

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

**In the Matter of the Application of Ohio)
Edison Company, The Cleveland Electric)
Illuminating Company, and The Toledo)
Edison Company for Authority to Provide)
for a Standard Service Offer Pursuant to)
R.C. 4928.143 in the Form of an Electric)
Security Plan.)**

Case No. 14-1297-EL-SSO

**REPLY BRIEF OF THE
RETAIL ENERGY SUPPLY ASSOCIATION**

February 26, 2016

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I. INTRODUCTION

The Retail Energy Supply Association (“RESA”)¹ has challenged multiple aspects of the fourth electric security plan (“ESP IV”) proposed by the Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company (collectively, “FirstEnergy”), including a number of tariff and rider changes. A review of the record and FirstEnergy’s initial brief aptly demonstrates that several of the key tariff changes proposed by FirstEnergy should be rejected outright as being outside the Commission’s legal authority and not in the public interest. Similarly, there are other changes to the Generation Cost Reconciliation Rider and Generation Service Rider that are needed. A purchase of receivables (“POR”) program is also warranted in FirstEnergy’s service territories at this time.

The Commission, in its decision, should address the Generation Cost Reconciliation Rider, the Generation Service Rider and POR. The main focus, though, as it has been throughout this hearing, is the Retail Rate Stability Rider (“Rider RRS”) proposal. The parties, including RESA, have focused extensively on Rider RRS, which will be a non-bypassable rider in place for the entire proposed eight-year term of the ESP IV.² Numerous parties object vehemently to Rider RRS – nearly twenty opposing briefs by 33 parties were filed on February 16, 2016. Two *amicus curiae* briefs raised concerns as well. Thousands upon thousands of letters and emails have poured into the Public Utilities Commission of Ohio (the “Commission”) opposing FirstEnergy’s proposal.

¹ The comments expressed in this filing represent the position of RESA as an organization but may not represent the views of any particular member of the Association. Founded in 1990, RESA is a broad and diverse group of more than twenty retail energy suppliers dedicated to promoting efficient, sustainable and customer-oriented competitive retail energy markets. RESA members operate throughout the United States delivering value-added electricity and natural gas service at retail to residential, commercial and industrial energy customers. More information on RESA can be found at www.resausa.org.

² FirstEnergy Exhibit (“Ex.”) 1 at 9; FirstEnergy Ex. 43 at 2; FirstEnergy Ex. 154 at 7.

The opposition to Rider RRS is justified and FirstEnergy’s initial brief presents no reason for this Commission to approve Rider RRS as part of the ESP IV. Ohio Revised Code Section (“R.C.”) 4928.143(B)(2) does not authorize the distribution monopoly granted by the State of Ohio to conscript its distribution ratepayers to be financially liable for a lucrative contract that FirstEnergy awarded outside of the Commission’s control to its non-regulated affiliate on a non-bid basis. Such a fundamental grant of state authority would have to be expressly granted by the General Assembly to the Commission. R.C. 4928.143 presents one of two options an electric distribution utility can use to supply the “competitive services” needed for default service. No amount of tortured interpretation can render a subsection that permits limited restrictions on shopping to authorize an exclusive, non-bypassable obligation for ratepayers to compensate an affiliated merchant generator for a competitive asset. In addition to this legal flaw, the record in this case will not support a factual finding that Rider RRS will result in retail rate stability. Further, Rider RRS is also not an “economic development program” under R.C. 4928.143(B)(2)(i) – that is certainly not what FirstEnergy Solutions Corp. (“FES”) had in mind when it offered to put all of its plants into a “hedge” so that FES could obtain certainty for its balance sheet.³

Other factual reasons why Rider RRS should be denied include the fact that the Commission will have no oversight over the so-called “Legacy Cost Components” that will be included in the Rider RRS rates. Those legacy costs are generation costs from the W.H. Sammis Plant, Davis-Besse Nuclear Power Station and Ohio Valley Electric Corporation (“OVEC”)

³ Transcript (Tr.) Volume (“Vol.”) 11 at 2290.

plants. Under Rider RRS and the Stipulation presented in this matter,⁴ any action and incurred cost by FES for those plants are not open for discussion or challenge but are fully recoverable under Rider RRS from ratepayers. Commission review of a rider with such a substantial loophole will not be “rigorous” Commission oversight and will be harmful to the competitive marketplace. Subsidy payments from ratepayers to a deregulated affiliate, contrary to FirstEnergy’s belief, are a step backwards from the competitive markets and along with other provisions in FirstEnergy’s proposed ESP IV, are not retail market enhancements.

Rider RRS is not an authorized mechanism under Ohio’s ESP statute, is not consistent with Ohio’s electric policy, and is not beneficial or in the public interest. Rider RRS should be rejected and the Stipulation must be modified to be acceptable.

II. FIRSTENERGY HAS NOT RESPONDED TO RESA’S TARIFF CHALLENGES AND OTHER RECOMMENDATIONS

Even though FirstEnergy has the burden of proving that its proposed ESP IV should be approved,⁵ FirstEnergy has not directly responded to a number of RESA’s challenges and recommendations to the ESP IV proposal. FirstEnergy filed an initial brief that was more than 150 pages long, but did not address many arguments and recommendations from an important segment of Ohio’s electric industry – the competitive suppliers.⁶ In particular, FirstEnergy failed to respond to the following RESA arguments and recommendations:

- RESA’s recommendation to reject FirstEnergy’s proposed narrowing of what competitive retail electric service (“CRES”) providers can include on

⁴ A partial Stipulation and Recommendation was filed in this proceeding on December 22, 2014, and supplemented on May 28, June 4, and December 1, 2015. For ease, those filings will be referred to collectively as “the Stipulation.”

⁵ R.C. 4928.143(C) places the burden of proof on the utility – the ESP applicant.

⁶ RESA has also opposed FirstEnergy’s proposal to include the PJM Interconnection LLC’s (“PJM”) Line Item 1375 (Balancing Operating Reserve) in its Non-Market-Based Rider (“Rider NMB”). RESA will not repeat its position in full herein. RESA stands by its opposition to that proposed change.

the consolidated bill by changing the definition of “Bill Ready” in its Supplier Coordination Tariff.⁷ FirstEnergy has not justified this change at all and RESA has presented compelling evidence explaining that the change will be harmful to the competitive suppliers while allowing FirstEnergy to include non-generation charges of others on its consolidated bills.⁸

- RESA’s recommendation to keep, in the Supplier Coordination Tariff, the ability for CRES providers to request non-summary, customer-specific interval usage data.⁹ This proposed change is contrary to the Commission’s express directive to provide interval usage data to CRES providers,¹⁰ and is unreasonable.
- RESA’s argument to not change the electric service regulations to state that unaccounted for energy is solely the CRES providers’ responsibility. There has been no explanation by FirstEnergy for this proposed change, especially since FirstEnergy is also responsible for unaccounted for energy like other load-serving entities.¹¹ The electric service regulations should be accurate – meaning, the responsibility for unaccounted for energy remains the responsibility of FirstEnergy and other load-serving entities like CRES providers.

⁷ FirstEnergy Ex. 1 at Attachment 5, 1st Revised Page 3 of 52.

⁸ RESA Ex. 2 at 8-9; RESA Initial Brief at 11-12.

⁹ FirstEnergy Ex. 1 at Attachment 5, 1st Revised Page 21 of 52 at Section G.

¹⁰ *In the Matter of the Commission’s Investigation of Ohio’s Retail Electric Service Market*, Case No. 12-3151-EL-COI, Entry on Rehearing at 19 (May 21, 2014).

¹¹ Tr. Vol. 26 at 5345-5346.

- RESA’s recommendation to change the structure of the Generation Cost Reconciliation Rider (“Rider GCR”) so that it will not automatically become non-bypassable. RESA witness Bennett explained several concerns with the proposed and stipulated changes for this rider, none of which have been addressed.¹² RESA’s recommended approach for this rider ensures flexibility and Commission analysis so that a specific, tailored response can be crafted, instead of a trigger that automatically makes the rider non-bypassable.
- RESA’s recommendation to not continue the time-of-use option under the Generation Service Rider without a corresponding requirement that FirstEnergy establish a protocol and provide the interval usage data electronically to CRES providers by the start of the ESP IV in June 2016.¹³ Since the Commission has already acknowledged that proper data exchange protocols are needed for CRES providers to offer time-differentiated products,¹⁴ any continuation for an eight-year period of FirstEnergy’s time-of-use option should only be approved if the competitive market can have access to the same type of data and then offer comparable products.
- RESA’s recommendation to implement a purchase of receivables (“POR”) program in FirstEnergy’s service territories. FirstEnergy has not responded to this recommendation (either in rebuttal testimony or in its

¹² RESA Ex. 3 at 3-4.

¹³ RESA Ex. 3 at 5-6.

¹⁴ *Retail Electric Service Market, supra*, Finding and Order at 38 (March 26, 2014).

initial brief). As outlined in RESA witness Bennett's testimony and in RESA's initial brief,¹⁵ a POR program will be a true enhancement to the competitive retail market in the FirstEnergy service territories and a just and reasonable addition at this time since FES no longer participates in the residential marketplace.¹⁶

FirstEnergy has not carried the burden of proving that its tariff proposals designated above should be approved and has not responded to RESA's challenges and recommendations. The Commission should adopt each of these RESA positions and recommendations, as well as RESA's recommendation to not include PJM Line Item 1375 in Rider NMB. They are just and reasonable.

Finally, based on the cross-examination of FirstEnergy witness Smialek, the record makes clear FirstEnergy is in agreement with two points raised by RESA. First, RESA's request for stakeholder collaborative meetings to assist with the development and implementation of the supplier portal is acceptable to FirstEnergy.¹⁷ Second, FirstEnergy has agreed that its proposed bill format as filed with Ms. Smialek's testimony, does not comport with the color and size requirements of the Commission.¹⁸ On cross-examination, Ms. Smialek testified that FirstEnergy's bill format will comply with the color and size requirements. Thus, while FirstEnergy did not directly address these two last points, the record makes clear that FirstEnergy agrees with RESA on these two points.

¹⁵ RESA Ex. 2 at 12-18; RESA Initial Brief at 20-24.

¹⁶ Tr. Vol. 11 at 2342.

¹⁷ Tr. Vol. 5 at 1051.

¹⁸ Tr. Vol. 5 at 1052-1057.

III. RIDER RRS IS NOT AUTHORIZED BY STATUTE AND SHOULD BE REJECTED

FirstEnergy claims that Rider RRS is legally permissible under Ohio law, citing R.C. 4928.143(B)(2). RESA addressed why R.C. 4928.143(B)(2) does not authorize Rider RRS (see, RESA Initial Brief Section V), including the testimony and evidence demonstrating that Rider RRS harms retail and wholesale markets. FirstEnergy in this proceeding is taking inconsistent positions as to whether Rider RRS limits shopping. As noted below, FirstEnergy states without reservation that Rider RRS will not harm or limit customers' ability to shop for competitive retail electric services. At the same time, FirstEnergy is claiming the Commission's authority for approving Rider RRS rests on the Commission's ability to accept an ESP that limits shopping. Specifically, FirstEnergy erroneously argues in its initial brief that Rider RRS fits within two of those nine items – subsections (d) and (i).

A. Rider RRS is either not authorized by R.C. 4928.143(B)(2)(d) or it harms retail and wholesale shopping.

R.C. 4928.143(B)(2)(d) states an ESP may provide for or include:

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

FirstEnergy claims that Rider RRS satisfies R.C. 4928.143(B)(2)(d) because it relates specifically to “limitations on customer shopping,” relates to “bypassability,” and relates to “default service.”¹⁹ A careful review of FirstEnergy's claims and Rider RRS demonstrates that

¹⁹ FirstEnergy Initial Brief at 117-120.

none of these claims is met, unless FirstEnergy recants its claim that Rider RRS will not harm wholesale or retail shopping.

1. **FirstEnergy has rejected that Rider RRS will be a limitation on customer shopping and cannot now meet the ESP statute by claiming that Rider RRS is a “financial limitation on the consequences of customer shopping.”**

Importantly, FirstEnergy has taken the stance on multiple occasions throughout this proceeding that Rider RRS will not be a limitation on customer shopping:

- “The Economic Stability Program, as designed, will have no adverse impact on the CRES market in Ohio, customers’ ability to shop for generation service, or on the Companies’ competitive bidding process or SSO Supply.”²⁰
- FirstEnergy witness Mikkelsen agreed that “the companies’ customers’ ability to shop for their own energy service would remain unchanged whether or not the proposed transaction were finalized.”²¹
- FirstEnergy witness Mikkelsen discussed a limitation on the consequences of customer shopping, not on customer shopping: “I think rider RRS, whether it is a charge or a credit, acts as a financial limitation on the consequence of a customer shopping for generation supply from a CRES provider or from electing to take competitively-sourced generation from the companies as an SSO customer.”²²
- The stipulating parties agree Rider RRS “does not in any way limit a customer’s ability to shop, and does not negatively impact retail competition or POLR auctions.”²³
- “Shopping customers will continue to receive market-based pricing from any certified [CRES] provider they select.”²⁴

FirstEnergy finds itself arguing inconsistent positions. On the one hand, it has testified and stated in its brief that Rider RRS will not limit shopping. If FirstEnergy stated that Rider

²⁰ FirstEnergy Ex. 1 at 9. (Emphasis added.)

²¹ Tr. Vol. 1 at 39 (emphasis added). *See, also*, Tr. Vol. 1 at 108.

²² Tr. Vol. 2 at 342.

²³ FirstEnergy Ex. 154 at 18.

²⁴ FirstEnergy Initial Brief at 3.

RRS would limit shopping, then the damage arising from the limitation would have to be weighed by the Commission in both the MRO test and in judging whether Rider RRS is in the public interest. On the other hand, if the Rider RRS does, in fact, present no limitation or harm to shopping, then it cannot be authorized under R.C. 4928.143(B)(2)(d).

2. Rider RRS does not relate to bypassability or default service.

Next, FirstEnergy argues that Rider RRS relates to bypassability on the theory that because the rider is non-bypassable, it also relates to bypassability.²⁵ R.C. 4928.03 makes clear that generation is a competitive service and all competitive services are bypassable. To meet its burden, FirstEnergy would have to show that Rider RRS is either a wire service and thus not a competitive service, or as discussed above, it is a limitation on shopping that fits the limited authorization of R.C. 4928.143 (B)(2)(d). The argument that FirstEnergy makes is that since it has requested that Rider RRS be non-bypassable, Rider RRS is related to bypassability. Such an interpretation nullifies the statutory requirement as all a utility would have to do to meet the “related” test is to request bypassability. Such an interpretation is self-serving and unconvincing, and should be rejected on that basis.

Even accepting, as FirstEnergy argues, that Rider RRS does relate to bypassability because it is non-bypassable, Rider RRS still does not meet the language of the statute based on Commission precedent. The Commission has concluded that “relating to bypassability” alone is an *insufficient basis* upon which a rider like Rider RRS can meet R.C. 4928.143(B)(2)(d).²⁶ The Commission reached this conclusion because nearly any charge can be non-bypassable or

²⁵ FirstEnergy Initial Brief at 118.

²⁶ *In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143, in the Form of an Electric Security Plan*, Case Nos. 13-2385-EL-SSO et al., Opinion and Order at 22 (February 25, 2015) (“*AEP ESP III*”).

bypassable.²⁷ Bypassability would be met all the time, effectively rendering the other provisions of the statute meaningless. As a result, the Commission should either reject this claim as simply a self-serving argument, or reject this claim as being an insufficient basis for meeting the language of the statute.

Also, FirstEnergy contends that Rider RRS relates to default service (the Companies' proposed SSO) because this separate component of the customers' bills will have an impact on the overall bill (FirstEnergy claims it will have a rate-stabilizing effect and will mitigate/reduce the impact of SSO price increases).²⁸ The Commission also faced this same argument for the rider proposal in the *AEP ESP III* case. However, the Commission did not reach a conclusion as to that argument²⁹ and, thus it is an open question whether this type of rider can "relate to default service." The flaw with FirstEnergy's argument is that Rider RRS will have an equal effect on shopping customers who are not exposed to SSO pricing. Since both shopping and non-shopping customers alike and to the same degree will take on the risk that the Davis-Besse and Sammis power plants are profitable, it cannot be stated that Rider RRS is related to default service. Every FirstEnergy rate on its bills would "relate to default service" under this theory.

Despite FirstEnergy's contention, the record establishes that Rider RRS is separate and apart from FirstEnergy's default service and not related. It will be a distinct rider added to the ratepayers' bills; it will not be included in the SSO component of the bills. In the following

²⁷ *Id.*

²⁸ FirstEnergy Initial Brief at 119. FirstEnergy cannot claim with any level of confidence that Rider RRS will across-the-board have a rate-stabilizing effect and will mitigate/reduce the impact of SSO price increases – from 2016 through 2018, Rider RRS will be a charge to customers, based on FirstEnergy's own forecast. Sierra Club Ex. 89. For purposes of addressing this argument, however, RESA need not get into those details at this point because, fundamentally, Rider RRS is not related to FirstEnergy's default service.

²⁹ *AEP ESP III, supra*, Opinion and Order at 22.

exchange, FirstEnergy witness Mikkelsen testified clearly that Rider RRS will be separate from default service and not have any bearing on default service.³⁰

- Q. [Mr. Fisk] * * * Instead the companies' nonshopping customers would continue to receive their energy through a Standard Service Offer even if this proposed transaction were finalized; is that right?
- A. [Ms. Mikkelsen] The companies' nonshopping customers would continue to receive market-based generation that the company procures on their behalf through a competitive bid process.
- Q. Okay. And that would not change one way or the other if the proposed transaction were finalized; is that right?
- A. Yes.
- Q. Okay. And the -- and if the proposed transaction were finalized, that would not impact the price of the energy received by nonshopping customers under the standard service offer; is that right?
- A. The price that the SSO customers pay for the physical energy would not change * * *.

Ms. Mikkelsen also acknowledged that Rider RRS will not affect the companies' default service because they are not related:³¹

- Q. [Mr. Fisk] * * * Would the companies nonshopping customers continue to receive their energy through a standard service offer even if rider RRS were approved?

* * *

- A. [Ms. Mikkelsen] Yes, absent any change in the Commission-approved structure for providing service to customers who choose not to shop.
- Q. Okay. But under the current proposal -- application from the companies, there would be nonshopping customers who would

³⁰ Tr. Vol. 1 at 38.

³¹ Tr. Vol. 1 at 107-108.

continue to receive their energy through an SSO even if rider RRS were approved, correct?

A. The physical provision of energy and capacity to the nonshopping customers would occur through the competitive bid process and delivered to the SSO customers.

Q. Okay. And the companies' customers' ability to shop for their own energy service would remain unchanged, whether or not rider RRS were approved, correct?

A. Correct.

This evidence from FirstEnergy's witness confirms that Rider RRS is not related to the Companies' default service (the proposed SSO).

As a result, the Commission should find that this last aspect of R.C. 4928.143(B)(2)(d) has also not been met. Based on the evidence in the record, the first three grounds under which FirstEnergy claims that it has met R.C. 4928.143(B)(2)(d) do not apply.

B. Rider RRS will not have the effect of stabilizing or providing certainty regarding retail electric service under R.C. 4928.143(B)(2)(d).

FirstEnergy also argues that Rider RRS fits within R.C. 4928.143(B)(2)(d) because it will have the effect of stabilizing or providing certainty regarding retail electric service.³² Two theories are keys to this part of FirstEnergy's claim: (1) the Rider RRS rate will fluctuate in the opposite direction of wholesale market prices, providing customers a counter-cyclical hedge against the wholesale market volatility and (2) ratepayers will receive a \$561 million credit over the course of the eight-year period.³³

³² FirstEnergy Initial Brief at 120-122.

³³ FirstEnergy Ex. 13 at 4-5; Tr. Vol. 2 at 431.

FirstEnergy has sidestepped the following critical evidence, all of which demonstrates that Rider RRS will not have the effect of “stabilizing or providing certainty” throughout the ESP IV period:

- Rider RRS’ initial rate will be calculated based on projected costs and projected revenues, and that rate will remain in effect until adjusted, which will occur a year later, effective in the following June.³⁴ Until reconciled, Rider RRS would not fluctuate and cannot definitively be “counter-cyclical” of wholesale market prices the entire period that the rate is in effect. It is impossible to claim that for the entire first year Rider RRS will stabilize or provide certainty, based on these facts.
- When reconciled each year thereafter, the Rider RRS rate will again be based on projected costs and projected revenues, but also capture the amount that the prior rider rate had not recovered (the “off amount”) along with carrying costs.³⁵ Essentially, some portion of every reconciled Rider RRS rate will be picking up the historical off amount and carrying costs, but how much of the reconciled Rider RRS rates will be attributed to the historical off amount and carrying costs is unknown. In light of this evidence, it is not reasonable to assume (as FirstEnergy seems to do) that, throughout the rest of the ESP IV period, the reconciled Rider RRS rates will fluctuate in the opposite direction of wholesale market prices. It is again impossible to claim that the subsequent years will stabilize or

³⁴ FirstEnergy Ex. 43 at 3.

³⁵ FirstEnergy Ex. 43 at 4.

provide certainty, based on these facts about the reconciliation process. Instead, what is known is that the reconciled Rider RRS rates will not be fully based on the then-current market prices.

- FirstEnergy has projected that Rider RRS will be a charge to ratepayers in 2016, 2017 and 2018 – totaling \$155 million, \$175 million, and \$84 million, respectively.³⁶ During those years, FirstEnergy is effectively claiming that the imposition of the Rider RRS *charges* on its ratepayers will stabilize or provide certainty. That is nonsensical. No ratepayer is going to accept and this Commission should likewise not accept that additional charges under Rider RRS (somewhere between \$84 million and \$155 million) provides rate stability or provide certainty to the ratepayers, especially when the undisputed evidence also shows that ratepayers have arrangements in place for the purchase of their generation supply – many of whom are under fixed-priced CRES contracts and under the blended SSO rate.³⁷
- Turning attention to the other years of the ESP IV period, there is differing evidence as to the value of Rider RRS. FirstEnergy is predicting that the rider will be a credit to customers for the remainder of the ESP IV period.³⁸ Multiple expert witnesses have criticized FirstEnergy’s forecast for these other years, raising multiple arguments including that the FirstEnergy forecast is based on out-of-date data, and noting that the

³⁶ Sierra Club Ex. 89.

³⁷ Staff Ex. 12 at 8; P3/EPSA Ex. 1 at 40; Exelon Ex. 1 at 12-13.

³⁸ Sierra Club Ex. 89.

recent significant changes in energy prices play a significant role in the forecasting process.³⁹ New estimates reflect substantial charges to ratepayers are inevitable under Rider RRS.⁴⁰ This expert evidence is not only compelling, but also was not addressed or rebutted by FirstEnergy in its initial brief.⁴¹ It is logical to accept the other expert witnesses' criticisms given that, when implementing the rider rates after the first year, FirstEnergy itself will not rely on the forecast it presented in this proceeding. Instead, FirstEnergy will prepare new one-year forecasts prior to filing each annual reconciliation application.⁴² Altogether, the evidence of record establishes that FirstEnergy's forecast for the remaining years of the ESP IV should not be relied upon. For the remaining years, it is again impossible to claim that of Rider RRS will stabilize or provide certainty, based on these facts.

- Lastly, the record establishes that FirstEnergy's forecast does not take into account that capacity performance payments can be passed through to ratepayers via Rider RRS.⁴³ As explained in RESA's initial brief, these penalties could affect Rider RRS rates and they completely undermine any claim that Rider RRS will stabilize or provide certainty.

³⁹ P3/EP SA Ex.12 at 11-19; OCC/NOPEC Ex. 9 at 3-8; Sierra Club Ex. 95 at 2, 7-9.

⁴⁰ P3/EP SA Ex.12 at 17; OCC/NOPEC Ex. 9 at 3.

⁴¹ Although FirstEnergy argued its claim that Rider RRS will provide rate stability and certainty, it does not even address this testimony from the other witnesses in its initial brief. *See*, FirstEnergy Initial Brief at 22-24, and 120-122.

⁴² Tr. Vol. 18 at 3652.

⁴³ Tr. Vol. 36 at 7707-7715.

Altogether, the evidence in the record establishes, for multiple reasons, that FirstEnergy has not met its burden of proving that Rider RRS will have the effect of “stabilizing or providing certainty” throughout the ESP IV period. As a result, the Commission should find that Rider RRS does not satisfy R.C. 4928.143(B)(2)(d) and should be rejected.

C. Rider RRS is not authorized under R.C. 4928.143(B)(2)(i).

R.C. 4928.143(B)(2)(i) states an ESP may provide for or include:

Provisions under which the electric distribution utility may implement economic development, job retention, and energy efficiency programs, which provisions may allocate program costs across all classes of customers of the utility and those of electric distribution utilities in the same holding company system.

FirstEnergy is claiming that Rider RRS is permissible under R.C. 4928.143(B)(2)(i) because the rider “supports” economic development as the *credits* going to the ratepayers “will benefit Ohio’s economy and lead to job retention and creation.”⁴⁴ This argument is tied specifically to the rider credits that FirstEnergy is predicting for some of the ESP IV years. Rider RRS does not satisfy R.C. 4928.143(B)(2)(i).⁴⁵ Rider RRS was not presented to the Commission as an economic development program or arrangement for the ratepayers.⁴⁶ More importantly, the evidence demonstrates that Rider RRS is not an economic development program for the ratepayers – as noted earlier, Rider RRS will result in charges in the near term, and it is speculative that there will be any credits to ratepayers after that. Rider RRS will not result in the alleged rate stability and thus, not “support” economic development either. Regardless of whether it will be a charge or a credit, this is in fact an unavoidable rider that will vary with

⁴⁴ FirstEnergy Initial Brief at 122.

⁴⁵ AEP claimed that its proposed version of Rider RRS was permitted under R.C. 4928.143(B)(2)(i) in *AEP ESP III*, but the Commission did not rule on it. *AEP ESP III*, Opinion and Order at 10, 19-27.

⁴⁶ FirstEnergy has been very clear it is not seeking Commission approval of the power purchase agreement/transaction between it and FES. Tr. Vol. 3 at 636.

market conditions; it is not stable. Rider RRS is not an “economic development program” that falls under R.C. 4928.143(B)(2)(i).

IV. THE LEGACY COST COMPONENTS ARE AN INTENDED LOOPHOLE IN RIDER RRS, WHICH NEGATES MEANINGFUL COMMISSION OVERSIGHT

FirstEnergy’s Rider RRS proposal involves the netting of (a) all costs incurred under the transaction with FES, including so-called Legacy Cost Components; and (b) all revenues received by FirstEnergy as a result of selling the capacity, energy and ancillary services from OVEC, Davis-Besse and Sammis into the PJM markets.⁴⁷ FirstEnergy has proposed a two-part process for reviewing Rider RRS and even claims that it will be a rigorous review by the Commission.⁴⁸ However, that review will not include any review of the Legacy Cost Components because FirstEnergy has declared that “[a]pproval of this ESP IV shall be deemed as approval to recover all Legacy Cost Components through Rider RRS as not unreasonable costs.”⁴⁹ FirstEnergy witness Mikkelsen confirmed that the reasonableness of the Legacy Cost Components will not be reviewed at any point during the ESP IV when she testified: “[t]he second review would include the opportunity to audit the reasonableness of the actual costs excluding legacy cost components as well as the actual market revenues.”⁵⁰

Legacy Cost Components are defined by FirstEnergy as all FES “costs that arise from decisions or commitments made and contracts entered into prior to December 31, 2014, including any costs arising from provisions under such historic contracts that may be employed

⁴⁷ FirstEnergy Ex. 7 at 14. “Legacy Cost Components” was a term developed for this proceeding. Tr. Vol. 1 at 160.

⁴⁸ FirstEnergy Ex. 7 at 14-15; FirstEnergy Ex. 154 at 8; FirstEnergy Initial Brief at 73-76.

⁴⁹ FirstEnergy Ex. 7 at 14.

⁵⁰ Tr. Vol. 1 at 55. *See, also*, Tr. Vol. 1 at 79, 162; Tr. Vol. 3 at 518-519, 530, 539; Tr. Vol. 36 at 7622, 7703.

in the future.”⁵¹ Ms. Mikkelsen further explained the carve-out for the Legacy Cost Components in the following exchange:⁵²

- Q. [Mr. Fisk] And they are the future costs from those commitments and decisions that would arise during the term of rider RRS; is that right?
- A. [Ms. Mikkelsen] They are costs that would arise in the future from decisions made prior to December 31st of 2014.
- Q. Okay, great. And am I correct there is no limit on how far back the contracts that could lead to legacy cost components go?
- A. I’m not aware -- there is no timeframe associated with contracts from which legacy cost components could arise.
- Q. Okay. And there is no limit, am I correct, on the amount of legacy costs that may be included in rider RRS, assuming they arise from decisions, commitments, or contracts entered into prior to December 31, 2014?
- A. Correct.

In FirstEnergy’s view, the opportunity to review the reasonableness of the Legacy Cost Components is occurring only in this proceeding.⁵³ FirstEnergy, however, did not even present the Legacy Cost Components as part of its application even though it declared that “[a]pproval of this ESP IV shall be deemed as approval to recover all Legacy Cost Components.”⁵⁴ Notably, Ms. Mikkelsen admitted that it is difficult to know today what dollar amounts in the future will arise under the Legacy Cost Components.⁵⁵

There are multiple problems with this proposal. The first problem was made clear by FirstEnergy’s own evidence – the Commission is left, based on the record before it, with no way

⁵¹ FirstEnergy Ex. 7 at 14; Tr. Vol. 1 at 161.

⁵² Tr. Vol. 1 at 87-88.

⁵³ Tr. Vol. 1 at 93, 162; Tr. Vol. 3 at 520; Sierra Club Ex. 27.

⁵⁴ FirstEnergy provided some general information regarding Legacy Cost Components via discovery. *See, e.g.*, Tr. Vol. 8 at 1605-1608; Tr. 9 at 1824-1853; Tr. Vol. 14 at 2947; Sierra Club Exs. 26, 27, 37-40.

⁵⁵ Tr. Vol. 1 at 89. *See, also*, Sierra Club Ex. 40 at 1.

of knowing what those future Legacy Cost Component costs will actually be and yet the Commission is being asked to deem them reasonable today for full recovery in the eight-year ESP IV. This is essentially a black box, without any justification. The Ohio Supreme Court has questioned whether the law permits the Commission to increase rates without first reviewing the reasonableness and lawfulness of the rates themselves.⁵⁶ This loophole for the Legacy Cost Components is just such a situation, and it is not just and reasonable to approve the unknown. A second problem is that the Commission is being asked to not review the reasonableness of those unknown costs for an eight-year period. The Companies will get a multi-year “pass” for the Legacy Cost Components. The Commission should not determine today that, based on this inadequate record, those unknown, future costs are reasonable for recovery for eight years and are not subject to any reasonableness review. Third, with such a clear loophole, the Commission cannot find that the proposed review process for Rider RRS constitutes a “rigorous review” that satisfies the Commission’s PPA requirements as set forth in the *AEP ESP III* decision.⁵⁷

Finally, the effect of the Legacy Cost Component provision of the ESP IV is nothing short of a losing proposition for the ratepayers whether Rider RRS is a charge or a credit. If the costs under the transaction exceed the revenues from the sales into the PJM markets, the ratepayers will pay those Legacy Cost Components that remain after the netting. If the revenues from the sales into the PJM markets exceed the costs under the transaction, the ratepayers will not receive as much of a credit because the Legacy Cost Components will reduce the credit amount. Putting aside the fact that FES business decisions in running these plants has resulted in

⁵⁶ *In re Application of Columbus S. Power Co.*, 129 Ohio St. 3d 271, 2011-Ohio-2638 (2011).

⁵⁷ *AEP ESP III*, *supra*, Opinion and Order at 25-26.

them needing a bailout, under either scenario, the ratepayers are burdened with the Legacy Cost Components of FES.

As a result, the Commission should reject the request to allow approval of this ESP IV to be “deemed as approval to recover all Legacy Cost Components through Rider RRS as not unreasonable costs.” Simply put, this is not just, reasonable, or beneficial.

V. RIDER RRS WILL HARM THE COMPETITIVE MARKET

FirstEnergy claims that Rider RRS and the stipulated ESP IV will promote the competitive marketplace,⁵⁸ but FirstEnergy is plainly wrong and the weight of the evidence is compelling on this point. As the Independent Market Monitor (“IMM”) explained in recommending that Rider RRS be rejected, the rider (a) shifts costs and risks from shareholders to customers, (b) removes FirstEnergy’s incentives to make competitive offers in the PJM capacity market and (c) provides FirstEnergy with incentives to make offers below the competitive level in the PJM capacity market.⁵⁹ He added that, with the new capacity performance product, Rider RRS will have the customer pay penalties; the shareholders and management will not have the same incentives to manage performance of those plants, which is an additional reason to reject Rider RRS.⁶⁰ These effects of Rider RRS will put FES in a unique position in the marketplace.

Dynergy witness Ellis similarly testified that Rider RRS distorts the markets by assuring benefits to one market participant (FES) and putting other market participants (including Dynergy) at a competitive disadvantage.⁶¹ Similar to the IMM, Mr. Ellis stated that the potential

⁵⁸ FirstEnergy Initial Brief at 147.

⁵⁹ IMM Ex. 2 at 2, 3.

⁶⁰ IMM Ex. 2 at 4.

⁶¹ Dynergy Ex. 1 at 4-5.

for capacity performance penalties to be passed onto the ratepayers puts all the other merchant generators (market participants) at a significant disadvantage.⁶²

P3/EPISA witness Kalt stated that the ESP IV will depress prices in the wholesale market, benefit inefficient producers at the expense of the more efficient ones, and crowd out new and existing suppliers.⁶³ RESA witness Bennett the stipulated ESP IV is anticompetitive because it permits FES to compete in the wholesale market without risk of loss, whereas new market entrants and existing asset owners will have competitive market risks trying to compete against generation units without any competitive market risk.⁶⁴

Multiple market observers and participants have presented detailed analyses of the competitive impact of Rider RRS. This evidence is compelling and should be accepted.

VI. THE STIPULATED ESP IV IS NOT AN ENHANCEMENT TO THE RETAIL MARKET IN OHIO AND THUS CANNOT BE APPROVED AS PROPOSED

FirstEnergy claims not only that nothing in the stipulated ESP IV will prohibit or hinder competition; rather, the stipulated ESP IV will provide multiple retail market enhancements to support development of the competitive retail market.⁶⁵ FirstEnergy cites several specific provisions of its ESP IV proposal. However, a careful review of what FirstEnergy is proposing reveals that, in reality, FirstEnergy has not proposed a host of retail market enhancements.

A. Proposed changes to FirstEnergy's tariff are not true enhancements.

FirstEnergy proposes to change the language in its tariff in five respects that it claims are retail market enhancements. First, the Companies propose to remove the minimum stay provisions in the electric service regulations. The minimum stay required customers who

⁶² *Id.* at 9.

⁶³ P3/EPISA Ex. 1 at 8, 29-33.

⁶⁴ RESA Ex. 6 at 4-5.

⁶⁵ FirstEnergy Initial Brief at 104-106, 147.

returned to FirstEnergy's SSO to remain an SSO customer for specified period of time.⁶⁶ On its face, removal of this tariff language seems to be a good thing for the competitive market. However, FirstEnergy has not been requiring the minimum stay for quite some time⁶⁷ and as a result, the removal of the language is simply a house-keeping action on the part of the Companies. Second, FirstEnergy proposes to remove from the electric service regulations the minimum notice for returning customers. These tariff provisions required certain customers to notify FirstEnergy in writing one to six months in advance of returning to the Companies' SSO.⁶⁸ Again, removal of this barrier to shopping would seem to be a good thing for the competitive market. However, FirstEnergy has not been requiring the minimum notice for returning customers for quite some time⁶⁹ and as a result, the removal of the language is another house-keeping action on the part of the Companies. Third, FirstEnergy proposes to remove time requirements for selecting a new CRES provider.⁷⁰ This tariff language is again an example of tariff language that has not been imposed by FirstEnergy⁷¹ and thus its removal is not actually an enhancement of the retail market. The enhancement took place when FirstEnergy stopped implementing these tariff provisions.

Fourth, FirstEnergy argues that its decision to update in the supplier coordination tariff the information that will be on the Customer Information List is an enhancement to the retail market. The Companies' Customer Information List currently contains 19 items.⁷² A review of the update reveals that mostly the updates are just wording clarifications – e.g., spelling out

⁶⁶ FirstEnergy Ex. 1 at Attachment 3, page 15 of 25.

⁶⁷ Tr. Vol. 5 at 1059. (FirstEnergy witness Smialek testified that the minimum stay has not been required but she did not know when FirstEnergy stopped imposing it.)

⁶⁸ FirstEnergy Ex. 1 at Attachment 3, pages 15-16 of 25.

⁶⁹ Tr. Vol. 5 at 1059. (FirstEnergy witness Smialek testified that the minimum notice has not been required but she did not know when FirstEnergy stopped imposing it.)

⁷⁰ FirstEnergy Ex. 1 at Attachment 3 at page 15 of 25.

⁷¹ Tr. Vol. 5 at 1060.

⁷² FirstEnergy Ex. 1 at Attachment 5, page 15 of 52.

acronyms, which is not an enhancement. While FirstEnergy did add to the list the meter number, service voltage and net metering indicator, the Commission's rules require the Customer Information List to include the net metering indicator⁷³ and FirstEnergy agreed in two prior ESP stipulations to provide the meter numbers to CRES providers.⁷⁴ Thus, only adding the service voltage is truly a new update. While it is certainly helpful to have the service voltage on the Customer Information List, that addition does not constitute an enhancement to the retail market.

Lastly, FirstEnergy has added the following provision in the supplier coordination tariff regarding placement by a CRES provider of its logos on the Companies' consolidated bills.⁷⁵

As set forth in the Commission Order in Case No. 12-3151-EL-COI, if a Certified Supplier has requested the Company to act as the Certified Supplier's billing agent and issue a consolidated bill, the Company must allow for the inclusion of Certified Supplier logos on the bill. Certified Suppliers electing to have the Company include their logo on the Company issued consolidated bill shall comply with the applicable process and procedures as provided on the Company website.

Like the four others described above, this tariff change is not an enhancement by FirstEnergy. The Commission required nearly two years ago (in March 2014)⁷⁶ that FirstEnergy include CRES logos on the consolidated bills. At that time, FirstEnergy was required to make the necessary changes and propose a new bill format to accomplish it. This additional language in FirstEnergy's tariff is not an enhancement because the obligation has existed. FirstEnergy has been subject to the CRES logo requirement and has simply avoided it by making the CRES logo

⁷³ Rule 4901:1-10-29(E), Ohio Administrative Code.

⁷⁴ *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to R.C. §4928.143 in the Form of an Electric Security Plan*, Case No. 10-388-EL-SSO, Stipulation and Recommendation at 43; *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. 12-1230-EL-SSO, Stipulation and Recommendation at 52.

⁷⁵ FirstEnergy Ex. 1 at Attachment 5, page 22 of 52.

⁷⁶ *In the Matter of the Commission's Investigation of Ohio's Retail Electric Service Market*, Case No. 12-3151-EL-COI, Finding and Order at 30-31 (March 26, 2014).

part of its ESP proposal. As RESA argued in its Initial Brief,⁷⁷ the CRES logo should be implemented immediately.

B. FirstEnergy’s commitment to a web-based supplier portal to provide customer information to CRES providers is a natural improvement over the existing web-based system, not a retail market enhancement.

FirstEnergy’s ESP IV application includes a web-based supplier portal to provide customer information to CRES providers.⁷⁸ FirstEnergy argues that its commitment to develop and implement a web-based system to provide customer information to CRES providers is a “retail market enhancement.”⁷⁹

First and foremost, RESA agrees and supports the supplier portal proposed by FirstEnergy in this proceeding.⁸⁰ RESA has advocated for secure supplier portals for years. However, this proposal is not a grandiose market enhancement as FirstEnergy portends because FirstEnergy already provides electronic access to much of the information and because the proposed improvement is a natural progression of electronic systems. FirstEnergy witness Smialek explained that, currently, CRES providers have electronic access to customer information.⁸¹ This is because FirstEnergy agreed years ago to provide data access via three mechanisms: (a) electronic data interchange (“EDI”) information; (b) a sync list; and (c) a web-based system.⁸² The web-based system agreed upon was quite detailed:⁸³

Web-based system that provides electronic access to key customer usage and account data that can be accessed via a supplier website that is updated quarterly and that presents data and information including:

⁷⁷ RESA Initial Brief at 2, 15-16.

⁷⁸ FirstEnergy Ex. 1 at 19.

⁷⁹ FirstEnergy Ex. 15 at 6; FirstEnergy Initial Brief at 105.

⁸⁰ RESA Ex. 2 at 19.

⁸¹ FirstEnergy Ex. 15 at 5.

⁸² *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to R.C. §4928.143 in the Form of an Electric Security Plan*, Case No. 10-388-EL-SSO, Stipulation and Recommendation at 30 and 43.

⁸³ *Id.* at 43.

account numbers, meter numbers, names, service addresses, and billing addresses including zip codes, email addresses, meter read cycle dates, meter types, interval meter flags, rate code indicators, load profile group indicators, PLC values (capacity obligations), 24 months of consumption data in kWh by billing period including on-peak and off-peak data; 24 months of demand data (in kW) by billing period; 24 months of interval data; default service indicators (if on default service); minimum stay dates (if applicable); and identifiers of whether customers are participating in budget plans.

FirstEnergy agreed to continue providing that web-based system in its last ESP proceeding.⁸⁴ At this time, FirstEnergy states that, through the supplier portal, it will make that information available “real time” (current as of the latest meter read, as opposed to being updated on a quarterly basis) and will include the EDI enrollment information.⁸⁵ The change does not appear significant based on what already exists. In addition, the change is not significant as reflected by the cost – FirstEnergy estimates that the cost of the change is only \$210,000.⁸⁶ Again, RESA considers this proposal to be a desired improvement and likely a natural progression of the Companies’ electronic system capabilities. In light of the evidence of record regarding this proposal, however, the supplier portal does not amount, to a retail market enhancement.

C. Referencing the partial payment priority on the FirstEnergy website is not a retail market enhancement.

FirstEnergy next claims, as a retail market enhancement, its proposed addition to the companies’ website of a reference to information related to partial payment priority.⁸⁷ Ms. Smialek presented testimony on this point, stating only that FirstEnergy would add “a reference

⁸⁴ *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. 12-1230-EL-SSO, Stipulation and Recommendation at 52.

⁸⁵ FirstEnergy Ex. 15 at 6; Tr. Vol. 5 at 1049-1050.

⁸⁶ Tr. Vol. 5 at 1037.

⁸⁷ FirstEnergy Initial Brief at 105.

to the Companies' website for information related to partial payment priority.”⁸⁸ She did not describe the partial payment priority reference to be included on the website, describe its location, or include the proposed text. As a result, the record does not have *any* of the key details upon which to really evaluate this change. Even assuming that the reference will be properly placed on the website (i.e., not buried under multiple layers) and will contain clear and concise information for the viewer, this reference nonetheless will only provide information to the public. Nothing about this proposal amounts to an enhancement of the retail market.

D. The credible evidence demonstrates that the stipulated ESP IV will not enhance the retail market in Ohio.

With all of the reasons cited by FirstEnergy not truly amounting to retail market enhancements, the remaining evidence in this case demonstrates that the ESP IV will not enhance the retail market in Ohio. Instead, the Ohio retail market will be harmed. First, as RESA witness Bennett explained, the Stipulation and ESP IV will negatively impact the retail market by giving FES a competitive advantage over other CRES providers.⁸⁹

Another negative implication of the Stipulation that may impact the retail market stems from the subsidy aspect of Rider RRS. As a subsidy, Rider RRS has the potential to skew wholesale prices and incentivize irrational market behavior. For example, the Rider RRS subsidy could create a situation in which FES, with a guaranteed recovery of costs and return on its PPA Units, could manage its remaining generation in a manner that belies proper market behavior and outcomes. Additionally, the Rider RRS subsidy will put FE Ohio in the situation in which it will need to offer the generation output of the PPA Units without any direct financial incentives to do so. Finally, although the intent of the Stipulation is to have FE sell the output [from] the PPA Units into the PJM real time and day ahead markets, there is not a distinct prohibition on making a bilateral sale. If FE Ohio could enter into bilateral contracts, then it can provide generation at unfair, out-of-market pricing. Theoretically, FE Ohio could sell the

⁸⁸ FirstEnergy Ex. 15 at 11.

⁸⁹ RESA Ex. 6 at 5-6.

generation output to an affiliate at prices that would allow the affiliate to undercut CRES providers anywhere in the PJM footprint.

Rider RRS will act as a barrier to retail market participants who must compete against a subsidized FES.

Second, Rider RRS will alter the customers' decisions about their generation service – the amount for the generation and from whom they purchase generation. Exelon witness Campbell pointed out that Rider RRS will “un-fix” the fixed-price CRES contracts offered to shopping customers and will “un-fix” the SSO rate applicable to non-shopping customers, thus making the customers subject to variable price risks.⁹⁰ The addition of Rider RRS' separate generation-related charges (or credits) unquestionably will affect the overall amount paid by the customers for generation. Moreover, the addition of Rider RRS' separate generation-related charges will “un-do” the customers' decisions to purchase their generation from a particular CRES supplier or from the SSO because the customers will also be forced to pay for FES' generation.

Lastly, as pointed out by numerous witnesses and even acknowledged by FirstEnergy, customers will be subject to increased costs with Rider RRS and the Stipulation.⁹¹ For several years, FirstEnergy predicts that the increased costs from Rider RRS will be \$414 million.⁹² The retail market does not benefit by being forced to incur millions in extra costs just so that one market participant (FES) can avoid its own market risks.

⁹⁰ Exelon Ex. 1 at 12-13.

⁹¹ There is extensive debate as to the amount of that extra cost over the proposed eight-year term of the ESP IV. For purposes of this argument that amount is irrelevant because the admitted fact is that customer will incur extra costs with the ESP IV.

⁹² Sierra Club Ex. 89 (Rider RRS forecasted charge in 2016-2018 equals \$155 million plus \$175 million plus \$84 million).

VII. CONCLUSION

For all of the foregoing legal and policy arguments, Rider RRS should be rejected and the Stipulation in this matter be modified.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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