

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

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

POST-HEARING REPLY BRIEF OF THE INDEPENDENT MARKET MONITOR FOR PJM

Monitoring Analytics, LLC, acting in its capacity as the Independent Market Monitor for PJM¹ (“Market Monitor”), hereby submits this post-hearing reply brief on the request of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively “FirstEnergy”) for Commission approval of their fourth electric security plan (“ESP IV”). ESP IV includes the Retail Rate Stability Rider (“Rider RRS”). The Rider RRS assures FirstEnergy’s recovery of costs for generation assets, including the Davis-Besse Nuclear Power Station; the W.H. Sammis Plant; and FirstEnergy’s share of the output of the Kyger Creek Plant in Cheshire, Ohio, and the Clifty Creek Plant in Madison, Indiana, which are owned and operated by Ohio Valley Electric Corporation (collectively, “RRS Assets”). Rider RSS is included in a stipulation among certain parties (“Stipulation”) in spite of strong and continuing opposition.

¹ Capitalized terms used herein and not otherwise defined have the meaning used in the FERC-approved PJM Interconnection, L.L.C. (PJM) Open Access Transmission Tariff (“OATT”) or the PJM Operating Agreement (“OA”).

Approval of the Rider RRS is not in the interests of Ohio customers and would fundamentally conflict with Ohio regulatory policy. Competition should be protected because it benefits Ohio customers. Adoption of a quasi-market approach to markets may create the worst of both paradigms for Ohio consumers.

Adoption of a quasi-market approach to benefit FirstEnergy shareholders would contradict 4928.143(C)(1) of the Ohio Revised Code, which provides that FirstEnergy must show that Ohioans would be better off under the partial return to cost of service than continuing under a competition-based approach. The evidence that FirstEnergy provides that the market cannot support the costs of the RSS Assets shows exactly the opposite of what FirstEnergy is required to prove. Record evidence in this proceeding shows that Ohioans would be better off if the state implements its pro-competition laws, regulations and policies. The interests of FirstEnergy shareholders that FirstEnergy seeks to protect by choosing to initiate this proceeding over the objections of Ohio customers should not take priority over the public interest, the correct administration of Ohio law and the consistent implementation of beneficial policies adopted in Ohio.

If the Commission believes the various elements included in the Stipulation but unrelated to the RRS Rider are desirable, it is not necessary to ignore the evidentiary requirements of Ohio law or to sacrifice the interests of Ohioans in pro-competition policies to obtain them.

The credits will not offset the significant financial risks Ohio customers assume. It is not a benefit for FirstEnergy to spend customers' money on projects that would not otherwise be economic. These projects do not represent a concession by FirstEnergy. FirstEnergy would profit from these projects.

Approval of the Rider RRS would interfere with federal policies promoting competition. It is in the interest of Ohio customers that state and federal policy work well together. Approval of the Rider RRS undermines federal policy and likely would result in protective measures that could disadvantage Ohioans.

Attempting to justify the RRS Rider, FirstEnergy relies on slogans such as “rate stabilization” and “fuel diversity.” Rate stabilization does not just imply “fixed,” it also implies protected from high rates. The “rate stabilization” that FirstEnergy proposes would, by design, lock in above market rates for Ohio customers. FirstEnergy attempts to justify this filing based on testimony that market prices will not be high enough to keep the RRS Assets in service, i.e. an expectation of low market prices. Rates stabilized above market levels are not in the interest of Ohio customers.

The Rider RRS will have no meaningful impact on the diversity of resources that serve Ohioans. “Fuel diversity” as used by FirstEnergy means nothing more than inefficiently prolonging the life of aging, risky and undesirable units. Subsidizing resources with characteristics that the market does not value is not in the public interest.

Most Ohio customers filed in opposition to the Rider RRS and do not want to assume responsibility for the RRS Assets. The settlement is not the product of a serious bargain about the value of the RRS Assets.

The Rider RRS is a bad bargain for Ohio customers and is not in the public interest. The Rider RRS should not be approved.

I. ARGUMENT

A. FirstEnergy Fails to Show That the Rider RRS Is in the Public Interest; The Rider RRS Fails to Meet Every Specific Criterion That It Must Satisfy.

The Rider RRS should not be approved unless FirstEnergy can demonstrate that it is in the public interest, and that it meets the standards for approval of a partial settlement.

FirstEnergy cites to Section 4928.143(C)(1) of the Ohio Revised Code for the standard that it must meet to obtain approval. Section 4928.143(C)(1) provides:

The burden of proof in the proceeding shall be on the electric distribution utility. The commission ... shall approve ... an application ... if it finds that the electric security plan ..., including its pricing and all other terms and conditions, ..., is more favorable in the aggregate as compared to the expected results that would otherwise apply under [competitive bidding].

... Otherwise, the commission by order shall disapprove the application.

FirstEnergy asserts (at 10) that “the total benefits of the Stipulated ESP IV in the aggregate ... demonstrate that it is considerably more favorable in the aggregate as compared to the expected results of [competitive bidding].” FirstEnergy has not met its burden to show that Ohio customers are better off under its scheme than under the rates that would be determined under a competitive bidding process.² FirstEnergy provides no record evidence about the expected results of competitive bidding. Without such evidence, FirstEnergy does not meet the burden that Section 4928.143(C)(1) requires it to meet. FirstEnergy does not merely fail to meet its burden, it provides strong evidence that undermines its case by showing that the market value of capacity is lower than the price that FirstEnergy proposes to charge its customers.

FirstEnergy states that the Commission’s standard to approve a partial settlement as reasonable specifies that such settlement must: (1) be a product of serious bargaining among capable, knowledgeable parties; (2) as a package, benefit customers and the public interest; and (3) not violate any important regulatory principle or practice.³

B. FirstEnergy Fails to Show That the Settlement Is the Product of Serious Bargaining (Prong 1).

FirstEnergy has not demonstrated that the settlement is a product of serious bargaining among capable, knowledgeable parties. FirstEnergy has not shown that any of

² See Ohio Rev. Code § 4928.142 (“(1) The market-rate offer shall be determined through a competitive bidding process that provides for all of the following: (a) Open, fair, and transparent competitive solicitation; (b) Clear product definition; (c) Standardized bid evaluation criteria; (d) Oversight by an independent third party that shall design the solicitation, administer the bidding, and ensure that the criteria specified in division (A)(1)(a) to (c) of this section are met; (e) Evaluation of the submitted bids prior to the selection of the least-cost bid winner or winners. No generation supplier shall be prohibited from participating in the bidding process.”)

³ FirstEnergy at 10–11, citing, e.g., *Consumers’ Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, 126 (1992).

the parties to whom it will transfer responsibility for the financial and operational risks of the RRS Assets have any direct knowledge of the condition of those assets and a basis to assess the associated risks.

FirstEnergy testimony shows that the RRS Assets are likely more costly than an equal amount of capacity available in the market, which means that any transfer to a rational buyer would be at a steep discount. But the Rider RRS proposes an above market premium. The Stipulation cannot be the product of serious bargaining under these circumstances.

The introduction of capacity market performance rules (CP) raises the risks of assuming cost responsibility for aging units. Ohio customers are at significant financial risk if the RRS Assets do not provide power when needed. The capacity performance penalties can exceed the total market revenues of the units. Under these circumstances, Ohio customers would pay the full costs of the units, would receive no revenue offset and would pay the full penalty while other FirstEnergy units could be receiving such penalty payments as bonus payments that would flow to shareholders.

FirstEnergy attempts to justify the settlement based on a number of credits and purported ancillary benefits (at 76–112). FirstEnergy has not demonstrated that the credit provisions offset the risks the Rider RRS transfers to Ohio customers. Many of the asserted benefits are paid for by Ohio customers, not FirstEnergy's shareholders. FirstEnergy will profit from providing these benefits. FirstEnergy has not shown that the Parties could not have obtained these benefits by other means, without Ohio customers having to assume responsibility for the unwanted RRS Assets, or that providing the benefits is a rational economic choice.

FirstEnergy has not demonstrated that the settlement is a product of serious bargaining, as the Ohio precedent applicable to settlements requires. No record evidence shows that any settling party would assume the terms of the Rider RRS as part of serious bargaining. Serious bargaining occurs when a buyer who wants to buy and a seller who wants to sell agree on terms. There is no evidence that any party in this proceeding actually

wants to assume cost responsibility for the RRS Assets going forward. There is no record basis showing that the Rider RRS is the result of serious bargaining. The evidence proves that the Rider RRS is a bad bargain for all parties except FirstEnergy.

C. FirstEnergy Fails to Show that the Rider RRS Is in the Public Interest and Benefits Customers (Prong 2)

1. FirstEnergy Fails to Show, and Cannot Show, That the Rider RRS Is Both in the Public Interest and Meets the Financial Needs of the RRS Assets.

To meet the criteria set forth in the ESP III decision, FirstEnergy must demonstrate the financial need of the generating plants included in the Rider RRS. FirstEnergy produced witnesses Moul and Lisowski and argues on the basis of their testimony that “[t]he economic viability of the Plants is in doubt.”⁴ FirstEnergy argues on the basis of witnesses Moul’s and Lisowski’s testimony:

Revenues have been at historic lows and are insufficient to cover the Plants’ costs, and thus to continue to operate the Plants, and make necessary investments.¹⁰ FES may not be financially able to bear short-term losses even if long-term projections of market prices show significant increases.¹¹ Thus, “[b]ased on a weak balance sheet caused by historical losses, and near-term forecasts of the Plants, FES has identified these Plants to be financially at-risk of closure prior to the end of their useful lives.⁵

FirstEnergy witnesses’ testimony shows that cost responsibility for the RRS Assets is risky and demonstrates that the RRS Assets likely could not be sustained on a market basis. This testimony explains the motivation for FirstEnergy to transfer responsibility for RRS

⁴ FirstEnergy at 125, citing Direct Testimony of Donald Moul at 2; Hearing Tr. Vol. X at 2184:13–22, 2185:9–13 (Moul cross); Hearing Tr. Vol. XI at 2395:8–15 (Moul cross); Hearing Tr. Vol. XXXII at 6541:6–12, 6542:3–20 (Lisowski rebuttal cross); Hearing Tr. Vol. XXXIII at 6818:21–24 (Lisowski rebuttal cross).

⁵ FirstEnergy at 125, citing Moul at 3; Hearing Tr. Vol. XI at 2267:2–17 (Moul cross); Moul Direct, pp. 2, 4; Hearing Tr. Vol. VIII at 1718:1–12; 1721:16–19; 1722:6–14 (Lisowski cross); Hearing Tr. Vol. X at 2202: 19–22 (Moul cross); Lisowski Rebuttal, p. 5.

Assets to others. This testimony does not show that the RRS Assets have an actual financial need.

Proving risk and low market value does not equate to proving financial need. For example, if the units retired and the capacity was replaced with lower cost resources, they would create a net financial benefit to Ohioans.

FirstEnergy states on the basis of the testimony of its witnesses Mikkelsen, Murley and Strah that operation of the RRS Assets could result in a net credit to FirstEnergy customers:

These baseload coal and nuclear plants have stable cost structures and will serve as the basis for a hedge against expected increasing and more volatile retail electric energy prices. Over the term of Stipulated ESP IV, if the anticipated price increases are realized, Rider RRS will provide customers net credits of \$561 million.⁶ If prices increase by more than the Companies' forecast, the credit to customers should exceed \$561 million. And under a hypothetical scenario where prices stay at historically low levels (a scenario raised by some, but lacking any support in the record here), customers will nevertheless benefit from having insurance against the risk of price increases.⁶

If a net credit to customers is a real possibility, FirstEnergy fails to demonstrate actual financial need. If it is not a real possibility, FirstEnergy's arguments are misleading.

The requirement to prove financial need poses a dilemma for FirstEnergy. If it demonstrates financial need because market prices will not support the RRS Assets, it necessarily demonstrates that the Rider RRS is not in the public interest. In that case, the market can provide capacity equal to that of the RRS Assets' capacity, but at lower cost. If FirstEnergy does not demonstrate financial need, it fails the ESP III criterion. It is

⁶ See FirstEnergy at 4, citing Fifth Supplemental Testimony of Eileen M. Mikkelsen at 11; Direct Testimony of Sarah Murley at 5, 8, 10; Hearing Tr. Vol. I at 75:10-17 (Company witness Mikkelsen explaining Rider RRS is insurance against risks of increasing and more volatile market prices in the future); Hearing Tr. Vol. IV at 844:5-845:18; (Company witness Strah discussing insurance concept).

impossible for FirstEnergy to prove both that the RRS Assets have financial need because the market does not value them and that transferring responsibility for them to Ohio customers is in their interest.

2. Ohio Customers Should Receive the Benefits of Ohio's Decision to Rely on Markets.

Ohio precedent requires that a settlement be evaluated to determine whether it "violate[s] any important regulatory principle or practice." The Rider RRS fails that test. Indeed, the Rider RRS is antithetical to the government of Ohio's decision to adopt retail competition.

Approval of the Rider RRS would interfere with the competitiveness of both the retail and wholesale regulatory paradigm that prevails in Ohio. Approval of the Rider RRS would introduce discord between Ohio policy and federal policies promoting competition. It is in the interests of Ohio customers that state and federal policy work well together.

The Rider RRS would operate to deprive Ohio customers of a key benefit that Ohio's pro competition policy offers: the placement of investment risk on FirstEnergy shareholders. If the FirstEnergy Rider is approved, FirstEnergy will be permitted to remove investment risk from its shareholders and place it on Ohio customers exactly when those risks have become highly elevated.

Consistent with a federal effort to restructure the electricity industry and the regulation of that industry based on competition, Ohio passed the 1999 Act, making Ohio a forward looking retail competition state. Ohio, like Maryland, New Jersey, Pennsylvania and most recently Illinois, adopted the retail market model. Ohio and its peers have assumed leadership in an important regulatory initiative that provides Ohio customers with power at lowest cost.

A key feature of competition policy is the assignment of investment risk to investors who are well positioned to manage risk and away from customers who are not. No market is perfect, and certainly the fledgling regulated electricity markets are not perfect, but retail competition working in tandem with wholesale competition remains the best choice for

Ohio customers. The way forward is to continue to improve and reform PJM wholesale markets and Ohio's retail markets. Adoption of a confused quasi-market approach to markets would not serve the public interest.

The Rider RRS represents exactly the type of misstep to avoid. Ohio's policies should not be modelled after quasi-market states, which pursue policies different from Ohio. The continued reliance on cost of service does not serve the interest of customers in those states. FirstEnergy is out of step with the direction of Ohio policy.

The Government of Ohio's website informs its citizens:

The power for Ohioans to choose their energy supplier has been around for more than a decade. Ohio initiated these reforms to remain competitive in business and industry and in order to bring jobs and economic developments to Ohio. Now, residential consumers are able to take advantage of the same competitive markets manufacturers and industrial consumers have engaged in for years. In fact, we are already seeing the benefits of choice in Ohio as nearly 2.4 million electric customers and 1.7 million natural gas customers are already participating either individually or with aggregation groups.

The Ohio Electric Restructuring Act of 1999 has not been repealed, and no statute requires approval of the Rider RRS. Ohio Senate Bill 221 did not repeal retail choice; on the contrary, it is intended to ease the transition to competitive markets. The Rider RRS does not ease the transition to markets, it hinders transition. Ohioans do not need protection from lower priced capacity available in the market.

Approving a quasi-market model for cost recovery the RRS Assets is worse for Ohioans than for customers still entirely under cost of service regulation. When power plants are built under a full cost of service, regulated, vertically integrated utility regime, they are built and operated for the entire life under the cost of service regime, and retail rates are set by that regime. The difference in Ohio is that units were at one point under the cost of service paradigm, were shifted to markets, and now are proposed to be shifted back.

Under the cost of service regime, customers always bore investment risk. FirstEnergy's Ohio customers, on the other hand have paid market prices, whether high or

low, for power from the RRS Assets, and have been free of the investment risk for such units since the passage of the 1999 Act. Only now, as the RRS Assets are less reliable, face new market risks and are unattractive investments, FirstEnergy seeks to transfer responsibility for them to Ohio customers. Ohio should not be deprived of a key benefit of competition policy. Ohio customers should not suddenly have the prevailing regulatory paradigm changed in a way that hurts customers when competition works in their interests.

The Rider RRS is not in the interests of Ohio customers and it should not be approved.

D. The Rider RRS Serves No Useful Purpose and Violates Regulatory Practices (Prong 3)

1. Rider RRS Does Not Meet the ESP III Criteria

FirstEnergy argues that the RRS does not violate any important regulatory principle or practice (prong (3)) with reference to the minimum factors that the Commission set forth in the recent decision on the electric security plan filed by Ohio Power Company (AEP) (“ESP III”).⁷

For FirstEnergy to meet the ESP III criteria, FirstEnergy must, at a minimum, address four factors to justify any subsidization of the RRS Assets: (i) financial need of the generating plant; (ii) necessity of the generating facility, in light of future reliability concerns, including supply diversity; (iii) description of how the generating plant is compliant with all pertinent environmental regulations and its plan for compliance with pending environmental regulations; and (iv) the impact that a closure of the generating

⁷ See FirstEnergy at 124–125, citing *In re Application of Ohio Power Company for Authority to Establish a Standard Service Offer*, Case Nos. 13-2385-EL-SSO et al., Opinion and Order at 19-27 (Feb. 25, 2015) (ESP III).

plants would have on electric prices and the resulting effect on economic development within the state.⁸ FirstEnergy does not provide evidence for any of these factors.

2. FirstEnergy Fails to Show the RRS Assets Are Needed for Resource Diversity or Reliability.

FirstEnergy asserts (at 24–27) that the Rider RRS is needed for supply diversity and reliability but does not prove it. Ohio customers have nothing to gain from paying above market prices to preserve aging and obsolete assets. Ohio law states Ohio policy: “Ensure diversity of electricity supplies and suppliers, by giving consumers effective choices over the selection of those supplies and suppliers and by encouraging the development of distributed and small generation facilities.”⁹ FirstEnergy’s proposal denies effective choice to all Ohio customers.

Ohio customers are supplied by resources located throughout the Eastern Interconnection and the PJM region. FirstEnergy has not defined diversity using any metric but makes general reference (at 26) to “the risk of increasing reliance on natural gas-fired generation in PJM.” That is a self serving and non measurable definition which could have been applied five years ago to overreliance on coal. FirstEnergy does not explain why Ohio customers are not better off with the lowest cost market based prices for capacity.

For years, coal units have provided a large share of electric power to Ohio and the PJM Region because they were economic. Now natural gas resources are increasingly economic and there is a shift from coal to natural gas. The market is working exactly as Ohio law wisely anticipates. There is no reason to interfere with a process that reflects the policy goal established in Ohio law.¹⁰

⁸ *Id.* at 25.

⁹ See R.C. 4928.02(C).

¹⁰ See R.C. 4928.02(C).

Reliability of supply entirely depends on the certainty of supply and whether there is any difference in certainty of supply among the various fuel types. There is no record evidence showing that, but for the RRS Assets, PJM will have sub optimal resource diversity.

Ohioans do have a strong interest in reliability. FirstEnergy cannot show that the RRS Assets are needed for reliability. PJM states that the RRS Assets are not needed for reliability.¹¹ The PJM Capacity Market can achieve resource adequacy goals without the RRS Assets. Coal units have performance risks like all units. There are frozen coal piles. There are issues with trains, issues with barge traffic. FirstEnergy has not shown that the aging RRS Assets are more reliable than the units that might replace them through operation of the market.

The aging RRS Assets do not represent the kind of diversity that will enhance reliability; FirstEnergy's testimony on the market prospects for the RRS Assets confirms that judgment.

Resource diversity is a concept that has not been clearly defined by FirstEnergy. Diversity is not a synonym for reliability. FirstEnergy has used diversity as an empty slogan. The test of the FirstEnergy proposal should be the impact on customers' bills and the risks to customers and to customers' bills.

Recent reforms in the PJM Capacity Market emphasize performance incentives. Suppliers have strong incentives to invest in resources that perform well. The Rider RRS places the performance risk on Ohio customers rather than shareholders. FirstEnergy has a clear incentive to offer the units into the PJM Capacity Market at zero or below competitive levels to ensure they clear in the capacity market. It is clear that the Rider RRS operates like

¹¹ See Brief for Amicus Curiae PJM Interconnection, L.L.C. at 9 ("In filed testimony, the FE Companies have voiced a generalized concern relating to electric system reliability as reason to accept the Stipulation.[footnote omitted] Such concerns are categorically unfounded.").

the programs in New Jersey and Maryland that have been found to be preempted by federal regulation.¹²

3. FirstEnergy Fails to Show that Subsidization of the RRS Assets Is Needed to Protect the Public Interest in Electric Prices and Economic Development.

FirstEnergy also uses price stability as an empty slogan.¹³ FirstEnergy has not defined price stability or why stable prices that are higher than market levels are a benefit to customers. They cannot provide such an explanation, because it is not true. FirstEnergy also fails to address the risk of even higher prices to customers under the proposed settlement.

FirstEnergy has not shown that Ohio customers can expect lower prices under the Rider RRS if the costs of the RRS Assets are included. Ohio customers would pay higher prices and bear the risk of even higher prices under FirstEnergy's proposal.

FirstEnergy has not proven that rate stabilization at above market levels is in the public interest. FirstEnergy has provided no support for its assertion that Rider RRS is in the public interest.

4. FirstEnergy Fails to Show That the PPA Will Not Interfere with Ohio's Compliance with Environmental Regulations.

To satisfy the ESP III criteria, FirstEnergy must describe "how the generating plant is compliant with all pertinent environmental regulations and its plan for compliance with pending environmental regulations."¹⁴ FirstEnergy's current compliance status is not the only issue, or even the most important issue, when the implications of environmental regulations are considered. Regulatory risk and who bears regulatory risk going forward

¹² See PPL EnergyPlus, LLC v. Solomon, 766 F.3d 241 (3d Cir. 2014); PPL EnergyPlus, LLC v. Nazarian, 753 F.3d 467 (4th Cir. 2014), *cert granted*.

¹³ See FirstEnergy at 22–24.

¹⁴ ESP III at 25.

are also important. Under the Rider RRS, FirstEnergy proposes to transfer the risks of regulatory compliance to Ohio customers.

Subsidizing uneconomic coal plants will not help Ohio comply with the Clean Power Plan. FirstEnergy's testimony fails to show why Ohioans are not better off allowing markets to determine the future of the RRS Assets. FirstEnergy could allow the markets to serve that purpose by offering the units for sale to the highest bidder.

5. The Response to Subsidies for New Entrants Demonstrates that the FERC Will Defend Competitive Markets Against Manifest Harm.

The PJM MOPR does not apply to existing units, it applies to new units. To prevent harm to competitive markets that would result from the Rider RRS and similar arrangements that may follow such a harmful precedent, the MOPR would have to be revised. A revised MOPR could prevent the harm to PJM markets that would result from subsidies shielding the RRS Assets from market incentives to retire in a manner similar to the way the MOPR protects against subsidized new entry.

Regulatory action addressing the concrete and discrete problem posed by the Rider RRS is quite likely. The possibility of the introduction of an expanded MOPR or similar mechanism should be carefully considered in evaluating whether the Rider RRS serves the interest of Ohio consumers.

If recent history repeats, a revised MOPR protecting PJM markets will be swiftly put in place even if it is controversial. The FERC has demonstrated that it will not ignore manifest harm to competitive wholesale markets.¹⁵ The current MOPR became effective 91

¹⁵ See *PJM Interconnection, L.L.C.*, 135 FERC ¶ 61,022 (2011) ("The filings ... contain sufficient information to resolve the issues without the need for suspension or a hearing; we are not persuaded that the existing record is deficient on any of the issues presented. We are also not persuaded that the delay, uncertainty, and administrative expense associated with additional litigation would be outweighed by any other countervailing considerations. Further, we agree with parties who argue that it would be beneficial to resolve these issues prior to the May 2011 base residual auction."); see also *PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,090 (2013).

days after New Jersey's passage of S. 2381 (program to promote qualified electric generation facilities). Both the Commission and PJM quickly appreciated the need to protect competitive markets and acted decisively to put a rule in place before the next RPM auction.

The amicus curiae brief filed by PJM in this proceeding reveals that it appreciates the problem. PJM has asked (at 4–5) that any order approving the Rider RRS interpret the Rider RRS in a way that would insulate the PJM markets from anti-competitive effects. Such an interpretation would require that FirstEnergy offer its units in way that would reduce the probability that the RRS Assets would clear RPM auctions and raise the prospects that Ohio customers will be unable to share their bad bargain with others. Ohio customers would pay above market prices and be relatively worse off than PJM customers in other states. Ohio customers should be protected from that harmful result. The best way to do that is to not approve the Rider RRS.

E. Staff's Arguments About FirstEnergy's Future Market Behavior Are Misplaced.

Staff has argued on brief (at 8–9):

[T]he Stipulation will provide that the PPA units are managed efficiently and bid competitively in the PJM markets with full Commission oversight to assure compliance.[footnote omitted] In addition, although anti-competitive claims may be made, no quantitative analysis on either a wholesale or retail basis is provided.

Staff also argued in a similar proceeding:

Unsubsidized units that have bid and cleared the 2016/2017 and 2017/2018 Transitional Auctions and the 2018/2019 Base Residual Auction (BRA) for capacity performance have been competitive in the PJM market.[footnote omitted] PJM and Market Monitoring Analytics conduct detailed reviews of all auction results and conclude that every capacity auction, including the most recent capacity performance auctions produced competitive results, and the behavior of participants was competitive.[footnote omitted] Nothing will change and opponents of the Stipulation have not and cannot demonstrate otherwise. The Staff fully expects, as part

of the Stipulation, that the PPA units will be bid competitively into the PJM markets consistent with recent bidding behavior. ... No irreparable harm exists in the PJM market today where cost-based units are treated the same as competitive units. As a result, the PPA rider would not harm the PJM market if approved.¹⁶

Staff's arguments are misplaced. There is no basis in the record to conclude that FirstEnergy will continue to offer the RRS Assets competitively if the Rider RSS is approved. On the contrary, the RRS Rider creates powerful incentives to offer the RSS Assets at non-competitive levels, i.e. at an offer price of zero. On the contrary, the record shows that FirstEnergy believes, based on its knowledge of the RRS Assets, that the competitive choice for the RRS Assets is to retire, sell or otherwise transfer financial responsibility for them. This proceeding constitutes an attempt to transfer the RRS Assets at above market levels to Ohioans.

Staff has not and cannot demonstrate that the assets will be offered in to the markets at competitive levels. If the units are offered at a competitive level and do not clear in the market, Ohio customers will have to pay for the full cost of the PPA assets. Staff has not and cannot demonstrate that the Commission has the authority to require FirstEnergy to offer the assets in to the markets at a competitive level. Staff has not stated the definition of a competitive offer. Staff has not and cannot demonstrate what the consequences would be, if any, for FirstEnergy if the assets were offered at zero or any noncompetitive level.

The burden of proof in this proceeding is FirstEnergy's. FirstEnergy offers no evidence that the Rider RRS will incentivize or compel competitive behavior.

If the Rider RRS is approved, the term "unreasonable" in the PUCO Oversight Rule should be explicitly redefined as "noncompetitive." Moreover, to ensure that the "noncompetitive" is accurately enforced, the RRS Assets should be directed to participate in

¹⁶ Reply Brief Submitted on behalf of the Staff of the Public Utilities Commission of Ohio, Case No. 14-1693-EL-EDR et al. (February 8, 2016) at 9.

the PJM capacity market and offer consistently with the results of a review process designed to ensure a competitive offers, e.g. the process specified in the MOPR unit specific offer review.¹⁷ Application of a process defined under the PJM rules is best way to promote the market behavior that Staff expects and relies upon in support of the RRS Rider. Only with such a rule in place, could there be any assurance that the RRS Assets would be offered competitively.

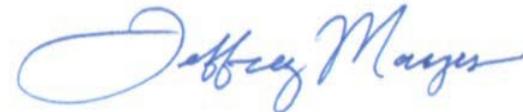
Although this change would protect PJM markets and reduce potential federal/state conflict, this change would mean that Rider RSS should not be approved as in the public interest. The result would be to charge above-market prices to Ohioans and to force Ohioans to purchase more capacity than PJM believes necessary. Ohio law protects Ohioans from that result, and that law should be properly applied. The Rider RRS should not be approved.

¹⁷ See OATT Attachment DD § 5.14(h)(8)&(9).

II. CONCLUSION

The Market Monitor respectfully requests that the Commission afford due consideration to this brief as the Commission resolves the issues raised in this proceeding.

Respectfully submitted,



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Dated: February 26, 2016

CERTIFICATE OF SERVICE

I hereby certify that I have this day served by email the foregoing document upon persons with email addresses listed below.

Dated at Eagleville, Pennsylvania, this 26th day of February, 2016.



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