**BEFORE**
**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| **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** |

# SIERRA CLUB'S APPLICATION FOR REHEARING

Pursuant to R.C. 4903.10 and O.A.C. 4901-1-35, Sierra Club respectfully submits this Application for Rehearing of the March 31, 2016 Opinion and Order ("Order") approving an Electric Security Plan ("ESP") for the Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, "FirstEnergy" or "Companies") issued by the Public Utilities Commission of Ohio ("Commission"). As demonstrated in the accompanying Memorandum in Support, the Order is unlawful and unreasonable for at least the following reasons:

1. The Order unlawfully holds that Rider RRS is authorized under R.C. 4928.143(B)(2)(d) even though:
    - Rider RRS does not relate to "limitations on customer shopping"
    - Rider RRS does not impact "retail electric generation service"
    - Rider RRS would not "have the effect of stabilizing or providing certainty regarding retail electric service."

2. The Order is unlawful and unreasonable because FirstEnergy failed to meet its burden of demonstrating that Rider RRS is a limitation on customer shopping, and the Commission's finding that the Rider is a limitation on customer shopping is against the manifest weight of the evidence.

3. To the extent that the Order approved Rider RRS pursuant to R.C. 4928.143(B)(2)(i), it is unlawful and unreasonable because Rider RRS does not implement any jobs or economic development programs.

4. The Order is unlawful and unreasonable because it failed to hold FirstEnergy to the burden of proof in the ESP IV proceeding as required by R.C. 4928.143(C)(1) and O.A.C. 4901:1-35-06(A).

5. The Order is unlawful and unreasonable because on multiple issues the Commission failed to satisfy its duty under R.C. 4903.09 to:
   - Set forth the reasoning followed by the Commission in reaching a decision
   - Support its decision with appropriate evidence
   - Respond to contrary positions

6. The Order is unlawful and unreasonable because the Commission held that Rider RRS would provide a net benefit to customers and be in the public interest even though: (i) FirstEnergy failed to satisfy its burden of proving that Rider RRS would provide a net benefit to customers; (ii) the Commission relied on forecasts and a projection that were unreliable, outdated, and already proven wrong; (iii) the Commission arbitrarily failed to give any weight to other projections in the record showing that customers would lose money under Rider RRS; and (iv) the Commission relied on a finding that Rider RRS would provide a net credit to customers of $256 million that is unreasonable and against the manifest weight of the evidence.

7. The Order is unlawful and unreasonable because the Commission disregarded that FirstEnergy – not intervenors – bears the burden of proof of demonstrating that Rider RRS is "just and reasonable," and that customers would, in fact, sufficiently benefit from Rider RRS.

8. The Order is unlawful and unreasonable because (i) there is no evidence, and the Commission made no finding, that customers would face any retail rate volatility in the absence of Rider RRS; (ii) FirstEnergy failed to meet its burden of demonstrating that Rider RRS would "have the effect of stabilizing or providing certainty regarding retail electric service," and (iii) the Commission's finding that Rider RRS would have such an effect is against the manifest weight of the evidence.

9. The Order is unlawful and unreasonable because the Commission approved the recovery of "legacy cost components" through Rider RRS, despite (i) FirstEnergy's failure to carry its burden of demonstrating that recovery of such costs is just and reasonable; (ii) the Commission's failure to review or evaluate the potential financial impact of its approval of FirstEnergy's legacy cost components; and (iii) the Commission's failure to address the deficiencies of this proposal, which were identified in briefing submitted by Sierra Club.

10. The Order is unlawful and unreasonable because the Commission credited Rider RRS with various benefits of continued operation of the Sammis and Davis-Besse plants even though: (i) there is no evidence in the record that the plants would shut down without Rider RRS, (ii) FirstEnergy's own projections show that the

plants would not shut down if Rider RRS were rejected, and (iii) FirstEnergy did not satisfy its burden of proving that the plants would shut down without Rider RRS.

11. The Order is unlawful and unreasonable in holding that ESP IV is more favorable than a market rate offer, as the Commission failed to find (i) any credible evidence that customers would receive a net benefit over the life of Rider RRS, and (ii) disregarded that FirstEnergy bears the burden of proving that the ESP is more favorable than market rate offer service.

For the reasons set forth in the accompanying memorandum, Sierra Club respectfully requests that the Commission grant this Application for Rehearing.

April 29, 2016

Respectfully submitted,

s/ Shannon Fisk

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| **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** |

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**MEMORANDUM IN SUPPORT**
**OF SIERRA CLUB'S APPLICATION FOR REHEARING**

***Public Version***

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On March 31, 2016, the Commission approved the Third Supplemental Stipulation[1] in this proceeding, which sets forth an Electric Security Plan ("ESP") for the Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, "FirstEnergy" or "Companies"). The core element of the ESP is the so-called Retail Rate Stability Rider ("Rider RRS"), under which the Companies' customers would, for eight years, incur charges or receive credits reflecting the results of a separate transaction between FirstEnergy and its merchant affiliate, FirstEnergy Solutions Corp. ("FES"). Under that transaction, FirstEnergy would pay all of the costs (including a 10.38% return on equity) of certain FES power plants[2] in exchange for the energy, capacity, and ancillary services from those plants. FirstEnergy would then sell the energy, capacity, and ancillary services into the PJM wholesale market, and pass on to customers the difference between the costs incurred and revenues received through the transaction with FES. The net effect of Rider RRS and the related transaction is that FES would be made whole for all of the costs of Sammis, Davis-Besse, and the OVEC entitlement (and would also receive a locked-in return on equity for Sammis and Davis-Besse), while FirstEnergy's customers would bear virtually all of the financial risks that these plants will lose money in the market.

Rehearing is necessary because the Commission's Order is unlawful and unreasonable. Simply put, the governing law and the facts of this case do not, and cannot, justify forcing customers to assume the risks of merchant generation while guaranteeing FES and its shareholders all of their costs and a rate of return. We identify and explain the specific grounds

[1] Because this memorandum does not discuss any previous stipulations that were filed in this case, any mention of the "Stipulation" in either the text or footnotes is referring to the Third Supplemental Stipulation, admitted as Co. Ex. 154.

[2] The FES plants at issue are the W.H. Sammis coal plant, the Davis-Besse nuclear plant, and the "OVEC entitlement," which is FES's 4.85% interest in the Kyger Creek and Clifty Creek coal plants.

for rehearing in the sections below. Following, however, is a summary of four key areas where the Commission's Order is contrary to law and the record.

First, in approving Rider RRS, the Commission arbitrarily relied on FirstEnergy's forecasts of energy, natural gas, and capacity prices without addressing the fact that those forecasts, which were developed in mid-2014, are outdated, already proven to be wrong, and are from a consultant who has a long track record of faulty forecasts. In reality, with energy prices at least 15% lower, and natural gas prices more than 30% lower than what FirstEnergy projected – both of which are facts that the Commission fails to even acknowledge – the manifest weight of the evidence in the record shows that customers will almost certainly lose far more in the first 31 months of Rider RRS than the $363 million loss that FirstEnergy projected. And while the Commission notes that prices will likely increase in the future, it has provided no basis to conclude that prices will reach the lofty heights projected by FirstEnergy that would be needed for customers to avoid losing money over the full eight-year term of Rider RRS. For these reasons, and the reasons stated below, the Commission's reliance on FirstEnergy's forecasts was unreasonable and contrary to manifest weight of the evidence.

Second, the Commission held that Rider RRS is legal on the grounds that it constitutes a "limitation[] on customer shopping for retail electric generation service." R.C. 4928.143(B)(2)(d). Yet Rider RRS has nothing to do with "retail electric generation service," as none of the energy or capacity that the Companies would obtain from the FES plants would provide retail service to customers. Instead, that energy and capacity would be sold into the wholesale market. In addition, the record is undisputed that Rider RRS would in no way impact FirstEnergy's customers' ability to shop for generation or the cost at which such shopping occurs and, therefore, cannot be considered a "limitation" on customer shopping under any reasonable

definition of that word. The Commission's Order is silent on the first point and offers a response on the second point that is wholly inconsistent with the statutory language of R.C. 4928.143(B)(2)(d).

Third, the Commission accepted FirstEnergy's claim that Rider RRS would serve as a countercyclical hedge against purportedly volatile energy prices in order to conclude that Rider RRS would, "in theory," have the "effect of stabilizing or providing certainty regarding retail electric service."[3] But, again, Rider RRS has no connection to retail electric service and would in no way change the price that customers pay for such service. In addition, the Commission did not make any finding that retail prices will actually be volatile during the term of Rider RRS. And the Commission failed to acknowledge, much less address, the fact that Rider RRS would have [redacted] during the two years – 2014 and 2015 – that FirstEnergy points to as a period of rate volatility. As such, the Commission has provided no basis upon which to conclude that retail electric service is unstable and uncertain or, even if it were, that Rider RRS would have the effect of stabilizing or providing certainty to such service. Accordingly, the Commission's findings are unlawful, unreasonable, and against the manifest weight of the evidence.

Fourth, the Commission attributed to Rider RRS resource diversity, economic development, and transmission benefits from avoiding the premature retirement of the Sammis and Davis-Besse plants. This finding was unreasonable and against the manifest weight of the evidence. While the Commission claims that "[t]he evidence demonstrates that both plants are at a serious risk of closure,"[4] the record actually shows the exact opposite. Moreover, the

[3] Case No. 14-1297-EL-SSO, Opinion and Order (hereinafter, "Order" or "ESP IV Order") at 109 (Mar. 31, 2016).

[4] *Id.* at 99.

Commission never addressed the fact that no witness for FirstEnergy was willing to testify that the plants would retire, or that FirstEnergy's own data and testimony demonstrates that they would not. Because the record demonstrates that Sammis and Davis-Besse would not retire even if Rider RRS were rejected, the Commission erred in attributing to Rider RRS any benefits from the continued operation of Sammis or Davis-Besse.

In summary, the Commission relied on demonstrably inaccurate and unreliable forecasts to approve an illegal rider, which will likely cost customers hundreds of millions of dollars or more, in order to avoid plant retirements that would not occur, address retail price volatility that has not been found to exist, and that Rider RRS would not mitigate. As such, the Commission's March 31, 2016 Order approving Rider RRS is "unjust and unwarranted," and rehearing should be granted so that the Commission can abrogate its unreasonable and unlawful approval. R.C. 4903.10(B); O.A.C. 4901-1-35.

## I. Grounds for Rehearing

The Order approving Rider RRS is unlawful and unreasonable for at least the following reasons:

1. The Order unlawfully holds that Rider RRS is authorized under R.C. 4928.143(B)(2)(d) even though:
    - Rider RRS does not relate to "limitations on customer shopping"
    - Rider RRS does not impact "retail electric generation service"
    - Rider RRS would not "have the effect of stabilizing or providing certainty regarding retail electric service."
2. The Order is unlawful and unreasonable because FirstEnergy failed to meet its burden of demonstrating that Rider RRS is a limitation on customer shopping, and the Commission's finding that the Rider is a limitation on customer shopping is against the manifest weight of the evidence.
3. To the extent that the Order approved Rider RRS pursuant to R.C. 4928.143(B)(2)(i), it is unlawful and unreasonable because Rider RRS does not implement any jobs or economic development programs.

4. The Order is unlawful and unreasonable because it failed to hold FirstEnergy to the burden of proof in the ESP IV proceeding as required by R.C. 4928.143(C)(1) and O.A.C. 4901:1-35-06(A).

5. The Order is unlawful and unreasonable because on multiple issues the Commission failed to satisfy its duty under R.C. 4903.09 to:
   - Set forth the reasoning followed by the Commission in reaching a decision
   - Support its decision with appropriate evidence
   - Respond to contrary positions

6. The Order is unlawful and unreasonable because the Commission held that Rider RRS would provide a net benefit to customers and be in the public interest even though: (i) FirstEnergy failed to satisfy its burden of proving that Rider RRS would provide a net benefit to customers; (ii) the Commission relied on forecasts and a projection that were unreliable, outdated, and already proven wrong; (iii) the Commission arbitrarily failed to give any weight to other projections in the record showing that customers would lose money under Rider RRS; and (iv) the Commission relied on a finding that Rider RRS would provide a net credit to customers of $256 million that is unreasonable and against the manifest weight of the evidence.

7. The Order is unlawful and unreasonable because the Commission disregarded that FirstEnergy – not intervenors – bears the burden of proof of demonstrating that Rider RRS is "just and reasonable," and that customers would, in fact, sufficiently benefit from Rider RRS.

8. The Order is unlawful and unreasonable because (i) there is no evidence, and the Commission made no finding, that customers would face any retail rate volatility in the absence of Rider RRS; (ii) FirstEnergy failed to meet its burden of demonstrating that Rider RRS would "have the effect of stabilizing or providing certainty regarding retail electric service," and (iii) the Commission's finding that Rider RRS would have such an effect is against the manifest weight of the evidence.

9. The Order is unlawful and unreasonable because the Commission approved the recovery of "legacy cost components" through Rider RRS, despite (i) FirstEnergy's failure to carry its burden of demonstrating that recovery of such costs is just and reasonable; (ii) the Commission's failure to review or evaluate the potential financial impact of its approval of FirstEnergy's legacy cost components; and (iii) the Commission's failure to address the deficiencies of this proposal, which were identified in briefing submitted by Sierra Club.

10. The Order is unlawful and unreasonable because the Commission credited Rider RRS with various benefits of continued operation of the Sammis and Davis-Besse plants even though: (i) there is no evidence in the record that the plants would shut down without Rider RRS, (ii) FirstEnergy's own projections show that the

plants would not shut down if Rider RRS were rejected, and (iii) FirstEnergy did not satisfy its burden of proving that the plants would shut down without Rider RRS.

11. The Order is unlawful and unreasonable in holding that ESP IV is more favorable than a market rate offer, as the Commission failed to find (i) any credible evidence that customers would receive a net benefit over the life of Rider RRS, and (ii) disregarded that FirstEnergy bears the burden of proving that the ESP is more favorable than market rate offer service.

Because the Commission's Order is unreasonable and unlawful, Sierra Club respectfully requests rehearing so that the Order can be modified to rescind approval of Rider RRS.

## II. The Commission's Order is Unlawful and Unreasonable Because Rider RRS Cannot be Authorized Under Ohio Law.

In its post-hearing briefs, Sierra Club explained that Rider RRS must be rejected because it is not authorized by R.C. 4928.143.[5] As the Ohio Supreme Court has held, a proposed rider cannot be approved as part of an ESP unless it falls within one of the enumerated categories set forth in R.C. 4928.143(B)(2).[6] Because Rider RRS does not fall within any of these categories, and is therefore legally impermissible, the Commission's approval of Rider RRS in the ESP IV Order is unlawful and unreasonable.[7]

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[5] *See generally* Initial Post-Hearing Brief of the Sierra Club ("SC Br.") at 5-12; Post-Hearing Reply Brief of the Sierra Club ("SC Reply") at 3-17.

[6] *See, e.g.*, *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 33.

The Commission's Order did not address whether Rider RRS could be approved under R.C. 4928.143(B)(1), and with good reason. As Sierra Club has explained, Rider RRS cannot be approved under (B)(1). *See* SC Br. at 9 n.33.

[7] Because Rider RRS is legally impermissible, the rider, which was included in the Stipulation at Section V.B, necessarily violates an "important regulatory principle." Order at 100.

In its Order, the Commission brushed aside these arguments, finding – incorrectly – that Rider RRS could be approved under R.C. 4928.143(B)(2)(d) or (B)(2)(i).[8] For the reasons explained in Sierra Club's post-hearing briefs, and as further explained below, the Commission's approval of Rider RRS is contrary to R.C. 4928.143 and is not authorized by any of the statutory provisions that the Companies rely on. To comply with Ohio law, Rider RRS must be removed from ESP IV and the Commission must rescind its approval of that rider.

### A. Rider RRS is not permissible under R.C. 4928.143(B)(2)(d).

The ESP IV Order is unlawful because Rider RRS cannot be approved under R.C. 4928.143(B)(2)(d). Under this provision, "terms, conditions, or charges" can be legally permissible under an ESP if they satisfy two threshold requirements: First, those terms, conditions, or charges must relate to "limitations on customer shopping for retail electric generation service."[9] Second, the terms, conditions, or charges must "have the effect of stabilizing or providing certainty regarding retail electric service."[10]

Here, Rider RRS satisfies neither of these requirements as it does not limit customer shopping in any way, is entirely unrelated to retail electric service, and would not have the effect of stabilizing or providing certainty to customer bills. Consequently, the rider cannot be authorized under 4928.143(B)(2)(d), and the Commission's approval of the rider is unlawful and unreasonable.

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[8] *Id.* at 107-10. As discussed *infra* in Section II.B, the Commission's ultimate holding as to R.C. 4928.143(B)(2)(i) is somewhat unclear. To the extent the Commission has authorized Rider RRS based on this provision, however, that decision was unlawful.

[9] R.C. 4928.143(B)(2)(d). FirstEnergy implicitly conceded that the other provisions of (B)(2)(d) – *i.e.*, those relating to "standby, back-up, or supplemental power service, . . . carrying costs, amortization periods, and accounting or deferrals, including future recovery of such deferrals" – do not apply to Rider RRS.

[10] *Id.*

### 1. Rider RRS is not related to "limitations on customer shopping for retail electric generation service."

In its post-hearing briefs, FirstEnergy tried to justify the legality of Rider RRS by variously arguing that the rider "operates as a financial limitation on the consequences of customer shopping," "relates to bypassability," and "relates to default service."[11] The Commission's Order rightly rejects FirstEnergy's bypassability argument, noting 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)."[12] And the Commission declined to address FirstEnergy's argument that the rider relates to default service.[13] The Commission erred, however, in concluding that Rider RRS can be authorized under R.C. 4928.143(B)(2)(d) as "a financial limitation on customer shopping for retail electric generation service."[14]

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[11] *See* Post-Hearing Brief of Companies ("Co. Br.") at 117-20; *see also* Post-Hearing Reply Brief of Companies ("Co. Reply") at 268-75.

[12] Order at 108-09 (citing *In re Ohio Power Co.*, Case No. 13-2385-EL-SSO, et al., Opinion and Order, at 22 (Feb. 25, 2015) (hereinafter, "AEP ESP III Order")). In its discussion of bypassability, the Commission did err in claiming that "both shopping and [standard service offer ("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 [competitive retail electric service ("CRES")] provider or the SSO." *Id.* at 108. This statement is wrong because (i) Rider RRS has nothing to do with retail electric service, (ii) there is no evidence in the record that customers will face retail price volatility in the absence of Rider RRS, and (iii) the manifest weight of the evidence shows that Rider RRS will not have a stabilizing effect on retail prices. *See generally infra* Sections II.A.1.b, V.

[13] Order at 109. If the Commission had accepted FirstEnergy's "default service" argument, that ruling would have been unlawful and unreasonable. As Sierra Club explained in its reply brief, this argument fails because Rider RRS has nothing to do with SSO service, i.e., the supplying of electricity to the Companies' non-shopping customers. *See* Tr. I at 37-38, 107-08. By FirstEnergy's logic, *any* type of charge or credit – regardless of its source – would relate to "default service" simply because it would affect the overall amount that SSO customers have to pay to the Companies. This "interpretation would remove any substantive limit to what an electric security plan may contain." *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 34. Moreover, as the Northeast Ohio Public Energy Council ("NOPEC") explained in its initial post-hearing brief, "default service" is not synonymous with voluntary SSO service. Initial Brief of NOPEC ("NOPEC Br.") at 20.

[14] Order at 109.

Rider RRS is not related to “limitations on customer shopping for retail electric generation service,” for two independent reasons. *First*, Rider RRS does not in any way limit customer shopping. *Second*, Rider RRS has nothing to do with retail electric generation service.

**a. Rider RRS is not related to “limitations customer shopping.”**

Turning to the first point, Rider RRS cannot be approved under the “limitation[] on customer shopping” provision of R.C. 4928.143(B)(2)(d) because it in no way limits such shopping. Where, as here, the General Assembly has not defined a term in a statute, that term “is to be accorded its common, everyday meaning.”[15] The common meaning of the term “limitation” is an “enforceable restriction[] imposed upon the scope or exercise of a privilege or power”[16] or, as set forth in Black’s Law Dictionary, a “restriction” or “restraint.”[17] Yet nothing in Rider RRS establishes a restriction or restraint, much less an enforceable one, on the ability of customers to exercise their privilege to shop for retail electric service. FirstEnergy and the Commission concede as much, noting that Rider RRS would not have any impact on customers’ ability to shop for the energy supply they receive.[18] As such, it is plainly unlawful and unreasonable for the Commission to conclude that Rider RRS somehow qualifies as a “limitation[] on customer shopping” under R.C. 4928.143(B)(2)(d).

In its Order, the Commission tries to sidestep this problem by characterizing Rider RRS as a financial, rather than physical, limitation on customer shopping.[19] In particular, the Commission opines that Rider RRS qualifies as a limitation on customer shopping because it

[15] *State v. Dorso*, 4 Ohio.St.3d 60, 62, 446 N.E.2d 449 (1983).

[16] *Gross v. State Med. Bd. of Ohio*, 10th Dist. Franklin No. 08AP-437, 2008-Ohio-6826, ¶ 36.

[17] *Clark v. State Med. Bd.*, 10th Dist. Franklin No. 14AP-212, 2015-Ohio-251, ¶ 16.

[18] *See, e.g.*, Co. Br. at 117 n.566; Co. Ex. 155, Mikkelsen Fifth Suppl. at 9; Tr. I at 108; Co. Ex. 1, ESP Application at 9; Co. Ex. 13, Strah Direct at 7; *see also* Order at 109.

[19] Order at 109.

"would function as a financial restraint on complete reliance on the retail market for the pricing of retail electric generation service."[20] But this argument fails because R.C. 4928.143(B)(2)(d) does not provide that a limitation on complete reliance on the retail market for the pricing of retail electric generation service qualifies as an acceptable provision of an ESP. Instead, the statute clearly provides that a provision must be related to a limitation on customer shopping itself in order to qualify under this portion of R.C. 4928.143(B)(2)(d). The mere fact that a portion of a customer's bill might be made up of a charge under Rider RRS does not in any way restrict or restrain the ability of customers to shop for their retail electric generation service.

Moreover, the Commission's "financial limitation" theory effectively drains the statutory language of its meaning. Under the Commission's theory, *any* type of customer charge – no matter how unrelated to retail electric service – could be approved under R.C. 4928.143(B)(2)(d) because it would affect the customer's overall bill. For example, under the Commission's interpretation, the Companies could (i) impose charges on their customers, (ii) use that money to buy a financial investment they believe will gain value over time (*e.g.*, natural gas futures, stock in a natural gas development company), and (iii) give customers a credit in future years if those investments pay off. Although such a scheme has nothing to do with limitations on customer shopping, it would, under the Commission's logic, "impose[] a financial limitation on the consequences of customer shopping,"[21] and therefore be permissible.[22] Because the

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[20] *Id.*

[21] Co. Br. at 117.

[22] Notably, this holds true regardless of the type of investment. If FirstEnergy were feeling bullish about the future financial prospects of IBM, it could use customer money to buy stock in that company, on the theory that IBM's future stock price could serve as a "hedge" against the purported future increases in energy prices. Just like Rider RRS, such financial transactions "would function as a financial restraint on complete reliance on the retail market for the pricing of retail electric generation service." Order at 109. OEG's initial post-hearing brief underscores the capacious of this financial limitation theory when it praises Rider RRS as "akin to a retirement account that includes both stocks and bonds." Post-Hearing

Commission's "interpretation would remove any substantive limit to what an electric security plan may contain,"[23] that interpretation must be rejected.[24]

In its reply brief, FirstEnergy tries to bolster this flawed "financial limitation" argument by arguing that a contrary interpretation would improperly add the word "physical" into the statutory language.[25] To the extent the Commission relied on that argument for its decision, its reliance was misplaced.[26] Whether the limitation on customer shopping is physical (such as a restriction on the number of customers who can shop or the amount of power they can shop for) or financial (such as an extra charge on customers because they decide to shop), it still must actually serve to restrict, restrain, or limit such shopping in order to qualify as a "limitation." As shown above, the record plainly demonstrates, and both FirstEnergy and the Commission concede, Rider RRS does not do so.

In fact, it is FirstEnergy's argument – that Rider RRS qualifies under R.C. 4928.143(B)(2)(d) because it "operates as a financial limitation on the consequences of customer shopping"[27] – that would improperly add words to the statute. In particular, nothing in R.C. 4928.143(B)(2)(d) speaks of limiting the "consequences" of shopping by, for example, ensuring that a portion of a customer's bill is not based on shopping charges. Instead, the statute requires

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Brief of the Ohio Energy Group ("OEG Br.") at 10. But the financial wisdom – or lack thereof – of such schemes is quite beside the point, because such schemes are not permitted by R.C. 4928.143(B)(2)(d). And neither is Rider RRS.

[23] *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 34.

[24] Moreover, as NOPEC argued persuasively in its post-hearing brief, the "financial limitation" theory advanced by FirstEnergy – and endorsed in the Commission's Order – also runs afoul of the legislative intent of S.B. 221. *See* NOPEC Br. at 22-23.

[25] Co. Reply at 269-70.

[26] Although the Order does not explicitly endorse this theory, the Order suggests that the Commission may have been influenced by this argument. Order at 109 ("Although the Rider RRS would impose no *physical* constraints on shopping, the rider does constitute a *financial* limitation . . . .") (emphasis added).

[27] Co. Br. at 117.

that the shopping itself be limited, which Rider RRS does not do. As such, the Commission's holding that Rider RRS qualifies as a limitation on customer shopping under R.C. 4928.143(B)(2)(d) is unlawful and unreasonable, and should be rescinded on rehearing.

**b. Rider RRS does not impact "retail electric generation service."**

A second fatal flaw in the Commission's conclusion that Rider RRS qualifies as related to a "limitation[] on customer shopping for retail electric generation service"[28] is that Rider RRS has no impact on such service. Under Ohio law, "[r]etail electric service" is defined as "any service involved in supplying or arranging for the supply of electricity to ultimate consumers in this state, from the point of generation to the point of consumption."[29] In other words, in order to qualify as a "limitation[] on customer shopping," the rider at issue must in some way impact the provision of energy to retail customers through an SSO, or the ability of retail customers to obtain energy for their own needs from a competitive retail electric service ("CRES") provider.[30]

Here, by contrast, it is undisputed the energy associated with Rider RRS would not be used to serve the Companies' customers.[31] As the Ohio Energy Group ("OEG") put it, "Rider

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[28] R.C. 4928.143(B)(2)(d)

[29] R.C. 4928.01(A)(27).

[30] This definition would also include services related to the electricity supplied by a CRES provider to the Companies' shopping customers, such as distribution services involved in the delivery of that electricity. *See, e.g.*, *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 11-346-EL-SSO, et al., Opinion and Order, at 31 (Aug. 8, 2012) ("AEP ESP II Order") (noting that AEP's proposed rider "provides rate stability and certainty through CRES services, which clearly fall under the classification of retail electric service, by allowing customers the opportunity to mitigate any SSO increases through increased shopping opportunities that will become available").

[31] Tr. I at 37-38, 39. Shopping customers would continue to receive electricity through their CRES provider, and non-shopping customers would still receive energy through an SSO auction process. *See id* at 38, 107-08.

RRS is merely a financial device."[32] The Companies would purchase the output from Sammis, Davis-Besse, and the OVEC entitlement from FES, and then sell that output into the wholesale PJM markets.[33] In effect, the Companies' customers would stand in the shoes of a merchant generator, paying for the costs of producing energy at FES's facilities, and earning whatever revenue that energy might receive from the wholesale market. Because FirstEnergy's proposal has nothing to do with "the supply of electricity to ultimate consumers,"[34] and is therefore unrelated to retail electric service, Rider RRS cannot be authorized under R.C. 4928.143(B)(2)(d). And because the Commission approved Rider RRS despite this fatal defect, the Commission's Order is unlawful and unreasonable.

The Order fails to address this fatal shortcoming of Rider RRS. In fact, the Commission has not even attempted to explain how a rider that has nothing to do with the provision of energy to retail customers can be considered relevant to retail electric generation service. By ignoring this fundamental statutory issue, which was raised in Sierra Club's initial brief and reply brief, the Commission's Order not only violates R.C. 4928.143, it disregards the Ohio Supreme Court's admonition that a Commission decision "should explain its rationale [and] respond to contrary positions."[35]

The irrelevance of Rider RRS to retail electric generation service is a further flaw in the Commission's financial limitation theory discussed above. In particular, the Commission explains its financial limitation theory by stating that "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

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[32] OEG Br. at 9.

[33] Co. Ex. 33, Ruberto Direct at 3; Tr. I at 36-37; Tr. XIII at 2808.

[34] R.C. 4928.01(A)(27).

[35] *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 30.

part on the retail market and in part on the cost of service of Sammis, Davis-Besse, and the OVEC plants."[36] Not so. If Rider RRS goes into effect, the price of retail electric generation service – *i.e.*, the service associated with supplying electricity to the Companies' customers[37] – will continue to be based entirely on the retail market (as it is today). Rider RRS, however, would impose a separate charge (or provide a credit) that is based on the net costs and wholesale revenues of FES's generating plants,[38] but that charge or credit has nothing to do with retail electric service or the price that customers pay for that service. Thus, the Order is simply wrong in claiming that, with Rider RRS, customer bills "for retail electric generation service" would be "based in part on the retail market and in part on the cost of service of [the plants]." [39] The Commission's finding otherwise demonstrates that the Order is unlawful and against the manifest weight of the evidence.

In sum, because Rider RRS would not limit customer shopping for retail electric generation service, the Commission's holding that the rider qualifies under the limitation on customer shopping provision of R.C. 4928.143(B)(2)(d) is unlawful and unreasonable.[40]

#### 2. Rider RRS would not "have the effect of stabilizing or providing certainty regarding retail electric service."

Even if Rider RRS could satisfy the threshold requirement discussed in Section II.A.1 above – which it cannot – this rider could still not be approved under R.C. 4928.143(B)(2)(d)

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[36] Order at 109.

[37] *See* R.C. 4928.01(A)(27).

[38] As the Commission notes, Rider RRS would "appear as a charge on customer bills." Order at 108.

[39] *Id.* at 109.

[40] The Commission's assertion that the Companies' customers are not "captive" because they can still shop for service once Rider RRS is in place, *id.,* has no basis in fact. As the Commission acknowledges *in the previous paragraph*, Rider RRS is, by design, nonbypassable. Because the Companies' customers cannot escape the financial risks and burdens of this rider, those customers are the very definition of captive ratepayers. The Commission should modify its Order to delete this misleading sentence.

because it would not "have the effect of stabilizing or providing certainty regarding retail electric service." Rider RRS fails this requirement for two reasons – either of which is fatal to the rider's legality under (B)(2)(d).

First, as explained below in Section V, Rider RRS would not have the effect of stabilizing or providing certainty to customers' bills. There is no evidence in the record (and the Commission made no findings) that customers would experience retail rate instability in the absence of Rider RRS, and the record also demonstrates that Rider RRS would not promote retail rate stability. Because the Commission's finding is against the manifest weight of the evidence, that finding is unreasonable and must be rejected.[41]

Second, even assuming, *arguendo*, that Rider RRS somehow had a stabilizing effect, that effect would not impact retail electric rates. As the plain language of R.C. 4928.143(B)(2)(d) makes clear, the stabilization or certainty provided must be with respect to "retail electric service," *i.e.*, the electricity purchased by the Companies to supply their customers' needs.[42] And it is undisputed that Rider RRS would not affect the rates that the Companies' customers pay for their own electricity; instead, the rider would pass along to ratepayers the net costs and revenues associated with a wholesale PPA between the Companies and FES.[43] Because the stability purportedly provided by Rider RRS bears no relationship to retail electric service, the

[41] *See, e.g.*, *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789, 856 N.E.2d 213, ¶ 12 (reversal warranted if "the PUCO's decision is against the manifest weight of the evidence or is clearly unsupported by the record"); *Tongren v. Pub. Util. Comm.*, 85 Ohio St.3d 87, 89-90, 706 N.E.2d 1255 (1999) (reversing Commission order, and noting that "some factual support for commission determinations must exist in the record").

[42] R.C. 4928.01(A)(27).

[43] *See, e.g.*, Order at 13-14 (describing structure and operation of Rider RRS); see also Co. Ex. 33, Ruberto Direct at 3.

rider cannot be authorized under R.C. 4928.143(B)(2)(d).[44] The Commission's approval of the rider is unlawful, and the ESP IV Order should be modified to rescind that approval.

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

In its post-hearing briefs, FirstEnergy made the additional argument that Rider RRS could be approved pursuant to R.C. 4928.143(B)(2)(i).[45] The Order's discussion of this issue is muddled, failing to explicitly state whether or not the Commission believes Rider RRS to be authorized by R.C. 4928.143(B)(2)(i).[46] The Order does, however, repeat some of FirstEnergy's claims about the plants' economic impact.

To the extent the Commission has authorized Rider RRS based on 4928.143(B)(2)(i), that decision was contrary to law and the evidence in the record. Section 4928.143(B)(2)(i) states that an ESP may include "[p]rovisions under which the electric distribution utility may implement economic development, job retention, and energy efficiency programs . . . ." The obvious intent of (B)(2)(i) is to authorize provisions that will implement programs, such as the energy efficiency and economic development riders that were approved by the Commission in the AEP ESP III order, that are specifically targeted at one or more of the three categories

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[44] The contrast between Rider RRS and the situation in *In re Application of Columbus S. Power Co.*, 138 Ohio St.3d 448, 2014-Ohio-462, 8 N.E.3d 863, is telling. The carrying charges permitted in *Columbus Southern Power* concerned generating facilities that were owned by the utility and that were serving the utility's own customers. *Id.* ¶ 34 (upholding the inclusion of environmental investment carrying charges for retrofitted coal units "because AEP generally uses its own generating units to serve its customers."). This is far different than Rider RRS, which would provide a subsidy to FES, an unregulated merchant generator that owns the plants at issue in this proceeding, and where the output of FES's plants would not serve the Companies' customers. Instead, that output would be sold into the PJM wholesale markets, while FirstEnergy's customers would still have to obtain their own electricity through an SSO or from a CRES provider. Moreover, the Commission in *Columbus Southern Power* found that AEP's carrying charges were important to the utility's "ability to provide generation power at a cost that was below the market rate for purchased power at that time." *Id.* ¶ 32. In other words, AEP's carrying charges were related to "retail electric service," as defined by R.C. 4928.01(A)(27), *see Columbus Southern Power* ¶ 32 (discussing statutory definition). Rider RRS, by contrast, has nothing to do with such retail electric service.

[45] Co. Br. at 122-24; Co. Reply at 275-76.

[46] Order at 109-10.

enumerated in the statute.[47] FirstEnergy's "economic development" theory, however, would read this provision as encompassing a rider that would not implement any economic development, job retention, or energy efficiency programs.[48] If this theory were credited, there would be no meaningful limits on what could be included in an ESP because any spending of customer money by a utility could arguably have some tangential impact on jobs or economic development. Because Rider RRS does not implement any economic development or job retention program, the rider cannot be authorized under R.C. 4928.143(B)(2)(i). To the extent the Commission's Order holds that it can, the Order is unlawful and unreasonable.

Moreover, to the extent the Commission's authorization of Rider RRS may be based on the FirstEnergy witness Murley's claims about the economic impacts of Sammis and Davis-Besse, that further underscores the unreasonableness of the Order. As explained *infra* in Section VII, there is no evidence in the record that, in the absence of Rider RRS, the plants would suddenly retire (in fact, there is affirmative evidence to the contrary). As such, any purported economic development benefits of Rider RRS are illusory. If the Commission approved Rider RRS on the theory that the generating plants' economic impacts qualify Rider RRS as an economic development or job retention program, such authorization would be against the

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[47] AEP ESP III Order at 68 (approving the EE/PDR rider, which allows AEP to offer energy efficiency programs); *id.* at 69 (approving the Economic Development Rider, which enables recovery of foregone revenues associated with reasonable arrangement approved under R.C. 4905.31).

[48] The Commission's Order also states 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." Order at 109-10. But this statement merely begs the question of whether Rider RRS is "authorized under the statute." *Id.* at 110. As explained in the text, the answer to that question is "no."

And to the extent the Commission is suggesting that a charge flowing from the Companies' captive ratepayers to an unregulated arm of FirstEnergy Corp. is somehow an "economic development program," *id.* at 109, that suggestion must be firmly rejected. Under that theory, a rider whose purpose was to increase the compensation of FirstEnergy Corp.'s CEO would be permissible under (B)(2)(i) because, much like the charges flowing to FES through Rider RRS, the financial transfer would have an economic impact. Clearly, that is not what the General Assembly had in mind when it crafted S.B. 221.

manifest weight of the evidence, unlawful, and unreasonable. As such, the Commission should clarify on rehearing that Rider RRS is not legally authorized by R.C. 4928.143(B)(2)(i).

## III. The Commission's Order Is Unlawful and Unreasonable Because it Fails to Apply the Governing Legal Standards.

In addition to violating the specific requirements of R.C. 4928.143(B)(2), the Commission's Order is also unlawful because it departs in multiple respects from the legal standards that govern his ESP. First, throughout its Order, the Commission fails to hold FirstEnergy to its burden of proof. As R.C. 4928.143(C)(1) makes clear, the "[t]he burden of proof in the proceeding shall be on the electric distribution utility." This statutory standard is mirrored by provisions in the Administrative Code, which also puts the burden of proof on the utility "to show that the proposals in [its] application are just and reasonable."[49] Consequently, when the Commission evaluated the Rider RRS proposal, and the stipulated ESP more generally, the Commission was required to place the burden of proof on the Companies. But the Commission failed to do so in considering Rider RRS. The Order's disregard of R.C. 4928.143(C)(1) and O.A.C. 4901:1-35-06(A) is pervasive throughout the discussion of Rider RRS.[50] Because the Commission failed to hold FirstEnergy to its burden of demonstrating that Rider RRS is "just and reasonable,"[51] the Order is unlawful and unreasonable.[52]

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[49] O.A.C. 4901:1-35-06(A).

[50] Specific examples of the Commission's disregard of these standards are discussed below at 24-33, 36-40, 42-45, 46-51.

[51] O.A.C. 4901:1-35-06(A); *see* R.C. 4928.143(C)(1); *see also, e.g.*, *Re Duke Energy Ohio, Inc.*, Case No. Case No. 12-2400-EL-UNC, et al., 2014 WL 1385220 (Feb. 13, 2014) (rejecting Duke's application where the utility had not sustained its burden of proof); AEP ESP III Order at 23 (considering, based on the record, whether AEP Ohio's "PPA rider proposal is reasonable and whether customers would, in fact, sufficiently benefit from the rider's financial hedging mechanism").

[52] Relatedly, the Commission also misapplied the ESP vs. market rate offer ("MRO") test by failing to hold FirstEnergy to its burden of demonstrating 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 section 4928.142." R.C.

Second, the Order also fails to satisfy R.C. 4903.09, which requires that "[i]n all contested cases . . . the commission shall file . . . findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact."[53] In applying this standard, the Ohio Supreme Court has explained that "[i]n order to meet the requirements of R.C. 4903.09, . . . the PUCO's order must show, in sufficient detail, the facts in the record upon which the order is based, and the reasoning followed by the PUCO in reaching its conclusion."[54] In addition, the case law makes clear that there is "[a] legion of cases establish that the commission abuses its discretion if it renders an opinion on an issue without record support."[55] In its Order, however, the Commission repeatedly failed to satisfy R.C. 4903.09 by asserting various claims about Rider RRS and its purported benefits without explaining the reasoning that the Commission followed or providing any record support.[56]

Because the Commission repeatedly failed to apply the standards set forth in R.C. 4903.09, R.C. 4928.143(C)(1), and O.A.C. 4901:1-35-06(A), the ESP IV Order is unlawful and unreasonable.

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4928.143(C)(1). Because many of the qualitative and quantitative benefits cited in the Commission's discussion, Order at 118-20, are premised on unreasonable findings that are against the manifest weight of the evidence, the Commission's application of the ESP vs. MRO test is fundamentally flawed. The Commission must view the record with the appropriate burden of proof, and rescind its approval of the unlawful and unreasonable Rider RRS, before it can properly evaluate the benefits of this ESP.

[53] *See also Indus. Energy Users-Ohio v. Pub. Util. Comm.*, 117 Ohio St.3d 486, 2008-Ohio-990, 885 N.E.2d 195, ¶ 30 (discussing R.C. 4903.09, and noting that "[a] legion of cases establish that the commission abuses its discretion if it renders an opinion on an issue without record support.") (quotation marks and citations omitted); *Ohio Consumers' Counsel*, 111 Ohio St.3d 300, 2006-Ohio-5789, 856 N.E.2d 213, ¶ 23 (same).

[54] *MCI Telecommunications Corp. v. Pub. Util. Comm.*, 32 Ohio St.3d 306, 312, 513 N.E.2d 337 (1987).

[55] *Tongren*, 85 Ohio St.3d at 90, 706 N.E.2d 1255 (quoting *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.*, 76 Ohio St.3d 163, 166, 666 N.E.2d 1372 (1996)).

[56] Specific examples of the Commission's failure to apply R.C. 4903.09 are set forth at 12-13, 36-42, 42-45, and 46-52.

## IV. The Commission's Finding that Customers Would Receive a Net Credit Under Rider RRS is Unreasonable and Against the Manifest Weight of the Evidence.

According to the Companies' own projections, customers would lose $363 million on a net present value basis ($414 million nominal) over the first 31 months of Rider RRS.[57] The Commission, however, concluded that over the full eight-year term of Rider RRS, customers would receive a projected net credit of $256 million in nominal terms.[58] That figure was derived by averaging the results of FirstEnergy's projection, which was sponsored by Jason Lisowski and used market price inputs from Judah Rose, with the results of one of the three scenarios projected by Ohio Consumers' Counsel witness James Wilson (hereinafter referred to as the "Wilson Scenario 1" projection). The Commission then relied primarily on the $256 million figure to conclude that Rider RRS would benefit customers and the public interest,[59] that Rider RRS would not be improperly passing transition costs through to customers,[60] and that ESP IV is more favorable than a market rate offer ("MRO").[61] Those holdings, however, are unreasonable and unlawful because the Commission's $256 million estimate of the impact of Rider RRS is unreliable, unreasonable, and against the manifest weight of the evidence. The record plainly demonstrates that customers will very likely lose hundreds of millions of dollars or more over the life of Rider RRS, which renders that rider unjust and unreasonable, not beneficial to ratepayers or the public interest, less favorable than an MRO, and potentially contrary to the statutory ban on charging customers for transition costs.

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[57] SC Ex. 89 (Mikkelsen Nov. 30, 2015 Workpaper).

[58] Order at 78, 85.

[59] *Id.* at 85.

[60] *Id.* at 112.

[61] *Id.* at 119.

There are numerous critical deficiencies in the Commission's assessment of the projected financial impact of Rider RRS on customers, including the following:

- The Commission relied on nominal dollars rather than a net present value ("NPV") calculation, thereby improperly ignoring the time value of money and making the projected results appear more favorable to customers than they actually are.

- The Commission's estimate of a $256 million nominal net credit[62] unreasonably relied on FirstEnergy's projection that is based on market forecasts that are unreliable, outdated, and already proven wrong.

- The Commission arbitrarily and unreasonably averaged the FirstEnergy projection with Wilson Scenario 1 instead of Wilson Scenario 2.

- The Commission arbitrarily dismissed credible projections of costs and revenues under Rider RRS that are in the record.

- The Commission's estimate of a $256 million nominal net credit[63] arbitrarily ignored the significantly lower energy and natural gas prices that have been experienced since FirstEnergy filed its application and that are expected to continue for at least the next few years.

- The Commission failed to evaluate capacity price forecasts, and modified Rider RRS in a way that could adversely impact FirstEnergy's bidding of capacity into the PJM market in ways that would cost customers money.

As explained below, these errors, most of which grow out of the Commission's failure to heed points that were raised in post-hearing briefing, render the Commission's finding that Rider RRS would result in a net credit to customers unreasonable and against the manifest weight of the evidence. They also demonstrate that FirstEnergy has failed to meet its statutory burden of proving that its proposed Rider RRS is just and reasonable, as required by R.C. 4928.143(C)(1) and O.A.C. 4901:1-35-06(A). On rehearing, the Commission must correct these errors, hold FirstEnergy to its burden of proof, and engage in a thorough and objective evaluation of the

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[62] *Id.* at 85.

[63] *Id.*

evidence, which demonstrates that customers would likely incur hundreds of millions of dollars or more in charges over the eight-year term of Rider RRS.

### A. The Commission Improperly Calculated the Financial Impact of Rider RRS on Customers in Nominal, Rather than NPV, Dollars.

The first fundamental flaw of the Commission's finding that customers will receive a projected $256 million in credits over the eight-year term of Rider RRS is that such figure was calculated in nominal, rather than NPV, dollars. The Commission's use of nominal dollars provides a skewed picture of the financial impact of Rider RRS on customers because it ignores the time value of money. Under a nominal approach, a dollar received today is accorded the same value as a dollar received in 2023. In reality, however, a dollar received today is worth more than a dollar received in 2023 because today's dollar can be invested or otherwise earn interest for the recipient starting now, while inflation erodes the value of the future dollar. A figure expressed in NPV dollars takes into consideration such time value factors and, therefore, more accurately assesses the financial impact of a transaction such as Rider RRS under which customers would be paying charges or receiving credits over an eight-year period.

The use of NPV, rather than nominal, dollars to assess the projected financial impact of Rider RRS is especially important because the FirstEnergy projection,[64] Wilson Scenario 1 projection,[65] and [redacted] each show customers losing hundreds of millions of dollars in the early years of Rider RRS (when those dollars are worth comparatively more) and potentially receiving credits in the latter years (when those dollars are worth comparatively less). For example, the projected customer losses through 2018 are $363 million NPV under

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[64] SC Ex. 89.

[65] OCC/NOPEC Ex. 9, Wilson Second Suppl. Test. at 8, Tbl. 1.

[66] [redacted]

FirstEnergy's projection, $558 million NPV[67] under Wilson Scenario 1, and [redacted] .[68] It is only through projected credits in the later years of Rider RRS that FirstEnergy was able to project a positive NPV, while projected later year credits would reduce but not eliminate net customer losses under the Wilson Scenario 1 projection and [redacted]. Especially given that any potential credits for customers under Rider RRS are back-loaded, an accurate assessment of the financial impact of Rider RRS for customers can only be achieved if the time value of customers' money is taken into account by using NPV, rather than nominal, dollars.

Even if FirstEnergy's projection were credited,[69] calculating results in terms of NPV, rather than nominal, dollars [redacted]

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[67] Unlike his other projections, Wilson reported his Scenario 1 results only in nominal dollars and not in NPV dollars. As such, we calculated the NPV using the same formula that FirstEnergy did: Over or Under-Recovery Amount / (1+WACC)^Yrs. *See* SC Ex. 89, at Line 12. The results were projected charges of $192 million, $248 million, and $118 million for 2016, 2017, and 2018, respectively, and projected credits of $70 million, $54 million, $79 million, $62 million, $88 million, and $19 million for each of the years 2019 through 2024, respectively. The total of those numbers is an NPV charge to customers of $186 million over the full eight-year term of Rider RRS.

[68] [redacted]

[69] As explained below in Section IV.b, the FirstEnergy projection is unreasonable and already proven wrong and, therefore, should not be relied upon in this proceeding.

[70] Order at 85.

using NPV, rather than nominal, dollars paints a significantly different picture of the potential financial impact of Rider RRS. For example, the NPV of FirstEnergy's projection for Rider RRS is $260 million NPV,[72] while the NPV for Wilson Scenario 1 is a $186 million charge.[73] Averaging those two NPV results gives a combined NPV amount of a $37 million credit for Rider RRS. In other words, merely switching to NPV, while keeping all of the other assumptions used by the Commission held the same, leads to an 85.5% reduction in the $256 million projected benefit of Rider RRS to customers that the Commission relies on so heavily in its Order.

### B. The Commission Unreasonably Relied on FirstEnergy's Projection and Forecasts that are Unreliable, Outdated, and Already Proven Wrong, While at the Same Time Arbitrarily Dismissing Wilson Scenario 2.

As noted, the Commission calculated the $256 million nominal projected credit under Rider RRS by simply averaging the results of two of many of the projections in the record. This approach was unreasonable and against the manifest weight of the evidence because the FirstEnergy projection was based on market price forecasts that are unreliable, outdated, and already proven wrong. As such, FirstEnergy's projection should be given little to no weight, and FirstEnergy should be found to have failed to satisfy its burden of proving that Rider RRS would be just and reasonable for customers. The Commission's use of the Wilson Scenario 1 projection

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[71] This figure was calculated by taking the $260 million NPV credit projected by FirstEnergy, SC Ex. 89, and subtracting from it the $186 million NPV charge projected in Wilson Scenario 1,

[72] SC Ex. 89.

[73] The $50 million nominal charge to customers under Wilson Scenario 1 is presented in Wilson Second Suppl. Test. at 8, Tbl. 1. The $186 million NPV figure is calculated in footnote 71 above.

was also arbitrary because Mr. Wilson himself explained that such projection was unlikely because the underlying forecasts were "out of date and out of line with market conditions."[74]

### 1. FirstEnergy's Projection of Costs and Revenues Under Rider RRS Should be Given Little to No Weight Because it is Based on Market Forecasts that are Unreliable, Outdated, and Already Proven Wrong.

As Sierra Club explained in its post-hearing briefs, the FirstEnergy projection of net costs and revenues relied on by the Commission was based largely on forecasts of energy, natural gas, and capacity prices that were sponsored by FirstEnergy witness Judah Rose.[75] These forecasts played the primary role in determining how often Sammis, Davis-Besse, and the OVEC entitlement were projected to operate during each year of Rider RRS, and how much revenue would be generated by the plants during those years. Mr. Rose's forecasts were developed in mid-2014 and submitted with FirstEnergy's application in August 2014. Neither those forecasts, nor the projections of generation and revenues developed from those forecasts, have been updated or revised since then.

#### a. Mr. Rose's market forecasts are outdated and already proven wrong.

The Commission's reliance on Mr. Rose's 2014 market price forecasts, and the Rider RRS revenue and cost projection that is based on those forecasts, is unreasonable and against the manifest weight of the evidence because the record clearly demonstrates that the energy, natural gas, and capacity prices forecasts are outdated and already proven to be wrong.[76]

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[74] Wilson Second Suppl. Test. at 12.

[75] *See, e.g.*, SC Br. at 17-18.

[76] SC Br. at 16-38; SC Reply at 19-28.

With regards to market energy prices, Mr. Rose forecast that they would increase from an average of $36/MWh for 2011 through 2013,[77] to , and .[78] Instead of such increases, however, actual energy prices in 2015 in ATSI and AEP Dayton Hub were $32.93/MWh and $31.80/MWh, respectively.[79] As Mr. Rose conceded at the October 2015 rebuttal hearing, actual year-to-date energy prices were 10% to 15% lower than he forecasted.[80] By the end of the year, 2015 prices were in ATSI and in the AEP Dayton Hub than Mr. Rose forecast.[81] And Mr. Rose acknowledged at hearing that energy price forwards are expected to stay "pretty much steady at 35 or so dollars a megawatt-hour" through 2019,[82] in contrast to his forecast of increasing market energy prices. While Mr. Rose's forecast played a critical role in the Companies' projection of increasing revenues from Sammis, Davis-Besse, and the OVEC entitlement, the record and real world developments[83] show that the Commission's reliance on Mr. Rose's 2014 forecast in its March 2016 Order was unreasonable and against the manifest weight of the evidence.

Mr. Rose's forecast of steadily increasing natural gas prices has similarly not panned out. As Sierra Club detailed in its initial brief, Mr. Rose's 2015 natural gas price was 66% higher than actual prices in 2015, his forecasts for 2016 and 2017 are 70% higher and , respectively, than market forwards for those years, and ICF itself issued a Henry Hub natural gas price forecast in August 2015 that forecasts lower prices than Mr. Rose forecasted for

[77] Co. Ex. 18c, Rose Direct at 13, Tbl. 1.

[78] Rose Direct, Att. II.

[79] Comings Third Suppl. at 12.

[80] Tr. XXXV at 7228.

[81] Compare Comings Third Suppl. at 12 with Rose Direct, Att. II.

[82] Tr. VI at 1228.

[83] SC Br. at 19-23; SC Reply at 21-24.

█ Rider RRS.[84] In short, there was no reasonable basis for the Commission to rely on Mr. Rose's 2014 natural gas price forecast, or the 2014 costs and revenue projection that was developed using such forecast, in deciding this case in March 2016.[85]

Mr. Rose's capacity price forecast has fared little better. As with natural gas and energy prices, Mr. Rose forecast a significant increase in capacity prices, but real world results suggest that Mr. Rose's forecast of capacity prices is significantly overstated.[86] In particular, while Mr. Rose projected that capacity prices would spike to ██████████ for the 2018/2019 base residual auction, the actual clearing price for capacity performance products in that auction was $164.77/MW-day.[87]

The Commission's reliance on Mr. Rose's outdated forecasts, and FirstEnergy's resulting projection of revenues and costs under Rider RRS, is especially unreasonable because virtually all of the ways in which Mr. Rose's forecasts are outdated and wrong push in the same direction, namely of making Rider RRS more costly to customers than projected. With natural gas prices lower than Mr. Rose forecast, the Sammis plant will be less competitive in dispatching against natural gas plants, and downward pressure is placed on energy prices. Lower energy prices lead to lower dispatching of Sammis and the OVEC entitlement, and lower revenues when the plants do dispatch. And lower than forecast capacity prices means less revenue than FirstEnergy

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[84] SC Br. at 23-26. Indeed, ICF's August 2015 gas price forecast has a price for 2018 of approximately $3.75/mmBtu, which is significantly lower than the $4.34/mmBtu that Mr. Rose in this proceeding forecasted for 2015 and the $4.28/mmBtu that he forecasted for 2016. *Id.*

Note: FirstEnergy's reply brief incorrectly suggests that the ICF forecast is from November 2015 (rather than August). Co. Reply at 37 n.127. While the ICF report itself is from November, it makes clear that the natural gas price forecast is from August 2015. Comings Third Suppl., Ex. TFC-44, A-25 at 17 ("Exhibit 2-7: GMM Average Annual Prices for Selected Markets").

[85] SC Br. at 23-30; SC Reply at 24-26.

[86] SC Br. at 30-38; SC Reply at 27-29.

[87] SC Br. at 32 (citing Co. Ex. 25c, Lisowski Workpapers at page 5 line 2).

projected. In fact, the record shows that these impacts are already occurring. For example, while FirstEnergy, using Mr. Rose's forecasts, projected that the Sammis plant would run at an [redacted] capacity factor in 2015,[88] from January through October 2015 it actually operated at a 47% capacity factor.[89] As a result of the [redacted] and lower energy prices, energy revenue generated by the Sammis plant was estimated to be [redacted] than FirstEnergy had projected.[90] Similarly, the lower than forecasted capacity prices for the 2018/2019 delivery year means that FirstEnergy will receive approximately [redacted] in capacity revenues during that period than it included in its projection.[91]

In short, the record is clear that Mr. Rose's forecasts are outdated and already proven to be wrong, and that FirstEnergy's projection of revenues and costs under Rider RRS relying on those forecasts from Mr. Rose is unreliable and outdated. As a result, FirstEnergy has failed to meet its burden of proving that Rider RSS is just and reasonable or beneficial to customers or the public interest, and the Commission's reliance on the FirstEnergy projection is unreasonable and against the manifest weight of the evidence.

**b. The Commission has provided no reasonable basis for its reliance on Mr. Rose's forecasts or the resulting projection of revenues and costs under Rider RRS.**

In the ESP IV Order, the Commission deems Mr. Rose's 2014 forecasts reliable without even addressing the fact that the record (and real world developments) demonstrate that those forecasts are outdated and already proven wrong. The Commission makes no attempt to explain how it can rely on revenue projections that are based on forecasts of increased energy, natural

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[88] Comings Third Suppl. at 12; *see also* SC Ex. 49c, Att. 1 (projecting capacity factors at Sammis); Conf. Tr. XII at 2649 (discussing source of the projected capacity factors).

[89] Comings Third Suppl. at 12.

[90] *Id*. at 13-14.

[91] SC Br. at 32-34.

gas, and capacity prices when, in fact, those prices have decreased or have increased far less than forecasted. Instead, the Commission attempts to divert attention away from Mr. Rose's faulty forecasts in four ways, none of which hold water.

First, the Commission notes that none of the intervening parties have submitted their own market price forecasts or full projections of net revenues to counter FirstEnergy's forecasts and projections.[92] But excusing FirstEnergy's demonstrably outdated and wrong forecasts and projection because another party has not submitted its own forecasts and projection improperly shifts the burden of proof in this proceeding away from FirstEnergy and towards intervening parties. The law is clear that FirstEnergy has the burden of proving that Rider RRS is just and reasonable by, for example, submitting credible forecasts and projections of the costs and revenues under that rider.[93] As demonstrated above, FirstEnergy has not met that burden, and it is not the intervening parties' legal duty to do FirstEnergy's job for it.

Second, the Commission attempts to lend credibility to Mr. Rose's forecasts on the grounds that his employer, ICF, is "a recognized leader in the field."[94] But the proof is in the pudding. No matter how widely recognized ICF, Mr. Rose, and/or the computer modeling programs they use to develop their market forecasts are, the reality is that actual energy, natural gas, and capacity prices to date, and expected prices for at least the next few years, are significantly lower than the forecasts Mr. Rose submitted and that the Commission relied upon in developing its projection of $256 million in net revenue under Rider RRS. In fact, ICF itself has

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[92] Order at 80 (noting that the "only full projection of energy prices" as well as net revenues was produced by FirstEnergy); *id.* at 81 (noting that "no other party has presented a full projection of energy prices and the net revenues under Rider RRS").

[93] *See* O.A.C. 4901:1-35-06(A).

[94] Order at 80.

adjusted its natural gas forecast[95] and some of its capacity price forecasts downward from Mr. Rose's.[96] In addition, Mr. Rose and ICF have a long track record of forecasting increasing prices, especially for natural gas, that end up not materializing and leading them to have to adjust their forecasts downwards.[97] As just one example, since 2010, Mr. Rose and/or ICF have forecasted natural gas prices clearing [redacted], but that price has never materialized.[98] Mr. Rose's forecast in this proceeding has natural gas prices clearing [redacted], but ICF's August 2015 forecast [redacted].[99] Combined with the fact that Mr. Rose's forecasts in this proceeding are already proven to be wrong, this track record should call into question the credibility of those forecasts and the reasonableness of relying on such forecasts and resulting net revenue projections. Yet the Commission does not even acknowledge the issue, much less attempt to explain why it thinks such evidence does not undermine the credibility of Mr. Rose's forecasts.

Third, the Commission contends that reliance on Mr. Rose's forecasts is reasonable because market prices will increase in the future. For example, the Commission opines that it does not believe:

> 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.[100]

The Commission further contends that:

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[95] Comings Third Suppl., Ex. TFC-44, A-25 at 17.

[96] SC Ex. 87; SC Ex. 88.

[97] *See* SC Reply at 26-28.

[98] *Id.* at 25-27.

[99] *Id.*

[100] Order at 83.

> 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.[101]

But this is flatly wrong, as the record clearly demonstrates. Under FirstEnergy's own projection, customers would not start receiving a credit under Rider RRS until 2019. By that time, according to Mr. Rose's forecasts, capacity, energy, and natural gas prices would have increased considerably over their 2014 levels. But as noted above, energy and natural gas prices to date have been far below what Mr. Rose predicted, and are now expected to stay lower than Mr. Rose projected through at least 2019. And we already know that capacity prices for the first seven months of 2019 are going to be significantly lower than Mr. Rose forecasted. So, in order for Rider RRS to start providing a credit to customers, prices would not simply have to "rise from the current low levels." Instead, they would have to jump to the levels that Mr. Rose forecast for 2019. Given that prices have been moving in the opposite direction since 2014, and that current market forwards and more recent forecasts suggest that they are going to stay lower than forecast for at least the next few years, there is simply no credible basis in the record to conclude that customers will start receiving a credit under Rider RRS any time soon.

Finally, the Commission cherry picks a single snippet from the Energy Information Administration's ("EIA") 2015 Annual Energy Outlook ("AEO") to contend that there was no need for Mr. Rose to update its forecasts.[102] In particular, the Commission contends that because the 2015 AEO projects slightly higher energy and natural gas prices in the 2020s than the 2014 AEO did, even if Mr. Rose had updated his forecasts it likely would have made Rider RRS

[101] *Id.* at 80.

[102] Order at 81.

appear more favorable to customers rather than less favorable.[103] This argument fails for at least two reasons.

First, the energy price forecast referenced in the AEO is an average for the U.S. as a whole[104] and, therefore, is not directly comparable to the AEP Dayton Hub and ATSI Zone prices that will play a large role in determining the level of revenue the plants at issue in this proceeding may earn. As discussed above, the record plainly shows that energy prices in AEP Dayton Hub and the ATSI zone are significantly lower than was forecast for 2015, and are expected to remain lower for at least the next few years. That fact alone is enough to significantly alter the financial impact of Rider RRS on customers, and is far more relevant than a national energy price forecast.

Second, EIA itself has changed some of its forecasts since the April 2015 issuance of the 2015 AEO. For example, in the 2015 AEO, the EIA forecast that Henry Hub natural gas prices in nominal dollars would be $3.82/mmBtu in 2015, $3.90/mmBtu in 2016, and $4.09/mmBtu in 2017.[105] In January 2016, however, EIA reported that actual Henry Hub natural gas prices were $2.63/mmBtu in 2015, and forecasted a price of $2.65/mmBtu in 2016 and $3.22/mmBtu in 2017.[106] As the EIA notes, natural gas prices are a "significant determinant" of the generation costs that are one of the three components of the EIA energy price forecast referenced in the

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[103] *Id.*

[104] Co. Ex. 166 at ii (noting that the AEO projections are focused on U.S. energy markets). It is also not clear whether the 2015 AEO is intended to be a comprehensive update that would reflect all of the changed market conditions, etc. that have led to the significant declines in energy and natural gas prices that help demonstrate that Mr. Rose's forecasts are outdated and proven wrong. In particular, the document itself explains that the EIA is now issuing AEOs on a two-year cycle, alternating each year between a shorter edition and a full edition. *Id.* at 2. The 2015 AEO is a shorter edition which means, among other things, that it "includes a limited number of model updates." *Id.* As such, it is not clear that the 2015 AEO is even meant to fully update the 2014 AEO forecasts.

[105] Co. Ex. 166 at 6, Fig. 6; the specific prices in Figure 6 are available on EIA's 2015 AEO website – http://www.eia.gov/forecasts/aeo/excel/fig-6_data.xls.

[106] Co. Ex. 167 at Tbl. 1.

Commission Order.[107] As such, the fact that EIA has already revised downward at least its short term natural gas price forecast is consistent with the lower natural gas and electricity prices that demonstrate that Mr. Rose's forecasts are outdated and already proven wrong.

### 2. The Commission's Decision to Average the FirstEnergy Projection with Wilson Scenario 1, as Opposed to Wilson Scenario 2, was Arbitrary and Unreasonable.

As noted, in calculating its $256 million nominal valuation of Rider RRS, the Commission averaged FirstEnergy's outdated and unsupported projection with one of the three scenarios posited by Mr. Wilson. In each scenario, Mr. Wilson used a different natural gas price forecast to recalculate an energy price that he then used to project the financial impact of Rider RRS on customers. In Scenario 1, Mr. Wilson used the EIA's 2015 AEO natural gas price forecast; in Scenario 2, he used EIA's natural gas price forecast from their 2015 High Oil and Gas Scenario; and in Scenario 3, he used recent natural gas price forwards which Mr. Wilson then assumed would increase at the rate of inflation in the later years of Rider RRS.[108] While all three Wilson scenarios predict that customers will lose money under Rider RRS, the net present value losses projected in Scenarios 2 and 3 ($1.97 billion and $2.7 billion, respectively) are far larger than the $184 million loss projected in Scenario 1. The Commission decided to use Scenario 1 in its averaging with the FirstEnergy projection, and dismissed as unreliable Mr. Wilson's other two scenarios.

The Commission's decision to use Wilson Scenario 1, instead of Scenario 2, is unreasonable and against the manifest weight of the evidence for at least four reasons. First, Mr. Wilson himself explained that Scenario 1 is "not . . . very likely," "out of date," and "out of line

[107] Co. Ex. 166 at E-7.

[108] Wilson Second Suppl. at 6-8.

with market conditions."[109] By contrast, the forecasted natural gas prices in the EIA's High Oil and Gas Scenario used in Wilson Scenario 2 were closer than the EIA Reference Case forecast to actual prices in 2015, and are closer to EIA's latest forecast of natural gas prices for 2016 and 2017. And, of course, those forecasted natural gas prices were much closer than the prices Mr. Rose forecast for those years.

Second, the Commission rejects Scenario 2 as unrealistically assuming continued high levels of natural gas production and low natural gas prices.[110] In doing so, the Commission relies largely on the testimony of Mr. Rose that falling rig counts may lead to lower levels of gas production, and by noting that EIA cautioned in the 2014 AEO that the High Oil and Gas Scenario assumes technological developments that remain uncertain.[111] But the High Oil and Gas Scenario is a realistic enough possibility for the EIA to model it in both the 2014 and 2015 AEOs. And the averaging of projections is only a meaningful endeavor if one picks scenarios that, while plausible, have significantly different assumptions about the future. That way, one can assess the financial impacts of a proposal such as Rider RRS if one future versus another comes about, and then you can average those scenarios to determine what happens if future conditions end up somewhere in the middle. The Commission's refusal to consider this plausible scenario – which, again, more closely mirrors actual natural gas prices and forwards – was unreasonable.

Third, the Commission rejects Wilson Scenario 2 on the grounds offered by FirstEnergy witness Mr. Rose that, in using a new natural gas price forecast to develop a new energy price forecast, Mr. Wilson purportedly failed to adjust the implied heat rate to match the changing

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[109] Wilson Second Suppl. at 12.

[110] Order at 83.

[111] *Id.*

natural gas prices.[112] But as Mr. Wilson explained, Mr. Rose's own data shows that the implied heat rate remains very steady across the price levels at issue in Rider RRS,[113] and the Commission has provided no explanation for why it rejects that explanation.[114] Instead, the Commission notes that Sierra Club witness Tyler Comings acknowledged that implied heat rates can change over time.[115] But that acknowledgment hardly means that Mr. Comings "corroborated" Mr. Rose's claim that Mr. Wilson failed to adjust the implied heat rate in the face of a changing natural gas price. The Commission's assertion that Mr. Comings did so is unreasonable.

Finally, the Commission criticizes Scenario 2 because Mr. Wilson did not adjust the coal price to be consistent with the changed natural gas price.[116] In support, the Commission notes that the EIA assumes that the price of natural gas, coal, and electricity are all directly related.[117] But this argument fails because a review of the EIA data shows that their coal price projection for the High Oil and Gas Scenario is only marginally different than for the EIA Reference Case. In the former, coal prices at the minemouth stay steady at $1.84/mmBtu from 2013 to 2020, and then gradually increases to $2.10/mmBtu by 2030.[118] In the latter, the same price increases a total of 4 cents, to $1.88/mmBtu, from 2013 to 2020, and then gradually increases to $2.18/mmBtu by 2030.[119] The difference is insignificant at best.

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[112] *Id.* at 82.

[113] Wilson Second Suppl. at 16.

[114] Here again, the Commission Order fails to "explain its rationale [and] respond to contrary positions." *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 30.

[115] Order at 82.

[116] *Id.*

[117] *Id.*

[118] Co. Ex. 166 at Table D1.

[119] *Id.*

Given how poorly Mr. Rose's forecasts have fared to date, it strains credulity for the Commission to credit Mr. Rose's forecasts, and the FirstEnergy projection relying on them, as reliable while at the same time rejecting Mr. Wilson's Scenario 2 using EIA's High Oil and Gas Scenario as implausible. The Commission must reject FirstEnergy's projections based on Mr. Rose's forecast out of hand as outdated, unreasonable, and lacking in credibility. Yet even if it improperly fails to do so, then, at a minimum, the Commission should average that projection with Wilson Scenario 2 so that the parties and the public can get a sense of the potential financial impact of Rider RRS under different possible energy futures.

## V. The Commission's Finding that Rider RRS Would Protect Customers Against Retail Rate Volatility and Promote Rate Stability is Unsupported and Against the Manifest Weight of the Evidence.

Throughout this proceeding, FirstEnergy has repeatedly claimed that Rider RRS would address purported retail electric price volatility by providing certainty and stability regarding electric pricing. In doing so, FirstEnergy is apparently relying on the hope that simply repeating something often enough will make people believe it, as the Companies have provided virtually no evidence that customers will face retail price volatility over the eight-year Rider RRS term, much less that Rider RRS would provide certainty and stability by counteracting any such volatility.

In the ESP IV Order, the Commission follows FirstEnergy's repetition strategy. In at least six separate places in the Order, the Commission finds that Rider RRS would "provid[e] certainty," "promote rate stability," and/or protect customers "against rate volatility and price fluctuations."[120] But the only explanation that the Commission offers for such findings is its

[120] Order at 46, 78-79, 100, 109, 113, 118.

claim that because Rider RRS is "intended to mitigate, by design, the effects of market volatility," the rider would "in theory" have the effect of stabilizing or providing certainty regarding retail electric service.[121] The Commission then relies on this theory not only in holding that Rider RRS is authorized under R.C. 4928.143(B)(2)(d),[122] but also in finding that the Stipulation satisfies the benefit to ratepayers and the public interest prong of the three-prong test for evaluating settlements,[123] and that ESP IV is more favorable in the aggregate than a market rate offer.[124]

This "theory," however, does not provide the requisite evidentiary support for a Commission finding. Yet the Commission clings to this theory presumably because, as Sierra Club explained in its post-hearing briefs,[125] the necessary evidentiary support for the rate stability findings simply does not exist in the record in this proceeding. In particular:

- While FirstEnergy's application was riddled with references to rate volatility and stability, the Companies provided no projection of what retail rates would be during the term of Rider RRS, much less any analyses showing that such rates would be volatile or unstable or quantifying the level of projected volatility.[126]

- FirstEnergy notes that its witness Judah Rose forecasts increasing energy, capacity, and natural gas prices over the term of Rider RRS. But, as explained in Section IV.B above, those forecasts lack credibility and, regardless, address only wholesale market prices, not retail rates. Mr. Rose acknowledged that he never evaluated retail rates or how his forecasted wholesale market price increases may impact retail rates.[127]

- While FirstEnergy contends that SSO auctions and CRES contracts provide rate stability for periods of time far shorter than the eight-year term of Rider RRS,[128] the

[121] *Id.* at 109.

[122] *Id.* at 100, 109.

[123] *Id.* at 46, 78-79.

[124] *Id.* at 113, 118.

[125] SC Br. at 78-80; SC Reply at 46-50.

[126] SC Br. at 78-79.

[127] *Id.* at 79; Tr. VI at 1198-99.

[128] Co. Br. at 44-45.

Companies did not present any analysis of (i) the impact of staggering and laddering of SSO auctions, or of longer-term CRES offers, on retail rate fluctuations or (ii) what, if any, level of volatility in the rates actually paid by customers purportedly occurs despite staggering and laddering or longer-term contracts.[129]

- FirstEnergy notes that there were some increases in SSO auction results and CRES offers in the wake of the 2014 polar vortex. But those increases were temporary, as SSO results and CRES offers had largely returned by late 2015 to their pre-polar vortex levels. In addition, the Companies provided no basis to conclude that similar increases would result if another polar vortex type weather event occurred in the future.[130]

- Even if some retail rate volatility had been shown, FirstEnergy presented no data or analysis showing to what extent Rider RRS would alleviate or reduce such volatility.[131]

- The record shows that if Rider RRS had been in effect in 2014 and 2015 – the years during which FirstEnergy claimed retail rates increased because of the polar vortex – Rider RRS would have [132]

In light of this lack of evidence that customers face significant retail rate volatility, or that Rider RRS would serve to address and reduce any such volatility, the Companies have failed to satisfy their burden of demonstrating that Rider RRS would "have the effect of stabilizing or providing certainty regarding retail electric service" under R.C. 4928.143(B)(2)(d). For the same reasons, the Commission has not supported "with appropriate evidence"[133] its repeated conclusory findings regarding rate volatility and stability, which are against the manifest weight of the

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[129] SC Reply at 47, 50.

[130] *Id.* at 47-49.

[131] *Id.* at 50.

[132] *Id.* at 51-54.

[133] *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 30; *see also Ohio Consumers' Counsel*, 111 Ohio St.3d 300, 2006-Ohio-5789, 856 N.E.2d 213, ¶ 28 (reversing Commission decision that was "devoid of evidentiary support," and which "merely asserted, without further justification, that the [utility's proposed] modifications would provide rate certainty for consumers . . .").

evidence in the record. The Commission's Order is therefore unlawful and unreasonable.[134] Moreover, by not addressing the substance of the arguments about retail rate volatility and stability raised by Sierra Club and other parties, the Commission has failed to heed its duty to "respond to contrary positions"[135] and to explain the reasoning that it followed in reaching its decision.[136] Each of these fatal shortcomings should be addressed by the Commission on rehearing.

Even if the Commission could supplant the need for evidentiary support with a "theory" as to why Rider RRS should have the effect of stabilizing rates, its reliance on the theory set forth in the Order is unreasonable because the record affirmatively disproves it. In particular, the Commission's conclusion that Rider RRS would "in theory" stabilize rates is based on the contention that the rider is designed to serve as a countercyclical hedge under which rising retail rates would be offset by credits under Rider RRS, while declining retail rates would be offset by charges.[137] FirstEnergy never provided, and the Commission's Order does not identify, any analysis showing that Rider RRS would actually serve to reduce customer bills during times of price volatility. But as detailed in Sierra Club's post-hearing reply brief,[138] the record shows that Rider RRS would not be an effective countercyclical hedge because there are times when rates may be volatile or increasing and [REDACTED].

[134] *See, e.g.*, *Indus. Energy Users-Ohio*, 117 Ohio St.3d 486, 2008-Ohio-990, 885 N.E.2d 195, ¶ 30 (noting that "[a] legion of cases establish that the commission abuses its discretion if it renders an opinion on an issue without record support") (alterations and citations omitted).

[135] *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 30.

[136] *MCI Telecommunications Corp.*, 32 Ohio St.3d at 312, 513 N.E.2d 337.

[137] Order at 109.

[138] SC Reply at 51-54.

For example, FirstEnergy notes various increases in SSO auction results and CRES contracts in 2014 and 2015 in the wake of the polar vortex, [139] and contends that Rider RRS would have enabled customers to capture the value of increased market energy prices reflected in such higher SSO auction results and CRES contracts.[140] But that does not change the fact that regardless of whatever price increases may have occurred in the wholesale markets, SSO auctions, and/or CRES offers, had Rider RRS been in effect during 2014 and 2015, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].[141] As such, instead of serving as a countercyclical hedge, Rider RRS [REDACTED] during the only two years of purported retail rate volatility identified by FirstEnergy.

The Commission's portrayal of Rider RRS as "insurance" against the risk of higher electricity prices[142] is also unreasonable because the rider lacks at least three major hallmarks of insurance – knowledge about the size of the loss being insured against, certainty about the price

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[139] Co. Br. 43-45; Co. Reply at 129-131.

[140] Co. Br. at 44; Co. Ex. 146, Mikkelsen Rebuttal at 6-7.

[141] SC Reply at 51-54. These results would not be materially affected by the Commission's modification to Rider RRS to provide for quarterly, rather than annual, true-ups. Order at 89-90. Quarterly true-ups may enable Rider RRS to increase how closely it tracks short term changes in retail prices, because if unexpected increases in wholesale prices begin triggering higher SSO auction prices or CRES provider offers, a quarterly true-up helps ensure that customers will not be waiting until the beginning of the next year for those increased wholesale prices to begin impacting the calculation or charges or credits under Rider RRS. But whether Rider RRS charges are calculated quarterly or annually would not alter the fact that over the 2014-2015 time period, whatever wholesale price increases did occur [REDACTED]

[REDACTED] As such, whether Rider RRS is trued-up quarterly or annually, the net result over those two years is that [REDACTED]

[REDACTED]

[142] Order at 109.

of the insurance, and the ability to shop for a better deal.[143] Here, there is no evidence regarding the potential size of the loss purportedly being insured against because FirstEnergy never presented a projection of how much retail rates would increase if Mr. Rose's forecasted wholesale market price increases materialized. In addition, the "price" of Rider RRS is uncertain as it would be based on the vagaries of the revenue produced from sales of energy, capacity, and ancillary services into the PJM wholesale market. And because the Commission approved Rider RRS as a non-bypassable charge, customers will not have the ability to shop for a better deal. The Order, however, fails to address any of these flaws in the Commission's and FirstEnergy's attempt to portray Rider RRS as an insurance policy against the risk of higher retail rates.

Finally, while the Commission added to Rider RRS a cap on total customer bills for two years, its claim that such cap will "protect customers against rate volatility and price fluctuations and to provide additional rate stability for customers" is unsupported and unreasonable.[144] The cap restricts FirstEnergy from increasing its customers' average total bill in the 2016/2017 and 2017/2018 delivery years compared to those bills in the 2015/2016 delivery year.[145] No evidentiary record has been created regarding this cap and, therefore, it is difficult to know exactly what sort of impact it would have. However, given that retail prices for 2016/2017 and 2017/2018 – as reflected in SSO auction results and CRES offers – have dropped significantly in comparison to the 2015/2016 prices, there was very little risk that customers' average bills would have significantly increased anyway.[146] Instead, using the Companies' own projections, Rider

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[143] SC Reply at 44-46.

[144] Order at 86.

[145] *Id.*

[146] For example, average SSO auction results over the past few years for the 2015/16 delivery period averaged approximately $65/MWh. By contrast, the latest auction results from April 2016 averaged approximately $50/MWh. *See* Case No. 16-0776-EL-UNC, Notification of CBP Auction Results - Redacted Version (Apr. 14, 2016); *id.* (Apr. 27, 2016). The auction results for 2015/16 can be found in

RRS would, with or without the bill cap, force customers to give up some of the benefits of such lower prices over the 2016/2017 to 2017/2018 time frame. In addition, because FirstEnergy is allowed to defer for recovery at a later time any expenses for June 1, 2017, through May 31, 2018, that the bill cap foreclosed recovery of during that year,[147] the bill cap could increase rate volatility in the latter years of Rider RRS by permitting the recovery of additional costs that are unrelated to the wholesale or retail rates at the time of recovery. As such, there is no basis in the record from which to conclude that the two year bill cap would provide any meaningful rate stability benefit.

## VI. The Commission's Approval of Legacy Costs Recovery Through Rider RRS Is Unlawful and Unreasonable.

As Sierra Club explained in its post-hearing briefs,[148] one of the reasons why the Rider RRS scheme is not "just and reasonable" is because FirstEnergy asked the Commission to sign off on a large category of costs – the so-called "legacy cost components" – without sufficient information about these costs. Because it approved FirstEnergy's request that all costs within the ill-defined category of "legacy cost components" be deemed reasonable now and not subject to challenge in a future Commission proceeding, thereby allowing those costs to be passed through to customers, the Order is unlawful and unreasonable.

FirstEnergy's request encompassed "all costs that arise from decisions or commitments made and contracts entered into prior to December 31, 2014, including any costs arising from

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Company Exhibits 109A-F. The $65/MWh figure can be derived by averaging the following auction results (which occurred between Oct. 2012 and Jan. 2015): 17 tranches at $60.89, 17 tranches at $59.17, 17 tranches at $59.99, 17 tranches at $68.31, 16 tranches at $73.82, and 16 tranches at $69.18. The $50/MWh figure can be derived by averaging the following auction results from April 2016: 16 tranches at $48.46 , 17 tranches at $49.36, 17 tranches at $50.49, 16 tranches at $49.67 , 17 tranches at $50.76, 17 tranches at $51.44.

[147] Order at 86.

[148] SC Br. at 58-60; SC Reply at 31-33.

provisions under such historic contracts that may be employed in the future."[149] There is no start date for which contracts, decisions, or commitments constitute legacy cost components, and no limit on the amount of legacy costs that can be included in Rider RRS.[150] Under FirstEnergy's proposal, this broad category of costs could be passed through to customers without being subject to a future audit or prudency review.[151]

Despite the potential magnitude of these legacy costs, FirstEnergy provides scant information about legacy cost components and their ultimate future impact on customers. The specific monetary amounts that FirstEnergy requested to be deemed reasonable are not in the record, and FirstEnergy never provided any basis on which such amounts could be calculated.[152] Moreover, despite repeated attempts by intervenors seeking such information, FirstEnergy failed to adequately disclose this information, either in testimony or discovery responses.[153] Consequently, the legacy cost components included in FirstEnergy's proposal constitutes an unknown, but potentially massive, source of financial risk to the Companies' customers.

Although Sierra Club repeatedly warned about the financial risks posed by the requested open-ended approval of legacy costs, the Commission's Order does not address those arguments

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[149] Co. Ex. 7, Mikkelsen Direct at 14.

[150] Tr. I at 88.

[151] *See* Mikkelsen Direct at 14-15; *see also* Tr. I at 79, 92-93.

[152] Tr. I at 92.

[153] *See* SC Ex. 40c (SC Set 1-INT-74 Supplemental Response + Attachment 1); *see also* SC Ex. 39c (P3/EPSA requests, the responses to which simply cross-reference SC Ex. 40c); Conf. Tr. IX at 1830, 1833-37 (discussing pp. 7-8 of Mr. Lisowski's workpapers), 1837-38 (discussing SC Ex. 38c), 1838-40 (discussing SC Ex. 37c, Att. 1 at 37), 1840-41 (discussing Co. Ex. 22c, Lisowski Direct, Atts. JJL-1, -2, -3), 1848-49 [redacted]

Moreover, although FirstEnergy asserted that legacy cost components "were reviewed by the EDU Team that Company witness R[u]berto led and found to be reasonable," Mikkelsen Direct at 14, the record belies this claim. The EDU Team [redacted] [redacted].[153] *See* SC Ex. 53c; Conf. Tr. IX at 1837-40; Conf. Tr. XIV at 2947.

at all. Instead, the Order simply states, in the context of a discussion about the audit process for Rider RRS: "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."[154]

The Commission's approval of FirstEnergy's "legacy cost components" proposal is unlawful and unreasonable for at least three reasons. First, the Commission could not lawfully approve this proposal because FirstEnergy has failed to meet its burden of demonstrating that recovery of these legacy costs is just and reasonable. When it enacted S.B. 221, the General Assembly made clear that, in an ESP proceeding, "[t]he burden of proof in the proceeding shall be on the electric distribution utility."[155] Consequently, in this proceeding, FirstEnergy carries "the burden of proof to show that the proposals in [its] application are just and reasonable."[156] FirstEnergy has failed to do so with respect to its legacy cost components proposal. As noted above, FirstEnergy did not disclose the specific monetary amounts that would be deemed reasonable under this proposal, nor did it provide any basis by which the amount of legacy costs could be estimated. Because there is virtually no evidence about the amount (or even the magnitude) of these costs, and because FirstEnergy failed to produce information that would enable the parties and the Commission to assess such costs, FirstEnergy did not meet its burden of proof under R.C. 4928.143(C)(1) and O.A.C. 4901:1-35-06(A). By approving this proposal

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[154] Order at 90. Again, none of the problems that Sierra Club identified were addressed by the Commission. Elsewhere, the Order briefly summarizes those arguments, *id.* at 53, but the Commission did not address the substance of them.

[155] R.C. 4928.143(C)(1).

[156] O.A.C. 4901:1-35-06(A).

despite FirstEnergy's failure to meet its burden of proof, the Commission's Order is unlawful and unreasonable.

Second, the Order is unlawful and unreasonable because it signed off on the recovery of a large category of costs without knowledge about the amount of such costs. It is well settled that "[r]uling on an issue without record support is an abuse of discretion and reversible error."[157] Here, the Commission approved cost recovery for "legacy cost components" despite the lack of evidence about their likely amount. Neither the parties, the Commission, nor the Companies' customers know how large these costs might be. The Commission's lack of knowledge is underscored by their directive that, sometime prior to the first annual audit of Rider RRS, the Companies must "provide to the Staff audited accounting information establishing the amount of legacy costs."[158] Plainly, this is putting the cart before the horse. By approving the recovery of legacy costs without knowledge of their amount, the Commission has abused its discretion.

Finally, the Commission's decision is unlawful and unreasonable because the Commission wholly disregarded the serious concerns raised by Sierra Club and failed to provide any basis for approving recovery of the legacy costs. As the Ohio Supreme Court has stated, in its decisions the Commission "should explain its rationale, respond to contrary positions, and support its decision with appropriate evidence."[159] As noted above, the Commission failed to explain its rationale for approving this proposal, and the Commission's decision is not supported with appropriate evidence (because such evidence is lacking). But, importantly, the Commission

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[157] *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 29. *See also Cleveland Elec. Illum. Co.*, 76 Ohio St.3d at 166, 666 N.E.2d 1372 ("A legion of cases establish that the commission abuses its discretion if it renders an opinion on an issue without record support.") (citations omitted).

[158] Order at 90.

[159] *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 30.

also failed to "respond to contrary positions." Because it wholly ignored Sierra Club's arguments, the Commission's Order is unlawful and unreasonable. The Order should be modified to rescind the Commission's approval of FirstEnergy's legacy cost component proposal.

## VII. The Commission's Reliance on Other Purported Benefits of Rider RRS was Unreasonable and Unsupported by the Manifest Weight of the Evidence in the Record.

In the ESP IV Order, the Commission highlights purported resource diversity, economic development, and transmission benefits as additional reasons for approving Rider RRS.[160] The Commission, and FirstEnergy, contend that such benefits can be credited to Rider RRS because the rider "will enable baseload generating units to remain online."[161] In other words, the Commission accepted FirstEnergy's claims regarding the benefits of the continued operation of Sammis and Davis-Besse, and concluded that it was proper to attribute those benefits to Rider RRS because in the absence of the rider, both plants are purportedly "at a serious risk of closure."[162] The crediting of resource diversity, economic development, and transmission benefits from Sammis and Davis-Besse to Rider RRS, however, is unreasonable and unsupported by the record because there is no credible basis upon which to conclude that Sammis or Davis-Besse are likely to retire if Rider RRS were rejected. In fact, the manifest weight of the evidence establishes that neither plant would retire. This is demonstrated by, *inter alia*, FirstEnergy's own data projection. As such, the Commission's findings that Rider RRS would provide resource

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[160] Order at 87-88.

[161] *Id.* at 54.

[162] *Id.* at 99.

diversity, economic development, and transmission benefits are unreasonable and against the manifest of the weight of the record evidence.

Sierra Club detailed in its post-hearing brief the overwhelming evidence in the record that the rejection of Rider RRS would not lead to the retirement of Sammis or Davis-Besse.[163] In particular, the record demonstrates that:

- None of FirstEnergy's witnesses would testify that the plants would close in the absence of Rider RRS;[164]
- None of FirstEnergy's witnesses were able to identify any analysis or even discussions by FES or the Companies of whether the plants would be retired;[165]
- FES's former Vice President of Commodity Operations, Donald Moul, confirmed that FES had not undertaken any economic analysis of whether Sammis or Davis-Besse would retire;[166]
- Under both the Companies' [redacted] projections of revenues and costs, the plants would not retire because those projections show that [redacted] Mr. Moul was unequivocal at the hearing that [redacted];[167]
- As FirstEnergy noted in its post-hearing reply brief, some or all of the capacity at Sammis and Davis-Besse have cleared in the PJM capacity markets "through

[163] SC Br. at 81-90; SC Reply at 57-61.

[164] SC Br. at 81-84.

[165] *Id.*

[166] *Id.* at 81-82 (citing SC Ex. 46 and Tr. XI at 2307).

[167] *Id.* at 84-86; Conf. Tr. XI at 2432-33, 2445. FirstEnergy misleadingly claims that Sierra Club contended that the ability of Sammis and Davis-Besse to cover their avoidable costs would be enough to ensure that they remain open. Co. Reply at 197 & n.927. In reality, what Sierra Club argued was that the projected revenues from Sammis and Davis-Besse, using the projections from the Companies [redacted], are [redacted]. In essence, therefore, Rider RRS is not about sustaining the Sammis and Davis-Besse plants but, instead, is about ensuring profits for FirstEnergy Corp.'s shareholders.

2019,"[168] which means that FES has committed to making that capacity available through at least May 31, 2019;[169] and

- The financial situations of Sammis and Davis-Besse on the one hand, and the Hatfield's Ferry plant that FES shuttered in 2013 on the other, .[170]

Given this clear record evidence, it is perhaps not surprising that FirstEnergy never once states in its 481 pages of post-hearing briefing that Sammis and Davis-Besse would definitely or even likely retire in the event that Rider RRS were rejected. Instead, as stated in the post-hearing brief of the Ohio Energy Group, which is a signatory to the Stipulation and supporter of Rider RRS, "there is no evidence that any of the PPA Units will shut down absent approval of Rider RRS."[171]

In the ESP IV Order, the Commission never engaged any of the evidence that Sammis and Davis-Besse would not retire and, instead, made a conclusory finding that "[t]he evidence demonstrates that both plants are at serious risk of closure" in the absence of Rider RRS.[172] While citing to a handful of places in the record suggesting that Sammis and Davis-Besse are facing some financial challenges, the Commission provided no explanation for how or why it concluded that there is a "serious risk of closure" in the face of the litany of evidence showing that such plants would not close. The Ohio Supreme Court has made clear that the Commission "should explain its rationale, respond to contrary positions, and support its decision with

[168] Co. Reply at 201.

[169] SC Br. at 88-89.

[170] SC Reply at 60.

[171] OEG Br. at 33.

[172] Order at 99.

appropriate evidence."[173] The Commission plainly has not met that standard here, because the Commission provided only a single conclusory statement with no explanation of its rationale, did not identify any evidence showing that retirement would be likely without RRS (because such evidence is lacking), and failed to respond to the evidence and arguments by Sierra Club and others demonstrating that rejection of Rider RRS would not trigger the plants' retirement.

The Commission's treatment of the issue of plant closure and the concomitant crediting of Rider RRS with resource diversity, economic development, and transmission benefits is also unreasonable because FirstEnergy did not satisfy its burden of proving that the plants would likely close. As the electric distribution utility that proposed ESP IV, FirstEnergy is statutorily assigned the burden of proof throughout this proceeding.[174] As such, for purposes of the plant closure issue, FirstEnergy needed to demonstrate that retirement was likely by, for example, submitting an analysis of the financial circumstances in which Sammis and/or Davis-Besse would likely retire and an explanation of why those circumstances are likely to come about. But FirstEnergy never did so. Instead, FirstEnergy's witnesses and briefs offer only vague claims that the future of the Sammis and Davis-Besse plants is "uncertain" or "in doubt,"[175] combined with testimony about the financial challenges that the plants have faced in recent years. Especially given the substantial evidence in the record that the plants would not retire even in the absence of Rider RRS, such vague and backward-looking testimony does not satisfy FirstEnergy's burden. Both because FirstEnergy did not sustain its burden of proof, and due to the overwhelming evidence that the plants will not retire, the Commission's finding that,"[t]he

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[173] *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 30.

[174] R.C. 4928.143(C)(1).

[175] Co. Ex. 29, Moul Suppl. at 1, 3, 4 (the confidential version of Moul's Supplemental Testimony is admitted as Co. Ex. 30c); Tr. II at 418; Co. Br at 5, 29, 125, 126, 128.

evidence demonstrates that both plants are at serious risk of closure" in the absence of Rider RRS,[176] is unreasonable and against the manifest weight of the evidence. As explained further below at 51-52, for these same reasons, the Commission's attributing resource diversity, economic development, and transmission benefits to Rider RRS is also unreasonable and against the manifest weight of the evidence.

In their post-hearing reply brief, the Companies attempt to avoid the fact that FirstEnergy's own projection of costs and revenues demonstrates that the plants would not close by contending that such argument "fails to account for the fact that there is uncertainty in the Companies [sic] projections."[177] It is certainly possible that the financial situation for Sammis and Davis-Besse could end up being far worse than the Companies have projected in attempting to sell Rider RRS to the Commission and public. In that case, however, it is clear that Rider RRS would lead to a net loss to customers of hundreds of millions of dollars or more and, as such, Rider RRS could not be approved because it would not benefit customers and because ESP IV would not be more beneficial than an MRO. In particular, while under [redacted] ,[178] those projections show that customers would [redacted] over the 8-year Rider RRS term.[179] As such, if financial conditions were challenging enough to cause the retirement of Sammis and Davis-Besse without Rider RRS, customer losses under the Rider would be even greater than [redacted] .[180] Regardless, the Companies have not provided any analysis

[176] Order at 99.

[177] Co. Reply at 200.

[178] SC Br. at 85-86.

[179] Comings Third Suppl. at 4 (describing FES figures generated with SC Ex. 36c).

[180] The Companies also dismiss the fact that FES has committed capacity from Sammis and Davis-Besse into the PJM market through May 31, 2019 on the grounds that FES "could procure replacement capacity

of how uncertain their projections are, how much they would need to change to make retirement of Sammis and Davis-Besse likely, and what the chances are that such changes would occur. Instead, FirstEnergy offered little more than vague threats that the future of the plants is "uncertain" in an effort to scare the Commission into approving Rider RRS. On rehearing, the Commission should reject such cynical tactics.

Without any reasonable and supported basis for concluding that Sammis and Davis-Besse would be likely to retire without Rider RRS, it was also unreasonable for the Commission to credit Rider RRS with resource diversity, economic development, and transmission benefits that result from the operation of those plants. The simple fact is that if the plants are not likely to retire without Rider RRS, then whatever benefits those plants provide would continue without Rider RRS and, therefore, cannot be attributed to the rider. The Commission's attribution of such benefits to the rider was therefore against the manifest weight of the evidence. On rehearing, the Commission should not attribute to Rider RRS whatever resource diversity, economic development, and transmission benefits may be provided by Sammis and Davis-Besse.

The Commission Order also erred in accepting FirstEnergy's estimate that transmission upgrades that would be needed in the event that both Sammis and Davis-Besse were to retire in 2017 would cost "in the range of $400 million to $1.1 billion."[181] In discussing FirstEnergy's estimates, the Order claims that they "are uncontroverted by opposing parties in this

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and retire the Plants." Co. Reply at 201. It is, of course, extremely unlikely that it would be financially prudent for FES to procure sufficient capacity before May 31, 2019 in order to retire Sammis and Davis-Besse before that date. But if such short term procurement strategy were financially prudent, it would demonstrate that customers would be losing far more money under Rider RRS than the $363 million loss that the Companies' own projections show customers would lose by the end of 2018.

[181] Order at 87.

proceeding."[182] That is flatly wrong, as is evidenced by the Order itself, which elsewhere states that:

> 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.[183]

The Commission, however, never addressed Sierra Club's challenge to FirstEnergy's estimate of transmission upgrade costs. As such, its acceptance of FirstEnergy's estimate as "uncontroverted" is unreasonable and unsupported on the record.

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[182] *Id.*

[183] *Id.* at 56.

## CONCLUSION

For the reasons stated above, the Commission's approval of Rider RRS is unlawful, unreasonable, and against the manifest weight of the evidence. Accordingly, the Commission should grant rehearing and modify the ESP IV Order by rescinding its approval of Rider RRS.

April 29, 2016

Respectfully submitted,

s/ Shannon Fisk

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of the foregoing public version of the Rehearing Application of the Sierra Club has been served upon the following parties via electronic mail on April 29, 2016:

s/ Michael Soules
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