upon the Signatory Parties supporting the modified Rider RRS or its successor provision. A Signatory Party may choose to oppose and express any concerns with the modified Rider RRS, or its successor provision, to the Commission; however, if such concerns are not accepted by the Commission, then any Signatory Party that opposed the modified Rider RRS, or its successor provisions, will forfeit its stipulated provisions. This commitment on severability is not intended and shall not be construed to affect the prohibition against retroactive ratemaking. No amounts collected shall be refunded as a result of the severability provision.

(Co. Ex. 154 at 8-9.)

- (5) Through May 31, 2024, the Companies agree to engage in federal advocacy, including to advocate in good faith for market enhancements such as a longer-term capacity product, and any other market improvements. Before making any such filing, the Companies will inform Staff of their position and the rationale behind it. Beginning June 1, 2016, and continuing through May 31, 2024, the Companies shall provide public, quarterly updates to the Commission on the state of wholesale electricity markets from the Companies' perspective. Further, in the event PJM has not obtained approval for a longer-term capacity product by September 2017, the Commission will solicit comments from interested parties no later than October 30, 2017, addressing the state's long-term resource adequacy needs (Co. Ex. 154 at 9).
- (6) The Companies agree to undertake grid modernization initiatives that promote customer choice in Ohio, for example, Advanced Metering Infrastructure, Distribution Automation Circuit Reconfiguration (DACR), Voltage/Voltage-Ampere Reactive (Volt/VAR), working with Staff to attempt to remove any barriers for distributed generation, and consulting with Staff on net-metering tariffs. Further, the Companies agree to, within 90 days of the filing of the Third Supplemental Stipulation, file a grid modernization business plan with the Commission that highlights future initiatives for Commission consideration. The Companies agree that: (1) the plan will include a timeline for the Companies to achieve full smart meter implementation with data capabilities and capable of transferability, and a decoupling mechanism; (2) the plan will address the examples set forth above; (3) the plan will include a provision that the data would be customer-owned and that it would be made available to competitive suppliers and third parties certified by the Commission upon written authorization from the customer; and (4) the plan will identify opportunities to leverage smart meter related investments being made in Pennsylvania that could benefit smart meter implementation in Ohio. Additionally, if the Commission approves any portion of the grid modernization business plan, the Signatory Parties agree that the Companies' recovery shall be through a rider, which shall be based on a forward-looking formula rate concept that would be subsequently reconciled for actual costs compared to forecasted costs and for actual revenue received compared to revenue forecasted to be recovered. The return on

equity shall be initially set at 10.38 percent (following the American Transmission Systems, Inc. (ATSI) ROE as that may be adjusted in the future), with an additional 50 basis point adder, the cost of debt will be set at the embedded long-term cost of debt in existence at the time the rider is updated, and the capital structure in existence at the time the rider is updated. All costs incurred will be recovered in Rider AML, which will be updated and reconciled on a quarterly basis and will remain in effect until such costs are fully recovered. Any operational savings that are produced by the investment and accrue to the Companies, such as reduced meter reading expense, will be credited against the costs during the quarterly update and reconciliation process. Further, the Companies will provide semi-annual updates to the Commission on progress regarding the same. (Co. Ex. 154 at 9-10.)

- (7) For the period of June 1, 2016, through May 31, 2024, the Companies agree not to request a waiver of Ohio Adm.Code 4901:1-18-06(A)(2), regarding providing customers with personal notice on the day of disconnection of service for nonpayment (Co. Ex. 154 at 10).
- (8) The Companies agree to implement the following mechanisms and programs to promote future resource diversity:
 - (a) FirstEnergy Corp. will establish a goal to reduce CO₂ emissions by at least 90 percent below 2005 levels by 2045, regardless of whether the EPA's recently finalized Clean Power Plan is overturned by court order. The Companies agree to report to the Commission every five years until 2045;
 - (b) The Companies will evaluate investing in battery resources contingent on Commission approval that all investments for such resources shall be rate-based and included in the stipulated recovery mechanism;
 - (c) The Companies will undertake comprehensive energy efficiency offerings including reactivation in 2017 of all programs suspended in Case No. 12-2190-EL-POR; a goal to achieve over 800,000 MWh of energy efficiency savings annually; inclusion in the next energy efficiency/peak-demand reduction (EE/PDR) portfolio

plan of a customer engagement pilot program to be implemented with EnerNOC to assist commercial and industrial customers in making smart energy choices through customized, timely, and targeted content and recommended actions specific to their businesses, with recovery of all associated costs through Rider DSE;

- (d) 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;
- (e) By November 1, 2016, the Companies will file a report with the Commission highlighting the Companies' strategy regarding promoting fuel diversification and carbon reduction, recognizing that renewable resources, energy efficiency, other advanced resources, including batteries, and existing or proposed legislation or regulation may play a role in such strategy and cause it to alter over time. The Companies agree to file a report with the Commission regarding progress of such initiatives every five years until 2045.

(Co. Ex. 154 at 11-12.)

- (9) The Companies agree to file a case before the Commission by April 3, 2017, to transition to *straight-fixed-variable* (SFV) cost recovery for residential customers' base distribution rates, with a three-year phase-in, and cost-recovery based on an allocation of 75 percent fixed costs and 25 percent variable costs. The phase-in will occur as follows: (1) Year 1: 25 percent fixed costs and 75 percent variable costs; (2) Year 2: 50 percent fixed costs and 50 percent variable costs; and (3) Year 3: 75 percent fixed costs and 25 percent variable costs. Additionally, lost-distribution revenue shall continue to be recovered up to the time any decoupling mechanism is implemented and the Companies agree to be cognizant of the principle of gradualism and the effect of decoupling on various usage levels. (Co. Ex. 154 at 12-13.)

- (10) The Signatory Parties agree that no proceeding shall commence whereby an adjustment to the base distribution rates of the Companies would go into effect prior to June 1, 2024, except in the case of an emergency pursuant to R.C. 4909.16. The Companies would not be precluded during this period from implementing changes in rate design that are designed to be revenue neutral, eliminate subsidies, or for any new service offering, as approved by the Commission. Notwithstanding the aforementioned commitment, the Companies are also not precluded with Staff agreement to file for a base distribution rate case that would go into effect prior to June 1, 2024. (Co Ex. 154 at 13.)
- (11) The revenue caps for the Delivery Capital Recovery Rider (Rider DCR)⁸ will increase annually to \$30 million for the period of June 1, 2016, through May 31, 2019; \$20 million for the period of June 1, 2019, through May 31, 2022; and \$15 million for the period of June 1, 2022, through May 31, 2024. Further, the audit schedule set forth in the Application shall be amended to provide audits for the entire term of the Stipulated ESP IV, and the amended language shall read: "The independent auditor shall be selected by Staff. The audit shall include a review to confirm that the amounts for which recovery is sought are not unreasonable and will be conducted following the Companies' December 31 filing during the term of the Companies' ESP IV, and one final audit following the Companies' final June 30 reconciliation filing." (Co. Ex. 154 at 13.)
- (12) Retail generation rates will be determined pursuant to the results of a descending-clock format CBP for the period of June 1, 2016, until May 31, 2024. Procurements will be "laddered in" at various times in order to help smooth out market prices for customers over the eight-year term of the Stipulated ESP IV. The schedule provides for a mix of one-, two-, and three-year products. The Companies' percentage of income payment plan (PIPP) load will be served in compliance with R.C. 4928.54. (Co. Ex. 154 at 13-14.)

⁸ Rider DCR allows the Companies to earn a return of and on plant-in-service associated with distribution, transmission, general, and intangible plant, which was not included in the rate base from the Companies' last distribution rate case.

- (13) The proposed rate design changes with respect to the renewal of Rider ELR in the Supplemental Stipulation will begin with service rendered June 1, 2016, and shall expire with service rendered May 31, 2024. Along with the renewal of Rider ELR for the eight-year term, the Interruptible Credit Provisions (Riders ELR and EDR(b)) will continue during the Stipulated ESP IV. The Rider ELR credit will be recovered through the DSE 1 component of Rider DSE, and the Rider EDR(b) credit will be recovered in Rider EDR(e), in the same manner as was recovered in ESP III. The Companies agree to work in good faith with their Rider ELR customers to develop terms and conditions of interruptible service that comply with necessary PJM requirements that may change from time to time. Additionally, with respect to provisions associated with the renewal of Rider ELR that expire on May 31, 2024, the Stipulated ESP IV does not preclude any Signatory Party from arguing for an extension of that provision in the Companies' next ESP. (Co. Ex. 154 at 14.)
- (14) The Automaker Credit and Charge Provisions (Rider EDR(h) and (i)) will continue during the Stipulated ESP IV and expire on May 31, 2024, subject to final reconciliation (Co. Ex. 154 at 14).
- (15) The General Service - Transmission (Rate GT) Provision (Rider EDR(d)) will be modified to be \$8.00, \$6.00, and \$4.00 per kVA of billing demand for June 1, 2016, through May 31, 2017; June 1, 2017, through May 31, 2018; and June 1, 2018, through May 31, 2019, respectively, with no charge or credit effective June 1, 2019. There will be no charge or credit effective June 1, 2019, subject to final reconciliation. (Co. Ex. 154 at 14-15).
- (16) The Commercial HLF/TOU proposal will continue through May 31, 2024. Additionally, the Companies will continue to offer the experimental Critical Peak Pricing Rider and experimental Real Time Pricing Rider for the duration of the ESP IV. (Co. Ex. 154 at 15.)
- (17) The contribution to COSE shall be modified to be \$170,000; \$25,000; \$25,000; and \$20,000, in 2016, 2017, 2018, and 2019, respectively, and \$60,000 per year in 2020 through 2024, with such amounts recovered through Rider DSE from June 1, 2016, through May 31, 2019 (Co. Ex. 154 at 15).

- (18) The number of ASHRAE Level II energy efficiency audits for C&I customers is modified to be 58 in 2016, 100 per year in 2017 through 2023, and 42 in 2024. All costs the Companies incur to conduct the audits shall be recovered through Rider DSE. (Co. Ex. 154 at 15.)
- (19) The contribution to AICUO shall be modified to be \$50,000 per year for the eight-year ESP IV period, commencing in 2016, with such amounts to be recovered through Rider DSE from June 1, 2016, through May 31, 2019 (Co. Ex. 154 at 15).
- (20) COSE and AICUO shall work in good faith with the Companies to track the benefits to ratepayers, which may include jobs created, retained, and impacted and energy efficiency and/or demand response savings. For the period of June 1, 2019, through May 31, 2024, the Companies may seek approval to recover costs associated with the demonstrated savings achieved, and such approval shall not be unreasonably withheld (Co. Ex. 154 at 15).
- (21) The funding of the CEI fuel fund to assist low-income customers shall be continued consisting of \$1,390,000 to be spent in each calendar year from 2017 through 2024. Any unspent funds from the annual fuel fund provided herein will be carried over through the following calendar year but must be spent prior to June 1, 2024. (Co. Ex. 154 at 15.)
- (22) The contribution by the Companies to the Citizens' Coalition is modified to be \$1,000,000 per year for the eight-year ESP IV period, commencing in 2017. The Customer Advisory Agency will be a pilot program and shall be evaluated after the third year of the ESP IV period, or May 31, 2019. Should the Companies' evaluation conclude that the benefits of the establishment of a Customer Advisory Agency do not outweigh its costs, the contributions for the remaining five years shall instead be made on an annual basis to fund the fuel fund in the CEI service territory to assist low-income customers in paying their electric bills. (Co. Ex. 154 at 16.)
- (23) Toledo Edison will bill to and collect from MSC a charge of \$4.00 per kVA of billing demand under Rider EDR(d), Rate GT, for service June 1, 2016, through May 31, 2019. There will be no

charge or credit effective June 1, 2019, subject to final reconciliation. (Co. Ex. 154 at 16.)

- (24) The Companies agree to multiple changes including filing amended *partial service tariffs* to minimize risks to other non-shopping customers; accept the revisions proposed by Staff witness Nicodemus to the proposed Electric Service Regulations included in the Companies' application; accept use of the long-term cost-of-debt approved in Case No. 07-551-EL-AIR as the carrying charge for riders with solely a debt-based carrying charge rate; and, to determine whether to exclude the impact of deferred carrying charges at the time of the Companies' annual Significantly Excessive Earnings Test (SEET) filings. (Co. Ex. 154 at 16.)
- (25) The Companies agree to continue funding the Community Connections program under the same terms and conditions set forth in Case Nos. 07-551-EL-AIR, 08-935-EL-SSO, 12-1230-EL-SSO, and 14-1297-EL-SSO, with funding of \$6,000,000 per year from 2016 through 2023. The funding shall continue to be fully recoverable through Rider DSE or other applicable rider. OP&AE shall be paid out of the commitment above an administrative fee equal to five percent of the program funding. Notwithstanding, the Cleveland Housing Network will be allocated \$1.7 million of the annual Community Connections program funding for each year of the Stipulated ESP IV. (Co. Ex. 154 at 17.)
- (26) The Companies agree to expand participation in the small scale pilot program, Rider NMB pilot program, which provides an alternative means for customers to obtain and pay for services otherwise provided by or through Rider NMB, to include up to five additional Rate GT customers who otherwise would be ineligible for participation (Co. Ex. 154 at 16-17).
- (27) The Companies utilized an independent consultant to perform the detailed transmission reliability impact study that was based on PJM data and described by FirstEnergy witness Phillips in this proceeding. The Companies will provide, upon request, an electronic copy of the independent third party's economic development analysis conducted for and filed in this proceeding. (Co. Ex. 154 at 17.)

- (28) The Companies' economic development and job retention contribution proposed in the Companies' application is modified as follows: During the period of June 1, 2016, through May 31, 2024, the Companies will contribute \$3 million dollars per each twelve-month period of shareholder dollars to fund energy conservation programs in the Companies' service territories, and economic development and job retention programs in this region (Co. Ex. 154 at 17).
- (29) "FirstEnergy" commits to maintain its corporate headquarters and its nexus of operations in Akron, Ohio, for the duration of Rider RRS (Co. Ex. 154 at 17).
- (30) The Companies commit to provide OP&E with \$1,000,000 per year from 2016 through 2023 through shareholder contributions to be used for a fuel fund in Ohio Edison's and Toledo Edison's service territories (Co. Ex. 154 at 17).
- (31) The Signatory Parties agree that recovery of new or incremental taxes authorized after May 31, 2014, shall continue for the entire Stipulated ESP IV period (Co. Ex. 154 at 17).
- (32) The Signatory Parties agree that the following termination and transition of the Stipulated ESP IV must occur under the fourth-year test required by R.C. 4928.143(E): (1) the Commission's test of the plan, including the impact of termination on the financial health of the utilities; and (2) a finding that the results of the test conclude that the remainder of the Stipulated ESP IV is no longer more favorable than an MRO and that the remainder of the ESP IV is likely to result in significantly excessive earnings for each utility. However, termination shall not affect continued cost recovery of Riders DCR and RRS. (Co. Ex. 154 at 18.)
- (33) The Signatory Parties agree that the Stipulated ESP IV is more favorable in the aggregate to customers as compared to the expected results that would otherwise occur under an MRO alternative and represents a serious compromise of complex issues and involves substantial customer benefits that would not otherwise have been achievable. Through combining more certain rate levels and timely recovery of all amounts authorized by the Commission to be collected through rate components and deferral of cost recovery, the Stipulated ESP

IV provides electric service at more predictable prices for an extended period through the adoption of the Economic Stability Program and supports demand response, energy efficiency, grid modernization, resource diversification, carbon dioxide emissions reductions, renewable resources, distribution systems reliability, economic development and low-income customers, which would not have been available otherwise, and all of which is beneficial to the public interest. (Co. Ex. 154 at 18.)

- (34) The Signatory Parties agree that the Stipulated ESP IV is in all respects consistent with Ohio law and does not violate any important regulatory principle or practice. Rider RRS is a term, condition, or charge that relates to the bypassability and default service as would have the effect of stabilizing or providing certainty regarding retail electric service, and is an economic development and job retention program. Rider RRS may operate as a financial limitation on the consequences of shopping, but does not in any way limit a customer's ability to shop, and does not negatively impact retail competition or provider of last resort (POLR) auctions. (Co. Ex. 154 at 18.)
- (35) The Signatory Parties assert that the agreement is conditioned upon its acceptance in its entirety and without alteration by the Commission, and the Companies have the right to withdraw and terminate the application and Stipulated ESP IV if the Commission or any court rejects all or any part of the Stipulated ESP IV or modifies its terms (Co. Ex. 154 at 20).

D. Procedural Issues

1. Noble Solutions - Motion to Intervene

A motion to intervene out-of-time was filed by Noble Solutions on January 13, 2016. In its memorandum in support, Noble Solutions asserts that it is a member of RESA, an intervenor in this proceeding, but that, recently, Noble Solutions' interests unforeseeably diverged from those of RESA. Consequently, Noble Solutions asserts that it is not adequately represented by the parties to this matter. On January 19, 2016, FirstEnergy filed a memorandum contra Noble Solutions' motion to intervene. In its memorandum contra, FirstEnergy asserts that Noble Solutions' motion is untimely and there is no good cause for its delay. More specifically, FirstEnergy notes that Noble Solutions filed its motion 470 days after the deadline for intervention and on the day the second portion of

the evidentiary hearing, regarding the Third Supplemental Stipulation, commenced. FirstEnergy also points out that Noble Solutions' alleged interests concern matters outside the scope of the Third Supplemental Stipulation.

The Commission finds that Noble Solutions' motion to intervene out-of-time should be denied. Initially, we emphasize the untimeliness—470 days—of Noble Solutions' filing. Further, we find that it was not unforeseeable that RESA might have taken a position with which Noble Solutions did not agree in this matter; thus, no extraordinary circumstances are present justifying the untimely intervention. Further, we find that granting Noble Solutions' untimely motion to intervene would prejudice other parties who have had no opportunity to conduct discovery or otherwise prepare to respond to the arguments raised by Noble Solutions.

2. Oregon – Motion for Leave to File Amicus Brief

Oregon's motion for leave to file an amicus brief asserts that Oregon is currently constructing an \$800 million state-of-the-art combined-cycle natural gas facility with a capacity of 860 MW. Oregon further asserts that the investment in this facility is entirely market-based and driven by market signals in Ohio and PJM and, further, will bring more than 3,600 MWs of new, efficient natural gas generation to Ohio. Oregon argues that it should be granted leave to file an amicus brief, as it will prejudice no party and will contribute to the full development and equitable resolution of the issue of the impact of FirstEnergy's proposal on unsubsidized power plant development in Ohio. Further, Oregon claims that the Commission has repeatedly granted leave for interested parties to file amicus briefs where actual intervention is unnecessary or unwarranted, citing *In re Application of Duke*, Case Nos. 12-1685-GA-AIR, et al., Entry (Nov. 13, 2013).

In its memorandum contra Oregon's motion for leave to file an amicus brief, the Companies assert that the motion is untimely, extremely prejudicial and unfair, and presents evidence outside of the record which may not be considered. Additionally, the Companies assert that Oregon has presented no valid reasons for its delay and its concerns are already adequately represented by other parties to this proceeding.

The Commission has previously found that the determination of whether to permit the filing of an amicus brief must be based on the individual case at bar and the issues to be addressed by the movant. *In re Application of Duke*, supra. Here, we find that permitting Oregon's amicus brief will not prejudice any party and will assist with the consideration of the issues briefed in this proceeding. Moreover, considering the unique and important investments made by Oregon in this state, the Commission finds that we would benefit from the amicus brief. Therefore, we find that Oregon's motion for leave to file an amicus brief is reasonable and should be granted. Although we are allowing Oregon's amicus brief, we also note that Oregon will not be considered a party to this

proceeding, including for purposes of rehearing and any appeals, consistent with our decision regarding PJM.

3. FirstEnergy – Motion to Strike Testimony of IGS Witness White and OMAEG Witness Hill

On October 13, 2015, the Companies filed a request for certification and application for an interlocutory appeal of the attorney examiner's oral rulings of October 7 and October 13, 2015, denying the Companies' motion to strike certain prefiled testimony of portions of the supplemental testimony of IGS witness White and the second supplemental testimony of OMAEG witness Hill—unauthenticated copies of purported legislative committee testimony of Leila Vespoli, current Executive Vice President, Markets and Chief Legal Officer of FirstEnergy Corp (Tr. Vol. XXV at 5035-5036, 5107). The Companies assert that the attorney examiners' rulings effectively allowed IGS and OMAEG to amend their witnesses' testimony months after its due date in order to cure defects. The Companies assert that these actions violate Ohio Adm.Code 4901-1-29(A) and prior Commission decisions. By Entry issued March 31, 2016, the attorney examiner granted FirstEnergy's request for certification, certifying it for the Commission's review.

In their replies to the Companies' interlocutory appeal, IGS and OMAEG assert that the attorney examiners' denial of the Companies' motion to strike did not deviate from precedent, and the Commission should not certify the appeal. IGS and OMAEG add that, even if the Commission certifies the appeal and addresses the argument, the Companies' argument should be rejected as inconsistent with applicable law, precedent, and Commission practice, as well as a lack of demonstrated prejudice. IGS asserts that it authenticated Ms. Vespoli's testimony and, in fact, its witness obtained a certified copy of the testimony, making any failure to authenticate moot. IGS adds that the testimony was self-authenticating and an admission of a party-opponent. Similarly, OMAEG specifies that Ms. Vespoli's testimony is not hearsay and is an admission of a party-opponent pursuant to Evid.R. 801(D)(2), and was properly authenticated as a self-authenticated public record under Evid.R. 902(4). OMAEG adds that the ruling does not present a new or novel question of interpretation, law, or policy, as attorney examiners continuously issue oral rulings on such issues during evidentiary hearings.

The Commission finds that the attorney examiners' denial of the Companies' motion to strike did not deviate from precedent and was consistent with applicable law. Initially, we note that, while it is not bound strictly by the Ohio Rules of Evidence, the Commission seeks to maintain consistency with the Ohio Rules of Evidence to the extent practicable. *In re Dayton Power & Light Co.*, Case No. 12-426-EL-SSO, et al., Opinion and Order (Sept. 4, 2013). Here, we find that the attorney examiners' ruling was consistent with the Ohio Rules of Evidence and Commission practice. We agree with the arguments of IGS and OMAEG, as described above, adding that these statements were determined to

be relevant during the evidentiary hearing as they were made less than one year before the date the Companies filed their initial application in this proceeding. Consequently, the Companies' application for interlocutory appeal should be denied.

4. OMAEG and OCC - Motion to Strike Testimony of OMAEG Witness Hill

In its brief, OMAEG and OCC assert that the attorney examiners erred in granting the Companies' motion to strike OMAEG witness Hill's testimony regarding the viability of a signatory party, the Consumers' Protection Association (CPA), asserting that it was within the scope of cross-examination and critical to the issue of whether the stipulation presented by the Companies is the product of serious bargaining (Tr. Vol. XXXIX at 8387-8393). Further, OMAEG and OCC assert that the validity of the signature and the operational capabilities of an entity receiving funding are germane to the second and third prongs of the three-prong test. OMAEG asserts that, consequently, the Commission should accept OMAEG witness Hill's testimony on the subject as evidence and allow the record to be reopened to accept further evidence on the issue. OCC urges reversal of the attorney examiners' ruling.

In its reply brief, FirstEnergy argues that the attorney examiner's ruling followed Commission precedent that redirect examination is limited to the subjects of questions asked on cross-examination. FirstEnergy asserts that allowing otherwise would permit a witness to offer additional direct testimony in violation of Ohio Adm.Code 4901-1-29, which requires a party to file and serve written copies of an expert's direct testimony before offering that testimony at hearing. FirstEnergy asserts that OMAEG's question was an attempt to circumvent this rule.

Under Ohio Adm.Code 4901-1-15(F), a party adversely affected by an oral ruling may raise the propriety of that ruling in its initial brief as a distinct issue for the Commission's consideration. Here, on redirect examination of OMAEG witness Hill, OMAEG's counsel inquired "[w]ith regard to the signatory parties and the diversity of the class, have you learned anything about the signatory parties that would affect your position on what diverse means in the context of the signatory parties and redistributive coalition?" (Tr. Vol. XXXIX at 8388). Thereafter, the witness responded that he had conducted a "news search" on one of the groups representing low-income customer interests, Consumers Protection Association, which he testified revealed that the organization had closed its doors and was subject to a federal investigation (Tr. Vol. XXXIX at 8389). Thereafter, the Companies' counsel moved to strike OMAEG witness Hill's entire response as (1) beyond the scope of the cross-examination; (2) hearsay, as it was not information within the direct knowledge of OMAEG witness Hill; and (3) more appropriate to have been presented in direct, pre-filed testimony. The record reveals that, although OMAEG witness Hill was asked very general questions about the diversity of

the signatory parties, he was never asked about Consumer Protection Association or even the low-income customer groups generally during cross-examination (Tr. Vol. XXXIX at 8349-8381).

The Commission appreciates the efforts of Dr. Hill to bring to our attention information regarding the viability of the Consumer Protection Association. However, this information should have been included in his direct testimony in order to allow the signatory parties the opportunity to prepare for this testimony. Redirect examination typically must be limited to the subject matter of the cross-examination. *State v. Brown*, 131 Conn.App. 275, 287, 26 A.3d 674, 681 (2011), *aff'd*, 309 Conn. 469, 72 A.3d 48 (2013). Here, we find that it was well within the attorney examiner's discretion to find that the redirect testimony subject to the motion to strike was far beyond the scope of the cross-examination. Further, even if the testimony had been within appropriate scope for redirect, we find that the testimony also constituted hearsay and could have been stricken on those grounds. Accordingly, we affirm the ruling of the attorney examiner.

5. OCC - Admission of OCC Exhibits 30 and 31

OCC requests that, pursuant to Ohio Adm.Code 4901-1-15(F), the Commission reverse the attorney examiners' decision to exclude past testimony of Staff witness Choueiki in the ESP cases of Duke and AEP Ohio (Tr. Vol. XXX at 6218, 6327). OCC argues that the past statements are admissible as evidence that is directly relevant to the issues involved in the case and are not unduly prejudicial.

In its reply brief, FirstEnergy asserts that attorney examiners are entrusted with determining what evidence the Commission will review, and the attorney examiner was within his discretion pursuant to Ohio Adm.Code 4901-1-27 in excluding the proffered exhibits.

As stated above, under Ohio Adm.Code 4901-1-15(F), a party adversely affected by an oral ruling may raise the propriety of that ruling in its initial brief as a distinct issue for the Commission's consideration. Here, OCC's stated purpose in proffering the testimony was to question Staff witness Choueiki on Staff's "change in position" and to "delv[e] into the reasons for the change in position" (Tr. Vol. XXX at 6222). In making the ruling, the attorney examiner explained that, "*** a change in staff position following the direction of the Commission has no probative weight. It is unduly prejudicial, confusing, and misleading[.]" (Tr. Vol. XXX at 6327). The Commission understands OCC's claim that Staff witness Choueiki has reversed his position as set forth multiple times in prior testimony before us. However, we believe that Staff should follow the broad policy positions set forth in our orders as the witness did in this case, based upon the *In re Ohio Power Co.*, Case No. 13-2385-EL-SSO, et al. (*AEP Ohio ESP III*), Opinion and Order (Feb. 25,

2015) (AEP Ohio ESP III Order). Therefore, we agree with the reasoning set forth by the attorney examiner and affirm the rulings of the attorney examiner.

6. FirstEnergy – Motions to Strike Portions of Briefs

FirstEnergy filed motions to strike portions of the initial briefs of OCC/NOAC, OMAEG, PJM, NOPEC, and RESA. Further, FirstEnergy filed motions to strike portions of the reply briefs of OCC/NOAC, OMAEG, NOPEC, and Exelon, and to strike the entire reply brief of Noble Solutions, or, in the alternate, portions therein. OCC/NOAC, OMAEG, PJM, NOPEC, and RESA filed memoranda contra FirstEnergy's motion to strike their initial briefs, to which FirstEnergy filed replies. Additionally, OCC/NOAC, OMAEG, and Exelon filed timely memoranda contra FirstEnergy's motions to strike their reply briefs, to which FirstEnergy filed replies. We note that Noble Solutions filed an untimely memorandum contra, which the Commission will disregard due to its untimeliness.

In its motion to strike portions of OCC/NOAC's initial brief, FirstEnergy asserts that OCC/NOAC improperly relied upon testimony that the attorney examiners struck from the record including: (1) Staff witness Choueiki's testimony from a previous proceeding; (2) OMAEG witness Hill's improper redirect testimony regarding the Consumer Protection Association; and (3) information regarding an alleged Dynegy offer based on hearsay and newspaper articles that was not admitted into the record. FirstEnergy further argues that OCC/NOAC's brief is improper in its discussion of Ms. Vespoli's legislative committee testimony. Although FirstEnergy admits that the attorney examiners overruled its motion to strike this exhibit during hearing, FirstEnergy maintains that the copy of Ms. Vespoli's testimony was unauthenticated and should be excluded from the brief. Thereafter, on March 2, 2016, OCC filed a motion to withdraw portions of its initial brief regarding the alleged Dynegy offer. In its memorandum contra FirstEnergy's motion to strike its initial brief, OCC/NOAC asserts that FirstEnergy's claims are without merit because: (1) excluded testimony not in the record may be relied upon in a brief in order to challenge the attorney examiner's ruling; and (2) it is not improper to reference evidence in an initial brief that has been admitted into the record. In its motion to strike portions of OCC/NOAC's reply brief, FirstEnergy asserts that OCC/NOAC improperly discussed the same testimony of Staff witness Choueiki from prior proceedings and OMAEG witness Hill's redirect testimony regarding the Consumer Protection Association. In its memorandum contra FirstEnergy's motion to strike its reply brief, OCC/NOAC reiterates the argument that excluded testimony may be relied upon in a brief in order to challenge the attorney examiner's ruling.

In its motion to strike portions of OMAEG's initial brief, FirstEnergy asserts that OMAEG improperly relied upon OMAEG witness Hill's redirect testimony regarding the Consumer Protection Association, given that the attorney examiner struck this testimony

from the record. Additionally, FirstEnergy asserts that OMAEG improperly quoted Ms. Vespoli's testimony, which FirstEnergy again asserts was unauthenticated and should not be cited. In its memorandum contra FirstEnergy's motion to strike its initial brief, OMAEG asserts that: (1) the motion to strike relying on two pieces of testimony given by Ms. Vespoli is improper in form and substance; and (2) the Commission should deny the Companies' request to strike an appeal of the attorney examiner's ruling regarding a signatory party no longer in existence. In its motion to strike portions of OMAEG's reply brief, FirstEnergy asserts that OMAEG again improperly references OMAEG witness Hill's redirect testimony regarding the Consumer Protection Association. In its memorandum contra FirstEnergy's motion to strike its reply brief, OMAEG reiterates the arguments set forth regarding its initial brief.

In its motion to strike portions of NOPEC's brief, FirstEnergy argues that NOPEC included an extensive discussion of legislative history, which FirstEnergy contends is inappropriate to be relied upon where the statutory language is unambiguous. Additionally, FirstEnergy asserts that the legislative history and bill analyses are outside of the record and should not be relied upon. In its memorandum contra FirstEnergy's motion to strike its initial brief, NOPEC asserts that the statutory language is ambiguous, permitting the Commission to consider legislative history pursuant to R.C. 1.49. In its motion to strike portions of NOPEC's reply brief, FirstEnergy moves to strike portions discussing and quoting an article from Law 360 that is not part of the record in the proceeding and, FirstEnergy asserts, is inadmissible hearsay.

In its motion to strike portions of PJM's brief, FirstEnergy contends that PJM inappropriately discussed and quoted a newspaper article which is not a part of the record and is inadmissible hearsay. In its memorandum contra, PJM asserts that the Commission is permitted to take judicial notice of any facts not subject to reasonable dispute if it chooses.

In its motion to strike portions of RESA's brief, FirstEnergy asserts that RESA inappropriately quoted testimony of Staff witness Choueiki, which the attorney examiner excluded from the record. In its memorandum contra FirstEnergy's motion to strike its initial brief, RESA asserts that the wording at issue in the motion to strike is included in Staff's testimony for the current proceeding. Consequently, RESA asserts the wording in its initial brief citing testimony from another case was an inadvertent error and should be corrected to cite Staff Ex. 12 at 7.

In its motion to strike portions of Exelon's initial brief, FirstEnergy asserts that Exelon inappropriately made an argument referencing documents filed in AEP Ohio's PPA proceeding and the recently-filed ESP DP&L that were not a part of the evidentiary record in this case. In its memorandum contra, Exelon asserts that the cited documents are

relevant to the Commission's consideration of this case and warrant the Commission's consideration.

In its motion to strike Noble Solutions' reply brief, FirstEnergy asserts that Noble Solutions is not a party to this proceeding and its late-filed motion to intervene lacks merit and was previously opposed by the Companies. Consequently, FirstEnergy urges the Commission to strike Noble Solutions' reply brief in its entirety on the basis that Noble Solutions is not an intervenor and may not participate as a party in filing a reply brief. Further, FirstEnergy asserts that, even if the Commission declines to strike the reply brief in its entirety, the Commission should strike portions therein relying on documents that constitute hearsay and are outside of the record.

The Commission appreciates the efforts of the parties in this proceeding to provide a full record for our consideration, but new information should not be introduced after the closure of the record and parties should not rely upon evidence which has been stricken from the record. We find that FirstEnergy's motions to strike should be granted regarding the portions of the enumerated parties' initial and reply briefs improperly relying upon OMAEG witness Hill's redirect testimony regarding the Consumer Protection Association and Staff witness Choueiki's testimony from a prior proceeding. We note that both of these testimonies were either stricken from the record or denied admission into the record by the attorney examiners, and we previously determined the rulings of the attorney examiners should be upheld. However, regarding the motions to strike relating to Ms. Vespoli's legislative committee testimony, we find that these motions should be denied, consistent with the attorney examiners' rulings, which we previously determined should be upheld. Next, regarding the alleged Dynegey offer, we note that OCC has willingly withdrawn this portion of its brief, making FirstEnergy's motion to strike moot. As to PJM's brief, we agree with FirstEnergy that the portion discussing and quoting a newspaper article is hearsay that is not part of the record and should be stricken.

Regarding Exelon's reply brief, the Commission finds that the portions in dispute referencing documents filed in AEP Ohio's PPA proceeding and the recently-filed DP&L ESP should be stricken, as these documents were not made a part of the evidentiary proceeding in this record. Additionally, regarding the motions to strike portions of NOPEC's initial and reply briefs, we find these motions should be granted on the basis that the disputed portions reference information outside of the record. Finally, we find that FirstEnergy's motion to strike Noble Solutions' brief in its entirety should be granted, on the basis that Noble Solutions was not granted intervenor status in this proceeding and did not seek leave to file an amicus brief.

7. Motions for Protective Order

Numerous motions for protective orders have been filed in the docket in this proceeding regarding documents filed under seal. The Commission notes that R.C.

4905.07 provides that all facts and information in the possession of the Commission shall be public, except as provided in R.C. 149.43, and as consistent with the purpose of Title 49 of the Revised Code. R.C. 149.43 specifies that the term "public records" excludes information which, under state or federal law, may not be released. The Supreme Court of Ohio has clarified that the "state or federal law" exemption is intended to cover trade secrets. *State ex rel. Besser v. Ohio State Univ.*, 89 Ohio St.3d 396, 399, 732 N.E.2d 373 (2000). Similarly, Ohio Adm.Code 4901-1-24 allows the Commission to protect the confidentiality of information contained in a filed document "to the extent that state or federal law prohibits release of the information, including where the information is deemed * * * to constitute a trade secret under Ohio law, and where non-disclosure of the information is not inconsistent with the purposes of Title 49 of the Revised Code." Moreover, Ohio law defines a trade secret as "information * * * that satisfies both of the following: (1) It derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use. (2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." R.C. 1333.61(D).

Applying the requirements that the information have independent economic value and be the subject of reasonable efforts to maintain its secrecy pursuant to R.C. 1333.61(D), as well as the six-factor test set forth by the Ohio Supreme Court in *State ex rel. Plain Dealer v. Ohio Dept. of Ins.*, 80 Ohio St.3d 513, 524-525, 687 N.E.2d 661 (1997), we find that the documents filed under seal in this docket contain trade secret information. Their release, therefore, is prohibited under state law. We also find that nondisclosure of this information is not inconsistent with the purposes of Title 49 of the Revised Code. Finally, we note that the filings and documents have been redacted to remove the confidential information and the public versions of the pleadings and documents have been docketed in this proceeding. Accordingly, we find that all pending motions for protective order are reasonable and should be granted. Further, the protective orders previously granted in this proceeding shall be extended in accordance with the time frame set forth below.

Ohio Adm.Code 4901-1-24(F) provides that, unless otherwise ordered, protective orders issued pursuant to Ohio Adm.Code 4901-1-24(D) automatically expire after 24 months. The attorney examiner finds that confidential treatment shall be afforded to the information filed under seal for a period ending 60 months from the date of a final, appealable order in this proceeding. Until that time, the Docketing Division shall maintain, under seal, the information filed confidentially. Further, Ohio Adm.Code 4901-1-24(F) requires a party wishing to extend a protective order to file an appropriate motion at least 45 days in advance of the expiration date. If a party wishes to extend its confidential treatment, it should file an appropriate motion at least 45 days in advance of the expiration date. If no such motion to extend the confidential treatment is filed, the Commission may release the information without prior notice.

E. Consideration of Stipulated ESP IV

As happens in many cases before the Commission, the parties filed stipulations, which the parties specifically describe as the culmination of discussions and accommodation of diverse interests. Ohio Adm.Code 4901-1-30 authorizes parties to Commission proceedings to enter into a stipulation. Although not binding on the Commission, the terms of such an agreement are accorded substantial weight. *Consumers Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, 125, 592 N.E.2d 1370 (1992), citing *Akron v. Pub. Util. Comm.*, 55 Ohio St.2d 155, 157, 378 N.E.2d 480 (1978). This concept is particularly valid where the stipulation is unopposed by any party and resolves all issues presented in the proceeding in which it is offered.

The standard of review for considering the reasonableness of a stipulation has been discussed in a number of prior Commission proceedings. See, e.g., *Cincinnati Gas & Elec. Co.*, Case No. 91-410-EL-AIR (Apr. 14, 1994); *Western Reserve Telephone Co.*, Case No. 93-230-TP-ALT (Mar. 30, 1994); *Ohio Edison Co.*, Case No. 91-698-EL-FOR, et al. (Dec. 30, 1993). The ultimate issue for our consideration is whether the agreement, which embodies considerable time and effort by the signatory parties, is reasonable and should be adopted. In considering the reasonableness of a stipulation, the Commission has used the following criteria: (1) Is the settlement a product of serious bargaining among capable, knowledgeable parties? (2) Does the settlement, as a package, benefit ratepayers and the public interest? (3) Does the settlement package violate any important regulatory principle or practice?

The Supreme Court of Ohio has endorsed the Commission's analysis using these criteria to resolve issues in a manner economical to ratepayers and public utilities. *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.*, 68 Ohio St.3d 559, 629 N.E.2d 423 (1994), citing *Consumers' Counsel* at 126. The Court stated in that case that the Commission may place substantial weight on the terms of a stipulation, even though the stipulation does not bind the Commission.

Additionally, on February 25, 2015, the Commission modified and approved an ESP for AEP Ohio, for the period beginning on June 1, 2015, through May 31, 2018. *AEP Ohio ESP III Order*. The Commission declined to adopt the purchase power agreement (PPA) rider proposal, as proffered in the *AEP Ohio ESP III* proceeding; however, the Commission authorized the establishment of a placeholder PPA rider, at the initial rate of zero, with AEP Ohio being required to justify any requested cost recovery in future filings before the Commission. The Commission also presented several factors it may balance, but not be bound by, in deciding whether to approve future cost recovery requests associated with PPAs. Those factors were listed as follows: financial need of the generating plant; necessity of the generating facility, in light of future reliability concerns, including supply diversity; description of how the generating plant is compliant with all pertinent environmental regulations and its plan for compliance with pending

environmental regulations; and the impact that a closure of the generating plant would have on electric prices and the resulting effect on economic development within the state. (*AEP Ohio ESP III* Order at 25.) In addition, the Commission indicated that the rider proposal should address additional issues specified by the Commission, including: a proposed process for periodic substantive review and audit; a commitment to full information sharing with the Commission and its Staff; and an alternative plan to allocate the rider's financial risk between the utility and its ratepayers. Further, the Commission indicated a PPA proposal should include a severability provision that recognizes that all the provisions of a proposed ESP will continue, in the event that the PPA rider is invalidated, in whole or in part at any point, by a court of competent jurisdiction (factors and additional requirements collectively, "AEP Ohio Order Factors"). (*AEP Ohio ESP III* Order at 25-26.)

As an initial matter, several of the non-signatory parties argue that Stipulated ESP IV should not be held to the same standard as previously used by the Commission as many of the components are not germane to the provision of the SSO and are wholly unrelated to the scope of this proceeding. Arguing the Companies have failed to provide sufficient evidence to support the inclusion of several provisions in the Third Supplemental Stipulation, Environmental Groups contend that the Commission has the authority to open separate dockets to independently evaluate and consider these unrelated issues on a full and open record. OCC/NOAC also argue a stricter standard than the Commission's three-prong test should be utilized. (OCC/NOPEC Ex. 11 at 7-10; Tr. Vol. XXXVIII at 8202-05.) Though they do not believe the traditional three-prong test to be an appropriate measure for Stipulated ESP IV, due to the inclusion of Rider RRS, OCC/NOAC alternatively argue the terms of Stipulated ESP IV should not be considered as a package for consideration of the second and third prongs, further noting that each stipulated term should be evaluated on its own merits in order to provide further protection to consumers. CMSD and P3/EPSC argue the Commission should exclude any claimed benefits associated with the stipulated Rider RRS arrangement from its consideration. (P3/EPSC Ex. 12 at 23-24; Tr. Vol. XXXVIII at 8202-05; Tr. Vol. XLI at 8717-18; OMAEG Ex. 19 at 19-20; ELPC Ex. 28 at 6-7.) NOPEC also states that the traditional three-prong test is not necessary in this case, noting that, in its opinion, Stipulated ESP IV has failed the ESP v. MRO test as described below, which NOPEC adds is the sole statutory standard to approve an ESP. CMSD also contends the appropriate analysis for the Commission would be to evaluate net financial benefits over its term, or, alternatively, consider a net financial benefit to customers as an additional essential component of a rider arrangement.

Staff contends these arguments have no merit, as all of the opposing intervenors were part of the settlement discussions and have had ample opportunity to challenge the various provisions in this case through the hearing process. Additionally, Staff

emphasizes that the test was intended for any stipulation to be evaluated as a package. Thus, Staff believes these arguments should be ignored.

The Commission notes that we have considered and rejected arguments that the criteria for the evaluation of stipulations should be revised in light of the EDUs' statutory right to reject modifications to an ESP. *In re FirstEnergy*, Case No. 10-388-EL-SSO, Opinion and Order (Aug. 25, 2010) at 20-21, Third Entry on Rehearing (Feb. 9, 2011) at 9-10. We decline to revisit that issue here. Under the three-prong test, we always carefully review all terms and conditions of a proposed stipulation in order to determine whether the stipulation is in the public interest; in making this determination, we exercise our independent judgment, based upon our statutory authority, the evidentiary record, and the Commission's specialized expertise and discretion. *Monongahela Power Co. v. Pub. Util. Comm.*, 104 Ohio St.3d 571, 578 (2004).

1. Is the settlement a product of serious bargaining among capable, knowledgeable parties?

a. Summary of Parties' Arguments

FirstEnergy, Nucor, Staff, MSC, and OEG argue that the Stipulated ESP IV is the product of serious bargaining among capable, knowledgeable parties in conformance with the first prong of the Commission's test for the evaluation of stipulations (Co. Ex. 8 at 5, 7). In support, FirstEnergy and Staff assert that the Companies began discussions with interested parties even before the application was filed, and that all intervenors were provided an opportunity to participate in discussions and the settlement process (*Id.*; Tr. Vol. II at 303-304; Co. Ex. 154 at 5). These supporting parties further assert that the signatory parties represent a broad cross-section of stakeholders with varied and diverse interests, including low-income customer advocates, industrial and commercial advocates, commercial customers, competitive retail electric suppliers, a city, higher education institutions, a demand response provider, and a union (Co. Ex. 8 at 7, 9; Co. Ex. 55 at 8-9).

NOPEC, RESA, OMAEG, OCC/NOAC, Power4Schools, Exelon, and P3/EPSC argue that serious bargaining did not occur in this proceeding. NOPEC, OMAEG, OCC/NOAC, and Power4Schools point out that a large number of parties with considerable experience before the Commission and with diverse interests have refused to sign the Stipulated ESP IV (OCC/NOPEC Ex. 11 at 28-30). NOPEC and OMAEG add that there cannot be serious bargaining when the EDU has the ability to unilaterally reject any modification to the proposed ESP (OCC/NOPEC Ex. 11 at 6-7). RESA, OMAEG, OCC/NOAC, Exelon, and P3/EPSC assert that the monetary inducements totaling more than \$19 million offered to signatory parties along with a "side deal" offered to another party demonstrate mere "favor trading" and a lack of serious bargaining among the parties (Tr. Vol. XXXVII at 7811-7817; OMAEG Ex. 24; Co. Ex. 154 at 2-3). P3/EPSC argue

that favor trading is evident due to wording mandating that a signatory party will forfeit its "stipulated provision" upon loss of a challenge to any attempt by FirstEnergy to cure a termination of Rider RRS (Co. Ex. 154 at 19-20). OMAEG also asserts that many of the commitments contained in the Stipulated ESP IV contain no accountability measures, cost-benefit analysis, or assessment, evincing a lack of serious bargaining (Tr. Vol. XXXVII at 7795, 7797-7799; Co. Ex. 154 at 11-13). Additionally, although stricken from their briefs subsequent to FirstEnergy's motion to strike, OMAEG and OCC/NOAC made the argument that one of the signatory parties, the Consumers' Protection Association, has ceased to be a functioning or operating entity and, therefore, cannot be a knowledgeable, capable party (Tr. Vol. XXXIX at 8386-93). Finally, OCC/NOAC assert that the signatory parties lack a party representing residential customers in the applicant's three service territories or widespread consumer support.

In their reply brief, the Companies reiterate their arguments that serious bargaining among diverse parties occurred, and assert that signatory parties' receipt of bargained-for benefits and/or "side deals" are not criteria to be considered in determining whether serious bargaining occurred. Initially, the Companies point out that OCC/NOPEC Witness Kahal admitted that no party, including OCC/NOAC or NOPEC has a veto power over the approval of a stipulation, and that the Commission has repeatedly held that it will not require any single party to agree to a stipulation in order to approve the first prong (Tr. Vol. XXIV at 4907). *In re Vectren*, Case No. 13-1571-GA-ALT, Opinion and Order (Feb. 19, 2014). Further, the Companies assert that the Commission has previously held that OPAE and the Citizens Coalition advocate on behalf of the interests of low- and moderate-income customers. *ESP III Case Order*. Next, the Companies contend that without signatory parties' receipt of bargained-for benefits, serious bargaining could not take place. Further, the Companies assert that the "side deal," or Competitive Market Enhancement Agreement (Agreement), with IGS also demonstrates that serious bargaining occurred in this proceeding. Finally, the Companies point out that the Commission has previously approved stipulations in other ESP cases which included the right of the EDU to withdraw any modifications to the proposed ESP. *ESP III Case Order*; *ESP II Case Order*.

IGS, in its reply brief, additionally responds to parties' arguments regarding the Agreement between it and FirstEnergy. IGS points out that the Agreement was disclosed soon after it was final, and all parties were given the opportunity to cross examine FirstEnergy witness Mikkelsen regarding the Agreement (Tr. Vol. XXXVII at 7804-06, 7917). IGS further argues that the Agreement has no bearing on the substance of the Stipulated ESP IV. In contrast, in its reply brief, OMAEG asserts that the Agreement must have been in negotiation for some time prior to being signed, and should have been disclosed to all parties prior to its actual execution.

In its reply brief, IMM joins the argument that the Stipulated ESP IV was not a product of serious bargaining by knowledgeable, capable parties. IMM asserts that there can be no serious bargaining in a situation where testimony shows the Rider RRS assets are likely more costly than an equal amount of capacity available in the market, which would result in a steep discount in a transfer to any rational buyer, but Rider RRS proposes an above-market premium. OCC/NOAC, in their reply brief, add that the parties arguing in support of the first prong have made merely general statements in support of their assertions that bargaining occurred with little or no evidentiary support from the record. OCC/NOAC further add that parties should not be considered as adding to the diversity of the bargaining where they received financial inducements that will be paid for by others, including other customers.

b. Commission Decision

The Commission finds that the Stipulations, as supplemented, appear to be the product of serious bargaining among capable, knowledgeable parties. We note that the signatory parties routinely participate in complex Commission proceedings and that counsel for the signatory parties have extensive experience practicing before the Commission in utility matters (Co. Ex. 155 at 2-3, 7-8). The signatory parties represent diverse interests including the Companies, a municipality, competitive suppliers, commercial customers, industrial consumers, labor unions, small businesses, advocates for low and moderate income residential customers, and Staff (*Id.* at 8). We do not dispute that non-signatory parties also represent a diverse group of interests or that the diverse interests of the signatory parties and non-signatory parties sometimes overlap. However, it is not unusual in Commission proceedings for non-signatory parties to a stipulation to represent a diverse group of interests, especially in a case which has over 40 intervening parties, but that fact has little weight in our decision.

The Commission notes that OCC and OMAEG argued that the Stipulations should only be approved by the Commission if the stipulation is agreed to by a larger, more heterogeneous group of customers, including residential customers (as represented by OCC), in the Companies' service territories. However, we note that the Stipulations are supported by a diverse group of customers, including small businesses, independent colleges and universities, industrial customers, and commercial customers as well as advocates for low- and moderate-income residential customers and Staff. Moreover, we have already rejected proposals that any one class of customers can effectively veto a stipulation, holding that we will not require any single party, including OCC, to agree to a stipulation in order to meet the first prong of the three-prong test. *Dominion Retail v. Dayton Power & Light Co.*, Case No. 03-2405-EL-CSS, Opinion and Order (Feb. 2, 2005) at 18; Entry on Rehearing (Mar. 23, 2005) at 7. Nothing in the record of this proceeding persuades the Commission to reconsider that ruling.

With respect to the claims that the Stipulations represent mere "favor trading" and a lack of serious bargaining among the parties, the Commission notes that, while many signatory parties receive benefits under the Stipulations, we will not conclude that these benefits are the sole motivation of any party in supporting the Stipulations. We expect that parties to a stipulation will bargain in support of their own interests in deciding whether to support a stipulation. Further, we believe that parties themselves are best positioned to determine their own best interests and whether any potential benefits outweigh any potential costs. The claim that benefits for low-income customers and for small businesses reflect mere "favor trading" and a lack of serious bargaining flies directly in the face of Ohio policy, which calls upon the Commission to protect at-risk populations and to encourage the education of small business owners regarding the use of, and to encourage the use of, energy efficiency programs. R.C. 4928.02(L), (M).

Moreover, the Commission notes that nothing in the Stipulations can be construed to represent "favor trading" with Staff. Staff receives no benefits whatsoever under the Stipulations. On the other hand, the fact that the stipulation was supplemented three times and the fact that numerous changes were made to Rider RRS in the process are indication of serious, intricate negotiations among the signatory parties. For example, the term of Rider RRS was reduced from 15 years to 8 years. Additional provisions for resource diversity were added. The provisions for Commission review were revised and strengthened. Provisions for the Companies to share up to \$100 million of any downside risk were added. Also the Companies agreed to reduce the return on equity (ROE) of the generation facilities to 10.38 percent. All of these changes demonstrate substantial bargaining among the signatory parties.

OMAEG contends that the Agreement between IGS and the Companies (OMAEG Ex. 24) raises questions regarding the bargaining among signatory parties and the signatory parties' knowledge of the terms of the Agreement. We agree that the existence of a side agreement can be relevant to a determination of whether serious bargaining occurred in the negotiation of a stipulation. *Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789, 856 N.E.2d 213, ¶ 86. However, the Commission notes that no signatory party has raised an objection to the agreement in this proceeding, and OMAEG has cited to no record evidence on this issue (Tr. Vol. XXXVII at 7809). We note that, in *Consumers' Counsel*, the side agreement was between signatory parties and the side agreement was requested but not provided in discovery. *Consumers' Counsel* at ¶ 86. In this proceeding, the Agreement was provided to all of the parties as a supplement to discovery (OMAEG Ex. 24). Moreover, since the Agreement was executed after the filing of the Stipulations, there is no reason to believe that the Agreement influenced any signatory party, other than IGS, to sign the Stipulations.

Further, the Agreement between IGS and the Companies has not been submitted to the Commission for approval. Accordingly, we will not approve the Agreement nor will

we enforce the terms of the Agreement. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 110 Ohio St.3d 394, 2006-Ohio-4706. In addition, any programs requested by the Companies pursuant to the Agreement must be filed in separate proceedings in which any interested party will have a full and fair opportunity to raise any issues regarding the programs. We will base our decision on proposed programs solely based upon the record in the separate proceedings. The sole question for us under the first prong of our test for the consideration of stipulations with respect to the Agreement between IGS and the Companies is whether the Agreement was fully disclosed as required by R.C. 4928.145, and the record demonstrates that the parties fully complied with that statutory requirement.

Although stricken from briefs subsequent to FirstEnergy's motion to strike, OCC and OMAEG claim that one of the signatory parties, the Consumers' Protection Association potentially no longer exists, based upon testimony which was properly stricken from the record of this proceeding (Tr. Vol. XXXIX at 8386-93). The Commission notes that the Consumers Protection Association filed a motion to intervene on September 24, 2014. Parties had a full and fair opportunity to oppose intervention at that time but did not avail themselves of that opportunity. On December 1, 2014, the attorney examiner granted intervention to The Consumers Protection Association. Entry (Dec. 1, 2014) at 2-3. Thus, these allegations appear to be an improper collateral attack on the attorney examiners' December 1, 2014 ruling. No other party to this proceeding, signatory party or non-signatory party, has been subjected to an investigation by opposing parties into its viability, and this tactic is an unwelcome innovation in litigation before the Commission.

Nonetheless, allegations regarding a lack of accountability or misuse of funds approved by the Commission in a stipulation must be taken seriously. First, in order to avoid even the possibility of prejudice to the non-signatory parties, we will disregard The Consumer Protection Association signature as a signatory party to the Stipulations. This finding, however, has no effect upon the other members of the Citizens Coalition or upon any other signatory party to the Stipulations. Further, the Commission will modify the Stipulations, as discussed below, to ensure that the payments provided for low-income customer assistance are properly audited, by independent third parties, to ensure that the funding is used for its proper purpose.

Accordingly, we find that, based upon the record before the Commission, all provisions of the Stipulations and any other agreements among the parties were fully and adequately disclosed pursuant to R.C. 4928.145 and that the Stipulations, as supplemented, appear to be the product of serious bargaining among capable, knowledgeable parties. We will determine whether the cumulative benefits parties receive under the Stipulations, as a package, benefit ratepayers and the public interest in our consideration of the second prong of our test for the consideration of stipulations below.

2. Does the settlement, as a package, benefit ratepayers and the public interest?

a. Introduction

According to the second prong of our three-prong test, the Commission must determine whether the settlement, as a package, benefits ratepayers and the public interest. Although the non-signatory parties have raised numerous concerns regarding the Stipulations, we are persuaded that the Stipulations, as a package, benefit ratepayers and the public interest. As discussed below, the evidence in the record demonstrates that the Stipulations, as modified will contain consumer protections that will protect consumers against rate volatility and price fluctuations by promoting rate stability for all ratepayers in this state, modernize the grid through the deployment of advanced technology and procurement of renewable energy resources, and promote retail competition by enabling competitive providers to offer innovative products to serve customers' needs.

b. Summary of Parties' Arguments

FirstEnergy, Staff, OEG, Nucor, Citizens Coalition, MSC, IGS, Kroger, and other signatory parties argue that the Stipulated ESP IV will provide a variety of significant qualitative and quantitative benefits to ratepayers and the public interest, and thus, satisfy the second prong of the Commission's three-prong test (Co. Ex. 8 at 8; Co. Ex. 155 at 10). FirstEnergy initially notes that Stipulated ESP IV contains many of the same terms as the *ESP III Case*, which has produced several successful auctions that have benefited customers with reasonably priced generation service (Co. Ex. 1 at 6; Co. Ex. 14 at 9; Tr. Vol. V at 959; Co. Ex. 154 at 13-14). In addition, the Companies state Stipulated ESP IV will provide retail market enhancements that further support the development of the retail market, including a comprehensive web-based system to provide customer information to competitive retail electric service (CRES) providers and various modifications to the Companies' electric service regulations (Co. Ex. 15 at 4, 6-11; Tr. Vol. V at 1039-52, 59). Further, the Companies argue that Stipulated ESP IV will provide greater price certainty during its term and resolve several other matters that would otherwise be the subject of litigation. In short, FirstEnergy contends that customers will benefit from Stipulated ESP IV because it is designed to provide adequate, safe, reliable and predictably priced electric service; supports economic development and job retention; continues the regulatory principle of gradualism to stabilize rates and helps transition customers to fully market-based prices; supports competitive markets; encourages energy efficiency and peak demand reduction; protects at-risk populations through low-income programs; provides benefits to large industrial customers that will allow them to better compete in the global marketplace; supports federal advocacy for improvements in the capacity markets;

produces CO₂ emission reductions; provides grid modernization; and provides resource diversification. (Co. Ex. 155 at 10.) FirstEnergy and signatory parties also contend that Rider RRS satisfies the AEP Ohio Order Factors, as discussed below. Staff agrees that Stipulated ESP IV provides a variety of benefits to customers in the Companies' service territories and requests that the Commission exercise its discretion to find that Stipulated ESP IV, as a whole, benefits the public interest. As a final matter, FirstEnergy asserts that, although a competitive process procurement was not utilized for the purposes of Rider RRS, the negotiation process led to a more beneficial outcome, which includes a rate stability hedge over the eight-year term of Stipulated ESP IV and several other unique benefits that would not otherwise be included in such an agreement if a competitive process had been utilized (Tr. Vol. XIII at 2788).

The following parties contend Stipulated ESP IV, as a package, does not benefit ratepayers or the public interest: Power4Schools; OHA, NOPEC, Environmental Groups, Exelon, Dynegy, RESA, IMM, P3/EPSCA, OCC/NOAC, OMAEG, Dynegy, Sierra Club, CMSD and Wal-Mart (OCC/NOPEC Ex. 8 at 8; P3/EPSCA Ex. 12 at 21-22). OHA, NOPEC, Environmental Groups, Exelon, P3/EPSCA, OCC/NOAC, Sierra Club, OMAEG, Power4Schools also generally believe that the "commitments" surrounding resource diversity and retail stability are illusory at best and do not subject the Companies to any real firm commitments or provide any real benefits to consumers (Tr. Vol. XXXVI at 7528-32, 7540-49; Tr. Vol. XXXVII at 7774-78, 7847). Environmental Groups further contest that the Companies have not met their burden of proof, Stipulated ESP IV and Rider RRS would create economic roadblocks, and any speculative benefits derived from such a plan would be significantly outweighed by the fact that they undermine state policy and customer welfare. Additionally, and as argued above, OCC/NOAC, OMAEG, Exelon, and NOPEC state that numerous terms of Stipulated ESP IV constitute monetary inducements or terms targeted to just select parties who agreed to support Rider RRS, and argues these few provisions may benefit some parties to this proceeding, but do little to benefit the public interest or the vast majority of consumers in the Companies' service territories (OMAEG Ex. 24; OMAEG Ex. 26A at 7-9; Dynegy Ex. 1 at 6, 11; OCC/NOPEC Ex. 8 at 27-28). Dynegy also warns the Commission to be wary of the benefits accruing to signatory parties, especially those to be paid by FirstEnergy's customers. CMSD states that the Commission lacks the statutory authority to approve Rider RRS and is preempted from doing so by federal law; however, CMSD also provides that if the Commission were to determine otherwise, it must exclude any claimed benefits associated with Rider RRS from its consideration of the second prong. OCC/NOAC contest allowing Rider RRS to continue in the event the ESP is terminated pursuant to R.C. 4928.143(E), noting it would be harmful to customers to allow a rider which, in their opinion contributes to the failure of the MRO v. ESP test to continue to be charged to customers.

c. Economic Stability Plan (Retail Rate Stability Rider)

i. Retail Stability

FirstEnergy, as well as many of the signatory parties such as Nucor, MSC, and OEG, argue that the Economic Stability Program will benefit customers and is in the public interest, stating that Rider RRS provides a valuable assurance to customers against the risk of increasing and volatile energy prices (Tr. Vol. I at 75; Tr. Vol. XVIII at 3650; Co. Ex. 13 at 4). Moreover, FirstEnergy contends that the hedge provided by Rider RRS will benefit both SSO and shopping customers, as the proposed eight-year term extends far beyond the terms of CRES supplier contracts currently offered and those contracts typically include a risk premium associated with anticipated wholesale market price volatility (Tr. Vol. XXVI at 5333; Tr. Vol. XXII at 4527; Co. Ex. 13 at 10-13; Co. Ex. 135; Tr. Vol. XXXIV at 7146; Co. Ex. 150). FirstEnergy further argues that fixed-price contracts are equally incapable to provide the same rate stability benefits that Rider RRS will provide to customers (Co. Ex. 13 at 13; Co. Ex. 146 at 2-4; Tr. Vol. XXX at 6288-89). Moreover, the Companies assert that because the output from the Plants and OVEC entitlement units will be sold into PJM markets, Rider RRS would not displace any load for the Companies' SSO customers or involve direct transactions with shopping customers (Tr. Vol. I at 37; Tr. Vol. XVIII at 3650-51; Tr. Vol. XXIV at 4878-79, 5086-87; Tr. Vol. XXV at 4909; Tr. Vol. XXVI at 5201-5202, 5332; Tr. Vol. XXVIII at 5620; Tr. Vol. XXXI at 6416-17). FirstEnergy also contends that Rider RRS will provide a sense of retail rate volatility mitigation that the SSO CBP staggering and laddering process does not, noting that, in addition to benefiting both shopping and non-shopping customers, the Companies will be able to capture the actual value of volatile 2013/2014 locational marginal prices (LMPs) that exceeded the weighted average clearing price, resulting in additional value to retail customers (Tr. Vol. at XXX at 6282-85; Co. Ex. 155 at 6-7). FirstEnergy also contends that all customers are exposed to the long-term increases and volatility in the retail price of power, stressing that SSO pricing is not immune to the impacts of extreme weather events (Co. Ex. 155 at 4; Tr. Vol. XXII at 4528). FirstEnergy asserts that it is appropriate for Rider RRS to be recovered on a non-bypassable basis, as both non-shopping and shopping customers will receive the resulting competitively-neutral hedge and other benefits attributed to the Economic Stability Program (Co. Ex. 13 at 6). As a final matter, the Companies assert that, while they cannot guarantee the results of the hedge provided by Rider RRS in the form of a guaranteed credit, the hedge will nevertheless provide benefits to customers.

FirstEnergy further asserts that Rider RRS would promote economic development by providing a greater degree of rate certainty to potential industrial and commercial customers considering locating or expanding in the Companies' service territories (Co. Ex. 13 at 11; Tr. Vol. IV at 877-78; Co. Ex. 2 at 15-16.) Additionally, provided that the operating costs of the Plants and OVEC entitlement units are forecasted to remain relatively stable and the 10.38 percent ROE, or 9.03 percent effective ROE, is fixed over the entire eight-year term of Rider RRS, FirstEnergy contends Rider RRS will have stable costs,

with the significant risk of an increased cost of equity falling on FES (Co. Ex. 141 at 4-5; Tr. Vol. XXXII at 6542-43, 6557-58, 6616; Tr. Vol. I at 35-36; Tr. Vol. XVIII at 3621-22; Co. Ex. 27 at 10-11; Co. Ex. 33 at 8; Co. Ex. 156 at 13). Moreover, FirstEnergy asserts that the record demonstrates the reasonableness of the initially proffered 11.15 percent ROE, and so, an even lower negotiated ROE would be a significant benefit to customers (Co. Ex. 27 at 3-5; Tr. Vol. X at 2064).

OCC/NOAC, RESA, Dynegy, Cleveland, and Sierra Club contend that the Commission should not consider the illusory promise of rate stability as a qualitative benefit to customers under Stipulated ESP IV, as the Companies have offered no guarantee, and have failed to establish with any degree of certainty, that Rider RRS will produce a net credit to customers to offset market volatility, on an annual or aggregate basis (OCC/NOPEC Ex. 4 at 49-52; Sierra Club Ex. 95; P3/EPSCo Ex. 12 at 5-6, 20; RESA Ex. 6 at 7-8). Instead, Dynegy, Cleveland, Power4Schools, Exelon, and OCC/NOAC propose that a CBP should be conducted for the capacity and energy that the Companies wish to include in Rider RRS. Furthermore, Environmental Groups, OCC/NOAC, RESA, Power4Schools and Sierra Club contend that FirstEnergy has failed to provide sufficient evidence to support the existence of benefits from the RRS or Stipulated ESP IV, specifically by failing to show that customers are actually exposed to any volatility or that, if so, customers lack adequate tools, including energy efficiency measures, to address it (Tr. Vol. IV at 704, 706-07; Tr. Vol. VI at 1198-99; P3/EPSCo Ex. 5 at 24; OCC/NOPEC Ex. 4 at 51-52; Sierra Club Ex. 84; Co. Ex. 13 at 14). In fact, OCC/NOAC contend no such volatility exists as SSO customers' rates are generally stable over time resulting from various competitive auctions (OCC/NOPEC Ex. 4 at 49-51). Moreover, NOPEC, OCC/NOAC, and Sierra Club also agree to the extent that customers are facing such volatility, there are adequate and less costly measures in place to mitigate such risk, noting CRES customers are protected through multi-year contracts and SSO customers are protected by the laddered CBP auctions (OCC/NOPEC Ex. 4 at 49-52; Staff Ex. 12 at 14). Exelon also argues that the Companies' promise of rate stability is illusory as the PPA is simply an effort to bolster FES' balance sheet and ensures FES will no longer be subject to PJM's capacity performance product penalties (Dynegy Ex. 1 at 9-10; Tr. Vol. XXXVI at 7704-09).

ii. Projected Quantitative Benefits

FirstEnergy asserts the proposed PPA between the Companies and FES was the subject of extensive due diligence and negotiations conducted at arm's length, emphasizing that the individuals assigned to evaluate the PPA (EDU Team) collected cost information and operational data of the Plants, produced and verified various cost projections, and benchmarked those projections against industry data. The Companies then compared these confirmed costs with the projected revenues based on the energy, capacity, and carbon price forecasts of FirstEnergy witness Rose. (Co. Ex. 33 at 4-5; Tr.

Vol. XIII at 2761-68, 2787-89, 2885-89.) FirstEnergy contends that the forecasts and cost data were reasonable to rely upon, and the amount by which projected market prices consistently exceeded projected variable costs enabled the EDU Team to independently corroborate the revenue projections FES provided to the Companies (Tr. Vol. XIII at 2773-2774). FirstEnergy also states that during this process, the EDU Team consulted FirstEnergy witness Murley for an analysis of the Plants' local and regional economic impacts (Tr. Vol. XIII at 2790-91). The EDU Team concluded that, based on the cost and revenue projections, as well as the modified term of eight years, Rider RRS could potentially create a nominal benefit to customers of \$561 million, or \$260 million, net present value (NPV), while also noting that Rider RRS would continue to effectively hedge against market prices in the event the forecasts were incorrect (Sierra Club Ex. 89; Co. Ex. 155 at 12; Co. Ex. 33, Attachment JAR-1(Revised); Tr. Vol. XIII at 2769-77, 2896).

Although there were several projected credits or charges resulting from Rider RRS in this proceeding, FirstEnergy additionally notes that its projection is the only one that utilized a probability-weighted methodology, or expected value analysis, indicating that this fact alone would make the Companies' projection the only credible analysis. Moreover, FirstEnergy argues that its forecasts remain reliable, despite short-term changes in the energy and capacity markets. According to FirstEnergy, unexpected short-term changes in natural gas prices would not necessarily dictate the energy pricing forecasts, as the natural gas market is extremely volatile and the short-term price changes would do little, if anything, to discredit the long-term trends that indicate natural gas prices will significantly increase over the duration of Rider RRS. (Co. Ex. 151 at 31-42; Tr. Vol. XXXV at 7327; Tr. Vol. XXXVIII at 8293-94.) In fact, FirstEnergy adds that coal has historically been the primary driver of electrical energy prices in Ohio (Co. Ex. 151 at 13). Additionally, FirstEnergy argues that market fundamentals also demonstrate the reliability of FirstEnergy witness Rose's projections, noting that the modeling utilized by FirstEnergy witness Rose also evaluated key supply and demand parameters, including the decrease in recent drilling activities for natural gas (Co. Ex. 151 at 31-42). As such, FirstEnergy alleges the intervenors were very short-sighted in their contention that the forecasts are stale, and thus, the Commission should not rely on their projections. FirstEnergy also notes that, despite several intervenor arguments that the capacity performance requirements would significantly increase capacity prices in the near future, its capacity projections are equally reliable, noting that the PJM restricted peak load, or the actual load required from generation owners, is unlikely to change during the term of Rider RRS and recent developments in the capacity market only bolster the capacity price projections (Co. Ex. 151 at 20-23; Tr. Vol. XXXIX at 8301). In fact, FirstEnergy contends that the capacity performance requirements will provide a substantial benefit to customers, rather than a cost (Co. Ex. 25; Co. Ex. 182; Co. Ex. 183; Tr. Vol. X at 2140-45, 2157-58). As for the various arguments regarding the lack of a sensitivity analysis, FirstEnergy notes that ICF was practically incapable to conduct such an analysis, given the nature of the complex and numerous variables used in its analysis, while also noting that

its reliance on one single forecast would be appropriate in this case since it is a probability-weighted analysis which gives due consideration to uncertainty in various scenarios (Co. Ex. 151 at 9-10; Co. Ex. 17 at 6; Tr. Vol. XXXV at 7273-75, 7278, 7451-52; Tr. Vol. VI at 1145-46). FirstEnergy argues this is also the reason FirstEnergy witness Lisowski determined a sensitivity analysis was unnecessary for his dispatch model for the expected costs of the Plants and OVEC entitlement units, in addition to the fact he was provided with only one set of inputs (Tr. Vol. VIII at 1636). In fact, FirstEnergy alleges that the intervenors' various arguments regarding the analyses utilized by FirstEnergy witnesses Rose and Lisowski only demonstrates their lack of understanding of the methodology and industry practices used in such analyses.

As noted above, FirstEnergy does not believe the contradicting analyses of various intervenor witnesses should be considered by the Commission, but in the event the Commission wishes to determine their respective reliability, FirstEnergy notes that the scenario utilized by OCC/NOPEC witness Wilson that applied the U.S. Energy Information Administration (EIA) 2014 and 2015 Annual Energy Outlook Reference Cases and underlying data (AEO Reference Cases) would be the most appropriate alternative, as these results proved to be very similar to that of an expected value analysis (Co. Ex. 151 at 42; Co. Ex. 60 at ii-iii; Tr. Vol. XXII at 4544-45). FirstEnergy also notes that the AEO Reference Cases project that natural gas prices will rise (Co. Ex. 151 at 39). However, FirstEnergy argues the difference between the Companies' projections and the AEO Reference Cases is misleading, as OCC/NOPEC witness Wilson failed to change the implied heat rate⁹ when he adjusted the natural gas prices, wrongly assuming that this relationship would remain constant over time (Tr. Vol. XXII at 4546; Tr. Vol. XXXV at 7443; Co. Ex. 151 at 10). Additionally, FirstEnergy notes that OCC/NOPEC witness Wilson failed to present any independent forecasts of energy, capacity, or natural gas prices (Tr. Vol. XXII at 4542). Accordingly, FirstEnergy provides that its projections for the potential credit arising under Rider RRS are the most accurate and should be given their due consideration by the Commission.

Sierra Club, RESA, OCC/NOAC, OMAEG, CMSD, and Exelon contend that FirstEnergy failed to definitively show that customers would receive a net credit over the eight-year term of Rider RRS; rather, the evidence presented in the record demonstrates that customers will likely lose hundreds of millions of dollars, ranging from \$793 million to \$2.97 billion, NPV (Sierra Club Ex. 95 at 1, 3-4, 7, 19; P3/EPSC Ex. 12 at 13; OCC/NOPEC Ex. 9 at 12; OCC/NOPEC Ex. 11 at 18). Sierra Club argues that several factors have significantly changed in the market and regulatory framework since the forecasts and assumptions upon which the Companies based their projections of charges and credits under RRS were made, which would make such projections outdated and unreliable (Sierra Club Ex. 95 at 11; Sierra Club Ex. 73 at 29; Co. Ex. 17 at 13; P3/EPSC Ex.

⁹ The implied heat rate is the ratio of electrical energy prices in the marketplace to gas prices.

12 at 17; OCC/NOPEC Ex. 9 at 12; Tr. Vol. XXXV at 7228). Specifically, Sierra Club and Environmental Groups assert that FirstEnergy's projection of credits and charges under Rider RRS is based on market energy, natural gas, and capacity price forecasts that are outdated, unreasonably high, and already proving to be wrong (Co. Ex. 171 at 88; Sierra Club Ex. 95 at 12, 17; Tr. Vol. VI at 1140-47, 1228-29; Sierra Club Ex. 88; Sierra Club Ex. 89; Tr. Vol. XXXV at 7258-64). Provided these projections are not accurate, Sierra Club contends these prices would have a significant impact on the ultimate result of Rider RRS (Sierra Club Ex. 9 at 18; Sierra Club Ex. 95 at 12-14; P3/EPSCA Ex. 12 at 22). Additionally, Sierra Club and Environmental Groups argue the projected costs of the Plants and OVEC entitlement units are unsupported and disregard inevitable environmental compliance costs, while also echoing the concerns of other parties that the Companies' projection utilized an unsophisticated single dispatch modeling run without the benefit of any accompanying sensitivity analyses or alternative scenarios to develop a range of asset valuations or the means to verify the results independently by another party (Sierra Club Ex. 95 at 4; Sierra Club Ex. 89; Tr. Vol. VIII at 1559-62, 1566-67, 1577-80, 1583, 1591; Sierra Club Ex. 69 at 9-10; Tr. Vol. X at 2227-2231). Sierra Club concludes by stating that other projections using more accurate information offered in this proceeding should be given more weight by the Commission as it determines the actual benefit or cost of Rider RRS to customers (P3/EPSCA Ex. 12 at 17; OCC/NOPEC Ex. 9 at 12). Exelon goes even further to state that *its offer, as a more realistic, competitively-based market offer, proves that the Companies' forecast is inaccurate and could be extremely detrimental to the Companies' customers* (Exelon Ex. 4 at 2, 7; Tr. Vol. XXXVII at 7828-33).

Environmental Groups, Exelon, and CMSD also contend that the Companies' Rider RRS projection lacks any reference points for evaluating the magnitude of customer risk or the reasonableness of the proposed PPA terms, noting that this analysis would be consistent with FERC precedent, while also adding that the Companies failed to conduct any competitive or market procurement or even evaluate alternative resources of its own to determine whether the PPA proposal was reasonable (Tr. Vol. XIII at 2745-2750; Co. Ex. 33 at 4-5). Based on testimony presented at hearing, Environmental Groups also state that the Plants' costs are likely to be higher than projected, noting significant regulatory changes by the U.S. EPA would likely require additional action on behalf of the Plants to reach compliance (Tr. Vol. XIX at 3803-3807; Tr. Vol. XII at 2548-49; Sierra Club Ex. 69 at 39-43; OCC Ex. 20 at 8-9). OCC/NOAC also provide that the uncertainty of these looming regulations make it even more unlikely that the costs projected are accurate for the Plants (OCC/NOPEC Ex. 20 at 19; OCC Ex. 20 at 3). Environmental Groups also argue that Rider RRS may also reduce the benefits of efficiency and peak demand reduction for FirstEnergy customers and the general public since these types of programs would essentially lower the revenues of the Plants, and thus, lower the amount to net against the costs (ELPC Ex. 28 at 22). IMM additionally argues Ohio consumers could also be disadvantaged by the foreseeable federal response to the Rider RRS, if approved. Specifically, IMM argues that federal action will be necessary to address the impact on competitive markets of subsidies,

effectively expanding the Minimum Offer Pricing Rule (MOPR) to address all cases where subsidies create an incentive to offer capacity into the PJM Capacity Market at less than an unsubsidized, competitive offer. As a result, IMM warns there would be no market revenues to offset the costs they would be required to pay under the Rider RRS, thus exacerbating the charges derived from Rider RRS.

iii. Additional Protections Recognized in the Proposed PPA

The Companies also assert the EDU Team negotiated several other protections for customers, including the Companies' ability to audit costs charged to the Companies, review and comment on FES' capital improvement plan and scheduled outage program, withhold consent for any accelerated depreciation, and hold FES subject to a standard of good utility practice for any operating costs incurred (Co. Ex. 156 at 3, 9-10; Co. Ex. 33 at 9; Tr. Vol. XIII at 2781-82; Tr. Vol. 2878-82; Tr. Vol. XXIV at 4879; Tr. Vol. at XXX at 6301; Tr. Vol. XIV at 3000-3003; Tr. Vol. XXI at 4066; Tr. Vol. at 4233-34; Tr. Vol. at XXVIII at 5620-21; Tr. Vol. XXXI at 6418). Additionally, FirstEnergy argues that Rider RRS is not an anti-competitive subsidy, noting that it is supported by a market negotiated cost-based contract and such contracts are common and frequently used in the industry as a Commission approved-means to mitigate and manage risk (Tr. Vol. XXI at 4169). The Companies also assert that the material provisions of the PPA are final and the Companies are not at risk from unilateral termination of the agreement (Co. Ex. 156; Co. Ex. 141 at 6; Tr. Vol. XXXII at 6567). Moreover, the Companies assert that there are substantial incentives for them to maximize revenues, as well as for FES to control costs (Co. Ex. 156; Tr. Vol. XIII at 2809-10; Tr. Vol. XIV at 3002, 3033; Tr. Vol. XXXVI at 7686-87; Tr. Vol. XXII at 4532-33; Co. Ex. 155 at 4).

Sierra Club and Cleveland contend that the very structure of FirstEnergy's proposal exacerbates the financial risk of Rider RRS and the protective provisions alleged by FirstEnergy will not shield customers (Co. Ex. 156; Tr. Vol. I at 40; Tr. Vol. XI at 2333). Sierra Club also notes that no final PPA has yet been created, and, thus, any alleged protections are not necessarily guaranteed to be included in the finalized agreement (Tr. Vol. I at 56-57; Tr. Vol. XIII at 2750-51; Tr. Vol. XXXVI at 7526-27). Even in the event the term sheet is finalized, Sierra Club states that it exposes customers to additional financial risks as it excuses FES' provision of energy, capacity, and ancillary services during many unit outages, allows FES to continue to control capital expenditures, which will not be subject to the good utility practices standard, and omits any protections against modification or early termination of the PPA (Co. Ex. 156 at 2-6, 10; Sierra Club Ex. 89; Tr. Vol. I at 81; Tr. Vol. VI at 2296-98; Tr. Vol. XI at 2284-86, 2472; Tr. Vol. III at 530, 535-36, 2783-84). Sierra Club further asserts the Companies failed to adequately define or quantify the legacy costs for which they are seeking approval, and notes these costs would not be subject to audit or prudence review in future Commission proceedings (Tr. Vol. I at 79, 88, 92-93; Co. Ex. 7 at 14-15). As for the actual negotiation, Sierra Club argues that the

PPA was not the result of an arm's length transaction since the Companies consistently failed to independently verify FES' information or consider alternatives that would better serve their customers (Sierra Club Ex. 52 at 2; Tr. Vol. XIII at 2754, 2765-66, 2834-35). Finally, Sierra Club contends that the Companies failed to adequately evaluate, scrutinize, and negotiate the terms of the PPA in order to protect consumers in the Companies' service territories, noting that the Companies conducted their review in an inwardly focused fashion without sufficient instruction or information or the consideration of any alternative proposals or options (Tr. Vol. XIII at 2758-60, 2766-67, 2776-77, 2830, 2843, 2861-62, 2871).

iv. Generation Resource Diversity

FirstEnergy, MSC, OEG, and Nucor further assert the Economic Stability Program benefits customers and is in the public interest because it enhances reliability by preserving and promoting generation resource diversity, which includes both fuel and asset diversity. FirstEnergy notes that maintaining adequate generation resource diversity will effectively maximize the strengths that each type of resource exhibits. (Co. Ex. 28 at 6.) Further, FirstEnergy states that the Commission needs to be aware of the resource diversity within Ohio in order to effectively balance those resources, especially due to the increased reliance on gas-fired generation in the PJM markets (Co. Ex. 28 at 4, 7-8; Tr. Vol. X at 2217; Tr. Vol. XXX at 6278-79). Along these same lines, FirstEnergy contends that maintaining adequate generation resource diversity is important to avoid potential catastrophic reliability issues related to over-reliance on any single class of generation, such as natural gas generation (Co. Ex. 28 at 7-8). FirstEnergy further maintains that generation assets fueled by interruptible gas supplies were not intended or designed to replace baseload coal and nuclear units, and moreover, are not adequate to handle the total load or to provide continuous service for prolonged periods (Co. Ex. 13 at 8; Tr. Vol. IV at 756-757). FirstEnergy asserts that Rider RRS will enable baseload generating units to remain online, and thus, encourage a more diverse and reliable supply of generation. Additionally, FirstEnergy alleges the generation resource diversity provided by the Plants will further contribute to retail rate stability, as diversification of the generating assets will promote lower and more stable fuel costs. (Co. Ex. 28 at 6-7; Co. Ex. 42 at 13; Tr. Vol. XXI at 4205; Tr. Vol. XXV at 4941-42; Tr. Vol. XXVIII at 5643.) The Companies note that natural gas prices are subject to extreme volatility and an over-reliance on natural gas generating assets would lead to higher wholesale and retail prices when natural gas prices inevitably rise (Co. Ex. 28 at 7; Tr. Vol. VI at 1168; Co. Ex. 151 at 30; see also Tr. Vol. XXV at 4939).

OCC/NOAC and Power4Schools argue that the Commission should not consider an increase in reliability and fuel diversity as a qualitative benefit to customers under Stipulated ESP IV, noting the PJM wholesale markets are wholly adequate to address the reliability and fuel diversity needs of the grid and it is not the Commission's responsibility to maintain generation reliability (OCC/NOPEC Ex. 7 at 28-29, 53; Tr. Vol. XXX at 6266).

Sierra Club, Exelon, and Dynegy contend that these resource diversity benefits are also illusory, noting these benefits wrongfully assume that the Plants would retire in the absence of Rider RRS, but would nonetheless be meritless in the event this assumption were true. Exelon specifically notes that FES has no power to retire the OVEC entitlement units and the Companies continue to aver that the Plants are, and will continue to remain, competitive in both energy and capacity markets. (P3/EPSCA Ex. 1 at 42; Tr. Vol. XXXIII at 6686; Tr. Vol. XI at 2305; Tr. Vol. II at 414.) Sierra Club and Dynegy add that no FirstEnergy witness was able to identify the optimal generation mix for Ohio, and still others testified about resource diversity without knowing the current generation mix (Tr. Vol. IV at 752, 785-86; Tr. Vol. XI at 2254, 2311-12; Tr. Vol. XVII at 3502, 3506; Sierra Club Ex. 7.) Sierra Club further asserts that FirstEnergy's claims regarding the superior reliability of coal and nuclear resources over other types of resources is significantly and inaccurately inflated, while discounting the reliability provided by other resources such as wind (Tr. Vol. IV at 758-59, 768, 772-73; Tr. Vol. X at 2217; OCC/NOPEC Ex. 4 at 53-54; Sierra Club Ex. 8 at 21).

v. Avoiding Transmission Upgrade Costs

FirstEnergy and MSC warn that if Rider RRS is not approved and the Plants subsequently close, the loss of over 3,000 MW of baseload generation would have a negative impact on the stability of the transmission system, thus, necessitating substantial transmission upgrades (Co. Ex. 37 at 2-3; Co. Ex. 39 at 5-7; Tr. Vol. XV at 3254-56; Tr. Vol. XVI at 3293-94). Based on the analysis of FirstEnergy witness Phillips, FirstEnergy and MSC assert the costs associated with these necessary transmission upgrades would fall within the range of \$436.5 million and \$1.1 billion, and would require PJM and transmission owners to develop a solution consisting of new facilities, as well as a combination of re-conductoring and rebuilding existing facilities (Co. Ex. 39 at 8-10; Tr. Vol. XVI at 3285). Even with such upgrades, the Companies assert that outages would still be more likely to occur due to the fact that increasing the distance between generation units and a load center increases the potential for outages on the transmission system (Co. Ex. 39 at 6). Additionally, as the need for transmission upgrades would be largely driven by the Companies' load, FirstEnergy asserts a significant portion of these costs would be borne by the Companies' customers (Co. Ex. 37 at 3; Co. Ex. 33 at 8; Co. Ex. 39 at 8-10; Tr. Vol. XXV at 5152-54). The Companies and MSC add that only a small percentage of the planned generation projects actually go into service and that it is not uncommon for developers to withdraw these projects from the PJM queue. Moreover, FirstEnergy witness Phillips testified that the Commission has authority over generation projects, noting that PJM does not have the authority to direct the construction of generation or to direct the generation to be built at any specific location; rather, PJM is limited to determine where overloads occur and attempt to identify a transmission solution, concluding that the former issues remain within the jurisdiction of the state (Tr. Vol. XVI at 3329). Thus, FirstEnergy and MSC conclude that the Economic Stability Program benefits customers by

avoiding the need for these costly transmission system upgrades that the retirement of the Plants would otherwise require (Tr. Vol. I at 96; Tr. Vol. XV at 3240).

OCC/NOAC and Sierra Club contend the Commission should also not consider the effects of plant retirement, such as transmission investment, as a qualitative benefit to customers under the Stipulated ESP IV, as no evidence has been presented in the record that the Plants would retire in the event that Rider RRS is not approved; rather, OCC/NOAC points to the significant evidence that these Plants would remain economically viable (OCC/NOPEC Ex. 7 at 34-44; OCC/NOPEC Ex. 8 at 34; Co. Ex. 29 at 1-4; Tr. Vol. II at 418; Tr. Vol. XI at 2305-07; Tr. Vol. XV at 3076-77; P3/EPSCo Ex. 5 at 11; Co. Ex. 143 at 2-3). Sierra Club adds that, even in the event the Plants were to retire and PJM required transmission upgrades, FES would have the opportunity to enter into a Reliability Must Run (RMR) contract¹⁰ to effectively subsidize the continued operation of the Plants while such upgrades were completed, which Sierra Club notes is a common approach in situations where a generator deactivation may alter reliability (Sierra Club Ex. 67 at 9-10). Sierra Club and Environmental Groups also note that the cost projections for these transmission upgrades, if required, were derived from a flawed, non-independently conducted transmission impact study that relied on outdated information and unrealistic assumptions involving the simultaneous retirement of Sammis and Davis-Besse, and, thus, should be disregarded by the Commission (Co. Ex. 39 at 4, 8; Tr. Vol. XV at 3223-26, 3229-32, 3259, 3264; Tr. Vol. XVI at 3318-19; Sierra Club Ex. 95 at 11, 17-18; Sierra Club Ex. 67 at 6-7). Further, Environmental Groups allege there is no evidence that reliability in PJM is at risk; rather, there is significant testimony in the record that states new generation is coming online and in significant amounts across the PJM market, including Ohio (Sierra Club Ex. 95 at 11; OCC/NOPEC Ex. 5 at 8-11). Exelon also echoes the assertions of OCC/NOAC and contends that it is PJM's, and not the Commission's, responsibility to ensure transmission grid reliability, noting PJM is effectively managing the capacity market with its newly implemented capacity performance product (Dynergy Ex. 1 at 10; Exelon Ex. 1 at 16; IMM Ex. 2 at 3-4).

vi. Consideration of AEP Ohio Order Factors

Pursuant to the Commission's decision in *AEP Ohio ESP III*, FirstEnergy, OEG, and Staff also assert that Rider RRS satisfies all of the AEP Ohio Order Factors (Co. Ex. 9 at 3-14). OCC/NOAC initially note that, while they address each of these factors, they believe the Commission should find the AEP Ohio Order Factors are an insufficient means to

¹⁰ An RMR contract is an agreement between a generator and PJM that is utilized to mitigate temporary system impacts and capacity shortfalls caused by generating plant closures. Practically speaking, once PJM receives notice of a generator's intent to close a plant or various units of a plant, PJM can enter into a RMR contract with the generator to provide payments for a fixed period of time to continue to run the units or plant while PJM addresses the potential reliability concerns.

assess whether customers are appropriately served and protected. In fact, OCC/NOAC recommend several factors they believe the Commission should consider in addition to the AEP Ohio Order Factors, including, but not necessarily limited to: requiring FirstEnergy to submit an independent assessment of the PPA and Rider RRS under independently produced future price scenarios so consumer interests are adequately protected; the effects of FirstEnergy's offer strategy into PJM on customers; the incentives, or lack thereof, of FirstEnergy to control the cost of the Plants and OVEC entitlement units so consumer interests are protected; the incentives, or lack thereof, for FirstEnergy and FES to make rational market-based retirement decisions pertaining to the Plants and OVEC entitlement units so consumer interests are protected; the economic impact of higher retail rates that would be imposed on FirstEnergy's customers, who OCC/NOAC assert are captive; and the cost of achieving the same benefits that Rider RRS and the PPA provide compared to other alternatives, such as the development of a least-cost combination of new and existing generation and/or transmission assets, competitive solicitation, or other market-based solutions. FirstEnergy believes the Commission should not afford any weight to these proposed factors, since the Commission has already determined which factors should be probative in its consideration.

In response to the first factor, FirstEnergy and MSC assert that the economic viability of the Plants remains in doubt, alleging that revenues have been at historic lows and are insufficient to cover the Plants' costs in the short-term, and thus, insufficient to continue to operate the Plants and make any necessary investments. The Companies provide that FES may not be able to financially bear short-term losses even if long-term projections of market prices show significant increases. Thus, based on a weak balance sheet caused by historic losses, and near-term forecasts of the Plants, FirstEnergy states that FES has identified these Plants to be financially at risk of closure prior to the end of their useful lives. (Co. Ex. 28 at 2-4; Tr. Vol. X at 2184-85; Tr. Vol. XI at 2395; Tr. Vol. XXXII at 6541-42; Tr. Vol. XXXIII at 6818; Co. Ex. 143 at 5.) The Companies conclude by stating that the Plants' recent performance is indicative of industry trends, noting that several other FES plants were recently retired due to projected near-term losses (Co. Ex. 28 at 4). FirstEnergy witness Lisowski also raised concerns regarding the Plants' cash flows in the near term, explaining that avoidable costs fail to consider this crucial aspect of financial viability (Co. Ex. 143 at 3-4). Thus, FirstEnergy believes it has adequately demonstrated the financial need of the Plants.

Sierra Club, P3/EPSC, OCC/NOAC, IMM, Dynegy, and OMAEG argue that, based on FirstEnergy's own projections regarding the Plants and OVEC entitlement units, these generating units are not in financial need. P3/EPSC and OCC/NOAC even contend that it is contradictory for FirstEnergy to argue that the Plants are in dire financial need when their own projections indicate that customers will receive a \$260 million, NPV, benefit resulting from the operations of those Plants and OVEC entitlement units through Rider RRS. P3/EPSC also contends that significant capital investments recently made in the

Davis-Besse and Sammis Plants indicate that FES believes these plants will not retire in the short-term (P3/EPSCA Ex. 1 at 41; P3/EPSCA Ex. 2C at 43-44; Sierra Club Ex. 89; OMAEG Ex. 18 at 9). Exelon, OCC/NOAC, and Dynegy add that none of the Companies' witnesses testified that the plants were uneconomic or set for closure in the event that Rider RRS was not approved (Tr. Vol. XXXII at 6636-37, 6686). Exelon additionally notes that the Companies' short-term projections do not incorporate capacity performance revenue and that FES is now obligated to provide its portion of the FirstEnergy committed capacity through May 31, 2019 (Tr. Vol. XXXVI at 7669, 7674, 7704). OMAEG agrees with Sierra Club, Exelon, and P3/EPSCA in that the Companies have not demonstrated the financial need of the Plants and the OVEC entitlement units, also asserting that market forces should be the ultimate determinate of a generating unit's financial need (OCC Ex. 25 at 9). OMAEG adds that allowing these subsidized units to participate in the wholesale market against unsubsidized units will destroy efficiency benefits and market price signals, thereby potentially increasing the cost of supplying customers with energy and capacity needs (OCC/NOPEC Ex. 1 at 4). Though NOPEC initially notes that the Commission has not provided a definition for "financial need," it also agrees that the Companies have failed to address this factor and concludes that the appropriate threshold for establishing the financial need of the Plants and OVEC entitlement units should be whether these units recover their avoidable costs (OCC/NOPEC Ex. 5 at 22-23).

FirstEnergy also asserts that it has demonstrated the necessity of the Plants and OVEC entitlement units as generating units that promote reliability and supply diversity in the Companies' service territories. In addition to other arguments presented above, FirstEnergy and MSC note that Rider RRS should also satisfy the second factor. FirstEnergy notes that coal and nuclear plants provide a much needed baseload generation source which can be supplemented with, but not replaced by, renewable resources (Co. Ex. 32 at 9; Co. Ex. 28 at 10). Likewise, unlike the coal and nuclear baseload generation provided by the Plants and OVEC entitlement units, the Companies also argue that natural gas plants lack significant on-site fuel storage and rely on "just in time" delivery of their fuel (Co. Ex. 29 at 7-8; Tr. Vol. XI at 2255). As such, the Companies maintain that the Plants and OVEC entitlement units remain an essential part of the diverse generation mix necessary to ensure the reliable delivery of electric service in the near and long term (Co. Ex. 32 at 9). Additionally, as noted earlier, FirstEnergy asserts that the Plants and OVEC entitlement units also have reliability benefits based on their location in close electrical proximity to the Companies' load (Co. Ex. 39 at 6). MSC further adds that FES' Plants and OVEC entitlement units have been negatively affected by improperly valued diversity, resulting from an inherently flawed market that produces artificially low cash flows which do not cover the costs of the power supply portfolio and environmental policies that encourage other types of resource generation (Co. Ex. 42 at 3, 6). Accordingly, FirstEnergy asserts the second factor of the AEP Ohio Order Factors should weigh in its favor.

Sierra Club and OMAEG also contend that the purported reliability benefits of Rider RRS are illusory because Sammis and Davis-Besse are not at risk of retirement. P3/EPSC and Exelon agree with Sierra Club, noting that if the Commission determines there is little to no risk of retirement for the Plants, that determination would rule out any concerns about reliability or supply diversity (Tr. Vol. XI at 2305; Co. Ex. 9 at 7; Tr. Vol. III at 521). P3/EPSC, IMM, and Exelon also believe that allowing the Plants to continue to operate would have a negative effect on future reliability, noting customers would bear the risk of capacity performance penalties while FES would be left with minimal incentives to make additional investments to avoid outages (IMM Ex. 2 at 3-4; Tr. Vol. X at 2215; Dynegy Ex. 1 at 9-10). Furthermore, Sierra Club, OCC/NOEC, and OMAEG note that, as described in their earlier arguments, the transmission upgrade cost estimate is based on outdated information and unrealistic assumptions and the resource and diversity purported benefits are unsubstantiated and vague (OCC/NOEC Ex. 1 at 26). OMAEG and OCC/NOEC contend that it is the responsibility of PJM to determine procedures for meeting the reliability needs of the region and that determination should not be made on a plant-specific basis by the Commission (OCC Ex. 26 at 6). As noted before, OMAEG, OCC/NOEC, and NOEC assert that PJM has effective measures to mitigate the threat of a jeopardized reliability system, specifically noting the provision of RMRs, incentives from the Reliability Pricing Model (RPM), and new generation projected to come online in the near future (Sierra Club Ex. 67 at 10; Exelon Ex. 1 at 16). Responding to the Companies' assertions about supply diversity, OMAEG and NOEC argue that maintaining the coal-fired generating units through Rider RRS will only further limit supply diversity, noting coal remains the highest utilized generation type in Ohio (OCC/NOEC Ex. 1 at 28). NOEC also states that extreme weather events, such as the Polar Vortex, should not validate FirstEnergy's assertions regarding reliability concerns, since all generation resources are challenged under such conditions (Sierra Club Ex. 8 at 24-25).

FirstEnergy and MSC also believe that Rider RRS has satisfied the third factor of the AEP Ohio Order Factors and that the Economic Stability Program affords several environmental compliance benefits. The Companies, MSC, OEG, and Nucor also believe that the Plants will continue to provide significant environmental compliance benefits, for both the U.S. EPA's Clean Power Plan (CPP) as well as other existing and pending environmental regulations (Co. Ex. 48 at 1-3, 6; Co. Ex. 12 at 9-12; Co. Ex. 145 at 2). FirstEnergy notes that Davis-Besse, as a zero-emissions resource, is well positioned to assist the Companies with their compliance with future U.S. EPA carbon reduction standards, adding that no issues have been raised by any party regarding Davis-Besse's environmental compliance (Co. Ex. 28 at 8, 12; Tr. Vol. IV at 877). FirstEnergy maintains that Sammis is also compliant with all existing environmental regulations and will continue to comply with future regulations, due to recent significant capital investments (Co. Ex. 32 at 9-12; Co. Ex. 46 at 2-3). FirstEnergy notes that Sammis is either fully in compliance or has a plan to comply with pending environmental regulations, including all of the following: (1) solid waste regulations, including the Coal Combustion Residuals

(CCR) rule; (2) air regulations, including the National Ambient Air Quality Standards (NAAQS), the Cross State Air Pollution Rule (CSAPAR), the Mercury and Air Toxics Standard (MATS) and the CPP; and (3) water regulations, including the Section 316(b) Cooling Water Intake Structures at Existing Facilities (316(b)) rule and the Effluent Limitations Guidelines and Standards (ELG) rule. FirstEnergy also states that any projected costs that the Plants may incur to comply with these regulations have already been included in the Companies' cost forecast provided by FirstEnergy witness Lisowski (Co. Ex. 46 at 3-5, 9). Furthermore, FirstEnergy argues it is unreasonable to give "proposed regulations" more consideration until their finalization, especially with regard to cost estimates for compliance, as several changes may occur to the proposed language before formal adoption of the language occurs (Co. Ex. 145 at 1-2). As evidence of its commitment to environmental compliance, FirstEnergy also states that Sammis has installed significant environmental upgrades and retrofits that are much more restrictive than current regulations, including controls for sulfur dioxide, nitrogen oxides and particulate matter (Co. Ex. 46 at 4, 6; Co. Ex. 32 at 7, 10-11; Co. Ex. 135; Tr. Vol. XII at 2519-22, 2536, 2552, 2577). Thus, despite the allegations that Sammis will be affected by the CPP or other pending environmental regulations, FirstEnergy argues that intervening parties have failed to produce any evidence that confirms their speculation. In the alternative, FirstEnergy argues that any unanticipated costs for such compliance, especially for the OVEC entitlement units, would be immaterial to the Companies' cost forecasts.

In addition to asserting that the Companies failed to consider environmental costs in their projections to calculate the ultimate credit afforded to customers, Sierra Club, IMM, and Environmental Groups argue that the Companies have failed to satisfy the third factor, noting that the Sammis and OVEC entitlement units face regulatory risk and potential unanticipated costs due to recently adopted regulations by the U.S. EPA. OMAEG, OCC/NOAC, and NOPEC add that the Commission should also consider any future requirements, even though the timing of the final rules is unknown, as compliance with these rules will have a significant impact on the coal-fire generation unit operations (OCC Ex. 20 at 3-6, 10, 24; OMAEG Ex. 17 at 8). OMAEG concludes by stating there would be considerable doubt as to whether the coal-fired generation units would be able to competitively operate in the energy market after achieving compliance with the new environmental regulations and their associated costs (Tr. Vol. XXIII at 4701-03). OCC/NOAC again stress that the impact of Rider RRS cannot be projected with a reasonable degree of certainty, and moreover, will not produce a benefit for customers commensurate with its potential cost (OCC/NOPEC Ex. 9 at 7-8). Sierra Club and Environmental Groups further emphasize that the Companies will be required to pay depreciation, interest expense and the ROE on such investment and failed to adequately address these issues during their analysis (Tr. Vol. XII at 2536; Tr. Vol. XIX at 3800-03; Tr. Vol. XXXIII at 6787-88, 6794.)

Finally, FirstEnergy and MSC state that closing the Plants would have a significant negative impact on electric prices and retail rate stability, with a resulting negative impact on economic development, both locally and regionally. In addition to the earlier arguments regarding effect of a potential closure on electric prices and rate stability, which included significant costs attributed to necessary transmission upgrades, FirstEnergy argues that this would also lead directly or indirectly to the loss of thousands of jobs, millions of dollars in tax revenue, and over \$1 billion in economic activity annually (Co. Ex. 35 at 2-3; Co. Ex. 36 at 6, 10-11; Tr. Vol. XV at 3214-17). Thus, the Companies assert that the fourth *AEP Ohio ESP III* Order factor should also weigh in their favor considering that closing the Plants would have a significant negative impact on economic development within the region (Tr. Vol. XI at 2371-72; Tr. Vol. XV at 3176-77).

OCC/NOAC, NOPEC, IMM, OMAEG, and Sierra Club assert that the Companies have failed to satisfy this factor, stating that Davis-Besse and Sammis are not at risk of retirement, and even in the event the Commission was to assume this could potentially be the case, the Companies' projections for transmission upgrades are significantly overinflated, adding that transmission and reliability concerns are best addressed at PJM (OCC/NOPEC Ex. 1 at 23-24). These parties contend the Commission should also not consider the effects of plant retirement, such as job loss, as a qualitative benefit to customers under the Stipulated ESP IV, as no evidence has been presented in the record that the plants would retire in the event that Rider RRS is not approved; rather, OCC/NOAC points to the significant evidence that these Plants would remain economically viable (OCC/NOPEC Ex. 7 at 34-44; OCC/NOPEC Ex. 8 at 34; Co. Ex. 29 at 1-4; Tr. Vol. II at 418; Tr. Vol. XI at 2305-07; Tr. Vol. XV at 3076-77; P3/EPSC Ex. 5 at 11; Co. Ex. 143 at 2-3). OMAEG, NOPEC, Environmental Groups, and Sierra Club further argue that several of the underlying assumptions supporting the economic development analysis conducted by FirstEnergy witness Murley are flawed. OMAEG, OCC/NOAC, and NOPEC specifically contend that the Companies' analysis ignores the potential economic benefits that might arise following the closure of a plant or potential mitigation of the economic consequences that may also occur (OCC/NOPEC Ex. 2 at 16; OMAEG Ex. 17 at 5; OMAEG Ex. 18 at 12). These parties specifically note the analysis ignores the opportunity costs of spending or any offsetting economic costs as well as the likely new generation or transmission upgrades that would occur in the event of the retirement (Tr. Vol. XV at 3064-65, 3077-81, 3090-91, Sierra Club Ex. 89; Sierra Club Ex. 73 at 34-35; OMAEG Ex. 18 at 10-13, 15). As a result, these parties request that the Commission disregard the economic impact analysis conducted by FirstEnergy witness Murley. OMAEG also maintains that Rider RRS and underlying PPA could potentially harm the economic development of the region from an environmental perspective, noting that the cost of continued operation of the coal-fired units may increase due to environmental regulations and discourage businesses from locating or expanding in Ohio. NOPEC adds that the retail rate increases may also impair Ohio manufacturers' ability to compete with other manufacturers regionally, in the United States, and globally (OMAEG Ex. 17 at 5).

Additionally, OMAEG argues that the Economic Stability Program will also deter new entrants from entering the power generation market because FES will be fully compensated for the operations of the Plants and OVEC entitlement units, thereby providing FES with a competitive advantage over its competitors (OMAEG Ex. 17 at 6, 11-12; OMAEG Ex. 18 at 6-7). Dynegy argues the Companies' proposal will create uncertainty in the wholesale markets and the discouragement of the development of new fuel-efficient, state-of-the-art generation in Ohio (Dynegy Ex. 1 at 6; RESA Ex. 6 at 4). Thus, these intervening parties do not believe FirstEnergy has satisfied the fourth factor.

FirstEnergy and MSC further assert that Rider RRS would be subject to rigorous Commission oversight with full information sharing and incorporates a risk-sharing mechanism. FirstEnergy witness Mikkelsen testified that an annual filing for Rider RRS would be submitted and would be subject to a two-part review by the Commission, which would include a review for mathematical errors, consistency with Commission-approved rate design, and incorporation of prior audit filings, as well as a second review to audit the reasonableness of the actual costs. (Tr. Vol. I at 58-59, 68; Tr. Vol. XXIV at 4879; Tr. Vol. at XXVI at 5198; Co. Ex. 7 at 15.) In fact, FirstEnergy provides that the audit would constitute the same level of review as the historic test the Commission employed when the plants were regulated, which would include full participation by intervening parties (Tr. Vol. I at 77-78, 82). In order to assist Staff in its reasonableness review of Rider RRS, FirstEnergy has also committed to provide Staff with FES' fleet information on any cost component, pursuant to a reasonable request, adding that FES also made such a commitment to supply this information (Tr. Vol. 1 at 82-84; Tr. Vol. XXXVI at 7519-20). Additionally, the Companies state that the Commission would have the ability to ultimately determine whether a request was "reasonable" for purposes of the review (Tr. Vol. XXXVI at 7519). Despite the fact that many intervenors objected to the proposed process for the review of legacy cost components, the Companies assert that parties had the opportunity to challenge legacy costs in this proceeding but elected not to do so (Tr. Vol. I at 79, 162; Co. Ex. 7 at 14-15). FirstEnergy further argues that the Companies, and not their customers, would be responsible for amounts disallowed for recovery through Rider RRS because the Commission deems those costs as unreasonable (Co. Ex. 8 at 21; Tr. Vol. I at 60-61; Tr. Vol. II at 448; Co. Ex. 154 at 8). FirstEnergy also emphasizes that a risk-sharing mechanism that potentially provides up to \$100 million in credits to customers for Years 5 through 8 of the Economic Stability Program will also foster greater rate certainty and stability (Co. Ex. 155 at 3-4; Tr. Vol. XXXVI at 7523; Tr. Vol. XXXVII at 7770; Co. Ex. 154 at 7-8). Finally, FirstEnergy contends the severability provision provided in Stipulated ESP IV is consistent with the requirement set forth in the *AEP Ohio ESP III* Order and provides sufficient guidance as to the remedy process if any portion of Rider RRS is determined to be deficient by a court of competent jurisdiction (Co. Ex. 9 at 13).

OCC/NOAC advance their concerns that consumers will not have the protection of cost control incentives due to a lack of regulatory oversight regarding cost-of-service

pricing. Notably, they argue that FES will have little incentive to aggressively control costs and it is not clear what the review process would allow for interested stakeholders or what would constitute a reasonable cost under such a review paradigm. (OCC/NOPEC Ex. 1 at 15, 19; Tr. Vol. I at 80-81; Co. Ex. 154 at 8.) Sierra Club also maintains that the proposed audit review process provides inadequate protections against the financial risks of customers associated with Rider RRS, noting it limits the Commission's oversight over some costs associated with Rider RRS (Sierra Club Ex. 89; Sierra Club Ex. 95 at 5). Sierra Club, RESA, OCC/NOAC, NOPEC, Exelon, and P3/EPSC argue that Stipulated ESP IV does not provide for rigorous review of Rider RRS and does not properly allocate risk between FirstEnergy and ratepayers. P3/EPSC, Exelon, OMAEG, OCC/NOAC, NOPEC, CMSD, and RESA further allege that the commitments to rigorous review and full information sharing are illusory. Specifically, P3/EPSC, OCC/NOAC, and RESA note the Commission will lack oversight or review authority over FES, Staff will not be provided all information pertaining to FES' fleet unless a "reasonable request" is submitted to FirstEnergy, which FES may ultimately deny, and this commitment will never include access to bilateral contracts between FirstEnergy and third parties. (Co. Ex. 154 at 8.) OCC/NOAC further opines the Commission should modify Rider RRS to provide Staff with complete access to all pertinent records, much like the requirement found in R.C. 4905.15,¹¹ rather than limit the scope of Staff's review to only those requests which are deemed "reasonable" during the review process. RESA and NOPEC raise a particular concern for the vaguely defined "legacy cost components" that will escape Commission review, noting that FirstEnergy failed to provide sufficient information regarding the nature or potential cost exposure for these various components (Co. Ex. 7 at 14-15; OCC Ex. 25 at 4; Tr. Vol. I at 89). NOPEC and Exelon add that additional deficiencies exist in the promise of a rigorous review since information pertaining to the OVEC units was never addressed. OMAEG, while agreeing with the arguments of Sierra Club, Exelon, and P3/EPSC, also argues that it would be wholly unreasonable that the reviews conducted by the Commission would not occur until after the bids and auctions have ensued and when the resulting revenue from the energy, capacity, or ancillary services is realized, or that such review would be based on the facts and circumstances that were known at the time the offer was made (OCC Ex. 25 at 4; Tr. Vol. I at 67; Tr. Vol. XXXVI at 7618-19).

P3/EPSC, Exelon, NOPEC, CMSD, and RESA also state that there is no alternative plan to allocate Rider RRS' financial risk between both FirstEnergy and its customers, noting the nominal benefits from the risk-sharing mechanism proposed by the Companies would pale in comparison to the forecasted charges customers will likely experience over the term of Rider RRS (Sierra Club Ex. 89; Tr. Vol. XXXVI at 7733). Moreover, RESA, Sierra Club, and OMAEG add that no cap has been implemented to protect customers

¹¹ R.C. 4905.15 states that "Each public utility shall furnish to the public utilities commission, in such form and at such times as the commission requires, such accounts, reports, and information as shall show completely and in detail the entire operation of the public utility in furnishing the unit of its product or service to the public."

over the term of Rider RRS (Tr. Vol. XXXVI at 7523-26). Sierra Club also emphasizes that FES, as the generating owner, will not share any of the financial risk (Tr. Vol. XIII at 2830; P3/EPSC Ex. 1 at 8-9, 25; OCC/NOPEC Ex. 4 at 58; Staff Ex. 12 at 13, 16-17). Sierra Club and RESA also maintain that proposed risk sharing mechanism provides inadequate protections against the financial risks of customers associated with Rider RRS, noting no credits were offered to alleviate charges to customers accrued in the first three years of the term when millions in actual charges have been predicted to occur (Tr. Vol. I at 67, 69-71, 73-76, 79, 81-83; Tr. Vol. III at 519; Tr. Vol. XXXVI at 7525, 7600, 7741; Sierra Club Ex. 89; Sierra Club Ex. 95 at 5). OMAEG and NOPEC also question the validity of this mechanism, as the credit merely acts as a slight cost reduction to customers and does not change the fact that the entirety of net costs will be passed to customers (OCC/NOPEC Ex. 9 at 18-19; Tr. Vol. XXXVII at 7771-72). RESA further contends that these credits will provide little to no incentive to FES or OVEC to manage the costs of the Plants or OVEC entitlement units (Tr. Vol. XXXVI at 7733). Additionally, given the projected charges customers may face during the course of the Rider RRS term, RESA notes that nominal credits customers would receive could not reasonably be considered to be a risk-sharing mechanism (OCC/NOPEC Ex. 9 at 8). Exelon, RESA, and OMAEG add that the nominal nature of these credits is exacerbated by the fact that they are applied on an annual basis, rather than in the aggregate. RESA agrees that it is unlikely Rider RRS would be conducive to rate stability, asserting that the Companies should stand behind the projections and offer an aggregate Rider RRS credit at least equal to any Rider RRS charges plus carrying charges, which would truly constitute an equitable risk-sharing mechanism (RESA Ex. 6 at 7-8). For similar reasons, RESA and Cleveland also request the Commission impose a floor and ceiling to safeguard customers affected by Rider RRS. Rather than accepting the proposed risk-sharing mechanism, OCC/NOAC and NOPEC suggest an asymmetric sharing mechanism where only 50 percent of the net charges under Rider RRS would be imposed upon customers during the first three years of ESP IV, with 25 percent imposed on customers thereafter (OCC/NOPEC Ex. 4 at 6-7). CMSD also requests the Commission to implement changes to the risk-sharing mechanism to better allocate the financial risk amongst all involved parties, further noting that Rider RRS, as proposed, would adversely affect the Companies' ratepayers, and thus, cannot be considered an effective hedge.

Additionally, P3/EPSC and RESA argue the proposed severability provision is insufficient to satisfy the conditions proffered by the Commission in *AEP Ohio ESP III*, as it allows FirstEnergy to cure defects in Rider RRS and discourages parties opposing the manner of the cure to raise the issue for fear of forfeiting its stipulation provision (Co. Ex. 154 at 8-9; Tr. Vol. XXXVI at 7681-83). Exelon further argues that the severability clause language would create a very limited focus for any modified Rider RRS proposal, which would ignore any applicable statutory or regulatory requirements that may exist at the time of its proposal (Co. Ex. 154 at 8-9). OMAEG, Cleveland, OCC/NOAC and CMSD also agree that the severability provision acts as an additional protection for FES, stating

that it would serve to make FES whole at the expense of ratepayers in the event that Rider RRS is later invalidated and, pursuant to retroactive ratemaking principles, would prohibit a refund to ratepayers (OCC Ex. 20 at 27; Co. Ex. 154 at 9).

d. Generation Cost Reconciliation Rider

FirstEnergy and MSC note that Stipulated ESP IV will continue the Generation Cost Reconciliation Rider (Rider GCR), arguing the proposed modifications will ensure additional stability and certainty. The proposed modifications will make costs recovered under Rider GCR bypassable unless the balance of the rider exceeds ten percent of the applicable generation expense in two consecutive quarters during the term of the Stipulated ESP IV, which is an increase of five percent from the previous threshold. (Co. Ex. 8 at 3; Tr. Vol. XVIII at 3609.) FirstEnergy notes the bypassability threshold has never been achieved in two consecutive quarters and adds that increasing the threshold from five percent to ten percent will make it less likely to be triggered in the future (Co. Ex. 43 at 7).

RESA does not oppose reimbursement through Rider GCR, but is opposed to the structure of the rider which automatically converts any imbalances from bypassable to non-bypassable once the threshold point is reached. RESA recommends that Rider GCR be modified so that if the threshold point is reached, FirstEnergy files a request for reimbursement explaining why it is not collecting the authorized expenses and then present solutions.

e. Delivery Capital Recovery Rider

FirstEnergy also argues that Stipulated ESP IV benefits customers and the public interest by helping to ensure reasonably priced and reliable distribution service. Initially, FirstEnergy contends that continuing the distribution rate freeze will also benefit customers (Co. Ex. 155 at 3). In connection with the freeze, FirstEnergy states the continued recovery of lost distribution revenue will appropriately balance the interests of customers with the interests of the Companies' shareholders (Co. Ex. 7 at 8). Further, the Companies stress that they will be required to show total investment amounts and provide justification as to why it is appropriate to recover these investments through Rider DCR, which will then be subject to an annual audit. As Rider DCR provides the Companies with the opportunity to invest in infrastructure in a more proactive manner, FirstEnergy asserts that the Companies have consistently outperformed their system average interruption frequency index (SAIFI)¹² and customer average interruption

¹² Represents the average number of interruptions per customer.

duration index (CAIDI)¹³ minimum reliability standards since Rider DCR has been in effect (Co. Ex. 50 at 9). Additionally, the Companies propose to increase the annual cap for revenue recovered under Rider DCR from \$15 million per year to \$30 million for the first three years, with a \$20 million increase annually for the subsequent three years and \$15 million annually for the final two years of the proposed eight-year term (Tr. Vol. XX at 3961-64). During the evidentiary hearing, FirstEnergy alleged that no intervening witnesses could contest that actual revenue requirements have increased \$30 million annually on average (Tr. Vol. XXI at 4117-19; Tr. Vol. XXXVIII at 8231).

While OCC/NOAC initially contends that Rider DCR will not result in a financial "wash" under the MRO v. ESP test, as proffered by FirstEnergy witness Fanelli, OCC/NOAC, NOPEC, and RESA argue the alleged qualitative benefits arising from Rider DCR will not actually accrue to customers and, instead, will cause customers to pay more than they otherwise would be required to pay under a distribution rate case (Co. Ex. 50 at 7; OCC Ex. 18 at 17; OCC/NOPEC Ex. 8 at 30; OCC/NOPEC Ex. 11 at 22-23). OCC/NOAC, NOPEC, and RESA argue these revenue cap increases could ultimately result in customers paying an additional \$240 to \$330 million in revenues, for a total of \$915 million in Rider DCR charges over the term of Stipulated ESP IV (OCC/NOPEC Ex. 11 at 23-24). Additionally, OMAEG and NOPEC maintain the Companies have provided no evidence showing the need for this increased cap, especially since no major distribution capital projects are currently planned (Co. Ex. 50 at 4; Staff Ex. 6 at 7-9; OCC Ex. 18 at 19). OCC/NOAC, Power4Schools, and OMAEG further assert that Rider DCR will function more efficiently or foster greater reliability when collecting these costs through a base distribution rate case (OCC/NOPEC Ex. 8 at 31). OMAEG, NOPEC, and Power4Schools assert it would not be reasonable or prudent for the Commission to allow the Companies to incrementally increase the distribution rate, absent a thorough Commission review of such rates in a distribution rate case, noting it has already been seven years since the Companies' last distribution rate case (OCC Ex. 22 at 3; Tr. Vol. XX at 3901). Moreover, OMAEG and NOPEC add that, in the event the Companies are earning returns that exceed their actual costs of capital, additional Rider DCR increases are both unnecessary and inappropriate (OCC Ex. 18 at 11). OCC/NOAC further asserts that allowing Rider DCR to continue to be charged to customers in the event the ESP is terminated pursuant to R.C. 4928.143(E) would be harmful, due to the fact, in their opinion, Rider DCR contributes to the failure of the MRO v. ESP test.

f. Government Directives Recovery Rider

FirstEnergy believes that the Government Directives Recovery Rider (Rider GDR) proposed in its application will permit timely recovery of future costs related to implementing programs required by legislative or governmental directives over which the Companies would have no control (Tr. Vol. I at 180; Co. Ex. 16 at 4). Given the proposed

¹³ Represents the average interruption duration.

eight-year term of Stipulated ESP IV, FirstEnergy argues that it is appropriate to establish a cost-recovery mechanism now for possible future charges incurred because of governmental actions or directives in order to ensure the recovery of such costs is completed in a uniform and consistent manner subject to Commission review and approval. (Tr. Vol. XXIV at 4905; Co. Ex. 16 at 3). As a part of Stipulated ESP IV, the Companies are specifically requesting deferral authority and recovery of the costs associated with the supplier web portal and bill logos through Rider GDR. Additionally, the Companies note that no costs related to proposed Rider GDR had been incurred at the time of the evidentiary hearing. (Co. Ex. 15 at 7-8; Tr. Vol. V. at 1030-33, 1079-83, 1101.)

Similar to its objections to Rider DCR, OCC/NOAC, Power4Schools, and NOPEC argue the alleged benefits resulting from Rider GDR are without merit, noting that this is again an attempt by the Companies to request approval of an asymmetric, single-issue ratemaking request when substantial excess earnings are already being recovered by the Companies. OCC/NOAC additionally contend that the proposed Rider GDR provides no incentive or requirement for Companies to file for rate reductions resulting from changes in governmental regulations. (OCC/NOPEC Ex. 7 at 32.) OMAEG also adds that FirstEnergy witness Mikkelsen even testified that it is too early to ascertain the types of costs that will result from implementing these directives or to estimate the amount of costs to be recovered under the rider from customers (Co. Ex. 7 at 25).

g. Legacy RTEP and MTEP Costs

FirstEnergy alleges Stipulated ESP IV will continue the Companies' commitment not to seek recovery from retail customers for certain legacy PJM Regional Transmission Expansion Plan (RTEP) costs, as well as certain legacy Midwest ISO (MISO) Transmission Plan (MTEP) charges. FirstEnergy states that Stipulated ESP IV will continue the commitment originally made in the *ESP II Case* and forego recovery of at least \$360 million of the RTEP charges, with the MTEP costs counting toward that commitment. (Co. Ex. 7 at 17-18; *ESP II Case*, Opinion and Order at 13.)

OCC/NOAC, Power4Schools, and NOPEC contend that recovering MTEP charges would potentially harm customers and would also be premature, as FERC has not approved recovering such costs through the American Transmission Systems, Inc. (ATSI) tariff. These parties also argue that allowing the Companies to count these MTEP costs toward the previous commitment to not seek recovery of the \$360 million of RTEP costs would violate the terms and spirit of the earlier settlement agreement (OCC Ex. 19 at 7-11; *ESP II Case*, Opinion and Order at 13).

h. Resource Diversification and EE/PDR Commitments

FirstEnergy avers that Stipulated ESP IV contains significant commitments to resource diversification, including establishing a goal to reduce CO₂ emissions by 90 percent from their 2005 levels by 2045; evaluating investment in battery resources and technology contingent upon Commission approval of cost recovery for such investments; reactivating all of their EE/PDR programs that were previously suspended and expanding, in accordance with best utility practices, EE/PDR offerings through the end of the eight-year term of Stipulated ESP IV; seeking to procure at least 100 MW of wind or solar energy sourced in Ohio, thereby, diversifying Ohio's energy portfolio; and filing a report every five years with the Commission that explains the progress with the resource diversification efforts. (Co. Ex. 154 at 11-12; Tr. Vol. XXXVII at 7775-76; Tr. Vol. XXXVII 7873.) Further, FirstEnergy claims Stipulated ESP IV will also provide support to several EE/PDR programs (Co. Ex. 2 at 10-11; Co. Ex. 154 at 15; Co. Ex. 155 at 5). The Companies also state that cost-effective EE programs will be eligible for shared savings, with after-tax annual cap increased from \$10 to \$25 million, which will continue to be recovered in Rider DSE (Co. Ex. 154 at 11-12). The Companies note the cost-effective EE programs will include the proposed Customer Action Program. FirstEnergy witness Mikkelsen also stated that, in the event the Companies are unable to achieve these various objectives, there will be penalties in the form of future negotiating opportunities with regulators (Tr. Vol. XXXVI at 7529). Accordingly, FirstEnergy believes that because these various commitments go above and beyond that which the Companies are currently legally obligated to do, these provisions should qualify as benefits for customers.

Environmental Groups, OCC/NOAC, and OHA contend that the lack of enforceability of these various targets and goals should lessen the weight the Commission affords to it when considering these provisions as a potential benefit to customers and the public interest. NOPEC agrees with other opposing parties that the Companies will not be held accountable for any of the goals made to further resource diversification, and thus, should not be considered as commitments nor considered by the Commission when it evaluates whether the traditional three-prong test has been met (Co. Ex. 154 at 9, 11-12; Tr. Vol. XXXVI at 7529, 7531-35, 7541, 7549). Sierra Club and RESA agree that these provisions are subject to several contingencies or are otherwise completely unenforceable and so they should be disregarded by the Commission (Tr. Vol. XXXVI at 7532-35; RESA Ex. 6 at 8-9). Sierra Club goes further to state that some of these provisions are empty commitments as the Companies were already projecting to supply certain levels of energy savings above the goals provided in Stipulated ESP IV (Tr. Vol. XXXVI at 7536-40; Sierra Club Ex. 93; Sierra Club Ex. 94). OCC/NOAC asserts that, without any further detail than what has been provided thus far, the Commission cannot reasonably determine whether such a proposal would be beneficial to the public interest or FirstEnergy's customers.

Environmental Groups also argue that this constitutes a 150 percent increase in the Companies' shared savings cap, with absolutely no explanation in the record as to the

basis for that increase. Environmental Groups further state that this goes against the inherent purpose of shared savings, which is to provide motivation to a utility to discover ways to encourage energy efficiency. (ELPC Ex. 27; Tr. Vol. XXXVII at 7866-67; OCC/NOPEC Ex. 11 at 26.) Environmental Groups note that counting the savings derived from the proposed Customer Action Program should not be included for the purposes of determining FirstEnergy's shared savings incentive payment. OCC/NOAC further add this increase in the shared savings cap will likely cause unreasonable additional costs to customers, especially impacting those low-income customers who are participating in the Percentage of Income Payment Plan (PIPP) program (OCC/NOPEC Ex. 11 at 26).

i. Grid Modernization Program

FirstEnergy alleges that the Stipulated ESP IV will also benefit customers through its grid modernization provision, as this provision contains several initiatives that would further promote customer choice in the Companies' service territories, including, but not limited to, Advanced Metering Infrastructure (AMI), DACR, Volt/VAR, engaging Staff to attempt to remove any barriers for distributed generation, consulting with Staff regarding net-metering tariffs, and full deployment of advanced smart meters (Co. Ex. 154 at 9-10). The Companies believe implementation of such initiatives will ultimately lead to customer savings and promote retail competition in the state of Ohio (Co. Ex. 154 at 3). Additionally, FirstEnergy states that the Companies will file a grid modernization plan with the Commission within 90 days of the filing of Stipulated ESP IV, in which all interested parties would have the opportunity to participate (Co. Ex. 154 at 9-10; Co. Ex. 155 at 4; Tr. Vol. XXXVI at 7584-85, 7624). The Companies state that costs associated with any approved grid modernization project would be recovered through Rider AMI, commencing within three months after Commission approval of the project and would be calculated based on a forward-looking formula rate (Co. Ex. 154 at 9-10). Further, FirstEnergy provides that the ROE would be initially set at 10.88 percent based on the currently approved ROE for ATSI plus a 50 basis point incentive mechanism to incentivize grid modernization investment over other potential types of investment (Co. Ex. 154 at 10; Tr. Vol. XXXVI at 7631-32; Tr. Vol. XXXVII at 7775).

Environmental Groups and OCC/NOAC allege that the Stipulated ESP IV may actually harm customers, noting the preclusion to terminate Rider RRS and Rider DCR before 2024 and arguing the Companies' commitment to file a grid modernization plan does not warrant the Commission approving an incentive ROE on grid modernization investments absent any evidence showing that it will not provide windfall profits to the Companies (ELPC Ex. 28 at 13-14). OCC/NOAC further asserts that the proposed ROE is unjust and unreasonable, as it is higher than the current ROE approved for FirstEnergy's SmartGrid pilot (Tr. Vol. XXXVII at 7774-7775). OCC/NOAC and OHA also contend that it would be unwise for the Commission to agree to an upfront fixed ROE for facility

deployment regarding DACR and Volt/VAR technologies before any details of the grid modernization plan are known.

j. Straight-Fixed Variable Rate Design

FirstEnergy asserts Stipulated ESP IV benefits customers through the potential transition to a straight-fixed variable (SFV) cost recovery mechanism. Per the terms of Stipulated ESP IV, the Companies would file an Application for Tariff Approval (ATA) case with the Commission by April 3, 2017, for the consideration of a transition to SFV cost recovery mechanism for residential customers' base distribution rates. (Co. Ex. 155 at 13.) Interested parties would then have the opportunity to provide input regarding the merits and details of an SFV rate design. FirstEnergy states that the SFV mechanism would be phased in over a period of three years, with 25 percent fixed costs and 75 percent variable costs in Year 1, 50 percent fixed costs and 50 percent variable costs in Year 2, and 75 percent fixed costs and 25 percent variable costs in Year 3. (Co. Ex. 154 at 12-13.) FirstEnergy further argues that the proposed rate design under Stipulated ESP IV supports gradualism in rates and benefit economic development and job retention, specifically referencing this rate design's effect on Riders EDR(d) and DRR (Co. Ex. 8 at 12).

Environmental Groups contend the Commission should not make any preliminary findings on SFV rates without a full record, arguing that this issue was never raised before its inclusion in the Third Supplemental Stipulation and the Companies have failed to explain how it will benefit customers or why it should be considered outside of a rate case (Co. Ex. 155 at 4; ELPC Ex. 28 at 18, Attachment KRR-4; Tr. Vol. XLVII at 7856-57). OCC/NOAC notes that a corresponding rate of return reduction should be utilized to match the lowered business risk afforded to FirstEnergy. OMAEG further asserts this rate design undermines the cost incentive for efficiency programs and discourages energy efficiency (OMAEG Ex. 28 at 14).

k. Economic Development Benefits

In addition to the economic development benefits provided by the Economic Stability Program, FirstEnergy also maintains that Stipulated ESP IV includes several economic development provisions that will help stimulate the economy in the Companies' service territories, noting some of the provisions will be funded through the Companies' Economic Development Rider (Rider EDR), while others will be funded through contributions by the Companies' shareholders. Notably, FirstEnergy contends that the Companies will provide a total of \$3 million per year in economic development and job retention funding over the term of Stipulated ESP IV, with no associated recovery from customers. (Co. Ex. 154 at 17; Co. Ex. 155 at 12; Tr. Vol. XXXVI at 7734-36.) FirstEnergy

and OEG also add that interruptible riders such as Rider ELR also benefit customers by promoting economic development and encouraging job retention in the region (Co. Ex. 8 at 3; Tr. Vol. III at 491; Tr. Vol. XXX at 6171; OEG Ex. 1 at 9).

i. Economic Development Rider

FirstEnergy notes various other benefits derived from Rider EDR can be found within Stipulated ESP IV, including the automaker provision (Rider EDR(h)), the interruptible credit provision (Rider EDR(b)), and the transmission provision (Rider EDR(d)). OEG also believes the gradual phase-out of rate GT load factor provision should be approved, as many large customers have relied on this provision being included in Stipulated ESP IV and by allowing the gradual phase out, the Commission would be promoting gradualism (OEG Ex. 1 at 4-5, 17; Co. Ex. 8 at 12). FirstEnergy also claims that Rider DRR will provide economic benefits to customers (Co. Ex. 8 at 3-4; Tr. Vol. II at 277-78; Co. Ex. 154 at 14-15; Co. Ex. 146 at 18). OEG further provides that the automaker credit has already been successfully adopted in FirstEnergy's service territory, and acts to bolster economic development in the region. OEG also notes that the credit is being reduced to \$0.01 per kWh, which limits the exposure of other customers to the costs of that credit. In addition to intra-company competition, OEG also provides that the automaker credit helps this region's auto industry compete with unaffiliated foreign producers and creates additional employment opportunities in the region. (OEG Ex. 1 at 4, 16; Co. Ex. 8 at 11.) MSC and Nucor agree with the overarching benefits of Stipulated ESP IV, but specifically note that it and Ohio's other largest energy users require economic development and job retention measures to remain competitive in the global market and will recognize such benefits by receiving service under Rider ELR and other price reducing provisions.

NOPEC states that, as an initial point, the principle of gradualism should not be considered by the Commission as it is premised upon FirstEnergy's speculation that electricity prices will rise significantly in years four through eight of Stipulated ESP IV (OCC/NOPEC Ex. 9 at 12). NOPEC also asserts the Companies failed to present any evidence on the record that the discounts provided to large industrial customers will allow them to compete better in the global marketplace. OHA also asserts that Rider EDR cannot reasonably be considered to promote gradualism, as it has extended beyond its original purpose, as evidenced by its omission in FirstEnergy's initial application. Exelon also argues that proposed rate design of Rider DRR merely shifts the allocation costs to different classes of ratepayers and provides no actual benefit to consumers, also noting that the cost allocation unfairly results in residential and commercial customers paying a larger proportional share of these costs than industrial customers.

ii. Economic Load Response Rider

FirstEnergy states that the Stipulated ESP IV will continue the Companies' interruptible service offerings through Rider ELR, noting interruptible tariff provisions such as Rider ELR benefit all customers by providing system reliability and stability. FirstEnergy adds that the availability of interruptible load during an emergency, such as an extreme weather event, may help prevent the need to resort to load-shedding, a clear benefit to both firm and non-firm customers. (Tr. Vol. XXX at 6131, 6154, 6156; Tr. Vol. II at 259-260.) Under the Stipulated ESP IV, FirstEnergy provides that Rider ELR will be available to both shopping and non-shopping customers to promote the competitive retail market throughout the entire term of the ESP (Co. Ex. 8 at 3; Tr. Vol. II at 237-38). OEG further agrees with the multiple benefits the Rider ELR interruptible load program would provide to large customers within the Companies' service territory, noting that increased reliability provided by this program is a key component to meeting firm loads and maintaining a reliable grid, especially in the face of upcoming plant retirements (OEG Ex. 1 at 4, 9). OEG witness Baron also noted that interruptible resources can provide economic benefits by lowering the market price for all consumers during peak times and reducing the need for additional capacity resources to be constructed (OEG Ex. 1 at 9). OEG believes this is a crucial program to continue as approximately 39 percent of the Companies' total sales are industrial sales (Tr. Vol. XXII at 4393). Additionally, OEG notes this may also be a benefit for EE/PDR requirements, as interruptible load programs increase energy conservation by reducing the amount of power that would otherwise be consumed during peak times and by avoiding the impacts of constructing and operating fossil generation. Additionally, interruptible load also serves as a demand response resource that FirstEnergy can use to satisfy its requirements under R.C. 4928.66. (OEG Ex. 1 at 10; Nucor Ex. 1 at 6.) Nucor also agrees the use of interruptible rates will support economic development and job retention in this region, while also noting the fact that Rider ELR has been included in all Commission-approved FirstEnergy ESPs dating back to 2009 (Nucor Ex. 1 at 8; Co. Ex. 146 at 18-19; Tr. Vol. XXX at 6133-34, 6172-75). Nucor, IEU-Ohio, and OEG agree that the several key improvements to this program help satisfy the second prong of the test, including removing the prohibition on shopping in order to allow all customers to participate on the rider, removing the economic buy-through option events, and including up to 136,250 kW of additional curtailable load to the current ELR load for customers who have historically been eligible for Rider ELR (Nucor Ex. 1 at 13-14; Co. Ex. 2 at 8; Co. Ex. 3 at 2; Co. Ex. 146 at 20). Nucor witness Goins also concluded that the valuation of the combined ELR credit is reasonable (Nucor Ex. 1 at 10).

OCC/NOAC and RESA assert the retention and 75 MW expansion of Rider ELR is not in the public interest, noting that there is a potential \$27 million additional cost, not every customer is eligible to receive the benefit, and effectively forces customers to subsidize the program (OCC/NOPEC Ex. 8 at 25-27; Tr. Vol. XXI at 4038). OMAEG adds that the Companies have failed to quantify the alleged benefits associated with the ELR program (Co. Ex. 8 at 11; Tr. Vol. III at 574). OMAEG also notes that due to the eligibility

limitations to the ELR program, new customers that enter the service territories, including new customers, new buildings, or new accounts of existing customers, will not be eligible to take service under the ELR program (Tr. Vol. II at 261, 274-276). OHA further provides that together, Rider ELR and EDR(b) provide a very select number of customers with credits of \$10 for each eligible kW of demand, to be paid for by other customers.

1. Customer Retail Rate Programs

FirstEnergy generally asserts that Stipulated ESP IV includes at least three provisions that promote customer choice: the extension of the time-differentiated time-of-day (TOD) pricing options under Rider GEN, the Experimental Critical Peak Pricing Rider and the Experimental Real Time Pricing Rider; the establishment of the Rider NMB Pilot Program; and the Commercial HLF/TOU. FirstEnergy states the extension of time-differentiated time-of-day pricing options under Rider GEN, the Experimental Critical Peak Pricing Rider and the Experimental Real Time Pricing Rider, will enhance customers' opportunities to lower their electric bills and understand the benefits of time-differentiated pricing. Nucor also believes extending the TOD SSO generation rate should also be approved, even if TOD rates are offered in the market, as they should help lower prices bid by SSO suppliers as well as lower real-time market prices in PJM (Nucor Ex. 1 at 14-15). The Companies have also committed to supply CRES providers with customer interval data and will provide Staff with plans for achieving this objective as a part of their commitment to file a grid modernization business plan (Co. Ex. 154 at 10).

RESA does not oppose the TOD option of Rider GEN, but does request the Commission require the Companies to provide an "action agenda" to Staff identifying how the Companies would provide interval data to CRES providers by June 2016 and limiting this program to only those customers currently taking service under it.

Similarly, FirstEnergy provides that Stipulated ESP IV will lower costs associated with non-market based charges by modifying the existing Rider NMB to have the Companies, rather than SSO suppliers and CRES providers, pay certain non-market based PJM billing line items, thereby reducing the risk premium added by SSO suppliers and CRES providers to bids and service prices (Co. Ex. 14 at 12, 16; Tr. Vol. V. at 940, 996-97, 1002). Specifically, the Companies propose to be charged directly for the following PJM billing line items that were determined to be non-market based: 1250, 1218, 2218, 1260, 2260, 1375, 1376, 1378, 2375, 2376, and 2378 (Co. Ex. 14 at 13-15; Tr. Vol. V at 941-43). FirstEnergy also requests the Commission to approve the Rider NMB Pilot Program, where the Companies will seek to study the administrative burden and costs of allowing customers the option to have their CRES providers pay Rider NMB charges, as well as whether such a program would result in benefits to both participating and non-participating customers (Co. Ex. 10 at 2; Tr. Vol. II at 470, 670-71). OEG supports the inclusion of the Rider NMB Pilot Program, noting that a customers' allocation of charges

from such a program would be based on the customer's own annual transmission coincident peak demand. Nucor and IEU-Ohio conclude that the Rider NMB Pilot Program offers an alternate method of acquiring transmission and transmission-related services from PJM that will provide improved price signals and promote economic development and job retention, as well as provide benefits to all customers in the Companies' service territories. (Co. Ex. 3 at 3; Tr. Vol. XXXIV at 7021-22; Tr. Vol. XXVI at 5325-26, 5357.) FirstEnergy, as well as several other signatory parties, also contend that a pilot program is, by its very nature, limited in participation in order to better evaluate the results, adding that the Commission is not precluded to approve experimental rates with limited participation.

Several intervening parties argue that the Rider NMB Pilot Program is discriminatory as it only allows participation from a few select customers, all of which are signatory parties to Stipulated ESP IV. In addition to arguing that the proposed pilot program is discriminatory, RESA contends that the Companies failed to provide the Commission with the necessary information to determine if the pilot was justified on a cost basis or if it violated the principles of gradualism. RESA further argues that PJM billing item 1375 should not be directly charged as it is not truly non-market-based, since the Companies would be unable to control operational costs associated with this line item. (Co. Ex. 154 at 9; RESA Ex. 5 at 7-8.) Exelon supports RESA's argument and agrees Rider NMB should continue but finds that the following eight other PJM billing line items should also be omitted: Items 1376, 1378, 2375, 2376, 2378, 1450, 1218, and 2218. OMAEG raises concerns regarding the potential for CRES suppliers and the Companies to charge customers twice for several of the enumerated items, noting that several of the costs being requested are already being recovered by CRES suppliers through their current rates and contracts.

The Companies also note Stipulated ESP IV includes a Commercial HLF/TOU rate that will provide qualifying HLF customers an opportunity to reduce their peak usage, reduce their overall energy bills and learn about time-of-use rates. Overall, FirstEnergy alleges that, in addition to providing economic benefits, these provisions also promote stability and certainty regarding retail electric service (Co. Ex. 8 at 4; Tr. Vol. III at 542-43). Nucor also reiterates OEG's praises to the several modifications and additional customer protections included within Stipulated ESP IV (Co. Ex. 154 at 7-8; Co. Ex. 155 at 7). Kroger also asserts that the Commercial HLF/TOU experimental rate will benefit the Companies' commercial HLF customers that participate in this pilot by providing these customers with the opportunity to reduce their overall energy bills and learn about the potential value of time-of-use rates, noting also that if customers participating in the experimental program are able to further improve their consumption profile during the peak periods, this will potentially result in a more cost-efficient energy consumption by these customers (Tr. Vol. II at 291, 302).

Several parties argue the eligibility requirements for this program should be modified by the Commission for similar reasons as those raised against the Rider NMB Pilot Program. RESA argues that the Commercial HLF/TOU rate is unduly discriminatory and unjust, adding that due to the eligibility requirements of the program, very few (and, in fact, perhaps only one) customers would be eligible to participate. RESA also questions the fact that the few customers who would be able to initially qualify could remain in the program despite any subsequent changes in its eligibility requirements. (Tr. Vol. II at 289-90; Tr. Vol. XXXVII at 7788; RESA Ex. 5 at 10.) RESA concludes by stating that these products are competitive services that should be offered by the competitive market without such narrow eligibility requirements.

m. Low-Income Customer Assistance Programs and Initiatives

As discussed earlier, FirstEnergy and Citizens Coalition maintain that Stipulated ESP IV will benefit customers and the public interest by supporting low-income customers. Apart from all customers enjoying reliable power at market-based prices, FirstEnergy has committed to provide funding for several programs geared toward assisting low-income customers, including the Community Connections program, the Cleveland Housing Network, the Council for Economic Opportunities in Greater Cleveland, the Consumer Protection Association for a Fuel Fund Program, OPAC, and the Customer Advisory Agency. (Co. Ex. 7 at 30; Tr. Vol. I at 44, 65, 200-201, 205; Tr. Vol. II at 427; Co. Ex. 154 at 17; Co. Ex. 155 at 11.) Citizens Coalition also emphasizes the importance of and demonstrable need for maintaining these various low-income programs, adding that the funding provided as a part of Stipulated ESP IV will help promote involvement in these programs.

OCC/NOAC state that, contrary to FirstEnergy's assertions, low-income customers will be significantly impacted by Stipulated ESP IV, as it does not continue certain low-income assistance programs and will significantly increase costs charged to these customers through Rider RRS, Rider DCR, and Rider GDR. Moreover, OCC/NOAC believe that, due to the exorbitant costs to low-income customers, the amount of customers whose electric service is terminated for non-payment may increase as a result of approving Stipulated ESP IV. Further, NOPEC points out that while many low-income groups will be receiving payouts funded by shareholders, the Stipulated ESP IV does little to benefit the Companies' ratepayers, who NOPEC asserts are captive and will be required to pay the eventual cost of Rider RRS. (OCC/NOPEC Ex. 9 at 7, 12; OCC Ex. 27 at 7-9, 13-14, 16, 19, 22.)

n. Market Enhancements

FirstEnergy asserts that Stipulated ESP IV benefits the competitive retail market by eliminating perceived barriers to competition and enhancing the information available to CRES providers in the Companies' service territories through the establishment of a supplier web-portal (Co. Ex. 50 at 9; Tr. Vol. XX at 3940). Additionally, the Companies state that Stipulated ESP IV will have no: (1) minimum stay provisions for customers electing to return to the Companies' SSO; (2) minimum default service charges; (3) standby charges; and (4) shopping credit caps (Tr. Vol. V at 1059-1060). Further, the Companies will delete existing language referring to minimum stays, minimum notice requirements for customers returning to the Companies' SSO service, and references for time requirements for selecting a new CRES provider (Co. Ex. 15 at 10). The Companies also note the modifications to Rider ELR, as discussed earlier, will support the competitive retail market by now allowing these customers to shop (Co. Ex. 8 at 11; Tr. Vol. II at 237-38). While IGS is requesting the Commission authorize a placeholder retail incentive rider, IGS also provides that IGS and FirstEnergy have agreed to develop and submit an application to the Commission at a later date to recover costs associated with a mechanism to provide additional incentives to encourage retail shopping and customer engagement in the Companies' service territories (IGS Ex. 11 at 17; Tr. Vol. XXXVII at 7927-34). The Companies further assert that the Commission should disregard the allegations that Stipulated ESP IV, through Rider RRS, will adversely affect wholesale markets, not only because consideration of this issue is within the exclusive jurisdiction of FERC, but also because intervening parties have not provided any probative evidence in the record of such an expected effect or that PJM's market design and prevailing business practices will be sufficient to remedy any such effect in order to protect ratepayers. As a final matter, FirstEnergy and Staff further contend that Exelon's offer is not a true alternative offer to the Economic Stability Program, as it has not been accepted or vetted through the appropriate channels of Exelon's administration and contains a significant amount of additional risk when compared to the forecasted risk of Rider RRS. Staff also notes this offer covers a smaller amount of capacity and does not include ancillary services. (Tr. Vol. XXXVIII at 8024-26, 8030, 8035-39, 8046-51, 8068-70.) Additionally, Staff asserts that while several intervening parties have made anti-competitive allegations, no quantitative analysis on a wholesale or retail basis has been provided in the record. Furthermore, Staff asserts that Stipulated ESP IV will not deter entry into the competitive market; rather, it will provide that the PPA units are managed efficiently and bid competitively in the PJM markets with full Commission oversight to assure compliance (Co. Ex. 154 at 8).

Several of the intervening parties raised concerns that Rider RRS constitutes an anti-competitive subsidy which could harm FirstEnergy's customers and the public interest. OCC/NOAC specifically provide that allowing subsidized power plants to participate in a wholesale market against unsubsidized power plants destroys the benefits to customers of a properly functioning competitive wholesale market, noting that both the short-run efficiency benefits and long-run efficiency benefits to customers and the market

would be undermined (OCC/NOPEC Ex. 1 at 10-15). NOPEC, OMAEG, IMM, P3/EPSC, and RESA also believe Rider RRS, as a large portion of Stipulated ESP IV, will result in an anti-competitive subsidy which only benefits the Companies and FES (OCC/NOPEC Ex. 1 at 16-17). Dynegy further asserts that if Rider RRS is approved, FES will be in a unique position compared to Dynegy and other merchant generators because of its non-market based PPA with the Companies, as well as distort wholesale markets and negatively impact the retail market (IMM Ex. 2 at 1, 5-6). Power4Schools and IMM also raise concerns that the Companies' proposed Rider RRS and underlying PPA will undermine the PJM market signals critical to maintaining and attracting adequate generation supply (IMM Ex. 2 at 3-5). Although RESA agrees that the web portal proposal should be approved, it recommends that the Commission direct the Companies to hold stakeholder collaborative meetings to assist with its development and implementation. Additionally, RESA also contends that the proposed changes to FirstEnergy's tariff will not result in any true retail market enhancement. In fact, RESA maintains that the several alleged market enhancements are mandated actions required by the Commission in prior proceedings or constitute improvements in existing systems that will do very little to enhance Ohio's retail market (Tr. Vol. V at 1059-60; Co. Ex. 1 at 19, Attachment 3, Attachment 5; Co. Ex. 15 at 5, 11). NOPEC and OCC/NOAC contend the agreement between IGS and FirstEnergy was nothing more than blatant violation of the first prong of the three-prong test and there is not sufficient evidence in the record to approve such a rider, even if it is merely a placeholder rider.

o. Various Other Benefits Derived Under Stipulated ESP IV

FirstEnergy further provides that while the costs of the Companies' compliance with renewable energy requirements will continue to be recovered through the Alternative Energy Resource Rider (Rider AER),¹⁴ the rate design of Rider AER will be modified so that estimated costs are recovered within the quarter they are expected to be incurred. FirstEnergy also states that the Companies seek to eliminate the loss differentiation of Rider AER and that these modifications are in compliance with the recommendations made in the financial audit report in Case No. 11-5201-EL-RDR. (Co. Ex. 45 at 5; Co. Ex. 14 at 11; Tr. Vol. XVIII at 3635.) FirstEnergy further maintains that Stipulated ESP IV includes provisions that will adjust the Companies' SEET calculation and electric service regulations and associated riders and tariffs, as well as engage in good faith in federal advocacy, all of which will benefit the public interest and customers (Co. Ex. 154 at 9). Stipulated ESP IV includes updates to the Companies' tariffs to provide clarity to customers, remove inconsistencies, and make the Companies' tariffs more user-friendly. (Co. Ex. 8 at 4, 12; Co. Ex. 10 at 2; Co. Ex. 11 at 2.) The Companies also propose to continue the current storm deferral mechanism during Stipulated ESP IV held to the

¹⁴ Rider AER is a bypassable generation rider that recovers the costs of the Companies' compliance with the alternative energy portfolio standards.

same terms and conditions that exist under the *ESP III Case*, with the disposition of any regulatory asset or liability balance at the end of Stipulated ESP IV to be addressed in a future proceeding (Co. Ex. 7 at 8). FirstEnergy further explains that under the current deferral mechanism, actual storm damage expenses in excess of the test year levels are added to the deferral, while actual storm damage expenses that are less than the test year levels are subtracted from the deferred amount (Co. Ex. 7 at 7). Moreover, the Companies propose to recover the costs associated with providing credits for excess generation to net-metering customers in the Companies' non-bypassable Distribution Uncollectible Rider (Rider DUN).¹⁵ The Companies state the inclusion of these credits in Rider DUN will allow the Companies to recover the costs associated with providing the credits to net-metering customers when their generation produces more kilowatt supply than what the Companies bill them during the respective billing cycle. The Companies also state that they are currently not recovering these costs; rather, they are subsidizing from the net metering customers. FirstEnergy alleges the inclusion of such costs in Rider DUN would help facilitate the efficient recovery of expenses associated with excess net metering customer generation. (Co. Ex. 7 at 26.) Furthermore, the Companies contend that the Master SSO Supply Agreement (MSA) does not require any amendments as it has effectively functioned for several years to procure sufficient and reasonably priced SSO load.

OCC/NOAC, OMAEG, OHA, and RESA argue that the provision committing FirstEnergy to engage in federal advocacy lacks any firm commitment from the Companies (OCC Ex. 9 at 20-21). Additionally, RESA proposes several modifications to the Companies' proposed tariff and bill format changes, as well as various amendments to the Companies' MSA.

p. Commission Decision

The Commission again emphasizes the importance of our mission in assuring all customers access to safe and reliable utility services at fair prices as well as the difficulty of balancing numerous important interests in deciding these sensitive and complex issues. We find that, subject to the modifications ordered by the Commission below, as a package, the Stipulations benefit ratepayers and are in the public interest. In making this determination, we have reviewed the Economic Stability Program and Rider RRS, which form the centerpiece of the proposed ESP IV; the additional provisions of the proposed ESP IV; and the additional programs which FirstEnergy will propose and which will require future Commission approval. Based upon our review, we find that the record in this case demonstrates a projected net credit to customers of \$256 million under Rider RRS for the eight years of ESP IV. Further, we find that the Stipulated ESP IV, as modified, will

¹⁵ Rider DUN is a nonbypassable rider that recovers distribution uncollectible expenses associated with the Universal Service Fund/Percentage of Income Payment Plan.

protect consumers against rate volatility and price fluctuations by promoting rate stability for all ratepayers in this state, modernize the grid through the deployment of advanced technology and procurement of renewable energy resources, and promote competition by enabling competitive providers to offer innovative products to serve customers' needs.

Additionally, we note that this portion of the three-part test specifically requires that we evaluate the Stipulations as a package. In prior cases, the Commission has considered and approved stipulations that address a wide variety of issues, often resolving several pending proceedings at the same time, and specifically emphasizing that the stipulation must be viewed as a package. *See, e.g., In re Ohio Power Co.*, Case No. 94-996-EL-AIR, et al., Opinion and Order (Mar. 23, 1995) at 20-21; *In re Columbus Southern Power Co. and Ohio Power Co.*, Case No. 99-1729-EL-ETP, et al., Opinion and Order (Sept. 28, 2000) at 44; *In re Dayton Power & Light Co.*, Case No. 02-2779-EL-ATA, Opinion and Order (Sept. 2, 2003) at 29. We have repeatedly found value in the parties' resolution of pending matters through a stipulation package, as an efficient and cost-effective means of bringing issues before the Commission while also, often times, avoiding the considerable time and expense associated with the litigation of a fully-contested case. *See, e.g., ESP III Case Order* at 42; *In re Columbus Southern Power Co. and Ohio Power Co.*, Case No. 11-5568-EL-POR, et al., Opinion and Order (Mar. 21, 2012) at 17. Consequently, we reaffirm that the Stipulations must be viewed as a whole.

As a preliminary matter, the Commission notes that the proposed ESP IV carries forward many elements of the previous FirstEnergy ESPs and that these elements are not seriously disputed by any party. Under the proposed ESP IV, FirstEnergy will continue to procure 100 percent of the load for SSO service on a competitive basis. FirstEnergy has not proposed any significant changes to the auction process which it has successfully used to procure the load for SSO service since 2009. Further, we note that, consistent with R.C. 4928.03, there are no captive retail customers as retail customers are free to choose any generation supplier. Wholesale competition and retail competition are different. Wholesale competition involves generators of power selling energy, capacity and ancillary services into the PJM market. Retail competition involves competitive retail electric service suppliers reselling power purchased from the wholesale market to retail consumers. Further, retail competition is robust in the Companies' service territories. According to the record, 72 percent of customers, and 84 percent of customer load, is provided by CRES providers in the Companies' service territories.¹⁶ These percentages reflect that customer shopping and choice in FirstEnergy's service territory is robust. Customers have choices of electric supplies. The Stipulations will allow for the continuation of choice and robust shopping by customers in the FirstEnergy service territory.

¹⁶ The Commission hereby takes administrative notice of the latest available customer choice switch rates available on its website.

i. Consideration of Rider RRS

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

The first task in our analysis of Rider RRS is to determine a reasonable estimate of the net credit or charge based upon the evidence in the record of this case. The Commission notes that the record in this proceeding contains several publically available projections of the net revenues to be recovered under Rider RRS as well as multiple other analyses of revenue under the Rider. One of these projections was prepared by FirstEnergy witness Rose, while three projections were prepared by OCC witness Wilson. Each of these projections involved numerous variables, many of which are interrelated, over both an eight-year and fifteen-year span of time. The challenge before the Commission is to determine which projections are sufficiently reliable and how to harmonize the varying results of the projections which the Commission determines to be reliable. We note at the outset that projections and forecasts are predictions. They are predictions of future conditions and are based upon what is happening now and multiple additional assumptions. Considering the nature of the proposed Rider RRS as a potential hedge or insurance on electricity rates, in making its determination the Commission must choose from the most reliable of these projections and forecasts to make a determination of whether the Stipulations, as a package, benefit ratepayers.

With respect to the projection prepared by Mr. Rose, the evidence in the record demonstrates that Mr. Rose's firm, ICF, is a recognized leader in the field (Co. Ex. 18 at 2; Tr. Vol. VI at 1300). In fact, the EIA uses ICF public projections of energy prices, as well as projections by other notable firms such as Energy Ventures Analysis benchmarks for comparisons of EIA projections (Co. Ex. 60 at CP-6 through 7, Table CP4, CP-9 through 10, Table CP-5).

The only full projection of energy prices, as well as the net revenues to be recovered or credited under Rider RRS, was produced by FirstEnergy witnesses Rose and Lisowski. Mr. Rose prepared the projection of energy prices, while Mr. Lisowski used such prices to determine the net annual revenues to be recovered or credited under Rider RRS using the Companies' dispatch modeling. The Commission notes that Mr. Rose forecasts higher energy prices in the future, based upon a number of factors, including higher forecast natural gas prices; greater reliance on natural gas as the price setting fuel; greater reliance on more costly units as demand grows and units retire; growth in demand for electricity;

power plant retirements; new environmental regulations; new FERC policies; inflation; and carbon emission regulations (Co. Ex. 7 at 5-6, 19-20; Tr. Vol. VI at 1287-88). Likewise, Mr. Rose forecasts higher capacity prices in the future based upon: elimination of excess capacity due to plant retirements; demand growth; less capacity price suppression from demand response; less capacity imports from other regions; environmental regulations, rising financing and other capital costs; inflation; and greater natural gas infrastructure leading to higher costs as gas is shipped elsewhere (Co. Ex. 17 at 6-9, 41-43). According to the Companies' forecasts, the projected net revenues to be charged or credited to customers will result in an aggregate \$561 million credit (in nominal dollars) over the eight-year term of ESP IV (Co. Ex. 155 at 11-12).

Despite the various criticisms of the projections prepared by FirstEnergy witness Rose and the modeling prepared by FirstEnergy witness Lisowski, we are not persuaded by arguments against giving weight to the projections and models. Although we are mindful of the fact that FirstEnergy has the burden of proof in this proceeding, no other party has presented a full projection of energy prices and the net revenues under Rider RRS. Even OCC witness Wilson derives much of his projection from the numbers prepared by Mr. Rose and Mr. Lisowski. Further, Mr. Rose observes that one of the EIA cases used by Mr. Wilson, the Reference case, projects natural gas prices which are comparable to, but slightly lower than, the natural gas prices projected by Mr. Rose (Co. Ex. 151 at 41-42).

We note that several parties criticize FirstEnergy for not updating its projection since it was prepared prior to the filing of the application in this proceeding in 2014. However, the EIA noted in its Annual Energy Outlook for 2015 that the projected electricity prices for the Reference case, over the long term, actually increased in comparison to the Reference case for the Annual Energy Outlook for 2014. EIA noted that:

In the AEO2015 Reference case delivered natural gas prices to electricity generators are lower than in the AEO2014 Reference case in the first few years of the projection but higher throughout most of the 2020s. From 2020 to 2030, the generation cost of component of end-use electricity prices is, on average, 4% higher in AEO2015 than in AEO2014.

(Co. Ex. 166 at E-7).

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

Accordingly, based upon the evidence in the record, the Commission finds that this projection by FirstEnergy witness Rose (Rose projection) is reliable, and we will include

the Rose projection in our determination of an estimate of the net revenues under Rider RRS.

One of the projections prepared by OCC witness Wilson ("Scenario 2") substitutes the energy and natural gas prices forecast by FirstEnergy witness Rose with natural gas prices forecast by the EIA and with energy prices derived from such forecasts by Mr. Wilson based upon the relationship between natural gas and energy prices (OCC/NOPEC Ex. 9 at 12). Mr. Wilson prepared this projection twice: first, for the full 15-year term of Rider RRS initially proposed by the Companies, based upon the EIA Annual Energy Outlook for 2014 (Co. Ex. 60) and, second, for the eight-year term of Rider RRS provided for in the Third Supplemental Stipulation, based upon the EIA Annual Energy Outlook for 2015 (Co. Ex. 166). For this projection, Mr. Wilson used the High Oil and Gas Resource case prepared by the EIA, and this projection resulted in a net charge to customers of \$2.7 billion over the eight years of ESP IV. The Commission agrees with numerous witnesses that the EIA is a source of reliable, unbiased information, including projections of future energy prices. However, we find that the use of this projection by Mr. Wilson is fundamentally flawed in two respects.

First, OCC witness Wilson's forecast is unreliable because it is internally inconsistent. Although Mr. Wilson changed the price of natural gas in FirstEnergy witness Rose's forecast to the price predicted by the EIA in the High Oil and Gas Resource case and changed the price of electricity to reflect that price of natural gas, Mr. Wilson failed to change all of the interrelated variables in FirstEnergy witness Rose's forecast and FirstEnergy witness Lisowski's model. First, although Mr. Wilson substituted his projected natural gas prices for Mr. Rose's forecasted natural gas prices, he did not change the implied heat rates, which are the ratio of electrical energy prices in the market to natural gas prices (Tr. Vol. XXII at 4545-46; Co. Ex. 151 at 10). Mr. Rose claims that the failure to change the implied heat rate causes Mr. Wilson to significantly underestimate the price of electrical energy (Co. Ex. 151 at 11). Mr. Rose's claim that implied heat rates change over time was corroborated, on cross examination, by Sierra Club witness Comings (Tr. Vol. XXXIX at 8299). Moreover, the EIA assumes that the price of natural gas, coal, and electricity are all directly related (Co. Ex. 166 at D-1). However, Mr. Wilson did not change the coal cost assumption provided by Mr. Rose even though the EIA High Oil and Gas Resource case predicts that the price of coal will remain at or below 2013 levels through 2020 and rise gradually through 2030 (Tr. Vol. XXXVIII at 8113, 8115). The cost of coal is a significant factor in determining the cost of generating electricity in a coal-fired power plant (Tr. Vol. XXXVIII at 8084). The net effect of Mr. Wilson's selective use of the EIA's projected natural gas and coal prices is to suppress the revenue from the sale of electricity under Rider RRS because of low forecasted electricity prices while keeping the costs of generating such electricity constant by failing to modify the assumed coal prices. This inconsistent application of related variables artificially suppresses projections of the net revenue recovered or credited under Rider RRS.

The next flaw in OCC witness Wilson's second projection is that Mr. Wilson arbitrarily chose to use the High Oil and Gas Resource case out of the numerous other cases prepared by the EIA for both the 2014 and the 2015 Annual Energy Outlook. The Commission notes that, at the time of the hearings in this proceeding, the price of natural gas was near historic lows. The High Oil and Gas Resource case postulates that the price of natural gas, as well as electricity, remains at historic lows; specifically, the High Oil and Gas Resource case predicts that the price of natural gas and electricity, as well as oil, will remain below 2013 prices through at least 2030 (using 2013 dollars) (Co. Ex. 166 at D-1). The evidence also illustrates that the High Oil and Gas Resource case predicts substantially lower natural gas prices through 2040 than any other case prepared by the EIA (Co. Ex. 166 at 6, Figure 6; Co. Ex. 60 at MT-22, Figure MT-41) and substantially lower electricity prices through 2040 than any other case prepared by the EIA (Co. Ex. 166 at 8, Figure 9). In other words, the claims by OCC and NOPEC, and other intervenors relying upon Mr. Wilson's testimony, that Rider RRS will cost consumers \$2.7 billion rely upon a projection which assumes that the price of natural gas, electricity and oil will remain below 2013 prices (in 2013 dollars) for at least the next 15 years.

The Commission does not believe that the evidence supports OCC and NOPEC's prediction that we have entered a period of energy price utopia where the price of natural gas, electricity and oil remains flat for a period of 15 years nor do we believe it would be responsible for the Commission to base its decision on such a prediction. The evidence in the record demonstrates that the predicted prices for natural gas are significantly below recent history dating to 2005 (Co. Ex. 166 at 6, Figure 6). In fact, the evidence in the record demonstrates that the oil and gas drilling rig count has dropped sharply, which may reduce future production of natural gas (Co. Ex. 151 at 31-33). In fact, the most current information from the EIA available at the hearing indicates that the rig count is at its lowest level since 1999 (Co. Ex. 173 at 1; Co. Ex. 174 at 1).

In addition, the High Oil and Gas Resource case is based upon the occurrence of several developments and improvements in oil and gas production (Co. Ex. 166 at 1, 21). The EIA cautions that "[t]here is still a great deal of uncertainty in the projections of U.S. tight oil production" (Co. Ex. 60 at IF-10). OCC witness Wilson, however, provides no evidence that such developments and improvements in oil and gas production have occurred or will occur (Tr. Vol. XXXVIII at 8157-58). Accordingly, we will place no weight on the projection prepared by Mr. Wilson which relies upon the EIA's High Oil and Gas Resource case.

The Commission notes that OCC/NOPEC witness Wilson based a second projection ("Scenario 3") on the prices of forward markets. Mr. Wilson considers this projection to be the "most likely and reasonable estimate" because it is based upon updated market conditions. (OCC/NOPEC Ex. 9 at 12.) However, although even

FirstEnergy witness Rose concedes that forward market prices may be relied upon in the short term, for two or three years, the evidence in the record demonstrates that forward markets beyond three years are thinly traded and that forward market prices beyond three years do not necessarily reflect actual transactions but reflect offers which may or may not have been accepted instead (Co. Ex. 151 at 49-50). Mr. Wilson addresses this issue by simply predicting that natural gas prices will rise by the rate of inflation in the out years (OCC/NOPEC Ex. 9 at 7; Tr. Vol. XXII 4571). We note that, by simply adjusting the forward prices for inflation, Mr. Wilson is once again predicting that natural gas prices will remain flat, in real dollars, in the future (Tr. Vol. XXII at 4571). However, Mr. Wilson presents no testimony regarding this projection as to why natural gas prices will remain flat in real dollars. Instead, Mr. Wilson defends this forecast as the most reliable based upon current market data (OCC Ex. 9 at 10). However, the current market data Mr. Wilson relies upon are very short term prices which were heavily influenced by warm weather conditions (Tr. Vol. XXXVIII at 8119-21; Co. Ex. 167 at 10). Accordingly, the Commission finds that the eight-year (and fifteen-year) projection based solely on forward market projections lacks sufficient reliability and should be given no weight by the Commission.

The third projection ("Scenario 1") prepared by OCC witness Wilson also substitutes the energy and natural gas prices forecast by FirstEnergy witness Rose with natural gas prices forecast by the EIA and with energy prices derived from such forecasts by Mr. Wilson based upon the relationship between natural gas and energy prices. Once again, Mr. Wilson prepared this projection twice: first, for the full 15-year term of Rider RRS initially proposed by the Companies, based upon the EIA Annual Energy Outlook for 2014 (Co. Ex. 60) and, second, for the eight-year term of Rider RRS provided for in the Third Supplemental Stipulation, based upon the EIA Annual Energy Outlook for 2015 (Co. Ex. 166). For this projection, however, Mr. Wilson used the Reference case postulated by the EIA, which resulted in a net cost to customers under Rider RRS of \$50 million (in nominal dollars) over the eight years of the proposed ESP IV (OCC/NOPEC Ex. 9 at 12). Even Mr. Rose concedes that the Reference case is based on sound forecasting methodology (Co. Ex. 151 at 42). The Reference case "is a business-as-usual trend estimate, given known technology and technological and demographic trends" (Co. Ex. 166 at iii). Accordingly, we find use of the Reference case to be reasonable.

We note that this projection shares the same flaw as OCC witness Wilson's other projections in that he did not modify either the implied heat rates projected by FirstEnergy witnesses Rose and Lisowski or the coal prices assumed by Mr. Rose to the coal prices predicted by the Reference case. However, these flaws are somewhat mitigated by the fact that the natural gas prices predicted by the Reference case are not abnormally low as in the High Oil and Gas Resource case. Further coal prices and production projections in the Reference case are generally more in line with projections published by ICF (Co. Ex. 60 at CP-16 through -17, Table CP7). Therefore, the Commission finds that Mr. Wilson's

projection based upon the EIA Reference case is reasonable and reliable, and we will consider this projection in our determination of the estimated net credit or charge of Rider RRS.

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

Therefore, as discussed above, in determining an estimate of the net revenues to be recovered or credited under Rider RRS over eight years, the Commission has found that two publically available projections are reliable: the Rose/Lisowski projection of a credit of \$561 million and the Wilson projection of a charge of \$50 million. We note that testimony in the hearing agreed that the Commission could aggregate projections which were found to be reliable by averaging the projection (Tr. Vol. XXII at 4384-86). Averaging a credit of \$561 million and a charge of \$50 million results in a reasonable estimate of a projected \$255.5 million (or \$256 million, rounded up) net credit to customers over the eight years of Rider RRS. Accordingly we will rely upon that estimate for purposes of this proceeding. Thus, in approving Rider RRS today, we base our decision on these projections.

Sierra Club witness Comings also produced a projection of net charges or credits under Rider RRS (Sierra Club Ex. 96C at 2, 6). This projection is based upon confidential information obtained from FES in discovery, subject to the reduction in the length of Rider RRS from 15 years to 8 years and the reduction in the ROE from 11.15 percent to 10.38 percent (Sierra Club Ex. 95 at 3; Sierra Club Ex. 96C at 3). As this projection is based upon confidential information, it is impossible for us to include this projection in our estimate of the net credit or charges to customers under RRS without confidential information being easily derived from the calculation. However, we will note that, if we had included this projection in the average with the other two projections to develop our estimate, it would not change our decision in this case as there would continue to be a projected net credit to customers over the eight years of Rider RRS (Sierra Club Ex. 96C, Co. Ex. 155 at 11, OCC/NOPEC Ex. 9 at 12).

The Commission acknowledges that the projections presented in this case are simply predictions of future market prices and costs; thus, even the most reliable projections may be proven wrong in the future, particularly over an eight-year timeframe. Therefore, in order to protect customers against rate volatility and price fluctuations and to provide additional rate stability for customers, the Commission will modify the Stipulations to include a mechanism to limit average customer bills. This will ensure that the average customer bill will see no total bill increase for two years.

Therefore, the Commission directs the Companies to ensure for the period of June 1, 2016, through May 31, 2017, that average customer bills do not increase as compared to average customer bills for the period of June 1, 2015, through May 31, 2016, the last year of FirstEnergy's ESP III, taking into account any seasonal rate differential and any over and under recoveries of Rider RRS for prior periods. Further, the Commission directs the Companies to ensure for the period of June 1, 2017 through May 31, 2018, that average customer bills do not increase as compared to average customer bills for the period of June 1, 2015, through May 31, 2016, taking into account any seasonal rate differential and any over and under recoveries of Rider RRS for prior periods. FirstEnergy is authorized to defer expenses for future recovery in an amount equivalent to the revenue reduction resulting from the implementation of the mechanism for the period of June 1, 2017 through May 31, 2018.

The mechanism limiting average customer bills shall be subject to certain limits. First, costs recovered for smart grid deployment will be excluded from consideration. Likewise, costs for renewable energy procurement and for Rider AER will be excluded from consideration. The impact on riders resulting from credits to customers due to a disallowance ordered by the Commission will also be excluded. This mechanism will not apply during periods where Rider RRS is a credit for customers.

The Commission notes that the Companies voluntarily included Rider RRS as part of their ESP and chose to file an ESP to fulfill the obligation to provide SSO service under R.C. 4928.141. Further, the Companies have the option, under R.C. 4928.143, to reject any Commission modifications to the ESP and withdraw their application for an ESP. Therefore, if the Companies proceed with Rider RRS by filing tariffs and finalizing a power purchase agreement with FES based upon the term sheet, we will construe such actions as the voluntary acceptance of the mechanism limiting average customer bills.

Having determined that the best projection or forecast, based upon the record, of the credit to be produced by Rider RRS is \$256 million, we will turn to other factors to be considered in determining whether Rider RRS is in the public interest. The Commission notes that, its approval of Rider RRS, as a retail hedge, is based upon retail ratemaking authority under state law, which does not conflict with or erode federal laws or the

responsibility of FERC to regulate electricity at wholesale. Charges at wholesale are exclusively within the jurisdiction of the FERC. Here, the Commission specifies the reasonable amount to pay at retail. The Companies are under no requirement by this Commission or FERC to enter into the arrangements proposed under the Economic Stability Program. *Penn. Power Co. v. Pennsylvania Pub. Util. Comm.*, 127 Pa. Commw. 97, 561 A.2d 43 (1989); *Pike County Light and Power Co. v. Pennsylvania Pub. Util. Comm.*, 77 Pa. Commw. 268, 465 A.2d 735 (1983).

Recently, in the AEP Ohio ESP III Order, we declined to adopt a PPA rider proposal, as put forth in that proceeding; however, we authorized the establishment of a placeholder PPA rider, at the initial rate of zero, with AEP Ohio being required to justify any requested cost recovery in future filings before the Commission. AEP Ohio ESP III Order at 24-25. Accordingly, we address the relevant factors we highlighted as important to consider. While the Commission is sympathetic to concerns surrounding the potential additional transmission costs, resource diversity, and local economic impact, the Commission's decision does not turn on such issues. As stated above, our decision today is based upon our retail authority under state law and is consistent with federal law.

The record demonstrates that, in the event of plant closure, substantial transmission investments would be necessary (Co. Ex. 37 at 2-3; Co. Ex. 39 at 5-7; Tr. Vol. XV at 2354-56; Tr. Vol. XVI at 3293-94). According to testimony in the record, the low estimates for such transmission investments is \$400 million while the high end estimate is \$1.1 billion (Co. Ex. 39 at 8-10; Tr. Vol. XVI at 2385). These estimates are uncontroverted by opposing parties in this proceeding. As with all such estimates, it is likely that neither the low end of the range nor the high end of the range are correct; therefore, in the event that Sammis and Davis-Besse were to close, in order to maintain reliability, transmission investments in the range of \$400 million to \$1.1 billion would be required simply to maintain reliability.

On the other hand, the Economic Stability Program will encourage resource diversity in the state. Rider RRS will support 2,220 MW in existing coal-fired generation capacity and 908 MW in existing nuclear generation (Co. Ex. 32 at 9; Co. Ex. 28 at 10). In addition, the Stipulations provide for the implementation of energy efficiency programs, with a goal of saving 800,000 MWh of energy annually (Co. Ex. 154 at 11-12) and expanded energy efficiency funding for small business and independent colleges and universities. Moreover, the Stipulations provide for the opportunity to procure at least 100 MW in wind and solar generation, sourced in Ohio, in the event that the market fails to adequately spur development of new renewable energy generation resources. In addition, the Stipulations will enhance the deployment of distributed generation by beginning the process for the widespread deployment of advanced metering and smart grid infrastructure in the Companies' service territories. Such deployment will be contingent upon the business case for deploying advanced metering and smart grid infrastructure; however, advanced

metering and smart grid infrastructure is essential to support distributed generation in Ohio. This is consistent with Ohio policy to encourage smart grid programs, advanced metering infrastructure and distributed generation. R.C. 4928.02(D) and (F).

The testimony in this case establishes the plants to be included in the Economic Stability Program have a significant economic impact upon the regions in which the plants are located (Co. Ex. 35 at 2-3; Co. Ex. 36 at 4, 9; Tr. Vol. XV at 3214-17). The Commission also notes that we have received numerous public comments from government entities near where the plants are located and from businesses which supply goods and services to the plants verifying the economic impact of the plants. FirstEnergy witness Murley testified that every \$1 million of power produced at Sammis results in an additional \$180,000 of economic activity (Co. Ex. 36 at 4) and that every \$1 million of power produced at Davis-Besse results in an additional \$390,000 of economic activity (Co. Ex. 36 at 9). Consequently, Sammis and Davis-Besse have a total economic impact of over \$1.1 billion annually (Co. Ex. 36 at 11). The economic impact of plant closures and the impact on local communities is of concern to the Commission. Rider RRS will provide support for the identified generation assets and will provide the other benefits described for ratepayers in this Order. We are mindful of the competing interests for any potential additional cash flow and encourage FirstEnergy to place the long-term interests of its employees and the grid first. Rather than any short-term opportunity to increase dividends, or otherwise impact earnings, we suggest that the retirement plans of hardworking employees, such as those working in plants, providing customer service, and responding to power outages, and the infrastructure needs of the grid be considered first.

Additionally, the Commission agrees that the allocation of costs under the proposed rate design for Rider DRR will promote economic development in the region by encouraging large industrial customers to locate or expand in the Companies' service territories in order to take advantage of lower competitive rates.

ii. Rigorous Review of Rider RRS

The Commission in *AEP Ohio ESP III Order* also indicated that a power purchase agreement rider proposal must include additional provisions specified by the Commission: provide for rigorous Commission oversight of the rider, including a proposed process for a periodic substantive review and audit; commit to full information sharing with the Commission and its Staff; and include a provision to allocate the rider's financial risk between both the Company and its ratepayers. Further, the proposal must include a severability provision. *AEP Ohio Order* at 25-26. The Stipulations contain the provision for review of Rider RRS as specified by the Commission. The Companies have proposed a process under which Staff will be able to review all future costs incurred by Sammis and Davis-Besse (Co. Ex. 7 at 15; Tr. Vol. I at 58-59, 68; Tr. Vol. XXIV at 4879; Tr.

Vol. XXVI at 5198). In addition, the Companies agree that the annual compliance reviews will include actions taken by the Companies when selling the output from the generation units included in Rider RRS into the PJM market (Tr. Vol. XXXVII at 7889). FirstEnergy agrees that the Companies, not customers, will be responsible for the adjustments made to Rider RRS for actions deemed unreasonable by the Commission (Co. Ex. 8 at 21; Co. Ex. 154 at 8; Tr. Vol. I at 60-61; Tr. Vol. II at 448).

We disagree with claims that this review is inadequate or illusory. The annual review provided for under the Stipulations fulfills the recommendation set forth by Staff (Staff Ex. 12 at 15-16; Tr. Vol. XXXVI at 7702-03). The Commission has always provided for the periodic review and reconciliation of riders created under ESPs. It is well-established that state commissions can review whether a utility prudently entered into a particular transaction in light of the alternatives. *Pike County Light and Power Co. v. Pennsylvania Pub. Util. Comm.*, 77 Pa.Commw. 268, 465 A.2d 735 (1983). FERC acknowledges the authority of states to review the prudence of transactions. *Duke Energy Retail Sales, LLC*, 127 FERC ¶ 61027 (2009). This authority also has been recognized by Federal courts:

Regarding the states' traditional power to consider the prudence of a retailer's purchasing decision in setting retail rates, we find no reason why utilities must be permitted to recover costs that are imprudently incurred; those should be borne by the stockholders, not the ratepayers. Although *Nantahala* underscores that a state cannot independently pass upon the reasonableness of a wholesale rate on file with FERC, it in no way undermines the long-standing notion that a state commission may legitimately inquire into whether the retailer prudently chose to pay the FERC-approved wholesale rate of one source, as opposed to the lower rate of another source.

Kentucky West Virginia Gas Co. v. Pennsylvania Pub. Util. Comm., 837 F.2d 600, 609 (3d Cir. 1988)(citing *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 106 S.Ct. 2349, 90 L.Ed.2d 943 (1986)).

Further, we note that the Companies have consented to this review as an integral part of Rider RRS under the ESP pursuant to R.C. 4928.143, specifically including both the costs of generating power and the transactions involving the sale of the power into the PJM market (Co. Ex. 155 at 4). *Kentucky West Virginia Gas Co.*, 837 F.2d at 617 (finding that the utility could not complain about process used by Commission to which it had consented).

Regarding the process for updating Rider RRS, ongoing Staff review and annual audits of Rider RRS, the Commission will modify the Stipulations to provide that

FirstEnergy will file annual forecasted values subject to quarterly true-ups to reflect actual values rather than the annual updates to Rider RRS proposed in the application. Further, we expect that the audit process will be carried out in a manner that is consistent with past practice. Accordingly, with respect to FirstEnergy's quarterly Rider RRS filings, which should include appropriate work papers, Staff should review each such filing for completeness, computational accuracy, and consistency with any prior Commission determinations regarding the adjustments. If Staff raises no issues prior to the billing cycle during which the quarterly adjustments are to become effective, the adjusted Rider RRS rates shall become effective for that billing cycle. Rider RRS, however, remains subject to adjustment during the annual audit and reconciliation, through which Staff, or another auditor selected by the Commission, will review the accuracy and appropriateness of the rider's accounting and the prudence of FirstEnergy's decisions and actions as set forth in the Stipulated ESP IV. In order to facilitate the audit of FirstEnergy's Rider RRS filings, the Companies should open a new case each year in which they should file their quarterly Rider RRS adjustments and in which the audit report for that year should also be filed. The quarterly Rider RRS adjustments should be filed on or before March 1, June 1, September 1, and December 1 of each year, unless otherwise agreed upon by Staff and the Companies. FirstEnergy and Staff should work together to determine the specific content and format for the quarterly Rider RRS filings. We also note that interested stakeholders may seek to intervene and participate in the annual audit process, consistent with any established procedural schedule.

With respect to legacy costs, the Commission directs the Companies to provide to the Staff audited accounting information establishing the amount of legacy costs. Further, the Commission directs the auditor in the first annual audit to verify the information provided by the Companies to serve as a baseline for future audits.

Some parties have raised the possibility that the Companies would sell the output from the generation units included in Rider RRS to an affiliate at a below-market price. The Companies have made it clear that their intent is to sell the energy, capacity and ancillary services into the PJM markets and that any sales under a bilateral contract would be subject to the Commission's review (Tr. Vol. XXXVI at 7685-88, 7695-96). This is an issue of importance considering the previously mentioned success of retail shopping in the Companies' service territories. It is the desire of the Commission that such robust shopping continues. We emphasize that any bilateral transaction between the Companies and any affiliate would be stringently reviewed to ensure that it did not adversely affect retail electric service competition in this state. We note that, consistent with Commission precedent, the Companies will bear the burden of proof in demonstrating the prudence of all costs and sales during the review as well as that such actions were in the best interest of retail ratepayers; however, no presumption of management prudence will apply to any bilateral sales by the Companies to affiliates.

With respect to bidding behavior, the Commission is mindful of the issues raised by PJM in its brief. Further, the Commission appreciates the continued investments in generation in our region by merchant generators. We note that PJM could impose the very same bidding standards it proposes on all bidders, or all similarly-situated bidders, in PJM auctions rather than only on the plants at issue in this proceeding. We are not persuaded that Sammis and Davis-Besse should be held to different standards than other generation plants, particularly those in states which already provide for full cost recovery of generation plants. Retail cost recovery may be disallowed as a result of a prudence review if the output from the units was not bid in a manner that is consistent with participation in a broader competitive marketplace comprised of the sellers attempting to maximize revenues. As noted above, the Companies will bear the burden of proof in demonstrating that bidding behavior is prudent and in the best interest of retail ratepayers.

We find that the Stipulations contain a provision for full information sharing as specified by the Commission in the *AEP Ohio ESP III* Order and as outlined in the testimony presented by Staff witness Choueiki (Staff Ex. 12 at 16). Under the Stipulations, FES fleet information will be provided to Staff pursuant to a reasonable Staff request as Staff reviews any specific component of Rider RRS (Co. Ex. 154 at 8; Tr. Vol. XXXVI at 7517-20). In the event that the Companies dispute whether a Staff request is "reasonable" and the Companies and Staff cannot resolve the dispute, the Commission will determine whether the request is "reasonable." We note that, as discussed above, the Companies bear the burden of proof regarding the prudence of costs evaluated during the annual reviews. If the Companies are unable to obtain required information from FES, the Companies will be unable to meet their burden of proof during the review.

iii. Risk Sharing

Under the Stipulations, the Companies are liable for credits to customers of up to an aggregate of \$100 million in years five through eight of Rider RRS, in the event that the net revenues from the output of the generation units do not exceed the costs of the generation units in each year by the amount of the stipulated minimum credit (Co. Ex. 154 at 7-8; Co. Ex. 155 at 3-4; Tr. Vol. XXXVI at 7723, 7726; Tr. Vol. XXXVII at 7720). We find that the mechanism appropriately balances legitimate customer concerns about prices with the interests of other stakeholders. Further, we will clarify the Stipulations and note that the Companies will be precluded from recovering the costs associated with the credits in any future Commission proceeding, which is consistent with their intent as evidenced during the hearing. (Tr. Vol. XXXVI at 7525-26.)

The Commission will also 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 will modify the Stipulations to clarify that no plant retirement costs may be recovered through Rider RRS. We also agree with PJM that the Stipulations do not properly allocate risk in light of PJM's new capacity performance standard. FirstEnergy, rather than ratepayers, will bear the burden for any capacity performance penalties incurred by the generation units. Under no circumstances will capacity performance penalties be considered recoverable under Rider RRS. However, we will further modify the Stipulations to provide that all capacity performance bonuses will be retained by the Companies. Additionally, 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, unless otherwise recommended by Staff and approved by the Commission.

The Third Supplemental Stipulation contains a severability provision in the event a court of competent jurisdiction invalidates Rider RRS in part or in whole (Co. Ex. 154 at 8-9). This provision attempts to preserve the benefits to customers under the proposed ESP IV while the parties negotiate in good faith to restore the invalidated provision or its equivalent value.

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

iv. Additional Benefits of Stipulations

The Commission notes that, in addition to the Economic Stability Plan and Rider RRS, the Stipulations contain several additional provisions which benefit ratepayers, are in the public interest, and are consistent with the policy of the state as set forth in R.C. 4928.02. These additional provisions include provisions related to distribution rates, proposals intended to facilitate the state's effectiveness in the global economy, and provisions to restart and revitalize FirstEnergy's energy efficiency programs.

The key provisions in the Stipulations related to distribution rates is the continuation of the base distribution rate freeze for eight years under ESP IV. The extension of the distribution rate freeze will promote stable rates, as base distribution rates will not rise during the term of ESP IV (Co. Ex. 155 at 3). The Commission notes that base distribution rates have not increased in the Companies' service territories since 2009. *In re FirstEnergy*, Case No. 07-551-EL-AIR et. al., Opinion and Order (Jan. 29, 2009). However,

in light of the proposed distribution rate freeze, it is necessary and appropriate to continue the existing Rider DCR mechanism, which allows the Companies to recover reasonable investments in plant in service associated with distribution, subtransmission, and general and intangible plant, which was not included in the rate base of the Companies' last distribution rate case. We note that Rider DCR was first approved by the Commission in FirstEnergy's ESP II and has been in effect since January 1, 2012. *ESP II Case*, Opinion and Order at 11. The Stipulations provide for continued annual audits of recovery under Rider DCR and requires the Companies to demonstrate what they spent and why the recovery sought is not unreasonable. These distribution investments are necessary to maintain distribution reliability at current levels. Likewise, the storm cost deferral mechanism facilitates the distribution rate freeze by allowing the Companies to defer unusually high storm damage expenses in the event such expenses are actually incurred.

In addition, in light of the eight-year distribution rate freeze, Rider GDR will allow the Companies to request Commission authorization to recover unforeseen expenses related to government mandates imposed during ESP IV (Co. Ex. 16 at 4; Tr. Vol. I at 180). The Commission finds that the duration of the eight-year proposed ESP IV distinguishes the proposed Rider GDR from a similar rider proposed in the *AEP Ohio ESP III* proceeding. *AEP Ohio ESP III* Order at 62. Rider GDR will be set initially at zero. FirstEnergy may file an application in a separate proceeding to recover any costs which it currently contemplates recovering through Rider GDR, and the Companies will bear the burden of demonstrating that such costs are just and reasonable (Co. Ex. 16 at 3; Tr. Vol. XXIV at 4905). The Commission will clarify that Rider GDR should be limited to Federal and state government mandates enacted after the filing date of the application in this proceeding and that no generation or transmission related expenses will be eligible for recovery under Rider GDR.

Further, the Companies have agreed to file an application to transition to SFV rate design for distribution rates (Co. Ex. 155 at 13). Implementation of SFV rate design removes disincentives to electric utilities to promote energy efficiency, is more consistent with principles of cost causation, and has been a policy goal for the Commission for some time. *In the Matter of Aligning Elec. Distribution Utility Rate Structure with Ohio's Public Policies to Promote Competition, Energy Efficiency and Distributed Generation*, Case No. 10-3126-EL-UNC, Finding and Order (Aug. 21, 2013). We are unpersuaded by the testimony of OCC witness Rubin opposing the SFV rate design proposal because he appears to have based his testimony on an earlier draft stipulation rather than the Third Supplemental Stipulation as filed (Tr. Vol. XXVIII at 8261-62, 8271-72). Although we may have preferred to address implementation of SFV in FirstEnergy's next distribution rate case, the Commission notes that R.C. 4928.143(B)(2)(h) specifically permits an ESP to include provisions for a revenue decoupling mechanism; and we find that it would not be in the public interest to delay implementation of SFV rate design until the end of the proposed eight-year distribution rate freeze. In addition, the Stipulations provide for a separate

proceeding where any interested party will have a full and fair opportunity to address whether the proposed SFV should be implemented and to raise any other issues specific to the Companies' service territories (Tr. Vol. XXXVI at 7577).

In addition to the proposal to transition to a SFV rate design, the Stipulations provide for a number of other provisions intended to promote the state's effectiveness in the global economy. The Companies will provide \$3 million per year in shareholder funding to promote job retention and economic development in the region (Co. Ex. 154 at 7; Co. Ex. 155 at 12; Tr. Vol. XXXVI at 7734-36). Additional provisions in the Stipulations include continuation of the automaker credit, continuation and expansion of Rider ELR, and a pilot program for large customers to obtain non-market based transmission services outside of Rider NMB. The automaker credit is intended to incentivize increased production from automaker facilities located in the Companies' service territories. This provision was initially approved in FirstEnergy's ESP II. *FirstEnergy ESP II Case*, Opinion and Order (Aug. 25 2010) at 16. With respect to the continuation and expansion of Rider ELR, the evidence in the record demonstrates that interruptible load programs provide reliability, economic and energy efficiency benefits to customers (OEG Ex. 1 at 9-13; Co. Ex. 8 at 3; Tr. Vol II at 259-60; Tr. Vol. III at 491; Tr. Vol. XXX at 6131, 6154, 6156, 6171). Rider ELR was approved by the Commission FirstEnergy's first ESP and has continued in place since then. *FirstEnergy ESP I Case*, Second Opinion and Order (Mar. 25, 2009) at 10. The Stipulations also include an experimental time-of-use rate for high load factor commercial customers. The experimental HLF/TOU provides an incentive for large retailers to retain or relocate their corporate headquarter to this state (Tr. Vol. II at 291, 302). The experimental HLF/TOU fits squarely under Ohio policy, which encourages innovation and market access for cost-effective retail electric service, including demand-side management and time-differentiated pricing. R.C. 4928.02(D). Finally, the pilot program for large customers to obtain non-market based transmission services outside of Rider NMB provides the opportunity to determine if industrial customers can obtain substantial savings by obtaining certain transmission services outside of Rider NMB without imposing significant costs on other customers. The Rider NMB pilot program will provide better price signals to industrial customers and promote job retention and economic development in this region (Co. Ex. 3 at 3; Tr. Vol. XXIV at 7021-22; Tr. Vol. XXVI at 5325-26). All of these programs should facilitate the state's effectiveness in the global economy in accordance with R.C. 4928.02(N).

As stated above, the Stipulations provide for the implementation of energy efficiency programs, with a goal of saving 800,000 MWh of energy annually (Co. Ex. 154 at 11-12). In addition, the Stipulations provide expanded energy efficiency funding for independent colleges and universities and for small businesses, including funding for energy efficiency audits for commercial and industrial customers (Co. Ex. 154 at 15). These provisions for energy efficiency funding for small businesses are consistent with Ohio policy which encourages "the education of small business owners in this state

regarding the use of, and encourage the use of, energy efficiency programs and alternative energy resources in their businesses." R.C. 4928.02(M).

In addition, the Stipulations would increase the cap on shared savings to \$25 million (Co. Ex. 154 at 12). We note that shared savings are the result of the Companies exceeding the statutory mandates for energy efficiency. The current cap of \$10 million was set only for the purposes of the Companies three-year program portfolio plan for 2014 through 2016; thus, the Commission made no ruling on the appropriate cap for 2017 and beyond. At that time, the Commission noted that the cap could be increased from \$10 million to \$20 million if the Companies implemented a decoupling mechanism. The Companies have now committed to file an application to implement a decoupling mechanism in the form of SFV rate design.

Further, as discussed by Company witness Mikkelsen, any programs eligible for shared savings must be cost-effective; thus the Companies only earn shared savings if they implement cost-effective energy efficiency programs that produce energy savings in excess of the statutory mandates (Tr. Vol. XXXVI at 7639). We find, therefore, that the increase in the shared savings cap is in the public interest because it encourages the Companies to seek to provide to their customers all available cost-effective energy efficiency opportunities. As the Commission has previously stated "because * * * energy savings must be cost-effective, by definition, customers in the aggregate save money when the Companies deliver energy savings opportunities to their customers instead of energy. To the extent the Companies accelerate the delivery of cost-effective energy savings opportunities to their customers, they will also accelerate the net cost savings which customers enjoy. Thus every kWh of energy that can be displaced through cost-effective energy efficiency programs is a savings, not a cost, to the Companies' customers." *In re Application of FirstEnergy*, Case No. 09-1947-EL-POR, *et al.*, Entry on Rehearing (Sep. 7, 2011) at 6.

The Stipulations have a number of other provisions, in addition to the transition to SFV rate design, where FirstEnergy will file applications for new programs for the Commission's consideration (Co. Ex. 154 at 9-10). These provisions include the filing of a proposal for a grid modernization program. This provision is consistent with the Staff's previous recommendation presented in this proceeding (Staff Ex. 8 at 1-3). Under the Stipulations, FirstEnergy will file an application with a business case supporting the full deployment of smart grid meters across all of its service territories (Co. Ex. 154 at 9-10). In that separate proceeding, FirstEnergy will bear the burden of demonstrating that the application is just and reasonable, and any interested party may raise any issues regarding the business case (Co. Ex. 155 at 4; Tr. Vol. XXXVI at 7584-85, 7624).

The Commission will determine whether to approve any such application based solely upon the record of that proceeding; however, we note that Ohio policy supports

innovation through the implementation of smart grid programs and advanced metering infrastructure. R.C. 4928.02(D). Further, modernizing the grid in the Companies' service territories is also consistent with efforts to make the grid more reliable and cost effective for consumers. Further, advanced metering associated with grid modernization will promote competition by facilitating the offering by competitive suppliers of innovative products to meet customers' needs. We encourage the Companies to ensure that the proposed grid modernization filing considers the future transition to a grid that engages customers and supports flexibility in meeting resource adequacy needs.

v. Modifications and Clarifications to Stipulations

However, before the Commission can find that the Stipulations benefit ratepayers and advance the public interest, a number of additional modifications and clarifications are necessary based upon the record of this proceeding. The Stipulations benefit the public interest by providing for shareholder funding for low-income customer assistance programs in order to aid those customer struggling to make ends meet (Co. Ex. 7 at 30; Tr. Vol. I at 44, 65, 200-01, 205; Tr. Vol. II at 427). Many of these programs have been in place for several years, and the Stipulations extend the funding for eight additional years (Co. Ex. 154 at 17; Co. Ex. 155 at 11). These programs help protect at-risk populations, consistent with R.C. 4928.02(L). However, as discussed above, the Commission is deeply concerned about the allegations raised regarding the constituent groups of the Citizens' Coalition given the funding provided to the members of the Citizens' Coalition by the Stipulations. Therefore, we will modify the Stipulations to require the filing of compliance reports, annually or more frequently, regarding the funding provided to both Citizens' Coalition and OPAE for programs to support low- and moderate-income customers. Thereafter, based upon the compliance reports, the Commission may order an independent audit of the funding. If such an independent audit is ordered, the independent auditor will be selected by the Commission, and the costs of the audits will be borne by the Companies, without recovery from ratepayers. The Companies are directed to work with Staff to determine the appropriate scope and frequency of the compliance reports and/or audits. We note that, with respect to payments to other parties to promote energy efficiency programs, all energy efficiency savings obtained through such programs is thoroughly reviewed the evaluation, measurement and verification (EMV) process by the Companies' independent EMV auditor as well as the Commission's statewide EMV auditor.

With respect to the provisions related to the procurement of additional renewable resources in Ohio, the Commission notes that renewable energy plays an integral role in promoting a reliable and cost-effective grid. The Commission will continue to look to the markets as the primary drivers of an adequate supply of energy from any source, including renewable energy. Additionally, the Commission will continue to support

bilateral contracts that lead to the development of renewable projects. The Stipulations provide for a commitment to procure 100 MW of renewable energy. The Commission supports the construction of new renewables in this state. The state has seen a number of wind-related projects approved for siting through the Power Siting Board, many of which have yet to be constructed. However, solar projects are not as prevalent. Solar projects would enhance the diversity of available generation options. 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. Moreover, the Commission will modify the Stipulations to require that FirstEnergy file a report detailing its strategy to promote fuel diversification and carbon reduction every four years instead of every five years (Co. Ex. 154 at 11-12).

The Commission will modify the ESP and Stipulations to reject the proposed changes to the stipulations reached in the ESP II Case regarding MTEP and RTEP charges (Co. Ex. 7 at 17-19). The agreement on how to allocate MTEP and RTEP charges between the Companies and customers was a fundamental issue in the Combined Stipulations approved by the Commission in the ESP II Case. ESP II Case, Opinion and Order at 13. When we adopted this provision, we noted that there was substantial litigation risk at both the state and Federal level, and we accepted the allocation of that risk proposed by the Combined Stipulations (Id. at 32). We decline to revisit that issue here.

With respect to Rider GCR, we agree with RESA that the rider should be modified from bypassable to non-bypassable only with the approval of the Commission. Therefore, we will modify the ESP to require FirstEnergy to file an application in a separate proceeding, in the event the threshold point is reached, seeking authority from the Commission to modify Rider GCR.

The Commission also notes that, as the Stipulations provide that "FirstEnergy" will retain its corporate headquarters and nexus of operations in Akron, Ohio, for the duration of Rider RRS, the Stipulated ESP IV should be clarified such that, if FirstEnergy Corp. should move its corporate headquarters and/or nexus of operations from Akron, Ohio, during the period of Rider RRS, the Commission may determine, in its sole discretion, to terminate Rider RRS.

Moreover, the Commission notes that the application contains a provision, regarding Rider AER, to limit refunds from out-of-period adjustments (Co. Ex. 1 at 10-11).

While we note that refunds based upon out-of-period adjustments are generally disfavored, such determinations should be made on a case-by-case basis. Accordingly, we will modify the Stipulated ESP IV to strike that proposed provision.

The Commission also will modify the ESP and the Stipulations to adopt three changes proposed by RESA. First, we will reject the proposed change to add the term "generation" in the supplier tariff provisions related to consolidated billing (Co. Ex. 1 at Attachment 5, 1st Revised Page 3 of 52). We agree that the Companies have failed to adequately support this proposed change. Second, we will also reject FirstEnergy's proposal to eliminate the ability of CRES providers to request non-summary, customer usage data. We agree that this proposal is inconsistent with our decision in the recent retail market investigation and should be rejected. *In re Retail Market Investigation*, Case No. 12-3151-EL-COI, Entry on Rehearing (May 21, 2014) at 19. Finally, the Commission will reject the changes to the supplier tariff related to unaccounted for energy (Co. Ex. 1 at Attachment 5, 1st Revised Page 30 of 52 at Section E). We find that the Companies have failed to adequately support this proposed change. We are willing to consider such a change in a future separate proceeding, provided that it is adequately supported by record evidence.

Moreover, we will modify the proposed ESP to accept the recommendation of IGS to establish a zero-based rider to unbundle from distribution rates the costs FirstEnergy incurs to support SSO service and to reflect those costs in the SSO price (IGS Ex. 11 at 17-18). We agree with the testimony of FirstEnergy Mikkelsen that this proposal may enhance competition in the Companies' service territories (Tr. Vol. XXXVII at 7927-28). In order to implement this rider, FirstEnergy should file an application in a separate proceeding. In that proceeding, FirstEnergy will bear the burden of demonstrating that the application is just and reasonable, and any interested party may raise any issues regarding the rider. Further, we will determine whether to approve any such application based solely upon the record of that proceeding.

As provided by FirstEnergy witness Mikkelsen during the second portion of the hearing, there are a few commercial and industrial rate schedules that will be impacted more significantly by Stipulated ESP IV. Ms. Mikkelsen further indicated that the *estimated impacts on these customers may be mitigated if the Commission would determine, for purposes of calendar year 2016, the summer billing periods to be July, August, and September, and that the Companies gradually phase out EDR(c) over the first three years of ESP IV.* FirstEnergy witness Mikkelsen added that the Commission could then develop a mutually agreeable phase-in plan for this group of non-residential customers who are projected to experience more significant rate increases. (Tr. Vol. XXXVI at 7659-7662). We agree a mitigation mechanism should be employed in order to ensure that customers are provided with electricity in a cost-effective manner consistent with our mission. Therefore, we direct FirstEnergy to address these significant rate

impacts, accordingly, and collaborate with Staff to develop a phase-in plan to be implemented during ESP IV.

The Commission notes that, following the conclusion of the rehearing period, the filing of tariffs consistent with this Order and its modifications shall be deemed as acceptance of the Order and its modifications by the Companies. Any such acceptance will be subject to rights of appeal in state courts. The Companies shall file tariffs by May 1, 2016. With its initial filing and annually thereafter, FirstEnergy will provide to Staff customer bill impacts and proposed rate mitigation measures, if necessary.

vi. Consideration of Exelon Indicative Offer

Finally, The Commission notes that Exelon has made a competing indicative offer or proposal in this proceeding (Exelon Ex. 10C at 6-7). We very much appreciate Exelon's efforts to craft a worthwhile proposal; however, setting aside questions raised by FirstEnergy regarding whether the competing proposal represents a firm or binding "offer" by Exelon, we find that, the proposal is not superior to the Stipulations because the Exelon proposal imposes too many risks on retail ratepayers in the Companies' service territories.

Although Exelon claims substantial savings to consumers for its proposal, the evidence in the record demonstrates that the around-the-clock product proposed by Exelon would require the Companies to take power at the fixed contract price even if the contract price exceeded the market price of power. Under proposed Rider RRS, on the other hand, the Companies retain the ability to dispatch the plants only when it is economic to do so. (Tr. Vol. XXXVIII at 8051.) Thus, the fact that the Companies will be required to take power and sell it into the market even if the around the clock, fixed price exceeds the market price undermines the savings claimed by Exelon.

Further, there is no information in the record regarding whether the proposal would support reliability with the ATSI zone of PJM (Tr. Vol. XXXVIII at 8070). Under the Exelon proposal, the energy and capacity would not be delivered into the ATSI zone of PJM (Tr. Vol. XXXVIII at 92). The evidence demonstrates that both plants are at a serious risk of closure (Co. Ex. 28 at 2-4; Co. Ex. 143 at 5; Tr. Vol. X at 2184, 2185; Tr. Vol. XI at 2395; Tr. Vol. XXXII at 6541-42; Tr. Vol. XXXIII at 6818). If Sammis or Davis-Besse were to be retired, and such plant retirement caused the ATSI zone to separate from PJM, resulting in higher capacity prices for the ATSI zone, ratepayers, rather than Exelon, would be responsible for the difference between the higher capacity prices in the ATSI zone and the price of capacity delivered by Exelon, for the final five years of the proposal (Tr. Vol. XXXVIII at 8092-94). In addition, the Exelon proposal does not preclude the necessity of transmission investments to maintain reliability in the event of plant closures. As

previously noted, the cost of these investments to be recovered from ratepayers ranges from \$400 million to \$1.1 billion (Co. Ex. 39 at 8-10; Tr. Vol. XVI at 2385).

Moreover, the proposal by Exelon would do nothing to mitigate the economic impact on the region of the potential closure of Sammis and Davis-Besse. As stated above, Sammis and Davis-Besse have a total economic impact of over \$1.1 billion annually (Co. Ex. 36 at 11). Closure of these plants would have a significant impact upon the communities where the plants are located and upon the region. Accordingly, the Commission finds that Exelon's proposal should be rejected.

3. Does the settlement package violate any important regulatory principle or practice?

a. Introduction

Initially, the Commission again emphasizes the complexity of the issues in this proceeding as well as the necessity that we balance multiple interests. Moreover, the Commission must be cognizant of the state policies set forth in R.C. 4928.02. While we appreciate the issues raised by non-signatory parties, we find that the Stipulations, as modified by the Commission, protect consumers against rate volatility and price fluctuations by promoting rate stability for all ratepayers in this state, modernize the grid through the deployment of advanced technology and procurement of renewable energy resources, and promote competition by enabling competitive providers to offer innovative products to serve customers' needs, consistent with state policy to ensure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service; to encourage innovation including smart grid programs; to protect at-risk populations; and to facilitate the state's effectiveness in the global economy. R.C. 4928.02 (A), (D), (L) and (N).

b. Economic Stability Plan (Retail Rate Stability Rider)

FirstEnergy, Staff, OEG, Nucor, and MSC represent that the Stipulated ESP IV violates no important regulatory principle or practice. Initially, FirstEnergy argues that the Economic Stability Program (including Rider RRS) is authorized under Ohio law on the basis that: (1) the Commission has previously ruled that ESP provisions like Rider RRS are authorized under Ohio law in the *AEP Ohio ESP II* Order and *In re Application of Duke*, Case No. 14-841-EL-SSO (*Duke ESP III*), Opinion and Order (Apr. 2, 2015); (2) the economic stability program is authorized by R.C. 4928.143(B)(2)(d) because it is a term, condition, or charge, it relates to limitations on customer shopping, to bypassability, and

to default service, and it would have the effect of stabilizing or providing certainty regarding retail electric service; and (3) the economic stability program is also authorized under R.C. 4928.143(B)(2)(i) (Tr. Vol. I at 42-44, 96; Co. Ex. 154; Co. Ex. 13 at 7, 10-11; Tr. Vol. III at 515, 598-599; Tr. Vol. XXII at 4523; Co. Ex. 155 at 12; Co. Ex. 28 at 6-10; Co. Ex. 42 at 3-4; Co. Ex. 39 at 6-10; Co. Ex. 9 at 6-11). Finally, FirstEnergy and Staff assert that the Stipulated ESP IV does not violate any state policy on the basis that it promotes important regulatory principles and practices, including that it: (1) provides customers with stable and reasonably priced electricity based upon market prices; (2) promotes reliable electric service; (3) promotes a competitive marketplace and supports the retail market; (4) protects at-risk populations; and (5) furthers Ohio's effectiveness in the global economy (Co. Ex. 7 at 16-17, 28-31; Tr. Vol. II at 427; Co. Ex. 8 at 3; Co. Ex. 15 at 2, 9-10; Sierra Club Ex. 89). Staff adds that the Stipulated ESP IV: (6) promotes energy efficiency and peak demand reduction; (7) promotes carbon reduction; and (8) hastens grid modernization and promotes resource diversity (Co. Ex. 154; Co. Ex. 155).

OEG and Staff assert that the proposed Economic Stability Program is consistent with Ohio's quasi-market regulatory system established by S.B. 221, and echo FirstEnergy's argument that it constitutes a financial limitation on shopping and will have the effect of stabilizing rates. OEG adds that the proposed Economic Stability Program is not an anti-competitive subsidy prohibited by R.C. 4928.02(H) (OEG Ex. 1 at 7-8). Finally, OEG argues that the Commission's approval of the proposed Economic Stability Program would not be preempted by FERC, as the Commission has the ability to approve the proposed program as part of its obligation to ensure the adequacy and reliability of Ohio electric service; approval would be consistent with Ohio's policy to preserve the Commission's ability to protect its customers; and there is no evidence that Rider RRS will directly effect either wholesale supply or demand in the PJM system, citing 16 U.S.C. 824o(i)(2) and (3) and R.C. 4928.02 (OEG Ex. 1 at 6).

In contrast, OCC/NOAC, NOPEC, Environmental Groups, CMSD, RESA, Power4Schools, P3/EPSC, Dynegy, Exelon, OMAEG, Sierra Club, and the IMM assert in their briefs that the settlement package violates important regulatory principles and practices, as set forth in further detail below.

NOPEC, CMSD, Power4Schools, P3/EPSC, Dynegy, Exelon, and Sierra Club argue that the Stipulated ESP IV violates R.C. 4928.143 by including Rider RRS in the ESP in violation of R.C. 4928.143(B) and the Supreme Court of Ohio's opinion in *In re Application of Columbus Southern Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 945 N.E.2d 655, ¶ 31-35, holding that only the nine items enumerated in R.C. 4928.143(B)(2) may be included in an ESP (Co. Ex. 155 at 9). NOPEC, CMSD, Power4Schools, P3/EPSC, Exelon, and Sierra Club explain that Rider RRS does not fall under any of the alternatives listed in R.C. 4928.143(B)(2)(d), as the Commission has rejected the Companies' bypassability rationale; Rider RRS does not relate to default service; and R.C. 4928.143(B)(2)(d) lists "limitations on

customer shopping," not *financial* limitations on the consequences of customer shopping. AEP Ohio ESP III Order. Next, NOPEC, CMSD, P3/EPSCo, Exelon, and Sierra Club argue that Rider RRS does not provide stability or certainty. In support, NOPEC cites testimony of OCC/NOPEC witness Wilson that Rider RRS will likely move in the same direction of market prices, exacerbating price volatility rather than promoting price stability (OCC/NOPEC Ex. 4 at 13, 50). Finally, NOPEC adds that Rider RRS is unlawful because it harms large-scale governmental aggregations by imposing a nonbypassable generation charge in violation of R.C. 4928.20(K) (Co. Ex. 13 at 12; Tr. Vol. XXII at 4591; Co. Ex. 1 at 21; Co. Ex. 7 at 31; Tr. Vol. XIII at 2871-72).

Next, OCC/NOAC, CMSD, Power4Schools, P3/EPSCo, and OMAEG assert that the Economic Stability Program is contrary to the pro-competition policies set forth in Ohio law, including R.C. 4928.02 (OCC Ex. 25 at 11-14, 22-23). OCC/NOAC specify that authorization of the proposed program would not: ensure the availability of reasonably priced retail electric service; ensure the diversity of electricity supplies and suppliers; ensure the avoidance of anticompetitive subsidies; and ensure facilitation of the state's effectiveness in the global economy (Co. Ex. 33; OCC/NOPEC Ex. 9 at 7; OCC Ex. 29; OCC/NOPEC Ex. 1 at 10-12, 23, 29; Tr. Vol. XXX at 6206; IGS Ex. 11). CMSD argues that, further, it is contrary to Commission precedent regarding the benefits of market-based pricing, and state policy embodied in the Ohio Uniform Depository Act, which, in pertinent part, prohibits risky investments in contracts where the return on investment is not tied to the contract, but is measured based on the performance of some other asset or index. OMAEG adds that the Stipulated ESP IV violates regulatory principles by: (1) thwarting competition and deterring new entry; (2) harming interstate commerce and out-of-state investment; (3) establishing an opaque system of income transfers and cross-subsidies among consumers; (4) distorting economic incentives of pricing mechanisms; (5) denying consumer protections; and (6) undermining and violating previous Commission orders, namely, AEP Ohio ESP III Order (OMAEG Ex. 26A at 8; Dynegy Ex. 1 at 6-7; OCC/NOPEC Ex. 1 at 18). In the same vein, IMM asserts that Rider RRS would constitute a subsidy inconsistent with the competitive regulatory paradigm established in the wholesale power market in which Ohio participates, by providing incentives for non-competitive offers, citing the testimony of IMM witness Bowring in support (IMM Ex. 2 at 2, 4-5, 7).

P3/EPSCo, Dynegy, and Exelon argue that Rider RRS would violate R.C. 4928.03, as it would require shopping customers to pay for affiliated generation and, thus, merge competitive services with regulated services (Tr. Vol. II at 344; Co. Ex. 156; Co. Ex. 13 at 4-5). P3/EPSCo and Exelon further contend that Rider RRS would violate R.C. 4905.22 because it would constitute an unreasonable charge.

Environmental Groups argue that Commission approval of a "backroom affiliate deal" is inconsistent with applicable regulatory principles or practices. In support,

Environmental Groups contend that Rider RRS contravenes legal protections against abuse of affiliate power set forth in R.C. 4928.17(A)(3) and 4928.02, and Ohio Adm.Code 4901:1-37-04(A)(3). RESA and Exelon echo this argument regarding R.C. 4928.17 and OMAEG echoes this argument regarding R.C. 4928.02.

OCC/NOAC, NOPEC, CMSD, OMAEG, Power4Schools, P3/EP SA, and Sierra Club assert that the Federal Power Act preempts the Commission from implementing the Economic Stability Program. OCC/NOAC, NOPEC, OMAEG, P3/EP SA, and Sierra Club specify that FERC has exclusive jurisdiction over wholesale energy transactions as a matter of federal law, and the Commission lacks jurisdiction to approve Rider RRS, as it would set wholesale prices, causing the Commission's jurisdiction to be both field preempted and conflict preempted (Co. Ex. 33 at 2). NOPEC adds that the Commission's approval of such a program would violate the Supremacy Clause and the dormant Commerce Clause of the United States Constitution. Sierra Club specifies that Commission approval of Rider RRS would intrude on FERC's and PJM's regulation of wholesale markets by nullifying price signals by creating a subsidy; creating an incentive for FirstEnergy to present a "zero offer" to maximize the revenue offset to customers; and directly harming the effectiveness of PJM's recent capacity market reforms that are intended to increase reliability (RESA Ex. 6 at 2; IMM Ex. 2 at 5). In the same vein, NOPEC argues that Rider RRS undermines the PJM capacity market by permitting the Companies to develop offer strategies that will harm their captive customers and by providing FES a disincentive to retire plants and an incentive to over-invest in the PPA units (OCC/NOPEC Ex. 1 at 9-13). RESA joins the argument that Rider RRS will cause harm to competitive markets and Ohio's regulatory framework (RESA Ex. 6 at 2).

OCC/NOAC further assert that the Commission should not rule on whether to approve the proposed Economic Stability Program until FERC rules on its legality, noting that EP SA, among other parties, filed a complaint with FERC requesting review of FirstEnergy's affiliate agreement with its generating affiliate.¹⁷ NOPEC joins this argument in its reply brief. CMSD adds that, if the Commission does not address this issue, customers will be exposed to significant financial risk, as it is well-settled that neither the Commission nor courts can order a refund of previously approved rates that are subsequently invalidated pursuant to *Keco Industries v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254, 257 (1957). OMAEG points out that, further, the Stipulated ESP IV specifically prohibits the refund to customers of dollars collected, even if a court finds Rider RRS to be unlawful (Co. Ex. 154 at 9). CMSD adds that Commission approval of the Economic Stability Program would stand as an obstacle to the accomplishment and execution of the full purposes and objectives of the federal policy embodied in PJM's market-based wholesale pricing model and that there is a significant risk that PJM will

¹⁷ *Elec. Power Supply Assn., et al. v. FirstEnergy Solutions Corp., et al.*, Federal Energy Regulatory Comm. No. EL-16-34-000 (EP SA Complaint Case).

apply mitigation measures if the proposed program is approved (OCC/NOPEC Ex. 1 at 12-17).

Finally, OCC/NOAC and Power4Schools contend that the proposed Economic Stability Program violates R.C. 4928.38, which provides that it is unlawful for the Commission to collect additional transition costs or equivalent revenues from customers.

In its reply brief, FirstEnergy responds that Rider RRS is authorized by R.C. 4928.143(B)(2)(d), emphasizing that the Commission has already determined that retail stability riders supported by purchase power agreements are authorized by this statute in the *AEP Ohio ESP III Order* and the *Duke ESP III Order*. Further, in response to arguments that the statute addresses only physical limitations on customer shopping, FirstEnergy argues that the statute addresses only limitations on customer shopping, without specification that such a limitation must be physical. Thus, FirstEnergy contends that a financial limitation satisfies the statute. Additionally, in response to parties' arguments that Rider RRS will not stabilize rates or provide certainty, FirstEnergy asserts that the Commission already considered and rejected these arguments in the *AEP Ohio ESP III Order* and *Duke ESP III Order*. In its reply brief, Sierra Club asserts that FirstEnergy should not rely on the fact that the Commission made these determinations in the *AEP Ohio ESP III Order* and *Duke ESP III Order*, as these issues were brought up on rehearing in those cases, the Commission granted rehearing, and the Commission has not yet issued entries on rehearing. Thus, Sierra Club asserts these issues remain pending. Additionally, in its reply brief, RESA asserts that FirstEnergy's argument that Rider RRS is a limitation on customer shopping is inconsistent with its prior assertions throughout this proceeding that Rider RRS will not have an adverse impact on the CRES market or limit a customer's ability to shop (Co. Ex. 1 at 9; Tr. Vol. I at 39, 108; Tr. Vol. II at 342; Co. Ex. 154 at 18).

FirstEnergy further argues in its reply brief that the Economic Stability Program is not an anticompetitive subsidy prohibited by statute, arguing that revenues from Rider RRS will not be used to subsidize any generation service, but will provide customers with long-term rate stability. FirstEnergy adds that Rider RRS does not conflict with R.C. 4928.03 or S.B. 3, as argued by some parties. FirstEnergy initially asserts that R.C. 4928.03 has no relevance here because Rider RRS is not a competitive retail electric generation service. Next, FirstEnergy contends that Rider RRS does not conflict with S.B. 3, as Ohio's current quasi-market regulatory scheme permits and encourages hedges to protect customers against market volatility. FirstEnergy goes on to claim that Rider RRS also does not violate the "just and reasonable" language in R.C. 4905.22 as claimed by some parties, asserting that R.C. 4905.22 does not apply to a retail stability charge authorized under R.C. 4928.143(B)(2)(d).

Next, FirstEnergy asserts that Rider RRS does not violate R.C. 4928.38 as alleged by some parties, as the Companies are not attempting to recover pre-2001 generation costs

through the rider, but are attempting to provide retail price stability to customers. FirstEnergy also points out that the Commission considered and rejected that argument in the *AEP Ohio ESP III Case* and *Duke ESP III Case*. FirstEnergy next addresses NOPEC's argument regarding R.C. 4928.20(K) and harm to large-scale government aggregation customers. FirstEnergy asserts that the statute only requires the Commission to promulgate rules and consider the effect on large-scale governmental aggregation, and does not require the Commission to ensure no nonbypassable generation charge will be applied to such customers.

Regarding R.C. 4928.17, FirstEnergy responds that this corporate separation statute merely requires FirstEnergy to have a corporate separation agreement, which it does, and states nothing that prohibits a retail stability rider. Regarding the Uniform Depository Act, FirstEnergy responds that this argument may be ignored, as nothing in the Act refers to the retail electric service paid for by schools or other political subdivisions under an ESP.

Next, FirstEnergy and OEG, in their reply briefs, respond to parties' arguments that the Commission's consideration and approval of Rider RRS would be in violation of Federal law. FirstEnergy initially emphasizes that the Commission is considering only Rider RRS and not the PPA, and that the approval of Rider RRS involves no wholesale rates, terms, or conditions, but only retail rate treatment of wholesale costs incurred under the PPA. FirstEnergy and OEG contend that federal law and precedent explicitly leave certain matters to the states, including retail rate stability, resource adequacy, and regulation over generation resources used to serve retail customers, which states may regulate without violating the Federal Power Act. FirstEnergy adds that Rider RRS would also not violate the dormant Commerce Clause, as it invalidates only state actions that constitute regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors, and there is no evidence that Rider RRS was designed for such a purpose. In the same vein, FirstEnergy contends that there is no reason for the Commission to delay its consideration of Rider RRS pending a FERC decision in the *EPSA Complaint Case*. FirstEnergy reasons that the ESP IV has been pending before the Commission since 2014 and the Commission holds all necessary information to render a decision. Further, FirstEnergy reasons that the *EPSA Complaint Case* is on a narrow issue that holds no bearing on the Stipulated ESP IV.

c. Other Provisions

Regarding Rider DCR, OCC/NOAC and Power4Schools oppose its proposed continuation and the continuation of the base distribution rate freeze, arguing that this proposal avoids the scrutiny of a base distribution rate case in violation of prudent regulatory policy (Co. Ex. 154 at 13).

OCC/NOAC, Power4Schools, NOPEC, and OMAEG assert that proposed Rider GDR violates important regulatory practices. OCC/NOAC and Power4Schools argue that proposed Rider GDR is vague, asymmetric, and unauthorized by Ohio law (OCC/NOPEC Ex. 7 at 34). NOPEC joins the argument that proposed Rider GDR is not authorized by law. OMAEG argues that proposed Rider GDR violates Commission precedent rejecting a rider request where the rider is premature and there is a lack of specificity of future potential costs to be included in the rider, citing *AEP Ohio ESP III* Order at 62.

OCC/NOAC address the ROE proposed by the Stipulations, arguing that it violates regulatory practices and/or principles because it is unsupported and does not reflect the applicable risk (OCC Ex. 22 at 10, 18, 27-32; Co. Ex. 156 at 13). Further, OCC/NOAC add that the grid modernization and resource diversification provisions violate regulatory practices and principles because they lack details (Co. Ex. 154 at 9-10; ELPC Ex. 28 at 15). Finally, OCC/NOAC address the SFV provision in the Stipulated ESP IV, and argue that it violates regulatory policy because it goes beyond the originally filed application to determine an issue that is more properly decided in a full base distribution case (ELPC Ex. 28 at 5, 17-18).

RESA adds that the Stipulated ESP IV violates important regulatory principles and practices because: (1) the federal advocacy provision requires the Commission to take action, rather than exercising its own judgment; (2) the Rider NMB pilot is unduly discriminatory and poorly designed in violation of R.C. 4928.02(A); and (3) the HLF/TOU pilot is unduly discriminatory and unjust in violation of R.C. 4928.02(A) (Co. Ex. 154 at 9; Co. Ex. 3 at 3; RESA Ex. 5 at 7-8, 10, 12; Co. Ex. 4 at 1-2; Tr. Vol. II at 289-291; Tr. Vol. XXXVII at 7788). P3/EPSC join RESA's argument regarding the federal advocacy provision.

Power4Schools addresses the Stipulated ESP IV's proposal that the Companies be permitted to count Legacy MTEP costs toward the Legacy RTEP costs the Companies agreed not to collect from customers as part of the *ESP II Case*, arguing that this proposal violates that commitment agreed to in the *ESP II Case* (OCC Ex. 19 at 4-5).

Regarding the Stipulated ESP IV's commitments to provide specified energy efficiency funding, ELPC contends that there is no evidence that the funding will result in cost-effective energy savings, making the Stipulated ESP IV inconsistent with Ohio Adm. Code 4901:1-39-03 and 4901:1-39-04. Next, Environmental Groups argue that the provisions in the Stipulated ESP IV allowing customers who have opted out of paying under the Companies' EE/PDR programs to continue to receive payments for peak demand reduction violates R.C. 4928.6613. Finally, Environmental Groups assert that granting the Companies' lost-distribution revenues for their customer action program is inconsistent with Commission precedent under *In re Application of FirstEnergy*, Case No.

09-1820-EL-ATA, et al., Finding and Order (June 30, 2010) at 10, and *In re Application of FirstEnergy*, Case No. 09-1947-EL-POR, et al., Opinion and Order (Mar. 23, 2011) at 18.

FirstEnergy, IEU-Ohio, and Nucor, in their reply briefs, respond to the Environmental Groups' argument that the Stipulated ESP IV violates R.C. 4928.6613, responding that Rider ELR customers may opt out of the Companies' EE/PDR portfolio plans and continue to receive Rider ELR credits because those credits do not arise from the Companies' EE/PDR portfolio plans, but rather from the Stipulated ESP IV itself. Additionally, FirstEnergy contends that the provisions regarding a transition to SFV rate design are permitted on the basis that they advance Ohio policy; further, FirstEnergy notes that the provisions do not require FirstEnergy to transition to SFV, but rather to file an application for such a rate design, which must be vetted through the Commission's usual process (Co. Ex. 155 at 4; Tr. Vol. XXXVI at 7577-7584).

Next, FirstEnergy responds to parties' arguments regarding the lawfulness of Riders DCR and GDR. FirstEnergy asserts that R.C. 4928.143(B)(2)(h) expressly permits single issue ratemaking as part of an ESP. Additionally, FirstEnergy points out that the Commission previously approved Rider DCR as part of an ESP. *ESP II Case*; *ESP III Case*. FirstEnergy also addresses the Environmental Groups' argument that the Companies should not be permitted to receive lost-distribution revenue tied to the Customer Action Program under Commission precedent. FirstEnergy argues that this provision is an integral part of the Stipulated ESP IV that is supported by all signatory parties, and that the Customer Action Program is an energy efficiency program authorized by R.C. 4928.662 and is contained in the Companies' Commission-approved EE/PDR Portfolio Plan. *In re FirstEnergy*, Case No. 12-2190-EL-POR, Finding and Order (Nov. 20, 2014) at 8-9. Next, FirstEnergy addresses parties' objections to the federal advocacy provision, arguing that this provision does not violate state policy and the Commission is well within its powers to accept the recommendation if it believes it is reasonable. Finally, FirstEnergy asserts that the proposed HLF/TOU pilot program is not unduly discriminatory and unjust as alleged by some parties, arguing that eligibility requirements in order to create a homogenous pool are necessary for such a pilot program (Tr. Vol. II at 290-291, 463-467; Co. Ex. 146 at 17).

d. Commission Decision

Initially, the Commission will determine whether the proposed Economic Stability Program, including Rider RRS, may be considered a permissible provision of an ESP, in accordance with R.C. 4928.143(B)(1) or (B)(2). The Commission has the authority to approve, as a component of an ESP, only items that are expressly listed in the statute. *In re Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655. FirstEnergy

claims R.C. 4928.143(B)(2)(d) as its statutory basis for Rider RRS but also offers R.C. 4928.143(B)(2)(i) as statutory authority for Rider RRS.

Under R.C. 4928.143(B)(2)(d), the Commission can approve, as a component of an ESP, 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. Thus, considering the plain language of the statute, we find that there are three criteria with which Rider RRS must comply. Specifically, an ESP component approved under R.C. 4928.143(B)(2)(d) must first be a term, condition, or charge; next, relate to one of the enumerated types of terms, conditions, and charges; and, finally, have the effect of stabilizing or providing certainty regarding retail electric service. *See AEP Ohio ESP III Order* at 20. *See also In re AEP Ohio*, Case No. 11-348-EL-SSO (*AEP Ohio ESP II*), Entry on Rehearing (Jan. 30, 2013) at 15-16; *In re Dayton Power and Light Co.*, Case No. 12-426-EL-SSO, et al. (*DP&L ESP Case*), Opinion and Order (Sept. 4, 2013) at 21-22.

The Commission finds that the first requirement of R.C. 4928.143(B)(2)(d) is met, as Rider RRS would consist of a charge incurred by customers under ESP IV. Rider RRS, as proposed by the Companies, would appear as a charge on customer bills, and there is no dispute among the parties on this point. Although we have determined that Rider RRS will provide a net credit over the eight years of ESP IV, even the Companies estimate that Rider RRS would result in a net charge to customers in the first two years of ESP IV. Thus, the record indicates that the Rider RRS would, at times, consist of a charge to customers.

With respect to the second criterion of R.C. 4928.143(B)(2)(d), the Rider RRS must relate to at least one of the following: 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. FirstEnergy contends that Rider RRS relates to limitations on customer shopping, to bypassability, and to default service.

The Commission finds that R.C. 4928.143(B)(2)(d) authorizes electric utilities to include, in an ESP, terms related to "bypassability" of charges to the extent that such charges have the effect of stabilizing or providing certainty regarding retail electric service. *DP&L ESP Case*, Opinion and Order (Sept. 4, 2013) at 21; *AEP Ohio ESP III Order* at 22. As discussed above, both shopping and SSO customers may benefit from Rider RRS because it would have a stabilizing effect on the price of retail electric service, irrespective of whether the customer is served by a CRES provider or the SSO. Therefore, we agree with FirstEnergy that Rider RRS, if approved, should be non-bypassable, as authorized by the second criterion of R.C. 4928.143(B)(2)(d). However, we have ruled that, since nearly

any charge may be bypassable or non-bypassable, "bypassability" alone is insufficient to fully meet the second criterion of R.C. 4928.143(B)(2)(d). *AEP Ohio ESP III Order* at 22.

Nonetheless, the Commission finds that, consistent with our rulings in the *AEP Ohio ESP III Order* and the *Duke ESP III Order*, Rider RRS is a financial limitation on customer shopping for retail electric generation service. Although the Rider RRS would impose no physical constraints on shopping, the rider does constitute a financial limitation on shopping that would help to stabilize rates. Under Rider RRS, shopping customers will still purchase all of their physical generation supply from the market through a CRES provider. Although Rider RRS would have no impact on customers' physical generation supply, the consequence of Rider RRS is that the bills of all customers would reflect a price for retail electric generation service that is based in part on the retail market and in part on the cost of service of Sammis, Davis-Besse, and the OVEC plants. The Commission estimates that Rider RRS will provide a generation credit to customers of \$256 million over the term of ESP IV. Effectively, then, Rider RRS would function as a financial restraint on complete reliance on the retail market for the pricing of retail electric generation service. Customers in the Companies' service territories have the ability to choose a competitive supplier pursuant to R.C. 4928.03 and will continue to benefit from a robust choice in competitive suppliers. In this respect, they are not captive customers. In light of our determination that Rider RRS is a financial limitation on customer shopping pursuant to R.C. 4928.143(B)(2)(d), it is unnecessary to reach the argument related to "default service." Accordingly, we find that the second criterion of R.C. 4928.143(B)(2)(d) is satisfied.

Turning next to the third criterion, whether the Rider RRS would have the effect of stabilizing or providing certainty regarding retail electric service. We find that the Rider RRS, as a financial hedging mechanism, is proposed to have the effect of stabilizing or providing certainty regarding retail electric service. Rider RRS will act as a form of rate insurance. If market prices for energy, capacity and ancillary services rise, Rider RRS will operate to mitigate the increase in market prices. Rider RRS, therefore, is intended to mitigate, by design, the effects of market volatility, providing customers with more stable pricing and a measure of protection against substantial increases in market prices. Therefore, since the record reflects that Rider RRS would, in theory, have the effect of stabilizing or providing certainty regarding retail electric service, we find that the third criterion of R.C. 4928.143(B)(2)(d) has been met.

With respect to FirstEnergy's claim that the Economic Stability Program, of which Rider RRS is part, is an economic development program under R.C. 4928.143(B)(2)(i), the record is clear that the plants have a significant economic impact upon the regions in which the plants are located (Co. Ex. 35 at 3; Co. Ex. 36 at 4, 9). FirstEnergy witness Murley testified that Sammis and Davis-Besse have a total economic impact of over \$1.1 billion annually (Co. Ex. 36 at 11). The Commission further notes that there is nothing in

R.C. 4928.143(B)(2)(i) which limits economic development programs authorized under the statute from assisting affiliates of the electric distribution utility.

Having determined that the Economic Stability Program and Rider RRS are authorized under R.C. 4928.143(B)(2), the Commission will turn to the specific claims by opposing parties that specific provisions of the Stipulations violate important regulatory principles and practices.

The Commission is not convinced by the claims of several parties that Rider RRS is anticompetitive. Rider RRS will be non-bypassable and thus will have the same impact on customers' bills on shopping customers as SSO customers (Co. Ex. 13 at 6). Rider RRS creates no advantage to shopping and no disincentive to shopping. Likewise, Rider RRS has the same impact on shopping customers irrespective of which CRES provider serves the shopping customer and irrespective of whether the customer is part of an aggregation or served by an individual marketer. The Companies will continue to source all of the SSO load through competitive auctions. Accordingly, we find that Rider RRS is consistent with the state policy to "[e]nsure the availability of unbundled and comparable retail electric service that provides consumers with the supplier, price, terms, conditions, and quality options they elect to meet their respective needs." R.C. 4928.02(B).

We are mindful, however, of concerns that the Companies will enter into bilateral contracts with an affiliate in order to give the affiliate a competitive advantage. As an initial matter, the Companies' witnesses have consistently testified that the Companies intend to liquidate the energy and capacity in PJM's markets and have no intention of entering into bilateral contracts. Nonetheless, as discussed above, the Commission has imposed safeguards in the annual prudency review process to safeguard against anti-competitive behavior by the Companies. Any bilateral contracts between the Companies and an affiliate will be stringently reviewed, and no presumption of management prudence will be assumed in a bilateral sale to an affiliate. These protections are more than sufficient to protect against anticompetitive subsidies pursuant to R.C. 4928.02(H).

With respect to issues raised regarding Rider GDR, we disagree that Rider GDR violates important regulatory principles and practices. No cost will be included in Rider GDR unless such costs are determined by the Commission to be just and reasonable in a separate proceeding. As noted above, Rider GDR should be limited to Federal and state government mandates enacted after the filing date of the application in this proceeding, and no generation or transmission related expenses will be eligible for recovery under Rider GDR. Any interested party will have a full and fair opportunity to participate in such separate proceeding. In addition, OMABG's reliance upon the *AEP Ohio ESP III* Order is misplaced. In the *AEP Ohio ESP III* Order, the Commission noted that AEP Ohio had existing means to seek recovery of costs, such as a distribution rate case, over the

three-year term of the ESP; in this case, the Companies have committed to an eight-year base distribution rate freeze. *AEP Ohio ESP III Order* at 62.

With respect to Rider DCR, the Commission is not persuaded by claims by OCC/NOAC and others that costs under Rider DCR fail to receive proper scrutiny. As we have stated previously, Rider DCR is subjected to annual audits which require the Companies to demonstrate what they spent and why the recovery sought is unreasonable. *ESP III Case*, Opinion and Order at 34. The Commission has been conducting such audits annually since the inception of Rider DCR. Thus, OCC/NOAC and any other party have had, and will continue to have, a full and fair opportunity to raise any issues regarding distribution investments to be recovered under Rider DCR during the audit process.

The Commission also disagrees with the claim by OCC/NOAC that the provisions of the Stipulation related to SFV rate design are improper because such provisions were not included in the original application. The provisions related to SFV rate design are specifically authorized by R.C. 4928.143(B)(2)(h), which provides that an ESP may include "a revenue decoupling mechanism." It does not depart from Commission precedent or practice in proceedings under R.C. 4928.143 for intervenors or Staff to recommend additional provisions for an ESP after the filing of the original application, as Staff, RESA and other intervenors have done throughout this proceeding, and it does not depart from Commission precedent or practice for parties to reach agreement on such additional provisions. See *FirstEnergy ESP II Case*, Opinion and Order (Aug. 25, 2010) at 32-33.

OCC/NOAC also contend that the provisions for grid modernization and resource diversification violate regulatory principles because they lack details. However, the Stipulations merely require the Companies to file, and support, applications in separate proceedings for grid modernization and resource diversification. All appropriate details will be addressed in the applications or during the Commission proceedings. Any interested party will have an opportunity to intervene in the separate proceedings and raise any relevant issues, and we will rule on the applications based solely on the evidence in the record of the separate proceeding. Accordingly, we find that the provisions of the Stipulations regarding grid modernization and resource diversification are consistent with Ohio policy calling for the development and implementation of flexible regulatory treatment. R.C. 4928.02(G).

The Environmental Groups raise concerns that the energy efficiency programs provided for by the Stipulations will not be cost-effective in violation of Ohio Adm.Code 4901:1-39-03 and -04. However, nothing in the Stipulations waive the cost-effectiveness requirements of Ohio Adm.Code 4901:1-39-03 and -04, and, as discussed above, the Commission expects that the portfolio implemented by the Companies under the Stipulations will continue to be cost-effective.

RESA claims that two of the pilot programs, the Rider NMB pilot and the HLF/TOU pilot, are unduly discriminatory. We disagree. The nature of any pilot program is to keep the number of participants manageable in order to make some determination of the efficacy of the program being tested. Moreover, with respect to the Rider NMB pilot program, the Third Supplemental Stipulation expanded the number of potential participants in the pilot program (Co. Ex. 154 at 17). RESA cites to no evidence in the record that any customers who wish to participate in, and would benefit from, the Rider NMB pilot program cannot do so because of the limits on the size of the pilot program. Further, we are not persuaded that the HLF/TOU eligibility requirements are so stringent to be discriminatory. Instead, we believe that the requirement that potential customers' corporate headquarters be located in this state provides an incentive to large retailers to retain or relocate their corporate headquarters to Ohio, which would have significant economic impacts.

The Commission disagrees with OCC/NOAC that Rider RRS violates R.C. 4928.38, which prohibits the collection of additional transition costs. We note that R.C. 4928.39 establishes the criteria for a cost to be considered transition costs. Among the criteria is the requirement that costs be "unrecoverable in a competitive market." R.C. 4928.39(C). The record in this proceeding demonstrates that Rider RRS should provide a net credit, not charge, to customers in the amount of \$256 million over its eight-year term. We find that the evidence demonstrates that the costs which are included in the Rider RRS calculation are not "unrecoverable in a competitive market" and that, accordingly, such costs do not meet the definition of transition costs.

Finally, with respect to claims that Rider RRS is preempted by the Federal Power Act, the Commission has determined that Rider RRS is authorized under state law; however, we are an administrative agency with powers specifically granted by the General Assembly and we have no authority to declare a statute unconstitutional. *Reading v. Pub. Util. Comm.*, 109 Ohio St.3d 193, 195, 846 N.E.2d 840 (citing *Panhandle E. Pipeline Co. v. Pub. Util. Comm.*, 56 Ohio St.2d 334, 346, 383 N.E.2d 1163 (1978)). Accordingly we decline to address constitutional questions raised by the parties in these proceedings, as under the specific facts and circumstances presented here, such issues are best reserved for judicial determination. *AEP Ohio ESP III* Order at 26.

4. ESP versus MRO Test

Additionally, as indicated earlier, the Commission must also consider the applicable statutory test for approval of an ESP. R.C. 4928.143(C)(1) provides that the Commission should approve, or modify and approve, an application for an ESP if it finds that the ESP, including its pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, is more favorable in the aggregate as compared to the expected results that would otherwise apply under an MRO, pursuant to

R.C. 4928.142. As noted above, we find that ESP IV, as modified by the Stipulations and by the Commission, will protect consumers against rate volatility and price fluctuations by promoting rate stability for all ratepayers in this state, modernize the grid through the deployment of advanced technology and procurement of renewable energy resources, and promote competition by enabling competitive providers to offer innovative products to serve customers' needs. An MRO contain none of these benefits. Therefore, as discussed below, the Commission finds that ESP IV, including its pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, is more favorable in the aggregate as compared to the expected results that would otherwise apply under an MRO.

a. Summary of the Parties' Arguments

i. Appropriate Application of the MRO v. ESP Test

The Companies assert that the Commission should consider both quantitative and qualitative factors in its analysis, citing to Commission and Ohio Supreme Court precedent which allows Commission review of "pricing and all other terms and conditions." *AEP Ohio ESP III Order* at 94; *ESP III Case Order* at 56; *In re Columbus S. Power Co.*, 128 Ohio St. 3d 402, 2011-Ohio-958. Thus, as provided below, the Companies contend that the total benefits of Stipulated ESP IV in the aggregate, including both quantitative and qualitative benefits, demonstrate that it is more favorable in the aggregate when compared to the expected results of the MRO.

NOPEC initially argues that the General Assembly intended, and the Ohio Supreme Court later confirmed, that the Commission is limited to only consider the quantitative factors listed in R.C. 4928.143(B) in its analysis of a proposed ESP, and thus, the language within R.C. 4928.143(C)(1) must be construed consistent with that intent. R.C. 1.49; *In re Columbus S. Power Co., et al.*, 128 Ohio St.3d 402, 2011-Ohio-958. Thus, NOPEC states that while a variety of qualitative benefits have been forwarded by the Companies in support of Stipulated ESP IV for purposes of prong two of the three-prong test, these qualitative benefits may not be considered for purposes of the ESP v. MRO test. Accordingly, NOPEC and OCC/NOAC provide that the Commission's determination of whether the proposed Stipulated ESP IV is more favorable in the aggregate than the MRO rests on a determination of whether the identifiable costs of the ESP are greater than the cost of an MRO. Additionally, as only the items listed in R.C. 4928.143(B) may be included for the Commission's consideration of an ESP, NOPEC also argues that the implementation of Rider GDR should be disallowed since no foreseeable costs to be recovered through this rider have been presented (OCC Ex. 18 at 23). NOPEC also disagrees with the Companies' decision to omit the costs associated with Rider DCR as part of the ESP v. MRO test, noting that OCC/NOPEC witness Kahal demonstrated that the revenues associated with Rider DCR were a quantifiable cost of the ESP and that they should be considered since

the "expected results" of R.C. 4928.142 do not contemplate consideration of the results of a distribution rate case. Power4Schools also contends that only quantitative benefits should be considered, and thus, the Commission should find the ESP to be less favorable than an MRO. P3/EPSC and RESA assert that the Companies have failed to meet their burden to show that the ESP would be more beneficial than an MRO, stating Stipulated ESP IV does not contain an explicit evaluation of this test, and instead, relies on conclusory arguments that this is the case. (Co. Ex. 154 at 18; Co. Ex. 155 at 10-14.)

In its reply brief, FirstEnergy asserts that NOPEC's discussion of legislative history is inappropriate because R.C. 4928.143(C)(1) is not ambiguous, and, further, emphasizes that the Commission has repeatedly held that qualitative factors must be considered. Additionally, FirstEnergy points out that the statute discusses not only "pricing" but also refers to "all other terms and conditions." Thus, FirstEnergy contends that NOPEC's focus solely on pricing conflicts with the plain meaning of the statute.

ii. Quantitative Benefits and Analysis

FirstEnergy claims that the ESP is estimated to be more favorable than the expected results of the MRO by \$612.1¹⁸ on a nominal basis, or \$260 million on a NPV basis (Co. Ex. 155 at 12; Co. Ex. 156 at 4-6). More specifically, and as discussed above, the Companies assert that this quantitative benefit is a combination of the Economic Stability Program as well as economic development and low-income funding. The Companies elected to omit the costs of Rider DCR in this analysis, posited on the fact that the Companies would utilize a CBP to procure generation under either Stipulated ESP IV or an MRO; thus, there would be no quantifiable difference relating to this pricing between either the two scenarios. Additionally, FirstEnergy reiterates its earlier arguments regarding the quantitative benefits associated with Stipulated ESP IV.

OCC/NOAC argue that the Companies' proposed Stipulated ESP IV is quantitatively more costly to customers than an MRO over its eight-year term, noting that the combined analyses of OCC/NOPEC witnesses Wilson and Kahal demonstrated that the actual cost of the ESP over that of an MRO would range from \$3.26 to \$3.35 billion (OCC/NOPEC Ex. 11 at 16, 26-27; OCC/NOPEC Ex. 7 at 8). Exelon, RESA, NOPEC, and OMAEG also provide that the only number that should be considered for purposes of this test is the Companies' projected credit arising under Rider RRS, since there is no indication that the other payments to be paid under Stipulated ESP IV could not otherwise be made under an MRO (Tr. Vol. XIII at 596). While OCC/NOAC initially contends that Rider DCR will not result in a financial "wash," as proffered by FirstEnergy witness

¹⁸ The Companies derive this number by adding their projected net benefit attributed to Rider RRS, \$561 million, and the additional \$51.1 million in quantitative benefits in the form of shareholder funding for economic development, low-income customers, and a customer advisory agency.

Fanelli, OCC/NOAC, NOPEC, and RESA argue the alleged qualitative benefits arising from Rider DCR will not actually accrue to customers and, instead, will cause customers to pay more than they otherwise would be required to pay under a distribution rate case (Co. Ex. 50 at 7; OCC Ex. 18 at 17; OCC/NOPEC Ex. 8 at 30; OCC/NOPEC Ex. 11 at 22-23). Additionally, Exelon states the evidence in the record shows the speculative nature of this projection, while also noting that the Companies failed to conduct, or even consider, a CBP in order to ensure customers pay the least amount for the purported benefits under Rider RRS (Tr. Vol. XXXVI at 7736; Exelon Ex. 4 at 3; Exelon Ex. 1 at 20.) Environmental Groups also state that the Commission lacks any reassurances, such as a competitive procurement or some objective benchmark price, which would allow it to adequately evaluate whether the PPA is just and reasonable or more favorable in the aggregate than an MRO. Based on OCC/NOPEC witness Kahal's analysis, and further supported by Exelon's offer, NOPEC also contends that Rider RRS should be quantified as costing ratepayers \$2.97 billion (OCC/NOPEC Ex. 11 at 18). OMAEG notes that while the Companies made changes to its claimed quantitative analysis to account for the shortened eight-year term of Rider RRS and updated ROE of 10.38 percent, they failed to update their energy, capacity, natural gas, and CO₂ price forecasts, which were more than 17 months old (Tr. Vol. XXXVI at 7513). OMAEG argues this outdated information cannot be considered reasonable by the Commission, especially when other parties in this proceeding have provided more recently updated forecasts that allude to an entirely different outlook for consumers (Tr. Vol. XXXVIII at 8118-19; OCC/NOPEC Ex. 9 at 12-13). Additionally, OMAEG asserts that the Companies failed to provide any costs associated with the riders and programs contained in the Third Supplemental Stipulation in their bill impact analyses, even though these provisions may result in significant additional costs to customers who are not eligible for such programs or do not receive the specific benefits (Co. Ex. 154 at 9-15).

In its reply brief, FirstEnergy responds to arguments questioning the net benefit to customers by maintaining that, according to its projections, Rider RRS has a net benefit to customers of \$561 million. FirstEnergy dismisses the testimony otherwise by other parties' witnesses, asserting that the Companies put forward the only reliable forecasts and all other projections were based on either unsupported *ad hoc* and erroneous rationalizations or demonstrably unreliable methodology.

Next, FirstEnergy responds to parties' arguments regarding whether Rider DCR should be included in calculation of the quantitative impact. FirstEnergy maintains that Rider DCR does not have a quantitative impact on the ESP v. MRO test, as Commission precedent considers recovery of distribution capital costs through Rider DCR to be equivalent to the recovery of similar costs through a distribution rate case. *ESP III Case Order* at 56. Further, FirstEnergy responds to parties' arguments that low-income funding commitments should not be counted as a quantitative benefit because similar commitments could be made by the Companies under an MRO. FirstEnergy urges the Commission to reject these arguments on the grounds that whether the Companies

theoretically could make such funding commitments under an MRO is irrelevant, as FirstEnergy witness Mikkelsen explained these funding commitments are specifically being made as part of the proposed ESP and would not exist otherwise (Tr. Vol. XXXVI at 7735-7736). Additionally, FirstEnergy points out that there is no Commission precedent showing that any such commitments could be required as part of a distribution rate case.

Next, FirstEnergy responds to parties' arguments that the costs associated with Riders GDR and ELR, as well as the HLF/TOU rate, EE programs, battery technology, renewable resources, and grid modernization should be included as part of the costs of an MRO. FirstEnergy notes that the Commission has previously not included in the ESP v. MRO calculation the costs of riders that are mere placeholders, such as Rider GDR. *AEP Ohio ESP III* Order at 94. Regarding Rider ELR and the HLF/TOU rate, FirstEnergy points out that FirstEnergy witness Mikkelsen testified that these provisions have a net zero quantitative impact across the Companies' customers (Tr. Vol. XXXVII at 7799-7800). Regarding EE programs, FirstEnergy maintains these also should not be counted, as the Companies are required to meet state benchmarks, meaning such costs would arise whether under an ESP or MRO. Finally, regarding battery technology, renewable resources, and grid modernization initiatives, the Companies' point to FirstEnergy witness Mikkelsen's testimony that it is premature to assume there will be any costs associated with these provisions to consider, as each one is contingent upon future, independent Commission approval.

iii. Qualitative Benefits and Analysis

The Companies further assert that Stipulated ESP IV includes a variety of qualitative benefits, which promote rate stability, economic development, retail competition, customer optionality, grid modernization, resource diversification, low-income customer assistance, continued investment in the delivery system, and system reliability. The Companies have concluded that these benefits would not be available under an MRO. (Co. Ex. 155 at 13, Co. Ex. Co. Ex. 8 at 11; Co. Ex. 50 at 8-9.) As discussed earlier, the Companies state that several provisions previously approved in the *ESP III Case* will continue to be utilized in Stipulated ESP IV, including the continuation of the base distribution rate freeze, the procurement of non-shopping load through a CBP, the continuation of Riders DCR, ELR, and EDR(h), and the continued support of economic development and low-income programs through various funding initiatives. Additionally, FirstEnergy reiterates its earlier arguments regarding the qualitative benefits evaluated above in the traditional three-prong test.

Though many parties have argued that qualitative benefits should not even be considered for purposes of the ESP v. MRO test, they also argue that in the event the Commission could or would consider them, they would be significantly outweighed by the quantifiable costs attributable to Stipulated ESP IV. P3/EPsA, Power4Schools, and

RESA indicated that there has been an overreliance on the qualitative benefits to shadow the fact that the quantitative benefits will likely not accrue to the Companies' customers (Tr. Vol. XXXVI 7736-37). NOPEC and Power4Schools also state that even if the Commission was statutorily authorized to consider qualitative factors during its evaluation of the MRO v. ESP test, it would be unlawful to consider qualitative factors that fall outside of the provisions of R.C. 4928.143(B) and unreasonable for such qualitative benefits, such as benefits furthering the state policies codified in R.C. 4928.02 or the benefits of proposed Riders DCR and GDR, to supersede the quantitative analysis required by R.C. 4928.143(C)(1). Furthermore, OMAEG, OCC, NOAC, and Power4Schools assert the Companies have failed to show that the qualitative benefits of Stipulated ESP IV are more favorable than an MRO, initially noting that the projected costs of Rider RRS during the eight-year term outweigh any claimed benefits, such as rate stability or reliable electric service (OCC/NOPEC Ex. 4 at 49-52; OCC/NOPEC Ex. 8 at 8). Specifically, OMAEG contends that the costs attributed to Rider RRS would greatly outweigh any incremental annual rate increase customers would experience otherwise, while adding that there would be no change in reliability if the Plants and OVEC entitlement units were to continue to operate as they do today but such a decision might have significant opportunity costs such as foregone new generation construction (OCC/NOPEC Ex. 9 at 12; Tr. Vol. XIII at 2797-99). In addition, OMAEG argues that the projected economic development benefits are flawed and the Companies' analysis fails to accurately reflect the impact of Rider RRS on the costs to customers and the resulting economic development in this region, noting that the Companies should not be able to claim these projected benefits if they cannot definitively state that the Plants and OVEC entitlement units are currently operating economically (Co. Ex. 141 at 6; OCC/NOPEC Ex. 11 at 20-21). OMAEG concludes by arguing that while the Companies assert the provisions contained in Stipulated ESP IV will provide additional qualitative benefits, these provisions will only benefit a handful of customers to the detriment of the majority. In addition, many parties reiterated their concerns regarding the various purported benefits in the second prong analysis of the traditional three-prong test.

In its reply brief, FirstEnergy responds to parties' arguments that the Commission should not consider various qualitative benefits by pointing out that the Commission has previously found that an ESP provides qualitative benefits when it: (1) includes energy efficiency programs; (2) promotes economic development; (3) ensures system reliability; and, (4) facilitates rate stability. *ESP II Case Order* at 44; *ESP III Case Order* at 56. FirstEnergy urges the Commission not to depart from its precedent and argues that the opposing parties have offered no justification for any departure.

In contrast, Exelon disputes FirstEnergy's assertion of the proffered qualitative benefits, contending that any economic development benefits are largely unknown and that environmental benefits should also not be considered as there is no indication the plants will close if Rider RRS is not approved. Further, Exelon asserts that any continued

benefits of the Companies' *ESP III Case* and new provisions proposed in the Stipulated *ESP IV* will be outweighed by the cost of Rider RRS. In its reply brief, OCC/NOAC reiterate their prior arguments and emphasize again their belief that FirstEnergy's purported qualitative benefits, including Rider RRS, are illusory and do not benefit customers. OCC/NOAC also assert that FirstEnergy's discussion of the distribution rate freeze as a qualitative benefit for customers is actually harmful for customers as there will be no detailed rate-case type of Commission review during the freeze.

b. Commission Conclusion

The Commission finds that the record in these proceedings demonstrates that the proposed *ESP IV* is more favorable in the aggregate than the expected results of an MRO under R.C. 4928.142. Under the proposed *ESP IV*, the generation rates to be charged SSO customers will continue to be established through a CBP; therefore, generation rates in the *ESP IV* should be equivalent to the results which would be obtained under R.C. 4928.142. However, the evidence in the record demonstrates that there are quantitative and qualitative additional benefits contained in the Stipulations that make the proposed *ESP IV* more favorable in the aggregate than the expected results under R.C. 4928.142. We note that these numerous additional benefits will be realized by customers in the Companies' service territories, thus, furthering our policy objectives as enumerated in R.C. 4928.02. These benefits include protection of consumers against rate volatility and price fluctuations by promoting rate stability for all ratepayers in this state, modernization of the grid through the deployment of advanced technology and procurement of renewable energy resources, and promotion of competition by enabling competitive providers to offer innovative products to serve customers' needs. Further, we note that, considering the term of *ESP IV*, the requirements of the Third Supplemental Stipulation and R.C. 4928.143(E) will apply to *ESP IV* (Co. Ex. 154 at 18).

Initially, the Commission finds that the proposed *ESP IV* is more favorable quantitatively than an MRO. As discussed above, the record in this case indicates that Rider RRS will generate \$256 million in net revenue over the eight-year term of *ESP IV*. As stated above, we are not persuaded by OCC/NOPEC witness Wilson's claims that Rider RRS will cost customers billions of dollars; OCC and NOPEC rely upon the assumption that prices for natural gas, electricity and oil will remain below 2013 prices (in real dollars) through 2030 and beyond. Further, we are unconvinced by Mr. Wilson's claim that Rider RRS will exacerbate price volatility by moving in the same direction as the market. On the contrary, the evidence in the record demonstrates that Rider RRS will promote rate stability by providing a credit if and when energy prices increase, in furtherance of Ohio policy set forth in R.C. 4928.02(A).

In addition, the Stipulations provide for additional quantitative benefits in the form of shareholder funding for economic development, low-income customers and a customer

advisory agency (Co. Ex. 155 at 11-12). This shareholder funding totals \$51.1 million over the term of ESP IV (Co. Ex. 155 at 12). *We also note that the low-income funding furthers state policy by protecting at-risk populations as provided by R.C. 4928.02(L).*

With respect to whether Rider DCR should be included in the quantitative analysis, the Commission previously has determined that Rider DCR allows the Companies to earn a return on and of plant in service associated with distribution, subtransmission, and general and intangible plant which was not included in the rate base of the Companies' last distribution rate case. Pursuant to R.C. 4909.15, the Commission is required to determine, in a distribution rate case, the valuation, as of the date certain, of property used and useful in rendering public utility service. Thus, we concluded that, to the extent that the Companies have made capital investments since the last distribution rate case, those investments will be recovered to an equal extent, through either Rider DCR or through distribution rates, provided that the property is used and useful in the provision of distribution service. Accordingly, over the long term, the Companies will recover the equivalent of the same costs, and, for purposes of the ESP v. MRO Test, the costs of Rider DCR and the costs of a potential distribution rate case should be considered substantially equal and removed from the ESP v. MRO analysis. *ESP III Case, Opinion and Order* (Jul. 18, 2013) at 55-56; *Entry on Rehearing* (Jan. 30, 2013) at 22-23.

Therefore, we find that, on a quantitative basis, the proposed ESP IV is more favorable than an MRO by \$307.1 million, representing the sum of the predicted \$256 in net revenue predicted for Rider RRS and \$51.1 million in committed shareholder funding, over the eight years of ESP IV.

Further, we find that the proposed ESP IV is more favorable qualitatively than an MRO. We find that the additional qualitative benefits of an ESP, which would not be provided for in an MRO, include: (1) continuation of the distribution rate increase freeze until June 1, 2024 to provide rate certainty, predictability, and stability for customers (Co. Ex 154 at 13); (2) continuation of multiple rate options and programs to preserve and enhance rate options for various customers provided in previous ESPs (Co. Ex. 154 at 14-15); (3) establishment of a goal to reduce CO₂ emissions by FirstEnergy Corp with periodic reporting requirements (Co. Ex. 154 at 11; Co. Ex. 155 at 13); (4) reactivation and expansion of energy efficiency programs previously suspended by the Companies, with a goal of saving 800,000 MWh of energy annually (Co. Ex. 154 at 11-12); and (5) programs to promote the use of energy efficiency programs by small businesses pursuant to state policy set forth in R.C. 4928.02(M) (Co. Ex. 155 at 5). In addition, the Stipulations require the Companies to file applications to: (1) modernize distribution infrastructure through the filing of a business plan for the deployment of smart grid technology and advanced metering infrastructure in accordance with Ohio policy set forth in R.C. 4828.02(D) (Co. Ex. 154 at 9-10); (2) promote resource diversity by investing in utility scale battery technology and, potentially, by procuring additional renewable energy resources (Co. Ex.

154 at 11-12; Co. Ex. 155 at 13); and (3) transition to a SFV rate design which balances the elimination of disincentives for the Companies to promote energy efficiency and conservation programs with the promotion of the principle of cost causation (Co. Ex. 154 at 12-13; Co. Ex. 155 at 13).

Therefore, based upon the evidence in the record in this proceeding, the Commission finds that the ESP IV, including its pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, is more favorable in the aggregate as compared to the expected results that would otherwise apply under an MRO pursuant to R.C. 4928.142. Accordingly, we find that the Stipulations, as modified, should be adopted. We also note that our finding in this section that the ESP IV is more favorable in the aggregate than the expected results that would otherwise apply under an MRO also addresses arguments by several parties that the Stipulations violate important regulatory principles by failing the ESP v. MRO test.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

- (1) The Companies are public utilities as defined in R.C. 4905.02 and, as such, are subject to the jurisdiction of this Commission.
- (2) On August 4, 2014, FirstEnergy filed an application for an SSO in accordance with R.C. 4928.141.
- (3) Stipulations were filed on December 22, 2014, as modified by errata filed on January 21, 2015; on May 28, 2015; on June 4, 2015; and, on December 1, 2015.
- (4) The signatory parties to the Stipulated ESP IV are the Companies, AEP Ohio, OEG, Akron, COSE, Citizens' Coalition, Nucor, MSC, AICUO, IBEW 245, Kroger, EnerNOC, Inc., OP&E, IGS, and the Commission's Staff.
- (5) The evidentiary hearing in this proceeding was held from August 31, 2015, until October 29, 2015, and from January 14, 2016, until January 22, 2016.
- (6) Pursuant to published notice, public hearings were held in Akron on January 12, 2015; in Toledo on January 15, 2015; and in Cleveland on January 20, 2015.
- (7) The Companies' application was filed pursuant to R.C. 4928.143, which authorizes the electric utilities to file an ESP as their SSO.

- (8) The Commission finds that the Stipulated ESP IV, as modified, meets the three criteria for adoption of stipulations, is reasonable, and should be adopted.
- (9) The proposed Stipulated ESP IV, including its pricing and all other terms and conditions, including deferrals and future recovery of deferrals is more favorable in the aggregate as compared to the expected results that would otherwise apply under R.C. 4928.142.

ORDER:

It is, therefore:

ORDERED, That Noble Solutions' motion to intervene out-of-time is denied as set forth herein. It is, further,

ORDERED, That Oregon's motion for leave to file an amicus brief is granted as set forth herein. It is, further,

ORDERED, That the applications for interlocutory appeal are denied as set forth herein. It is, further,

ORDERED, That the rulings of the attorney examiners are affirmed as set forth herein. It is, further,

ORDERED, That the motions to strike portions of the initial and reply briefs are granted, in part, and denied, in part, as set forth herein. It is, further,

ORDERED, That the pending motions for protective order are granted as set forth herein. It is, further,

ORDERED, That the previously granted motions for protective order are extended as set forth herein. It is, further,

ORDERED, That the Stipulated ESP IV, as modified by the Commission, be adopted and approved. It is, further,

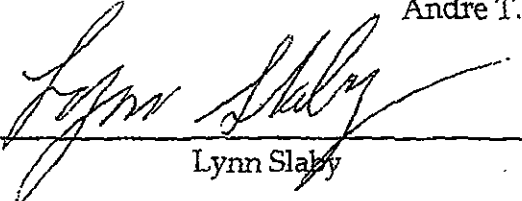
ORDERED, That the Companies file proposed tariffs consistent with the Stipulated ESP IV as modified. It is, further,

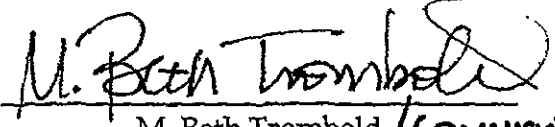
ORDERED, That the Companies take all steps necessary to implement the Stipulated ESP IV. It is, further,

ORDERED, That a copy of this Opinion and Order be served upon all parties of record.

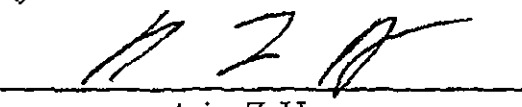
THE PUBLIC UTILITIES COMMISSION OF OHIO

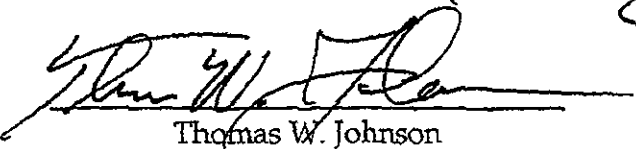

Andre T. Porter, Chairman


Lynn Slaby


M. Beth Trombold

(concurring)


Asim Z. Haque

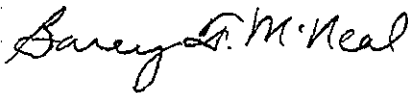

Thomas W. Johnson

Concur

GAP/MWC/MJA/vrm

Entered in the Journal

MAR 31 2016



Barcy F. McNeal
Secretary

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) Case No. 14-1297-EL-SSO
for a Standard Service Offer Pursuant to)
R.C. 4928.143 in the Form of an Electric)
Security Plan.)

CONCURRING OPINION OF COMMISSIONER ASIM Z. HAQUE

As these cases have been pending before the Commission for a considerable period of time, and due to the concern expressed by the consumers of this great State (along with interest shown by spectators nationally), I feel compelled to write separately to explain my decisions today. I also want to take this opportunity to provide my thoughts about the current status of the electric industry here in Ohio. My hope is that this opinion will be insightful to those looking for more guidance on how and why these decisions were made, the issues that face the electric industry today, and our collective path forward.

I. THE PPA DECISIONS

In adjudging these cases over the past two plus years, so many questions have been posed by the general public and those on the periphery of these cases. *Why did the utilities bring these cases? Why should the Commission evaluate them when it has committed the State to competitive markets? Are the PPAs a good deal for consumers? Are the utilities asking consumers to subsidize plants that are no longer competitive in the market? Does the PUCO (and the State of Ohio) care about the environment?* These are all fair questions to ask.

We must always remember, however, that the Commission serves a quasi-judicial function, and the cases we evaluate have legal standards of review that should create the frame for our analysis. I am, by formal training and by inherent nature, a lawyer. I understand policy well enough. But to me, when it comes to actually deciding cases, the technical arguments, the law, the testimony, the cross-examination, the overall record, and the briefing, must prevail.

From a legal perspective, I analyzed these cases differently than in our first American Electric Power (AEP) PPA-related decision, *In re Ohio Power Co.*, Case No. 13-2385-EL-SSO, et al., Opinion and Order (Feb. 25, 2015), whereby the Commission found a PPA construct to be legal, but did not allow for a generating unit to actually be placed in the rider. The key difference here, legally, is that AEP (and FirstEnergy) filed a settlement stipulation with the Commission. As a result, while the legal standard of review still requires that the utilities bear the burden of proof, the true test for legality in these cases is the three-part stipulation

test established by this Commission and upheld by the Supreme Court of Ohio. That test reads as follows:

- (1) Is the settlement a product of serious bargaining among capable, knowledgeable parties?
- (2) Does the settlement, as a package, benefit ratepayers and the public interest?
- (3) Does the settlement package violate any important regulatory principle or practice?

Admittedly, the plain language of this test leaves some room for Commission interpretation. Over the course of my next term, I hope to add some doctrinal principles to this test that future Commissions can rely upon for reference. I will in fact attempt to do some of this here.

A. The Three Part Stipulation Test

1. Serious Bargaining Among Capable, Knowledgeable Parties

First, is the stipulation a product of serious bargaining among capable, knowledgeable parties? I agree with the conclusions set forth in both Opinions and Orders, but let me add a bit more. As to whether the parties are capable and knowledgeable, the Commission should look to the *quality* of the parties that have signed the stipulation. *Quantity* of parties, in my mind, is meaningless.

The Commission is well-acquainted with the parties that typically intervene in major proceedings before the Commission, and the various interests they represent. The Commission is also well-aware that if a party intervenes and signs a stipulation, but is not a typical intervenor, whether that party has a symbolic and meaningful representation in that particular case. Again, it is *quality* of the parties that is determinative, not quantity. In the cases at hand, this *quality* bar was reached by both AEP and FirstEnergy.

Let me also provide some feedback on the concept of side agreements and whether they impact the first part of the stipulation test. I am not a tremendous fan of these side agreements, and I worry about their proliferation in these types of proceedings. There were two side agreements executed in these cases that I want to mention. One side agreement was between AEP and IEU-Ohio. The other side agreement was between FirstEnergy and IGS Energy. The AEP/IEU side agreement settles major pieces of litigation between the parties, and the only component of the side agreement that overtly touches the PPA case is IEU's agreement not to oppose the AEP stipulation. This, in my mind, would not impact the first part of the stipulation test. AEP and IEU can agree to settle their claims whenever

they choose, and for whatever monetary or non-monetary terms they agree upon. The agreement was properly disclosed pursuant to the law, and again, I do not find that this agreement impacts the serious bargaining among knowledgeable, capable parties.

The FirstEnergy and IGS Energy side agreement was also properly disclosed, but that agreement requires, essentially, that the Commission consider a future adjustment to our oversight of default service pricing through a future filing. My preference is that something like this would have been included in the actual stipulation. At the same time, I am aware of the tight timeframe that the Commission placed on the stipulation hearings, and my notion is that the parties perceived it to be administratively cleaner (which it is) to execute their side agreement rather than file an amended stipulation since the parties agreed on terms during the actual stipulation hearing. I understand these circumstances, the agreement was properly disclosed under the law, but my preference is that a side agreement term that requires eventual Commission action or oversight be placed within the actual confines of the stipulation to ensure that serious bargaining is occurring among knowledgeable parties. Ultimately, my concern about this particular side agreement, under these circumstances, does not yield a failure of the first part of the stipulation test.

2. As a Package, Benefits Ratepayers and the Public Interest

i. Introduction

This is hard. There is no other way to say it. Whether these stipulations, as a package, benefit ratepayers and the public interest is the pivot point for these stipulations. It is through this part of the stipulation test that some of the broader questions articulated above can be addressed. But first, let me provide some commentary on the plain language of the second part of the stipulation test. To me, it is clear who *ratepayers* are. *Ratepayers* encompass those persons or entities that pay for utility service in the service territory of the stipulating utility. This could range from a single residential consumer that lives in a small apartment, to a large auto manufacturer that consumes massive amounts of electricity all day and through the night in order to keep the manufacturing line moving. All are *ratepayers* within a utility's given service territory.

Defining the *public interest* is harder. It would seem to me that the *public* should mostly consist of the same definitional set that I established above for *ratepayers*. However, it could encompass more. It could encompass those who are less fortunate and who do not have a domicile. It could encompass those who live outside of the service territory of the subject utility but still within the State (i.e. a decision made in the FirstEnergy service territory that impacts persons or entities located in the Duke service territory), and it could even encompass those persons and entities that do not take service from a utility regulated by the Commission (e.g. persons or entities that take service from municipally owned utilities and co-operatives). Thus, *public interest* is broader than *ratepayers*, and has the

potential to include persons and entities beyond those who pay rates within the subject utility's service territory.

ii. PPA Rider Charges and Credits

First, let's talk about the rate impacts of the PPA rider in the AEP and FirstEnergy service territories. There were projections for the riders presented in both cases, and all of the projections presented had their merits. Here's what I think I know from these projections. I think that, based upon the projections and the evidence in the record, there is general consensus that the PPA riders will result in a charge to consumers for at least the first 2-3 years of the riders. Because the Commission feels somewhat certain of this, we have attempted to build in certain consumer protections to ensure that bills do not increase beyond a certain limit.

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

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

Let me also argue the 'utilities' side of this. Let us say that after 2-3 years of Rider PPA charges, environmental regulations are promulgated that serve to prohibit fracking, or serve to limit the ease of interstate transport of natural gas, or some other unforeseen circumstance that would serve to drive up the price of natural gas beyond its historically low price of the present. If that happens, the operating costs of our natural gas-fired generation fleet will increase, thereby increasing market prices. Again, the PPA riders work contra to the market. If market prices rise, then the PPA riders produce credits to

ratepayers, and of course the flip is also true. If market prices increase sharply for these reasons associated with the natural gas fleet, or for any other reason, then the credits that the utilities provide to ratepayers could offset increased market prices. It is certainly a possibility.

Because predictions of market prices beyond a few years are speculative, we must monitor the riders to ensure that ratepayers are purchasing the hedge that has been marketed to them. This should not be perceived as a blank check, and consumers should not be treated like a trust account. It's not right. At the same time, consumers, you have the potential to benefit from this if market prices increase. I know that experts opposing PPAs are saying *now* that there is no way that this will happen. Please read my commentary on wholesale markets below, and understand that the energy industry is very dynamic with many, many moving parts that have the potential to impact these markets and make them unpredictable.

iii. The Rest of the Stipulation Packages

It is extremely important to note that cost is not the only factor that this Commission is to weigh in determining whether the stipulations benefit ratepayers and are in the public interest. In *In re Application of Columbus Southern Power Company*, 129 Ohio St.3d 46 (2011), the Supreme Court of Ohio addressed this issue of whether the PUCO could consider more than cost in determining whether a stipulation benefits ratepayers and is in the public interest. In that case, IEU-Ohio challenged AEP's peak demand reduction plan stipulation, presenting what it believed to be a more cost-effective approach to prove that AEP's stipulation did not benefit ratepayers and was not in the public interest. The Supreme Court of Ohio held that, "While cost is surely a relevant concern to be balanced... it is not the only concern, and the commission is entitled to consider more." (*emphasis added* at 51).

Here, I think the public benefits from a few major categories of terms agreed to in the stipulations, especially the grid modernization and clean generation technologies provisions. Many states have opened dockets and are undertaking "utility 2.0" or "utility of the future" grid modernization endeavors. The State of Ohio is due for this conversation. For some time now, I've wondered how we could possibly persuade the electric utilities to have conversations with us about the future of their industries: how they expect to incorporate next generation (and often third party) technologies into the distribution grid, how they expect to cater to millennial consumers who want more control and understanding over how and what they consume, how to better incorporate clean technologies into everything that they do, etc. These conversations could yield revolutionary endeavors that would surely benefit the public interest. The stark reality is that until these PPA cases were resolved, no such conversations would occur.

Also, clean generation technologies are advanced in these stipulations with renewable, energy efficiency and even battery storage provisions. In fact, a major environmental advocate, the Sierra Club, signed onto the AEP stipulation. It would be foolhardy for me not to recognize the tremendous amount of public sentiment expressed over the past two years associated with these cases and their environmental ramifications. The environmental community surely will not be pleased that the Commission is approving PPA riders for coal plants and a nuclear plant, but at the same time, the Commission recognizes the importance of cleaner generation technologies by approving certain endeavors in these Opinions and Orders. Again, I do not believe that there would have been a path forward for such commitments without these stipulations.

There are more stipulated terms to discuss that elicited the signatures (or non-opposition) of a number of very important parties in these proceedings. Our largest consumers will be able to take advantage of utility demand response programs. Economic development opportunities are created. Our competitive retailers will be given the opportunity to advance endeavors that could serve to enhance the retail marketplace. And there is more. Surely, it is fair to ask how much all of this will cost. Much of these costs will be determined in future proceedings before the Commission, and so we will find out if the perceived present benefits are actually worth the costs. That question, however, sheds light on the very difficult balance between a current financial impact to ratepayers, and future benefits (and even savings) for those same ratepayers after this initial investment. I save this conundrum for another day, however.

In summary, while it is unclear what the net impact of the PPA riders will be over the next eight years, the concept itself has merit as it could serve as a hedge against marketplace volatility. At the same time, from purely a monetary perspective, we must ensure that constant and large charges do not become the norm, as this would mitigate the conceptual benefit that the hedge has to offer. The other benefits in the stipulation packages, eliciting the signature of parties in these proceedings, push the stipulations just beyond the pivot point, allowing for a finding that these stipulations pass this second part of the stipulation test.

3. Violate any Important Regulatory Principle or Practice

This third part of the stipulation test, again, allows for some Commission discretion. What is a *regulatory principle* and a *regulatory practice*, and even then, which of these principles and practices are *important*? Do these principles and practices encompass more than the law set forth in the Ohio Revised Code and the rules set forth in the Ohio Administrative Code? Would these principles and practices encompass the current policy positions of the State and perhaps the Chairman of the PUCO? Do these principles and practices encompass generally accepted regulatory norms adopted by a majority of state utility commissions, the National Association of Regulatory Utility Commissioners, the

Mid-Atlantic Conference of Regulatory Utility Commissioners, the National Regulatory Research Institute, etc.?

In trying to provide some guidance here, I am of the opinion that, at the very least, the stipulation cannot violate a statute of the Ohio Revised Code or a rule of the Ohio Administrative Code. For this reason, I concur with the language set forth in the Opinions and Orders stating that the third part of the stipulation test has been satisfied. The Commission spent much of 2014 and early 2015 mired in the quandary of whether the PPA mechanism was legal under Ohio law, and more specifically, the ESP statute. The Commission's conclusion on that issue in the AEP ESP III case has been made. I do not wish to revisit that decision or its justification here.

I would, however, like to provide some commentary on the factors set forth by the Commission in AEP ESP III that were meant to serve as evaluative criterion for the Commission in determining whether to grant or deny future PPA requests. The plain language leading into those factors reads in a more permissive, than mandatory manner. That is, the Commission can take those factors into account, but it doesn't necessarily have to. If these cases were not presented to us as stipulations, I would have looked more to those factors as guide posts in my decision-making. However, again, the presentation of these cases as stipulations very much changed my legal standard of review, and thus, my analysis. To note, I do not believe that either company successfully proved that the PPA units are needed to preserve reliability. Based upon the legal standard of review though, this failure to meet one of the Commission's permissive factors is not fatal.

II. The Current Status of the Industry

My time on the Commission thus far has been one of ultimate flux in the electric industry. I sometimes cannot believe both the fortune and misfortune in my timing. As I was coming onto the Commission, the Commission was completing its vision of transitioning utilities to full competition via the most recent Dayton Power & Light (DP&L) ESP. Now, states and their electric utilities are trying to determine how to best plan for the modernized "utility 2.0" future grid, in tandem with demands for cleaner energy, more thoughtful consumer engagement, and of course, having to deal with market dynamics that are favoring some assets and disfavoring others. I pen this portion of my concurrence not for purposes of legacy though. As I have been appointed to another term, my intent is the diametric opposite. I pen this portion of my concurrence to try and provide the utility community with a glimpse of how I presently view the industry and its various stakeholders and interests. From here, and based upon these thoughts, my hope is that we can chart a clear path for this industry, together.

A. Competition

I begin with the concept of competition. There has been plenty of rhetoric espoused stating that the granting of PPAs will destroy competition in the State of Ohio. I will address this concern, but an important distinction needs to first be made. There is a difference between *wholesale* competition and *retail* competition. *Wholesale* competition involves the generators of electricity competing to sell the power that they produce into a marketplace for the best possible price. *Retail* competition involves entities that purchase this power from the wholesale marketplace, and then resell that power to consumers.

In the State of Ohio, *wholesale* competitors include the generation companies affiliated with AEP, FirstEnergy, DP&L, Dynegy (who last year purchased the generation fleet owned by Duke Energy Ohio's generation affiliate) and other independent power producers in the State. Generation owned by municipals and co-ops (whom the PUCO do not regulate) also partake in wholesale competitive markets. *Retail* competitors include companies like Direct Energy, IGS Energy, Constellation, Just Energy, the retail affiliates of the aforementioned four electric companies and many, many more. I will address retail competition first, followed by wholesale competition.

1. Retail Competition

The status of retail competition in the State of Ohio is strong, and will continue to be strong going forward. Nothing in these Opinions and Orders should be construed as me being unsupportive of retail competition. Retailers have become the true innovators in the State. They are bringing home energy management products, distributed generation, innovative pricing and so much more to their customers. I am supportive and very appreciative of our retailers' efforts to continue to innovate and make customers' lives better.

In analyzing the PPA riders, the mechanisms contemplated could hurt the retail market in a few ways that we must be cognizant of. The first way is if there is confusion about what the Commission has done here. Again, retail competition is working, and it should not be harmed by law or policy based upon a misunderstanding of the Commission's decisions today. The second way is if either the AEP-Ohio or FirstEnergy (the distribution companies) sell their power purchased via the PPAs to their retail affiliates (AEP Retail and FirstEnergy Solutions) via bilateral contract. Per the Opinions and Orders, no presumption of prudence will exist here.

Retail competition is thriving. These companies are innovators. I want to continue to see them thrive and we need to ensure that the potential harms that could arise from these decisions never come to fruition.

2. Wholesale Competition

As I have already stated, my eventual decisions in these cases were made by analyzing the stipulations against the three part test. My decisions were based upon the concept of the PPAs being utilized as a retail hedge and rooted in state law. Although our decisions do not rely on Federal or wholesale issues, I want to utilize this "industry status" section to provide some observations on wholesale market operation, specifically the PJM wholesale market.

I am a believer in wholesale markets for reasons associated with the discipline of economics. Clearly though, state governments have been expressing some recent trepidation with the markets. There are more states than Ohio that are exercising, or contemplating to exercise their retail jurisdictional authority associated with existing generation (mostly nuclear), or have attempted to incent new generation. Why? What is the root cause of this? I am not entirely sure. Conceptually for the markets, what I think would be essential is that trust and confidence exist in the markets from not only the actual market participants, but in this case, those who are forced to deal with the collateral damage associated with market operation.

State governments are the entities that invariably manage wholesale market collateral damage because they are the most directly accountable to the consumers and job creators in their respective States. I have said this publicly on a few occasions. If the states, who are the most directly accountable to consumers for the impacts of wholesale markets (even though they do not plan or operate them) start to feel pressure, whether from their consumers, utilities, interest groups, etc., and this pressure is either supplemented by, or helps to bolster a lack of trust and confidence in the markets themselves, then states will contemplate exercising their given legal authority associated with their in-state generation.

When prices were high during the polar vortex, consumers and businesses in the State of Ohio called the PUCO and state government offices to express their displeasure. They don't know who PJM is. They don't know who FERC is. When a coal plant in Appalachia is shut down and hundreds are losing their livelihoods, these families send letters to the PUCO and state government offices to tell us of their hardships. They don't know who PJM is. They don't know who FERC is. Again, states feel accountable for the impacts of markets that are not in their control.

That's not to say that there aren't solutions. I have had the professional pleasure of interacting with the executives at PJM as well as FERC Commissioners. They are forthright and brilliant people in their own right, and they have very challenging jobs. They have, in my experience, also been very receptive to the concerns of the states. But again, state government behavior is expressing some trepidation which will need to be addressed. The

below thoughts/concerns are a start. These are mainly byproduct questions from these PPA cases:

- Are the markets prepared if, for whatever the reason, we see a spike in natural gas prices, especially with the continued shedding of plants from the coal and nuclear generation fleets?
- How close are we to technically reliable and cost-effective utility scale renewables, and are they adequate replacements for the coal and nuclear fleets?
- The nuclear fleet appears to be in the most difficult position, with retirements occurring or being threatened in other states. With nuclear continuing to be a large chunk of generating capacity in PJM, do we need to treat them differently in the wholesale markets in order to preserve them?
- Is the demise of the coal fleet overblown? That is, will there continue to be a large coal fleet that clears wholesale markets *sans* environmental (carbon) reform?
- If environmental (carbon) reform finally goes through, whether it be the Clean Power Plan or other reform, and the nuclear fleet continues to struggle, and renewables aren't ready, what is your plan to ensure a reliable grid?

Perhaps these questions seem preposterous to the reader. Perhaps the answers to these questions are obvious. Perhaps each of these questions can be answered by stating simply that the markets will account for and take care of all of these potential scenarios. Perhaps the policy underpinnings of my questions, concerns about cost and reliability, are not appropriate to ask when dealing with markets. If market prices are high, then that's the market. If power is scarce, then that's the market. Admittedly, if you had my job though, and had to think about consumers big and small just trying to "make it" on a day-to-day basis here in my State, a State in which I have lived all over and have always called home, you may understand my concern.

B. Our Electric Utilities

The Commission and our electric utilities need to work as partners going forward. These cases were filed two or so years ago, and the Commission has been playing defense ever since. Going forward, we need to have a conversation about your future. How can we work to better the lives of consumers in the State of Ohio while also ensuring that you maintain your economic viability? My hope is that we will have this important conversation within the confines of our grid modernization dockets and beyond. We need to work as partners going forward for the betterment of the State.

C. The Environmental Community

In my eyes, you have officially arrived here at the Commission. When I first started litigating at the Commission some five years ago, I think the perception of your participation is that you were more fringe advocacy parties that would not likely gain traction in large rate cases. Now, unequivocally, you have a seat at the table, and you deserve to be praised for your advocacy and ascension.

My only request is that your advocacy of social principle is firmly grounded in regulatory reality. It is not technically feasible, nor is it presently cost-effective to simply replace our coal, nuclear and gas fleets with renewables and energy efficiency. Perhaps it could happen, but not nearly in the immediate future. As I have stated numerous times when speaking about the Clean Power Plan, cleaner air and a cleaner environment are very fine policy objectives. We must be intelligent and intellectually honest in how we get there from a State regulatory perspective.

D. The Coal Fleet

Coal has a rich history here in Ohio. It has supported Ohio communities and families. It has helped preserve reliability of the grid and the cost-effectiveness of power. I continue to be engaged at a national level to help try and find solutions for coal. Clearly, because of its environmental attributes, coal does not hold the same favor that it once did. This, combined with the price of natural gas, makes for a very challenging market environment for coal.

Cleaner coal solutions like carbon capture and other forms of carbon management are discussed *ad nauseum* in Washington, but there appears to be some relative consensus that these technologies, at present, are cost prohibitive. Further, based upon current market dynamics, I wonder if their cost effectiveness may arrive too late for the existing coal fleet.

I have become familiar with the research of Dr. L.S. Fan and his chemical looping work at The Ohio State University. These types of research endeavors could revolutionize the coal industry. As a State regulator, I don't know that I can do much more to move research endeavors to market other than to say "I support you." I think, however, that lending whatever support we can to such research endeavors makes all the sense in the world. I continue to search for solutions for this industry, and I am very hopeful that solutions present themselves.

E. Merchant Generators

We are very grateful to have you here, and these decisions should in no way be viewed as a condemnation of your operations here in the State. Through the natural

demographics of the State, existing infrastructure and our "one-stop" power siting shop, my hope is that merchant generators will continue to feel that investment in Ohio is a profitable endeavor.

F. The Path Forward

Regulation is far from perfect. When one considers all of the moving parts, especially in the electric industry, it is extremely hard to fathom how it could be. Markets are dynamic. Industries evolve based upon technological innovation. Industry players change priorities based upon share prices, new Boards, and new CEOs. Social movements take shape and influence policy. Lawmakers and other regulators impact what you can and cannot do. The regulators themselves are swapped in and out, and they evolve during the course of their terms. How, then, can electric industry stakeholders in the State of Ohio have some semblance of certainty in regulation?

I feel, at least, that there are a few principles that I will always rely upon when making decisions and charting policy paths. I have quoted the mission of the PUCO extensively in my past decision-making. Outside of the law, it is all that exists to guide us. Now that I have been in this seat for close to three years, I am going to express some autonomy and add a few more principles to the mission that will help guide my second term.

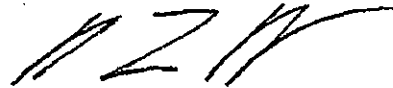
Safe, reliable and cost-effective. These principles are articulated in the mission of the PUCO, and are the core principles to rely upon in safeguarding the industry. The Commission will continue to enforce and seek to make better its reliability and safety measures. The tremendous work that the staff of the Commission does to ensure safety and reliability, and the cooperation that our utilities provide should not be forgotten. It is a heavy, heavy responsibility. I have addressed cost-effectiveness earlier in this concurrence. Note that the principle is *cost-effective* and not *cheapest*. As in life, sometimes you have to pay for great service, and sometimes you have to invest on the front-end to save on the back-end. I am always concerned about costs. I am concerned about what our most indigent consumers can pay, and I am concerned if our job creators are paying too much. It is a very challenging balance, but a balance nonetheless that we must endeavor to create.

Innovative. I now view this as synonymous with "competitive" in the retail space. If a retailer is being innovative, then it is also being competitive. If a retailer's only offer to consumers is a small discount off of the price to compare, that retailer is not being innovative, and thus the retailer is not being competitive. I hope to see more and more retail innovation as I progress through my second term. I also hope to see innovation expressed in our grid modernization dockets. Again, these dockets have tremendous potential.

Clean. We must acknowledge the clean movement. Failing to do so runs afoul of what appears to be overwhelming consumer sentiment. Recall though that we have to balance this principle against the principles of reliability and cost-effectiveness. Again, environmental advocates have a seat at the table, but we have to work always towards immediately practical solutions. This is not to say, again, that I do not believe in our historical baseload generation either. We must support clean solutions for coal, and must also realize that trying to push the baseload fleets out of the market sooner than our grid can account for may be very harmful.

Safe - Reliable - Cost-Effective - Innovative - Clean

These are principles that can guide our path forward. These are big cases, but there is still, and there always will be, much work to be done.

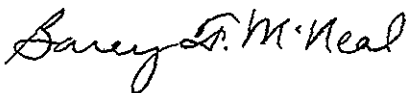


Asim Z. Haque, Commissioner

AZH/vrm

Entered in the Journal

MAR 3 1 2016



Barcy F. McNeal
Secretary

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) Case No. 14-1297-EL-SSO
for a Standard Service Offer Pursuant to)
R.C. 4928.143 in the Form of an Electric)
Security Plan.)

CONCURRING OPINION OF COMMISSIONER M. BETH TROMBOLD

I write separately from my colleagues because I feel it is important to emphasize the expectation on which today's Opinion and Order is based.

The energy market is dynamic and complicated, and the issues raised in this proceeding are difficult and not given to simple solutions. The application in this case was submitted by the Companies in mid-2014. For over 18 months, the Commission has worked diligently to decide the case in a manner consistent with Ohio law while balancing many interests and providing extensive due process.

Every Ohioan relies on public utility companies for the critical services they provide; therefore, we want those companies to be financially sound and stable. We have also worked long and hard in Ohio to establish a robust competitive electric marketplace to the benefit of consumers and growing businesses. Importantly, Ohio consumers want safe, reliable electricity at affordable rates as well as innovative products and services that meet their needs and interests. To be sure, it's all a very delicate balance.

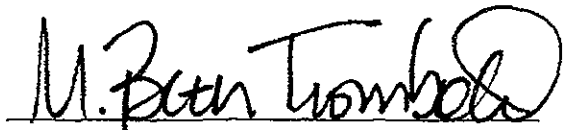
In the case before us today, the Commission must consider whether the Stipulated ESP IV, as a package, benefits ratepayers and the public interest. The analysis made by the Commission in reaching this conclusion is articulated in the Opinion and Order. In short, the Commission concludes that Ohio consumers will benefit from several items in the Stipulated ESP IV such as provisions that will result in grid modernization and more renewables. These provisions will enable the Commission to advance important conversations with our utilities about the future of the electric industry and incorporating "next generation technologies" into our electric distribution grid.

In addition, the Stipulated ESP IV continues utility demand response programs important to the viability of our large industrial companies, and creates pilot programs necessary for our competitive retail suppliers to advance Ohio's retail marketplace.

The Purchase Power Agreement (PPA) included in the Stipulated ESP IV has been discussed at great length in this docket and elsewhere.

One of the challenges of utility regulation is that it is based on *forecasts*, and forecasts are just that: a prediction about an uncertain future. We all know there have been changes in the market in recent years caused by the weather, the economy, technological innovations, and environmental considerations that have resulted in market prices no one predicted despite our best attempts to forecast them.

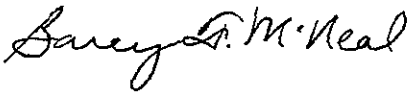
The PPA mechanism proposed by the Companies is designed to operate as a financial hedge against such price volatility, wherein consumers pay more when market prices are low but pay less when market prices are high. Based on the forecasts submitted by the Companies and evidence in the record, it is my clear expectation, just as it is Commissioner Haque's, that the PPA rider approved today will result in a credit (i.e. benefit) to ratepayers over the next eight years (Co. Ex. 155 at 11-12; OCC/NOPEC Ex. 9 at 12; Tr. Vol. XXII at 4384-86).


M. Beth Trombold, Commissioner

MBT/vrm

Entered in the Journal

MAR 31 2016



Barcy F. McNeal
Secretary

ATTACHMENT B

**PUCO FIFTH ENTRY ON REHEARING
(October 12, 2016)**

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

FIFTH ENTRY ON REHEARING

Rendered on October 12, 2016

I. SUMMARY

{¶ 1} On rehearing, the Commission finds that the Companies' Proposal to modify Rider RRS should not be adopted and that the Staff's alternative proposal to establish Rider DMR should be adopted. Further, the Commission makes additional modifications to the Stipulations approved by the Commission to ensure that the Stipulations, as a package, benefit ratepayers and the public interest and that the Stipulations violate no important regulatory principles or practices.

II. PROCEDURAL HISTORY AND APPLICABLE LAW

A. *Procedural History*

{¶ 2} Ohio Edison Company (Ohio Edison), The Cleveland Electric Illuminating Company (Cleveland Electric Illuminating), and The Toledo Edison Company (Toledo Edison) (collectively, FirstEnergy or the Companies) are electric distribution utilities as defined in R.C. 4928.01(A)(6) and public utilities as defined in R.C. 4905.02 and, as such, are subject to the jurisdiction of this Commission.

{¶ 3} R.C. 4928.141 provides that an electric distribution utility shall provide customers within its certified territory a standard service offer (SSO) of all competitive retail electric services necessary to maintain essential electric services to customers, including firm supply of electric generation services. The SSO may be either a market rate

offer (MRO) in accordance with R.C. 4928.142 or an electric security plan (ESP) in accordance with R.C. 4928.143.

{¶ 4} On August 4, 2014, FirstEnergy filed an application pursuant to R.C. 4928.141 to provide for an SSO to provide generation pricing for the period of June 1, 2016, through May 31, 2019. The application was for an ESP, in accordance with R.C. 4928.143 (*ESP IV*).

{¶ 5} On March 31, 2016, the Commission issued its Opinion and Order in *ESP IV*, approving FirstEnergy's application and stipulations¹ with several modifications (Order or *ESP IV* Opinion and Order). As part of that *ESP IV* Opinion and Order, we approved a modified version of FirstEnergy's original proposal for a retail rate stability rider (Rider RRS).

{¶ 6} On April 27, 2016, the Federal Energy Regulatory Commission (FERC) issued an order granting a complaint filed by the Electric Power Supply Association (EPSA), the Retail Energy Supply Association (RESA), Dynegy, Inc. (Dynegy), Eastern Generation, LLC, NRG Power Marketing LLC, and GenOn Energy Management, LLC, and rescinding a waiver of its affiliate power sales restrictions previously granted to FirstEnergy Solutions Corporation (FES). 155 FERC ¶ 61,101 (2016) (FERC Order).

{¶ 7} On April 29, 2016, FirstEnergy filed a motion for an extension of time to file its tariffs in this proceeding in order to fully consider the FERC Order and its impact on the Companies' tariffs to be filed pursuant to the *ESP IV* Opinion and Order.

{¶ 8} The attorney examiner granted FirstEnergy's request by Entry issued April 29, 2016. By Entry issued May 10, 2016, the attorney examiner directed the Companies to file their proposed tariffs, consistent with the *ESP IV* Opinion and Order, by May 13, 2016,

¹ The applications and stipulations will collectively be referred to as "Stipulations" or "Stipulated *ESP IV*."

noting such tariffs would be effective June 1, 2016, subject to Commission review and approval.

{¶ 9} On May 13, 2016, FirstEnergy filed proposed tariffs in Case Nos. 14-1297-EL-SSO and 16-541-EL-RDR. Staff filed its review and recommendations regarding the Companies' proposed tariff filing on May 20, 2016, concluding that it was consistent with the *ESP IV* Opinion and Order. Thereafter, by Finding and Order issued May 25, 2016 (Tariff Finding and Order), the Commission found that, in accordance with Staff's review and recommendations, the Companies' proposed tariff filing was consistent with the *ESP IV* Opinion and Order, did not appear to be unjust or unreasonable, and, therefore, was approved for rates effective June 1, 2016.

{¶ 10} R.C. 4903.10 states that any party who has entered an appearance in a Commission proceeding may apply for rehearing with respect to any matters determined in that proceeding, by filing an application within 30 days after the entry of the order upon the journal of the Commission.

{¶ 11} On April 29, 2016, applications for rehearing regarding the *ESP IV* Opinion and Order were filed by the following parties: Sierra Club; Dynegy; the PJM Power Providers Group and EPSA (collectively, P3/EP SA); and RESA.

{¶ 12} Thereafter, on May 2, 2016, applications for rehearing regarding the *ESP IV* Opinion and Order were filed by the following parties in this proceeding: FirstEnergy; Mid-Atlantic Renewable Energy Coalition (MAREC); Cleveland Municipal School District (CMSD); The Ohio Schools Council, Ohio School Boards Association, Buckeye Association of School Administrators; and Ohio Association of School Business Officials, dba Power4Schools (Power4Schools); Northeast Ohio Public Energy Council (NOPEC); Environmental Law and Policy Center (ELPC), Ohio Environmental Council (OEC), and Environmental Defense Fund (EDF) (collectively, Environmental Advocates); the Ohio

Manufacturer's Association Energy Group (OMAEG); and the Ohio Consumers' Counsel and Northwest Ohio Aggregation Coalition (collectively, OCC/NOAC).

{¶ 13} In its application for rehearing, and as a recommended solution to three of its proffered assignments of error, FirstEnergy proposed a modified calculation for Rider RRS as approved in the Order (Companies' Proposal or Proposal).² Additionally, FirstEnergy recommended an expedited procedural schedule in order for the Commission to consider the proposed modifications to Rider RRS.

{¶ 14} Thereafter, by Entry on Rehearing issued May 11, 2016 (First Entry on Rehearing), the Commission granted the sixth, seventh, and eighth assignments of error stated in the Companies' application for rehearing in order to hold a hearing with respect to the proposed modifications to Rider RRS. Additionally, the Commission granted the applications for rehearing filed by the Companies, Sierra Club, P3/EPSCA, Dynegy, RESA, MAREC, CMSD, Power4Schools, NOPEC, Environmental Advocates, OMAEG, and OCC/NOAC in order to allow further consideration of the matters specified in those applications for rehearing. Further, the Commission noted that memoranda contra the applications for rehearing were due to be filed on May 12, 2016. The Commission stated in its First Entry on Rehearing that, "due to the number and complexity of the assignments of error raised in the applications for rehearing, as well as the potential for future evidentiary hearings in this matter," it found it appropriate to grant rehearing before receiving memoranda contra in order to allow parties the opportunity to begin discovery in anticipation of potential future hearings. However, the Commission noted that it would

² Of the eight assignments of error alleged by FirstEnergy in its May 2, 2016 application for rehearing, the following assignments of error would be rendered moot in the event it's proposed modifications to Rider RRS are approved: " * * * 6. The Order is unreasonable because it requires the Companies to bear the burden for any capacity performance penalties."; "7. The Order is unreasonable because the Commission prohibited cost recovery for Plant outages greater than 90 days."; and "8. The 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." We will refer to the mechanism in the Companies' Proposal as the modified Rider RRS.

consider all arguments set forth in the memoranda contra in its ultimate determination of the issues raised in the various applications for rehearing.

{¶ 15} On May 12, 2016, memoranda contra applications for rehearing were filed by FirstEnergy, Sierra Club, P3/EPSC, CMSD, NOPEC, Environmental Advocates, OMAEG, OCC/NOAC, Nucor Steel Marion (Nucor), Industrial Energy Users-Ohio (IEU-Ohio), Interstate Gas Supply, Inc. (IGS Energy), and Ohio Energy Group (OEG).

{¶ 16} On May 31, 2016, OCC/NOAC filed a second application for rehearing, regarding the Tariff Finding and Order, asserting that the Commission had unreasonably found the tariff rates filed by FirstEnergy to be consistent with the *ESP IV* Opinion and Order as the tariff rates failed to implement Rider RRS as approved and ignored other Commission modifications as described in the *ESP IV* Opinion and Order.³ Further, OCC/NOAC asserted that, by including the Companies' Proposal with its application for rehearing, FirstEnergy was effectively rejecting the Commission's modifications to the proposed ESP and should have been required to withdraw its pending application and file a new application, given the stark differences between the original Rider RRS mechanism and the Companies' Proposal. IEU-Ohio, FirstEnergy, and OEG filed memoranda contra OCC/NOAC's second application for rehearing, stating that the Commission had already determined that the tariffs complied with the *ESP IV* Opinion and Order and that the FERC Order had no bearing on the tariff filing. Tariff Finding and Order at 4.

{¶ 17} Additionally, on June 24, 2016, RESA filed its second application for rehearing, asserting the Tariff Finding and Order was unjust and unreasonable as the Commission erred in adopting the Companies' Economic Load Response Program Rider (Rider ELR) tariff containing a limitation requiring shopping customers to use consolidated billing, which was inconsistent with the *ESP IV* Opinion and Order and unduly discriminates against customers using dual billing. OMAEG also filed a second

³ OCC/NOAC also argued that the Commission lacked authority to approve Rider RRS as it did not satisfy the requirements of R.C. 4928.143(B)(2)(d).

application for rehearing on June 24, 2016, regarding the Tariff Finding and Order. On July 5, 2016, FirstEnergy filed memoranda contra RESA and OMAEG's second applications for rehearing.

{¶ 18} On June 29, 2016, the Commission issued an Entry on Rehearing (Second Entry on Rehearing) in which it granted rehearing for further consideration of the matters specified in the applications for rehearing filed by OCC/NOAC and RESA on May 31, 2016, and June 24, 2016, respectively.

{¶ 19} On June 10, 2016, OCC/NOAC filed their third application for rehearing in this proceeding, presenting three assignments of error regarding the First Entry on Rehearing.

{¶ 20} On June 3, 2016, the attorney examiner issued an Entry establishing a procedural schedule for an additional hearing in this matter. The evidentiary hearing was scheduled to begin on July 11, 2016, the scope of which was limited to the provisions of, and alternatives to, the Companies' Proposal. The Entry indicated "[n]o further testimony will be allowed regarding other assignments of error raised by parties." Subsequent to that Entry, Staff submitted testimony on June 29, 2016, in preparation of the hearing, in which it recommended implementing a distribution modernization rider (Rider DMR) as an alternative proposal to the Companies' Proposal.

{¶ 21} On June 8, 2016, P3/EPSC, OCC/NOAC, and OMAEG filed requests for certification and applications for review of interlocutory appeals of the June 3, 2016, Entry. IEU-Ohio and FirstEnergy filed memoranda contra the requests for certification and applications for review of interlocutory appeals. By Entry issued June 30, 2016, the attorney examiner granted P3/EPSC, OCC/NOAC, and OMAEG's requests for certification, certifying their applications for interlocutory appeals for the Commission's review.

{¶ 22} On July 6, 2016, the Commission issued an Entry on Rehearing (Third Entry on Rehearing), in which it denied the applications for interlocutory appeal filed on June 8, 2016, specifically noting that the June 3, 2016 Entry was consistent with all Commission rules and applicable Commission and Supreme Court of Ohio precedent. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789, 856 N.E.2d 213 (*CG&E Case*). Third Entry on Rehearing at 9-12. Additionally, the Commission denied the applications for rehearing filed by OCC/NOAC on May 31, 2016, and June 10, 2016. Third Entry on Rehearing at 14-16, 19. The Commission also denied rehearing on the assignments of error raised in OMAEG's June 24, 2016, application for rehearing, noting that they merely repeated arguments raised by OCC/NOAC in their May 31, 2016, application for rehearing. Third Entry on Rehearing at 20. The Commission also indicated that, although it granted rehearing prior to the filing of memoranda contra on May 12, 2016, in order to provide parties sufficient time for discovery, it would "thoroughly consider all arguments raised in the memoranda contra in the ultimate disposition of the applications for rehearing." Third Entry on Rehearing at 19.

{¶ 23} The additional evidentiary hearing began, as scheduled, on July 11, 2016, and concluded on August 1, 2016 (Rehearing). During Rehearing testimony, 19 witnesses, including witnesses from FirstEnergy and Staff, presented testimony regarding the Companies' Proposal and Rider DMR.

{¶ 24} On August 5, 2016, P3/EPSC filed an application for rehearing, asserting that the Commission's Third Entry on Rehearing was unreasonable and unlawful. Specifically, P3/EPSC argue that the Commission erred to find that: the FirstEnergy's application for rehearing was comprised of three parts; the Companies' sixth, seventh, and eighth assignments of error provided sufficient detail on which grounds the Companies claim that the *ESP IV* Opinion and Order was unreasonable and unlawful; and the Commission has jurisdiction to consider the Companies' Proposal, pursuant to R.C. 4903.10. FirstEnergy filed a memorandum contra P3/EPSC's application for rehearing on

August 15, 2016, stating that these arguments were sufficiently addressed in the Third Entry on Rehearing and no new facts or circumstances warranted additional review of these arguments by the Commission.

{¶ 25} On August 31, 2016, the Commission issued an Entry on Rehearing (Fourth Entry on Rehearing), in which we granted rehearing for further consideration of the matters specified in the applications for rehearing filed by P3/EP SA.

{¶ 26} On August 15, 2016, initial Rehearing briefs were filed by the following: FirstEnergy; IEU-Ohio; Staff; Sierra Club; Material Sciences Corporation (MSC); P3/EP SA; RESA; Nucor; OEG; NOPEC; OMAEG; OHA; Environmental Advocates; CMSD; OCC/NOAC; Monitoring Analytics, LLC (IMM); and Direct Energy Services, LLC and Direct Energy Business, LLC (collectively, Direct Energy).

{¶ 27} On August 29, 2016, Rehearing reply briefs were filed by the following: Staff; FirstEnergy; IEU-Ohio; MSC; OCC; NOAC; RESA; P3/EP SA; CMSD; Nucor; Sierra Club; OHA; NOPEC; OEC/EDF; and Direct Energy.

{¶ 28} In addition, the City of Akron, Council for Economic Opportunities in Greater Cleveland, Cleveland Housing Network, Citizens Coalition, Council of Smaller Enterprises, Association of Independent Colleges and Universities of Ohio, International Brotherhood of Electrical Workers Local 245, and EnerNOC, Inc. (collectively, "Supporting Parties") filed a joint reply brief on August 29, 2016, indicating their support for the Companies' Proposal or, in the alternative, the Companies' modifications to Staff's proposed Rider DMR. IGS Energy, the Kroger Company (Kroger), and Ohio Partners for Affordable Energy (OPAE) made a similar filing on August 29, 2016, indicating their general support of the Companies' Proposal and the Stipulated ESP IV.

{¶ 29} On September 6, 2016, OCC/NOAC gave notice to the Commission that they were appealing several decisions issued in this proceeding, including the Tariff

Finding and Order, the attorney examiner's Entry issued on June 3, 2016, and the Commission's Third Entry on Rehearing issued on July 6, 2016.

B. *Applicable Law*

{¶ 30} R.C. Chapter 4928 provides an integrated system of regulation in which specific provisions were designed to advance state policies of ensuring access to adequate, reliable, and reasonably priced electric service in the context of significant economic and environmental challenges. In considering these cases, the Commission is cognizant of the challenges facing Ohioans and the electric power industry and is guided by the policies of the state as established by the General Assembly in R.C. 4928.02, as amended by Am.Sub.S.B. 221 (S.B. 221).

{¶ 31} In addition, S.B. 221 amended R.C. 4928.141, which provides that, beginning January 1, 2009, electric utilities must provide customers with an SSO, consisting of either a MRO or an ESP. The SSO is to serve as the electric utility's default service. R.C. 4928.143 sets forth the requirements for an ESP. Additionally, R.C. 4928.143(C)(1) provides that the Commission is required to determine whether the ESP, as modified by the Commission, including its pricing and all other terms and conditions, including deferrals and future recovery of the same, is more favorable in the aggregate as compared to the expected results that would otherwise apply under R.C. 4928.142.

III. DISCUSSION

A. *Jurisdiction to Consider Companies' Proposal and Rider DMR*

1. ASSIGNMENTS OF ERROR AND ARGUMENTS OF THE PARTIES

{¶ 32} OCC/NOAC, OMAEG, and P3/EPSC first assert that FirstEnergy's eighth assignment of error violates R.C. 4903.10 and, therefore, the Commission lacks jurisdiction to consider it. OCC/NOAC and NOPEC also reiterate their arguments that the Companies, at this stage of the proceeding, were either limited to accepting the Commission's modifications to the Stipulated ESP IV or withdrawing and terminating

their ESP application, pursuant to R.C. 4928.143(C)(2)(a). OCC/NOAC, Sierra Club, OMAEG, and P3/EPSC also state that the Companies' Proposal, supplemental testimony, and proposed procedural schedule are nothing more than an untimely motion to reopen the record, as the reopening of the record may only occur prior to the issuance of a final order, upon a showing of good cause, further noting there was no conceivable way the ESP IV Opinion and Order could have addressed the FERC Order. Ohio Adm.Code 4901-1-34. Finally, OCC/NOAC, OMAEG, and P3/EPSC state that evidence pertaining to the Companies' Proposal could have been offered during the initial hearings of this proceeding. Furthermore, many intervenors argued in their memoranda contra applications for rehearing that, if the Commission elected to consider the Companies' Proposal, sufficient time should be afforded to the parties in order to have adequate opportunity to review the merits of that proposal.

{¶ 33} Sierra Club, OHA, P3/EPSC, and NOPEC argue that the Commission lacks jurisdiction to consider Rider DMR as an alternative proposal because it is not a proper issue for rehearing under R.C. 4903.10. In particular, Sierra Club, OHA, P3/EPSC, and NOPEC contend that rehearing is not the proper mechanism for evaluating and approving an entirely new rider proposal that has no connection to the issues that were the subject of this proceeding. Furthermore, given the expedited timeline from the initial filing of Rider DMR to the closing of the record on August 1, 2016, Sierra Club notes that there is simply not enough evidence substantiating the need for this additional charge.

{¶ 34} As a final matter, P3/EPSC contend that the Commission erred in its Third Entry on Rehearing to find that FirstEnergy's application for rehearing was comprised of three parts.⁴ Further, P3/EPSC argue that the Commission also erred to find that the sixth, seventh, and eighth assignments of error in the Companies' application for

⁴ See Third Entry on Rehearing at 10 (where the Commission determined FirstEnergy's application for rehearing consisted of three parts: (1) the application for rehearing setting forth the assignments of error; (2) a memorandum in support of the assignments of error as well as providing the details of the Companies' Proposal; and (3) rehearing testimony in support of the Companies' Proposal).

rehearing provided sufficient detail on which grounds the Companies claim that the *ESP IV* Opinion and Order was unlawful or unreasonable. (P3/EP SA App. for Rehearing (Aug. 5, 2016).

{¶ 35} FirstEnergy responds by stating the Commission's consideration of the Companies' Proposal or Rider DMR is not barred by R.C. 4903.10, as the Commission has previously found, further noting that the Companies are under no burden to anticipate "unprecedented actions by the FERC" when preparing for an evidentiary hearing (Third Entry on Rehearing at 10, 19; Rehearing Tr. Vol. I at 43). Similarly, FirstEnergy argues that FirstEnergy witness Murley's testimony could have been offered, with reasonable diligence, during the original hearing, as it was offered as rebuttal testimony responding to the failure of Staff witness Buckley to quantify in his rehearing testimony the value of the corporate headquarters condition proposed in Rider DMR (Co. Ex. 205 at 2; Staff Ex. 13 at 7; Rehearing Tr. Vol. IX at 1425-26, 1432-34). Additionally, FirstEnergy argues that the Commission's consideration of the Companies' Proposal and Rider DMR is not barred by R.C. 4928.143(C)(1), noting that electric utilities are entitled to seek rehearing of, and take appeal from, any Commission modifications to an ESP. Finally, FirstEnergy asserts that the Companies' application for rehearing included assignments of error and, on rehearing, the Commission may consider the Companies' Proposal and Rider DMR as proposed solutions to those assignments of error.

{¶ 36} Staff also notes that it was proper for Staff to submit its alternative proposal at this stage of the hearing as the FERC Order effectively made it impossible for the Companies to comply with the Commission's Order. Furthermore, Staff indicates that it is in fundamental fairness that all parties be allowed to respond to a proposal submitted during an ESP proceeding, which Staff did when it made an alternative suggestion to the Companies' Proposal that it also believed would benefit consumers to a greater degree. Staff further notes that the Supreme Court of Ohio has held that the Commission

maintains broad authority to modify its orders on rehearing. *Columbus & S. Ohio Elec. Co. v. Pub. Util. Comm.*, 10 Ohio St.3d 12, 15, 460 N.E.2d 1108 (1984).

{¶ 37} Additionally, Staff contends that it was not possible to propose Rider DMR during the early stages of this proceeding, indicating that the projected cost in the initial years of the original Rider RRS mechanism made it financially impractical for Staff to recommend that both Rider RRS and Rider DMR be approved by the Commission, as that strategy would have resulted in extraordinary costs for ratepayers in those years. As circumstances have changed, Staff now believes that Rider DMR has only become viable because the original Rider RRS mechanism is no longer viable, adding that the Companies' Proposal fails to provide the same level of benefits as the original Rider RRS. Therefore, Staff contends that the Commission is fully authorized to consider Rider DMR.

2. COMMISSION DECISION

{¶ 38} Once again, this Commission finds no merit in these jurisdictional and procedural arguments. We note that we sufficiently addressed these arguments raised by various parties, as well as the related arguments regarding the attorney examiners' June 3, 2016 Entry, in the Third Entry on Rehearing. (Third Entry on Rehearing at 9-12, 14-16, 19.) Although it is not our desire to unnecessarily repeat our conclusions in that decision, we would emphasize that our determination is consistent with the *CG&E Case*, in which the Supreme Court of Ohio rejected the claim that a utility failed to follow the formal requirements of R.C. 4903.10 by including an alternative proposal allegedly without setting forth the specific grounds challenging the reasonableness or lawfulness of the Commission's order. (Third Entry on Rehearing at 9-12.) Specifically, the Court stated that:

the commission treated CG&E's alternative proposal as an assignment of error on rehearing and not as a new or separate proposal. The commission determined that subject to certain clarifications and modifications, CG&E's first assignment of

error, i.e., the alternative proposal, should be sustained. The commission merely modified its opinion and order just as it might do based on any other party's arguments on rehearing. Under R.C. 4903.10(B), 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," it can abrogate or modify the order. *The commission also has discretion under this section to decide whether a subsequent hearing is necessary to take additional evidence.* CG&E Case at ¶ 15 (emphasis added).

{¶ 39} Further, we note that parties have experienced no prejudice by the Commission's consideration of these two proposals, as the parties have been afforded ample opportunity to review both the Companies' Proposal and Rider DMR, and perhaps, were provided more time for discovery than would have otherwise been the case⁵ (Third Entry on Rehearing at 19). An evidentiary hearing was scheduled and held. Every party was afforded an opportunity to present testimony and cross-examine witnesses. The parties were afforded the opportunity to file testimony responding to both the Companies' Proposal and the Staff's alternative proposal, in the form of Rider DMR. The evidentiary hearing lasted ten days and the parties presented rehearing testimony by 17 witnesses. Parties were afforded the opportunity to file post-hearing and reply briefs. No party can show they were prejudiced by this process. Accordingly, we will reject the arguments raised in Rehearing briefs and Rehearing reply briefs and deny the outstanding related assignments of error pertaining to these jurisdictional and procedural issues raised in the April 29, 2016, May 2, 2016, and August 5, 2016, applications for rehearing.

⁵ The Commission also notes that, although it issued its First Entry on Rehearing in an attempt to provide parties additional time for discovery, P3/EPSC requested, and were subsequently granted, a stay of discovery pertaining to the Companies' Proposal. The temporary stay of discovery was lifted in the attorney examiners' June 3, 2016 Entry.

{¶ 40} We will address one new argument raised on rehearing by P3/EPSA, in which they assert that the Commission erred in its Third Entry on Rehearing in finding that FirstEnergy's application for rehearing was comprised of three parts: the application for rehearing, the memorandum in support, and the supporting testimony. We disagree with P3/EPSA's claim. We note that the Companies' application for rehearing did not raise concerns that the Companies failed to allege that the Commission's Order was unlawful or unreasonable, or that the assignments of error were not plainly stated. Instead, P3/EPSA seeks to elevate form over substance, complaining that the Companies' filing was deficient because the application for rehearing did not contain the Companies' Proposal, which was detailed in the memorandum in support. We find that the application plainly alleged the grounds for error claimed by the Companies. The arguments supporting the assignment of error and a potential alternative remedy to the grounds for error were properly contained in the memorandum in support. Further, as the Companies sought an evidentiary hearing on rehearing, the Companies' testimony was attached to the filing. P3/EPSA have not shown any prejudice or confusion resulting from the filing or the Commission's subsequent decision to grant rehearing. Accordingly, rehearing on this assignment of error should be denied.

B. The Companies' Proposal

1. OVERVIEW OF THE COMPANIES' PROPOSAL

{¶ 41} FirstEnergy argues that, by adopting the Companies' Proposal, the Commission will allow *ESP IV*, as modified, to provide all the rate stabilization benefits recognized in its Order, without reliance on a power purchase agreement (PPA) or any other contractual agreement with its unregulated affiliate, FES. Moreover, FirstEnergy argues that its proposal also addresses many of the risk-related concerns raised by intervening parties and will lead to a more efficient and timely resolution, ultimately providing customers the benefits of *ESP IV* much sooner than revisiting the entire ESP process. The Companies' Proposal changes the original Rider RRS mechanism in the following ways: (1) the PPA-related units' fixed and variable costs to be passed through

the modified Rider RRS would not be the actual costs of those units, but instead would be the fixed and variable costs as forecasted by FirstEnergy's 2014 data; (2) the energy revenues offsetting the calculated costs would be based on actual market energy prices, but, instead of using the actual generation amounts, would use the monthly on-peak and off-peak generation amounts from the Companies' 2014 modeling and forecasts; (3) capacity revenues would be calculated using actual capacity prices, which would be applied to forecasted quantities; and (4) revenues would remain with the Companies rather than being passed through a PPA to FES. (Co. Ex. 197 at 4-6, 12.)⁶ FirstEnergy maintains that the hedging mechanism will continue to apply under the modified calculation of Rider RRS (Co. Ex. 197 at 5, 8; Rehearing Tr. Vol. I at 161-62, 193-94). FirstEnergy adds that the Companies' Proposal eliminates the need for reconciliations, apart from reconciling actual sales and billing demands with projected amounts, and energy revenues with actual energy pricing in quarterly true-ups, further reducing the risks faced by ratepayers (Co. Ex. 197 at 7-8).

2. ARGUMENTS OF THE PARTIES

a. Whether the Companies' Proposal is Authorized under R.C. 4928.143(B)(2)?

i. Whether the Companies' Proposal is authorized under R.C. 4928.143(B)(2)(d)?

{¶ 42} P3/EPSC assert that the modified Rider RRS will not constitute a charge or a financial limitation on customer shopping and would not provide retail rate stability or certainty, thus, making the inclusion of the modified Rider RRS unlawful under R.C. 4928.143(B)(2)(d). P3/EPSC also argue that, because the rider may result in a credit to ratepayers in the later years of *ESP IV*, and, in fact, FirstEnergy alleges that it will result in an overall net credit of \$561 million, the rider would be impermissible under R.C. 4928.143(B)(2)(d) as it would not qualify as a "term, condition, or charge." P3/EPSC

⁶ FirstEnergy witness Mikkelsen also identified certain provisions of the Commission's Order, notably on pages 91-92, that would no longer apply since the PPA would effectively be eliminated from the arrangement (Co. Ex. 197 at 14-15).

further claim that the Supreme Court of Ohio has strictly held that if a provision does not fall within one of the authorized categories of the ESP statute, it is not authorized by that statute. *In re Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655 (CSP II) at ¶ 32-34. Accordingly, P3/ESPA contends that, because the Companies' Proposal would not solely be a charge, the Commission would exceed its authority if it approved the Companies' Proposal.

{¶ 43} P3/EPSC and Sierra Club further contend, contrary to FirstEnergy's arguments, that the Companies' Proposal does not act as a limitation on customer shopping, noting the Companies make no claim that the modified Rider RRS controls the size or extent of the class of the Companies' ratepayers that shop for generation with a CRES provider, or alternatively, prohibits the Companies' ratepayers from migrating to or from the SSO. In fact, P3/EPSC assert that, according to FirstEnergy witness Mikkelsen, the Companies' Proposal does not limit ratepayers from shopping for their generation supply. *Clark v. State Med. Bd.*, 10th Dist. Franklin No. 14AP-212, 2015-Ohio-251 (*appeal not accepted*, 143 Ohio St.3d 1442, 2015-Ohio-3427). (Co. Ex. 197 at 10; Rehearing Tr. Vol. I at 49; Rehearing Tr. Vol. II at 359-62; Rehearing Tr. Vol. V at 1065-66.) Notably, Sierra Club argues that FirstEnergy's justification of a "financial limitation" is also inaccurate, as there would be no extra charge for customers who decide to shop or increase in the price at which this shopping would occur (Rehearing Tr. Vol. I at 197). P3/EPSC and Sierra Club maintain that applying the plain meaning of the word "limitation," and, therefore, the Companies' Proposal may not be authorized under R.C. 4928.143(B)(2)(d) on that basis.

{¶ 44} OMAEG, Sierra Club, Staff, and P3/EPSC further argue that the Companies' Proposal is not appropriate for inclusion in an ESP under R.C. 4928.143(B)(2)(d), as it fails to have the alleged effect of stabilizing or providing certainty regarding retail electric service. Contrarily, OMAEG notes the customers taking service from CRES providers, especially large commercial customers, will experience additional uncertainty by the extra charge or credit as it will disrupt fixed-price contract prices and

competitive rates, which will ultimately lead to uncertain and unexpected costs (OMAEG Ex. 37 at 11-12). OMAEG further asserts that these allegedly unexpected and uncompetitive costs may also deter businesses from investing and locating in Ohio, if they are able to find an alternative location without such uncompetitive prices (OMAEG Ex. 37 at 12; Rehearing Tr. Vol. II at 335-37). Additionally, OMAEG notes that FirstEnergy witness Mikkelsen even acknowledged that customers would not be guaranteed to receive a credit in any given year during the life of the Modified Rider RRS, thereby, negating any claims that this mechanism will operate as a hedge. OMAEG adds that this risk is even further exacerbated by the fact that the Companies' Proposal is based on outdated forecasts originally derived in August 2014. (Co. Ex. 197 at 6; Rehearing Tr. Vol. I at 133; Rehearing Vol. II at 334.) P3/EP SA also note that volatility in short-term wholesale power markets is not necessarily reflected in longer-term retail power markets. Further, P3/EP SA contend that it is possible that the additional charge may result in an increase in volatility, if the reconciliation of the modified Rider RRS would occur in a period where electricity prices would fall in the same direction as the credit or charge due to customers, thereby reinforcing the effect of the reconciliation rather than running counter to it, as a proper hedge would operate (P3/EP SA Ex. 1 at 11; P3/EP SA Ex. 5 at 27-29).

{¶ 45} P3/EP SA and Sierra Club also disagree with the Companies' assertions that their Proposal is authorized by R.C. 4928.143(B)(2)(d) on the basis of bypassability (Co. Ex. 197 at 10). Consistent with the Commission's earlier determination, P3/EP SA and Sierra Club argue that bypassability alone is not enough to satisfy the second portion of R.C. 4928.143(B)(2)(d) and reject the Companies' arguments on this basis (*ESP IV* Opinion and Order at 108).

{¶ 46} NOPEC, P3/EP SA, Dynegy, and Sierra Club argue that the Stipulated *ESP IV* violates R.C. 4928.143 by including Rider RRS in the *ESP* in violation of R.C. 4928.143(B) and the Supreme Court of Ohio's opinion in *CSP II*, holding that only the nine items enumerated in R.C. 4928.143(B)(2) may be included in an *ESP*. *CSP II* at ¶ 31-35. (Co. Ex.

155 at 9.) NOPEC, CMSD, P3/EPSC, and Sierra Club explain that Rider RRS does not fall under any of the alternatives listed in R.C. 4928.143(B)(2)(d), as the Commission has rejected the Companies' bypassability rationale; Rider RRS does not relate to default service; and R.C. 4928.143(B)(2)(d) lists "limitations on customer shopping," not financial limitations on the consequences of customer shopping. *In re Application of Ohio Power Co.*, Case No. 13-2385-EL-SSO, et al. (AEP Ohio ESP III), Opinion and Order (Feb. 25, 2015) (AEP Ohio ESP III Order). NOPEC, CMSD, P3/EPSC, and Sierra Club add that the modified Rider RRS does not provide stability or certainty. Finally, NOPEC adds that the modified Rider RRS is unlawful because it harms large-scale governmental aggregations by imposing a non-bypassable generation charge in violation of R.C. 4928.20(K) (Co. Ex. 13 at 12; Tr. Vol. XXII at 4591; Co. Ex. 1 at 21; Co. Ex. 7 at 31; Tr. Vol. XIII at 2871-72).

{¶ 47} In response to the Companies' assertions that its proposal relates to default service and is, thereby, authorized by R.C. 4928.143(B)(2)(d), P3/EPSC and Sierra Club argue that this provision only applies in the event a competitive supplier fails to provide service pursuant to R.C. 4928.14. P3/EPSC and Sierra Club contend that interpreting the statute to mean default service as a ratepayer's election to take the SSO offer would allow any conceivable charge or provision under the statute, making the other limitations meaningless. Rather, P3/EPSC and Sierra Club claims that Rider RRS applying to those who choose to take the SSO offer should not satisfy the requirements of R.C. 4928.143(B)(2)(d). Sierra Club goes further to assert that Rider RRS has no relationship to the price paid by SSO customers for SSO service.

{¶ 48} Direct Energy goes even further to state that the Companies' Proposal would fail any provision of R.C. 4928.143(B)(2) due to the fact that the proposal does not seek the recovery of "costs," as defined in R.C. Chapter 4909.⁷ Specifically, Direct Energy notes that the definition of cost under traditional ratemaking is generally understood to mean an "actual expenditure," or equivalent, incurred by the utility. R.C. 4909.151.

⁷ Direct Energy argues that because the term "cost" is not defined in R.C. Chapter 4928, there is no reason to deviate from the definition provided under traditional ratemaking.

Further, Direct Energy argues that this definition also applies to rates established in an ESP, noting that in *CSP II*, the Supreme Court of Ohio held that AEP Ohio failed to provide any evidence of specific costs that it incurred related to its provider of last resort (POLR) obligation and, as a result, determined that the POLR charge could not be considered "cost-based," and was, instead, an estimate of the value to shopping customers to have the option of a default SSO. *CSP II* at ¶ 24; *In re Application of Columbus S. Power Co.*, Case No. 08-917-EL-SSO, et al. (*AEP Ohio ESP I*), Opinion and Order (Mar. 18, 2009). Direct Energy also claims that recent Supreme Court of Ohio decisions bolster this argument. *In re Columbus S. Power Co.*, Slip Op. No. 2016-Ohio-1608 (Apr. 21, 2016) (*AEP Ohio RSR Case*); *In re Application of Dayton Power & Light Co.*, Slip. Op. No. 2016-Ohio-3490 (June 20, 2016) (*DP&L SSR Case*). Direct Energy contends that the Companies' Proposal is very similar to the POLR charge in *AEP Ohio ESP I*, as the proposed charge is merely based on the value to customers of the Rider RRS hedging mechanism. Moreover, Direct Energy argues, regardless if the revenues are determined to be related to distribution or generation services,⁸ the real issue to determine recoverability is whether there is a sufficient nexus between the revenues recovered and the costs incurred by the utilities. *In re Application of AEP Ohio*, Case No. 11-346-EL-SSO (*AEP Ohio ESP II*), Entry on Rehearing (Jan. 30, 2013) at 15-16. As FirstEnergy acknowledges that the projected charge is not based on any actual costs incurred by the Companies, Direct Energy argues that the Companies' Proposal is unlawful under R.C. 4928.143(B)(2).

{¶ 49} Based on the foregoing, these intervening parties contend that it is impermissible to include the Companies' Proposal in the Companies' *ESP IV* on the basis that it fails to comply with R.C. 4928.143(B)(2)(d) (OMAEG Ex. 37 at 7; RESA Ex. 7 at 12-13).

{¶ 50} In response, FirstEnergy initially argues that several intervenors have raised arguments that Rider RRS is not authorized by R.C. 4928.143(B)(2)(d), despite the

⁸ Direct Energy also contends that Rider RRS does not provide a service.

fact that the Commission found the rider to be authorized by this statute in the Order (Order at 108-109). FirstEnergy further provides that its proposed modifications have no impact on the fact that Rider RRS is a charge that relates to limitations on customer shopping for retail electric generation service, bypassability and default service, and would provide stability for retail electric service (Co. Ex. 197 at 10). Additionally, the Companies assert that, because the Commission granted rehearing for the limited purpose of considering modifications to the calculation of Rider RRS, or alternatives to the rider, it is inappropriate for intervenors to raise these issues on rehearing. However, even if the Commission were to entertain these arguments, FirstEnergy argues that the modified Rider RRS would clearly be authorized by R.C. 4928.143(B)(2)(d).

{¶ 51} Additionally, the Companies assert that no party, until now, has disputed the fact that Rider RRS is a charge for purposes of R.C. 4928.143(B)(2)(d). Although P3/EPSC argue that Rider RRS cannot be characterized as a charge because it could result in a credit, FirstEnergy claims that a credit is merely a negative charge appearing on customer bills and the Commission previously found Rider RRS constitutes a charge. Further, the Companies contend P3/EPSC have provided no justification for a different result on rehearing. (Order at 108.)

{¶ 52} Next, FirstEnergy maintains that Rider RRS relates to limitations on customer shopping for retail electric generation service, stating that OEG witness Baron was even able to quantify the financial restraint of Rider RRS to customers, which resulted in generation rates being comprised of approximately 40 percent guaranteed cost-based pricing and 60 percent market-based pricing (Order at 109; OEG Ex. 4 at 8). Although P3/EPSC state that the Companies' Proposal would not place any restriction on the ability of retail customers to shop, FirstEnergy states that, because Rider RRS provides rate stability, as quantified by Mr. Baron, the Commission did not err in finding that it relates to a financial limitation on customer shopping (Order at 109).

{¶ 53} Additionally, the Companies contend that, while the Commission indicated that the original Rider RRS met the bypassability criterion partly, but not fully, it has also determined that a charge relates to bypassability when both shopping and non-shopping customers will benefit. *In re Application of Dayton Power and Light Co.*, Case No. 12-426-EL-SSO, et al. (DP&L ESP II), Opinion and Order (Sept. 4, 2013) (DP&L ESP II Order) at 20-21. As the modified Rider RRS is non-bypassable and it benefits both shopping and non-shopping customers, FirstEnergy argues that its proposal relates to bypassability in accordance with R.C. 4928.143(B)(2)(d) and Commission precedent.

{¶ 54} Moreover, FirstEnergy argues that the Commission has previously found that "default service," as used in R.C. 4928.143(B)(2)(d) means SSO service, adding that customers will default to the Companies' SSO service, pursuant to R.C. 4928.14. *AEP Ohio ESP II*, Entry on Rehearing (Jan. 30, 2013) at 15-16. As Rider RRS is designed to mitigate the long-term risk of wholesale market price increases that will be incorporated directly into the SSO via the competitive procurement process, FirstEnergy concludes that the rider relates to the Companies' proposed default service.

{¶ 55} The Companies also assert that the record in this proceeding shows their customers are exposed to market risks over the next eight years and Rider RRS is designed to mitigate that risk. Thus, because the Companies' Proposal will only modify the calculation of the hedge, without undermining its value, FirstEnergy argues that its proposal does not impact the Commission's finding that Rider RRS would have the effect of stabilizing retail electric service. (Order at 109; Co. Ex. 206 at 10.)

{¶ 56} In response to Direct Energy's arguments, FirstEnergy contends that arguments regarding the nature of Rider RRS are beyond the scope of rehearing, as the Commission has already determined that Rider RRS will provide several benefits to ratepayers and will act as a form of rate insurance. Additionally, FirstEnergy claims that Direct Energy is incorrect to state that Rider RRS does not provide a service. Finally, FirstEnergy contends the cases cited by Direct Energy do not conclusively provide that a

rate must be cost-based; rather, the Companies argue that the Supreme Court of Ohio held that the riders in those cases were rejected⁹ because they allowed for the recovery of revenues in exchange with the companies agreeing to transition to market-based SSO rates and transition their generating assets out of the distribution utility. Moreover, FirstEnergy states the Court has expressly reserved the question of whether rates must be cost-based for future consideration. *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 402, 407, 2011-Ohio-958, 945 N.E.2d 501 (CSP I). As a final matter, FirstEnergy claims that NOPEC has presented no new evidence supporting its contention that the modified Rider RRS would violate R.C. 4928.20(K), noting that the Commission previously found that non-bypassable charges have the same effect on all shopping customers, including those that are members of an aggregation (Order at 110).

ii **Whether the Companies' Proposal is authorized under R.C. 4928.143(B)(2)(i)?**

{¶ 57} The Companies argue that the modified Rider RRS will also continue to be authorized under R.C. 4928.143(B)(2)(i), as it offers rate stability to customers resulting in economic development benefits that will help contribute to the overall economic vitality of the Companies' service territories (Order at 109-110; Rehearing Tr. Vol. I at 255-56). According to FirstEnergy witness Mikkelsen, the Companies' Proposal will provide predictability and certainty to retail electric rates and provide incentives for customers to maintain and/or increase their respective loads in the Companies' service territories (Rehearing Tr. Vol. I at 51).

{¶ 58} For many of the same reasons that they assert economic development should not be considered as one of the benefits arising under the Companies' Proposal, P3/EPSCA, OHA, and Sierra Club reiterate that this proposal no longer furthers economic development in this state. Noting that FirstEnergy witness Mikkelsen acknowledged that the Companies' Proposal no longer ensures the continued operation of any Ohio-based

⁹ FirstEnergy also notes that there was no evidentiary support for additional generation costs being recovered through AEP Ohio's RSR.

generation, P3/EPSC, Sierra Club, and OHA argue that R.C. 4928.143(B)(2)(i) cannot authorize the proposal on economic development grounds. (Rehearing Tr. Vol. I at 51.) Additionally, Sierra Club argues that it would be “legally wrong” for the Commission to consider Rider RRS as being authorized by this statute, noting that the statute’s language limits EDUs to only implementing economic development, job retention, and energy efficiency programs.

{¶ 59} In response, FirstEnergy first contends that Rider RRS will continue to provide economic development benefits, even though it is no longer specifically tied to the continued operation of any specific plants. Additionally, FirstEnergy argues that Sierra Club’s interpretation of “program” is overly narrow and contrary to Commission precedent, noting that FirstEnergy’s Rider ELR and automaker credits also support economic development and provide significant benefits to attract and maintain industrial and commercial customers. *In re Application of FirstEnergy*, Case No. 12-1230-EL-SSO (*FirstEnergy ESP III*), Opinion and Order (July 18, 2012) (*FirstEnergy ESP III Order*) at 42-44, 55-57; *In re Application of FirstEnergy*, Case No. 10-388-EL-SSO, Opinion and Order (Aug. 25, 2010) (*FirstEnergy ESP II Order*) at 39-42, 44-45; *In re Application of FirstEnergy*, Case No. 08-935-EL-SSO (*FirstEnergy ESP I*), Second Opinion and Order (Mar. 25, 2009) (*FirstEnergy ESP I Order*) at 10, 14. Finally, FirstEnergy states that this argument is improper to raise during this phase of the proceeding. (Co. Ex. 197 at 12; Rehearing Tr. Vol. I at 51.)

b. Whether the Companies’ Proposal Violates Other Regulatory Practices or Principles?

i. Whether the modified Rider RRS constitutes Transition Revenues, pursuant to R.C. 4928.38?

{¶ 60} FirstEnergy witness Mikkelsen contends that the Companies’ Proposal cannot be considered a transition charge, due to the fact that it is projected to be a net credit over the term of ESP IV (Rehearing Tr. Vol. X at 1688-89; Co. Ex. 206 at 4). MSC agrees with FirstEnergy’s assertion that, because Rider RRS is projected to provide a \$256

million net credit to customers over the term of *ESP IV*, it cannot be categorized as a transition charge. FirstEnergy even notes that Staff witness Choueiki acknowledged that Rider RRS would not count as a transition charge during the periods a credit is issued (Rehearing Tr. Vol. V at 1250-51). Furthermore, the Companies claim that the hedge stabilizing market prices is, in no way, related to "transition revenues," authorized under R.C. 4928.38. FirstEnergy argues that modified Rider RRS is not designed to protect the Companies from the financial harm of transitioning to market rates, noting that the Companies completed this transition in 2009 when they began to offer market-based SSO pricing to their customers and Rider RRS does not seek to recover the Companies' generating plant costs, essentially because there are none to recover (Co. Ex. 206 at 3-4; Rehearing Tr. Vol. X at 1697). Finally, the Companies contend that there are several generation riders in place that have not been determined to be transition charges, such as the Generation Service Rider (Rider GEN), the Generation Cost Reconciliation Rider (Rider GCR), the Alternative Energy Resource Rider (Rider AER), and the Non-Distribution Uncollectible Rider (Rider NDU). Accordingly, FirstEnergy maintains that just because a transition charge is generation-related, does not necessarily mean that all generation riders are transition charges. (Staff Ex. 15 at 14.)

{¶ 61} OMAEG, Staff, Sierra Club, OHA, P3/EP SA, OCC/NOAC, OEC/EDF, and NOPEC argue that the Companies' Proposal would unlawfully collect transition revenues, or its equivalent, from customers under R.C. 4928.38. In fact, OMAEG, Direct, and OEC/EDF point out that Staff witness Choueiki noted in his rehearing testimony that the modified Rider RRS "*is at its core a generation rider*" and may potentially be construed as a transition charge (Staff Ex. 15 at 14; OEC/EDF Ex. 3 at 10). Although there is no longer a direct link, OMAEG, P3/EP SA, and NOPEC argue that the Companies are attempting to collect revenue associated with their unregulated competitive affiliate's generation plants, which is equivalent to transition revenues, and disallowed pursuant to R.C. 4928.38 (Co. Ex. 197 at 8; Rehearing Tr. Vol. IV at 955). Additionally, OMAEG, Staff, and P3/EP SA note that the Supreme Court of Ohio recently overturned two Commission decisions that

authorized the receipt of unlawful transition revenues or its equivalent through the establishment of non-bypassable riders. *AEP Ohio RSR Case; DP&L SSR Case*. In fact, Staff, NOPEC, and P3/EPSC note that Staff witness Choueiki stated that the credits and charges from the proposed rider are explicitly connected to the 3,257 megawatts (MWs) of unspecified generation, and as such, poses a significant risk that the Supreme Court of Ohio will view the charges resulting from the Companies' Proposal as the equivalent to a transition charge and find it impermissible under R.C. 4928.38. (Staff Ex. 15 at 11-12, 14-16.) OEC/EDF add that, although the Companies have projected a net credit for the duration of Rider RRS under its modified proposal, there is still a projected charge for, at least, the first few years of Rider RRS.

{¶ 62} P3/EPSC argue that the designation of Rider RRS as a transition charge is even more likely given the fact that the 10.38 percent return on equity was based on FES' guaranteed return, in addition to FES' legacy costs, in the original Rider RRS mechanism (Rehearing Tr. Vol. I at 146; Rehearing Tr. Vol. V at 1249-53.) Moreover, P3/EPSC, OMAEG, and Sierra Club contend that, although the Companies' Proposal does not explicitly provide that FES will retain any portion of the revenues flowing through the modified Rider RRS, there is no prohibition against the Companies from shifting such revenues to FES by routing them first through FirstEnergy Corp. (Rehearing Tr. Vol. I at 73-75, 228, 232). Thus, as the modified Rider RRS may be considered a transition charge, OMAEG, Sierra Club, OCC/NOAC, P3/EPSC, and NOPEC request the Commission reject the Companies' Proposal.

ii Whether modified Rider RRS constitutes an unreasonable charge under R.C. 4905.22?

{¶ 63} R.C. 4905.22 provides that "[a]ll charges made or demanded for any service rendered, or to be rendered, shall be just, reasonable * * * and no unjust or unreasonable charge shall be made or demanded for, or in connection with, any service * * *." P3/EPSC and OMAEG argue that, due to the fact that the Companies' alleged hedging benefit is greatly overstated when compared to the potential costs, calculated by updated energy

forward and capacity prices, the Companies' Proposal would violate R.C. 4905.22 by implementing an unreasonable charge (P3/EPSC Ex. 18 at 10-11). FirstEnergy responds by stating that R.C. 4905.22 does not apply to ESP proceedings, but, rather, it applies traditional base rate cases.

iii Whether the Companies' Proposal is unlawful pursuant to R.C. 4928.02(H)?

{¶ 64} OMAEG, IMM, OCC/NOAC, OEC/EDF, NOPEC, Direct, and Staff also argue that the Companies' Proposal is a "virtual" PPA, designed to avoid FERC regulatory review, which would provide an unlawful subsidy to FirstEnergy Corp. and its unregulated affiliates, thus violating R.C. 4928.02(H)¹⁰ and/or FERC's affiliate restrictions (Staff Ex. 15 at 9-10). Moreover, Staff, OEC/EDF, P3/EPSC, Direct Energy, and OMAEG contend the Companies' Proposal contains no restrictions against redistributing the amounts collected through Rider RRS from the Companies to its unregulated affiliate, FES, by way of paying dividends to FirstEnergy Corp. (Rehearing Tr. Vol. I at 176-77). OMAEG and Sierra Club also note that the Companies made no guarantees that such revenue redistribution would not occur if the Companies' Proposal was adopted by the Commission (Rehearing Tr. Vol. I at 75, 158). OMAEG argues that the Companies should have included safeguards to ensure that the money collected from customers would not ultimately flow to FES (OMAEG Ex. 37 at Att. TNL-4). Staff, P3/EPSC, and OMAEG also note that the funds provided to the Companies through the modified Rider RRS will have the result of providing credit support to the parent corporation and its unregulated subsidiaries (Staff Ex. 13 at 2; Staff Ex. 15 at 15). Rather than curtail concerns regarding FirstEnergy Corp.'s credit rating, OEC/EDF and OMAEG contend that alternative cost savings measures should have been utilized to strengthen its financial position (OMAEG Ex. 37 at 9-10).

¹⁰ R.C. 4928.02(H) provides that it is the policy of this state to "[e]nsure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa, including by prohibiting the recovery of any generation-related costs through distribution or transmission rates."

{¶ 65} Pursuant to the plain language of this statute and Commission precedent, NOPEC asserts that the Commission is prohibited from authorizing the recovery of any generation-related costs through distribution rates. *In re Ohio Power Co.*, Case No. 10-1454-EL-RDR, Finding and Order (Jan. 11, 2012). Thus, NOPEC contends that because modified Rider RRS would be charged to all distribution customers, and that charge would reflect the cost of generation associated with the Sammis, Davis-Besse, and OVEC entitlement units, modified RRS is unlawful under R.C. 4928.02(H) (Rehearing Tr. Vol. IV at 1008).

{¶ 66} Further, OMAEG and OEC/EDF claim that the Companies have failed to demonstrate that adverse impacts, such as increased borrowing costs, would occur in the event of an investment downgrade, or any indication of the magnitude that such impacts would have on the operations of FirstEnergy Corp. (Rehearing Tr. Vol. I at 77, 102-05; Rehearing Tr. Vol. V at 1073-74). Thus, OMAEG, OHA, and OEC/EDF assert that approval of the Companies' Proposal will allow FirstEnergy and FirstEnergy Corp. to continue to engage in risky business decisions and poor financial decision-making, all at the expense of their customers. OEC/EDF contends that the most appropriate course for FirstEnergy to request credit support would have been to request temporary rate relief under R.C. 4909.16, although, according to OEC/EDF and based on the record evidence, the Companies have failed to satisfy the requirements of that statute, as well. As a final matter, and in response to Staff's assertion that the Commission cannot interpret federal law, OCC states that the Commission has a statutory responsibility to interpret federal law in its normal course of business, noting that whether its interpretation is correct is another matter for the courts to decide.

{¶ 67} In response, FirstEnergy initially notes that many of the concerns raised in the Commission's Order related to the possibility of anticompetitive subsidies would be eliminated, given the fact the PPA has been removed and FES will have no involvement with the execution of the Companies' Proposal (Order at 110; Co. Ex. 197 at 4). Further, FirstEnergy contends that intervening parties presented no evidence that revenues will

flow between the Companies and FES, or any other unregulated affiliate. The Companies state that the revenues generated from Rider RRS will be received, and used by, the Companies. (Co. Ex. 197 at 11; Rehearing Tr. Vol. I at 226-27.) FirstEnergy witness Mikkelsen testified that she was not aware of "any mechanism within the Companies' organization that would allow them to share dollars collected with FES" and that it was the Companies' intention to use all of the revenues generated by Rider RRS toward grid modernization projects and programs, as well as other business operations (Rehearing Tr. Vol. I at 58, 226-27). Furthermore, the Companies also claim that modified Rider RRS is not unlawful under the FERC affiliate restrictions, stating again that there is no evidence such monetary transfers would occur between the Companies and FES, as the modified Rider RRS no longer contains a PPA or similar contractual agreement. FirstEnergy maintains that it will abide by all state and federal laws pertaining to corporate separation.

c. Whether the Companies' Proposal provides benefits to the public?

i. Whether the AEP Ohio ESP III Order Factors should apply to modified Rider RRS and whether it satisfies those factors?

{¶ 68} In its Order, the Commission relied on several factors, which were initially presented in the *AEP Ohio ESP III* Order, that the Commission would be able to balance, but not be bound by, when deciding whether to approve future cost recovery requests associated with PPAs.¹¹

¹¹ Those factors were listed as follows: financial need of the generating plant; necessity of the generating facility, in light of future reliability concerns, including supply diversity; description of how the generating plant is compliant with all pertinent environmental regulations and its plan for compliance with pending environmental regulations; and the impact that a closure of the generating plant would have on electric prices and the resulting effect on economic development within the state. In addition, the Commission indicated that the rider proposal should address additional issues specified by the Commission, including: a proposed process for periodic substantive review and audit; a commitment to full information sharing with the Commission and its Staff; and an alternative plan to allocate the rider's financial risk between the utility and its ratepayers. Further, the Commission indicated a PPA proposal should include a severability provision that recognizes that all the provisions of a proposed ESP will continue, in the event that the PPA rider is invalidated, in whole or in part at any point, by a court of competent jurisdiction (factors and additional requirements collectively, "AEP Ohio Order Factors"). (AEP Ohio ESP III Order at 25-26.)

{¶ 69} FirstEnergy and MSC argue that the AEP Ohio Order Factors are no longer applicable to the modified Rider RRS, noting that those factors would only apply if the PPA was still in place. As the Companies' Proposal has removed the PPA construct from what was originally approved by the Commission, they contend the Commission should not consider these factors in its decision (Co. Ex. 197 at 19). Nonetheless, FirstEnergy claims that Staff will continue to have the opportunity to perform rigorous review of Rider RRS under the Companies' Proposal, adding that the review will have a much more targeted approach and Staff will no longer have to engage in certain activities, including, but not limited to, examining actual plant costs, conducting annual prudence reviews, or requesting and reviewing information regarding the FES fleet (Co. Ex. 197 at 16-17).

{¶ 70} Utilizing many of the same arguments against the alleged economic development benefits associated with the Companies' Proposal, P3/EPSC and OEC/EDF also maintain that the recommended modifications to the original Rider RRS, as approved by the Commission, would result in the Companies' Proposal no longer satisfying the AEP Ohio Order Factors. P3/EPSC add that when the Commission chose to apply these particular factors, it was doing so to ensure that a PPA rider would offer more than the mere possibility of retail rate stability and provide a vast array of benefits, such as economic development and maintaining resource diversity, in order to justify the costs. Due to the fact the PPA is no longer in place, P3/EPSC, OHA, and OEC/EDF claim that benefits relied on by this Commission in its Order, including maintaining fuel supply diversity, avoidance of significant transmission costs, and economic development, have been eliminated. Thus, P3/EPSC, OHA, and OEC/EDF argue that the Companies' Proposal also fails to satisfy the AEP Ohio Order Factors. (Staff Ex. 15 at 13; OEC/EDF Ex. 3 at 8; Rehearing Tr. Vol. I at 51, 179, 263.) Finally, OCC/NOAC assert that the Commission erred in unreasonably and unlawfully considering factors identified in the *AEP Ohio ESP III* Order, noting that it was unlawful for the Commission to rely on a non-final order and the Commission should have considered other factors in order to ensure a

less-biased analysis of PPA riders (OCC/NOAC App. for Rehearing (May 2, 2016) at 65-69, 71-72).

{¶ 71} In response to OCC/NOAC's arguments regarding due process, FirstEnergy first alleges that OCC/NOAC's reliance on *Ohio Bell Tel. Co. v. Pub. Util. Comm.*, 301 U.S. 292 (1937), is generally misplaced, as this case merely requires that parties have an opportunity to challenge findings of fact at a hearing, if such a hearing is necessary. FirstEnergy states that OCC/NOAC had ample notice that the Commission may take such factors into consideration and even provided the parties an opportunity to present evidence at an additional evidentiary hearing, thereby providing sufficient due process for all parties to this proceeding, including OCC/NOAC. Furthermore, FirstEnergy argues that the *AEP Ohio ESP III* Order was effective immediately. R.C. 4903.15.

ii Whether modified Rider RRS provides rate stability and economic development benefits?

(a) Quantitative Benefits.

{¶ 72} FirstEnergy initially states that the Companies' Proposal utilizes record evidence already relied upon, and determined to be reasonable, by the Commission in this case to modify the cost, output, and cleared capacity assumptions in the Rider RRS calculation (Co. Ex. 197 at 5, 8; Rehearing Tr. Vol. II at 127; Order at 80-85). By utilizing representative proxies for the fuel-diverse baseload generation of that region, FirstEnergy and MSC contend that significant amounts of inherent variability have been removed from the original Rider RRS hedge mechanism, as the Companies' Proposal focuses on actual changes in energy and capacity prices (Rehearing Tr. Vol. I at 161-62, 193-94). Additionally, FirstEnergy states that it will no longer be necessary to reconcile costs or capacity revenues; rather, other than reconciling actual sales and billing demands with projected amounts, only energy revenues will need to be reconciled with actual energy pricing in the quarterly true-up. FirstEnergy claims that fixing the costs associated with

the proxy generation results in a significant decrease in the risk faced by consumers. (Co. Ex. 197 at 6-8; Order at 90; Rehearing Tr. Vol. IV at 892.) FirstEnergy, Nucor, and MSC argue that the Companies' Proposal not only maintains the benefits provided in the Commission's Order, it improves upon the original Rider RRS by holding the costs of the hedging mechanism constant and reducing the number of variable terms associated with the hedge and, thus, reducing the associated risk for FirstEnergy's customers (Co. Ex. 197 at 5-6; Rehearing Tr. Vol. I at 226-27). FirstEnergy and MSC add that the Commission-ordered mechanism limiting average customer bills provides additional customer protections (Co. Ex. 197 at 7). CMSD also notes that the severability provision in the Third Supplemental Stipulation would be an appropriate standard to apply to the Companies' Proposal, adding that under such a provision the Companies' Proposal could very well be considered an "equivalent value," or, in fact, a greater value (Co. Ex. 197 at 11).

{¶ 73} Despite the projection of large credits in future years, FirstEnergy argues that it will have the means to pay customers these credits due to the fact that these years will also include multiple other revenue sources. FirstEnergy claims these revenue sources, in addition to revenues from Rider DCR, shared savings, lost distribution revenues, and other elements of *ESP IV*, will provide sufficient revenues to fund the credits and allow the Companies to make all necessary investments in their grid modernization initiative. (Sierra Club Ex. 89; Rehearing Tr. Vol. I at 76, 80-81, 85, 91.) As a final matter, FirstEnergy contends that there is no longer any mechanism in Rider RRS that will transfer revenues arising from Rider RRS to FES or any other of FirstEnergy's unregulated affiliates (Co. Ex. 197 at 11; Rehearing Tr. Vol. I at 226-27).

{¶ 74} OMAEG, OCC/NOAC, OEC/EDF, Sierra Club, and P3/EPSC first contend that the quantitative benefits asserted by the Companies to be associated with Rider RRS continue to be overstated, as the Companies rely on outdated data and refuse to use more recent forecasts and actual capacity pricing (Co. Ex. 197 at 18-19; P3/EPSC Ex. 18C at 15-16, Att. JPK-1, Att. JPK-2). OMAEG notes that Staff witness Choueiki testified

that Staff no longer agreed with the Companies' projections (Rehearing Tr. Vol. IV at 986-87). P3/EPSC, NOPEC, and Sierra Club even argue that based on these updated energy forward and capacity auction results, the Companies' forecast reflects ratepayers would experience at least a \$154 million net charge over the term of the modified Rider RRS (P3/EPSC Ex. 18C at 15-16, Att. JPK-1, Att. JPK-2; Rehearing Tr. Vol. V at 1201-02). Additionally, P3/EPSC, OCC, and Sierra Club point out that Staff witness Choueiki also indicated that the modified Rider RRS would be an overall charge based on updated pricing information (Rehearing Tr. Vol. V at 1250). Moreover, OMAEG asserts that the revenues from other provisions of *ESP IV* that FirstEnergy witness Mikkelsen indicated the Companies may use to fund the credits to customers would originally be collected from customers. OMAEG adds that the Companies' Proposal includes no prohibition from seeking recovery of any credits resulting from Rider RRS from ratepayers in an emergency rate relief case, a self-complaint, or Staff approval of an exception to the Companies' distribution rate freeze as part of the *ESP IV*. (Rehearing Tr. Vol. I at 80-85, 88, 200-08.)

{¶ 75} OEC/EDF note that, based on the Commission's analysis of the various projections in its Order, the Companies would face a revenue shortfall of \$256 million during the term of Rider RRS due to projected customer credits (Order at 81; OEC/EDF Ex. 3 at 6). Moreover, with the elimination of the PPA, OEC/EDF now asserts that this loss will need to be absorbed by ratepayers. As updated in the workpapers of FirstEnergy witness Mikkelsen, OEC/EDF and Sierra Club argue that the result is even more critical, adding that during the period of January 1, 2019 through May 31, 2024, the Companies project credits to customers of \$976 million (or \$623 million NPV) from Rider RRS. (Sierra Club Ex. 89; Rehearing Tr. Vol. I at 79.) Sierra Club adds that these projections run directly counter to the Companies' support of Rider DMR, further casting doubt on the projected credits and charges. If the Commission were to approve the Companies' Proposal, OEC/EDF would recommend directing the Companies to enter into a PPA or a financial

hedge contract with an independent third party, in order to reduce the risk exposure currently faced by ratepayers (OEC/EDF Ex. 3 at 5).

{¶ 76} Sierra Club notes that the Companies' Proposal is completely unrelated to, and does not impact, the electricity that customers receive or the rates they pay for that electricity, further demonstrating that the Companies' Proposal cannot be found to provide any stability for retail electric rates. Sierra Club contends this issue is further compounded given the fact that the Companies have failed, once again, to demonstrate that customers are facing, and will continue to face during the term of *ESP IV*, price volatility and whether the modified Rider RRS would mitigate such volatility. As a final point of concern, OCC/NOAC, OMAEG, and Sierra Club add that the modified Rider RRS is not in the public interest because it is no longer revenue neutral for the Companies, noting that the Companies could be financially threatened if they are required to pay millions of dollars in credits over the term of Rider RRS.

{¶ 77} FirstEnergy contends that the intervenor arguments regarding the quantitative benefits of Rider RRS are largely reiterations of earlier arguments that were dismissed by the Commission in its Order (Order at 83). Additionally, the Companies assert that Staff witness Choueiki's calculation and P3/EPSC witness Kalt's forward price analysis are flawed due to their reliance on recent forward prices, which the Commission previously noted are unreliable due to abnormally high temperatures and record high natural gas inventories (Rehearing Tr. Vol. V at 1232-36). Further, the Companies argue that the energy forwards market that Dr. Choueiki and Dr. Kalt rely on is extremely illiquid in the specific term utilized by these witnesses (Co. Ex. 199; Co. Ex. 200; Rehearing Tr. Vol. V at 1237, 1246-47). FirstEnergy even notes that Dr. Kalt's analysis seems to have incorporated a Henry Hub natural gas spot price that also happened to be the lowest spot price since December of 1998, further indicating that his analysis is unrepresentative of the projected outcome of the Rider RRS hedge mechanism (Rehearing Tr. Vol. V at 1188-90). As a final matter, the Companies contend that the projections of FirstEnergy witness Rose

continue to be the only sound forecasts of record in this proceeding, noting no circumstances have changed since the Commission issued its Order that would challenge the validity of these forecasts (Order at 80-82). Accordingly, FirstEnergy asserts that the projected \$256 million credit will be preserved under the Companies' Proposal.

{¶ 78} Additionally, FirstEnergy notes that the Companies will have sufficient revenue streams from SmartGrid investment, Rider DCR, shared savings, lost distribution revenue, and other provisions of ESP IV, in order to pay any projected net credits resulting under the modified Rider RRS (Rehearing Tr. Vol. I at 80-81, 85; Rehearing Tr. Vol. V at 1098-99). The Companies add that any revenues received above those forecasted for any particular year will be used for additional investment to support its grid modernization initiatives and other related projects, negating any arguments that the modified Rider RRS will provide the Companies with excess revenues (Co. Ex. 197 at 6-7; Rehearing Tr. Vol. V at 1098-99). Finally, the Companies contend there is no basis for adopting OEC/EDF's recommendation that the Companies enter into a PPA or third party financial hedge contract, as this would merely shift revenues from the Companies and frustrate their ability to pursue numerous beneficial programs and projects, including modernizing the Companies' distribution grid, as well as jeopardize the Companies' ability to pay credits to customers in the later years of Rider RRS (Sierra Club Ex. 89; Co. Ex. 197 at 12). Moreover, as acknowledged by many intervening witnesses, FirstEnergy argues that no competitive bidding process for modified Rider RRS was feasible or necessary (Rehearing Tr. Vol. IV at 821-23; Rehearing Tr. Vol. V at 1104-05).

(b) *Qualitative Benefits.*

{¶ 79} FirstEnergy, MSC, and OEG also argue that the Companies' Proposal maintains the retail rate stability benefits that the Commission relied upon in its Order approving the original Rider RRS mechanism (Co. Ex. 197 at 10; Co. Ex. 206 at 3; OEG Ex. 4 at 1, 5; Order at 80-81, 83-84). In fact, OEG asserts the Companies' Proposal will result in smoother cost-based rates that would otherwise fluctuate significantly depending upon

market conditions and PJM's regulatory construct, noting that the modified Rider RRS will provide customers with generation rates comprised of approximately 40 percent at the guaranteed cost-based pricing and 60 percent at the federally-regulated market rate (OEG Ex. 4 at 7-8). OEG notes that this benefit alone would be enough for the Commission to approve the Companies' Proposal. Further, FirstEnergy argues that by limiting the variable inputs to day-ahead energy prices and actual capacity prices, the Companies' Proposal "provides customers the benefit of the hedge without bearing the risk of changes in [p]lant costs, operating levels or any other operational or market performance risk," essentially resulting in a superior hedging mechanism (Co. Ex. 197 at 6; Rehearing Tr. Vol. I at 127-28).

{¶ 80} Additionally, FirstEnergy claims that the price stability provided by the modified Rider RRS will promote economic development. As price stability is always an important consideration for businesses when it comes to site location, expansion, and other considerable business decisions, FirstEnergy argues that modified Rider RRS will provide rate certainty in its service territory and may lead to businesses deciding to increase their respective loads while, at the same time, ensuring generation plants in those areas continue to operate. (Co. Ex. 197 at 12; Rehearing Tr. Vol. I at 51, 263.) Moreover, the Commission's decision to approve the original Rider RRS mechanism in its Order was not dependent on the economic development benefits provided by that mechanism; rather, the Companies state that such benefits were considered ancillary to the rate stabilization benefits provided by Rider RRS (Order at 87).

{¶ 81} OMAEG and IMM argue that the Companies' Proposal is not appropriate for inclusion in an ESP under R.C. 4928.143(B)(2)(d), as it fails to have the alleged effect of stabilizing or providing certainty regarding retail electric service. Contrarily, OMAEG notes the customers taking service from CRES providers, especially large commercial customers, will experience additional uncertainty by the extra charge or credit as it will disrupt fixed-price contract prices and competitive rates, which will ultimately lead to

uncertain and unexpected costs (OMAEG Ex. 37 at 11-12). OMAEG further asserts that these allegedly unexpected and uncompetitive costs may also deter businesses from investing and locating in Ohio, if they are able to find an alternative location without such uncompetitive prices (OMAEG Ex. 37 at 12; Rehearing Tr. Vol. II at 335-37). Additionally, OMAEG notes that FirstEnergy witness Mikkelsen even acknowledged that customers would not be guaranteed to receive a credit in any given year during the life of the modified Rider RRS, thereby, negating any claims that this mechanism will operate as a hedge. Moreover, OMAEG, Sierra Club, OCC/NOAC, and OEC/EDF question the Companies' financial ability to implement the various qualitative benefits, noting the possibility of the Companies to pay out an expected total of \$561 million in net credits to customers over the course of the eight-year term of Rider RRS (Rehearing Tr. Vol. I at 80-85, 88, 200-08).

{¶ 82} As previously argued, OMAEG adds that this risk is even further exacerbated by the fact that the Companies' Proposal is based on outdated forecasts originally derived in August 2014 (Co. Ex. 197 at 6; Rehearing Tr. Vol. I at 133; Rehearing Vol. II at 334). Based on the foregoing, OMAEG contends that the overall effect of the Companies' Proposal is a negative impact for customers and for the economic development of the state of Ohio, and, thus, the Companies' Proposal is impermissible to be included in the Companies' *ESP IV* (OMAEG Ex. 37 at 7; RESA Ex. 7 at 12-13).

{¶ 83} OMAEG and P3/EPSC also contend that the Companies' Proposal will harm economic development in the state of Ohio, noting that large manufacturers and other businesses will consider the increased variable cost of energy in resource allocation decisions, and even, perhaps, decisions on company expansion or relocation (OMAEG Ex. 37 at 11-13; Rehearing Tr. Vol. V at 1060-61). As OMAEG witness Lause testified, the additional charge that would result from the Companies' Proposal would either need to be borne by customers and may even be so detrimental as to cause some commercial or industrial customers to go out of business (OMAEG Ex. 37 at 12). As a final point,

OMAEG again notes that these extra charges through modified Rider RRS would interfere with market forces and disrupt the ability of these companies to enter into cost-competitive contracts with CRES providers (OMAEG Ex. 37 at 11-12).

{¶ 84} Additionally, Staff, OHA, Sierra Club, OCC/NOAC, IMM, and OEC/EDF argue that the Companies' Proposal no longer provides the various benefits the Commission found to be present in the original Rider RRS mechanism, including preserving resource diversity and the avoidance of negative economic effects of power plant closures, as the operation of the rider is no longer connected to any particular plant or power source or the guarantee that such units remain in operation. IMM and NOAC add that FirstEnergy has recently announced the retirement of several units at the Sammis plant (Rehearing Tr. Vol. V at 1702). Staff and OHA note that the retention of the Davis-Besse and Sammis units, with their respective varying levels of economic benefits, was a significant reason the Commission approved the original Rider RRS. (Staff Ex. 15 at 4-9, 11-13; Order at 87-88; Rehearing Tr. Vol. V at 1702.) Further, Staff and P3/EPSC contend that the rationale for the Companies' Proposal as a financial hedge is also defunct, given updated capacity auctions and prices, which indicate the estimated hedge would not benefit consumers, at least to the extent alleged by FirstEnergy (Sierra Club Ex. 101 at 16).

iii Whether the Companies' Proposal provides grid modernization benefits?

{¶ 85} FirstEnergy and MSC state that FES will no longer be receiving any portion of the revenues collected under Rider RRS, as there is no PPA or similar contract in place (Co. Ex. 197 at 11). Rather, as noted above, FirstEnergy and MSC argue the funds collected from modified Rider RRS will be used toward significant investment in distribution grid modernization (Co. Ex. 197 at 12; Rehearing Tr. Vol. I at 58, 70). Moreover, FirstEnergy adds that the Stipulated ESP IV contained a commitment by the Companies to file a grid modernization plan, which has been filed and is currently under review by the Commission and other intervening parties in that proceeding. *In re FirstEnergy*, Case No. 16-0481-EL-UNC (*FirstEnergy Grid Modernization Case*), Application (Feb. 29, 2016).

{¶ 86} OMAEG, OEC/EDF, and OHA further argue that the Companies' Proposal contains no firm commitment as it relates to modernizing the distribution grid. OMAEG and OEC/EDF add that FirstEnergy failed to identify any specific projects or implementation strategies regarding grid modernization, making these qualitative benefits even more illusory. (Rehearing Tr. Vol. I at 63-64.)

iv Whether the Companies' Proposal provides additional benefits to the public?

{¶ 87} FirstEnergy also indicates that the Companies' Proposal would assist the Companies in improving certain credit metrics and would allow them to maintain investment grade ratings to ensure continued access to adequate financing options and more desirable borrowing terms (Co. Ex. 206 at 7; Rehearing Tr. Vol. I at 90-91). FirstEnergy acknowledges that this was not a purported benefit when it filed its proposal, but Staff identified credit support to be a concern when proposing Rider DMR (Staff Ex. 13 at 4-5).

{¶ 88} Moreover, FirstEnergy and MSC contend that all five qualitative benefits¹² of *ESP IV* relied upon by the Commission in its Order remain unchanged (Order at 78-95; Co. Ex. 197 at 13, 19; Rehearing Tr. Vol. X at 1682; Rehearing Tr. Vol. II at 479). In fact, FirstEnergy witness Mikkelsen testified to the fact that, as it provides even greater rate stability to customers, as outlined above, the Companies' Proposal actually enhances the qualitative benefits of *ESP IV* considered by the Commission in its Order (Co. Ex. 197 at 19). FirstEnergy further notes that Staff witness Turkenton agreed that none of the qualitative factors relied upon by the Commission have changed due to the modifications proposed in the Companies' Proposal (Rehearing Tr. Vol. II at 479; Co. Ex. 197 at 19-20).

¹² These five qualitative benefits included the following: (1) continuation of the distribution rate increase freeze until June 1, 2024; (2) continuation of multiple rate options and programs to preserve and enhance rate options for various customers provided in previous ESPs; (3) establishment of a goal to reduce CO₂ emissions by FirstEnergy Corp. with periodic reporting requirements; (4) reactivation and expansion of energy efficiency programs previously suspended by the Companies, with a goal of saving 800,000 MWh of energy annually; and (5) programs to promote the use of energy efficiency programs by small businesses.

Thus, the Companies assert that they remain obligated to fulfill these various conditions and commitments, as provided in the approved *ESP IV*, and conclude by stating that the Companies' Proposal will not affect these qualitative benefits. The Companies further contend that the benefits associated with the continued operation of the plants noted in the Order have no relevance to the *ESP* versus *MRO* test, because the Commission did not consider them in its analysis (Order at 87, 118-20). Moreover, FirstEnergy notes that, because modified Rider RRS will not be tied to any specific plants, the Companies' Proposal will present less risk to customers since they will no longer be subject to the specific risks attributed to operating the plants at full capacity for the duration of Rider RRS's term (Co. Ex. 197 at 6; Rehearing Tr. Vol. I at 126-27). OEG argues that, while some of the benefits may not be present under the revised Companies' Proposal, the increased retail rate stability would be enough for the Commission to approve the proposal. FirstEnergy further notes that the modified Rider RRS will provide significant economic benefits by providing rate stabilization and encouraging customers to maintain or expand their business in the Companies' service territories (Co. Ex. 197 at 12; Rehearing Tr. Vol. I at 255-56). Moreover, the Companies assert that their proposal will avoid untimely delays resulting from FES obtaining approval from FERC of the PPA under 18 C.F.R. 35.39(b) (Co. Ex. 197 at 4). As a final point, FirstEnergy contends that there is no longer any mechanism in Rider RRS that will transfer revenues arising from Rider RRS to FES or any other unregulated affiliates of FirstEnergy (Co. Ex. 197 at 11; Rehearing Tr. Vol. I at 158, 226-27). MSC agrees with FirstEnergy that the Companies' Proposal will help foster competition.

{¶ 89} OMAEG and NOPEC reaffirm their disagreement that all of the qualitative public interest benefits will continue under the Companies' Proposal, and argue that this would alter the outcome if presented under the statutory *ESP* versus *MRO* test. Specifically, OMAEG, OHA, CMSD, Sierra Club, OEC/EDF, NOPEC, and P3/EPSC assert that, because the Companies' Proposal is no longer tied to the two specific power plants located in the state, benefits such as increased reliability of generation, supply diversity, avoidance of transmission costs, economic development, and job retention at the power

plants, would be eliminated from the Commission's analysis in the Order (Staff Ex. 15 at 13; OCC Ex. 44 at 12; Rehearing Tr. Vol. I at 51, 179). OMAEG once again argues that FirstEnergy has provided no firm commitment that the funds collected through Rider RRS will be utilized for its numerous grid modernization initiatives, including advanced metering infrastructure (AMI), distribution automation, Volt/VAR controls, battery resources, and new Ohio renewable resources (Rehearing Tr. Vol. I at 63-64). P3/EPSC note that even if the qualitative benefits were found to still be present under the Companies' Proposal, they would not exceed the vast negative quantitative effect of the modified Rider RRS.

{¶ 90} OMAEG also contends that the Companies' Proposal will not promote competition, but rather, will inhibit competition through the implementation of a non-bypassable charge to be recovered by shopping and non-shopping customers. OMAEG adds that this additional charge will impact customers and restrict their ability to take advantage of low market prices through fixed price contracts, adding uncertainty for many larger manufacturers that consider electricity costs as a critical component of production operations. (OMAEG Ex. 37 at 12; Rehearing Tr. Vol. V at 1060-61.) OMAEG further contends that the possibility of the Companies redistributing the revenues collected through Rider RRS under its Proposal to FirstEnergy Corp. by means of paying dividends bolsters its claims that the Proposal will not foster competition in the state of Ohio. Specifically, OMAEG, IMM, and NOPEC claim that if these funds are used by FirstEnergy to support FES or other unregulated affiliates, then customers would essentially be forced to subsidize these companies through an anti-competitive subsidy to the detriment of their own electricity costs and businesses. (Dynege Ex. 2 at 5-6; OMAEG Ex. 37, Att. TNL-4; Rehearing Tr. Vol. I at 158, 176-77, 227.)

d. If approved by the Commission, should revenues from the modified Rider RRS be excluded or included for purposes of the SEET?

{¶ 91} Pursuant to R.C. 4928.143(F), a utility choosing to provide service under an ESP must undergo an annual earnings review to determine whether the ESP resulted in

"significantly excessive earnings" compared to those companies facing comparable levels of risk. To determine whether an ESP resulted in excessive earnings, the Commission must conduct a Significantly Excessive Earnings Test (SEET) and consider "whether the earned return on common equity of the [EDU] is significantly in excess of the return on common equity that was earned during the same period by publicly traded companies, including utilities, that face comparable business and financial risk, with such adjustments for capital structure as may be appropriate. R.C. 4928.143(F); *In re Application of Columbus S. Power Co.*, 134 Ohio St.3d 392, 2012-Ohio-5690, 983 N.E.2d 276. Furthermore, certain revenues and expenses may be excluded from the SEET calculation in the event they are determined to be "non-recurring, special, and extraordinary items." *In re the Investigation into the Dev. of the SEET Pursuant to Am.S.B. 221 for Elec. Util.*, Case No. 09-786-EL-UNC, Finding and Order (*SEET Finding and Order*) (June 30, 2016) at 18.

{¶ 92} FirstEnergy witness Mikkelsen argues that the charges associated with Rider RRS may be excluded from the SEET calculation because "the credit support is necessary to achieve Staff's stated goal of developing one of the nation's most intelligent distribution grids, as well as the commitment to retain FirstEnergy Corp.'s headquarters and nexus of operations in Akron, Ohio, are both extraordinary in nature." (Co. Ex. 197 at 18; Co. Ex. 206 at 22-23). The Companies specifically request the credits and charges from Rider RRS be excluded from its "earned return," because they constitute "special items" for purposes of the SEET calculation, given the fact they are not, or at most incidentally, related to typical utility operations (Co. Ex. 206 at 21). The Companies note that OCC witness Kahal even acknowledged that, under some circumstances, excluding the costs associated with Rider RRS credits from the SEET calculation could result in a more beneficial situation for customers (Rehearing Tr. Vol. V at 1107-08). FirstEnergy also argues that Rider RRS has a symmetric design, while the SEET calculation promotes an asymmetric result by not providing any downside protection to the Companies in the event of a SEET refund (Co. Ex. 206 at 21). Additionally, the Companies argue that excluding the Rider RRS revenues from the SEET calculation will enable the Commission

to conduct a more reliable comparison of FirstEnergy's return on equity to that of comparable utilities and companies, as required by R.C. 4928.143(F) (Co. Ex. 206 at 21-22). As a final matter, the Companies claim that, while his testimony recommended that the Rider RRS revenues be included in the SEET calculation, OCC witness Duann agreed that the common meanings for each exclusionary category be used. FirstEnergy asserts that utilizing these definitions would lead to a result contrary to Dr. Duann's request. (Rehearing Tr. Vol. IV at 921, 924-27). As a final matter, FirstEnergy argues Dr. Duann's analysis is flawed, as he consistently opposes the exclusion of any recurring item from the SEET calculation, which is also contrary to Commission precedent. MSC agrees that the revenues and expenses running through Rider RRS should be treated as a "special item," and should, thus, be excluded for purposes of the SEET calculation.

{¶ 93} OCC witness Duann recommends that, if the Commission approves the Companies' Proposal, the modified Rider RRS revenues and expenses resulting from the Companies' Proposal should be included for purposes of conducting the SEET (OCC Ex. 43 at 3). OCC/NOAC further argue that adjustments for purposes of the SEET are generally limited to "extraordinary, special, one-time only events," rather than adjustments resulting from an ESP (OCC Ex. 43 at 8). OCC/NOAC note that Rider RRS revenues should be included in the SEET because the revenues from AEP Ohio's RSR and DP&L's SSR are included for purposes of the calculation.

{¶ 94} OEC/EDF, OMAEG, and Direct Energy support OCC's recommendation, noting that to allow such an exclusion from the SEET calculation would be inconsistent with Commission precedent and what has previously been determined to be "extraordinary." *SEET Finding and Order*. OEC/EDF and OMAEG add the fact that no other utility has a similar rider in place does not excuse its inclusion in the SEET calculation when the statute only requires that the Commission look to companies that "face comparable business and financial risk." Additionally, OMAEG notes that the

modified Rider RRS revenues should be treated as "recurring" since this rider will provide a regular charge or credit over the next eight years. (Rehearing Tr. Vol. V at 1164.)

{¶ 95} In response to OCC/NOAC's request to include the Rider RRS revenues in the SEET calculation, FirstEnergy argues that the revenues from those respective riders was included in the SEET calculation as a condition of the stipulations filed in those proceedings. *AEP Ohio RSR Case*; *DP&L SSR Case*. Further, the Companies assert these riders were merely acting as revenue collection mechanisms and did not function as a hedge, like Rider RRS, with the inherent risk of substantial credits. As a final point, FirstEnergy notes that those riders were also designed to be symmetrical, i.e., both had upper and lower return on equity (ROE) boundaries and a SEET cap that ensured the companies earned a return between seven and 11-12 percent. *AEP Ohio ESP II*, Opinion and Order (Aug. 8, 2012) at 33; *DP&L ESP II* Order at 26. (Rehearing Tr. Vol. IV at 931-34.)

3. COMMISSION DECISION

{¶ 96} The Commission finds that, although the Companies' Proposal, in the form of modified Rider RRS, is authorized under R.C. 4928.143(B)(2)(d), important secondary benefits related to reliability, resource diversity, and economic development are absent from the Companies' Proposal. Therefore, we find that, based upon the record established on rehearing, the Companies' Proposal should not be adopted.

a. The Companies' Proposal is authorized under R.C. 4928.143(B)(2)(d).

{¶ 97} As a preliminary matter, the Commission finds that the Companies' Proposal is authorized under R.C. 4928.143(B)(2)(d). Under R.C. 4928.143(B)(2)(d), the Commission can approve, as a provision of an ESP, 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 electric service. Therefore, a proposed provision in an ESP is authorized under the statute if it

meets three criteria: (1) it is a term, condition, or charge; (2) it relates to one of the listed items (e.g. limitations on customer shopping, bypassability, carrying costs); and (3) it has the effect of stabilizing or providing certainty regarding retail electric service. *AEP Ohio RSR Case* at ¶ 43.

{¶ 98} The Commission finds that, with respect to the Companies' Proposal, the first requirement is met, and Rider RRS, as modified by the Proposal, would consist of a charge, or credit, incurred by customers under *ESP IV*. The record in this case demonstrates that, for the first few years under the Proposal, customers are likely to see a net charge for modified Rider RRS (*Sierra Club Ex. 89*). Thus, the record indicates that modified Rider RRS would, at times, consist of a charge to customers.

{¶ 99} Under the second criterion of R.C. 4928.143(B)(2)(d), modified Rider RRS must relate to at least one of the following: 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 (*Order* at 108). The Commission finds that the Proposal relates to both "bypassability" and "limitations on customer shopping for retail electric generation service."

{¶ 100} We note that R.C. 4928.143(B)(2)(d) authorizes electric utilities to include in an *ESP* provisions related to the "bypassability" of charges, to the extent that such charges have the effect of stabilizing or providing certainty regarding retail electric service. *Order* at 108-109; *AEP Ohio ESP III Order* at 22. Under the Companies Proposal, both shopping and SSO customers may benefit from modified Rider RRS because it would have a stabilizing effect on the price of generation service regardless of whether the customer is served by a CRES provider or the SSO. Therefore, we agree that, under the Proposal, FirstEnergy is authorized to propose that modified Rider RRS be a non-bypassable rider under R.C. 4928.143(B)(2)(d). However, we have consistently ruled that, because nearly every charge may be bypassable or non-bypassable, "bypassability" alone is insufficient to

fully meet the second criterion of R.C. 4928.143(B)(2)(d). (Order at 108-109; *AEP Ohio ESP III* Order at 22.)

{¶ 101} Further, the Commission finds that modified Rider RRS is a financial limitation on customer shopping for retail electric generation service. Modified Rider RRS is solely a financial hedge; there is no actual purchase or sale of energy and capacity at all. Modified Rider RRS would flow through to both shopping and non-shopping customers the net difference between an assumed cost (and assumed quantity) of generation service and actual market rates. Thus, modified Rider RRS would impose a financial limitation on shopping which would have the effect of stabilizing rates. Under modified Rider RRS, shopping customers would still purchase all of their generation supply from the market through CRES providers. However, the bills of shopping customers would reflect a price for generation service that is based in part on the retail market and in part on the assumed cost of generation service under modified Rider RRS. OEG witness Baron quantified this limitation, estimating that 60 percent of generation service pricing would be based upon retail market rates and 40 percent would be based upon guaranteed fixed cost pricing (OEG Ex. 4 at 8). Therefore, modified Rider RRS would function as a financial limitation on complete reliance on the retail market for the pricing of retail generation service. Therefore, we find that, since modified Rider RRS is a limitation on customer shopping, the second criterion of R.C. 4928.143(B)(2)(d) is met.

{¶ 102} With respect to the third and final criterion, whether the modified Rider RRS would have the effect of stabilizing or providing certainty regarding retail electric service, the Commission finds that modified Rider RRS would act as a hedging mechanism, similar to Rider RRS as originally modified and adopted by the Commission (Order at 109). However, modified Rider RRS would entail less risk to customers and limit the hedge strictly to the price of energy and capacity during ESP IV. If market prices for energy and capacity rise, Rider RRS will operate to mitigate increases in market prices. Therefore, modified Rider RRS is designed to mitigate the effects of market volatility,

providing customers with more stable pricing for retail electric generation service. Accordingly, since modified Rider RRS would, in theory, have the effect of stabilizing or providing certainty for retail electric service, the Commission finds that the third criterion of R.C. 4928.143(B)(2)(d) has been satisfied.

b. The Companies' Proposal does not contain important benefits to the public.

{¶ 103} The Commission finds that modified Rider RRS does not include important secondary benefits related to reliability, resource diversity, and economic development when compared to Rider RRS as originally modified and approved by the Commission.

{¶ 104} Reliability, resource diversity, and economic development were all issues identified by the Commission in the *AEP Ohio ESP III Case* as factors we would consider in evaluating requests for a PPA. *AEP Ohio ESP III Order* at 24-25. FirstEnergy contends that these factors are not relevant with respect to the Companies' Proposal because modified Rider RRS does not involve an actual PPA. We disagree. Modified Rider RRS would be charged to customers in a manner sufficiently similar to an actual PPA that it is not unfair to characterize modified Rider RRS as a "virtual PPA" (Rehearing Tr. Vol. IV at 1008-09). In rehearing testimony, Staff witness Choueiki identified the absence of resource diversity and economic development benefits as one of two grounds for his recommendation that the Commission reject modified Rider RRS, stating that "Modified Rider RRS is no longer comprised of a PPA that is tied to specific power stations in the state and accordingly, eliminates two important benefits that the Commission highlighted in its Opinion and Order ***" (Staff Ex. 15 at 13 (emphasis in the original)).

{¶ 105} In the *ESP IV Opinion and Order*, the Commission noted that, in the event of the closure of Davis-Besse and Sammis, substantial transmission investment would be necessary in order to maintain reliability (Order at 87; Co. Ex. 37 at 2-3; Co. Ex. 39 at 5-7; Tr. Vol. XV at 2354-56; Tr. Vol. XVI at 3293-94). According to the record, the low estimate for such transmission was \$400 million and the high estimate was \$1.1 billion (Order at 87;

Co. Ex. 39 at 8-10; Tr. Vol XVI at 2385). Modified Rider RRS does nothing to avoid these transmission investments, which would be necessary to maintain reliability in the event of the closure of Davis-Besse or Sammis (Rehearing Tr. Vol. I at 264-65).

{¶ 106} We further noted that original Rider RRS encouraged resource diversity in this state, supporting 2,220 MW in existing coal-fired generation and 908 MW in existing nuclear generation (Order at 87; Co. Ex. 32 at 9; Co. Ex. 28 at 10). Modified Rider RRS does nothing to mitigate the risk of closure of Davis-Besse or Sammis or otherwise support these existing, diverse, generation resources (Rehearing Tr. Vol. I at 178-79, 263).

{¶ 107} In addition, the Commission noted, in the *ESP IV* Opinion and Order, that Davis-Besse and Sammis have a significant economic impact in the regions in which the plants are located (Order at 88; Co. Ex. 35 at 2-3; Co. Ex. 36 at 4, 9; Tr. Vol. XV at 3214-17). The Commission relied upon the testimony of FirstEnergy witness Murley who testified that every \$1 million of power produced at Sammis resulted in an additional \$180,000 of economic activity, while every \$1 million of power generated at Davis-Besse produced an additional \$390,000 of economic activity (Order at 88; Co. Ex. 36 at 4; Co. Ex. 36 at 9). Accordingly, the record demonstrated that Sammis and Davis-Besse have a total economic impact of over \$1.1 billion annually (Co. Ex. 36 at 11). However, modified Rider RRS has no direct economic development or job retention impact (Rehearing Tr. Vol. I at 263-64).

{¶ 108} Accordingly, the Commission finds that modified Rider RRS does not provide important secondary benefits when compared to Rider RRS as originally modified and approved by the Commission. Further, the Commission notes that, when we rejected the indicative offer presented by Exelon Generation Company, LLC, and Constellation NewEnergy, Inc. (jointly, Exelon) as an alternative to the original Rider RRS, the Commission relied upon the failure of Exelon's indicative offer to support reliability or economic development in comparison to original Rider RRS (Order at 99-100). Having rejected a competing proposal to original Rider RRS due to a lack of support for reliability

and economic development, we cannot adopt the Companies' Proposal now when it also lacks these same benefits.

- c. *FirstEnergy has not demonstrated that the Companies will be able to pay credits to customers without endangering needed investments in the distribution systems.*

{¶ 109} The Commission finds that, based upon the record in this proceeding, FirstEnergy has not demonstrated that the Companies will be able to pay credits to customers under modified Rider RRS without endangering needed investments in the distribution systems. According to the projections supported by the Companies, modified Rider RRS would be a net charge to customers for the first few years after implementation. However, the Companies' projections also forecast that, over the full eight years of the ESP, modified Rider RRS would produce an aggregate net credit of \$561 million (Co. Ex. 197 at 3). There is no evidence in the record that the Companies will be in a position to pay an aggregate net credit of \$561 million to customers over the term of ESP IV.

{¶ 110} Under Rider RRS, as originally modified and approved by the Commission, credits to customers would have been paid for by revenues generated by selling energy, capacity, and ancillary services in the market. Under modified Rider RRS, there would not be actual sale of power in the markets, and the Companies would be liable to pay the credits to customers from the Companies' own funds. The projections by the Companies forecast that, for the period of January 1, 2019, through May 31, 2024, the Companies would issue credits to customers totaling \$976 million (Rehearing Tr. Vol. I at 78-79; Sierra Club Ex. 89). FirstEnergy claims that, looking at the totality of ESP IV, the Companies would be able to fund the credits without harming investments necessary to deploy smart grid technology, pursuant to the Stipulations adopted by the Commission in this case; however, at the hearing, the Companies' witness had not calculated how much the Companies projected to be received from Rider DCR or the return on smart grid investments (Rehearing Tr. Vol. I at 83) although FirstEnergy witness Mikkelsen also testified that customer credits could be funded from cash from operations, lost distribution

revenue, shared savings, and potential borrowing by the Companies (Rehearing Tr. Vol. I at 84-85).

{¶ 111} The Commission notes that there is substantial evidence in the record of this proceeding, both in testimony in the initial phase of the proceeding and in rehearing testimony, that the Companies and FirstEnergy Corp. face financial challenges at this time. As noted below, on January 26, 2016, Moody's issued a credit opinion stating that certain factors could lead to a downgrade of FirstEnergy Corp. These factors include the failure of the modified ESP to allow FirstEnergy Corp. to maintain financial metrics adequate for investment grade ratings and continued weakening of merchant energy markets. (Staff Ex. 13 at 4; Co. Ex. 206 at 6-7; Direct Ex. 1 at 3.) In addition, on April 28, 2016, Standard and Poor's Financial Service, LLC (S&P) issued a research update revising FirstEnergy Corp.'s outlook from "stable" to "negative" (Staff Ex. 13 at 8, Att. 3 at 4). The rehearing testimony further shows that, with respect to S&P credit ratings, if FirstEnergy Corp. were downgraded, the Companies would also be downgraded (Co. Ex. 206 at 7, fn. 7; Rehearing Tr. Vol. III at 595-96, 680).

{¶ 112} The Commission finds that, in light of these documented financial challenges, the Companies have not demonstrated that they will be able to pay credits to customers under modified Rider RRS without endangering their ability to make needed investments in maintaining their distribution systems and in deploying smart grid technology.

{¶ 113} Moreover, FirstEnergy's witness declined to commit to exclude consideration of the credits paid to customers under modified Rider RRS from any application for emergency rate relief filed under R.C. 4909.16. (Rehearing Tr. Vol. I at 81-82). Therefore, even if customers had previously paid a substantial amount in charges in the early years of *ESP IV* under modified Rider RRS, there is an unacceptable risk that the Companies could seek to offset credits due to be paid customers by raising rates under the emergency rate relief statute, R.C. 4909.16.

- d. It is unnecessary to address the question of whether modified Rider RRS is a transition charge or its equivalent.*

{¶ 114} Having determined that modified Rider RRS should not be adopted, the Commission finds that it is unnecessary to address the question of whether modified Rider RRS is a transition charge or its equivalent. Absent our approval of modified Rider RRS, FirstEnergy will not recover any costs under the rider. Therefore, the question as to whether such costs are transition charges or its equivalent is moot.

- e. It is unnecessary to address claims that modified Rider RRS violates Federal law.*

{¶ 115} The Commission further finds that it is unnecessary to address claims that modified Rider RRS violates Federal law. The Commission has not approved modified Rider RRS; accordingly, such claims are moot. Further, we reaffirm our holding that constitutional questions, such as preemption, are beyond our statutory authority (Order at 112). The Commission is an administrative agency with power specifically granted by the Ohio Revised Code and has no authority to declare a Federal statute unconstitutional. *Reading v. Pub. Util. Comm.*, 109 Ohio St.3d 193, 195, 2006-Ohio-2181, 846 N.E.2d 840, at ¶ 14, citing *Panhandle E. Pipeline Co. v. Pub. Util. Comm.*, 56 Ohio St.2d 34, 346, 383 N.E.2d 1163 (1978).

- f. The Companies should focus their innovation and resources on modernizing their distribution systems.*

{¶ 116} The Commission is persuaded by the rehearing testimony of RESA witness Crockett-McNew, who stated that:

FirstEnergy should focus on the regulated side of the business that is essential for customers and the competitive market -- the distribution meters and wires. RESA would support a revenue mechanism that is tied to improvement and modernization of FirstEnergy's grid. This would include expansion of smart

meters, data access and system design to allow for greater reliability and technically advanced competitive market offers. RESA believes that this is essential to markets and fully within the realm of the regulated utility to achieve. (RESA Ex. 7 at 6.)

{¶ 117} In our Order in this proceeding, the Commission approved the original Rider RRS because it would serve as a financial hedge and it also included secondary benefits with respect to reliability, resource diversity, and economic development (Order at 87-88). In light of FERC's withdrawal of FirstEnergy's affiliate waivers, those goals cannot be accomplished in a timely fashion. As stated above, while modified Rider RRS may still serve as a useful financial hedge, it does not provide the important secondary benefits included in Rider RRS as modified and approved by the Commission. Accordingly, the Commission will consider alternatives which focus FirstEnergy's innovation and resources on providing distribution service and on modernizing the grid.

C. *Rider DMR*

1. OVERVIEW OF PROPOSED RIDER DMR

{¶ 118} Staff introduced an alternative proposal to the Companies' Proposal in testimony filed on June 29, 2016, in which it recommends the approval of Rider DMR. Staff contends that Rider DMR would provide FirstEnergy Corp., through the Companies, with funds to assure continued access to credit on reasonable terms in order to allow the borrowing of adequate capital to support its grid modernization initiatives. Staff's purported rationale for establishing such a rider is R.C. 4928.143(B)(2)(h) (Staff Ex. 15 at 15). Staff proposes to allow recovery of \$131 million annually through Rider DMR, for a period of three years, in order to improve FirstEnergy's credit position, as determined by its Cash Flow from Operations per-Working Capital (CFO) to debt ratio. According to Staff's proposal, the Commission will have the option of extending the duration of Rider DMR for an additional two years. Staff also proposes the following two conditions on Rider DMR: (1) FirstEnergy Corp. would be required to keep its headquarters and nexus