IN THE SUPREME COURT OF OHIO

OHIO ENVIRONMENTAL COUNCIL, ENVIRONMENTAL DEFENSE FUND, and ENVIRONMENTAL LAW AND POLICY CENTER,	)	CASE NOS. 2017-1444, 2017-1664
Appellants,	)	Appeal from the Public Utilities Commission of Ohio
v.	)	
THE PUBLIC UTILITIES COMMISSION OF OHIO,	)	*In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide for a Standard Service Offer in the Form of an Electric Security Plan.*
Appellee.	)	Case No. 14-1297-EL-SSO

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TABLE OF CONTENTS

Table of authorities ... iii

Glossary of terms and abbreviations ... viii

Introduction ... 1

Statutory background ... 3

1. For decades, Ohio employed a traditional model of utility regulation ... 4
2. The Ohio Legislature deregulates the generation component of the electricity market. ... 5
3. The Ohio Legislature provides support for a growing free market for electricity generation. ... 7

Statement of the facts and case ... 9

1. The three FirstEnergy entities in this case. ... 9
2. Regulators reject FirstEnergy's initial efforts to prop up its struggling generation affiliate. ... 12
3. After rejecting FirstEnergy's proposal, the Commission proposes its own bailout—a distribution modernization rider. ... 13
4. The Commission approves Rider DMR in its Fifth Entry on Rehearing, rejecting challenges that it is unlawful and unreasonable. ... 14
5. The Commission reaffirms Rider DMR in its Eighth Entry on Rehearing. ... 18

Standard of review ... 18

Argument ... 19

<u>Proposition of Law 1</u>: R.C. 4928.143(B)(2)(h) does not permit distribution modernization riders that fail to require any grid modernization or other distribution investments. ... 19

A. The Commission exceeded its statutory authority in creating and approving Rider DMR under R.C. 4928.143(B)(2)(h) because it does not require any distribution investments, and hence does not "regard[] distribution service." ... 19

B. Rider DMR cannot be considered an "incentive" to modernize the grid. ... 24

C. Rider DMR cannot be approved under R.C. 4928.143(B)(2)(h) because it is not based on the utility's costs incurred in providing services, in violation of the statute and the Commission's own longstanding precedent. ... 25

Proposition of Law 2: Awarding a distribution utility a rider to compensate for debt accumulated by its poor performing market-based generation affiliate constitutes unlawful transition revenue or "any equivalent revenues" under R.C. 4928.38. 31

Proposition of Law 3: The Commission's approval of the modified DMR is unreasonable because, contrary to the Commission's established standards, it does not provide for safeguards to ensure that the revenues be used for grid modernization 37

Proposition of Law 4: It is unreasonable and contravenes R.C. 4928.66(D) for the Commission to allow a utility to recover lost distribution revenues stemming from independent customer decisions that improve energy efficiency rather than any affirmative efficiency program sponsored by the companies. 41

Conclusion 46

Appendix — App. Page

Notice of appeal 1

Fifth entry on rehearing (Oct. 12, 2016) 10

Eighth entry on rehearing (Aug. 16, 2017) 202

Application for rehearing 292

Ohio Revised Codes 327

TABLE OF AUTHORITIES

Cases

Bark v. USFS,
37 F. Supp. 3d 41 (D.D.C. 2014) 36

Broad Street Energy v. Endeavor Ohio, LLC,
975 F. Supp. 2d 878 (S.D.Ohio 2013) 36, 37

California Div. of Labor Stds. Enforcement v. Dillingham Constr., N.A., Inc.,
519 U.S. 316, 117 S.Ct. 832, 136 L.Ed.2d 791 (1997) 20

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112 Ohio St.3d 360, 2007-Ohio-53, 859 N.E.2d 957 19

EPSA v. FirstEnergy,
155 FERC ¶ 61,101, No. EL16-34-000 (April 27, 2016) 13

Heckler v. Chaney,
470 U.S. 821, 105 S.Ct. 1649, 84 L.Ed.2d 714 (1985) 36

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Pub. Util. Comm. No. 09-1089-EL-POR, Opinion and Order (May 13, 2010),
available at https://perma.cc/LZE7-ELR6 43

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Pub. Util. Comm. No. 16-0395-EL-SSO, available at
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147 Ohio St.3d 439, 2016-Ohio-1608, 67 N.E.3d 734 .... 3, 8, 32

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available at https://perma.cc/W7ZP-P8G6 28

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147 Ohio St.3d 166, 2016-Ohio-3490, 62 N.E.3d. 179 32

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New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co., 514 U.S. 645, 115 S.Ct. 1671, 131 L.Ed.2d 695 (1995)....20

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42 Ohio App.3d 85, 536 N.E.2d 651 (10th Dist. 1987) 36

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2011 Ind. PUC LEXIS 115, Ind. Util. Regulatory Comm. No. 43839,
Final Order (Apr. 27, 2011) 44

United States v. Gordon,
961 F.2d 426 (3d Cir. 1992) 36

Statutes

R.C. 4903.09 45

R.C. 4903.13 ..... 18, 36, 37

R.C. 4905.02 9

R.C. 4905.04 5

R.C. 4905.22 .....4, 27

R.C. 4905.32 39

R.C. 4905.402 14

R.C. 4909.04 .....4, 26

R.C. 4909.10 .....5, 27

R.C. 4909.15 ..... 4, 5, 26, 39

R.C. 4909.154 .....4, 26, 27

R.C. 4928.01 ..... 3, 6, 9

R.C. 4928.02 ..... 5, 6, 8

R.C. 4928.03 6

R.C. 4928.07 6

R.C. 4928.15 .....5, 25, 26

R.C. 4928.17 5

R.C. 4928.37 .....6, 31

R.C. 4928.38 .....*passim*

R.C. 4928.40(A) 6

R.C. 4928.66(D) 3, 41, 42

R.C. 4928.141 .... 7, 31

R.C. 4928.142 7

R.C. 4928.143 .... *passim*

R.C. 4928.662(A) 42

Rules

Nevada Admin. Code 704.95225 44

Legislative materials

Am.Sub.S.B. No. 221 (SB221) 7

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GLOSSARY OF TERMS AND ABREVIATIONS

AEP: American Electric Power; an electric utility.

Att.: Attachment.

CAP: Consumer Action Program; a program that measures customer energy conservation efforts.

CFO: Cash Flow to Operations; a measure of the cash flow generated by a business generally calculated by subtracting operating expenses from the total revenues from a business's principal operations.

Commission or PUCO: The Public Utilities Commission of Ohio.

Distribution: The delivery of electricity to homes and businesses over the local poles and wires, transformers, substations and other equipment. Electricity distribution remains regulated by the Commission.

Eighth Entry: The Commission's Eighth Entry on Rehearing, Case No. 14-1297-EL-SSO (Aug. 16, 2017).

ESP: Electric security plan; the default plan for the supply and pricing of electric generation that is filed by the utility company.

Ex.: Exhibit.

Fifth Entry: The Commission's Fifth Entry on Rehearing, Case No. 14-1297-EL-SSO (Oct. 12, 2016).

FES: First Energy Solutions; the generation affiliate of FirstEnergy.

FERC: The Federal Energy Regulatory Commission; a federal agency.

FirstEnergy (the Companies): Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company, which are electric distribution utilities ad defined in R.C. 4928.01(A)(6) and public utilities as defined in R.C. 4905.02.

First Energy Corp.: First Energy Corporation is the parent holding company of, among other subsidiaries, FES and FirstEnergy.

Generation: The production of electricity in a power plant. The Commission no longer regulates electricity generation charges.

Lost Distribution Revenues: Revenue that the utility loses due to diminished consumer energy use accompanying energy efficiency programs.

MRO: Market rate offer; a type of ESP based on the market rate for electricity.

PPA: Power Purchase Agreement; an agreement from a distribution utility to purchase electricity supply from a generation company.

RESA: Retail Energy Supply Association; an organization comprised of retail electricity and natural gas suppliers.

Rider: An extra charge to distribution customers authorized under R.C. 4928.143(B).

- Rider AMI—Advanced Metering Infrastructure Rider
- Rider DCR—Delivery Capital Recovery Rider
- Rider DMR—Distribution Modernization Rider
- Rider RRS—Retail Rate Stability Rider

SB3: Senate Bill 3 (1999)

SB221: Senate Bill 221 (2008)

SSO: Standard Service Offer; the default electric generation service a customer will receive from the distribution utility if she does not choose a different electric generation supplier.

Tr. Vol.: Transcript Volume of testimony from hearings before the Commission conducted regarding FirstEnergy's ESP application. These transcripts were transferred to the Court on November 15, 2017, by the Commission.

Transmission: The transporting of high-voltage electricity from a power plant to the local distribution utility.

INTRODUCTION

It is no secret that, for years, FirstEnergy's power generation company has been failing in the competitive market for electricity. Reports of its plant closings and financial woes routinely make headlines in Ohio's newspapers. And FirstEnergy executives repeatedly lobbied the Governor and the Legislature for economic support.[1] But those efforts were unsuccessful, prompting FirstEnergy to pursue another route: It went to the Public Utilities Commission of Ohio seeking the cash infusion the Legislature refused to provide. The Commission, however, "is not a bank" or "a trust fund." Fifth Entry at ¶ 7 (Haque, Chairman, concurring). It is, instead, a utility regulator bound by a statute that does not authorize bailouts of utilities. But that's exactly what it did in this case—it wrote a blank check to FirstEnergy. This Court should not allow what the Legislature has refused.

Central to the Legislature's scheme governing electric utilities in Ohio is the principle that electric distribution (i.e., the delivery of electricity to a home or business) remains regulated by the Commission, but electric generation (i.e., the supply of electricity) is unregulated and "fully on its own in the competitive market." R.C. 4928.38. For distribution, that means the Commission gives a utility a monopoly over delivery services to all the customers in a particular geographic area, and those captive customers pay a rate set by the Commission based on the utility's distribution costs plus a reasonable rate of return. But the Commission cannot force a utility's captive distribution customers to compensate for its generation affiliate's failure in the competitive market. That would

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[1] John Funk, *FirstEnergy power plant bailouts rebuffed by state and federal leaders*, The Plain Dealer (Aug. 23, 2017), available at https://goo.gl/grxUwB; Andrew Cass, *FirstEnergy lobbying for state legislation upping revenue*, The News-Herald (Jan. 26, 2018), available at https://goo.gl/tjqPqE; Julie Carr Smyth, *Ohio House Sidelines Bailout of 2 FirstEnergy Nuclear Plants*, U.S. News (May 19, 2017), available at https://goo.gl/UfPYPJ.

violate the legislative scheme, distort the market, and force ratepayers to shoulder the generation company's poor business decisions.

Yet, under the guise of promoting "grid modernization," that is what the Commission did in approving FirstEnergy's so-called "distribution modernization rider" (Rider DMR). FirstEnergy's parent company was saddled with debt from FirstEnergy's failing *generation affiliate*, threatening the parent company's credit rating. To make up for that debt, the Commission approved extra fees—in the form of Rider DMR—for FirstEnergy's captive *distribution* customers. By the Commission's own admission, Rider DMR requires FirstEnergy's captive distribution customers to provide FirstEnergy with "credit support"—a fancy term for a cash infusion.

Ostensibly, the Commission approved this cash infusion so that FirstEnergy can obtain more favorable borrowing terms when undertaking grid modernization which, in turn, would help deliver electricity to its customers. But, fatal to its plan, Rider DMR does not require FirstEnergy to actually engage in grid modernization at all. To the contrary, the Commission made clear that it would "not place restrictions on the use of Rider DMR funds." Fifth Entry at ¶ 282. With no strings attached, Rider DMR cannot reasonably be considered within the Commission's authority to approve riders "regarding . . . distribution services." R.C. 4928.143(B)(2)(h). Nor can it survive the Legislature's bar on "transition fees," because regulated rates are being used to offset free market losses. R.C. 4928.38. Rider DMR, therefore, cannot stand.

What's more concerning is the precedent that this case sets: the Commission can now use riders and other fees to pass generation-related losses to regulated distribution consumers. Today it's FirstEnergy, but other utilities struggling to compete in the electric generation market will surely follow. That is not the Commission's role. It is the Legislature's choice if it wants Ohioans to bailout generation companies that cannot survive in the competitive market. But thus far it has declined, leaving generation utilities "wholly responsible for whether [they are] in a competitive position" in the free market. Neither this Court nor the Commission should authorize what the Legislature has not.

Even apart from Rider DMR, the Commission hands FirstEnergy cash without requiring it to improve its services in another area: energy efficiency. The Commission, following R.C. 4928.66(D), often allows utilities to charge extra fees to make up for revenues they lose "as a result of" energy conservation programs. But here, the Commission authorized FirstEnergy to charge its customers additional fees based on losses from conservation efforts undertaken independently by consumers without any help or incentive from FirstEnergy. That too is unreasonable and violates the Legislature's mandates.

STATUTORY BACKGROUND

Revised Code Title 49 governs the terms of Ohio's retail electric service "from the point of generation to the point of consumption." R.C. 4928.01(A)(27). Undoubtedly, it is a "labyrinthian scheme," which has been amended and changed over the years. *In re Application of Columbus S. Power Co.*, 147 Ohio St.3d 439, 2016-Ohio-1608, 67 N.E.3d 734, ¶ 72 (O'Connor, C.J., dissenting). But the myriad code provisions form a comprehensive scheme that serves an important purpose: to separate the utility's distribution service—which is regulated—from generation service—which is not. And it accordingly prohibits the Commission from requiring a utility's distribution customers, who are captive in a regulated market, from having to pay additional fees to support a utility's generation affiliate that is failing in the free market.

1. For decades, Ohio employed a traditional model of utility regulation.

Until the late 1990s, Ohio's electric utilities followed a traditional approach to electricity regulation: generation and distribution services were bundled together by the local utility, which held monopoly rights to provide that bundled package to all consumers in a given geographic area.[2] Andrew R. Thomas, et al., *Electricity Customer Choice in Ohio: How Competition Has Outperformed Traditional Monopoly Regulation*, Urban Publications: Cleveland State University 10 (2016), available at https://perma.cc/G52K-VQVK. Under this arrangement, the rates charged to consumers by utilities were "cost-based"—that is, they were calculated based on the utility's cost of operation, plus a reasonable return on investment. *See* R.C. 4909.15. But utilities were not free to charge whatever rates they saw fit. Instead, because consumers in this scheme were captive—unable to choose between competing utilities or negotiate the terms or rates of their electricity service—Ohio created several safeguards designed to protect consumers from paying inflated rates. For starters, the Commission had to approve the rates. *Id.* And because the rates were based on costs, the Legislature charged the Commission with making sure a utility's costs were "prudent," "reasonable," and "used and useful" to render utility service to customers. R.C. 4909.154; 4909.04(A); 4905.22. Accordingly, Revised Code Chapters 4905 and 4909 set forth detailed standards and procedures for ensuring that the utility's rates were reasonably fixed. The Commission may conduct independent financial audits, hold public hearings, and require a

[2] Transmission services were also bundled. Because transmission is not relevant to this appeal, it is not included in the statutory background.

utility to refund or credit customers if the utility charged rates based on imprudent expenditures. *See* R.C. 4905.04; 4909.10; 4909.15.

2. The Ohio Legislature deregulates the generation component of the electricity market.

In 1999, the Ohio Legislature—at the urging of the utility companies—made a definitive choice to split up the distribution and generation components of electric service. *See* Am.Sub.S.B. No. 3, 148 Ohio Laws, Part IV, 7962 (SB3). On the distribution side, SB3 left undisturbed the traditional cost-based model that had governed it for years. *See* R.C. 4928.15; Thomas, *supra*, at 12. The utilities still had a monopoly over distribution in a given geographic territory, but the Legislature opted to deregulate the generation side. It believed market forces—instead of regulation—should govern generation because, in its judgment, creating a separate competitive market for electricity supply would result in lower utility bills for customers, while still allowing them to receive safe, adequate and reliable service. *See* R.C. 4928.02(A).

As a result, the industry was forced to restructure. *See generally* R.C. Chapter 4928; *Ohio Consumers Counsel v. Pub. Util. Comm. Of Ohio*, 114 Ohio St.3d 340, 2007-Ohio-4276, 872 N.E.2d 269, ¶ 2. For the utilities, deregulation meant that they had to reform their corporate structures to separate their generation and supply entities; the distribution arm could not "extend any undue preference or advantage to any affiliate . . . of its own business" engaged in the newly competitive generation market. R.C. 4928.17. And, while the utilities were not required to sell their generation assets to third parties, they were required to place them into separately operated subsidiaries. *Id.*; Thomas, *supra*, at 12. Most critically—the "cornerstone of SB 3"—was that the utilities had to separate or "unbundle" their services and charges for electricity generation and distribution. *Ohio*

Consumers Counsel v. PUCO, *at* ¶ 22; R.C. 4928.07. That meant changes for consumers. With unbundled distribution and generation charges, consumers could choose their electric supplier. *Id.* Because the utility had to deliver power from any licensed supplier, not just its generation affiliate, consumers were no longer tied to the utility's supplier preferences. R.C. 4928.03. They had "effective choices over the selection of [their electric supplier]." R.C. 4928.02(I). Deregulation also meant a new role for the Commission, namely, policing the separation between regulated distribution utilities and their generation affiliates. Specifically, the Legislature mandated that the Commission "[e]nsure effective competition" in the electric generation market by "avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service." R.C. 4928.02(H).

The Legislature gave the utilities five years (until December 31, 2005) to complete the transition to an unregulated generation market. R.C. 4928.40(A), 4928.01(A)(17). To assist utilities in this "market development" period, SB3 provided each electric utility with a limited opportunity to "receive transition revenues that may assist it in making the transition to a fully competitive retail electric generation market." R.C. 4928.37(A)(1). Transition revenues were permitted because the existing utilities had to prepare for competition—they risked losing customers in a free market, and some of their capital investments (i.e., building a big power plant) or other decisions might have been predicated on the assumption of a captive generation market. Over these five years the utilities could receive transition fees, but then the Legislature intended that a generation business "shall be fully on its own in the competitive market." R.C. 4928.38.[3] After this window, SB3 thus specifically prohibited the Commission from "authoriz[ing] the receipt of transition revenues or any equivalent revenues by an electric utility." *Id.*; *see also In re Application of Columbus S. Power Co.*, 147 Ohio St.3d 439, 2016-Ohio-1608, 67 N.E.3d 734, at ¶ 16.

3. The Ohio Legislature provides support for a growing free market for electricity generation.

In 2008, the Legislature made further changes to foster the transition to an open generation market. *See* Am.Sub.S.B. No. 221 (SB221). Competition in the electricity generation market had failed to develop as quickly as the Legislature anticipated, leading to volatility in electric supply prices. So SB221 sought to ease the transition to a market-based system by making changes that would stabilize rates, while still fostering competition. *In re Application of Columbus S. Power Co.*, 128 Ohio St. 3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶¶ 2–5.

To this end, SB221 allowed utilities some flexibility on how to offer generation plans to retail customers. In relevant part, SB221 required each distribution utility to provide a standard service offer (SSO) to serve as the default electricity generation plan for all the customers within its geographic territory. R.C. 4928.141(A). The electricity prices in the default plan must be set either as a market rate offer (MRO) or an electric security plan (ESP). *See id*. An MRO sets retail rates through a competitive bidding process where the utility seeks bids from wholesale suppliers of power. *See* R.C. 4928.142. An ESP, by contrast, does not require that the electricity supply be bought in a competitive market. *See*

[3] Transition fees for regulatory assets could be recovered through December 31, 2010. R.C. 4928.01(A)(26), 4928.40(A).

R.C. 4928.143. It can be based on the cost of electricity from the utility's existing generating capacity, from power the utility purchases (such as from bidding on the wholesale market), or a combination of both. R.C. 4928.142; Thomas, *supra,* at 14. But the Commission is required to determine that the ESP is "more favorable in the aggregate as compared to the expected results that would apply" with an MRO. Fifth Entry at ¶ 31; R.C. 4928.143(C)(1). Customers do not have to accept the standard service offer; they can choose an alternative retail supplier.

To help utilities cover the costs of special projects and programs, ESPs may contain extra fees in the form of "riders." For example, riders may charge customers "to reimburse [the utilities] for costs they incur in providing distribution services," to pay for need-based assistance programs, to comply with energy efficiency mandates, or for other bases specifically enumerated in the statute. Thomas, *supra*, at 15; *see* R.C. 4928.143(B)(2)(a)–(i). The ESP statute "states, 'The [electric security] plan may provide for or include, without limitation, any of the following,' and then lists nine categories of cost recovery." *In re Application of Columbus S. Power Co.*, at ¶ 31. Because the Legislature spells out exactly what riders an ESP may include, "if a given [charge] does not fit within one of the categories . . . it is not authorized by statute." *In re Application of Columbus S. Power Co*., at ¶ 32.

By allowing utilities some flexibility on how to offer generation plans to retail customers, the Legislature eased the transition to a still-developing market. But it doubled-down on its intention to have an independent competition-based generation market. SB221 forced utilities that had not yet separated their generation business to do so. Thomas, *supra,* at 15. And it specifically prohibited "the recovery of any generation-related costs through distribution . . . rates." R.C. 4928.02(H). Like SB3, SB221 again "expressly prohibits the recovery of transition costs" by providing that any ESP "shall exclude any previously authorized allowances for transition costs." *In re Application of Columbus S. Power Co*., 147 Ohio St.3d 439, 2016-Ohio-1608, 67 N.E.3d 734, at ¶ 17. The overall goal was for the electric generation market to stand on its own, without anticompetitive props from the regulated distribution companies. The plan has largely worked: "Since 2011, a robust retail market for electricity has developed in Ohio." Thomas, *supra*, at 1.

STATEMENT OF THE FACTS AND CASE

1. The three FirstEnergy entities in this case.

This case centers on the interplay between three related entities—FirstEnergy (the distribution company), FirstEnergy Solutions (the generation affiliate), and FirstEnergy Corporation (the parent company).

FirstEnergy is a public utility that distributes electricity to customers in Ohio and throughout the Midwest and Mid-Atlantic. *See* R.C. 4928.01(A)(6) and 4905.02. In Ohio, FirstEnergy is comprised of three smaller companies: the Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company (collectively the "Companies" or "FirstEnergy"). As an electric distribution utility, FirstEnergy is governed by the traditional noncompetitive regulated scheme described above. Under this framework, the Commission has granted FirstEnergy the exclusive right to distribute electricity to customers within a particular geographic area (mainly northern Ohio). And through rates approved by the Commission, FirstEnergy collects its costs for delivering electricity and earns a reasonable rate of return. It also collects additional fees from riders for specific projects. For instance, through the existing Advanced Metering Infrastructure Rider (Rider AMI) and the Delivery Capital Recovery Rider (Rider DCR), FirstEnergy can recover capital expenditures made on grid-modernization and other distribution-infrastructure investments. Fifth Entry at ¶ 108; *id.* at ¶ 4 (Haque, Chairman, concurring). This scheme ensures a safe and stable business; as a result, the Companies have a strong financial outlook. *Id.* at ¶ 11 (Haque, Chairman, concurring); Rehearing Testimony of Joseph Buckley (June 29, 2016), Staff Ex. 13, Att. 3, 6–7 (S&P report).

FirstEnergy Solutions (FES) is the affiliate generation entity that spun off from FirstEnergy in 2006 after SB3. By all accounts, FES has struggled in the competitive market. Fifth Entry at ¶ 6 (Haque, Chairman, concurring). FES has repeatedly "bet heavily on coal-fired generation as the cheapest source of base load electricity," Thomas, *supra*, at 6, and it bet that it could sell its electricity to retail customers for more than its cost of production. But that bet turned out to be wrong, as "low natural gas prices" drove down the price of power and thus undercut FES's generation sources, placing "considerable strain on FES' business." Tr. Vol. X (Aug 1, 2016), P3/EPSA Ex. 21. As Moody's has reported, FES's competitive-market weakness stems in part on "the composition of [its] generation portfolio, which is roughly 50% coal, 40% nuclear, and 5% each of gas and renewables." *Id*. FES's "old power plants cannot generate electricity as cheaply as the constantly growing number of gas-fired power plants and wind farms pushing power into wholesale power markets." John Funk, *FirstEnergy hopes to move its power plants back under regulated rates, customer prices could increase*, The Plain Dealer (Nov. 4, 2016), available at https://goo.gl/qkKZ5X. But independent market forces are not solely to blame for FES's financial woes: As recently as 2013, FES continued to bet heavily on coal and nuclear-powered plants, investing upwards of $1.8 billion to upgrade its coal-fired Sammis plant in Stratton, Ohio—only to later concede that the investment and upgrade had failed. Tr. Vol.

XI (Sept. 15, 2015), 2280:16–2282:2. Less than five years later, four of the units in the Sammis plant are scheduled to close. Fifth Entry at ¶ 204.

FES's poor investment decisions have, as a result, become a "dangerous drag on the parent company." Funk (Nov. 4, 2016), *supra*. Things had gotten so bad that FES's chief executive recently urged the Ohio Legislature to approve a bailout for the failing generation company. *Id*. One proposal requested that FES be allowed to return to a regulated system where customers are forced to buy electric supply from FES, covering the costs of generating electricity plus a reasonable profit margin. *Id.*; *see also supra* n.1. But the Legislature refused. All indications now are that FES will soon file for bankruptcy. *See* John Funk, *FirstEnergy Solutions downgraded on bankruptcy expectation, FE parent seen as stable*, The Plain Dealer (Aug. 21, 2017), available at https://goo.gl/zbbHY8.

FirstEnergy Corp. is the parent holding company of FirstEnergy, FES, and other affiliates. Due in large part to FES's failings, FirstEnergy Corp. has been "experiencing financial challenges," and—at the time of the relevant hearings in this case—the Commission determined that it was at risk for a credit downgrade.[4] Fifth Entry at ¶¶ 143, 194. The credit agencies' reports (all available in the record) demonstrate that FirstEnergy Corp.'s potential downgrade was tied directly to generation-related losses. Standard & Poor's, one such credit rating agency, described "weak commodity prices" and "[t]he higher-risk competitive businesses" as increasing FirstEnergy Corp.'s likelihood for a downgrade. Rehearing Testimony of Joseph Buckley (June 29, 2016), Staff Ex. 13, Att. 3, at 2–3. Because the Companies are subsidiaries, "if FirstEnergy Corp. were downgraded, the

[4] Since the administrative proceedings' termination, Moody's has downgraded FES. *See* Jim Mackinnon, *Moody's downgrades FirstEnergy Solutions, says default risk growing* (Jan. 23, 2018), available at https://perma.cc/LR2H-CABM.

Companies would also be downgraded." *Id.* at ¶¶ 111, 194. A downgrade, in turn, could limit the Companies' "access to the credit markets," "may result in higher borrowing costs," or could mean "more restrictive terms and conditions" if the Companies sought to access capital in the future. *Id*. at ¶ 195. But "rather than acknowledge that technology, regulation and markets have changed over the decades, and retire their uncompetitive generation capacity, [FirstEnergy Corp.] . . . instead turned [its] attention to identifying alternative strategies for offsetting the costs of the competitive portions of [its] generation fleet"—including squeezing more money from its captive distribution customers. Thomas, *supra*, at 7.

2. Regulators reject FirstEnergy's initial efforts to prop up its struggling generation affiliate.

FirstEnergy's initial ESP application in this case was an overt attempt to prop up its struggling affiliate FES. The application proposed a power purchase agreement (PPA) that would have required FirstEnergy to purchase the output from FES's aging and uneconomic power plants at rates well above the market and then sell that electricity supply on the wholesale market for a clear loss. FirstEnergy would then pass the *entire* loss on to all of its captive distribution customers via a mandatory retail rate stability rider (RRS) on their electric bills. FirstEnergy explained that the deal was necessary "because without [it], major existing generation facilities"—which were no longer competitive on the open market—"would be shut down, threatening grid reliability." Thomas, *supra*, at 1. But as Cheryl Roberto, a former PUCO commissioner testified during hearings on this proposal, the plan was "a non-competitive purchase agreement," which would subsidize "the Companies' uneconomic generation . . . and lock the Companies into a risky long-term supply contract." Direct Testimony of Cheryl Roberto (Dec. 22, 2014) 4:24–5:3.

Nevertheless, the Commission approved this initial proposal, concluding that Rider RRS would serve the public's interest. Federal regulators saw it differently. Less than two months after the Commission's initial approval, the Federal Energy Regulatory Commission (FERC), following a U.S. Supreme Court ruling on a similar generation subsidy scheme in Maryland, determined that FirstEnergy could not force its captive distribution customers into a bad deal with its own generation affiliate. *See EPSA v. FirstEnergy*, 155 FERC ¶ 61,101, No. EL16-34-000 (April 27, 2016). That would be anticompetitive. As a consequence, FirstEnergy was required to scrap that plan.

Its second effort was no more successful. After FERC rejected its initial proposal, FirstEnergy filed a second proposal with the Commission. Fifth Entry at ¶¶ 9–14. This time, the proposal no longer involved contracting with its unregulated affiliate FES; but it nevertheless still proposed to be compensated for FES's failings. *See id.* at ¶ 41. In particular, although there was "no actual purchase or sale of energy and capacity at all," *id*. ¶ 101, FirstEnergy proposed charging a rider to all customers to pay for the "net difference between an assumed cost (and assumed quantity) of generation service from FES and actual market rates." *Id.* at ¶101. That approach was unacceptable, and the Commission rejected it. *Id*. at ¶ 96. Because there was no direct purchase from FES, unlike the original proposal, the new proposal would not save FES's struggling plants, and so it lacked sufficient public benefit. *Id*. at ¶¶ 103–08.

3. After rejecting FirstEnergy's proposal, the Commission proposes its own bailout—a distribution modernization rider.

Although FirstEnergy's two attempts to secure a cash-infusion to prop up the FES generating plants failed, the Commission's staff came up with a third plan to help FirstEnergy deal with the fallout from its struggling sister affiliate. But its solution was just another cash-infusion. Its proposal: a so-called "distribution modernization rider" (Rider DMR) that required FirstEnergy's captive distribution customers to provide FirstEnergy with an infusion of over $600 million in "credit support" with the "intention" that FirstEnergy would be "stimulated" to access capital and update the electric grid. Fifth Entry at ¶¶ 190, 281. Specifically, Rider DMR allows FirstEnergy to recover fees from customers amounting to approximately $204 million annually ($132.5 million, grossed-up for taxes) for a period of three years, which the Commission can extend for an additional two years. *Id.* at ¶ 188; PUCO, FirstEnergy's Electric Security Plan (Oct. 12, 2016), available at https://perma.cc/4NMU-NDUZ. The Rider has three conditions: (1) FirstEnergy Corp. has to keep its headquarters in Akron for the duration of the ESP; (2) there can be no change in "control" of the Companies, as that term is defined in R.C. 4905.402(A)(1); and (3) there must be "sufficient progress" in grid modernization programs approved by the Commission. Fifth Entry at ¶ 206.

4. The Commission approves Rider DMR in its Fifth Entry on Rehearing, rejecting challenges that it is unlawful and unreasonable.

After extensive testimony, on October 12, 2016, the Commission approved Rider DMR in its Fifth Entry on Rehearing, rejecting all of the appellants' challenges to it. Fifth Entry at ¶ 185.

The Commission main goal in embracing Rider DMR was "to improve FirstEnergy's credit position." Fifth Entry at ¶ 118. Staff witness Joseph Buckley introduced Rider DMR at the hearing, and explained that the purpose of Rider DMR was to provide credit support to FirstEnergy Corp. so that it would maintain an investment grade rating. Tr. Vol. III (July 13, 2016), 509:25–510:19. Testimony at the hearing focused on FirstEnergy Corp.'s credit rating and potential downgrade, which is driven by the market failures of FES. *See supra*

10–12. The Commission concluded that a downgrade for the parent company could, in turn, trigger a downgrade for the Companies. *Id.* at ¶ 278. By requiring captive customers to shoulder additional charges, the Commission explained that Rider DMR would "provide credit support to the Companies in order to avoid a downgrade in credit ratings." *Id.* at ¶ 281.

Consistent with these credit rating concerns, the Commission calculated the amount recoverable through Rider DMR by first determining the amount of cash necessary for FirstEnergy Corp. to maintain a Cash Flow to Operations (CFO) debt ratio of 14.5 percent—the CFO/debt ratio that experts testified would avoid a downgrade. *Id.* at ¶ 197. Next, the Commission allocated 22 percent of that to the Companies, based on the Companies' share of FirstEnergy Corp.'s operating revenues. *Id*. at ¶ 196.

The calculations were not based on the cost of any grid modernization. Costs that the Companies expend on actually modernizing the grid can be recovered through a separate infrastructure rider, as staff witness Tamara Turkenton testified. *See* Tr. Vol. II (July 12, 2016), 473:22–474:3. Chairman Haque further confirmed: "After this initial [cash] infusion, . . . Rider AMI will function as the corresponding traditional regulatory mechanism, providing a return for monies expended to construct/maintain service." Fifth Entry at ¶ 4 (Haque, Chairman, concurring).

Even though there is a separate rider to fund actual grid modernization expenditures, the Commission tied this credit-support plan to distribution modernization and concluded that it was authorized under R.C. 4928.143(B)(2)(h). Under this subsection, an ESP may include:

> Provisions regarding the utility's distribution service, including, without limitation and notwithstanding any provision of Title XLIX of the Revised

> Code to the contrary, provisions regarding single issue ratemaking, a revenue decoupling mechanism or any other incentive ratemaking, and provisions regarding distribution infrastructure and modernization incentives for the electric distribution utility. The latter may include a long-term energy delivery infrastructure modernization plan for that utility or any plan providing for the utility's recovery of costs, including lost revenue, shared savings, and avoided costs, and a just and reasonable rate of return on such infrastructure modernization.

The Commission concluded that Rider DMR is "related to distribution rather than generation" because "Rider DMR will provide credit support . . . , which will allow the Companies to access capital markets and obtain favorable borrowing terms and conditions, enabling investment in a more extensive grid modernization program." Fifth Entry at ¶¶ 190, 358. Specifically, the Commission held that Rider DMR is a "distribution modernization incentive." *Id*. at ¶ 190. "Webster's [Dictionary] defines an 'incentive' as 'something that stimulates one to take action, work harder, etc.; stimulus; encouragement." And the "Staff intends for Rider DMR to jump start the Companies' grid modernization efforts." *Id*. at ¶ 190; *see also id.* ("Rider DMR is *intended* to stimulate the Companies to focus their innovation and resources on modernizing their distribution systems." (Emphasis added)).

The Commission explicitly rejected any requirements that any portion of the funds be used for actual distribution enhancements, or that the Companies even ever attempt to access capital for modernization projects. It declared: "[W]e will not place restrictions on the use of Rider DMR funds" *Id.* at ¶ 282. The Commission did, however, "direct Staff to periodically review how the Companies, and FirstEnergy Corp., use the Rider DMR funds to ensure that such funds are used, directly or indirectly, in support of grid modernization." *Id*. at ¶ 282. And it mandated that there be "sufficient progress" toward grid modernization, which is to be determined "in the sole discretion" of the Commission. *Id*. at ¶ 208. But it did not mandate any particular grid modernization plan or benchmarks for progress. Instead, FirstEnergy was required to submit a modernization plan in a separate proceeding, not tied to customer charges under Rider DMR. *Id*. at ¶ 188. "The Commission intends on having a very robust conversation about the future of the grid and the electric industry" at an unspecified point "in the near future." *Id.* at ¶ 207; *id*. at ¶ 3 (Haque, Chairman, concurring). The Commission would evaluate FirstEnergy's plan to modernize the grid at that time. *Id*. If FirstEnergy fails to follow-through with a plan or any actual grid modernization, if it fails to make "sufficient progress" as determined by the Commission, or even if it moves from Akron, there is no provision allowing consumers to be refunded for these costs. *Id.* at ¶ 209.

Lastly, the Commission rejected the argument that Rider DMR would "collect transition revenue or its equivalent" in violation of R.C. 4928.38. *Id*. at ¶ 284–87. Multiple parties, including the Environmental Advocates, argued that because Rider DMR was targeted to compensate for FES's generation failings, and the attendant potential downgrade to FirstEnergy Corp., it constituted an unlawful transition charge. Per the legislative scheme, FES was supposed to act independently in the competitive generation market; yet with Rider DMR, FirstEnergy's captive distribution customers were being forced to compensate for its shortfalls. The Commission disagreed, concluding that "there is no 'transition' involved in this case" because FirstEnergy's separation of its generation assets occurred "many years ago." *Id*. at ¶ 287. And although FES's failings on the generation market necessitated the rider, the Commission stated that Rider DMR is "entirely unrelated to generation because the Companies have no generation assets." *Id*.

Chairman Haque concurred, openly acknowledging that the Commission's decision was "undoubtedly unconventional." *Id*. at ¶ 4. "Typical public utility regulation" provides utilities with "recovery and a return for expenditures made in constructing/maintaining service." *Id*. But Rider DMR "will serve to provide FirstEnergy with an infusion of capital" so that FirstEnergy "will be healthy enough" to make modernization investments in the future. *Id.* As for what those grid investments are, Chairman Haque expressly recognized that there are none delineated. But he would not "tie DMR recovery to certain grid modernization endeavors" because the Commission's vision for "the future of the grid and electric industry" remained uncertain. And, thus, he recognized "Rider DMR may feel a bit premature." *Id*. at ¶ 5.

5. The Commission reaffirms Rider DMR in its Eighth Entry on Rehearing.

Along with multiple other parties, the Environmental Advocates filed for rehearing arguing, among other things, that the Commission exceeded its statutory authority in approving Rider DMR. The Commission reaffirmed Rider DMR largely relying on the reasons articulated in its Fifth Entry.

STANDARD OF REVIEW

Revised Code 4903.13 provides that a PUCO order "shall be reversed, vacated, or modified by the supreme court on appeal," if the Court finds the order to be either "unlawful or unreasonable." This Court's review of factual questions is deferential, as it "will not reverse or modify a PUCO decision as to questions of fact where the record contains sufficient probative evidence to show the PUCO's determination is not manifestly against the weight of the evidence." *Monongahela Power Co. v. Pub. Util. Comm.,* 104 Ohio St.3d 571, 2004-Ohio-6896, 820 N.E.2d 921, ¶ 29. But this appeal does not challenge any factual findings; it presents only legal questions about the statutory authority and reasonableness of the PUCO's determinations. And the Court has "complete and independent power of review as to all questions of law" in appeals from the Commission. *Ohio Edison Co. v. Pub. 868 Util. Comm.,* 78 Ohio St.3d 466, 469, 678 N.E.2d 922 (1997).

ARGUMENT

<u>Proposition of Law 1</u>: R.C. 4928.143(B)(2)(h) does not permit distribution modernization riders that fail to require any grid modernization or other distribution investments.

The Commission cannot authorize Rider DMR under R.C. 4928.143(B)(2)(h). That provision permits riders based on the costs the utility bears in providing "distribution service." *Id*. But Rider DMR is meant only to provide credit support to FirstEnergy Corp., with the "intention" that FirstEnergy *hopefully*, *someday*, *in some form*, accesses credit to modernize the distribution infrastructure; in which case, it will then be compensated for its actual modernization expenditures through other riders. The Commission, however, "as a creature of statute, has no authority to act beyond its statutory powers." *Discount Cellular, Inc. v. Pub. Util. Comm.,* 112 Ohio St.3d 360, 2007-Ohio-53, 859 N.E.2d 957, ¶ 51. "So if a given provision does not fit within one of the categories listed [in R.C. 4928.143(B)(2)], it is not authorized by statute." *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, at ¶ 32. Because Rider DMR "does not fit" in R.C. 4928.143(B)(2)(h), the Commission acted beyond its authority in allowing FirstEnergy to charge its captive customers these excessive fees.

A. The Commission exceeded its statutory authority in creating and approving Rider DMR under R.C. 4928.143(B)(2)(h) because it does not require any distribution investments, and hence does not "regard[] distribution service."

The starting place for determining which riders can be authorized under R.C. 4928.143(B)(2)(h) is the plain language of the statute. *In re Application of Columbus S.*

Power Co., at ¶ 34. Here, the relevant statutory language authorizes only riders "regarding the utility's distribution service." R.C. 4928.143(B)(2)(h). Distribution service, in turn, is "the delivery of electricity to homes and businesses over the local poles and wires, transformers, substations and other equipment." PUCO, Glossary of utility-related terms, available at https://perma.cc/VA6W-M8UN.

The Commission's approval of Rider DMR fails for the simple reason that it does not "regard[] distribution services." At a minimum, the requirement that a rider be "regarding . . . distribution services" means that approval of the rider fees is contingent on the utility undertaking some actual investment in its distribution services. To be sure, the term "regarding" is not specific. And the myriad parts of the electric industry are interdependent—generation impacts distribution, and vice versa—they all arguably "regard[]" one another. "[A]pplying the [regarding] provisions according to its terms," therefore, is a "project doomed to failure, since, as many curbstone philosopher has observed, everything is related to everything else." *California Div. of Labor Stds. Enforcement v. Dillingham Constr., N.A., Inc*., 519 U.S. 316, 335–336, 117 S.Ct. 832, 136 L.Ed.2d 791 (1997) (Scalia, J., concurring). But just as courts have construed such broad language in other statutes, the Court here too should not "read [the Legislature's] words of limitation as mere sham." *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co*., 514 U.S. 645, 655, 115 S.Ct. 1671, 131 L.Ed.2d 695 (1995). Rather, to give R.C. 4928.143(B)(2)(h) meaning, the Commission can only approve a rider "regarding . . . distribution service" if—at a minimum—it imposes a requirement that the utility make *some* investment in distribution service. Revised Code 4928.143(B)(2)(h), in short, only allows riders "regarding the utility's distribution service," not unrestricted cash infusions.

But that is what Rider DMR is. The Fifth and Eighth Entries confirm that the purpose of the rider was to provide needed credit support to FirstEnergy Corp., and that it imposes no actual requirement that FirstEnergy invest in grid modernization. *See* Fifth Entry at ¶ 127 ("We intend for Rider DMR to provide the minimum amount necessary to provide credit support for the Companies to facilitate access to the credit markets."); *id.* at ¶ 281 ("Rider DMR is intended to provide credit support to the Companies in order to avoid a downgrade in credit ratings."); Eighth Entry at ¶ 84 ("Rider DMR is intended to provide credit support to the Companies in order to prevent such a downgrade."). The Commission sought to tie credit support to distribution service on the theory that it "intends" for FirstEnergy, with access to credit markets on more favorable terms, to borrow capital to modernize the grid. But that fails to satisfy the statute's clear mandate. Despite its name, Rider DMR does not require a *single* penny to be spent on distribution service or infrastructure, or even that a *single* improvement or change be made in distribution service.

A careful review of the Commission's Fifth and Eighth Entries makes that clear. Although the Commission frequently mentions distribution modernization, Rider DMR is connected to distribution only by the Commission's "intention" that by "enabling" FirstEnergy to "access" capital markets, FirstEnergy will indeed access capital and undertake unspecified distribution modernization projects. *See, e.g.*, Fifth Entry at ¶ 118 (Rider DMR is meant to "assure continued *access* to credit on reasonable terms in order to *allow* the borrowing of adequate capital to support its grid modernization initiatives.") *id.* at ¶ 185 ("Rider DMR will . . . ensure that the Companies have *access* to capital markets in order to make investments in their distribution systems."); *id.* at ¶ 190 ("Rider DMR is *intended* to stimulate the Companies to focus their innovation and resources on modernizing.); *id.* at ¶ 385 (Rider DMR "will allow the Companies to *access* capital markets and obtain favorable borrowing terms and conditions, *enabling* investment in a more extensive grid modernization program."); Eighth Entry at ¶ 84 ("Rider DMR is *intended* to enable the Companies to procure funds to jumpstart their distribution grid modernization initiatives."). Under the Rider, then, FirstEnergy is *not* required to even try to access capital for a distribution modernization project, let alone undertake one.

The Commission's "sufficient progress" requirement does not change the analysis. The Commission stated in the Fifth Entry that its staff would monitor to make sure FirstEnergy made "sufficient progress" in approved grid-modernization projects, though it is unclear what progress would count as "sufficient" because there is no approved plan nor any benchmarks for grid modernization. Regardless, the Commission walked back that requirement in the Eighth Entry, explaining that the "'sufficient progress' language should not be interpreted to mean that Rider DMR revenues be limited in the deployment of grid modernization programs" because it can be "used for other purposes related to improving the Companies' ability to access capital markets such as debt repayment and funding pension obligations." Eighth Entry at ¶ 115. Moreover, it's entirely within the Commission's "sole discretion" to determine whether there's been sufficient progress, making it a meaningless standard. And assuming FirstEnergy is not making "sufficient progress"—whatever that means—it does not matter: there is no consequence, as Rider DMR does not provide for a refund and this Court cannot order it. *See In re Rev. of Alternative Energy Rider Contained in Tariffs of Ohio Edison Co.*, Slip Opinion No. 2018-Ohio-229, ¶ 19.

Ultimately, therefore, the connection between Rider DMR revenues and actual distribution modernization is too attenuated to meet R.C. 4928.143(B)(2)(h)'s statutory requirement that the rider "regard[] distribution service." If the Commission's "intentions" were enough, the Commission would be able to approve any and all charges to FirstEnergy customers. Imagine, for instance, if there were a coal ash spill at an FES plant that cost hundreds of millions of dollars in environmental remediation and personal injury costs. Could the Commission approve a rider for FirstEnergy's captive distribution customers to pay for the clean-up? By the Commission's rationale, yes. Eliminating FES's debt would help FirstEnergy Corp. maintain its credit rating, so that it might hopefully, but not necessarily, invest in distribution. Indeed, because money is fungible, approving any charge for FirstEnergy helps "enable" it to fix electric lines, replace poles, and otherwise support its distribution infrastructure, and the Commission may "intend" that the rider ultimately inure to support "distribution service." The implications are endless.

But that broad reading of R.C. 4928.143(B)(2)(h) cannot stand. Adopting the Commission's "interpretation would remove any substantive limit to what an electric security plan may contain, a result we do not believe the General Assembly intended." *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, at ¶ 34. At a minimum, for the Commission to authorize a rider under R.C. 4928.143(B)(2)(h) there must be some concrete requirement that the utility make an expenditure or investment in its "distribution service." Yet here, there is not a single distribution service expenditure or upgrade required.[5]

[5] The Commission's staff did not even believe Rider DMR could be considered a proper "distribution modernization rider." Staff witness Tamara Turkenton testified: "[I]t is named 'distribution modernization rider,' but I believe Staff Witnesses Buckley and Dr. Choueiki

B. Rider DMR cannot be considered an "incentive" to modernize the grid.

The Commission fares no better in attempting to characterize Rider DMR as a distribution modernization "incentive" authorized under R.C. 4928.143(B)(2)(h). Fifth Entry at ¶ 190. In describing those types of riders that satisfy the statutory mandates, R.C. 4928.143(B)(2)(h) specifically enumerates "distribution infrastructure and modernization incentives." Seizing on this language, the Commission defined an "'incentive,' per Webster's Dictionary, as "something that stimulates one to take action, work harder, etc.; stimulus, encouragement."" Fifth Entry at ¶ 190 (quoting Webster's New World Dictionary, Third College Ed. 682 (1988)). Because a Rider DMR was "intended to stimulate the Companies to focus . . . on modernizing their distribution," the Commission concluded it was "[t]herefore . . . a distribution modernization incentive authorized by R.C. 4928.143(B)(2)(h)." *Id.*; *see also* Eighth Entry at ¶ 114 ("Rider DMR qualifies as a provision 'regarding distribution infrastructure and modernization incentives' for the Companies."). But this reasoning is flawed.

An "incentive" encourages or stimulates an entity to perform in a particular manner because the proffered "incentive" is *contingent* on that performance. In the context of ratemaking, an "incentive" scheme works by offering the utility increased compensation—the "incentive"—if the utility surpasses a particular performance standard (e.g., it beats a deadline for construction, conserves more energy than expected, or completes a project for less cost). "[T]he primary method of adding incentives is by allowing regulated entities to

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and myself believe that this is a form of credit support for the company to be able to access -- access the capital markets and hopefully they will, in turn, modernize the grid. So there is a distribution component to it, but I don't know that staff believes that it is a distribution rider, per se. That late recovery will happen when they apply for this in the SmartGrid rider." Tr. Vol. II (July 12, 2016), 429:11–21.

earn . . . extra profits above their allowed rate of return, tied to improvements in performance." Michael Schmidt, Performance-Based Ratemaking: Theory and Practice 15 (2000). Record evidence reinforces this understanding. At the ESP hearing, for example, the Retail Energy Supply Association (RESA) witness emphasized that "the Commission could also provide performance incentives to the Companies if a more accelerated rollout [for a grid modernization plan] is achieved, such as a higher rate of return or a performance related true-up." Fifth Entry at ¶ 123. But Rider DMR includes no such incentive mechanism.

Moreover, even outside of the ratemaking context, an incentive-based mechanism requires conditioning the receipt of payment (or other reward) on a particular action. That contingency is what distinguishes an incentive from a gift. A person is "incentivized" to act because of a particular reward or outcome—like money—that he would not receive otherwise. Quite simply, if the reward accrues without the action, there is no incentive to take the action. It is giving away money and hoping that the action will happen anyway. Unfortunately, that's what Rider DMR does because the Commission did "not place restrictions on the use of Rider DMR funds." Fifth Entry at ¶ 282. Rider DMR is akin to an illusory promise: the Commission is forcing consumers to pay FirstEnergy, and it merely hopes to get something in return. It cannot reasonably be characterized as an incentive.

C. Rider DMR cannot be approved under R.C. 4928.143(B)(2)(h) because it is not based on the utility's costs incurred in providing services, in violation of the statute and the Commission's own longstanding precedent.

Rider DMR cannot be approved under R.C. 4928.143(B)(2)(h) for another reason—it is not based on any costs that the utility incurs in providing distribution service. As described above, *supra* 4–5, in restructuring the electricity industry, the Legislature designed a hybrid scheme. It deregulated the generation market, but it left electric distribution service subject to the traditional regulatory scheme where a utility has a monopoly over a geographic area and rates are calculated based on the utility's prudent costs plus a reasonable rate of return. *See* R.C. 4928.15. Because riders under R.C. 4928.143(B)(2)(h) regard "distribution service," they too must be cost-based, as the Commission itself has consistently held.

The Revised Code makes this cost-based requirement clear. Revised Code 4928.15 prohibits a utility from providing "distribution service in this state . . . except pursuant to a schedule for that service." Moreover, "[d]istribution service rates and charges under the schedule shall be established in accordance with Chapters 4905. and 4909. of the Revised Code." *Id*. Riders under R.C. 4928.143(B)(2)(h) are, according to the plain language of that statute, charges for "distribution service," and must be part of the schedule mandated by R.C. 4928.15. Accordingly, these riders must also comply with the protections set forth in Chapters 4905 and 4909.

Chapters 4905 and 4909—which were enacted before SB3—set forth the traditional cost-based regulatory scheme. Specifically, R.C. 4909.15 establishes detailed requirements for "fixing and determining just and reasonable rates." Under this system, the Commission determines the utility's costs and multiplies that amount by an allowed rate of return. This product, when added to the utility's operating expenses and taxes, determines how much revenue the utility should be allowed to earn, known as the revenue requirement. Working backwards from this revenue requirement, the utility's rates are then calculated based on the number of customers and the amount of energy they use. *See id*.

The Legislature also included important consumer protections in Chapters 4905 and 4909 to make sure consumers captive in the utility's monopoly are not overcharged. These protections allow the Commission to demand detailed information about the utility's costs and its "management policies [and] practices." *See* R.C. 4909.04, 4909.154. The utility can only recover its costs from customers if the costs are not "imprudent" and are actually "used and useful" to render utility service to customers. *Id.* Mandated public hearings further make the process transparent and provide accountability. R.C. 4909.10. In the end, "[a]ll charges made or demanded . . . shall be just [and] reasonable." R.C. 4905.22.

Revised Code 4928.143(B)(2)(h) does not eliminate all these protections. The few examples provided in R.C. 4928.143(B)(2)(h) demonstrate that the Legislature intended "distribution service" riders to be cost-based. For instance, as mentioned above, that section specifically provides for "distribution infrastructure and modernization incentives." *Id*. The Legislature specified that those "may include a long-term energy delivery infrastructure modernization plan . . . or any plan providing for the utility's recovery of costs, . . . and a just and reasonable rate of return on such infrastructure modernization." *Id*. The cost-based mechanism is written right into R.C. 4928.143(B)(2)(h). Similarly, as described above, "incentive ratemaking" (which is explicitly listed in the statute) is a cost-based mechanism; a utility receives a higher rate of return on its costs for exceeding particular performance standards. *Supra* at 16.

It's no surprise, then, that the Commission has consistently ruled that ESP provisions approved under R.C. 4928.143(B)(2)(h) must be cost-based. Yet in approving Rider DMR it departed from its own precedent, and it provided no reasoning for reversing course. In fact, FirstEnergy may have been just as surprised as any other party that the

Commission sua sponte proposed Rider DMR as an alternative to FirstEnergy's original bail-out proposals, because FirstEnergy is no stranger to the Commission's long-standing position that distribution riders must be tied to the cost of providing distribution services. A decade ago, FirstEnergy sought approval for a rider that it acknowledged was "not based on historically incurred costs." But FirstEnergy insisted that it could "take[] advantage of [R.C. 4928.143(B)(2)(h)], which it claimed was "not a cost-based proceeding." *In re Ohio Edison Co., The Cleveland Electric Illuminating Co., Toledo Edison Co.*, Pub. Util. Comm. No. 08-935-EL-SSO, Opinion and Order, at 40 (Dec. 19, 2008), available at https://perma.cc/JH35-X59P. The Commission disagreed, explaining:

> [T]he Commission does not believe that a distribution rider should be approved, unless it is based on a reasonable, forward-looking modernization program and prudently incurred costs. At the hearing. Staff indicated that it could only support mechanisms such as Rider DSI if such mechanism is cost-based (Tr, VII at 302). The Commission believes that this is a sound policy. Although Section 4928.143(B)(2)(h), Revised Code, does provide for distribution modernization riders as part of an ESP, following the sound policy goals of Section 4928.02, Revised Code, the Commission believes that such riders should be based upon prudently incurred costs, including a reasonable return on investment for the electric utility.

Id. at 41. The Commission has subsequently reaffirmed that position. For example, the Commission approved a distribution rider under R.C. 4928.143(B)(2)(h) relating to American Electric Power's (AEP) vegetation management program, stating: "Consistent with prior decisions, the Commission also believes that, pursuant to the sound policy goals of Section 4928.02, Revised Code, a distribution rider established pursuant to Section 4928.143(B)(2)(h), Revised Code, should be based upon the electric utility's prudently incurred costs." *In re Application of Columbus S. Power Co.,* Pub. Util. Comm. Nos. 08-917-EL-SSO, 08-918- EL-SSO, at 34 (Mar. 18, 2009), available at https://perma.cc/W7ZP-P8G6 (citations omitted). And this Court, in reviewing that ruling, likewise acknowledged the

Commission's long-standing rule that "a distribution rider established pursuant to R.C. 4928.143(B)(2)(h) should be based on the electric utility's prudently incurred costs." *In re Application of Columbus S. Power Co.,* 138 Ohio St.3d 448, 2014-Ohio-462, 8 N.E.3d 863, ¶ 38.

In approving Rider DMR, the Commission's Chairman acknowledged that "[t]ypical public utility regulation functions to provide utilities with recovery and a return for expenditures made in constructing/maintaining service." Fifth Entry at ¶ 4 (Haque, Chairman, concurring). He further explained that, "[a]fter this initial infusion," the Commission would return to this "traditional regulatory mechanism" through Rider AMI. So Rider DMR, in his words, is "undoubtedly unconventional." *Id*. But that's euphemistic. Rider DMR breaks from "convention" because it breaks from the statutory scheme the Legislature enacted and from the Commission's precedent. Yet without providing any explanation why its previous view was wrong, the Commission switched position. Its new view, therefore, should be given no weight. The Commission had it right before this case—distribution service riders under R.C. 4928.143(B)(2)(h) must be cost-based. And for that reason, it should have rejected Rider DMR. This Court should reverse the Commission's decision, and place it back on course.

D. If affirmed, the Commission's decision to save FirstEnergy from its own poor investment decisions will invite bailout applications from other utilities.

The Commission's decision to bail out FirstEnergy Corp., though the guise of a distribution service rider, creates a dangerous precedent. Other utility companies will seek similar compensation for the financial troubles of their generation business; indeed, some already have. *See, e.g.*, *In the Matter of the Application seeking Approval of Ohio Power Co.'s Proposal to Enter Into an Affiliate Power Purchase Agreement for Inclusion in the Power*

Purchase Agreement Rider, Pub. Util. Comm. Nos. 14-1693-EL-RDR, 14-1694-EL-AAM (pending before this Court, Case No. 17-0752), available at https://perma.cc/6YTG-L3KA; *In re App. of the Dayton Power and Light Company for Approval of Its ESP*, Pub. Util. Comm. No. 16-0395-EL-SSO, available at https://perma.cc/3G5F-UBMY. FirstEnergy Corp. "is not the only utility . . . invested in either coal-fired or nuclear generation" that is struggling to compete on the open generation market. Fifth Entry at ¶ 6 (Haque, Chairman, concurring). Losses from generation affiliates threaten the financial integrity of myriad parent corporations, they too could benefit from "credit-support" and cash infusions that would enable them to borrow at better rates for future projects. *See id.* ("wholesale market difficulties are not unique to [FirstEnergy Corp.]"). But the Commission cannot saddle captive distribution consumers with such costs in this case or any other. "[R]ates and charges . . . come directly from the pockets of consumers and businesses in this state." *Id*. at ¶ 6. If they have to pay for FES's losses, what other losses will they have to pay for as well?

The Commission's decision also sets a bad precedent for the market. Almost two decades ago the Legislature decided to deregulate the generation market, making it plain that electric suppliers would have to sink or swim on their own. And the Legislature reaffirmed that goal a decade ago with SB211. *See* R.C. 4928.38. But if the Commission continuously forces distribution consumers to cover for generation affiliates that are failing in the market, then what of the free market? A cash infusion here, even if it does not go directly to FES, props up FirstEnergy Corp for mistakes made by FES. That is, indeed, Rider DMR's purpose. But by artificially propping up FirstEnergy Corp., the Commission distorts the market. The generation affiliate, FES, is bolstered not because of its innovation, management, or superior service, but because the Commission has forced the customers within the utility's monopoly to pay more. That's antithetical to the Legislature's scheme, and thwarts market development going forward.

Addressing this point, the Chairman stated that he was not "terribly concerned" that the Commission was setting bad precedent by "providing recovery based mathematically upon the financial condition" of a utility's parent company *Id.* at ¶ 10. Why not? Because the Commission promised to "closely monitor this going forward." *Id*. at ¶ 11. But that's not how the law works—if it is legal for one company, it is legal for others. The Court must stop these anticompetitive cash infusions, setting the Commission on a stable path for the next case.

<u>Proposition of Law 2</u>: Awarding a distribution utility a rider to compensate for debt accumulated by its poor performing market-based generation affiliate constitutes unlawful transition revenue or "any equivalent revenues" under R.C. 4928.38.

Rider DMR also runs afoul of the Legislature's prohibition on providing "transition revenues or any equivalent revenues" after the date of deregulation. R.C. 4928.38; *see also* R.C. 4928.141. Transition revenues were meant to assist the utilities "in making the transition to a fully competitive retail electric generation market." R.C. 4928.37(A)(1). With the passage of SB3, the Legislature recognized that it might be difficult for the utilities to transition to a free market for electric generation. So during the five year "market development period,"—until December 31, 2005 (or, in the case of regulatory assets, until December 31, 2010)—it allowed the utilities to charge extra fees to their distribution customers to make up for losses on the generation side. That is, even if the utility's distribution customers had chosen to get their electricity from another generation source, those captive customers would still pay to help the utility's generation arm transition to the free market. R.C. 4928.37. But "the utility's receipt of transition revenues . . . terminate[d] at the end of the market development period." R.C. 4928.38. The Legislature mandated that after this period, a utility is "wholly responsible for whether it is in a competitive position after the market development period." *Id*. And it barred the Commission from "authoriz[ing] the receipt of transition revenues or any equivalent revenues by an electric utility." *Id*. The Commission's approval of Rider DMR thwarts this restriction.

This Court has taken a searching approach to determine whether the Commission has improperly authorized transition revenues. *In re Application of Columbus S. Power Co*., 147 Ohio St.3d 439, 2016-Ohio-1608, 67 N.E.3d 734, at ¶ 21. By "inserting the phrase 'any equivalent revenues,' . . . the General Assembly has demonstrated its intention to bar not only transition revenue associated with costs that were stranded during the transition to the market following S.B. 3 but also any revenue that amounts to transition revenue by another name." *Id*. So the Court has accordingly dug beneath the surface of riders to determine whether they are "allow[ing] the company to recover costs that are otherwise unrecoverable in the competitive generation market." *Id*. at ¶ 14.

For instance, the Court recently reversed the Commission's approval of AEP's rate stability rider (Rider RSR), finding that it constituted an unlawful transition charge. *Id.* Because it would "promote stable retail-electric-service prices," the Commission had authorized Rider RSR under R.C. 4928.143(B)(2)(d). *Id*. But "after looking at the nature of the revenue" recovered by Rider RSR, the Court concluded that "AEP is receiving the equivalent of transition revenues through that rider." *Id.* at ¶ 22. Rider RSR revenues were tied to generation "revenues that AEP would expect to lose based on the projected shopping" and it "was intended to provide AEP with sufficient revenue to maintain its financial integrity and ability to attract capital during the ESP." *Id*. at ¶¶ 8, 24, 36. Hence they were transition revenues, just "by another name." *Id*. at ¶ 21. *See also In re Application of Dayton Power & Light Co.*, 147 Ohio St.3d 166, 2016-Ohio-3490, 62 N.E.3d. 179.

Rider DMR does exactly the same thing. Although not called "transition revenues," Rider DMR provides a mandatory charge to the utility's captive distribution company to compensate for troubles on the open generation market—it therefore operates no differently from the original transition revenues following SB3. As the background of this case demonstrates, Rider DMR was a response to the financial troubles of FirstEnergy Corp. due to the failing of its generation affiliate, FES. *Supra* at 9–15. Moody's and Standard & Poor's emphasized that FES's reliance on coal, nuclear, and other costly sources of generation were the root of the parent corporation's shortcomings. *See* Tr. Vol. X (Aug 1, 2016), P3/EPSA Ex. 21 (Moody's report); Rehearing Testimony of Joseph Buckley (June 29, 2016), Staff Ex. 13, Att. 3, at 2–3 (S&P report). And it's no secret that "[w]hen this rate case began just over three years ago, the company's objective was to find a way to have customers help support its financially failing power plants." John Funk, *PUCO rejects challenge to FirstEnergy special subsidy, you'll keep paying more*, The Plain Dealer (Aug. 17, 2017), available at https://goo.gl/Q1NaUB. FirstEnergy had twice asked the Commission for a bailout; first, with Rider RRS, which was denied by FERC as an anti-competitive contract with a generation affiliate, then with a second proposal that did virtually the same thing, which even the Commission rejected.

The third attempt—Rider DMR—fares no better. Just like the revenues this Court rejected for AEP, the Rider DMR revenues are meant to compensate for a utility's generation failings. Just as the Commission was worried about AEP's "financial integrity [and] its ability to attract capital," the Commission staff here too designed Rider DMR precisely to "provide FirstEnergy Corp., through the Companies, with funds to assure continued access to credit," due to the generation affiliate's financial woes. Fifth Entry at ¶ 118. Yet, for generation, the law is clear: "the utility shall be fully on its own in the competitive market." *Id*. If AEP's Rider RSR gave unlawful transition revenues, so too does Rider DMR.

The Commission improperly dismissed concerns that Rider DMR constitutes unlawful transition revenue, providing four unpersuasive reasons for dismissal. *First*, it concluded that this Court's AEP decision does not apply because "Rider DMR is authorized by R.C. 4928.143(B)(2)(d) rather than R.C. 4928.143(B)(2)(d), the statute which authorized the AEP stability charged overturned by the Supreme Court." Fifth Entry at ¶ 287. But that is a meaningless distinction. This Court's analysis turned on the "nature of the revenue" recovered; if the rider forces captive customers to compensate for losses on the generation side, it is an unlawful transition revenue regardless of its label.

Second, the Commission reasoned that "there is no 'transition' involved in this case" because the Companies "transferred their generation assets to FES many years ago." Fifth Entry at ¶ 287. But that rationale overlooks R.C. 4928.38's prohibition of "transition revenues or *any equivalent revenues*." (Emphasis added.) It would make no sense if the Legislature's prohibition on transition charges did not apply *after* the transition period elapsed and the companies separated their generation business. That is precisely when the Legislature wanted to prohibit anticompetitive revenues and ensure that the companies were "fully on [their] own." R.C. 4928.38.

Third, the Commission stated that, in its view, Rider DMR "is entirely unrelated to generation because the Companies have no generation assets." Fifth Entry at ¶ 287. But the entire case history contradicts that claim. Chairman Haque, in his attempt to place this case into "plain language," asked: "How did we get here?" Fifth Entry at ¶¶ 1, 6. His response: FirstEnergy's "wholesale market difficulties" (i.e., the generation market difficulties) from "invest[ing] in either coal-fired or nuclear generation in a restructured state." Fifth Entry at ¶ 6. As he explained, the "regulated distribution utilities [like FirstEnergy] get a regulated rate of return for everything that they do. There is no reason why these regulated distribution utilities should ever be in a position of true financial harm whereby they can't make necessary investments to better the delivery of power and innovate." *Id*. at ¶ 11. Rider DMR was needed because of FES, not because of any FirstEnergy failings.

Lastly, the Commission concluded that Rider DMR was not a transition fee because "Staff will periodically review how the proceeds of Rider DMR are used in order to ensure that such proceeds are used, directly or indirectly, in support of grid modernization." *Id*. at ¶ 287. But its concession that the funds can be used "indirectly" to support modernization undermines its case. The Commission considers paying off FirstEnergy debts, such as "pension obligations," *id.* at ¶ 115, an "indirect" support of modernization because the goal is to improve FirstEnergy Corp.'s cash-to-debt ratio; a ratio plagued by FES's financial collapse. If the revenues are going to compensate for FES's failings on the open market, it runs afoul of the statute.

The Companies, for their part, assert a different argument—one that the Commission did not adopt. They argue that there is no prohibition on receiving transition revenues from distribution service riders because R.C. 4928.143(B) allows for the Commission to approve riders "notwithstanding any provision of Title XLIX of the Revised Code to the contrary," including R.C. 4928.38's prohibition on transition revenues. Fifth

Entry at ¶ 284. But the Companies take this "notwithstanding" language too far. By their reading, the Commission can authorize any rider under the ESP statute without regard to anything else in Title 49. That would mean the Commission could authorize riders without being subject to judicial review, R.C. 4903.13, or without regard to the Legislative policies articulated in R.C. 4928.02.

That interpretation defies the "the common-sense principle of statutory construction that sections of a statute generally should be read 'to give effect, if possible, to every clause.'" *Heckler v. Chaney,* 470 U.S. 821, 829, 105 S.Ct. 1649, 84 L.Ed.2d 714 (1985). A statute's use of a "notwithstanding" clause "signals the drafter's intention" that certain provisions of the "notwithstanding" section may "override" other directly "contrary or conflicting provisions" contained in other sections, but it does not "operate to override non-conflicting or non-contrary provisions" of the statute. *Broad Street Energy v. Endeavor Ohio*, *LLC*, 975 F. Supp. 2d 878, 885 (S.D.Ohio 2013); *see also see also NLRB v. SW General*, ___ U.S. ___, 137 S.Ct. 929, 940, 197 L.Ed.2d 263 (2017) (explaining that a "notwithstanding" clause "just shows which of two or more provisions prevails in the event of a conflict"). To the contrary, when construing a "notwithstanding" clause, courts must be "careful to adhere to more general canons of statutory interpretation by applying a 'notwithstanding' clause in context with the rest of the statute in which it appears." *Bark v. USFS*, 37 F. Supp. 3d 41, 53 (D.D.C. 2014). In practice, that means that "where literal application of the clause would lead to so broad an application that it would negate another section of the same statute," applying "a narrower reading of the 'notwithstanding' clause" is the better approach. *Id.* Put another way: "Courts should attempt to reconcile two seemingly conflicting statutory provisions whenever possible, instead of allowing one provision effectively to nullify the other provision." *United States v. Gordon*, 961 F.2d 426, 431 (3d Cir. 1992); *see Ottery v. Bland*, 42 Ohio App.3d 85, 87, 536 N.E.2d 651 (10th Dist. 1987) (explaining that courts should "attempt to harmonize all the provisions rather than produce conflict in them").

Following that approach here leads away from the companies' interpretation of R.C. 4928.143(B). There is no inherent conflict between the Legislature's decision to allow "distribution service" riders in R.C. 4928.143(B)(2)(h) and prohibit transition revenues in R.C. 4928.38. A distribution service rider does not, by definition, have to compensate for generation losses. That is, it does not have to provide transition revenue. For example, as the Legislature explained in R.C. 4928.143(B)(2)(h), a distribution service rider may provide "for the utility's recovery of costs . . . [for] infrastructure modernization." Simply compensating a utility for its distribution expenditures—as with Rider AMI—does not offend the Legislature's bar on transition revenues. Because the two provisions are not directly "contrary or conflicting," *Broad Street Energy*, 975 F. Supp. 2d at 885, and can be read in harmony, they should be. The Court should reverse the Commission's improper approval of unlawful transition revenues.

<u>Proposition of Law 3</u>: The Commission's approval of the modified DMR is unreasonable because, contrary to the Commission's established standards, it does not provide for safeguards to ensure that the revenues be used for grid modernization.

The Commission's approval of Rider DMR is not only unlawful, it is also unreasonable. This Court has an independent obligation to ensure that the Commission's determinations are not "unreasonable." R.C. 4903.13; *Ohio Consumers Council v. PUCO*, 114 Ohio St.3d 340, 2007-Ohio-4276, 872 N.E.2d 269, at ¶ 41. By vesting this Court with exclusive review of the Commission's decisions, the Legislature entrusted this Court to serve as a check on the Commission's power. *Id*. And that check is needed here because under any rational measure Rider DMR comes up short. It requires consumers to give the Companies more than $600 million without *any* of three indispensable safeguards: (1) a plan for grid modernization; (2) a mechanism for refunding or crediting consumers if the Companies fail to modernize the grid; or (3) ring-fencing to protect ratepayers from having to dig FES out from financial crisis again. That, standing alone, warrants reversal.

First, Rider DMR is an unreasonable distribution modernization rider because it is not tied to a modernization plan.[6] In prior cases where the Commission has approved distribution riders, the Commission has required that the rider be based on a distribution improvement plan. *See, e.g.*, *In re Ohio Edison Co., et al.*, Pub. Util. Comm. No. 08-935-EL-SSO, at 40–41. But, as described above, there is neither a plan nor any "restrictions on the use of Rider DMR funds." Fifth Entry at ¶ 282. Consequently, there are no benchmarks—none—to measure the Companies' progress in modernizing the grid. There are similarly no deadlines to keep and no way to evaluate whether the Companies have appropriately used the funds. In approving Rider DMR, the Commission relied heavily on RESA's testimony regarding the benefits of grid modernization. Fifth Entry at ¶¶ 116, 186; Eighth Entry at ¶ 65. But even RESA refused to support Rider DMR because it "lacks any directives regarding the amount of grid modernization to be undertaken by the Companies or the necessary timeframes for making such investments." Fifth Entry at ¶ 122.[7]

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[6] The Companies were required to file a grid modernization plan in a separate case, not tied to Rider DMR revenues. *See* Fifth Entry at ¶ 188. Even the Commission's staff did not believe that filing an application in a separate case was sufficient basis for Rider DMR. *Id*.

[7] RESA, for example, recommended that the Commission impose the following minimum conditions on Rider DMR's approval: "(1) smart meter roll-out through 100 percent of the Companies' service territories in five years, with the exception for very rural areas; and (2) the implementation timeframe should be 20 percent a year over the five-year rollout

In defense of its position, the Commission explained that "placing restrictions on the use of Rider DMR funds would defeat the purpose of Rider DMR . . . . [which] is intended to provide credit support to the Companies." *Id*. at ¶ 281. But if the purpose of providing credit support to the Companies is so that they can invest in grid modernization, it is reasonable to expect that they actually make such investments. Yet the Commission did not require that the Companies even attempt to access capital to make modernization improvements. Without "specific directives to the Companies to implement grid modernization," *id.* at ¶ 122, Rider DMR is essentially a blank check. This Court shouldn't sign it.

Second, Rider DMR is unreasonable because it does not include any consequence for the Companies' failure to invest in grid modernization. That is, it lacks a plan for modernization up-front (as explained above), and it fails to protect consumers on the back-end if the Companies do not deliver. It is commonplace for the Commission to subject the utilities to an annual audit and hearing process to determine whether the rider revenues collected were appropriately utilized. *See* R.C. 4909.15. And, likewise, the Commission regularly includes "true-up" provisions that require the utilities to refund or credit customers for any amounts not prudently spent. *See* R.C. 4905.32 (refund or remittance allowed if specified in rider); *In re Rev. of Alternative Energy Rider Contained in Tariffs of Ohio Edison Co.*, Slip Opinion No. 2018-Ohio-229, at ¶ 19.

In this instance, however, the Commission repeatedly rejected calls that the utility be required to refund customers (or credit their accounts) for Rider DMR in the event that it failed to modernize the grid. The Commission worried that subjecting FirstEnergy to a

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period" with "performance incentives . . . if a more accelerated rollout is achieved." Fifth Entry at ¶ 123.

refund would be "counterproductive" because it would "impose additional risks on the Companies." Eighth Entry at ¶ 76. But, as a result, it is the consumers that bear all the risk. They bear the risk that FirstEnergy will collect Rider DMR revenues but won't prudently and efficiently undertake grid modernization. And if that happens, this Court will be powerless to impose a refund. *See In re Rev. of Alternative Energy Rider Contained in Tariffs of Ohio Edison Co.*, at ¶ 19 (where no refund was given because the rider did not specify a refund process).

Lastly, Rider DMR is unreasonable because it does nothing to prevent the Companies' captive distribution customers from having to compensate for FES's future market failings. To protect the Companies—and most importantly, their ratepayers—in the future, the Commission should have implemented ring-fencing (i.e., provisions to insulate the Companies from their affiliates).

The record, as detailed above, demonstrates that FES's poor performance on the open generation market was the main contributor to its parent company's, First Energy Corp.'s, financial troubles and the need for Rider DMR. And unfortunately, the problem is just getting worse. Recent developments demonstrate that FES is further failing in the competitive market—experts expect that it may go bankrupt. Funk (Aug. 21, 2017), *supra*. So the ongoing financial troubles of FES—an entity that should be on its own in the generation market—continuously threaten to drag down its parent company, FirstEnergy Corp., and its regulated affiliates, the Companies. After three years of Rider DMR, the Commission will have to decide whether to extend it for another two. If FES keeps spiraling down, then FirstEnergy Corp. may still have credit troubles that it will use to justify an extension. Ohio ratepayers will then have to pay hundreds of millions more dollars for FES's poor market performance.

The Commission, however, rejected ring-fencing proposals as "premature." Eighth Entry at ¶¶ 87–88. The Chairman cautioned that "[g]oing forward, in the event that the Commission sees our regulated distribution utilities suffer as a result of actions from parent companies or affiliates, the Commission should very seriously consider ring-fencing the distribution utilities." Fifth Entry at ¶ 11 (Haque, Chairman, concurring). As he further acknowledged, "our regulated distribution entities should not be utilized to subsidize market difficulties, risky behavior, etc., associated with parent and affiliate companies." *Id*. But that is exactly what happened with Rider DMR, and it provides no protection against it happening again. Even if it were permissible to make ratepayers bailout FirstEnergy Corp. this time (which it was not), it certainly is unreasonable to refuse precautions to prevent another bailout.

<u>Proposition of Law 4</u>: It is unreasonable and contravenes R.C. 4928.66(D) for the Commission to allow a utility to recover lost distribution revenues stemming from independent customer decisions that improve energy efficiency rather than any affirmative efficiency program sponsored by the companies.

The Commission's approval of FirstEnergy's ESP improperly serves to enrich the Companies in another way, entirely separate from Rider DMR: it allows the Companies to collect "lost distribution revenues" for energy saved by the independent conservation actions of consumers, rather than from any FirstEnergy conservation program. Fifth Entry at ¶¶ 317, 324; Eighth Entry at ¶¶ 140–142. Under federal and state law, utility companies are both required and encouraged to implement energy efficiency programs. But efficiency programs can hurt a utility's bottom line because if less energy is distributed, the utility collects less from consumers. The Legislature has thus allowed the Commission to approve compensation for "lost distribution revenues" stemming from a utility's energy efficiency programs. *See* R.C. 4928.66(D). But in this case, FirstEnergy's Customer Action Program (CAP) is an efficiency "program" in name only. It simply measures customer energy reduction efforts undertaken without any assistance or funding from FirstEnergy, such as a consumer's choice to use more efficient light bulbs or upgrade to energy-saving appliances. Tr. Vol. XXXVII (Jan. 15, 2016), 7861:23–7864:10. The Commission's decision to allow FirstEnergy to recover lost distribution revenues for CAP is therefore both unlawful and unreasonable.

Revised Code 4928.66(D) provides for a "revenue decoupling mechanism," so that a utility may recover for lost distribution revenue when the Commission:

> determines both that the revenue decoupling mechanism provides for the recovery of revenue that otherwise may be forgone by the utility *as a result of or in connection with* the implementation by the electric distribution utility of any energy efficiency or energy conservation programs and reasonably aligns the interests of the utility and of its customers in favor of those programs.

As the plain language of this provision demonstrates, lost distribution revenue can be recovered only for revenue that was reduced "as a result of or in connection with" an energy efficiency program "implement[ed] by the electric distribution utility." *Id.* Otherwise, the customers' interest would not "reasonably align[]" with the utility. *Id*. A customer has no interest in paying extra fees to a utility for the customer's own conservation efforts in which the utility had no role.[8]

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[8] Under R.C. 4928.662(A), a utility may count energy savings resulting from independent customer actions toward compliance with the state's energy efficiency requirements. But that is distinct from receiving lost distribution revenues, which is governed by R.C. 4928.66(D).

This limitation is not only in the statute's text, it also makes sense. The utility should not be harmed by its own efforts to increase efficiency. But if consumers take independent actions that are not prompted or incentivized by the utility, the utility does not deserve a reward. As the Commission has explained, awarding this recovery revenue is only reasonable when the implementation of effective energy efficiency programs would otherwise reduce the utility's revenue from volumetric rates and "penalize a utility for encouraging customers to use less power." *In the Matter of Aligning Electric Distribution Utility Rate Structure With Ohio's Public Policies to Promote Competition, Energy Efficiency, and Distributed Generation*, Pub. Util. Comm. No. 10-3126-EL-UNC, Entry, at 1 (Dec. 29, 2010), available at https://perma.cc/G3L6-8Y4K. Therefore, "once a utility demonstrates that it successfully implemented energy efficiency programs with documented energy savings, the utility is permitted to recover the 'lost' volumetric revenue for each kWh saved by the energy efficiency program." *Id*. at 2.

Consistent with R.C. 4928.66(D), the Commission has historically authorized recovery of lost distribution revenues only to compensate for a utility's conservation efforts—lest the utilities be discouraged from helping customers save energy. *In re AEP Request for Approval of Its Program Portfolio Plan*, Pub. Util. Comm. No. 09-1089-EL-POR, Opinion and Order, at 26 (May 13, 2010), available at https://perma.cc/LZE7-ELR6; *see also In the Matter of Aligning Electric Distribution Utility Rate Structure*, *supra*. In the context of smart grid deployment, for example, the Commission clarified that "approval of lost distribution revenues is limited to those lost revenues which can be demonstrated to be the *result* of FirstEnergy's proposed alternative pricing program." *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The*

Toledo Edison Company for Approval of Ohio Site Deployment of the Smart Grid Modernization Initiative, Case Nos. 09-1820-EL-ATA *et al.*, Finding and Order, at 10 (June 30, 2010), available at https://perma.cc/UC2K-MFBJ (emphasis added). In short: lost distribution revenues are meant to reflect "the *actual impact* of [a utility's efficiency programs] . . . upon energy savings[,]" *In the Matter of the Application of The Cleveland Electric Illuminating Company, Ohio Edison Company, and The Toledo Edison Company for Approval of Their EE/PDR Program Portfolio Plans for 2010 through 2012*, Pub. Util. Comm. Nos. 09-1947-EL-POR *et al.*, Opinion and Order, at 18 (Mar. 23, 2011), available at https://perma.cc/7VBG-GT9N (emphasis added), not independent consumer action.

Other states have adopted a similar approach of limiting lost revenues to the energy savings directly resulting from a utility's energy efficiency or demand-side management programs. Indiana specifically rejected the idea that lost revenues should be awarded based on independent customer efficiency improvements rather than energy savings "specifically caused by that utility's energy efficiency efforts," concluding that "[i]t would not be equitable to allow [a utility] to recover from its ratepayers for energy savings caused by ratepayers' own responsible efforts to conserve." *Pet. of S. Indiana Gas and Electric Co.*, 2011 Ind. PUC LEXIS 115, Ind. Util. Regulatory Comm. No. 43839, Final Order, at 85 (Apr. 27, 2011). *See also, e.g.*, Nevada Admin. Code 704.95225 ("An electric utility may recover an amount based on the measurable and verifiable effects of the implementation by the electric utility of programs for energy efficiency and conservation described in the demand side plan of the electric utility . . . .").

Despite this, the Commission allowed FirstEnergy to earn extra revenue based on its customers' independent efficiency improvements without any utility assistance. The CAP simply provides after-the-fact documentation of the results of these independent customer efforts. Neither the Companies nor the Commission dispute that. *See* Fifth Entry at ¶ 147 (CAP "involves no action by the Companies to achieve the energy savings."). Yet the Fifth and Eighth Entries offer no reason why lost distribution revenues for the CAP are justified or permissible under the statute if they are not the "result of" the utility's actions. Instead, the Commission merely reasoned that the savings under the CAP could be recovered as long as they were "verifiable." Fifth Entry at ¶ 324; Eighth Entry at ¶ 142. But the fact that "verifiable" energy savings occur when customers implement energy efficiency measures on their own does not mean that ratepayers should pay FirstEnergy extra for documenting those savings. The Commission's bare-bones statement makes no sense, and falls short of the Commission's obligation under R.C. 4903.09 to "set[] forth the reasons prompting the decisions arrived at." Its inability to justify its decision is not surprising. The award of lost distribution revenues based on the CAP is unlawful, unreasonable, and inconsistent with the Commission's own precedent. This Court should reverse.

CONCLUSION

For the reasons given above, the Environmental Advocates respectfully request that the Court reverse the Commission's Fifth and Eighth Entries on Rehearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing brief was served upon the following parties of record via electronic transmission this 26th day of February, 2018.

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APPENDIX

IN THE SUPREME COURT OF OHIO

OHIO ENVIRONMENTAL COUNCIL, ENVIRONMENTAL DEFENSE FUND, and ENVIRONMENTAL LAW AND POLICY CENTER, Appellants,	)	CASE NO. 2017-1664
	)	Appeal from the Public Utilities Commission of Ohio
v.	)	*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 in the Form of an Electric Security Plan.*
THE PUBLIC UTILITIES COMMISSION OF OHIO, Appellee.	)	Case No. 14-1297-EL-SSO

NOTICE OF APPEAL OF OHIO ENVIRONMENTAL COUNCIL, ENVIRONMENTAL DEFENSE FUND, AND ENVIRONMENTAL LAW AND POLICY CENTER

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NOTICE OF APPEAL

The Ohio Environmental Council, Environmental Defense Fund, and Environmental Law and Policy Center (collectively, "Environmental Appellants"), in accordance with Ohio Revised Code sections 4903.11 and 4903.12 and Supreme Court Rules of Practice 3.11(D)(2), 5.05, and 10.02, give notice to this Court and the Public Utilities Commission of Ohio of this appeal from the Commission's decision to approve an over $600 million charge to consumers for grid modernization without actually requiring any grid modernization. The approved Electric Security Plan ("ESP") is not just "undoubtedly unconventional" and a first of its kind, as the Commission's chairman concedes. *See* Attachment B at ¶4 (Haque, concurring). It was an unreasonable, undemocratic bailout, and it was beyond the scope of the Commission's authority.

The Environmental Appellants were parties of record in the case, Commission Case No. 14-1297-EL-SSO, from which this appeal is taken. Specifically, the Environmental Advocates appeal two of the Commission's orders: (1) the Fifth Entry on Rehearing entered in its journal on October 12, 2016 (Attachment A); and (2) the Eighth Entry on Rehearing entered in its journal on August 16, 2017 (Attachment B).

In its Fifth Entry on Rehearing, the Commission approved a Distribution Modernization Rider ("DMR") as part of the ESP for Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company (collectively, "FirstEnergy"). On November 14, 2016, the Environmental Advocates timely filed an Application for Rehearing of the Fifth Entry on Rehearing in accordance with R.C. 4903.10 because, among other things, the Commission had authorized First Energy to increase its customer's rates via a so-called grid modernization rider even though the revenues are not required to go to grid modernization, but instead are primarily intended to sure up the credit of First Energy's parent (and unregulated) company, FirstEnergy Corp. The Commission granted the Environmental Appellants' and other parties' applications for rehearing in its Sixth Entry on Rehearing on December 7, 2016 to further consider the parties' arguments. On August 16, 2017, in its Eighth Entry on Rehearing, the Commission denied the Environmental Appellants' Application for Rehearing of the Fifth Entry. On October 11, 2017, the Commission issued its Ninth Entry on Rehearing, disposing of all remaining applications for rehearing, making this appeal ripe for the Court's review.

The Environmental Advocates contend that the Fifth and Eighth Entries are unlawful and unreasonable in the following respects, all of which were raised in their Application for Rehearing and in other parties' applications, as noted:

1. The Commission exceeded its statutory authority in creating and approving the modified DMR under R.C. 4928.143(B)(2)(h) because:

    a. Its primary purpose was to preserve FirstEnergy's creditworthiness;
    b. It does not require any grid modernization or other distribution investments; and
    c. It is not based on the utility's costs incurred in providing services, and cannot constitute "incentive ratemaking."

    (*Memorandum in Support of Environmental Advocates Application for Rehearing of the Fifth Entry on Rehearing*, at 6-12; *Memorandum in Support of Sierra Club Application for Rehearing*, at 17-21.)

2. The Commission's approval violates R.C. 4928.38 because the DMR delivers unlawful transition revenues or "any equivalent revenues" to FirstEnergy.

    (*Memorandum in Support of Environmental Advocates Application for Rehearing of the Fifth Entry on Rehearing*, at 12-16.)

3. The Commission's approval is unreasonable and departs from its own established standards because:

    a. It failed to provide safeguards to ensure that revenues be used exclusively for grid modernization;

b. It failed to require an actual distribution plan.
c. It failed to impose meaningful audit and true-up requirements.

(*Memorandum in Support of Environmental Advocates Application for Rehearing of the Fifth Entry on Rehearing.* at 10-12)

4. The Commission, unreasonably and contravening R.C. 4928.66(D), authorized FirstEnergy to recover lost distribution revenues stemming from independent customer decisions that improve energy efficiency rather than any affirmative efficiency program sponsored by the companies.

   (*Memorandum in Support of Environmental Advocates Application for Rehearing of the Fifth Entry on Rehearing* at 29-31.)

Environmental Advocates respectfully submit that the Commission's Fifth and Eighth Entries on Rehearing are unreasonable and unlawful, and should be reversed, vacated, or modified with specific instructions to the Commission to correct these errors.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned counsel certifies that, in accordance with Supreme Court Rule of Practice 3.11(B)(2), a copy of this Notice of Appeal was served upon the Chairman of the Public Utilities Commission of Ohio by leaving a copy at the office of the Chairman in Columbus, Ohio, on December 1, 2017. In addition, the undersigned counsel certifies that a copy of this Notice of Appeal was served by electronic mail upon counsel for all parties to the proceeding before the Public Utilities Commission of Ohio identified below and pursuant to Section 4903.13 of the Ohio Revised Code on this 1st day of December, 2017.

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CERTIFICATE OF FILING

The undersigned counsel certifies that, in accordance with Supreme Court Rule of Practice 3.11(D)(2), a copy of this Notice of Appeal was filed with the docketing division of the Public Utilities Commission of Ohio in accordance with sections 4901-1-02(A) and 4901-1-36 of the Ohio Administrative Code on this 1st day of December, 2017. The copy was delivered in person.

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THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE APPLICATION OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY FOR AUTHORITY TO PROVIDE FOR A STANDARD SERVICE OFFER PURSUANT TO R.C. 4928.143 IN THE FORM OF AN ELECTRIC SECURITY PLAN.	CASE NO. 14-1297-EL-SSO

FIFTH ENTRY ON REHEARING

Rendered on October 12, 2016

I. SUMMARY

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

II. PROCEDURAL HISTORY AND APPLICABLE LAW

A. *Procedural History*

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

{¶ 3} R.C. 4928.141 provides that an electric distribution utility shall provide customers within its certified territory a standard service offer (SSO) of all competitive retail electric services necessary to maintain essential electric services to customers, including firm supply of electric generation services. The SSO may be either a market rate offer (MRO) in accordance with R.C. 4928.142 or an electric security plan (ESP) in accordance with R.C. 4928.143.

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

{¶ 5} On March 31, 2016, the Commission issued its Opinion and Order in *ESP IV*, approving FirstEnergy's application and stipulations[1] with several modifications (Order or *ESP IV* Opinion and Order). As part of that *ESP IV* Opinion and Order, we approved a modified version of FirstEnergy's original proposal for a retail rate stability rider (Rider RRS).

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

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

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

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

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

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

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

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

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

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

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

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

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2 Of the eight assignments of error alleged by FirstEnergy in its May 2, 2016 application for rehearing, the following assignments of error would be rendered moot in the event it's proposed modifications to Rider RRS are approved: " * * * 6. The Order is unreasonable because it requires the Companies to bear the burden for any capacity performance penalties."; "7. The Order is unreasonable because the Commission prohibited cost recovery for Plant outages greater than 90 days."; and "8. The Order is unreasonable because it does not reflect the ruling by the Federal Energy Regulatory Commission Order issued on April 27, 2016 in Docket Number EL16-34-000." We will refer to the mechanism in the Companies' Proposal as the modified Rider RRS.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. *Applicable Law*

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

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

III. DISCUSSION

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

1. ASSIGNMENTS OF ERROR AND ARGUMENTS OF THE PARTIES

{¶ 32} OCC/NOAC, OMAEG, and P3/EPSA first assert that FirstEnergy's eighth assignment of error violates R.C. 4903.10 and, therefore, the Commission lacks jurisdiction to consider it. OCC/NOAC and NOPEC also reiterate their arguments that the Companies, at this stage of the proceeding, were either limited to accepting the Commission's modifications to the Stipulated ESP IV or withdrawing and terminating their ESP application, pursuant to R.C. 4928.143(C)(2)(a). OCC/NOAC, Sierra Club, OMAEG, and P3/EPSA also state that the Companies' Proposal, supplemental testimony, and proposed procedural schedule are nothing more than an untimely motion to reopen the record, as the reopening of the record may only occur prior to the issuance of a final order, upon a showing of good cause, further noting there was no conceivable way the *ESP IV* Opinion and Order could have addressed the FERC Order. Ohio Adm.Code 4901-1-34. Finally, OCC/NOAC, OMAEG, and P3/EPSA state that evidence pertaining to the Companies' Proposal could have been offered during the initial hearings of this proceeding. Furthermore, many intervenors argued in their memoranda contra applications for rehearing that, if the Commission elected to consider the Companies' Proposal, sufficient time should be afforded to the parties in order to have adequate opportunity to review the merits of that proposal.

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

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

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

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

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

{¶ 36} Staff also notes that it was proper for Staff to submit its alternative proposal at this stage of the hearing as the FERC Order effectively made it impossible for the Companies to comply with the Commission's Order. Furthermore, Staff indicates that it is in fundamental fairness that all parties be allowed to respond to a proposal submitted during an ESP proceeding, which Staff did when it made an alternative suggestion to the Companies' Proposal that it also believed would benefit consumers to a greater degree. Staff further notes that the Supreme Court of Ohio has held that the Commission maintains broad authority to modify its orders on rehearing. *Columbus & S. Ohio Elec. Co. v. Pub. Util. Comm.*, 10 Ohio St.3d 12, 15, 460 N.E.2d 1108 (1984).

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

2. Commission Decision

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

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

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

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

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

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

B. The Companies' Proposal

1. Overview of The Companies' Proposal

{¶ 41} FirstEnergy argues that, by adopting the Companies' Proposal, the Commission will allow *ESP IV*, as modified, to provide all the rate stabilization benefits recognized in its Order, without reliance on a power purchase agreement (PPA) or any other contractual agreement with its unregulated affiliate, FES. Moreover, FirstEnergy argues that its proposal also addresses many of the risk-related concerns raised by intervening parties and will lead to a more efficient and timely resolution, ultimately providing customers the benefits of *ESP IV* much sooner than revisiting the entire ESP process. The Companies' Proposal changes the original Rider RRS mechanism in the following ways: (1) the PPA-related units' fixed and variable costs to be passed through the modified Rider RRS would not be the actual costs of those units, but instead would be the fixed and variable costs as forecasted by FirstEnergy's 2014 data; (2) the energy revenues offsetting the calculated costs would be based on actual market energy prices, but, instead of using the actual generation amounts, would use the monthly on-peak and off-peak generation amounts from the Companies' 2014 modeling and forecasts; (3) capacity revenues would be calculated using actual capacity prices, which would be applied to forecasted quantities; and (4) revenues would remain with the Companies rather than being passed through a PPA to FES. (Co. Ex. 197 at 4-6, 12.)[6] FirstEnergy maintains that the hedging mechanism will continue to apply under the modified calculation of Rider RRS (Co. Ex. 197 at 5, 8; Rehearing Tr. Vol. I at 161-62, 193-94). FirstEnergy adds that the Companies' Proposal eliminates the need for reconciliations, apart from reconciling actual sales and billing demands with projected amounts, and energy revenues with actual energy pricing in quarterly true-ups, further reducing the risks faced by ratepayers (Co. Ex. 197 at 7-8).

2. ARGUMENTS OF THE PARTIES

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

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

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

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

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

{¶ 43} P3/EPSA and Sierra Club further contend, contrary to FirstEnergy's arguments, that the Companies' Proposal does not act as a limitation on customer shopping, noting the Companies make no claim that the modified Rider RRS controls the size or extent of the class of the Companies' ratepayers that shop for generation with a CRES provider, or alternatively, prohibits the Companies' ratepayers from migrating to or from the SSO. In fact, P3/EPSA assert that, according to FirstEnergy witness Mikkelsen, the Companies' Proposal does not limit ratepayers from shopping for their generation supply. *Clark v. State Med. Bd.*, 10th Dist. Franklin No. 14AP-212, 2015-Ohio-251 (*appeal not accepted*, 143 Ohio St.3d 1442, 2015-Ohio-3427). (Co. Ex. 197 at 10; Rehearing Tr. Vol. I at 49; Rehearing Tr. Vol. II at 359-62; Rehearing Tr. Vol. V at 1065-66.) Notably, Sierra Club argues that FirstEnergy's justification of a "financial limitation" is also inaccurate, as there would be no extra charge for customers who decide to shop or increase in the price at which this shopping would occur (Rehearing Tr. Vol. 1 at 197). P3/EPSA and Sierra Club maintain that applying the plain meaning of the word "limitation," and, therefore, the Companies' Proposal may not be authorized under R.C. 4928.143(B)(2)(d) on that basis.

{¶ 44} OMAEG, Sierra Club, Staff, and P3/EPSA further argue that the Companies' Proposal is not appropriate for inclusion in an ESP under R.C. 4928.143(B)(2)(d), as it fails to have the alleged effect of stabilizing or providing certainty regarding retail electric service. Contrarily, OMAEG notes the customers taking service from CRES providers, especially large commercial customers, will experience additional uncertainty by the extra charge or credit as it will disrupt fixed-price contract prices and competitive rates, which will ultimately lead to uncertain and unexpected costs (OMAEG Ex. 37 at 11-12). OMAEG further asserts that these allegedly unexpected and uncompetitive costs may also deter businesses from investing and locating in Ohio, if they are able to find an alternative location without such uncompetitive prices (OMAEG Ex. 37 at 12; Rehearing Tr. Vol. II at 335-37). Additionally, OMAEG notes that FirstEnergy witness Mikkelsen even acknowledged that customers would not be guaranteed to receive a credit in any given year during the life of the Modified Rider RRS, thereby, negating any claims that this mechanism will operate as a hedge. OMAEG adds that this risk is even further exacerbated by the fact that the Companies' Proposal is based on outdated forecasts originally derived in August 2014. (Co. Ex. 197 at 6; Rehearing Tr. Vol. I at 133; Rehearing Vol. II at 334.) P3/EPSA also note that volatility in short-term wholesale power markets is not necessarily reflected in longer-term retail power markets. Further, P3/EPSA contend that it is possible that the additional charge may result in an increase in volatility, if the reconciliation of the modified Rider RRS would occur in a period where electricity prices would fall in the same direction as the credit or charge due to customers, thereby reinforcing the effect of the reconciliation rather than running counter to it, as a proper hedge would operate (P3/EPSA Ex. 1 at 11; P3/EPSA Ex. 5 at 27-29).

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

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

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

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

{¶ 48} Direct Energy goes even further to state that the Companies' Proposal would fail any provision of R.C. 4928.143(B)(2) due to the fact that the proposal does not seek the recovery of "costs," as defined in R.C. Chapter 4909.[7] Specifically, Direct Energy notes that the definition of cost under traditional ratemaking is generally understood to mean an "actual expenditure," or equivalent, incurred by the utility. R.C. 4909.151.

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

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

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

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

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

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

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

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

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

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

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

{¶ 56} In response to Direct Energy's arguments, FirstEnergy contends that arguments regarding the nature of Rider RRS are beyond the scope of rehearing, as the Commission has already determined that Rider RRS will provide several benefits to ratepayers and will act as a form of rate insurance. Additionally, FirstEnergy claims that Direct Energy is incorrect to state that Rider RRS does not provide a service. Finally, FirstEnergy contends the cases cited by Direct Energy do not conclusively provide that a rate must be cost-based; rather, the Companies argue that the Supreme Court of Ohio held that the riders in those cases were rejected[9] because they allowed for the recovery of revenues in exchange with the companies agreeing to transition to market-based SSO rates and transition their generating assets out of the distribution utility. Moreover, FirstEnergy states the Court has expressly reserved the question of whether rates must be cost-based for future consideration. *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 402, 407, 2011-Ohio-958, 945 N.E.2d 501 (*CSP I*). As a final matter, FirstEnergy claims that NOPEC has presented no new evidence supporting its contention that the modified Rider RRS would violate R.C. 4928.20(K), noting that the Commission previously found that non-bypassable charges have the same effect on all shopping customers, including those that are members of an aggregation (Order at 110).

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

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

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

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

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

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

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

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

{¶ 60} FirstEnergy witness Mikkelsen contends that the Companies' Proposal cannot be considered a transition charge, due to the fact that it is projected to be a net credit over the term of *ESP IV* (Rehearing Tr. Vol. X at 1688-89; Co. Ex. 206 at 4). MSC agrees with FirstEnergy's assertion that, because Rider RRS is projected to provide a $256 million net credit to customers over the term of *ESP IV*, it cannot be categorized as a transition charge. FirstEnergy even notes that Staff witness Choueiki acknowledged that Rider RRS would not count as a transition charge during the periods a credit is issued (Rehearing Tr. Vol. V at 1250-51). Furthermore, the Companies claim that the hedge stabilizing market prices is, in no way, related to "transition revenues," authorized under R.C. 4928.38. FirstEnergy argues that modified Rider RRS is not designed to protect the Companies from the financial harm of transitioning to market rates, noting that the Companies completed this transition in 2009 when they began to offer market-based SSO pricing to their customers and Rider RRS does not seek to recover the Companies' generating plant costs, essentially because there are none to recover (Co. Ex. 206 at 3-4; Rehearing Tr. Vol. X at 1697). Finally, the Companies contend that there are several generation riders in place that have not been determined to be transition charges, such as the Generation Service Rider (Rider GEN), the Generation Cost Reconciliation Rider (Rider GCR), the Alternative Energy Resource Rider (Rider AER), and the Non-Distribution Uncollectible Rider (Rider NDU). Accordingly, FirstEnergy maintains that just because a transition charge is generation-related, does not necessarily mean that all generation riders are transition charges. (Staff Ex. 15 at 14.)

{¶ 61} OMAEG, Staff, Sierra Club, OHA, P3/EPSA, OCC/NOAC, OEC/EDF, and NOPEC argue that the Companies' Proposal would unlawfully collect transition revenues, or its equivalent, from customers under R.C. 4928.38. In fact, OMAEG, Direct, and OEC/EDF point out that Staff witness Choueiki noted in his rehearing testimony that the modified Rider RRS *"is at its core a generation rider"* and may potentially be construed as a transition charge (Staff Ex. 15 at 14; OEC/EDF Ex. 3 at 10). Although there is no longer a direct link, OMAEG, P3/EPSA, and NOPEC argue that the Companies are attempting to collect revenue associated with their unregulated competitive affiliate's generation plants, which is equivalent to transition revenues, and disallowed pursuant to R.C. 4928.38 (Co. Ex. 197 at 8; Rehearing Tr. Vol. IV at 955). Additionally, OMAEG, Staff, and P3/EPSA note that the Supreme Court of Ohio recently overturned two Commission decisions that authorized the receipt of unlawful transition revenues or its equivalent through the establishment of non-bypassable riders. *AEP Ohio RSR Case; DP&L SSR Case.* In fact, Staff, NOPEC, and P3/EPSA note that Staff witness Choueiki stated that the credits and charges from the proposed rider are explicitly connected to the 3,257 megawatts (MWs) of unspecified generation, and as such, poses a significant risk that the Supreme Court of Ohio will view the charges resulting from the Companies' Proposal as the equivalent to a transition charge and find it impermissible under R.C. 4928.38. (Staff Ex. 15 at 11-12, 14-16.) OEC/EDF add that, although the Companies have projected a net credit for the duration of Rider RRS under its modified proposal, there is still a projected charge for, at least, the first few years of Rider RRS.

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

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

{¶ 63} R.C. 4905.22 provides that "[a]ll charges made or demanded for any service rendered, or to be rendered, shall be just, reasonable * * * and no unjust or unreasonable charge shall be made or demanded for, or in connection with, any service * * *." P3/EPSA and OMAEG argue that, due to the fact that the Companies' alleged hedging benefit is greatly overstated when compared to the potential costs, calculated by updated energy forward and capacity prices, the Companies' Proposal would violate R.C. 4905.22 by implementing an unreasonable charge (P3/EPSA Ex. 18 at 10-11). FirstEnergy responds by stating that R.C. 4905.22 does not apply to ESP proceedings, but, rather, it applies traditional base rate cases.

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

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

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

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

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

{¶ 67} In response, FirstEnergy initially notes that many of the concerns raised in the Commission's Order related to the possibility of anticompetitive subsidies would be eliminated, given the fact the PPA has been removed and FES will have no involvement with the execution of the Companies' Proposal (Order at 110; Co. Ex. 197 at 4). Further, FirstEnergy contends that intervening parties presented no evidence that revenues will flow between the Companies and FES, or any other unregulated affiliate. The Companies state that the revenues generated from Rider RRS will be received, and used by, the Companies. (Co. Ex. 197 at 11; Rehearing Tr. Vol. I at 226-27.) FirstEnergy witness Mikkelsen testified that she was not aware of "any mechanism within the Companies' organization that would allow them to share dollars collected with FES" and that it was the Companies' intention to use all of the revenues generated by Rider RRS toward grid modernization projects and programs, as well as other business operations (Rehearing Tr. Vol. I at 58, 226-27). Furthermore, the Companies also claim that modified Rider RRS is not unlawful under the FERC affiliate restrictions, stating again that there is no evidence such monetary transfers would occur between the Companies and FES, as the modified Rider RRS no longer contains a PPA or similar contractual agreement. FirstEnergy maintains that it will abide by all state and federal laws pertaining to corporate separation.

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

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

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

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

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

{¶ 70} Utilizing many of the same arguments against the alleged economic development benefits associated with the Companies' Proposal, P3/EPSA and OEC/EDF also maintain that the recommended modifications to the original Rider RRS, as approved by the Commission, would result in the Companies' Proposal no longer satisfying the AEP Ohio Order Factors. P3/EPSA add that when the Commission chose to apply these particular factors, it was doing so to ensure that a PPA rider would offer more than the mere possibility of retail rate stability and provide a vast array of benefits, such as economic development and maintaining resource diversity, in order to justify the costs. Due to the fact the PPA is no longer in place, P3/EPSA, OHA, and OEC/EDF claim that benefits relied on by this Commission in its Order, including maintaining fuel supply diversity, avoidance of significant transmission costs, and economic development, have been eliminated. Thus, P3/EPSA, OHA, and OEC/EDF argue that the Companies' Proposal also fails to satisfy the AEP Ohio Order Factors. (Staff Ex. 15 at 13; OEC/EDF Ex. 3 at 8; Rehearing Tr. Vol. I at 51, 179, 263.) Finally, OCC/NOAC assert that the Commission erred in unreasonably and unlawfully considering factors identified in the *AEP Ohio ESP III* Order, noting that it was unlawful for the Commission to rely on a non-final order and the Commission should have considered other factors in order to ensure a less-biased analysis of PPA riders (OCC/NOAC App. for Rehearing (May 2, 2016) at 65-69, 71-72).

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

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

(a) Quantitative Benefits.

{¶ 72} FirstEnergy initially states that the Companies' Proposal utilizes record evidence already relied upon, and determined to be reasonable, by the Commission in this case to modify the cost, output, and cleared capacity assumptions in the Rider RRS calculation (Co. Ex. 197 at 5, 8; Rehearing Tr. Vol. II at 127; Order at 80-85). By utilizing representative proxies for the fuel-diverse baseload generation of that region, FirstEnergy and MSC contend that significant amounts of inherent variability have been removed from the original Rider RRS hedge mechanism, as the Companies' Proposal focuses on actual changes in energy and capacity prices (Rehearing Tr. Vol. I at 161-62, 193-94). Additionally, FirstEnergy states that it will no longer be necessary to reconcile costs or capacity revenues; rather, other than reconciling actual sales and billing demands with projected amounts, only energy revenues will need to be reconciled with actual energy pricing in the quarterly true-up. FirstEnergy claims that fixing the costs associated with the proxy generation results in a significant decrease in the risk faced by consumers. (Co. Ex. 197 at 6-8; Order at 90; Rehearing Tr. Vol. IV at 892.) FirstEnergy, Nucor, and MSC argue that the Companies' Proposal not only maintains the benefits provided in the Commission's Order, it improves upon the original Rider RRS by holding the costs of the hedging mechanism constant and reducing the number of variable terms associated with the hedge and, thus, reducing the associated risk for FirstEnergy's customers (Co. Ex. 197 at 5-6; Rehearing Tr. Vol. I at 226-27). FirstEnergy and MSC add that the Commission-ordered mechanism limiting average customer bills provides additional customer protections (Co. Ex. 197 at 7). CMSD also notes that the severability provision in the Third Supplemental Stipulation would be an appropriate standard to apply to the Companies' Proposal, adding that under such a provision the Companies' Proposal could very well be considered an "equivalent value," or, in fact, a greater value (Co. Ex. 197 at 11).

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

{¶ 74} OMAEG, OCC/NOAC, OEC/EDF, Sierra Club, and P3/EPSA first contend that the quantitative benefits asserted by the Companies to be associated with Rider RRS continue to be overstated, as the Companies rely on outdated data and refuse to use more recent forecasts and actual capacity pricing (Co. Ex. 197 at 18-19; P3/EPSA Ex. 18C at 15-16, Att. JPK-1, Att. JPK-2). OMAEG notes that Staff witness Choueiki testified that Staff no longer agreed with the Companies' projections (Rehearing Tr. Vol. IV at 986-87). P3/EPSA, NOPEC, and Sierra Club even argue that based on these updated energy forward and capacity auction results, the Companies' forecast reflects ratepayers would experience at least a $154 million net charge over the term of the modified Rider RRS (P3/EPSA Ex. 18C at 15-16, Att. JPK-1, Att. JPK-2; Rehearing Tr. Vol. V at 1201-02). Additionally, P3/EPSA, OCC, and Sierra Club point out that Staff witness Choueiki also indicated that the modified Rider RRS would be an overall charge based on updated pricing information (Rehearing Tr. Vol. V at 1250). Moreover, OMAEG asserts that the revenues from other provisions of *ESP IV* that FirstEnergy witness Mikkelsen indicated the Companies may use to fund the credits to customers would originally be collected from customers. OMAEG adds that the Companies' Proposal includes no prohibition from seeking recovery of any credits resulting from Rider RRS from ratepayers in an emergency rate relief case, a self-complaint, or Staff approval of an exception to the Companies' distribution rate freeze as part of the *ESP IV*. (Rehearing Tr. Vol. I at 80-85, 88, 200-08.)

{¶ 75} OEC/EDF note that, based on the Commission's analysis of the various projections in its Order, the Companies would face a revenue shortfall of $256 million during the term of Rider RRS due to projected customer credits (Order at 81; OEC/EDF Ex. 3 at 6). Moreover, with the elimination of the PPA, OEC/EDF now asserts that this loss will need to be absorbed by ratepayers. As updated in the workpapers of FirstEnergy witness Mikkelsen, OEC/EDF and Sierra Club argue that the result is even more critical, adding that during the period of January 1, 2019 through May 31, 2024, the Companies project credits to customers of $976 million (or $623 million NPV) from Rider RRS. (Sierra Club Ex. 89; Rehearing Tr. Vol. I at 79.) Sierra Club adds that these projections run directly counter to the Companies' support of Rider DMR, further casting doubt on the projected credits and charges. If the Commission were to approve the Companies' Proposal, OEC/EDF would recommend directing the Companies to enter into a PPA or a financial hedge contract with an independent third party, in order to reduce the risk exposure currently faced by ratepayers (OEC/EDF Ex. 3 at 5).

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

{¶ 77} FirstEnergy contends that the intervenor arguments regarding the quantitative benefits of Rider RRS are largely reiterations of earlier arguments that were dismissed by the Commission in its Order (Order at 83). Additionally, the Companies assert that Staff witness Choueiki's calculation and P3/EPSA witness Kalt's forward price analysis are flawed due to their reliance on recent forward prices, which the Commission previously noted are unreliable due to abnormally high temperatures and record high natural gas inventories (Rehearing Tr. Vol. V at 1232-36). Further, the Companies argue that the energy forwards market that Dr. Choueiki and Dr. Kalt rely on is extremely illiquid in the specific term utilized by these witnesses (Co. Ex. 199; Co. Ex. 200; Rehearing Tr. Vol. V at 1237, 1246-47). FirstEnergy even notes that Dr. Kalt's analysis seems to have incorporated a Henry Hub natural gas spot price that also happened to be the lowest spot price since December of 1998, further indicating that his analysis is unrepresentative of the projected outcome of the Rider RRS hedge mechanism (Rehearing Tr. Vol. V at 1188-90). As a final matter, the Companies contend that the projections of FirstEnergy witness Rose continue to be the only sound forecasts of record in this proceeding, noting no circumstances have changed since the Commission issued its Order that would challenge the validity of these forecasts (Order at 80-82). Accordingly, FirstEnergy asserts that the projected $256 million credit will be preserved under the Companies' Proposal.

{¶ 78} Additionally, FirstEnergy notes that the Companies will have sufficient revenue streams from SmartGrid investment, Rider DCR, shared savings, lost distribution revenue, and other provisions of *ESP IV*, in order to pay any projected net credits resulting under the modified Rider RRS (Rehearing Tr. Vol. 1 at 80-81, 85; Rehearing Tr. Vol. V at 1098-99). The Companies add that any revenues received above those forecasted for any particular year will be used for additional investment to support its grid modernization initiatives and other related projects, negating any arguments that the modified Rider RRS will provide the Companies with excess revenues (Co. Ex. 197 at 6-7; Rehearing Tr. Vol. V at 1098-99). Finally, the Companies contend there is no basis for adopting OEC/EDF's recommendation that the Companies enter into a PPA or third party financial hedge contract, as this would merely shift revenues from the Companies and frustrate their ability to pursue numerous beneficial programs and projects, including modernizing the Companies' distribution grid, as well as jeopardize the Companies' ability to pay credits to customers in the later years of Rider RRS (Sierra Club Ex. 89; Co. Ex. 197 at 12). Moreover, as acknowledged by many intervening witnesses, FirstEnergy argues that no competitive bidding process for modified Rider RRS was feasible or necessary (Rehearing Tr. Vol. IV at 821-23; Rehearing Tr. Vol. V at 1104-05).

(b) Qualitative Benefits.

{¶ 79} FirstEnergy, MSC, and OEG also argue that the Companies' Proposal maintains the retail rate stability benefits that the Commission relied upon in its Order approving the original Rider RRS mechanism (Co. Ex. 197 at 10; Co. Ex. 206 at 3; OEG Ex. 4 at 1, 5; Order at 80-81, 83-84). In fact, OEG asserts the Companies' Proposal will result in smoother cost-based rates that would otherwise fluctuate significantly depending upon market conditions and PJM's regulatory construct, noting that the modified Rider RRS will provide customers with generation rates comprised of approximately 40 percent at the guaranteed cost-based pricing and 60 percent at the federally-regulated market rate (OEG Ex. 4 at 7-8). OEG notes that this benefit alone would be enough for the Commission to approve the Companies' Proposal. Further, FirstEnergy argues that by limiting the variable inputs to day-ahead energy prices and actual capacity prices, the Companies' Proposal "provides customers the benefit of the hedge without bearing the risk of changes in [p]lant costs, operating levels or any other operational or market performance risk," essentially resulting in a superior hedging mechanism (Co. Ex. 197 at 6; Rehearing Tr. Vol. I at 127-28).

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

{¶ 81} OMAEG and IMM argue that the Companies' Proposal is not appropriate for inclusion in an ESP under R.C. 4928.143(B)(2)(d), as it fails to have the alleged effect of stabilizing or providing certainty regarding retail electric service. Contrarily, OMAEG notes the customers taking service from CRES providers, especially large commercial customers, will experience additional uncertainty by the extra charge or credit as it will disrupt fixed-price contract prices and competitive rates, which will ultimately lead to uncertain and unexpected costs (OMAEG Ex. 37 at 11-12). OMAEG further asserts that these allegedly unexpected and uncompetitive costs may also deter businesses from investing and locating in Ohio, if they are able to find an alternative location without such uncompetitive prices (OMAEG Ex. 37 at 12; Rehearing Tr. Vol. II at 335-37). Additionally, OMAEG notes that FirstEnergy witness Mikkelsen even acknowledged that customers would not be guaranteed to receive a credit in any given year during the life of the modified Rider RRS, thereby, negating any claims that this mechanism will operate as a hedge. Moreover, OMAEG, Sierra Club, OCC/NOAC, and OEC/EDF question the Companies' financial ability to implement the various qualitative benefits, noting the possibility of the Companies to pay out an expected total of $561 million in net credits to customers over the course of the eight-year term of Rider RRS (Rehearing Tr. Vol. I at 80-85, 88, 200-08).

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

{¶ 83} OMAEG and P3/EPSA also contend that the Companies' Proposal will harm economic development in the state of Ohio, noting that large manufacturers and other businesses will consider the increased variable cost of energy in resource allocation decisions, and even, perhaps, decisions on company expansion or relocation (OMAEG Ex. 37 at 11-13; Rehearing Tr. Vol. V at 1060-61). As OMAEG witness Lause testified, the additional charge that would result from the Companies' Proposal would either need to be borne by customers and may even be so detrimental as to cause some commercial or industrial customers to go out of business (OMAEG Ex. 37 at 12). As a final point, OMAEG again notes that these extra charges through modified Rider RRS would interfere with market forces and disrupt the ability of these companies to enter into cost-competitive contracts with CRES providers (OMAEG Ex. 37 at 11-12).

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

iii Whether the Companies' Proposal provides grid modernization benefits?

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

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

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

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

{¶ 88} Moreover, FirstEnergy and MSC contend that all five qualitative benefits[12] of *ESP IV* relied upon by the Commission in its Order remain unchanged (Order at 78-95; Co. Ex. 197 at 13, 19; Rehearing Tr. Vol. X at 1682; Rehearing Tr. Vol. II at 479). In fact, FirstEnergy witness Mikkelsen testified to the fact that, as it provides even greater rate stability to customers, as outlined above, the Companies' Proposal actually enhances the qualitative benefits of *ESP IV* considered by the Commission in its Order (Co. Ex. 197 at 19). FirstEnergy further notes that Staff witness Turkenton agreed that none of the qualitative factors relied upon by the Commission have changed due to the modifications proposed in the Companies' Proposal (Rehearing Tr. Vol. II at 479; Co. Ex. 197 at 19-20).

12 These five qualitative benefits included the following: (1) continuation of the distribution rate increase freeze until June 1, 2024; (2) continuation of multiple rate options and programs to preserve and enhance rate options for various customers provided in previous ESPs; (3) establishment of a goal to reduce CO_2 emissions by FirstEnergy Corp. with periodic reporting requirements; (4) reactivation and expansion of energy efficiency programs previously suspended by the Companies, with a goal of saving 800,000 MWh of energy annually; and (5) programs to promote the use of energy efficiency programs by small businesses.

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

{¶ 89} OMAEG and NOPEC reaffirm their disagreement that all of the qualitative public interest benefits will continue under the Companies' Proposal, and argue that this would alter the outcome if presented under the statutory ESP versus MRO test. Specifically, OMAEG, OHA, CMSD, Sierra Club, OEC/EDF, NOPEC, and P3/EPSA assert that, because the Companies' Proposal is no longer tied to the two specific power plants located in the state, benefits such as increased reliability of generation, supply diversity, avoidance of transmission costs, economic development, and job retention at the power plants, would be eliminated from the Commission's analysis in the Order (Staff Ex. 15 at 13; OCC Ex. 44 at 12; Rehearing Tr. Vol. I at 51, 179). OMAEG once again argues that FirstEnergy has provided no firm commitment that the funds collected through Rider RRS will be utilized for its numerous grid modernization initiatives, including advanced metering infrastructure (AMI), distribution automation, Volt/VAR controls, battery resources, and new Ohio renewable resources (Rehearing Tr. Vol. I at 63-64). P3/EPSA note that even if the qualitative benefits were found to still be present under the Companies' Proposal, they would not exceed the vast negative quantitative effect of the modified Rider RRS.

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

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

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

{¶ 92} FirstEnergy witness Mikkelsen argues that the charges associated with Rider RRS may be excluded from the SEET calculation because "the credit support is necessary to achieve Staff's stated goal of developing one of the nation's most intelligent distribution grids, as well as the commitment to retain FirstEnergy Corp.'s headquarters and nexus of operations in Akron, Ohio, are both extraordinary in nature." (Co. Ex. 197 at 18; Co. Ex. 206 at 22-23). The Companies specifically request the credits and charges from Rider RRS be excluded from its "earned return," because they constitute "special items" for purposes of the SEET calculation, given the fact they are not, or at most incidentally, related to typical utility operations (Co. Ex. 206 at 21). The Companies note that OCC witness Kahal even acknowledged that, under some circumstances, excluding the costs associated with Rider RRS credits from the SEET calculation could result in a more beneficial situation for customers (Rehearing Tr. Vol. V at 1107-08). FirstEnergy also argues that Rider RRS has a symmetric design, while the SEET calculation promotes an asymmetric result by not providing any downside protection to the Companies in the event of a SEET refund (Co. Ex. 206 at 21). Additionally, the Companies argue that excluding the Rider RRS revenues from the SEET calculation will enable the Commission to conduct a more reliable comparison of FirstEnergy's return on equity to that of comparable utilities and companies, as required by R.C. 4928.143(F) (Co. Ex. 206 at 21-22). As a final matter, the Companies claim that, while his testimony recommended that the Rider RRS revenues be included in the SEET calculation, OCC witness Duann agreed that the common meanings for each exclusionary category be used. FirstEnergy asserts that utilizing these definitions would lead to a result contrary to Dr. Duann's request. (Rehearing Tr. Vol. IV at 921, 924-27). As a final matter, FirstEnergy argues Dr. Duann's analysis is flawed, as he consistently opposes the exclusion of any recurring item from the SEET calculation, which is also contrary to Commission precedent. MSC agrees that the revenues and expenses running through Rider RRS should be treated as a "special item," and should, thus, be excluded for purposes of the SEET calculation.

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

{¶ 94} OEC/EDF, OMAEG, and Direct Energy support OCC's recommendation, noting that to allow such an exclusion from the SEET calculation would be inconsistent with Commission precedent and what has previously been determined to be "extraordinary." *SEET Finding and Order*. OEC/EDF and OMAEG add the fact that no other utility has a similar rider in place does not excuse its inclusion in the SEET calculation when the statute only requires that the Commission look to companies that "face comparable business and financial risk." Additionally, OMAEG notes that the modified Rider RRS revenues should be treated as "recurring" since this rider will provide a regular charge or credit over the next eight years. (Rehearing Tr. Vol. V at 1164.)

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

3. COMMISSION DECISION

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

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

{¶ 97} As a preliminary matter, the Commission finds that the Companies' Proposal is authorized under R.C. 4928.143(B)(2)(d). Under R.C. 4928.143(B)(2)(d), the Commission can approve, as a provision of an ESP, terms, conditions, or charges relating to limitations on customer shopping for retail electric generation service, bypassability, standby, back-up, or supplemental power service, default service, carrying costs, amortization periods, and accounting or deferrals, including future recovery of such deferrals, as would have the effect of stabilizing or providing certainty regarding electric service. Therefore, a proposed provision in an ESP is authorized under the statute if it meets three criterial: (1) it is a term, condition, or charge; (2) it relates to one of the listed items (e.g. limitations on customer shopping, bypassability, carrying costs); and (3) it has the effect of stabilizing or providing certainty regarding retail electric service. *AEP Ohio RSR Case* at ¶ 43.

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

{¶ 99} Under the second criterion of R.C. 4928.143(B)(2)(d), modified Rider RRS must relate to at least one of the following: limitations on customer shopping for retail electric generation service, bypassability, standby, back-up, or supplemental power service, default service, carrying costs, amortization periods, and accounting or deferrals (Order at 108). The Commission finds that the Proposal relates to both "bypassability" and "limitations on customer shopping for retail electric generation service."

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

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

{¶ 102} With respect to the third and final criterion, whether the modified Rider RRS would have the effect of stabilizing or providing certainty regarding retail electric service, the Commission finds that modified Rider RRS would act as a hedging mechanism, similar to Rider RRS as originally modified and adopted by the Commission (Order at 109). However, modified Rider RRS would entail less risk to customers and limit the hedge strictly to the price of energy and capacity during *ESP IV*. If market prices for energy and capacity rise, Rider RRS will operate to mitigate increases in market prices. Therefore, modified Rider RRS is designed to mitigate the effects of market volatility, providing customers with more stable pricing for retail electric generation service. Accordingly, since modified Rider RRS would, in theory, have the effect of stabilizing or providing certainty for retail electric service, the Commission finds that the third criterion of R.C. 4928.143(B)(2)(d) has been satisfied.

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

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

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

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

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

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

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

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

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

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

{¶ 110} Under Rider RRS, as originally modified and approved by the Commission, credits to customers would have been paid for by revenues generated by selling energy, capacity, and ancillary services in the market. Under modified Rider RRS, there would not be actual sale of power in the markets, and the Companies would be liable to pay the credits to customers from the Companies' own funds. The projections by the Companies forecast that, for the period of January 1, 2019, through May 31, 2024, the Companies would issue credits to customers totaling $976 million (Rehearing Tr. Vol. I at 78-79; Sierra Club Ex. 89). FirstEnergy claims that, looking at the totality of *ESP IV*, the Companies would be able to fund the credits without harming investments necessary to deploy smart grid technology, pursuant to the Stipulations adopted by the Commission in this case; however, at the hearing, the Companies' witness had not calculated how much the Companies projected to be received from Rider DCR or the return on smart grid investments (Rehearing Tr. Vol. I at 83) although FirstEnergy witness Mikkelsen also testified that customer credits could be funded from cash from operations, lost distribution revenue, shared savings, and potential borrowing by the Companies (Rehearing Tr. Vol. I at 84-85).

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

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

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

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

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

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

{¶ 115} The Commission further finds that it is unnecessary to address claims that modified Rider RRS violates Federal law. The Commission has not approved modified Rider RRS; accordingly, such claims are moot. Further, we reaffirm our holding that constitutional questions, such as preemption, are beyond our statutory authority (Order at 112). The Commission is an administrative agency with power specifically granted by the Ohio Revised Code and has no authority to declare a Federal statute unconstitutional. *Reading v. Pub. Util. Comm.*, 109 Ohio St.3d 193, 195, 2006-Ohio-2181, 846 N.E.2d 840, at ¶ 14, citing *Panhandle E. Pipeline Co. v. Pub. Util. Comm.*, 56 Ohio St.2d34, 346, 383 N.E.2d 1163 (1978).

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

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

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

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

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

C. *Rider DMR*

1. Overview of Proposed Rider DMR

{¶ 118} Staff introduced an alternative proposal to the Companies' Proposal in testimony filed on June 29, 2016, in which it recommends the approval of Rider DMR. Staff contends that Rider DMR would provide FirstEnergy Corp., through the Companies, with funds to assure continued access to credit on reasonable terms in order to allow the borrowing of adequate capital to support its grid modernization initiatives. Staff's purported rationale for establishing such a rider is R.C. 4928.143(B)(2)(h) (Staff Ex. 15 at 15). Staff proposes to allow recovery of $131 million annually through Rider DMR, for a period of three years, in order to improve FirstEnergy's credit position, as determined by its Cash Flow from Operations per-Working Capital (CFO) to debt ratio. According to Staff's proposal, the Commission will have the option of extending the duration of Rider DMR for an additional two years. Staff also proposes the following two conditions on Rider DMR: (1) FirstEnergy Corp. would be required to keep its headquarters and nexus of operations in Akron, Ohio for the duration of the Companies' *ESP IV* or the credit support provided to FirstEnergy Corp. will be subject to refund; and (2) if FirstEnergy Corp. or its subsidiaries were to experience a change in ownership, Rider DMR would end immediately. (Staff Ex. 13 at 2, 7.) While FirstEnergy agrees that Rider DMR may be beneficial to customers if properly designed, it disagrees that Rider DMR should be subject to refund in the event Staff's conditions are not satisfied and it recommends several modifications to the calculations of Rider DMR, as discussed below (Co. Ex. 206 at 11-15, 22).

2. Arguments of the Parties

a. Whether Rider DMR will provide an adequate incentive to the Companies to focus efforts on Grid Modernization?

{¶ 119} Staff and FirstEnergy contend that Rider DMR will not only further grid modernization technologies throughout the state of Ohio, it will also bolster the several policies set forth in R.C. 4928.02, specifically by improving reliability by reducing the number and length of outages, provide new options to customers, and allow new suppliers to enter the market (Co. Ex. 206 at 5-6; Rehearing Tr. Vol. X at 1819; Rehearing Tr. Vol. II at 464; Rehearing Tr. Vol. IV at 967; Staff Ex. 14 at 4). Moreover, FirstEnergy states that RESA witness Crockett-McNew agreed that encouraging the deployment of the SmartGrid would be an important policy objective for the Commission and would help foster the competitive market and additional product offerings in Ohio (Rehearing Tr. Vol. IV at 844-46). Staff acknowledges that such grid modernization efforts will be costly to undertake and expresses its concern regarding FirstEnergy Corp. and the Companies' weakened financial positions (Rehearing Tr. Vol. VIII at 1387). FirstEnergy adds that other intervenor witnesses agreed that the Companies' ability to find appropriate funding for their grid modernization projects was partially dependent on their credit ratings (Rehearing Tr. Vol. IV at 819; Rehearing Tr. Vol. VIII at 1384). Further, the Companies assert that Rider DMR would improve their CFO to debt ratio used by Moody's Investors' Services (Moody's) as part of its rating methodology (Co. Ex. 206 at 8; Staff Ex. 13 at 3-4;

Rehearing Tr. Vol. III at 570-71, 643). Although FirstEnergy and MSC argue the Companies' Proposal remains more beneficial than Rider DMR, they also acknowledge that Rider DMR, if modified, would benefit the public interest by providing credit support that will allow accelerated investment in distribution grid modernization (Co. Ex. 206 at 5).

{¶ 120} OMAEG, Sierra Club, OEC/EDF, Direct, OHA, P3/ESPA, OCC/NOAC, and CMSD initially argue that Staff's proposal provides no explicit requirements that the Companies use the revenues derived from Rider DMR to invest in distribution grid modernization (Rehearing Tr. Vol. X at 1604, 1607-09). In fact, CMSD points out that no portion of these revenues will be used toward capital expenditures associated with grid modernization. Instead, OMAEG, Direct Energy, and OEC/EDF assert it acts as a way to provide credit support to FirstEnergy Corp. with a cash infusion. (Rehearing Tr. Vol. II at 426, 429, 433, 473-74; Rehearing Tr. Vol. III at 584, 611, 702-03, 957-58; Rehearing Tr. Vol. IV at 1001.) OMAEG notes that Staff witness Buckley indicated it was unclear when the Companies would begin implementing their grid modernization initiative, adding that it could take years before customers would begin to see any benefits from this provision. Moreover, according to OMAEG, OEC/EDF, and P3/EPSA, Staff indicated that it would not be recommending a condition to require the Companies to make a certain amount of investment in grid modernization, nor recommending that any particular proportion of the revenues collected under Rider DMR be used on grid modernization. (Staff Ex. 15 at 15; Rehearing Tr. Vol. III at 573-74, 644-45, 647-648; Rehearing Tr. Vol. IV at 956-58, 968-69.)

{¶ 121} Moreover, P3/EPSA, RESA, and OHA note that the only commitments for grid modernization that exist are contained in the Companies' grid modernization plan, which, at this time, fails to provide any necessary details for the implementation of these initiatives or commitment to spend money on grid modernization efforts. *In re FirstEnergy*, Case No. 16-481-EL-UNC (*FirstEnergy Grid Modernization Case*), Application (Feb. 29, 2016). (Rehearing Tr. Vol. II at 472-73.) P3/EPSA, OEC/EDF, and OHA further contend that the *FirstEnergy Grid Modernization Case* would be the more appropriate docket to discuss the Companies' future investment in grid modernization and required funding for such investment (Rehearing Tr. Vol. IV at 1021). P3/EPSA also argue that the Companies may already recover costs related to grid modernization initiatives through its non-bypassable Rider AMI, adding that this rider was designated by the Commission in its Order to be the appropriate rider for cost recovery of any specifically approved parts of the proposed grid modernization plan (Co. Ex. 154 at 10, 12-13; Rehearing Tr. Vol. II at 429, 473-74; Rehearing Tr. Vol. IV at 1015; Rehearing Tr. Vol. X at 1643-44). Accordingly, OMAEG, OEC/EDF, CMSD, and P3/EPSA argue that Rider DMR does not benefit the public interest, given the fact that there is no real commitment to spend revenues received from Rider DMR on grid modernization (Rehearing Tr. Vol. II at 472-73; Rehearing Tr. Vol. X at 1604, 1607-09).

{¶ 122} Although RESA ultimately recommends that the Commission reject Staff's proposed Rider DMR, in the event the Commission was to approve some form of the rider, RESA suggests that the Commission also include specific directives to the Companies to implement grid modernization. RESA initially contends that numerous witnesses testified to the benefits of grid modernization to customers; however, Staff's Rider DMR, as currently proposed, lacks any directives regarding the amount of grid modernization to be undertaken by the Companies or the necessary timeframes for making such investments (RESA Ex. 7 at 7; Staff Ex. 15 at 15-16; Rehearing Tr. Vol. II at 475; Rehearing Tr. Vol. IV at 844-45, 1006-07; Rehearing Tr. Vol. X at 1697).

{¶ 123} As specific recommendations, RESA requests that the Commission impose the following minimum conditions if Rider DMR is approved: (1) smart meter roll-out throughout 100 percent of the Companies' service territories in five years, with the exception for very rural areas; and (2) the implementation timeframe should be 20 percent a year over the five-year rollout period. RESA adds that the Commission could also provide performance incentives to the Companies if a more accelerated rollout is achieved, such as a higher rate of return or a performance-related true-up.

{¶ 124} Next, RESA suggests the following conditions in order to ensure that there are no barriers to the development of innovative products and services for customers: (1) to include the addition of indicators on the customer lists and electronic data interchange (EDI) system as meters are installed and active (meaning validation, estimation, and editing data (VEE data) is available); (2) to allow CRES providers full access to smart meter data and allow access to VEE data within 30 days of installation of the smart meter for CRES provider product use; (3) make VEE data available via EDI with a minimum interval of 15 minutes; (4) require data to be trued up to VEE bill quality at the end of the month, but excepting next day data from that requirement; (5) use AMI hourly use data for individual customer peak load contribution and settlement; (6) hold workshops and require the Companies to file a report within eight months of the Commission's decision in this matter to allow for discussions and recommendations on distributed generation use of AMI and settlement; and (7) require that distributed generation use of AMI and settlement be part of a future workshop discussion. RESA also believes an important component to the smart meter rollout would be to direct the Companies to engage in a thorough customer education campaign on smart meters and grid modernization, in order to ensure that customers are utilizing these additional tools advantageously. As a final point, RESA notes that FirstEnergy witness Mikkelsen indicated that the Companies would not oppose Commission directives to undertake particular grid modernization projects throughout the Companies' service territories, if the Companies were to receive cost recovery of such projects (Rehearing Tr. Vol. X at 1778-79).

{¶ 125} OMAEG also requests that, if the Commission approves Rider DMR, that investment in grid modernization be undertaken simultaneously with the implementation of the rider in order to further Staff's underlying objective for distribution grid modernization (Staff Ex. 15 at 16; Rehearing Tr. Vol. IV at 960). Direct Energy and OCC also request that the Commission undertake appropriate action in the *FirstEnergy Grid Modernization Case* in order to provide parties sufficient opportunity to discuss various grid modernization projects and find a consensus amongst the competing interests. Direct

Energy states that Rider DMR should function as a traditional rider, in which the Commission would initially set at $0.00 and have the rider trued-up at regular intervals, noting that the Companies should also maintain its burden to show that the costs were prudent, just, and reasonable.

{¶ 126} In response to the intervenors' concerns regarding the grid modernization objective, FirstEnergy notes that it would be impractical to require the Companies to "paint" or earmark the dollars received under Rider DMR to ensure they are used for grid modernization purposes, especially when the Companies have indicated it is their intent to use the funds for such purposes, in addition to other business operations that Ms. Mikkelsen alluded to in her testimony (Rehearing Tr. Vol. X at 1605-07, 1609-10). Additionally, Staff notes that there is no basis for concern as to whether these funds will be used for grid modernization because the Commission will be able to control the timing and particular requirements of the grid modernization initiative.

b. Whether Rider DMR is authorized under R.C. 4928.143(B)(2)(h)?

{¶ 127} Staff and FirstEnergy argue that Rider DMR is authorized by R.C. 4928.143(B)(2)(h), which provides that an ESP may include "[p]rovisions regarding the utility's distribution service, including, without limitation and notwithstanding any provision of Title XLIX of the Revised Code to the contrary, provisions regarding single-issue ratemaking, a revenue decoupling mechanism or any other incentive ratemaking, and provisions regarding distribution infrastructure and modernization incentives for the electric distribution utility." Staff contends that Rider DMR satisfies the criteria of this statute because the credit support provided to FirstEnergy Corp. will permit it to maintain investment grade and, in turn, help FirstEnergy Corp. attract the necessary capital for the Companies' distribution grid modernization projects (Staff Ex. 13 at 2; Staff Ex. 15 at 15). FirstEnergy further emphasizes that Rider DMR provides single issue ratemaking, as it deals with the single issue of providing credit support in order to incentivize the Companies to obtain the necessary capital for purposes of distribution grid modernization.

FirstEnergy adds that OCC witness Williams acknowledged that provisions related to grid modernization may be permitted under an ESP. (Co. Ex. 206 at 8-9; OCC Ex. 27 at 16.) OEG and MSC agree that Rider DMR would be lawful under R.C. 4928.143(B)(2)(h), but take no position as to whether the Commission should approve this alternative plan.

{¶ 128} As noted earlier, OMAEG, Sierra Club, Direct, OCC/NOAC, OEC/EDF, and P3/EPSA argue that Staff's proposal provides no explicit requirements that the Companies use the revenues from Rider DMR to invest in distribution grid modernization, or any distribution-related services, and, instead, it is a means of providing credit support to FirstEnergy Corp. with a cash infusion (Rehearing Tr. Vol. II at 426, 429, 433, 472-74; Rehearing Tr. Vol. III at 584, 611, 647-48, 702-03, 957-58; Rehearing Tr. Vol. IV at 957, 1001, 1008; Rehearing Tr. Vol. X at 1687). OEC/EDF asserts that simply having the word "distribution" in a rider's name does not change the fact that the underlying purpose of the rider is credit support. As R.C. 4928.143(B)(2)(h) provides that an ESP may include, among other things, "provisions regarding distribution infrastructure and modernization incentives for the electric distribution utility," OMAEG, Sierra Club, and OCC/NOAC contend that some portion of the revenues collected under Rider DMR should be specifically required to be used toward these grid modernization initiatives. However, according to OMAEG, OHA, Sierra Club, OCC/NOAC, NOPEC, and P3/EPSA, Staff indicated that it would not be recommending a condition to require the Companies to make a certain amount of investment in grid modernization, nor recommending that any particular proportion of the revenues collected under Rider DMR be used on grid modernization. (Staff Ex. 15 at 16; OMAEG Ex. 37 at 8; Rehearing Tr. Vol. III at 644-45, 647-48; Rehearing Tr. Vol. IV at 956-57, 969; Rehearing Tr. Vol. X at 1606-09.) Further, Direct Energy argues that the approved *ESP IV* already assures the Companies the ability to recover distribution-related costs, specifically with grid modernization costs through Rider AMI, and any additional recovery mechanism would either be unnecessary or allow for double recovery of these costs (Rehearing Tr. Vol. IV at 1228-29). OEC/EDF, P3/EPSA, OCC/NOAC, and Sierra Club also argue that Rider DMR cannot meet the requirements of

R.C. 4928.143(B)(2)(h), as neither Staff nor the Companies provided any analysis of the reliability of the Companies' distribution system or the customers' and the Companies' expectations are aligned (OCC Ex. 28 at 21). As a final matter, NOPEC notes that, as R.C. 4928.143(B)(2) does not explicitly provide that an ESP may include a provision for credit support, Rider DMR would not be authorized by any enumerated category under that statute. *CSP II* at ¶ 32-34.

{¶ 129} Sierra Club adds that Rider DMR does not constitute an incentive because the Companies would not be required to make any investments in distribution grid modernization in exchange for the revenues collected under Rider DMR; rather, Sierra Club claims the Companies would be entitled to an amount between $131 million and $1.126 billion[13] annually with Staff's "hope" that they make such investments (Rehearing Tr. Vol. II at 426). CMSD also notes that single issue ratemaking has historically been viewed unfavorably given the limited review of that issue's impact on a company's overall revenue requirement and has usually been confined to instances where the company is confronted with an extraordinary and volatile expense beyond its control and would not otherwise impact the company's rate of return. *In re Cleveland Elec. Illum. Co.*, Case No. 79-537-EL-AIR, Opinion and Order (July 10, 1980) at 34. Moreover, P3/EPSA claim that, because Rider DMR is not a provision regarding "the utility's distribution service," the matter of determining whether it qualifies as single issue ratemaking or a provision regarding "distribution infrastructure and modernization" is irrelevant. However, in the event the Commission were to entertain these arguments, P3/EPSA argue that Rider DMR considers several separate issues, such as grid modernization, credit support, and the Companies' abilities to access the capital markets, and, further, does not incentivize grid modernization since there are no restrictions or requirements for the use of Rider DMR revenues.

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13 This is the maximum amount Sierra Club, as well as other intervening parties, claim FirstEnergy is requesting provided all of its recommended modifications to the proposed Rider DMR are accepted by the Commission.

{¶ 130} Accordingly, OMAEG, Sierra Club, OCC/NOAC, Direct, OEC/EDF, NOPEC, and P3/EPSA argue that Rider DMR cannot reasonably be determined to demonstrate compliance with R.C. 4928.143(B)(2)(h), given the fact that there is no real commitment to spend revenues received from Rider DMR on grid modernization and the record evidence shows the real purpose of this rider is credit support for FirstEnergy Corp. and the Companies (Rehearing Tr. Vol. II at 472-74, 509-10).

{¶ 131} In response to the intervenors' arguments, Staff notes that Rider DMR satisfies all three conditions to constitute an incentive under R.C. 4928.143(B)(2)(h), which requires the Commission to: (1) examine the reliability of the Companies' existing system; (2) ensure that the customers' and the EDU's interests are aligned; and (3) ensure that the EDU is emphasizing and dedicating sufficient resources to reliability. The Companies contend that R.C. 4928.143(B)(2)(h) does not require that the rider relate to "the cost recovery of distribution services" or the rider's "main purpose" relate to the provision of distribution services; rather, the Companies argue that the statute merely requires that the rider "regard the utility's distribution service," and Rider DMR meets such a definition. Additionally, FirstEnergy notes that several of the intervenors based their arguments on the testimony of Staff witnesses Buckley and Turkenton, when Staff witness Choueiki was the appropriate witness to discuss the purpose of the rider. Moreover, even when intervenors cited to Dr. Choueiki's testimony, FirstEnergy notes they did so in a selective way. FirstEnergy states that Dr. Choueiki explained very clearly that, although Rider DMR presents the potential recovery of $131 million on an annual basis, that component must also be read with Staff's other recommendations, including that the Commission should direct the Companies to invest in distribution grid modernization. (Rehearing Tr. Vol. IV at 959, 967-68, 1020-21.) Although the Companies made no firm "commitment" to use the revenues collected under Rider DMR toward grid modernization, as alleged by many intervenors, FirstEnergy witness Mikkelsen testified that the Companies intend to use capital obtained through the credit support provided by such revenues for distribution grid modernization and other necessary business operations (Rehearing Tr. Vol. X at 1607).

Further, the Companies argue that the record already sufficiently demonstrates the reliability of the Companies' distribution system and the customers' and the Companies' expectations are aligned, noting there was no need to repeat these arguments for the purposes of Rider DMR (Co. Ex. 7 at 9-11; Staff Ex. 4 at 6-10). Staff also adds that Rider DMR will provide customers with access to new goods, services, and providers they would not otherwise have, thus reaffirming the position that both interests are aligned (Staff Ex. 15 at 15). As a final point, Staff indicates that Rider DMR will enable the Companies to access capital markets on more favorable borrowing terms, thus, ensuring that they have sufficient resources to dedicate toward reliability through their grid modernization initiative.

c. Whether Rider DMR is authorized under R.C. 4928.143(B)(2)(i)?

{¶ 132} Alternatively, FirstEnergy claims that Rider DMR would also be lawful under R.C. 4928.143(B)(2)(i), noting that the rider includes an economic development and job retention component by including a condition that FirstEnergy Corp. maintain its corporate headquarters and nexus of operations in Akron, Ohio, or risk the possible refund of Rider DMR revenues to customers (Staff Ex. 13 at 7; Rehearing Tr. Vol. III at 580). The Companies also note that FirstEnergy witness Mikkelsen recommended that the economic value associated with this particular condition be reflected in the Rider DMR value (Co. Ex. 206 at 14). In an effort to quantify the economic benefits to the region resulting from FirstEnergy Corp. maintaining its headquarters and nexus of operations in Akron, Ohio, FirstEnergy witness Murley testified that her analysis resulted in an annual economic impact of $568 million on Ohio's economy (Co. Ex. 205 at 3-6; Co. Ex. 206 at 13; Rehearing Tr. Vol. V at 1256). OEG and MSC agree that Rider DMR would be lawful under R.C. 4928.143(B)(2)(i), but take no position as to whether the Commission should approve this alternative plan. On a somewhat different note, Staff argues that it is the grid modernization that will drive significant economic benefits and bolster energy efficiency improvements (Staff Ex. 15 at 15; Rehearing Tr. Vol. X at 1221-24, 1818-19).

{¶ 133} Sierra Club first reiterates its argument that Rider DMR provides no economic benefits due to the fact that there is no record evidence that the corporate headquarters and nexus of operations are at risk of leaving Akron, Ohio. OCC also notes that this particular provision only applies to new programs that require implementation, not benefits arising from operations that have been in place for several years. In addition to those arguments, Sierra Club and P3/EPSA also contend that the Companies have not complied with Ohio Adm.Code 4901:1-35-03(C)(9)(h), which requires a utility applying for an economic development rider as part of an ESP to "provide a complete description of the proposal, together with a cost-benefit analysis or other quantitative justification, and quantification of the program's projected impact on rates." Sierra Club notes that FirstEnergy failed to satisfy these requirements by omitting the rate impacts of their suggested modifications to Rider DMR or a cost-benefit analysis or other quantitative justification for the rider; rather, Sierra Club notes that FirstEnergy elected to provide a simplistic analysis regarding the economic impact. (Rehearing Tr. Vol. III at 694; Rehearing Tr. Vol. X at 1600, 1965.) P3/EPSA and OCC/NOAC agree with Sierra Club, adding that R.C. 4928.143(B)(2)(i) only contemplates recovery of "program costs," not the estimated economic impact attributed to such a program, and such costs have not been identified in the record (Rehearing Tr. Vol. IX at 1487-88). P3/EPSA and OCC/NOAC further assert that, even if the Companies would have provided the required cost analysis, the Companies would still fail to satisfy R.C. 4928.143(B)(2)(i), as FirstEnergy Corp. would be the entity to implement the program, by maintaining its headquarters and operations in Akron, Ohio, and not the Companies, as required by the statute's plain language.

{¶ 134} Sierra Club adds that Staff even acknowledged in its initial brief that FirstEnergy is "already recompensed adequately for the presence of the headquarters," noting that, if the Commission were to then authorize the rider on this basis, there is a potential to overcompensate the Companies. OMAEG also raises its earlier argument that such a commitment has already been made in the Third Supplemental Stipulation in this proceeding, as well as FirstEnergy Corp.'s recent lease renewal.

{¶ 135} FirstEnergy, in response, states that R.C. 4928.143(B)(2)(i) contains no requirement that a company must show the economic development program is the only mechanism in place preventing the company from relocating or ending operations. Rather, FirstEnergy notes that as long as a program maintains employment or retains industry, it is properly considered to be an economic development program, consistent with Commission precedent relating to economic development programs. *FirstEnergy ESP I* Order at 10, 13-14; *FirstEnergy ESP II* Order at 27. Moreover, FirstEnergy emphasizes that FirstEnergy Corp. maintaining its headquarters and nexus of operations in Akron, Ohio is a condition, rather than a commitment, with the potential consequences of discontinuation of the rider and refund issued by the Companies (Rehearing Tr. Vol. X at 1715). The Companies also argue that R.C. 4928.143 does not mandate that program provisions be limited to cost recovery alone, providing EDUs and the Commission adequate discretion to determine the value of economic development provisions and whether they should be included in an ESP. *In re Columbus S. Power Co.*, 138 Ohio St.3d 448, 2014-Ohio-462, 8 N.E.3d 863. Finally, Staff and FirstEnergy agree that, because Staff proposed Rider DMR as an alternative to Rider RRS during rehearing, Ohio Adm.Code 4901:1-25-03(C)(9)(h) is inapplicable.

d. *Whether the Companies currently need investments in their distribution systems?*

{¶ 136} FirstEnergy argues that Rider DMR would provide sufficient credit support in order for the Companies to access the capital markets and acquire the necessary funds to invest in grid modernization projects (Rehearing Tr. Vol. II at 426, 433, 482). Of the three scenarios filed in the *FirstEnergy Grid Modernization Case*, FirstEnergy asserts that full deployment of smart meters would not occur, at the earliest, until 2026 and, at the latest, 2033. In order to accelerate this process, FirstEnergy argues that it will require a fair amount of capital support or access to capital markets with fair borrowing terms. FirstEnergy asserts that Rider DMR may be the appropriate method to ensure that the Companies have the necessary capital for investments in grid modernization. (Co. Ex. 206

at 6-7; Rehearing Tr. Vol. X at 1611-12). Specifically, FirstEnergy contends the increased revenues through Rider DMR would be used to: (1) improve the Companies' credit metrics; (2) strengthen the Companies' credit ratings; (3) preserve the Companies' ability to obtain capital at a reasonable cost; and (4) allow the Companies' to implement capital intensive programs, like grid modernization. The Companies further argue that there are additional obligations they face in the short-term that may affect their ability to make the necessary investments in their distribution system (Rehearing Tr. Vol. X at 1607).

{¶ 137} Sierra Club and P3/EPSA question whether the Companies really require credit support, given the fact the Companies failed to provide any forward-looking projections showing the need for such support, and instead rely on historical data from the past five years.[14] Sierra Club and P3/EPSA state this was the case despite Staff witness Buckley indicating that forecasted numbers would be the best information to consider for this issue (Rehearing Tr. Vol. III at 742). Without such information, Sierra Club claims that the amount of annual revenue required under Rider DMR, as calculated by Staff or modified by the Companies, cannot be supported by the evidentiary record. Additionally, Sierra Club notes that FirstEnergy witness Mikkelsen previously testified that the Companies would be able to provide customers with $561 million in net credits under the Companies' Proposal, while still advancing grid modernization and maintaining the Companies' investment grade rating, contradicting her later testimony in which she stated that the Companies would require at least $558 million of additional annual revenue to accelerate implementation of grid modernization projects and provide credit support. (Rehearing Tr. Vol. I at 79-80, 90-91; Rehearing Tr. Vol. X at 1614-15.) OCC adds that, while Staff may argue that Rider DMR is necessary to achieve the objectives identified in R.C. 4928.02, Staff ignores the risk of encouraging an anticompetitive subsidy. OCC claims

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14 Sierra Club argues that the reason for this lack of evidence is due to the fact that FirstEnergy failed to provide forward-looking projections of the Companies' CFO to debt ratio over the term of *ESP IV*, justifying that this information constituted "material non-public information," the provision of which may violate federal securities laws, specifically the Securities and Exchange Commission's Regulation Fair Disclosure, 17 C.F.R. 243.100 *et seq.*

that Staff is equating financial weakness with financial need, stating that any nominal benefits provided to customers under Rider DMR would be vastly outweighed by the potential costs, ranging from $393 million over a three-year period, and if the Companies' modifications are approved, to over $9 billion in an eight-year period.

{¶ 138} CMSD also adds that providing adequate rate relief solely in response to credit rating concerns would run afoul of Commission precedent requiring a more thorough analysis to ensure fair balancing between various interests. Specifically, CMSD notes the Commission held that "[t]here is quite clearly more to establishing a reasonable earnings opportunity than a mechanical calculation designed to satisfy the ratings agencies' coverages ratios." *In re The Cleveland Elec. Illum. Co.*, Case No. 79-537-EL-AIR, Opinion and Order (July 10, 1980) at 34. Additionally, CMSD argues that this case furthered the principle that utility management has been recognized to have a role in rating agency decisions. As such, CMSD raises, once again, that the real contributing cause to FirstEnergy Corp.'s credit rating issues is the performance of the unregulated generation subsidiaries, which, unfortunately, will not be improved with the implementation of Rider DMR. CMSD adds that Staff has failed to consider the practical implications of Rider DMR and how the rider will actually operate, noting that Staff witness Choueiki testified that the Commission should direct the Companies to engage in their grid modernization initiative and Rider DMR should not take effect until grid modernization commences, even though, under this sequence of events, Rider DMR revenues would then have no effect on the cost of new debt issued to fund grid modernization and ultimately defeat the entire purpose of Rider DMR (Co. Ex. 206 at 16; Rehearing Tr. Vol. 1209-11). Finally, OCC argues that, even assuming that grid modernization is required for the Companies' distribution system, they will already be entitled to very favorable treatment through *ESP IV* in connection with their grid modernization business plan. In fact, OCC notes that customers could even potentially pay for costs associated with grid modernization under Rider AMI at the same time customers would be paying charges through Rider DMR.

{¶ 139} FirstEnergy initially responds by stating the fact that the Companies and FirstEnergy Corp. have been placed on a negative outlook provides sufficient evidence that credit support is needed to avoid severe consequences (Rehearing Tr. Vol. III at 601). Further, FirstEnergy argues that, although some parties contend that FES's cash flow is responsible for the CFO to debt ratio shortfall currently facing the Companies, FES's CFO to debt ratio is currently 24 percent, with Moody's projecting it to fall to 16 percent by 2018 (P3/EPSA Ex. 21 at 3). FirstEnergy further claims that there is no contradiction between their support of the Companies' Proposal and subsequent testimony regarding its support, considering various proposed modifications, to Rider DMR. Specifically, FirstEnergy emphasizes that the projected cash to be received in the first three years of the Companies' Proposal would provide credit support in the same fashion as the proposed Rider DMR (Rehearing Tr. Vol. I at 91). Moreover, FirstEnergy claims that its proposed modifications to Rider DMR are geared towards achieving Staff's proffered reasoning for such a proposal, including grid modernization and maintaining FirstEnergy Corp.'s headquarters and nexus of operations in Akron, Ohio (Staff Ex. 13 at 7; Rehearing Tr. Vol. IV at 967-68).

{¶ 140} According to Staff, it is the cash flow to debt metric which provides a true picture of the financial viability of the Companies and FirstEnergy Corp., dismissing OCC witness Kahal's objections regarding the Companies' authorized rate of return (Staff Ex. 13 at 4; Rehearing Tr. Vol. III at 571). Staff claims Rider DMR is necessary in order to financially allow the Companies to update their respective distribution systems, benefitting customers throughout the state of Ohio. Staff also states that the Commission would have the opportunity to reassess whether additional action be taken to improve efforts toward grid modernization, noting that its recommendation for a three-year period, and possibility of a two-year extension, at this time, appears to be sufficient to allow the Companies to begin implementation of the grid modernization initiative and take additional steps to improve their financial positions (Staff Ex. 13 at 4).

{¶ 141} According to FirstEnergy, the grid modernization results desired by Staff in this proceeding would require a significant cash investment over the course of *ESP IV*, in addition to other obligations of the Companies, including, but not limited to, pension funding obligations and expected debt maturities (Rehearing Tr. Vol. X at 1623-25, 1761). FirstEnergy also asserts that CMSD is incorrect to claim that the revenues received under Rider DMR would not be available to improve the CFO to debt ratio, noting that cash used for capital expenditures would be properly designated as investing activities on the Statement of Cash Flows, having no effect on the cash flow from operations. In addition, FirstEnergy notes that the resulting ability to issue debt at a lower interest rate would consequently lead to lower interest expenses, thereby further improving the CFO to debt ratio. (Rehearing Tr. Vol. V at 1229.) Accordingly, FirstEnergy states that there is more than enough evidence to show that additional funds are needed in order to make necessary investments through the term of *ESP IV*.

e. What is the current state of FirstEnergy's creditworthiness?

{¶ 142} Staff claims that without Rider DMR, FirstEnergy Corp. risks experiencing a downgrade, which, in turn, will hamper the Companies' ability to borrow funds necessary for their distribution system (Staff Ex. 13 at 4; Staff Ex. 15 at 15). Specifically, Staff notes that Moody's has indicated that a "negative rating action could also occur" if FirstEnergy Corp. does not maintain a CFO to debt ratio of 14-15 percent (Staff Ex. 13 at 4).

{¶ 143} OMAEG, OCC/NOAC, P3/EPSA, and Sierra Club argue that neither Staff nor the Companies have provided sufficient evidence to show that Rider DMR is necessary in order for the Companies to avoid failing below investment grade (Rehearing Tr. Vol. I at 185-86). CMSD further notes that there is no assurance that the proposed amount of $131 million in annual revenues through Rider DMR would prevent a downgrade in FirstEnergy Corp.'s or the Companies' credit ratings. Additionally, CMSD and P3/EPSA argue that, according to a S&P research update upon which Staff witness Buckley relied upon for his analysis, the underlying reason for FirstEnergy Corp.'s credit rating is the business risk associated with its unregulated generation subsidiaries. Thus, CMSD and P3/EPSA claim that Rider DMR, if approved, would do nothing to remedy the actual cause of FirstEnergy's Corp.'s financial distress. (Staff Ex. 13 at 5, Att. 2.) P3/EPSA and NOAC also note that FirstEnergy Corp.'s recent announcement that it will be transitioning to a fully regulated utility holding company will likely allow FirstEnergy Corp. to improve its credit metrics, given Moody's and S&P responsive decisions to downgrade the credit ratings of FES and Allegheny Energy Supply Company (P3/EPSA Ex. 21 at 1; Rehearing Tr. Vol. X at 1769-72, 1774).

{¶ 144} P3/EPSA also argue that there are other measures that FirstEnergy Corp. could take in order to maintain its investment grade credit rating without resorting to additional revenues through Rider DMR. For instance, as the Companies and FirstEnergy Corp. are currently rated at least one notch above non-investment grade, OMAEG argues that the Companies have adequate ratings to issue new debt. Additionally, P3/EPSA relies on the testimony of OMAEG witness Lause, who explained several actions could be taken in order to alleviate the risk of a credit rating downgrade, such as minimizing unnecessary selling, general, and administrative (SG&A) costs, reviewing the level of dividend payments, and selling assets or divisions of certain unprofitable operations (OMAEG Ex. 39 at 10). P3/EPSA further note that Ms. Mikkelsen was unable to identify whether any of these suggested steps had been taken by FirstEnergy Corp. in the last three years, apart from its reduction in dividend payments (Co. Ex. 206 at 17; Rehearing Tr. Vol. X at 1631, 1736-37).

{¶ 145} Additionally, CMSD argues that Staff implicitly acknowledged that Rider DMR may not prevent a credit rating downgrade by recommending a possible two-year extension of the initial three-year term without providing guidance to FirstEnergy Corp. as to what "additional steps" should be taken during that initial term. Furthermore, P3/EPSA contend that it is even more doubtful that an actual credit rating downgrade will occur, given the fact that FirstEnergy Corp. has retained its investment credit rating in prior years despite having CFO to debt ratios falling well below Moody's target range (Staff Ex. 13 at 4; Rehearing Tr. Vol. X at 1780).

{¶ 146} FirstEnergy notes that OCC witness Kahal acknowledged that, because the Companies have been placed on a negative outlook, the credit rating agencies may downgrade the Companies' credit ratings even further within the next year. Moreover, FirstEnergy argues that Mr. Kahal also agreed that a credit rating downgrade from Moody's may occur if the Companies fail to maintain a CFO to debt ratio of 14 percent. (Rehearing Tr. Vol. VIII at 1384-86.) Additionally, the Companies assert their position raised during this proceeding is that a properly constructed Rider DMR, in addition to other simultaneous actions taken by the Companies and FirstEnergy Corp. as part of the collective effort, should be able to avoid a credit rating downgrade. In fact, FirstEnergy provides that FirstEnergy Corp. has implemented several aggressive initiatives as a part of this collective effort. (Co. Ex. 206 at 17-18; Rehearing Tr. Vol. X at 1619-20.)

f. What potential adverse effects upon the Companies' ability to access the capital markets would occur in the event of an investment rating downgrade?

{¶ 147} FirstEnergy and Staff state there is sufficient evidence in the record showing that the credit ratings of FirstEnergy Corp. and the Companies falling to a non-investment grade rating is a matter of concern, which in turn would result in several potential negative consequences, including, but not limited to, more restrictive and expensive borrowing terms for necessary capital, the inability to make investments to ensure the delivery of safe and reliable electric service, the inability to make investments toward grid modernization, and more costly electric service for customers located in the Companies' service territories (Co. Ex. 206 at 7-8; Direct Ex. 1 at 3-4; Staff Ex. 13, Att. 3 at 2; Rehearing Tr. Vol. III at 723-24).

{¶ 148} OCC/NOAC argue that neither Staff nor the Companies have presented evidence showing that "emergency rate relief" is needed. Sierra Club, P3/EPSA, and

OMAEG argue that the Companies should have provided a quantification of the adverse effects of a credit rating downgrade, noting that the increased borrowing costs to ratepayers would need to exceed the proposed charges under Rider DMR to justify utilizing the rider on this basis (Rehearing Tr. Vol. III at 575-76; Rehearing Tr. Vol. X at 1627). OHA, OMAEG, Direct Energy, and NOPEC also claim that the Companies and Staff failed to provide sufficient evidence indicating that borrowing costs would, in fact, increase in the event the Companies' or FirstEnergy Corp.'s respective credit ratings were downgraded (Rehearing Tr. Vol. III at 575-76). CMSD adds that, even if Rider DMR would provide lower financing costs, customers would not likely recognize these benefits until the Companies' next distribution rate case, which with the distribution rate freeze, will not occur until the eight-year term of *ESP IV* expires.

{¶ 149} Similarly, OMAEG asserts that there is no guarantee that Rider DMR would even prevent a downgrade of FirstEnergy Corp. or the Companies' credit ratings, noting that FirstEnergy Corp. would still require a substantial amount of additional funding to achieve the desired CFO to debt ratio. As there was no evidence presented that other subsidiaries of FirstEnergy Corp. would be willing to contribute some portion of that amount, OMAEG claims that Rider DMR would likely have no impact on maintaining or improving FirstEnergy Corp.'s credit grade rating. (Staff Ex. 13 at 6; OCC Ex. 49 at 3, 5, 8; Rehearing Tr. Vol. II at 576; Rehearing Tr. Vol. V at 1073-74.)

{¶ 150} In response, FirstEnergy argues that if such a credit rating downgrade was to occur, the Companies could face "sharp increases" in the cost of borrowing. Additionally, FirstEnergy argues that Dynegy witness Ellis acknowledged that the Companies' ability to fund their grid modernization efforts was, at least partially, dependent on their credit rating. (Rehearing Tr. Vol. IV at 819; Rehearing Tr. Vol. VIII at 1387-88.)

g. How should the annual revenue amount for Rider DMR be calculated?

{¶ 151} In response to the proposed calculation of Rider DMR recommended by Staff, and illustrated above, FirstEnergy made several recommendations to adjust the calculation of Rider DMR during its rebuttal testimony. First, the Companies suggest adjusting the target goal of the CFO to debt ratio from 14.5 percent to 15 percent, in order to reflect a slight adjustment in the opinion of Moody's (Co. Ex. 206 at 9-10). The Companies also recommend shortening the five-year time period used by Staff to calculate the required revenue from Rider DMR to a three-year period, only including the years 2012, 2013, and 2014. According to FirstEnergy, this calculation would be more accurate since 2011 included a year that already met Moody's target CFO to debt ratio target range and the first nine months of 2015 reflect an anomalous one-year spike in capacity prices. (Co. Ex. 206 at 10; Rehearing Tr. Vol. X at 1615; Rehearing Tr. Vol. III at 735, 741.) Additionally, the Companies request the Commission utilize net income to calculate the appropriate revenue requirement, resulting in 40 percent of the total revenue requirement to be collected from Ohio customers, rather than the 22 percent allocation factor as recommended by Staff, in order to reflect the high level of shopping in each utilities' service territory (Co. Ex. 206 at 11-12; Staff Ex. 13 at 3). Moreover, FirstEnergy recommends using net income, rather than operating revenues, as the appropriate allocation metric, since it represents an amount more suitable for net cash flows (Co. Ex. 206 at 12; Rehearing Tr. Vol. III at 738). The Companies would also suggest that Rider DMR should not be subject to refund, as this would run counter to the credit support objectives of the rider, as well as the policies and practices of the Commission, in addition to impermissibly allowing the Commission to engage in retroactive ratemaking. *Keco Industries v. Cincinnati & Suburban Bell Telephone Co.*, 166 Ohio St. 254, 259, 141 N.E.2d 465 (1957). (Co. Ex. 206 at 22.)

{¶ 152} As a final recommendation, and with support from various intervening parties, FirstEnergy suggests adjusting the term of Rider DMR to reflect the entire eight-year period of the already-approved *ESP IV*, as grid modernization efforts related to the rider will occur well after the three-year period suggested by Staff and lengthening this period will provide the necessary credit support based on recent performance and future short-term cash requirements and other obligations (Co. Ex. 206 at 12, 14-16, 22; Rehearing Tr. Vol. X at 1614). In the event the Commission were to adopt all of the recommended changes proposed by FirstEnergy, the average annual Rider DMR revenue amount would be $558 million (Co. Ex. 206 at 13). The Companies also request, that if Rider DMR is approved, that the Commission authorize the rider with their proposed modifications, with an effective date as soon as possible (Co. Ex. 206 at 16; Rehearing Tr. Vol. V at 1254-55). MSC, Supporting Parties, and Nucor agree with all of the recommended modifications to the Rider DMR calculation that the Companies have proposed.

{¶ 153} Staff, NOPEC, OMAEG, OEC/EDF, OCC/NOAC, Sierra Club, P3/EPSA, and CMSD argue that the Companies' suggested modifications to the calculation of Rider DMR should summarily be rejected. Staff first notes that the adjustment in the Moody's target CFO to debt ratio target range resulted in no change in the ratings or outlook for the Companies or FirstEnergy Corp., thus, concluding that the originally proposed range is appropriate (Rehearing Tr. Vol. X at 1614). Staff adds that its recommendation is the target range that has been fully analyzed and there is no reason to change the considered target range at this point. However, FirstEnergy questions Staff's argument, noting that if this target range adjustment was unimportant, Moody's would not have gone through the trouble to raise it in its credit opinion.

{¶ 154} Additionally, Staff and OMAEG contend that Staff's recommended five-year period used to determine the average revenue requirement would be more appropriate as it represents the entire period since the last significant restructuring of FirstEnergy Corp., specifically its merger with Allegheny Energy. Staff and OCC/NOAC add that omitting the years 2011 and 2015 from the average annual shortfall calculation is inappropriate, despite FirstEnergy's arguments, because the spike in capacity prices had no effect on the relevant credit metrics and doing so would not provide an accurate depiction of the financial deterioration that the Companies and FirstEnergy Corp. have experienced since 2011 (Rehearing Tr. Vol. X at 1816). OCC/NOAC even claim that FirstEnergy chose the three years of their recommendation because they represent the worst performance years for the CFO to debt ratio.

{¶ 155} FirstEnergy contends that, given that one of the purposes of Rider DMR is to address FirstEnergy Corp.'s worsening CFO to debt ratio, the years to be considered should omit any year in which FirstEnergy Corp. achieved Moody's target range. Moreover, FirstEnergy contends that the Allegheny Energy Supply Company merger has nothing to do with the underlying purpose of Rider DMR, which is to facilitate the Companies' access to capital on more favorable terms in order to implement distribution grid modernization projects. As a final point, FirstEnergy states that, although its recommended three-year period represents the "worst three-years," as alleged by OCC/NOAC, it claims that this recommendation is based on a reasoned analysis and this three-year period accurately represents the consistent downward trend of FirstEnergy Corp.'s, and not the Companies', CFO to debt ratio performance. (Co. Ex. 206 at 10.)

{¶ 156} Furthermore, Staff, OCC/NOAC, and OMAEG contend that the 40 percent allocation factor based on net income proposed by FirstEnergy would be inappropriate, as the Companies represent a much less significant portion of FirstEnergy Corp.'s operations due to a large number of shopping customers within their respective territories and the allocation factor should reflect this. Moreover, Staff asserts that allocating on the basis of operating revenue, and thus resulting in a 22 percent allocation factor, represents a method that is consistent with previous determinations in this proceeding and reflects a moderate view on the portion of the annual shortfall for which the Companies should be responsible (Rehearing Tr. Vol. III at 554, 660). OMAEG, OEC/EDF, and P3/EPSA agree with Staff's opposition, adding that FirstEnergy did not provide any evidence as to what the allocation amounts of the remaining annual shortfalls would be for the other subsidiaries of FirstEnergy Corp. (Co. Ex. 206 at 17-18; Rehearing Tr. Vol. X at 1629-30, 1632-68; 1738). NOPEC notes that the Companies' suggested modifications to the proposed Rider DMR do nothing to remedy the legal concerns; rather, FirstEnergy is merely attempting to increase the revenues that will be collected from ratepayers. OEC/EDF and P3/EPSA go even farther to conclude that, regardless of the proposed allocation number, the Companies' customers should not be responsible for any portion of the FirstEnergy Corp.'s annual shortfall, as no evidence was presented to show that the Companies were somehow responsible for their parent corporation's financial distress. Alternatively, Sierra Club suggests, if any credit support allocation is determined to be warranted, that it be based on the proportional share of FirstEnergy Corp.'s credit issues attributable to the Companies. Thus, OMAEG, OEC/EDF, Sierra Club, and P3/EPSA recommend the Commission reject the Companies' modification to the allocation amount.

{¶ 157} FirstEnergy reiterates its earlier arguments regarding the use of a 40 percent allocation factor based on net income, adding that this allocation metric will accurately take into account the effect of cash inflows and outflows, which more closely follows the underlying purpose of utilizing the CFO to debt ratio, and, at the same time, eliminates the issue of excluding generation-related revenues from shopping customers. Additionally, FirstEnergy notes Sierra Club's alternative recommendation would be inappropriate since FirstEnergy Corp. retains debt at the parent level, but has no ability to generate cash flow from operations, which goes against the methodology and reasoning of Staff to use the CFO to debt ratio as the governing credit metric and would result in understating the Companies' relative share of the annual revenue requirement. As such, FirstEnergy maintains its position that a 40 percent allocation factor based upon net income would more accurately depict the Companies' contributions to FirstEnergy Corp.'s cash flow from operations. (Co. Ex. 206 at 11-12; Rehearing Tr. Vol. X at 1632-33.)

{¶ 158} Furthermore, Staff, OMAEG, OCC, and NOPEC maintain that extending the term of proposed Rider DMR to eight years would be excessive and that limiting the period to three years, with the possibility of a two-year extension, is simply the best resolution if Rider DMR is approved, given the risks associated with auction prices for years beyond the three-year mark (Staff Ex. 13 at 7). OMAEG, OCC/NOAC, and P3/EPSA agree that modifying the term of proposed Rider DMR would be unreasonable, with OMAEG adding that this request is even more egregious given the fact that FirstEnergy witness Mikkelsen was not able to confirm what actions had been taken to improve FirstEnergy Corp.'s credit rating for the past three years (Rehearing Tr. Vol. X at 1631, 1763-37). CMSD notes that the Companies' request to collect billions of dollars from distribution ratepayers over the next eight years, if all of their recommendations are approved, is unreasonable without the benefit of a rate case revenue requirement analysis and with no means to compel other subsidiaries to pay the remaining portion of the annual revenue requirement under Rider DMR.

{¶ 159} The Companies again note that FirstEnergy Corp. has taken various steps over the past three years in order to address the current financial situation, adding that the level of desired distribution grid modernization will require significant capital and will very unlikely be achieved within a three-year period. Additionally, the Companies add that, before any grid modernization projects would even begin, they would need to improve their credit metrics before accessing capital markets, thus ensuring more favorable borrowing terms. (Co. Ex. 206 at 15-16; Staff Ex. 13 at 7.) OEG also recommends that the Commission should retain the ability, upon an application of the Companies, to allow the term of Rider DMR to be extended through the approved term of *ESP IV*.

{¶ 160} Consistent with its objections against Rider DMR as proposed by Staff, OMAEG argues that the Companies and FirstEnergy Corp. have adequate credit ratings to issue new debt. Moreover, OMAEG claims that the Companies failed to provide sufficient evidence indicating that their borrowing costs would increase in the event of a credit rating downgrade. Additionally, OMAEG and OEC/EDF assert that there is no guarantee that Rider DMR would even prevent a downgrade of FirstEnergy Corp. or the Companies' credit ratings, noting that FirstEnergy Corp. would still require a substantial amount of additional funding to achieve the desired CFO to debt ratio. As there was no evidence presented that other subsidiaries of FirstEnergy Corp. would be willing to contribute some portion of that amount, OMAEG and OEC/EDF claim that Rider DMR would likely have no impact on maintaining or improving FirstEnergy Corp.'s credit grade rating. (Staff Ex. 13 at 6; OCC Ex. 46 at 10; OCC Ex. 49 at 3, 5, 8; Rehearing Tr. Vol. II at 576; Rehearing Tr. Vol. III at 531-34, 537-38, 541, 648; Rehearing Tr. Vol. V at 1073-75.) OMAEG and OEC/EDF conclude by arguing that, if the Commission were to approve Rider DMR, with the Companies' modifications, Ohio ratepayers would essentially be providing the Companies and FirstEnergy Corp. with approximately one billion dollars annually with no return in the form of grid modernization or otherwise.

{¶ 161} As a final matter, Staff reaffirms its belief that revenues collected under Rider DMR should be subject to refund in the event that FirstEnergy Corp. relocates its headquarters or nexus of operations, or there is a change of ownership in FirstEnergy Corp. or the Companies, during the term of Rider DMR (Staff Ex. 13 at 2, 7). OCC agrees that the revenues collected under Rider DMR be subject to refund, if for no other reason, due to the extraordinary projected cost associated with the rider.

h. Should the Rider DMR revenue amount be grossed up for income taxes?

{¶ 162} FirstEnergy, Nucor, Supporting Parties, and MSC also request that the annual revenue requirement should be adjusted for taxes using the Companies' respective composite tax rates in order to actually achieve the cash flow improvement sought by Staff (Co. Ex. 206 at 11; Rehearing Tr. Vol. III at 739-41).

{¶ 163} To the extent FirstEnergy has requested that the annual revenue requirement be grossed up, or increased, to reflect the payment of income taxes, Staff agrees that the amount should be adjusted; however, Staff believes that the adjustment should be limited to reflect the amount of income tax actually paid in any given year, rather than simply using the Companies' composite tax rates. Staff adds that, because the credit metric is primarily based on the cash inflows and outflows, this adjustment would better align with the underlying purpose of Rider DMR. OCC/NOAC and OMAEG agree with Staff's assertions, stating that the corporate tax rate to determine tax liability is far different from what the Companies would ultimately pay for income taxes. OMAEG opposes FirstEnergy's recommendation to adjust the annual revenue requirement to account for expected additional income taxes, especially considering that FirstEnergy witness Mikkelsen did not consider any other tax rates from the Companies' average composite tax rates provided in a Rider DCR update filing. Further, OMAEG notes that FirstEnergy witness Mikkelsen testified that she was unaware if this proposed composite tax rate accounted for reductions in taxable income due to accelerated depreciation. As a final note, Staff and OMAEG contend this type of gross-up methodology is more customary in traditional base rate cases. (Rehearing Tr. Vol. X at 1799-1800.)

{¶ 164} FirstEnergy responds by stating that any method of increasing Rider DMR revenues to account for the expected increase in taxable income that is less than the Companies' respective composite tax rates will fall short of the desired cash flow objectives of Staff. Particularly, FirstEnergy argues that the Companies will be required to pay additional income tax on the Rider DMR revenues equivalent to their composite tax rates and any recognizable tax offsets would either already apply to other revenue streams or would have to be recognized earlier than expected, resulting in the same net effect over time. FirstEnergy also notes that the Companies paid over $200 million in cash in 2015 for federal and local income taxes. (Co. Ex. 206 at 11; Direct Ex. 2 at 262; Direct Ex. 3 at 262; Direct Ex. 4 at 262.) OEG agrees that, if the Commission determines that the Rider DMR revenues should be adjusted for income taxes, it should adopt gross-up methodology proposed by FirstEnergy. OEG contends, given that FirstEnergy Corp. files a consolidated tax return and any temporary differences between the financial statements and tax returns would eventually balance out, this is the most appropriate approach for the Commission to take at this time. However, OEG recommends that the Commission reserve the right to lower the level of the tax gross-up during the term of Rider DMR in the event the corporate tax rate decreases over that period.

i. Should the Rider DMR revenue amount include an additional component to account for economic development benefits?

{¶ 165} The Companies also propose that customers pay an additional amount attributable to the economic benefit of having FirstEnergy's headquarters based in Akron, Ohio, not to exceed $568 million (Co. Ex. 205 at 3-6; Co. Ex. 206 at 13). FirstEnergy, Supporting Parties, Nucor, and MSC request that the Commission increase the annual revenue requirement under Rider DMR to adequately recognize the economic benefit associated with the imposed condition of requiring FirstEnergy Corp. to maintain its headquarters and nexus of operations in Akron, Ohio (Co. Ex. 206 at 13-14). As indicated before, FirstEnergy also requests that the Commission reject Staff's recommendation that all Rider DMR revenues received be refunded in the event FirstEnergy Corp. moves its headquarters and nexus of operations from Akron, Ohio, noting that this condition runs counter to the purpose of Rider DMR (Co. Ex. 206 at 14-15; Rehearing Tr. Vol. X at 1603). Specifically, as a result of Ms. Murley's analysis, FirstEnergy asserts that maintaining FirstEnergy Corp.'s headquarters in Akron, Ohio has an estimated economic impact of $568 million on Ohio's economy, and supports approximately 3,407 jobs and $244.6 million in annual payroll throughout the state of Ohio. Moreover, the Companies assert that for every $1 million of goods and services created by FirstEnergy Corp., an additional $920,000 in economic activity is generated within the state's economy. (Co. Ex. 205 at 3-5.) Thus, in addition to the $558 million annual revenue requirement discussed above, FirstEnergy would also include an amount related to the economic development benefits, not to exceed $568 million (Rehearing Tr. Vol. X at 1599-03).

{¶ 166} OMAEG and OEC/EDF assert that FirstEnergy's alleged economic benefits associated with maintaining the corporate headquarters in Akron, Ohio are overstated, noting that FirstEnergy witness Murley's economic impact analysis overstates the impact of FirstEnergy Corp. maintaining its corporate headquarters and nexus of operations in

Akron, Ohio, and fails to account for negative consequences of doing so. Specifically, OMAEG and OEC/EDF note that FirstEnergy witness Murley's analysis failed to account for several factors, including, but not limited to: the impact of Rider DMR on the six other Fortune 500 companies located in northeast Ohio; the impact of Rider DMR on other manufacturers in the state of Ohio; the increased costs on customers and whether those costs would impact their ability to invest their money in this state; whether the increased costs would impact customers' ability to expand businesses in this state; whether the increased costs would impact customers' ability to fund community projects in this state; or whether the increased costs would deter companies from locating their businesses in this state. Additionally, OMAEG and OEC/EDF argue that Ms. Murley failed to address costs to customers associated with Rider DMR, such as lost revenues or lost opportunity costs, and that her analysis does not include a cost-benefit analysis for the Commission's consideration. (Rehearing Tr. Vol. IX at 1480-81, 1483, 1487-89, 1500-02, 1539-40, 1558.) Furthermore, OMAEG contends that Ms. Murley's IMPLAN modeling included numerous hypothetical assumptions and, that during her analysis, she failed to take any independent steps to verify the figures generated by the IMPLAN assumptions or the information provided to her by the Companies (Rehearing Tr. Vol. IX at 1481-84, 1521-23). OEC/EDF also notes that Ms. Murley failed to show that FirstEnergy Corp. had experienced a credit rating devaluation due to its headquarters being located in Akron, Ohio. OCC/NOAC specifically raised concerns that the Companies would be double-counting the value of FirstEnergy Corp.'s employees in both base rates and towards the value of FirstEnergy Corp.'s headquarters to be included in Rider DMR.

{¶ 167} As a final point, OMAEG, OCC/NOAC, and NOPEC contend that, while the Companies criticize Staff's Rider DMR for failing to include an amount associated with the benefit of maintaining FirstEnergy Corp.'s headquarters and nexus of operations in Akron, Ohio, they also ignore the fact that this commitment was already in place prior to the proposed Rider DMR (Order at 96-97; Co. Ex. 206 at 13; Co. Ex. 154 at 17; Dynegy Ex. 1 at 11; Rehearing Tr. Vol. X at 1603-04). NOPEC further asserts that it was improper for the

Companies to suggest inclusion of this additional component to the calculation of Rider DMR, since FirstEnergy did not seek rehearing on its commitment to maintain its corporate headquarters in Akron, Ohio and the June 3, 2016 Entry implied that the remaining portions of the Stipulated ESP IV that were not contested on rehearing would remain in place. Sierra Club and OCC once again add that Staff even acknowledged in its initial brief that FirstEnergy is "already recompensed adequately for the presence of the headquarters," noting that, if the Commission were to then authorize the rider on this basis, there is a potential to overcompensate the Companies.

{¶ 168} In response, FirstEnergy maintains Ms. Murley's analysis was executed correctly and is the same model from which Ms. Murley determined the economic impact of certain plants Commission relied on in its Order (Order at 88). Additionally, the Companies argue that it would have been impractical, if not impossible, for Ms. Murley to conduct the level of independent analysis requested by several intervening parties. Further, FirstEnergy also provides that the commitment to maintain FirstEnergy Corp.'s headquarters in Akron, Ohio, as described in the Third Supplemental Stipulation, represents a completely separate commitment from the condition proposed by Staff as part of Rider DMR, noting that the previous commitment was related to the continuation of Rider RRS, while Staff's condition relates to Rider DMR, including the possibility of discontinuing Rider DMR and a potential refund in the event FirstEnergy Corp. decides to move its headquarters or experiences a change in control. FirstEnergy also states that the previous commitment will only remain in place for as long as Rider RRS exists, and if Rider RRS is discontinued, then FirstEnergy Corp. will not be obligated to maintain its headquarters or nexus of operations in Akron, Ohio. While many intervenors contend that there has been no indication that FirstEnergy Corp. intends to move its headquarters, the Companies note that this condition also applies to changes in control and/or ownership, and given FirstEnergy Corp.'s weakened financial state, the Companies indicate this is a very real risk. Finally, FirstEnergy witness Murley testified that a cost-benefit analysis would have been impractical to conduct and the results of this type of analysis would have been so broad that it would not have contributed any real meaning or understanding as to the effects of Staff's condition. (Rehearing Tr. Vol. IX at 1558-59; Rehearing Tr. Vol. X at 1499-1500, 1596-98, 1683-84, 1715, 1744.)

{¶ 169} Additionally, FirstEnergy states that the attorney examiner recognized that the double recovery arguments of OCC/NOAC were completely unfounded and irrelevant to this proceeding (Rehearing Tr. Vol. X at 1751-52). Moreover, FirstEnergy claims that its request to include an additional amount to the recoverable revenues through Rider DMR will be limited to the Commission's determination of the appropriate amount, not to exceed the actual approximate economic impact of maintaining FirstEnergy Corp.'s headquarters in Akron, Ohio (Co. Ex. 206 at 14; Rehearing Tr. Vol. X at 1805-06).

j. How will the remaining amount of the revenue shortfall be collected?

{¶ 170} Staff states that the proposed $131 million per year, a 22 percent portion of FirstEnergy Corp.'s energy operating revenue, represents a fair proportional share to be provided by Ohio ratepayers in order to allow the Companies to retain access to financial markets and support the grid modernization initiative (Staff Ex. 13 at 4, 6). Staff witness Buckley emphasized the importance of having a balanced effort between all constituents of FirstEnergy Corp. in order to alleviate the burden to maintain the parent company's investment grade rating (Staff Ex. 13 at 5-6).

{¶ 171} The Companies initially note that FirstEnergy witness Mikkelsen presented rebuttal testimony which identified various contributions and initiatives undertaken by employees, management, shareholders, and customers of other FirstEnergy Corp. subsidiaries in order to help maintain FirstEnergy Corp.'s investment grade rating (Co. Ex. 206 at 17-18; Rehearing Tr. Vol. VIII at 1400). Specifically, FirstEnergy acknowledges the following efforts and contributions of other FirstEnergy Corp. utilities outside of Ohio: (1) the utility company in New Jersey will be recovering $736 million for storm costs incurred in 2011 and 2012, in addition to amounts to be recovered in its pending rate case; (2) the four utilities in Pennsylvania obtained approval to recover $293 million annually and have additional pending rate cases that seek a total increase of $439 million annually and capital recovery filings that will provide a $245 million rate increase over five years; and (3) the utility in West Virginia has generated almost $100 million in additional annual revenue from its rate case and vegetation management rider (Co. Ex. 206 at 18; Rehearing Tr. Vol. X at 1646, 1650, 1654-58, 1667).

{¶ 172} OCC/NOAC, OEC/EDF, OMAEG, and CMSD state that there are other actions FirstEnergy Corp. and the Companies could take in order to alleviate the pressing risk of a credit rating downgrade. These intervenors claim such actions would include selling additional equity, engaging in programs like FirstEnergy's cash flow improvement program, or "ring-fencing" (OCC Ex. 46 at 13-14; Tr. Vol. XXXII at 6576-77). Further, P3/EPSA contend that there are several other corporate initiatives that will provide credit support to FirstEnergy Corp., including, but not limited to, the returns on equity from storm cost recovery, base rates, capital recovery filings, and a vegetation management rider. However, OEC/EDF states these types of cases were not designed to recoup money already reserved for other purposes, therefore, they could not be considered a reasonable solution to the pressing financial situation of FirstEnergy. P3/EPSA also add that Rider AMI will also provide credit support. With these other available means of credit support, P3/EPSA claim that it would be unreasonable for the Commission to allow the Companies' ratepayers to pay these significant costs without any commitment that this investment would be used for distribution grid modernization. (Co. Ex. 206 at 17-18; Rehearing Tr. Vol. X at 1634, 1641-44, 1649-50, 1662-67.) OMAEG, CMSD, OCC, OHA, OEC/EDF, and P3/EPSA note that FirstEnergy did not provide any evidence as to how, or even if, the remaining portion of the annual shortfalls would be collected from the other subsidiaries of FirstEnergy Corp. (Co. Ex. 206 at 17-18; Rehearing Tr. Vol. III at 541, 648; Rehearing Tr. Vol. X at 1629-30, 1632-68; 1738). Additionally, P3/EPSA and CMSD argue that ensuring FirstEnergy Corp. receives adequate credit support should not solely fall on the Ohio distribution utilities' ratepayers; however, CMSD also notes that even if a reduced portion of that amount is allocated to the Companies' distribution customers, the

Commission would not have control over the residual revenue requirement needed to provide FirstEnergy Corp. with adequate credit support, nor would it have control over FirstEnergy Corp.'s generation business in order to mitigate future credit support needs (Staff Ex. 13 at 4).

{¶ 173} FirstEnergy responds by stating that Ms. Mikkelsen explained how these utility rate cases provide additional credit support to FirstEnergy Corp., noting that every time a utility files an application which includes a request to recover a return on investment, that return on investment provides credit support (Rehearing Tr. Vol. X at 1662-64). Moreover, FirstEnergy again emphasizes that Rider DMR would only be a part of a more collective effort from various constituents to maintain and/or improve the Companies' and FirstEnergy Corp.'s credit ratings (Rehearing Tr. Vol. X at 1790-91).

k. *If approved by the Commission, how should Rider DMR rates be designed?*

{¶ 174} Nucor, OMAEG, and IEU-Ohio assert that, if the Commission authorizes Rider DMR, it should allocate the revenue requirement on the basis of distribution revenue, as this method would be consistent with cost causation principles and the goal of the policy to ensure the state of Ohio's effectiveness in the global economy, as provided in R.C. 4928.02(N) (OEG Ex. 4 at 2). OEG notes that this would be an appropriate cost allocation method, since Rider DMR specifically relates to a distribution service and is intended to incentivize investment in distribution grid modernization. However, OEG ultimately recommends the Commission take a different approach, as discussed below. (OEG Ex. 7 at 2; Staff Ex. 14 at 2.)

{¶ 175} OEG contends that, given the fact that Rider DMR contains economic development and distribution components, the Commission should instead allocate costs to rate schedules 50 percent based on distribution revenues and 50 percent based on demand (OEG Ex. 7 at 3). After applying the 50/50 cost allocation to the rate schedules, OEG further recommends that the Companies collect the allocated DMR costs using a kWh charge calculated for each rate schedule, noting that, although this runs contrary to cost causation principles, it will promote a more balanced overall outcome for low load factor customers (OEG Ex. 7 at 4). OEG witness Baron testified that including this kWh charge component is detrimental to high load customers, including many of OEG's members, but will lead to a more desirable overall outcome for all rate classes (Rehearing Tr. Vol. VI at 1319-20). In the event Rider DMR costs are not allocated on the basis of distribution revenues, MSC, OMAEG, and Nucor support OEG's recommended rate design for Rider DMR. Nucor and MSC also support OEG's recommendation to recover costs within each rate schedule using a kWh charge. OCC argues that OEG's recommendation would result in a disproportionate share of costs on residential and small commercial customers.

{¶ 176} In the event the Commission were to decide to reject an allocation based solely on distribution revenue, IEU-Ohio and Nucor suggest that the Commission adopt the proposed approach by OEG witness Baron (OEG Ex. 7 at 3). IEU-Ohio and Nucor argue that the portion based on demand would accurately reflect the economic development components of this unique charge and, at the same time, avoid shifting a substantial portion of the revenue responsibility to commercial and industrial customers in energy intensive industries. Nucor adds that this allocation method would be a balanced approach to more evenly spread the impact of the rider among the customer classes. Nucor also notes its support for Mr. Baron's recommendation that Rider DMR be recovered from all customers through the kWh charge (Rehearing Tr. Vol. VI at 1318-19).

{¶ 177} OCC/NOAC and Staff recommend alternative proposals that allocate and charge the revenue responsibility for Rider DMR in accordance with a 50 percent demand basis and 50 percent energy basis, noting this would result in the most equitable treatment across the rate classes (Rehearing Tr. Vol. II at 431).

{¶ 178} IEU-Ohio and OEG request that the Commission reject Staff's and OCC/NOAC's proposals to allocate a portion of the non-variable Rider DMR costs based on variable energy usage, noting that, in addition to a complete lack of evidentiary support, this methodology runs against industry practice and would be inconsistent with the state policies set out in R.C. 4928.02(H) (OEG Ex. 7 at 3). Furthermore, IEU-Ohio contends that approving the rate designs proposed by either OCC/NOAC or Staff would violate R.C. 4903.09, which requires the Commission to make findings of fact and base its decision on those findings of fact. Nucor adds that an energy allocation would not be optimal, as there is no nexus between the costs that would be recovered under Rider DMR and the volume of energy used by any given customer. Additionally, Nucor and IEU-Ohio argue that an energy allocation would also shift a large portion of the responsibility for Rider DMR to energy-intensive commercial and industrial customers (OEG Ex. 7 at 3-4).

{¶ 179} Although OEG supports its own recommendations for cost allocation and rate design as described above, it also acknowledges that a more appropriate alternative to Staff's proposal would be to allocate Rider DMR costs to only the residential class based 50 percent on demand and 50 percent on energy and then allocate the remaining Rider DMR costs to the other rate schedules on a 50 percent distribution revenue basis and 50 percent demand basis. OEG adds that this would provide residential customers with the cost allocation suggested by Staff witness Turkenton and would effectively lessen the rate impact of Rider DMR on residential customers by $15.4 million per year. (Rehearing Tr. Vol. II at 431.) OCC notes that, in the event Rider DMR is approved, OEG's alternative rate design would be reasonable and should be adopted.

{¶ 180} NOPEC argues that both of OEG's recommendations would result in a disproportionate share of costs on residential and small commercial customers and, thus, recommend adopting Staff and OCC/NOAC's alternative proposal for Rider DMR's rate design in the event the Commission approves Rider DMR. OEC/EDF also questions OEG's recommended alternative to Staff's proposal, adding that no customers should be responsible for any portion of the credit issues currently faced by the Companies.

l. If approved by the Commission, should Rider DMR revenues be included or excluded for purposes of the SEET?

{¶ 181} FirstEnergy and MSC argue that including Rider DMR revenues in the SEET calculation would defeat the purpose of the rider to provide credit support to the Companies, further complicating FirstEnergy's efforts to modernize its grid. Specifically, FirstEnergy argues that including these revenues in the calculation may result in the Companies having to refund these same revenues in the following year, in which case the funds would not be available for future grid modernization projects. Much like its arguments against including the modified Rider RRS revenues in the SEET calculation, FirstEnergy contends that Rider DMR constitutes an "extraordinary item" in the sense that no other company used in the SEET calculation has a mechanism similar to Rider DMR, or a mechanism designed to incentivize grid modernization and provide credit support. (Co. Ex. 206 at 22-23; Rehearing Tr. Vol. IV at 926.) Additionally, FirstEnergy argues that Rider DMR revenues would also qualify for exclusion from the SEET calculation under the Companies' existing exclusion "associated with any additional liability or write-off of regulatory assets due to implementing the Companies' *ESP IV*," as the credit support provided by Rider DMR would be associated with the additional debt needed to fund its grid modernization initiative. Along those same lines, FirstEnergy further asserts that the revenues may be excluded from the SEET calculation as the Commission has previously excluded the Companies' deferred carrying charges. *FirstEnergy ESP III* Order at 48. (Co. Ex. 206 at 23-24.)

{¶ 182} Utilizing many of the same arguments used in his discussion of the Companies' Proposal, OCC witness Duann similarly recommends that, if the Commission approves Rider DMR, the revenues and expenses resulting from Rider DMR should be included for purposes of conducting the SEET (OCC Ex. 43 at 11-12; Rehearing Tr. Vol. IV at 930). Direct Energy agrees with OCC/NOAC's recommendation, further indicating that these exclusionary terms would lose all meaning in the event the Commission was to determine a rider that is proposed and approved as part of an ESP is "special" or "extraordinary." OCC/NOAC further argue that adjustments for purposes of the SEET are generally limited to "extraordinary, special, one-time only events," and there is nothing extraordinary about "the purpose, regularity, and permanency of revenues collected" through Rider DMR (OCC Ex. 43 at 8-9). Finally, OMAEG and OCC once again assert that FirstEnergy's argument that there is no other rider similar to Rider DMR is baseless, given the fact that the Commission is only required to evaluate companies that "face comparable and financial risk."

m. Additional recommendations of conditions to Rider DMR.

{¶ 183} In the event that Rider DMR is approved by the Commission, Sierra Club makes several recommendations that it asserts will benefit the Companies' customers. For instance, Sierra Club requests that the Commission require that all Rider DMR revenues be set aside in a separate account(s) within the Companies and restrict disbursements from this account(s). Furthermore, Sierra Club suggests that the use of revenues collected under Rider DMR be limited to grid modernization projects or other projects benefiting customers, further recommending that these projects be implemented within a reasonable amount of time. As its last recommendation, Sierra Club requests that the Companies be precluded from receiving double recovery on capital investments made with Rider DMR revenues, particularly recovery of depreciation payments. With these mechanisms in place, Sierra Club argues that Rider DMR would benefit customers and would continue to provide the necessary credit support to FirstEnergy, much like the existing Riders AMI and DCR. (Co. Ex. 206 at 18; Rehearing Tr. Vol. X at 1635, 1641-44.) RESA supports Sierra Club's recommendation to impose restrictions to ensure Rider DMR revenues are not transferred from the Companies to FirstEnergy Corp. and then to FES. Additionally, RESA suggests that the Companies be required to publicly file quarterly reports and provide details as to how the Rider DMR funds are being utilized.

{¶ 184} The Companies initially assert that Sierra Club has misunderstood the purpose of Rider DMR, noting that there is a difference between the revenues necessary to provide credit support for grid modernization projects and the actual amount of cash needed to pay for such projects. Moreover, FirstEnergy argues that Sierra Club's recommendations ignore the true purpose of Rider DMR, which is to provide credit support to the Companies so that they will be able to fund distribution modernization projects, adding that Rider DMR was never intended to provide cash to be used for any specific projects. (Staff Ex. 15 at 15; Co. Ex. 206 at 5, 8, 16.) Additionally, FirstEnergy contends that requiring the suggested restrictions directing the Rider DMR revenues to be used by the Companies and for such funds to be accounted for in a separate account are unnecessary, as it would be reasonable to assume that the Rider DMR revenues would be recorded in a separate general ledger account for tracking purposes (Rehearing Tr. Vol. I at 71-72; Rehearing Tr. Vol. X. at 1607). As Rider DMR would not be tied to any specific capital investments and is not recovering a return on investment, the Companies and Staff further assert that there would be no double recovery, adding that any capital expenditures needed under a grid modernization program would have to be funded well before the Companies would be able to recover any specific costs under Rider AMI. The Companies add that Staff witness Choueiki explained this distinction during his testimony, noting that the credit support through Rider DMR and the return on and of investment under Rider AMI, although linked, are very different. (Rehearing Tr. Vol. V at 1227-30.) Finally, the Companies state that, contrary to Sierra Club's arguments, Rider DMR, and the applicable credit support to the Companies, will provide an array of benefits to customers, without the need of Sierra Club's additional modifications (Co. Ex. 206 at 5-6, 8; Rehearing Tr. Vol. X at 1697-98, 1818).

3. Commission Decision

{¶ 185} The Commission finds that the Staff's alternative proposal, in the form of proposed Rider DMR, should be adopted. Rider DMR will provide a needed incentive to the Companies to focus innovation and resources on grid modernization. Further, Rider DMR will address a demonstrated need for credit support for the Companies in order to ensure that the Companies have access to capital markets in order to make investments in their distribution system. Accordingly, we will further modify the Stipulations previously adopted by the Commission to eliminate the provision for original Rider RRS in the Stipulated ESP IV and to authorize the Companies to implement Rider DMR as recommended by Staff, subject to modifications ordered herein by the Commission. Further, we will direct the Companies to file tariffs withdrawing existing Rider RRS.

a. Rider DMR would provide a needed incentive to the Companies to focus efforts on grid modernization.

{¶ 186} The Commission finds that the evidence in the record demonstrates that Rider DMR would provide a needed incentive to the Companies to focus innovation and resources on grid modernization. As noted above, during rehearing testimony, RESA witness Crockett-McNew urged the Commission to reject Rider RRS and to "focus FirstEnergy on an area that would warrant improvements" (RESA Ex. 7 at 7). Staff witness Choueiki recommended, in his rehearing testimony, that:

> [T]he Commission should direct the Companies to invest in modernizing the distribution grid. This effort would be accomplished through the deployment of advanced hardware and software with the goal of bringing about the intelligence of the distribution grid all the way to the customers' premises. Customers would then be able to interact and transact with retail suppliers and third party providers of innovative products and services, such as energy efficiency and demand response products, green energy, distributed generation and others. (Staff Ex. 15 at 15.)

{¶ 187} RESA witness Crockett-McNew also testified to the benefits of grid modernization:

> While many commercial and industrial customers in FirstEnergy's service territories already have interval meters,

> they nonetheless would benefit from FirstEnergy's ability to identify, isolate and quickly resolve outages, which will occur with a grid modernization program in place. All other customers without smart meters will likewise benefit from reduced outage times. In addition, customers currently without smart meters would further benefit from greater product options, such as time-of-use or peak-shaving products. There are companies who use meters within homes and businesses (through device-level analytics) to allow customers to make better informed energy decisions. This type of grid modernization is changing the face of utility and energy services to the benefit of all customers. (RESA Ex. 7 at 7.)

{¶ 188} The Commission notes the Stipulations modified and approved by the Commission in this proceeding provide that the Companies file a grid modernization business plan. Pursuant to this provision, the Companies filed an application on February 29, 2016, in the *FirstEnergy Grid Modernization Case*. However, Staff witness Choueiki testified that the Companies grid modernization efforts should extend beyond this application (Staff Ex. 15 at 15-16; Rehearing Tr. Vol. IV at 1007-08, 1021-22; Rehearing Tr. Vol. IV at 1015; Rehearing Tr. Vol. V at 1221-23).

b. Rider DMR is authorized under R.C. 4928.143(B)(2)(h).

{¶ 189} The Commission finds that Rider DMR is authorized under R.C. 4928.143(B)(2)(h). Under this statutory provision, an electric security plan may include:

> Provisions regarding the utility's distribution service, including, without limitation and notwithstanding any provision of Title XLIX of the Revised Code to the contrary, provisions regarding single issue ratemaking, a revenue decoupling mechanism or any other incentive ratemaking, and

> *provisions regarding distribution infrastructure and modernization incentives* for the electric distribution utility. R.C. 4928.143(B)(2)(h) (emphasis added).

{¶ 190} As proposed by Staff, Rider DMR is a distribution modernization incentive for the Companies. The testimony in the record makes it clear that Rider DMR is related to distribution rather than generation (Rehearing Tr. Vol. IV at 1009-11). Further, under the plain language of the statute, Rider DMR is an incentive. Webster's defines an "incentive" as "something that stimulates one to take action, work harder, etc.; stimulus; encouragement" (Webster's New World Dictionary, Third College Edition 682 (1988)). The rehearing testimony demonstrates that Staff intends for Rider DMR to jump start the Companies' grid modernization efforts (Staff Ex. 15 at 15; Co. Ex. 206 at 5-6; Rehearing Tr. Vol. IV at 956-57; 1015-16; Rehearing Tr. Vol. V at 1223, 1254-55). Accordingly, we find that the record demonstrates that Rider DMR is intended to stimulate the Companies to focus their innovation and resources on modernizing their distribution systems. Therefore, Rider DMR is a distribution modernization incentive authorized by R.C. 4928.143(B)(2)(h).

{¶ 191} Further, the Commission notes that, in this proceeding, Staff has completed an examination of the reliability of the Companies' distribution system and ensured that the customers' and the Companies' expectations are aligned (Staff Ex. 4 at 6-10; Tr. XXVIII at 5840-41). We find that this examination complies with the requirements of R.C. 4928.143(b)(2)(h) for approval of a mechanism enumerated in that statute.

c. *The Companies need to be able to obtain capital for needed investments in their distribution systems.*

{¶ 192} The Commission finds that Rider DMR is necessary to assist the Companies in accessing the capital markets in order to make needed investments in their distribution systems. The Companies already need capital to make investments in the distribution systems simply to maintain reliability. These investments are recovered through Rider DCR, which provides for accelerated recovery of distribution investments when compared to recovery through a distribution base rate case but is subject to annual caps. In addition, the record indicates that the Companies need cash to meet debt redemption requirements which will exceed one billion dollars through 2024 (Co. Ex. 206 at 6). Additional investments needed to modernize the grid will require the Companies to access the capital markets for additional dollars to fund such investments (Rehearing Tr. Vol III at 571-573). Staff witness Choueiki notes that, credit support provided by Rider DMR will assist the Companies in receiving more favorable terms when accessing the credit market and that accessing the credit markets will, in turn, enable the Companies to obtain funds to "jumpstart" their grid modernization efforts (Staff Ex. 15 at 15).

{¶ 193} FirstEnergy witness Mikkelsen testified regarding the challenges faced by the Companies in competing for investor dollars. According to Moody's, while Ohio Edison is three notches above investment grade, Cleveland Electric Illuminating and Toledo Edison are only one notch above investment grade. Likewise, FirstEnergy Corp. is only one notch above investment grade. (Co. Ex. 206 at 6-7.) Staff witness Buckley testified that S&P's rating for FirstEnergy Corp. is one notch above investment (Staff Ex. 13 at 5). However, Mr. Buckley also testified that S&P takes an "umbrella" approach to credit ratings and that a downgrade to FirstEnergy Corp. would result in a downgrade to the Companies (Rehearing Tr. Vol. III at 595-96, 680). Staff witness Choueiki notes that, if the Companies are downgraded, future financing costs could increase (Staff Ex. 15 at 15, fn. 26), and OCC witness Kahal agreed with the Staff's goal of protecting the Companies' credit ratings (OCC Ex. 46 at 13).

d. The evidence demonstrates that a downgrade of the Companies' credit ratings is a serious risk and that a downgrade would have adverse effects upon the Companies' ability to access the capital markets.

{¶ 194} There is ample evidence in the record establishing that a downgrade of the Companies' credit rating is a serious risk. Staff witness Buckley testified that, on January 26, 2016, Moody's issued a credit opinion stating that certain factors could lead to a downgrade of FirstEnergy Corp. These factors include the failure of the modified ESP to allow FirstEnergy Corp. to maintain financial metrics adequate for investment grade ratings and continued weakening of merchant energy markets. (Staff Ex. 13 at 4; Co. Ex. 206 at 6-7; Direct Ex. 1 at 3.) Likewise, on April 28, 2016, S&P issued a research update revising FirstEnergy Corp.'s outlook from "stable" to "negative" (Staff Ex. 13 at 8, Att. 3 at 4). OMAEG witness Lause agreed that, in his experience, the credit ratings of parents and subsidiaries are usually consistent and that, if one credit rating downgraded the Companies it is highly possible that the other credit rating agencies would also downgrade the Companies (Tr. Rehearing Vol. V at 1072-73). The rehearing testimony also demonstrates that, with respect to S&P credit ratings, if FirstEnergy Corp. were downgraded, the Companies would also be downgraded (Co. Ex. 206 at 7, fn. 7; Rehearing Tr. Vol. III at 509-10, 594-96, 680).

{¶ 195} The rehearing testimony also shows that a downgrade would have adverse consequences for the Companies. A downgrade may result in limited access to the credit markets (Staff Ex. 13 at 6). Both Company witness Mikkelsen and OCC witness kahal agreed that some investors, such as pension funds, will only invest in investment grade companies (Co. Ex 206 at 7; Rehearing Tr. Vol. VIII at 1391). A downgrade may result in more restrictive terms and conditions (Staff Ex. 13 at 6; Co. Ex. 206 at 7). A downgrade may trigger requirements that the Companies or FirstEnergy Corp. post cash as collateral (Staff Ex. 13 at 6; Co. Ex. 206 at 8; OMAEG Ex. 37 at 9). Most importantly, a downgrade may result in higher borrowing costs, increasing the Companies' long-term cost of debt, as OCC witness Kahal acknowledged (Rehearing Tr. Vo. VIII at 1387-88, 1391). Because long-term cost of debt is a key factor in determining a utility's rate of return, increases in the long-term cost of debt will inevitably result in higher rates for customers. (Staff Ex. 13 at 6; Co. Ex. 206 at 7-8.) Finally, higher debt costs may reduce the funds available for investment in distribution infrastructure to maintain reliability or for investment in modernizing the grid (Co. Ex. 206 at 8).

e. ***Staff's recommendation for the amount of Rider DMR is supported by the record and should be adopted, as modified by the Commission.***

{¶ 196} The Commission finds that the Staff's recommendation for the amount of Rider DMR is reasonable and should be adopted subject to modification by the Commission. Staff witness Buckley testified that the ratio of CFO to debt is a key metric in avoiding a future downgrade (Staff Ex. 13 at 3, 4). Moody's identified a CFO to debt ratio of 14 to 15 percent as essential to maintain the current investment grade rating (Staff Ex. 13, Att. 2 at 2). Using energy operating revenues, Staff witness Buckley calculated, based upon a five-year historic average, the amount of cash necessary for FirstEnergy Corp. to maintain a CFO to debt ratio of 14.5 percent. Mr. Buckley then allocated 22 percent of that cash necessary to the Companies based upon the Companies' share of operating revenues of FirstEnergy Corp. overall. This results in the recommendation for the annual revenue amount for Rider DMR of $131 million.

{¶ 197} The Commission notes that FirstEnergy disputes Staff's recommended amount for Rider DMR, alleging that the proper amount for Rider DMR is at least $4.464 billion over the term of the ESP (Co. Ex. 206 at 12-13). FirstEnergy witness Mikkelsen recommends that the target goal for CFO to debt should be 15 percent rather than the 14.5 percent recommended by Staff witness Buckley. Ms. Mikkelsen points out that, although Staff relied upon a notice issued by Moody's in January 2016 setting the range for CFO to debt at 14 percent to 15 percent, a more recent notice from Moody's set the range at 14 percent to 16 percent (Co. Ex. 206 at 10; Direct Ex. 1 at 2). Thus, FirstEnergy claims the midpoint of the range should be 15 percent instead of 14.5 percent. We disagree with FirstEnergy. We intend for Rider DMR to provide the minimum amount necessary to provide credit support for the Companies to facilitate access to the credit markets. Staff's recommendation of 14.5 percent as a target ratio for CFO to debt is within the range proposed by Moody's in both January 2016 and April 2016. It should be adopted.

{¶ 198} FirstEnergy also contends that the calculation for Rider DMR revenue should be based upon a three-year average, from 2012 through 2014, rather than the Staff's proposed five-year average, from 2011 through 2015. FirstEnergy witness Mikkelsen claims that 2011 should be excluded because the CFO to debt ratio was 14 percent, which was already within Moody's target range adopted by Staff. Ms. Mikkelsen also testified that 2015 should be excluded because there was an unusual spike in capacity prices and because it is based upon a partial year. We disagree with Ms. Mikkelsen's rationale for excluding 2011. The fact that the actual ratio of CFO to debt for that year was within the range adopted by Staff is irrelevant; the ratio is still part of the historic average. However, although it would be best to use the most recent numbers data available, we do agree that averaging partial year numbers for 2015 with full year numbers for 2011 through 2014 is inappropriate. Therefore, Rider DMR will be calculated on the historic average of CFO to debt for 2011 through 2014. This results in an adjustment of Rider DMR to $ 132.5 million annually rather than the $131 million proposed by Staff.

{¶ 199} The Staff's recommendation of an allocation factor based upon energy operating revenue (Staff Ex. 13 at 3) is also reasonable and should be adopted. FirstEnergy witness Mikkelsen did not agree with energy operating revenue as the allocation factor, arguing that this factor was too dependent on customer shopping levels. Ms. Mikkelsen proposed a number of alternatives, including distribution sales, percentage of distribution employees in Ohio, and percentage of distribution customers in Ohio while recommending net income as the allocation factor. (Co. Ex. 206 at 11-12.)

{¶ 200} We are not persuaded that Staff's proposed allocation factor is inappropriate or that FirstEnergy's proposed allocation factor should be used instead. We note that Staff witness Buckley testified that Staff examined a number of other allocation factors and that use of energy operating revenue was the most consistent way of allocating Rider DMR (Rehearing Tr. Vol. III at 553-54). Further, Staff witness Buckley specifically rejected use of net income as an allocation factor (Rehearing Tr. Vol. III at 738-39).

{¶ 201} Moreover, on cross-examination, Ms. Mikkelsen acknowledged that she had not performed the calculations to determine what share of the overall CFO to debt ratio shortfall of FirstEnergy Corp. is attributable to the Companies (Rehearing Tr. Vol. X at 1629-30). Therefore, use of net income as the allocation factor could cause Ohio ratepayers to improperly subsidize FirstEnergy affiliates who are either under-earning or losing money and, thus, who are disproportionately contributing to the overall CFO to debt ratio shortfall of FirstEnergy Corp. Accordingly, we conclude that, based upon the record, use of energy operating revenue is the proper allocation factor.

{¶ 202} The Commission agrees that Rider DMR should be adjusted to account for Federal corporate income taxes. Rider DMR is intended to assist the Companies in addressing the CFO to debt ratio shortfall of FirstEnergy Corp. This requires an adjustment for taxes as the "cash" component of the CFO to debt ratio is an after tax amount (Rehearing Vol. III at 738-39). Therefore, the Commission directs that Rider DMR should recover $ 132.5 million, adjusted for recovery of taxes at the prevailing Federal corporate income tax rate.

{¶ 203} Several intervenors on brief contend that Ohio should not bear the full burden of ensuring that FirstEnergy Corp. does not suffer a downgrade. As a preliminary matter, the Commission notes that the allocation factor recommended by Staff ensures that Rider DMR recovers the Companies' proportionate share of improving FirstEnergy Corp.'s CFO to debt ratio.

{¶ 204} Nonetheless, the record demonstrates that all of FirstEnergy Corp.'s stakeholders are sharing in the burden of improving its financial health. FirstEnergy Corp. has already reduced the dividend paid to shareholders, from $2.20 per share to $1.44 per share, which results in a reduction of over $300 million annually (Co. Ex. 206 at 17). In addition, FirstEnergy affiliates have sought or had approved the following rate increases: (1) in New Jersey, approved recovery of $736 million in storm damage costs incurred in 2011 and 2012, as well as a proposed increase in rates of $142 million; (2) in Pennsylvania, approved increase of $293 million, additional proposed increase of $439 million and proposed capital recovery filings of $245 million; and (3) in West Virginia, $100 million in additional revenue from a rate case and vegetation management rider (Co. Ex. 206 at 18; Rehearing Tr. Vol. X at 1646, 1650, 1654-58, 1667). In addition, FirstEnergy Corp. has embarked on other cost savings programs (Co. Ex. 206 at 18). Finally, the Commission notes that several intervenors have blamed FirstEnergy Corp.'s financial difficulties on "risky unregulated merchant plant operations" (OCC Ex. 46 at 13); however, during the hearing, FES announced that it would shut down four of the units at the Sammis generation plant (Rehearing Tr. Vol. V at 1702).

{¶ 205} The Commission notes that OCC witness Kahal claims that FirstEnergy Corp. has the capability to strengthen its balance sheet through equity share sales. Although we agree that issuing equity may be part of the solution to FirstEnergy Corp.'s financial issues, the Commission does not regulate FirstEnergy Corp., and it is up to FirstEnergy Corp.'s management to decide the proper steps to take to strengthen its balance sheet. We further note that OCC witness Kahal advocates that the Commission also explore ring fencing of the Companies to protect them from risks due to FES merchant plant operations (OCC Ex. 46 at 9, 13-14). However, Mr. Kahal also acknowledges that ring fencing is "premature" at this time (OCC Ex. 46 at 14).

*f. **Rider DMR should be conditioned upon the implementation of all grid modernization programs approved by the Commission.***

{¶ 206} The Commission finds that recovery of revenue under Rider DMR should be conditioned upon: (1) continued retention of the corporate headquarters and nexus of operations of FirstEnergy Corp. in Akron, Ohio; (2) no change in "control" of the Companies as that term is defined in R.C. 4905.402(A)(1); and (3) a demonstration of sufficient progress in the implementation and deployment of grid modernization programs approved by the Commission.

{¶ 207} We note that the Commission will undertake a detailed policy review of grid modernization in the near future. Following such review, we will address FirstEnergy's pending grid modernization application, and, informed by the results of that detailed policy review, the Commission will grant approval of the grid modernization programs as we deem appropriate in light of the policy review.

{¶ 208} Nonetheless, nothing in our decision today should be construed as approving any of the grid modernization programs referenced above. Further, we note that, for purposes of the continuation of Rider DMR, "sufficient progress" will be determined at the sole discretion of the Commission; further, "sufficient progress" will only be determined with respect to the implementation and deployment of grid modernization programs actually approved by the Commission.

{¶ 209} However, the Commission will not adopt the Staff's recommendation that Rider DMR be subject to refund, to be refunded if FirstEnergy Corp. moves its headquarters or nexus of operations during the collection of Rider DMR (Staff Ex. 13 at 7). Making Rider DMR subject to refund would be counterproductive and impose additional risks on the Companies.

{¶ 210} The Commission agrees with Staff's recommendation that Rider DMR be limited to three years with a possible extension of two years (Staff Ex. 13 at 7). FirstEnergy may apply for such extension by filing an application in a separate docket by October 1, 2018. The Commission will determine the amount of the Rider DMR for the two-year extension period based upon the evidence presented in the separate docket, including, but not limited to evidence of the Companies' financial needs and evidence of the measures undertaken by the Companies, FirstEnergy Corp., and their stakeholders to address the financial issues discussed throughout this Fifth Entry on Rehearing.

g. Rider DMR rate design.

{¶ 211} With respect to rate design, we note that we agree with OEG witness Baron that Rider DMR is "primarily a distribution-related rider since the revenues received by the Companies under the Rider are intended to incentivize increased investment in distribution modernization (OEG Ex. 7 at 2). We further agree that the Commission should take a different approach to Rider DMR and take a hybrid approach to allocating Rider DMR costs (OEG Ex. 7 at 3). However, the allocation and rate design proposed by Mr. Baron results in the allocation of 44 percent of the Rider DMR cost to residential customers (Rehearing Tr. Vol. IV at 1303-04; OEG Ex. 8). The Commission finds that this allocation would excessively impact residential customers. Therefore, the Commission will adopt the rate design and allocation proposed by Staff witness Turkenton on cross-examination, based upon 50 percent energy and 50 percent demand (Rehearing Tr. Vol. II at 431). This rate design appears to best embody the concept of gradualism by allocating the revenue and designing rates based in equal share on energy and demand (Rehearing Tr. Vol. II at 430-31). This allocation will mitigate the impact of Rider DMR on residential customers. The Commission finds that Rider DMR revenue should also be allocated between Ohio Edison, Cleveland Electric Illuminating, and Toledo Edison based upon 50 percent energy and 50 percent demand. The Commission further notes that the Companies should update Rider DMR annually, including any over- or under-recoveries, but the Companies are not authorized to collect carrying charges on any monthly over- or under-recoveries.

{¶ 212} In addition, the Commission finds that Rider DMR revenues should be excluded from SEET calculations. Including the revenue in SEET would introduce an unnecessary element of risk to the Companies and undermine the purpose of providing credit support for the Companies. However, we will reconsider whether to exclude Rider DMR revenues from SEET when we rule upon any possible extension of Rider DMR.

h. Existing Rider RRS should be eliminated.

{¶ 213} The Commission clarifies we are granting rehearing on the sixth, seventh, and eighth assignments of error in the application for rehearing filed by the Companies in this proceeding on May 2, 2016; and we intend Rider DMR to replace Rider RRS as modified and approved by the Commission in the *ESP IV* Opinion and Order.

Accordingly, the Companies are directed to file compliance tariffs eliminating the placeholder for Rider RRS, as modified and approved by the Commission.

D. The Stipulations, as modified by the Commission, continue to meet the three-prong test for the consideration of stipulations.

{¶ 214} As we discussed in the Order, the parties filed stipulations, which the parties specifically describe as the culmination of discussions and accommodation of diverse interests. Ohio Adm.Code 4901-1-30 authorizes parties to Commission proceedings to enter into a stipulation. Although not binding on the Commission, the terms of such an agreement are accorded substantial weight. *Consumers Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, 125, 1992-Ohio-122, 592 N.E.2d 1370, citing *Akron v. Pub. Util. Comm.*, 55 Ohio St.2d 155, 157, 378 N.E.2d 480 (1978). This concept is particularly valid where the stipulation is unopposed by any party and resolves all issues presented in the proceeding in which it is offered.

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

{¶ 216} The Supreme Court of Ohio has endorsed the Commission's analysis using these criteria to resolve issues in a manner economical to ratepayers and public utilities. *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.*, 68 Ohio St.3d 559, 1994-

Ohio-435, 629 N.E.2d 423, citing *Consumers' Counsel* at 126. The Court stated in that case that the Commission may place substantial weight on the terms of a stipulation, even though the stipulation does not bind the Commission. Contrary to many assertions of the intervening parties, the Commission must only review the three-prong test as it pertains to Stipulated ESP IV, as a package, as modified by the Commission in its Order and this Fifth Entry on Rehearing.

{¶ 217} OCC/NOAC, RESA, and P3/EPSA reiterate their arguments that the Commission acted unreasonably and unlawfully, under R.C. 4928.141(B), when it applied the three-prong test, alleging that this standard is inappropriate when the Companies maintained unequal bargaining power, there was considerable "favor-trading," and the various stipulations filed in this proceeding addressed issues unrelated to FirstEnergy's ESP filing. These parties claim that the Commission should have found that Stipulated *ESP IV* did not pass the first prong of the three-prong test and evaluated each individual provision of Stipulated ESP IV on its own merits, rather than as a package. (OCC/NOAC App. for Rehearing (May 2, 2016) at 4-5; RESA App. for Rehearing (Apr. 29, 2016) at 30-32, 42-43; P3/EPSA App. for Rehearing (Apr. 29, 2016) at 26-29, 38-39; OCC/NOAC Ex. 1 at 7-9.)

{¶ 218} In its memorandum contra intervenor applications for rehearing, FirstEnergy argues that the Commission was correct to utilize the three-prong test for evaluating the Stipulated ESP IV.

{¶ 219} We note that these issues were thoroughly addressed in our Order and we continue to carefully conduct the same type of analysis as previously discussed, requiring our independent judgment, based upon the Commission's statutory authority, the evidentiary record, and the Commission's specialized expertise and discretion. *Monongahela Power Co. v. Pub. Util. Comm.*, 104 Ohio St.3d 571, 578, 2004-Ohio-6896, 820

N.E.2d 921. (Order at 40-41, 79, 81.) Accordingly, we find no merit in these arguments and the related assignments of error will, therefore, be denied.[15]

1. The Stipulations, as Modified by the Commission, are the Product of Serious Bargaining Among Capable, Knowledgeable Parties

a. Assignments of Error Raised and Arguments of the Parties.

{¶ 220} In the Order, the Commission determined that the Stipulations, as supplemented, appeared to be the product of serious bargaining among capable, knowledgeable parties (Order at 43). In this Fifth Entry on Rehearing, we affirm our finding that, the Stipulations are the result of serious bargaining among capable, knowledgeable parties.

{¶ 221} OCC/NOAC, OMAEG, RESA, P3/EPSA, NOPEC, and Power4Schools argue that the Commission unreasonably determined that the Stipulations were the product of serious bargaining among capable, knowledgeable parties. More specifically, OCC/NOAC argue that the Commission created a new and more lenient standard for determining whether to adopt a settlement. Further, OCC/NOAC contend that the Commission erred by not explicitly ruling that the Consumer Protection Association was a defunct organization and would not receive any of the alleged benefits of the settlement, including fuel fund monies allocated to the Citizens' Coalition and money directed to the Citizens' Coalition for the Customer Advisory Agency pilot program. OMAEG adds that the evidence shows that the signatory parties are merely a redistributive coalition. RESA and P3/EPSA argue that the Commission erred in making this determination despite the fact that millions of dollars in favors were allegedly traded to the signatories in order to obtain their consent to the Stipulations and despite the fact that side agreements existed with several signatory parties. Similarly, Power4Schools argues that the signatory parties

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[15] We also note that all memoranda contra applications for rehearing that have not otherwise been addressed in this proceeding, will be considered during the Commission's analysis of the three-prong test. To the extent that intervening parties argued that the Commission erred to grant rehearing before memoranda contra were filed on May 12, 2016, those assignments of error are summarily rejected.

did not bargain on behalf of large customer classes, but negotiated narrowly tailored benefits to meet their self interests. NOPEC and Power4Schools argue that the Commission failed to consider the diversity of interests of the parties opposing the Stipulations and, further, NOPEC argues that the Commission erred in finding the bargaining was serious when the Companies had the statutory ability to unilaterally reject any modification to the proposed ESP. (RESA App. for Rehearing (Apr. 29, 2016) at 32-41; P3/EPSA App. for Rehearing (Apr. 29, 2016) at 29-38; OCC/NOAC App. for Rehearing (May 2, 2016) at 5-7; OMAEG App. for Rehearing (May 2, 2016) at 8-12, 63-65; NOPEC App. for Rehearing (May 2, 2016) at 9-10; Power4Schools App. for Rehearing (May 2, 2016) at 3-4).

{¶ 222} In its memorandum contra, FirstEnergy asserts that the Commission correctly found that serious bargaining occurred. Initially, FirstEnergy contends that opposition by some intervenors to the Stipulated ESP IV does not undermine serious bargaining, as opposition is irrelevant; rather, FirstEnergy asserts that what matters is adequate diversity among the parties to the stipulation. FirstEnergy also cites Commission precedent that no single party or customer class may exercise veto power over a stipulation. Next, FirstEnergy argues that the Stipulated ESP IV did not result from alleged favor trading, but rather, actual bargaining which, by its nature, requires a quid pro quo. Further, FirstEnergy asserts that the existence of a side agreement did not undermine serious bargaining, as it was fully disclosed as required by statute. FirstEnergy also contends that the Commission did not create a new standard for the serious bargaining prong in the Order by using the word "appear" rather than the word "is" in describing the Stipulations being the product of serious bargaining. FirstEnergy points out that, in its specific findings of fact, the Commission found that the parties did in fact represent a diverse group of interests and customer classes.

{¶ 223} In correspondence filed on August 29, 2016, IGS, Kroger, and OPAE indicated that the Companies' Proposal followed the process contemplated by the various stipulations and that the signatory parties had been consulted prior to the filing. Additionally, these three parties acknowledge the signatory parties' continued support of the Companies' Proposal; however, they ultimately recommend that the Commission issue a decision approving an ESP for the Companies that accomplishes the original intent of the Stipulated ESP IV.[16]

{¶ 224} Although several parties have stated that they do not oppose the proposed Rider DMR, CMSD claims that the first prong of the three-prong test cannot be satisfied in the event that no party to the proceeding endorses Rider DMR. While CMSD acknowledges that support from a majority of parties is not required for the Commission's approval of any given proposal; however, CMSD would caution the Commission's approval of Rider DMR when there has been significant opposition to this alternative proposal from a wide variety of stakeholder interests.

{¶ 225} The Commission finds that the arguments made in these assignments of error were thoroughly addressed and considered in the Order and that the parties present no new issues on rehearing. Initially, the Commission specifically addressed arguments relating to the criteria for evaluation of stipulations in light of EDUs' statutory right to reject modifications to an ESP (Order at 41). Additionally, the Commission specifically acknowledged the diversity of the interest of the non-signatory parties and noted that it was not unusual for non-signatory parties to a stipulation to represent diverse interests, particularly in cases with many intervening parties (Order at 43). Regarding arguments by OMAEG, Power4Schools, and NOPEC relating to the diversity of the signatory parties and OMAEG's alleged "redistributive coalition" construct, the Commission determined that the Stipulations are supported by a diverse group of customers, including small businesses, independent colleges and universities, industrial customers, commercial customers as well as advocates for low-income and moderate-income residential

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16 Assuming the Competitive Market Enhancement Agreement remains in place, IGS continues to support the Stipulated ESP IV. Additionally, Kroger and OPAE note that they do not oppose Rider DMR, so long as their positions are not used as precedent for other proceedings.

customers and Staff. We also noted that we have rejected proposals that any one class of customers can effectively veto a stipulation (Order at 43, citing *Dominion Retail v. Dayton Power & Light Co.*, Case No. 03-2405-EL-CSS, Opinion and Order (Feb. 2, 2005) at 18). Additionally, the Commission addressed arguments regarding "favor trading," and declined to conclude that benefits received by signatory parties to the Stipulations were the sole motivation of the party in supporting the stipulation (Order at 43-44). Further, the Commission addressed specific arguments relating to side agreements as well as the Consumers Protection Association (Order at 44-45). As the applications for rehearing have raised no new arguments on these issues, the Commission finds that rehearing should be denied as to these issues.

{¶ 226} With respect to the arguments raised by CMSD regarding the adoption of Rider DMR, the Commission notes that the signatory parties to the Stipulations were aware that the Commission may modify the Stipulations, both prior to adoption of the Stipulations and on rehearing; and the signatory parties included provisions in the Stipulations to protect their interests in the event of Commission modification of the Stipulations. Individual signatory parties may, or may not, invoke those provisions as they see fit, based upon our adoption of Rider DMR or any other modification of the Stipulations by the Commission. Nonetheless, CMSD cites to no precedent in support of its argument, and we decline to find that Commission modification of a stipulation means that the stipulation is not the result of serious bargaining among capable, knowledgeable parties.

{¶ 227} Additionally, NOPEC asserts the omission of parties during negotiations runs afoul of the Supreme Court of Ohio's previous holdings regarding the exclusion of parties with significant interests from settlement negotiations in Commission proceedings. *Time Warner AxS v. Pub. Util. Comm.*, 75 Ohio St.3d 229, 1996-Ohio-224, 661 N.E.2d 1097. OCC/NOAC further argue the purported signatory parties no longer represent a diverse group of interests, given the positions of Kroger and Staff, as well as the fact that less than half of intervening parties support the Stipulated ESP IV.

{¶ 228} NOPEC's claim that the exclusion of parties during negotiations violates the Supreme Court of Ohio's holding *Time Warner AxS v. Pub. Util. Comm.*, should be rejected. The evidence in the record does not support the contention that any interested parties were excluded from negotiations, let alone an entire class of customers. Further, the Court has rejected similar claims in previous cases, ruling that:

> NOPEC questions whether the stipulation represented the interests of the broad residential class. We have expressed grave concern regarding a stipulation when an entire customer class is intentionally excluded from the settlement talks. *Time Warner AxS v. Pub. Util. Comm.*, 75 Ohio St.3d 229, 661 N.E.2d 1097 (1996), fn. 2. However, the deliberate exclusion of specific customer class members does not raise the same concern, so long as the class in its entirety is not excluded. *Constellation NewEnergy, Inc. v. Pub. Util. Comm.*, 104 Ohio St.3d 530, ¶ 16-24, 820 N.E.2d 885 (2004); *In re Application of FirstEnergy*, 146 Ohio St. 3d 222, ¶ 42, 2016-Ohio-3021, 54 N.E.3d 1218.

b. Commission conclusion.

{¶ 229} Therefore, the Commission finds that, as modified by the Commission, the Stipulations are the result of serious bargaining among capable, knowledgeable parties in accordance with the first prong of our three-prong test for the consideration of Stipulations.

2. AS MODIFIED BY THE COMMISSION, THE STIPULATIONS, AS A PACKAGE, BENEFIT RATEPAYERS AND THE PUBLIC INTEREST

a. Assignments of Error and Arguments of the Parties.

{¶ 230} In the Order, the Commission determined that the Stipulations, as a package, benefited ratepayers and the public interest (Order at 78-99). The Commission now finds that, as further modified by this Fifth Entry on Rehearing, the Stipulations, as a package, benefit ratepayers and the public interest.

i Grid Modernization.

{¶ 231} OCC/NOAC assert that the Commission erred in finding that the creation of a grid modernization program is in the public interest because the Commission's finding was not supported by evidence, violating R.C. 4903.09. Specifically, OCC/NOAC note that the main tenets of the grid modernization plan considered in the Stipulated ESP IV will be determined in an entirely different proceeding. Moreover, OCC/NOAC point out that, due to this additional proceeding, FirstEnergy failed to meet its burden to show that any customer benefits would arise from this plan, or the details of any projected benefits. However, OCC/NOAC are quick to point out that the only element approved by the Commission for the current SmartGrid modernization initiative is an excessive return on equity. (OCC/NOAC App. for Rehearing (May 2, 2016) at 25-27; Order at 95; Tr. Vol. XXXVII at 7774-75, 7847.) Additionally, Staff, FirstEnergy, and the intervening parties reassert their arguments regarding the grid modernization benefits of Rider DMR, as stated above, for the analysis of the second prong of the three-prong test.

{¶ 232} In its memorandum contra, FirstEnergy initially asserts that the arguments raised by OCC/NOAC are not new, and, therefore, rehearing should be denied as to these issues. Furthermore, FirstEnergy contends that the Commission did cite to record evidence when discussing the benefits associated with grid modernization in its Order, noting that the specific requirements for the grid modernization initiative will be determined in the grid modernization plan proceeding. (Order at 95-96.) As for the arguments pertaining to the approved return on equity, FirstEnergy argues that this return is not fixed, but merely initially set at 10.88 percent based on the current FERC-approved return on equity for ATSI of 10.38 percent, plus a 50 basis point incentive mechanism. The return on equity would be adjusted in the future in accordance with changes in the FERC-approved ATSI rates and FirstEnergy further notes that the signatory parties agreed this return formula would be appropriate in order to incentivize grid modernization in the Companies' service territories. (Order at 69, 95-96; Staff Ex. 8 at 2-3; Co. Ex. 154 at 10; Tr. Vol. XXXVI at 7624, 7628, 7631-32; Tr. Vol. XXXVII at 7775.) Also, as stated above, the grid modernization benefits associated with Rider DMR are significant and will help foster state policy through the development of distribution grid modernization. Thus, FirstEnergy requests the Commission deny rehearing on these grounds.

{¶ 233} We reject OCC/NOPEC's claim that the Commission violated R.C. 4903.09 because the evidence does not support our finding that the grid modernization program is in the public interest. In the *ESP IV* Opinion and Order, the Commission specifically cited to the testimony of Staff in support of the filing of a business case for grid modernization (Order at 95; Staff Ex. 8 at 1-3). Further, we disagree with claims that the filing of the grid modernization business case is not in the public interest because the cost-benefit analysis and deployment details will be determined in a separate case. Moving forward with consideration of a grid modernization plan is in the public interest and is consistent with state policy to "[e]ncourage innovation and market access for cost-effective supply- and demand-side retail electric service including, but not limited to, demand-side management, time-differentiated pricing, waste energy recovery systems, *smart grid programs, and implementation of advanced metering infrastructure.*" R.C. 4928.02(D) (emphasis added). However, FirstEnergy, in the separate proceeding, will bear the burden of demonstrating that the application is just and reasonable (Order at 95-96; Co. Ex. 155 at 4; Tr. Vol. XXXVI at 7584-85, 7624).

{¶ 234} However, we will grant rehearing on OCC/NOAC's assignment of error with respect to the stipulated return on equity in the grid modernization provisions of the Stipulations. In the *ESP IV* Opinion and Order, we approved a 50 basis point adder to the return on equity for investment made for grid modernization (Order at 22-23). This provision provided the Companies with an incentive to invest in grid modernization pursuant to R.C. 4928.143(B)(2)(h). However, in this Fifth Entry on Rehearing, the Commission has approved Rider DMR, which was designed to provide the Companies with an incentive to invest in grid modernization (Staff Ex. 15 at 14-15, 16). In light of the fact that the purpose of the 50 basis point adder has been supplanted by Rider DMR, we find that the 50 basis point adder is no longer necessary or appropriate, and we will modify the Stipulations to remove this provision. This modification applies to the 50 basis point adder and to no other provision of the Stipulations.

ii Resource Diversification and EE/PDR Commitments.

{¶ 235} In their respective applications for rehearing, OMAEG, RESA, and P3/EPSA argue that the Commission erred to find that the provisions in the Stipulated ESP IV related to CO_2 reduction, battery technology investment, and an increase of 100 megawatts of wind or solar renewable resources benefit the public interest, noting that there was no evidence presented on the record for the Commission to conclude that these were firm commitments or that the Companies would not otherwise be required to meet these stated goals pursuant to applicable laws (OMAEG App. for Rehearing (May 2, 2016) at 15-17; P3/EPSA App. for Rehearing (Apr. 29, 2016) at 39-40; RESA App. for Rehearing (Apr. 29, 2016) at 43-44; Tr. Vol. XXXVI at 7528-32, 7541-43, 7649).

{¶ 236} FirstEnergy again notes that none of these parties have demonstrated how the Commission's Order was unreasonable or unlawful as it pertained to the resource diversification provisions, noting that these intervening parties have further failed to recognize that the Commission has no legal authority to direct these Companies to engage in such initiatives, therefore, these provisions will result in benefits to customers that would not otherwise become obligations of the Companies. (Order at 94-97; Co. Ex. 154 at 11-12; Tr. Vol. XXXVI at 7540, 7543, 7634-35; Tr. Vol. XXXVII at 7775-76).

{¶ 237} Rehearing on the assignments of error claimed by OMAEG, RESA and P3/EPSA regarding whether the CO_2 reduction, battery technology and renewable energy resource provisions of the Stipulations are in the public interest should be denied. With respect to the CO_2 reduction provision, the Commission has no authority to order FirstEnergy Corp. to undertake this program. The fact that FirstEnergy Corp. has now voluntarily committed to this program is plainly in the public interest. With respect to the battery technology and renewable energy resource provisions, it is in the public interest to consider such programs; in fact, it is the policy of the state to "[p]rovide coherent, transparent means of giving appropriate incentives to technologies that can adapt successfully to potential environmental mandates." R.C. 4928.02(J). We find that utility scale battery technology and renewable energy resources have the potential to be a benefit in meeting potential environmental mandates (Tr. Vol. XXXVII 7775-78). Further, we specifically reject the contention that the renewable energy resource provision is not a firm commitment by the Companies as such claim is not supported by the record (Order at 97; Tr. Vol. XXXVI at 7740-43). However, the Companies will be required to demonstrate in an application filed with the Commission that the procurement or construction of renewable energy resources is in the public interest, and any recovery of the costs of the programs will be subject to Commission review and approval, based upon whether any such costs are just and reasonable (Tr. Vol. XXXVI at 7743).

iii Economic Development Benefits.

{¶ 238} Staff recommends that, if the Commission approves Rider DMR as part of FirstEnergy's *ESP IV*, it should impose a condition that the FirstEnergy Corp. headquarters remain in Akron, Ohio (Staff Ex. 13 at 7; Rehearing Tr. Vol. III at 679-80). Staff argues that allowing FirstEnergy Corp. to move its headquarters to another state would be contrary to the underlying purposes of Rider DMR, which are to promote grid modernization and preserve the existing economic benefits from having FirstEnergy Corp. headquartered in the state of Ohio. Staff notes that although many intervenors questioned the basis of FirstEnergy witness Murley's economic impact study, no party could dispute that the headquarters provide many benefits in the local region, as well as the state as a whole. (Co. Ex. 205.) FirstEnergy and OEG agree that Rider DMR will support Ohio's economy, noting that, according to Ms. Murley's analysis, maintaining FirstEnergy Corp.'s headquarters and nexus of operations in Akron, Ohio provides $568 million of annual economic benefits (Co. Ex. 205 at 4).

{¶ 239} OMAEG also argues that Rider DMR does not promote economic development in the state of Ohio. OMAEG notes that Staff did not conduct any independent analysis quantifying the effect of keeping the corporate headquarters and nexus of operations in Akron, Ohio, or the impact of Rider DMR on customer bills and local businesses as a result of the additional charges to be collected under the rider (Rehearing Tr. Vol. III at 694-95). Contrary to Staff's assertions, OMAEG claims that Rider DMR will likely have a detrimental effect on the economic development in the state, noting that the additional charge will create increased electricity costs for manufacturers and other consumers and will lead to a less competitive marketplace (OMAEG Ex. 39 at 8). Moreover, OMAEG argues that FirstEnergy Corp. has already committed to retain its headquarters in Akron, Ohio when it signed an eight and a half-year lease extension in order keep its office headquarters through June 2025. Additionally, OMAEG and OEC/EDF note that the Companies also committed to keep its headquarters in Akron, Ohio as a condition of the Stipulated ESP IV, and FirstEnergy witness Mikkelsen did not indicate in her testimony that this commitment would not be upheld. (Order at 96-97; Dynegy Ex. 1 at 11; Co. Ex. 154 at 17; Co. Ex. 197at 1-2, 5-7.) Additionally, OEC/EDF contends that no evidence was presented that would indicate FirstEnergy Corp. was considering moving its headquarters from Akron, Ohio (Rehearing Tr. Vol. III at 578). Thus, OMAEG and OEC/EDF contend that maintaining the headquarters in Akron, Ohio should not be considered a benefit to maintain and improve the economic development of the state.

{¶ 240} CMSD agrees that FirstEnergy Corp. has already committed to maintaining its headquarters and nexus of operations in Akron, Ohio, adding that the only modification to this commitment presented in Rider DMR is that FirstEnergy Corp. will be required to refund all amounts collected via Rider DMR in the event FirstEnergy Corp. would decide to relocate its headquarters. CMSD argues that requiring FirstEnergy Corp. to remain in Ohio is a much larger benefit than merely imposing a penalty in the event FirstEnergy would move its headquarters and nexus of operations. (Rehearing Tr. Vol. X at 1593). Additionally, CMSD adds that as long as FirstEnergy would continue to provide utility service to customers in Ohio, the Companies would remain subject to the jurisdiction of the Commission, and, thus, a change in ownership would not likely affect the requirement of *ESP IV* that FirstEnergy Corp.'s headquarters remain in Akron, Ohio for the eight-year term.

{¶ 241} OMAEG, OEC/EDF, CMSD question the economic development impact of Staff's recommendation to make Rider DMR contingent on FirstEnergy Corp. maintaining its corporate headquarters and nexus of operations in Akron, Ohio. We disagree. First, there has been much confusion over FirstEnergy Corp.'s commitment to maintain its headquarters in Akron, Ohio. The Third Supplemental Stipulation clearly states that FirstEnergy Corp. is committed to maintain its headquarters in Akron, Ohio *during the duration of Rider RRS* (Order at 29; Co. Ex. 154). In this Fifth Entry on Rehearing, the Commission has directed the Companies to terminate Rider RRS. Accordingly, the commitment in the Third Supplemental Stipulation will end with the termination of Rider RRS. Therefore, Staff's recommendation, which we have adopted in part, is a new condition upon the Companies which replaces the previous commitment. Further, there is ample evidence in the record of the economic impact of maintaining FirstEnergy Corp.'s headquarters in Akron. FirstEnergy witness Murley testified that the annual economic impact of the headquarters is $568 million (Co. Ex. 205 at 4). No other party has produced evidence to dispute this estimate, and we find that no testimony elicited on cross-examination undermines or casts doubt on this estimate. In fact, OCC witness Kahal conceded that there is economic value to Akron and Ohio to have FirstEnergy Corp.'s headquarters located in Akron (Rehearing Tr. Vol. VIII at 1404). Therefore, we find that Staff's recommendation should be adopted, in part, as discussed above.

{¶ 242} Additionally, OMAEG contends in its application for rehearing that the Commission failed to modify the expanded Economic Load Response (ELR) program to ensure that it is just, reasonable, and available to all similarly-situated customers. While OMAEG agrees with the Commission that this type of program may benefit customers, it argues that the ELR program contained in Stipulated ESP IV is not designed properly to achieve the maximum benefit for customers, further noting that the Commission failed to address OMAEG's proposed modifications to the program, contrary to R.C. 4903.09 and Supreme Court of Ohio precedent. (OMAEG App. for Rehearing (May 2, 2016) at 18, citing *AEP Ohio RSR Case;* Order at 94.)

{¶ 243} The Commission finds that OMAEG's assignment of error with respect to the ELR should be granted, in part, and denied, in part. OMAEG requests that the Commission ensure that the ELR be available to all similarly-situated customers. Under the Supplemental Stipulation filed on May 28, 2015, new customers were given until May 31, 2015 to provide notice to the Companies of their intent to participate in the ELR program. Although we acknowledge that this is a narrow time window, there is no evidence that similarly-situated customers were unable to provide notice to the Companies on an equal footing. In fact, five new customers were added to the ELR program (Tr. Vol. II at 265). Likewise, there is no evidence that any party, including OMAEG, was excluded from negotiations leading up to the filing of the Supplemental Stipulation. In light of the complete lack of evidence in support of OMAEG's claims, the Commission finds that this assignment of error should be denied.

{¶ 244} With respect to whether the Companies should retain a share of revenues generated by bidding the demand response resources into the PJM markets in order to provide an incentive to maximize the value of the demand response resources, the Commission notes that this issue was addressed in the Companies' most recent energy efficiency program portfolio plan proceeding. *In re FirstEnergy,* Case No. 12-2190-EL-POR et al., Entry on Rehearing (July 13, 2013) at 4-5. Because this issue is related to how all energy savings and demand response capabilities, rather than only those related to ELR, are bid into the PJM market, we continue to find that this issue is best resolved in such proceedings, rather than in the ESP proceedings.

{¶ 245} However, we will grant rehearing with respect to the recovery of ELR credits through Rider EDR(e). Rider DSE1 recovers half of the cost of the ELR credits, $5 per credit, from all customers, net of any revenues received from the PJM markets (Tr. Vol. II at 276). Rider EDR(e) recovers the other half of the cost of the interruptible credit, $5 per credit, solely from GS and GP customers (Tr. Vol. II at 274). In the interests of gradualism and because ELR is an economic development program, we believe that the recovery of the cost of the incremental increase in available credits under the Stipulations should be recovered from all customers, who all benefit from the economic development spurred by the ELR programs rather than through Rider EDR(e). Therefore, we will modify the Stipulations and direct the Companies to file tariffs containing a new provision within Rider EDR(e) recovering the cost of the incremental increase in credits, over and above the levels contained in *FirstEnergy ESP III,* from all customers. We find that such costs should be allocated and charged as a percentage of base distribution revenue. The recovery of the cost of credits under the previous cap should remain unchanged through Rider EDR(e).

iv Distribution Rate Freeze and Rider DCR.

{¶ 246} OCC/NOAC also assert that it is unjust and unreasonable for the Commission to find the distribution rate freeze to be a benefit for consumers, adding this is especially the case when FirstEnergy will have gone 17 years without a base rate review.

OCC/NOAC argue that the process of a base distribution rate case would be much more beneficial to customers, as that would include a complete review of the Companies' distribution operations. (OCC/NOAC App. for Rehearing (May 2, 2016) at 20-22; Order at 92-93; Co. Ex. 154 at 13.) Additionally, OCC/NOAC assert that the Commission's authorization of potentially $915 million in increased Rider DCR charges, per its approval of the proposed revenue caps, makes the customer benefits of a base distribution rate freeze illusory, and is unjust and unreasonable. In fact, OCC/NOAC assert the distribution rate freeze may potentially harm customers, due to the fact that they will face the risk of exponentially higher costs without the corresponding benefit of a comprehensive review of FirstEnergy's distribution operations. (OCC/NOAC App. for Rehearing at 22-23; Order at 92-93; OCC/NOPEC Ex. 11 at 23-24.)

{¶ 247} OMAEG further asserts that the Commission erred to approve the extension of Rider DCR and the increase in the revenue caps for the eight-year term of the ESP, as it will increase costs to customers by $2.59 billion and allow cost recovery of assets that are not directly related to maintaining the reliability of the distribution system (OMAEG App. for Rehearing (May 2, 2016) at 18; Tr. Vol. XXXVI at 7575; Staff Ex. 6 at 9).

{¶ 248} FirstEnergy responds by providing that the Companies have outperformed reliability standards since Rider DCR has been in effect and the initial increase in the annual aggregate revenue cap that many of the intervening parties dispute is based on the actual average annual Rider DCR revenue requirement increase since the Companies' last base rate case. Additionally, FirstEnergy argues that witnesses provided sufficient testimony upon which the Commission relied in its Order to find that Rider DCR, as proposed by the Companies and signatory parties, satisfied the requirements of R.C. 4928.143(B)(2)(h) and provided significant benefits to customers. (Order at 65-66, 93; Co. Ex. 7 at 8-13; Tr. Vol. XX at 3927-28; Staff Ex. 4 at 9-10). FirstEnergy also argues that the Commission recognized the benefits of Rider DCR, especially when considering the distribution base rate freeze in Stipulated ESP IV (Order at 92-93). The Companies also provide that general and intangible plant related to the distribution system have been recovered through Rider DCR since its initial approval in 2012 (Co. Ex. 7 at 11). Finally, FirstEnergy notes that Staff will have the opportunity to conduct quarterly and annual reviews involving significant oversight over the amounts to be recovered through Rider DCR, further demonstrating that the intervening parties' arguments are misplaced (Co. Ex. 7 at 11-12).

{¶ 249} The Commission finds that arguments raised by OCC/NOAC and OMAEG questioning whether the distribution base rate freeze and the increases in the DCR caps are in the public interest should be rejected. In the Order, we noted that continuation of the distribution rate freeze will provide rate certainty, predictability and stability for customers (Order at 92, 119; Co. Ex. 154 at 13). We affirm that finding here. Base distribution rates will remain frozen until June 1, 2024. Although there will be rate increases under Rider DCR, those increases are capped annually, ensuring predictability of rate increases. Elimination of the distribution rate freeze, on the other hand, exposes customers to known expenses which will be recovered, such as rate case expense, and unquantifiable risks that the rate base, rate of return and expenses may be greater than in the current revenue requirement.

{¶ 250} In addition, we note that the Commission, the Companies, Staff and other stakeholders have now had ample experience with the Rider DCR mechanism, which was first approved by the Commission in the *FirstEnergy ESP II*. Rider DCR ensures that the Companies can make necessary investment in the distribution infrastructure to maintain reliability by reducing the regulatory lag for recovery of those investments (Staff Ex. 10 at 4; Tr. Vol. XX at 3926-29). *See also FirstEnergy ESP III*, Second Entry on Rehearing (Jan. 30, 2013) at 23. The record is clear that the Companies have been meeting their reliability standards (Staff Ex. 4 at 9-10). Further, elimination of regulatory lag promotes cost causation by ensuring that customers using distribution service are paying the costs of such distribution service. Rider DCR is also audited annually, ensuring that the investments are reasonable. Finally, Rider DCR promotes gradualism. It is well established that, over the long run, recovery of the costs of distribution investments will be equivalent through Rider DCR or through base distribution rates. *FirstEnergy ESP III* Order at 55-56, Second Entry on Rehearing (Jan. 30, 2013) at 22-23. However, Rider DCR ensures that revenue increases are spread out over time, rather than risking rate shock when increased through a distribution rate case. *FirstEnergy ESP III*, Second Entry on Rehearing (Jan. 30, 2013) at 23. Accordingly, all assignments of error related to Rider DCR should be denied.

{¶ 251} We do note, however, that, by the end of *ESP IV*, it will have been 17 years since the Companies' last distribution rate case, and we direct the Companies to file a distribution rate case at that time.

v Rider GDR.

{¶ 252} Additionally, OCC/NOAC argue that the Commission's approval of Rider GDR further erodes any alleged consumer benefits associated with a distribution rate freeze, and is, therefore, unjust and unreasonable. OCC/NOAC add that Rider GDR is an open-ended collection mechanism and the Companies will be able to seek recovery for any costs related to governmental directives, further shifting cost recovery risks onto consumers. (OCC/NOAC App. for Rehearing at 24-25; Order at 92-93; OCC Ex. 18 at 18.)

{¶ 253} With respect to this assignment of error, the Commission thoroughly addressed these arguments in the *ESP IV* Opinion and Order, where we modified Rider GDR to limit the scope of potential costs which could be included in Rider GDR (Order at 110). OCC/NOAC have raised no new arguments on rehearing; accordingly, rehearing on this assignment of error should be denied.

vi Low-Income Customer Assistance Programs and Initiatives.

{¶ 254} OCC/NOAC note the Commission also erred by failing to modify the Stipulated ESP IV to require competitive bidding of low-income programs, asserting that this modification would have resulted in a more cost-effective outcome for consumers and fostered more efficient use of such funds (OCC/NOAC App. for Rehearing (May 2, 2016) at 63; Staff Ex. 11 at 3-4).

{¶ 255} In response to OCC/NOAC's argument that the Commission should have required competitive bidding of low-income programs, we note that we identified several benefits that would accrue to low-income customers during term of *ESP IV* (Order at 96, 118-19). Additionally, in order to mitigate concerns regarding the funding being provided to certain consumer groups, the Commission modified the Stipulated ESP IV to incorporate an additional degree of oversight and review of programs to support low- and moderate-income customers (Order at 96). We find that significant benefits through the low-income programs exist, as illustrated in our Order, and sufficient protections are in place to ensure the cost-effective and efficient use of funds provided to low-income customers, making competitive bidding procedures unnecessary at this time. Thus, this assignment of error should be denied.

vii Customer Retail Rate Programs.

{¶ 256} RESA argues that the Commission failed to address several recommended modifications proposed by RESA regarding the customer retail rate programs. First, RESA contends that the Commission should have required an action agenda that identified how the Companies would provide meter data to CRES providers and limit Time of Day (TOD) rates in Rider GEN to only customers taking service under it. Additionally, RESA argues that the Commission's rejection of a web portal collaborative is unreasonable or unlawful, noting that this portal would "assist in the development and implementation of the CRES web portal." RESA also contends that the Commission should have required a purchase of receivables program as part of the Companies' *ESP IV* (RESA App. for Rehearing (Apr. 29, 2016) at 95-96.)

{¶ 257} RESA also contends that the Commission's Order approving the HLF/TOU pilot program is unreasonable or unlawful, noting the pilot program is unduly discriminatory and will not benefit of the public interest. RESA specifically questions the use of the homogenous participant pool and expresses concern over the ability of a customer to maintain participation in the pilot program in the event their qualifications lapse. (RESA App. for Rehearing (Apr. 29, 2016) at 100-102.)

{¶ 258} FirstEnergy argues that RESA failed to state how it was unreasonable or unlawful for the Commission to reject these proposed modifications of RESA, specifically noting that RESA failed to present sufficient evidence to establish the need for such provisions in the Stipulated ESP IV. Furthermore, FirstEnergy states that the Commission is not required to include a discussion as to why they have rejected every item recommended by RESA, especially when such parties simply reiterate already rejected arguments. As a final matter, FirstEnergy states that these recommendations were either ill-designed or would detract from the purpose of the customer retail rate programs. (Order at 76-77, 94, 98, 112; Tr. Vol. II at 286, 290-91, 463-67; Tr. Vol. V at 1039; Tr. Vol. XXVI at 5347-51, 5353-55; Tr. Vol. XXXIV at 7097-98.) Thus, the Companies assert that the Commission was correct to reject all of these recommendations and RESA's application for rehearing should be denied on these issues.

{¶ 259} With respect to RESA's assignment of error regarding proposed modifications to proposed *ESP IV*, specifically the requests for an "action agenda," the web portal collaborative, and a purchase of receivables program, the Commission thoroughly considered all of the proposed modifications to *ESP IV* submitted by RESA (Order at 73-74). The modifications which the Commission found were adequately supported by the record and were in the public interest were approved (Order at 98). With respect to RESA's proposed modifications which were not approved, the Commission was not persuaded that the modifications were supported by the evidence or in the public interest (RESA Ex. 2 at 12-13, 14-18, 19-20); Tr. Vol. V at 1051; Tr. XXVI at 5347-50, 5353, 5355). In the case of the purchase of receivables program, the Commission also notes that we have previously rejected requiring this program. *FirstEnergy ESP III*

Order at 40-42. RESA has not persuaded the Commission to disturb that ruling in this proceeding. Finally, we note that the Commission will explore, in the near future, the feasibility of establishing a statewide standard for the use and protection of customer energy usage data. All stakeholders will have a full and fair opportunity to participate in that discussion.

{¶ 260} The Commission also finds that RESA's assignment of error with respect to the HLF/TOU pilot program should be denied. The Commission thoroughly addressed the HLF/TOU pilot program, holding that:

> The experimental HLF/TOU provides an incentive for large retailers to retain or relocate their corporate headquarters to this state (Tr. Vol. II at 291, 302). The experimental HLF/TOU fits squarely under Ohio policy, which encourages innovation and market access for cost-effective retail electric service, including demand-side management and time-differentiated pricing. R.C. 4928.02(D). (Order at 94.)

The Commission would add that incentives for large retailers to retain or relocate their corporate headquarters in this state serves state policy to facilitate the state's effectiveness in the global economy. R.C. 4928.02(N). RESA has raised no new arguments in its application for rehearing. Accordingly, rehearing on this assignment of error should be denied.

viii Market Enhancements.

{¶ 261} OCC/NOAC also state that the Commission unreasonably and unlawfully modified the Stipulated ESP IV to create a new rider, which essentially unbundles the costs incurred by FirstEnergy to support the SSO (OCC/NOAC App. for Rehearing at 6). RESA also states that the creation of this rider completely contradicts with the provision establishing the distribution rate freeze (RESA App. for Rehearing (Apr. 29, 2016) at 103-

104). The Companies agree with OCC/NOAC's arguments against the rider originally proposed by IGS and the Companies (Retail Competition Enhancement Rider or Rider RCE), as described in the analysis of the third prong, and request that the Commission clarify that the decoupling mechanism has been superseded by the Competitive Market Enhancement Agreement.

{¶ 262} In light of our decision to grant rehearing and withdraw authorization for Rider RCE at ¶ 301 below, the Commission finds that this assignment of error is moot. Accordingly, rehearing should be denied.

ix Straight-Fixed Variable Rate Design.

{¶ 263} OMAEG also asserts that the Commission erred to find that the Companies' commitment to file a case to transition to a SFV rate design for the residential class before April 3, 2017 to be in the public interest, stating that this type of rate design eliminates necessary price signals that allow ratepayers to take advantage of efficiency programs and energy efficiency efforts. Moreover, OMAEG believes this type of decision would be more appropriate to make in a base distribution rate case, noting that the Commission also seems to be pre-approving the rate design before the necessary filings, as set by the Order, have been made. (OMAEG App. for Rehearing (May 2, 2016) at 17; Order at 93-94; Co. Ex. 154 at 12-13.) RESA also requests additional clarification regarding how this distribution-related rate change will not undermine the distribution rate freeze approved as part of *ESP IV* (RESA App. for Rehearing (Apr. 29, 2016) at 103-104).

{¶ 264} FirstEnergy quickly notes that any arguments relating to the benefits of the SFV rate design are premature, as the more appropriate time to present such arguments would be the additional hearing to be held once the Companies make their SFV rate design filing. FirstEnergy also states the distribution rate freeze is consistent with the Companies' future application for a SFV rate design. (Order at 93-94.)

{¶ 265} The Commission finds that OMAEG has raised no new issues on rehearing, and the Commission thoroughly addressed these issues in the *ESP IV* Opinion and Order (Order at 93-94). Therefore, rehearing on this assignment of error should be denied. Further, we have previously considered whether SFV sends the proper price signals to customers. *In the Matter of Aligning Elec. Distribution Utility Rate Structure with Ohio's Public Policies to Promote Competition, Energy Efficiency and Distributed Generation,* Case No. 10-3126-EL-UNC, Finding and Order (Aug. 21, 2013). Nonetheless, as we pointed out in the *ESP IV* Opinion and Order, we have *not* decided to implement SFV in FirstEnergy's service territory at this time. FirstEnergy is required under the Stipulations to file an application in a separate proceeding where any interested party will have a full and fair opportunity to address whether the proposed SFV should be implemented and to raise any other issues specific to the Companies' service territories (Order at 94; Tr. Vol. XXXVI at 7577).

{¶ 266} We do not agree with RESA that the SFV provision undermines the distribution rate freeze. It is an exception to the distribution rate freeze, but it is an exception which applies to rate design only. The Companies' revenue requirement will not change as the result of the SFV provision.

b. Commission conclusion.

{¶ 267} Accordingly, based upon the entire record of this proceeding, the Commission finds that the Stipulations, as modified by the Commission, benefit ratepayers and are in the public interest in accordance with the second prong of our three-prong test for the consideration of stipulations.

3. THE STIPULATIONS, AS MODIFIED BY THE COMMISSION, VIOLATE NO IMPORTANT REGULATORY PRINCIPLES OR PRACTICES

a. Assignments of Error and Arguments by the Parties.

{¶ 268} The Commission concluded in its Order that the Stipulations, and as modified by its Order, do not violate any important regulatory principles or practices and, thus, satisfy the third prong of three-prong test (Order at 107-112). As discussed below, the Commission finds that Stipulations, as further modified by this Fifth Entry on Rehearing, do not violate any important regulatory principles or practices.

i Whether Rider DMR complies with R.C. 4928.02?

{¶ 269} OMAEG, OHA, OCC, and OEC/EDF contend that Rider DMR does not advance state policy under R.C. 4928.02. Specifically, these parties continue to argue that Rider DMR will limit competitive retail generation, other generating companies may view Rider DMR as simply providing FirstEnergy Corp. a large cash infusion, thereby deterring new entry into the supply market (OMAEG Ex. 39 at 7). OMAEG also raises the fact that Rider DMR contains no firm commitment or requirement that the Companies use the revenues collected under the rider to fund its distribution grid modernization. As such, OMAEG contends that Rider DMR is a way to provide credit support to the Companies and FirstEnergy Corp., not to modernize the grid. (Rehearing Tr. Vol. IV at 957-58, 960.) Thus, OMAEG maintains that Rider DMR also fails to promote or advance the policies set forth in R.C. 4928.02.

{¶ 270} Staff contends that Rider DMR supports and furthers the policies of the state of Ohio, as illustrated in R.C. 4928.02. Specifically, Staff argues that Rider DMR will enable the Companies to procure funds to invest in modernizing the distribution grid, increase the diversity of supplies and suppliers, and encourage the offerings of innovative services (Staff Ex. 15 at 14-15; Staff Ex. 14 at 4). MSC agrees with Staff, noting that these significant investments will foster the development of innovative products and services.

{¶ 271} The Commission agrees with Staff that Rider DMR promotes state policy to "[e]nsure 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" and to "[e]ncourage innovation and market access for cost-effective supply- and demand-side retail electric service including, but not limited to, demand-side management, time-differentiated pricing, waste energy recovery systems, smart grid programs, and implementation of advanced metering infrastructure" (Staff Ex. 15 at 14-15; R.C. 4928.02(C); R.C. 4928.02(D)). The Commission also notes the testimony of RESA witness Crockett-McNew regarding the benefits of grid modernization (RESA Ex. 7 at 7), and we find that Rider DMR, by incentivizing and supporting grid modernization, promotes additional provisions of state policy to: ensure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service; and ensure the availability of unbundled and comparable retail electric service that provides consumers with the supplier, price, terms, conditions, and quality options they elect to meet their respective needs. R.C. 4928.02(A); R.C. 4928.02(B). Finally, the Commission finds that the retention of FirstEnergy Corp.'s headquarters and nexus of operations in Akron, Ohio serves to facilitate the state's effectiveness in the global economy. R.C. 4928.02(N).

{¶ 272} Alternatively, CMSD argues that FirstEnergy could have also filed a distribution rate case, pursuant to R.C. 4909.18, or an emergency rate relief case, under R.C. 4909.16, if it believed that the Companies' annual revenues were inadequate. CMSD raises concerns over the fact that the Companies have requested such credit support when they argued, based upon their projections, that they would be required to pay out $561 million over the course of *ESP VI* and had the financial viability to do so. (Co. Ex. 194 at 4.)

{¶ 273} The Commission addressed these points by CMSD in ¶ 186 above, where the Commission determined that Rider DMR would provide a needed incentive to the Companies to focus on grid modernization and in ¶ 195 where we discussed the serious consequences of a downgrade of the Companies' credit ratings. There is no need to repeat those conclusions here. With respect to the Companies' ability to pay credits under the Companies' Proposal, we have already determined that the record cast substantial doubt upon their ability to pay such credits in the future at ¶ 110-112 above.

ii Whether Rider DMR is an unlawful subsidy?

{¶ 274} Staff notes that the classification of Rider DMR as an unlawful subsidy is simply inaccurate, noting that, rather, Rider DMR constitutes the necessary credit support to allow the Companies to access credit markets with reasonable rates, terms, and conditions so as to raise the significant amounts of money needed to implement its grid modernization initiative. Further, Staff notes that even OCC witness Kahal admitted that, if FirstEnergy Corp. or the Companies were downgraded below investment grade, it could lead to increased borrowing costs (Rehearing Tr. Vol. VIII at 1388). MSC also notes that Rider DMR is providing the necessary resources in order for the Companies to implement the various grid modernization programs and initiatives and that reducing the risk that the Companies and FirstEnergy Corp. will be downgraded with be extremely beneficial for their customers. Finally, MSC contends that the Companies' customers will not be the only constituents providing credit support, specifically identifying several corporate-wide initiatives that have been implemented in order to provide additional investment in grid modernization (Co. Ex. 206 at 17-18).

{¶ 275} Much like their arguments against the Companies' Proposal, OMAEG, OEC/EDF, OCC/NOAC, Direct, and NOPEC contend that Rider DMR will act as an anti-competitive subsidy or "bailout" for FirstEnergy Corp.'s generation services, in violation of R.C. 4928.02 (OMAEG Ex. 39 at 3-4). As it alleges there is currently no requirement for grid modernization investment to occur or that revenues collected through Rider DMR be used for such initiatives, OMAEG argues Rider DMR functions as "an unlawful subsidy for FirstEnergy Corp. and increases costs for manufacturers who are forced to pay additional charges for their electric service, thereby impeding their ability to remain competitive in the global economy" (Rehearing Tr. Vol. IV at 956-57; OMAEG Ex. 39 at 6-8). In fact, Direct Energy notes that, if the Companies issue a dividend to FirstEnergy Corp. of all, or any portion of, the revenues collected under Rider DMR, FirstEnergy Corp. would then have the ability to utilize those revenues for any purpose of its choosing (Rehearing Tr. Vol. I at 158).

{¶ 276} Additionally, CMSD and P3/EPSA argue that, according to an S&P research update upon which Staff witness Buckley relied upon in his testimony, the underlying reason for FirstEnergy Corp.'s current credit issues is the business risk associated with its unregulated generation subsidiaries. Thus, these parties argue that Rider DMR, if approved, would do nothing to remedy the actual cause of FirstEnergy Corp.'s financial distress. (Staff Ex. 13 at 5.) Accordingly, much like their recommendation to reject the Companies' Proposal, OMAEG, OCC/NOAC, Direct, CMSD, and OEC/EDF request the Commission reject Rider DMR and encourage FirstEnergy Corp. to make more fiscally responsible business decisions (OMAEG Ex. 39 at 9, 11; OCC Ex. 46 at 6-7).

{¶ 277} FirstEnergy states that Dr. Choueiki made it clear that the purpose of Rider DMR is related to distribution service, specifically noting Staff's objective of modernizing the Companies' distribution grid (Rehearing Tr. Vol. IV at 967). In fact, FirstEnergy contends that Dr. Choueiki stated numerous times during cross-examination that Staff's objective is to modernize the grid, which requires the Companies to have the financial capacity to implement such projects, and, thus, requires the ability to access capital on favorable terms (Staff Ex. 15 at 15; Rehearing Tr. Vol. IV at 1015-16, 1029). Furthermore, FirstEnergy reiterates its claims that there is no mechanism in Rider DMR which would allow the transfer of revenues between the Companies and FES and that FirstEnergy Corp. has indicated that it will not be making any additional investments in FES in the future (Co. Ex. 197 at 11; Rehearing Tr. Vol. I at 158, 226-27). Notably, FirstEnergy witness Mikkelsen testified that the Companies intended to use the revenues collected under Rider DMR toward grid modernization improvement projects and, additionally, noted that the Commission would be able to review any information with respect to the Companies' operations and Rider DMR within their statutorily granted authority (Rehearing Tr. Vol. X at 1607, 1609). Staff also asserts that because the annual shortfall amount required to meet Moody's CFO to debt ratio target range was allocated on a proportional basis to the Companies, there can be no subsidy. The amount allocated to the Companies reflects the appropriate portion they should be responsible for, further noting that Staff has always maintained the mindset that several other constituents will be responsible for the remaining shortfall amount. (Co. Ex. 13 at 3, 6.)

{¶ 278} The Commission finds that the record demonstrates that Rider DMR does not constitute an unlawful subsidy to FirstEnergy Corp. As discussed in detail above, the record shows that the Companies need to able to obtain capital for needed investments in their distribution systems (Rehearing Tr. Vol. III at 571-73). Further, the evidence shows that S&P's rating for FirstEnergy Corp. is one notch above investment (Staff Ex. 13 at 5) and that S&P takes an "umbrella" approach to credit ratings. Therefore, a downgrade to FirstEnergy Corp. would result in a downgrade to the Companies (Rehearing Tr. Vol. III at 595-96, 680). Moreover, while Ohio Edison is three notches above investment grade, Cleveland Electric Illuminating and Toledo Edison are only one notch above investment grade. Likewise, FirstEnergy Corp. is only one notch above investment grade according to Moody's. (Co. Ex. 206 at 6-7.) Staff witness Choueiki notes that, if the Companies are downgraded, future financing costs could increase (Staff Ex. 15 at 15, fn. 26).

{¶ 279} The evidence also demonstrates that a downgrade of the Companies' credit ratings is a serious risk and that a downgrade would have adverse effects upon the Companies' ability to access the capital markets. According to Staff witness Buckley, Moody's issued a credit opinion stating that certain factors could lead to a downgrade of FirstEnergy Corp. on January 26, 2016. These factors include the failure of the modified ESP to allow FirstEnergy Corp. to maintain financial metrics adequate for investment grade ratings and continued weakening of merchant energy markets. (Staff Ex. 13 at 4; Co. Ex. 206 at 6-7; Direct Ex. 1 at 3.) Further, S&P issued a research update revising FirstEnergy Corp.'s outlook from "stable" to "negative" on April 28, 2016 (Staff Ex. 13 at 8, Att. 3 at 4). The record also indicates that, with respect to S&P credit ratings, if FirstEnergy Corp. were downgraded, the Companies would also be downgraded (Co. Ex. 206 at 7, fn. 7; Rehearing Tr. Vol. III at 509-10, 594-96, 680).

{¶ 280} The rehearing testimony shows that a downgrade would have adverse consequences for the Companies. A downgrade may result in limited access to the credit markets (Staff Ex. 13 at 6). Some investors, such as pension funds, will only invest in investment grade companies (Co. Ex 206 at 7). A downgrade may result in more restrictive terms and conditions (Staff Ex. 13 at 6; Co. Ex. 206 at 7). A downgrade may trigger requirements that the Companies or FirstEnergy Corp. post cash as collateral (Staff Ex. 13 at 6; Co. Ex. 206 at 8; OMAEG Ex. 37 at 9). Although the exact amount of collateral to be posted is disputed by the parties, the record reflects that it would be hundreds of millions of dollars. Most importantly, a downgrade may result in higher borrowing costs, increasing the Companies' long-term cost of debt. Because long-term cost of debt is a key factor in determining a utility's rate of return, increases in the long-term cost of debt will inevitably result in higher rates for customers. (Staff Ex. 13 at 6; Co. Ex. 206 at 7-8.) Finally, higher debt costs may reduce the funds available for investment in distribution infrastructure to maintain reliability or for investment in modernizing the grid (Co. Ex. 206 at 8).

{¶ 281} Therefore, placing restrictions on the use of Rider DMR funds would defeat the purpose of Rider DMR. Rider DMR is intended to provide credit support to the Companies in order to avoid a downgrade in credit ratings. The Commission notes that even OCC witness Kahal agreed with the Staff's goal of protecting the Companies' credit ratings (OCC Ex. 46 at 13). Maintaining credit ratings at current levels will allow the Companies to access the capital markets in order to fund needed investments in grid modernization as discussed in detail above. Moreover, although OCC witness Kahal raised the possibility of ring fencing the Rider DMR funds, Mr. Kahal was not prepared to recommend ring fencing at this time (OCC Ex. 46 at 14).

{¶ 282} Although we will not place restrictions on the use of Rider DMR funds, the Commission directs Staff to periodically review how the Companies, and FirstEnergy Corp., use the Rider DMR funds to ensure that such funds are used, directly or indirectly, in support of grid modernization. The Commission notes that grid modernization initiatives, such as smart grid deployment or utility scale battery technology, may involve very large up front investments, which will be recovered over a number of years (Rehearing Tr. Vol. III at 585-86). Therefore, the Companies may use revenue under Rider DMR to make the large cash up front investments to fund grid modernization (Co. Ex. 206 at 5-6). On the other hand, we recognize that the Companies and FirstEnergy Corp. may use revenue from Rider DMR to indirectly support grid modernization investments (Co. Ex. 206 at 16). Such steps should lower the cost of borrowing the funds needed to invest in grid modernization and may include reducing outstanding pension obligations, reducing debt, or taking other steps to reduce the long-term costs of accessing capital. The Commission finds that this Staff review will ensure that there is no unlawful subsidy of the Companies' affiliates.

{¶ 283} The Commission further notes that Rider DMR, as proposed by Staff, would recover a proportionate share of the CFO to debt ratio shortfall, which ensures that the Companies are not subsidizing affiliates. Rehearing testimony shows that all of FirstEnergy Corp.'s stakeholders are sharing in the burden of improving its financial health. FirstEnergy Corp. has already reduced the dividend paid to shareholders, from $2.20 per share to $1.44 per share, which results in a reduction of over $300 million annually (Co. Ex. 206 at 17). In addition, FirstEnergy affiliates have sought or had approved the following rate increases: (1) in New Jersey, approved recovery of $736 million in storm damage costs incurred in 2011 and 2012, as well as a proposed increase in rates of $142 million; (2) in Pennsylvania, approved increase of $293 million, additional proposed increase of $439 million and proposed capital recovery filings of $245 million; and (3) in West Virginia, $100 million in additional revenue from a rate case and vegetation management rider (Co. Ex. 206 at 18; Rehearing Tr. Vol. X at 1646, 1650, 1654-58, 1667). In addition, during the hearing, FES announced that it would shut down four of the units at the Sammis generation plant.

iii Whether the Revenues Collected under Rider DMR Constitute Unlawful Transition Revenues?

{¶ 284} Staff, FirstEnergy, and OEG contend that Rider DMR would not result in unlawful transition revenues, contrary to the Supreme Court of Ohio's recent decisions regarding AEP Ohio and Dayton Power & Light. *AEP Ohio RSR Case; DP&L SSR Case.* OEG notes that Rider DMR is authorized under a completely separate provision of the ESP statute than the charges struck down in those two cases. Additionally, OEG argues that Rider DMR is a distribution-related charge, rather than a generation-related charge. Furthermore, OEG asserts that even if the costs included in Rider DMR would be considered transition revenues, R.C. 4928.143(B) creates an exception from the prohibition for transition revenues for charges that may lawfully be authorized under the ESP statute, such as those proposed under Rider DMR.

{¶ 285} Despite Staff's assertions that the Companies will use these funds to obtain more favorable terms when accessing the capital markets that will allow for necessary investment in grid modernization, NOPEC argues that there is no requirement in Rider DMR that the funds be used for that purpose (Staff Ex. 13 at 6; Staff Ex. 15 at 15; OMAEG Ex. 39 at 8). In fact, OCC/NOAC and NOPEC contend that the record shows the revenues collected under Rider DMR would be used to provide credit support to FirstEnergy Corp. and its unregulated affiliates, including FES, as a means to improve its credit rating. NOPEC and Sierra Club note that the Supreme Court of Ohio has held that riders that are designed to provide "sufficient revenue to maintain [a utility's] financial integrity and ability to attract capital during the ESP" constitute unlawful transition charges. Therefore, NOPEC, OCC/NOAC, and Sierra Club argue that the Commission should reject Rider DMR because it would collect unlawful transition revenues, similar to the modified Rider RRS. *AEP Ohio RSR Case.* (Co. Ex. 206 at 8-9.)

{¶ 286} Largely relying on the same arguments it raised to show that the Companies' Proposal did not constitute the collection of transition, or equivalent, revenues, FirstEnergy notes that Rider DMR is proposed to help access capital to support distribution services rather than generation services (Staff Ex. 13 at 3). Staff agrees that Rider DMR is not tied to generation services. Additionally, FirstEnergy emphasizes the amount of revenue to be provided to the Companies is based on the Companies' proportional contribution to FirstEnergy Corp., and is completely unrelated to the operations of FES with respect to FirstEnergy Corp. Notably, the Companies again state that R.C. 4928.38 has no applicability to an ESP. (Staff Ex. 13 at 3; Co. Ex. 206 at 12.) Staff again emphasizes that the underlying purpose of Rider DMR is to support the Companies' access to the necessary funds required to implement their distribution grid modernization initiative, adding that transition revenues are focused on the past, while Rider DMR is focused on the future and what grid modernization will be able to provide to the state of Ohio (Staff Ex. 15 at 15).

{¶ 287} We disagree with claims that Rider DMR will collect transition revenue or its equivalent. First, there is no "transition" involved in this case. The Companies transferred their generation assets to FES many years ago (Rehearing Tr. Vol. VIII at 1401), and the Companies have provisioned the SSO through a competitive bidding process since their first ESP in 2009. Moreover, Rider DMR is authorized by R.C. 4928.143(B)(2)(h) rather than R.C. 4928.143(B)(2)(d), the statute which authorized the AEP stability charge which was overturned by the Supreme Court. As such, Rider DMR is clearly a "distribution" charge rather than a "generation" charge. In fact, Rider DMR is entirely unrelated to generation because the Companies have no generation assets. As discussed in more detail above, Staff will periodically review how the proceeds of Rider DMR are used in order to ensure that such proceeds are used, directly or indirectly, in support of grid modernization.

iv Whether Rider DMR Complies with R.C. 4905.22?

{¶ 288} P3/EPSA and NOPEC reiterate many of their earlier arguments against Rider DMR to establish that this proposal would violate R.C. 4905.22 as an unjust and unreasonable charge. First, P3/EPSA argue that the proposed rider offers ratepayers no guarantees that the Companies will spend any of the revenues collected thereunder on its grid modernization initiative. Second, P3/EPSA and NOPEC claim that the Companies do not require this rider to be approved in order to engage in grid modernization efforts, especially when the costs of doing so may be recoverable through a different rider. Finally, P3/EPSA and NOPEC maintain that the Companies have several other means of generating cash flow from operations that would be able to support FirstEnergy Corp.'s credit rating and recover costs in grid modernization (Rehearing Tr. Vol. IV at 1227-29; Rehearing Tr. Vol. X at 1610, 1757-59).

{¶ 289} In an assignment of error, OCC/NOAC contend that the Commission erred in reviewing and approving Stipulated ESP IV only after determining that the charges were cost-effective, in violation of R.C. 4905.22 and 4928.02(a) (OCC/NOAC App. for Rehearing (May 2, 2016) at 3; Order at 98).

{¶ 290} The Commission finds the claims that Rider DMR violates R.C. 4905.22 should be rejected. Rider DMR is authorized by R.C. 4928.143(B)(2)(h), which states that an ESP may include provisions "regarding the utility's distribution service, including, without limitation and *notwithstanding any provision of Title XLIX of the Revised Code to the contrary* * * * *" (emphasis added). With this language, the General Assembly clearly intended that the Commission have flexibility in approving provisions related to distribution service contained in ESPs and that the strict requirements of R.C. Chapters 4905 and 4909 do not necessarily apply to such provisions. For example, single-issue ratemaking and incentive ratemaking is not authorized by R.C. Chapter 4909; however, R.C. 4928.143(B)(2)(h) explicitly authorizes "single issue ratemaking" and "incentive ratemaking." Therefore, we find that, based upon the plain language of R.C. 4928.143(B)(2)(h), charges authorized by R.C. 4928.143(B)(2)(h) cannot be construed to violate R.C. 4905.22.

{¶ 291} Nonetheless, even if R.C. 4905.22 were to apply to Rider DMR, the Commission finds that Rider DMR would not be unreasonable under R.C. 4905.22. The

Commission explained in detail at ¶ 196-205 that the Staff's calculation of Rider DMR was reasonable, as modified by the Commission. Accordingly, claims that Rider DMR violated R.C. 4905.22 should be rejected.

v Stipulation Transition Provision.

{¶ 292} NOPEC asserts that the Commission erred when it failed to reject the Third Stipulation and Recommendation's transition provision, noting that, pursuant to R.C. 4928.143(E), the Commission is required to review the ESP after the initial four years to determine its continued satisfaction of the ESP versus MRO test and whether continuing the ESP would result in excessive earnings. However, under the terms of the provision, NOPEC contends that Rider DCR revenues could continue to be collected for the initially approved eight-year term, regardless if the Commission elected to terminate the rider after its four-year review. Moreover, NOPEC argues the provision inserts language that unlawfully increases the likelihood of the ESP continuing for the entire eight-year term. (NOPEC App. for Rehearing at 7-8; Co. Ex. 154 at 18).

{¶ 293} FirstEnergy notes that NOPEC's argument is incorrect, since the Order does not address or prejudge the results of the four-year review in any way and NOPEC fails to cite to any record evidence to indicate otherwise. Additionally, FirstEnergy claims that R.C. 4928.143(E) includes no language prohibiting the Commission from approving a rider like Rider DCR that will be in place for longer than four years. (Order at 89, 92, 97.)

{¶ 294} The Commission finds that rehearing on this assignment of error should be denied. We note that modified *ESP IV* will be in place for eight years, therefore, the Commission must comply with the provisions of R.C. 4928.143(E) every four years. At that time, the Commission will strictly comply with the provisions of R.C. 4928.143(E). In the event that the Commission terminates modified *ESP IV* pursuant to R.C. 4928.143(E), the annual increases in revenue caps under Rider DCR will be terminated. However, Rider DCR provides a return on and of past investments in the distribution system. It would be manifestly unfair to deny the Companies' recovery of past investments in the event *ESP IV* is terminated pursuant to R.C. 4928.143(E).

vi Rider GDR.

{¶ 295} In its Order, the Commission also approved Rider GDR, initially set at zero, in order to allow the Companies to recover unforeseen expenses specific to federal and state mandates, including directives relating to cyber and physical threats, other attacks on infrastructure, costs related to former manufactured gas plant (MGP) sites, or costs arising from implementing directives from the retail market investigation (Order at 93). OMAEG contends that the Commission should not approve the establishment of, or cost recovery under, Rider GDR until such time the Companies incur actual costs to be recovered under the rider and the Commission deems these costs prudent for recovery. OMAEG further notes that approving Rider GDR would be inconsistent with Commission precedent dealing with similar proposed riders. *AEP Ohio ESP III* Order at 59-62. (OMAEG App. for Rehearing (May 2, 2016) at 37-39.) NOPEC and Power4Schools agree with OMAEG and similarly assert that the Commission's approval of Rider GDR was both unreasonable and unlawful (NOPEC App. for Rehearing (May 2, 2016) at 23-24; Power4Schools App. for Rehearing at 10).

{¶ 296} FirstEnergy first notes that Rider GDR is authorized under R.C. 4928.143(B)(2)(h) and the approval of a placeholder rider set at zero is supported by Commission precedent and record evidence. *AEP Ohio ESP III* Order at 94 (citing *AEP Ohio ESP II*, Opinion and Order (Aug. 8, 2012) at 24-25; *In re Duke Energy Ohio, Inc.*, Case No. 08-920-EL-SSO, et al., Opinion and Order (Dec. 17, 2008) at 17; *FirstEnergy ESP I*, Second Opinion and Order (Mar. 25, 2009) at 15). (Order at 93, 106-107, 110-111; Co. Ex. 7 at 24-25.) Finally, the Companies claim the remaining assignments of error raised against Rider GDR should be reserved for the future proceeding, as directed in the Order, as they are premature at this time (Order at 110).

{¶ 297} The Commission agrees with FirstEnergy that Rider GDR is authorized under R.C. 4928.143(B)(2)(h) as a provision for "single issue ratemaking." Further we agree that creation of a placeholder rider set at zero is supported by Commission precedent. *AEP Ohio ESP III* Order at 94 (citing *AEP Ohio ESP II*, Opinion and Order (Aug. 8, 2012) at 24-25; *In re Duke Energy Ohio, Inc.*, Case No. 08-920-EL-SSO, et al., Opinion and Order (Dec. 17, 2008) at 17; *FirstEnergy ESP I*, Second Opinion and Order (Mar. 25, 2009) at 15). All other issues raised with respect to this assignment of error were thoroughly addressed in the *ESP IV* Opinion and Order (Order at 110-11). OMAEG, NOPEC and Power4Schools have raised no new issues for our consideration; therefore, we find that rehearing should be denied.

vii Rider RCE.

{¶ 298} The Companies and IGS[17] assert that the Order is unreasonable because it adopts IGS witness White's proposal to unbundle SSO service costs from distribution rates, despite the Companies' separate agreement to file for approval of a retail competition incentive mechanism that would achieve the same objective of incentivizing customer shopping. Additionally, as neither the Companies nor IGS requested unbundling of distribution rates, they request the Commission modify its Order to better reflect their understanding. (Co. App. for Rehearing (May 2, 2016) at 10-12; Order at 98.)

{¶ 299} NOPEC, RESA, and OCC/NOAC also assert that the Stipulated ESP IV is unlawful because it establishes a new bundled distribution rate rider in the ESP, contrary to the Supreme Court of Ohio's ruling in *CSP II* and Commission precedent. *In re The Cleveland Elec. Illum. Co.*, 42 Ohio St.2d 403, 431, 330 N.E.2d 1 (1975). Additionally, OCC/NOAC contend that the Commission decided to implement Rider RCE without a sufficient showing of the facts in the record upon which the decision was based, contrary to 4903.09. As a final matter, OCC/NOAC agree with FirstEnergy that it would be

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[17] On May 2, 2016, IGS filed correspondence indicating its support of FirstEnergy's assignment of error on this matter, to the extent that it does not affect the underlying intent behind the Competitive Market Enhancement Agreement between the Companies and the IGS.

improper to approve a provision that does not accurately reflect what has been contemplated in the Competitive Market Enhancement Agreement, but note that their preference would be to eliminate the rider altogether. (NOPEC App. for Rehearing (May 2, 2016) at 23-24; RESA App. for Rehearing (Apr. 29, 2016) at 103-04; OCC/NOAC App. for Rehearing (May 2, 2016) at 64-65.)

{¶ 300} Although IGS seeks clarification as to a portion of the Commission's Order pertaining to Rider RCE, IGS disagrees with NOPEC and OCC/NOAC's contentions that the Commission's approval of this placeholder rider was contrary to its duty pursuant to R.C. 4903.09 and Commission precedent. Specifically, IGS notes that the Commission clearly cited to the record when approving the rider in the *ESP IV* Opinion and Order and indicated that FirstEnergy will bear the burden to establish that any future cost recovery is just and reasonable and will also be subject to the Commission's review. (*ESP IV* Opinion and Order at 98; IGS Ex. 11 at 17-18; Tr. Vol. XXXVII at 7927-28.)

{¶ 301} The Commission finds that rehearing on these assignments of error should be granted. The Commission notes that, although FirstEnergy may dispute the characterization, Rider RCE would effectively "unbundle" distribution rates by assessing a charge on standard service customers and distributing the proceeds of that charge to all non-Rate GT customers (Tr. Vo. XXXVII at 7818-19). Nonetheless, we will accept the claims by FirstEnergy and IGS that the testimony by IGS witness White (IGS Ex. 11 at 17-18) does not support the creation of Rider RCE. However, absent the testimony of IGS witness White in support of Rider RCE, we find that there is insufficient evidence to support the creation of Rider RCE, even on a placeholder, zero-cost basis. Neither FirstEnergy nor IGS presented any testimony in support of Rider RCE, and we find that the limited commentary of FirstEnergy witness Mikkelsen on cross-examination is insufficient by itself to support the creation of the rider (Tr. Vol. XXXVII at 7817-23, 7911-13, 7925-37). Accordingly, we will grant rehearing and modify *ESP IV* to eliminate Rider

RCE. The Companies are directed to file compliance tariffs eliminating the placeholder for Rider RCE, as modified and approved by the Commission.

viii Straight Fixed Variable Rate Design.

{¶ 302} OCC/NOAC assert that the Commission erred in unreasonably and unlawfully finding that it can approve plans to implement SFV rate design through an ESP under R.C. 4928.143(B)(2)(h), as such a finding misconstrues the statute's term "revenue decoupling mechanism" to include a SFV rate design. Specifically, OCC/NOAC argue that R.C. 4928.66 clarifies that revenue decoupling is intended to be directly related with a company's energy efficiency efforts as a part of achieving energy efficiency benchmarks. (OCC/NOAC App. for Rehearing (May 2, 2016) at 44-45.)

{¶ 303} In its memorandum contra OCC/NOAC's application for rehearing, FirstEnergy states that the Commission did not approve the SFV rate design, but merely instructed the Companies to file an application to transition to such a design for distribution rates, guaranteeing a separate proceeding to address arguments as to whether such a rate design should be implemented. Furthermore, FirstEnergy states that R.C. 4928.143(B)(2)(h) does not require a revenue decoupling mechanism to be related to energy efficiency efforts. (Order at 93-94.)

{¶ 304} The Commission finds that R.C. 4928.143(B)(2)(h) authorizes SFV rate design as a decoupling mechanism. The plain language of the statute provides that an ESP may include "a revenue decoupling mechanism." As we noted in the *ESP IV* Opinion and Order, implementation of SFV rate design would remove disincentives to electric utilities to promote energy efficiency (Order at 93). As such, it is a form of revenue decoupling. The Commission fully considered this issue in a previous proceeding, which we cited in the Order (Order at 93; *In the Matter of Aligning Elec. Distribution Utility Rate Structure with Ohio's Public Policies to Promote Competition, Energy Efficiency and Distributed Generation*, Case No. 10-3126-EL-UNC, Finding and Order (Aug. 21, 2013)). Nonetheless, as we pointed out in the *ESP IV* Opinion and Order, we have *not* decided to implement SFV in

FirstEnergy's service territory at this time. FirstEnergy is required under the Stipulations to file an application in a separate proceeding where any interested party will have a full and fair opportunity to address whether the proposed SFV should be implemented and to raise any other issues specific to the Companies' service territories (Order at 94; Tr. Vol. XXXVI at 7577). Rehearing on this assignment of error should be denied.

ix Customer Retail Rate Programs.

{¶ 305} OMAEG initially contends that the Commission's decision to approve the expanded Rider NMB pilot program was unreasonable and unlawful due to the fact that the Commission failed to address concerns regarding the inclusion of the additional costs recoverable through Rider NMB, including costs associated with balancing operating reserves and uplift charges. OMAEG notes by moving these costs to the regulated rate through Rider NMB, the risks of suppliers' purchases and hedging strategies is shifted to customers when they should rightfully remain with the SSO suppliers and CRES providers. According to OMAEG, there is even a potential risk that including these costs into a non-bypassable rider such as Rider NMB could result in certain customers being charged twice if the costs are already included in the customers' CRES provider charges. Notably, OMAEG also argues that the Commission failed to explain its rationale for permitting the Companies to expand Rider NMB. (OMAEG App. for Rehearing (May 2, 2016) at 54-60; Staff Ex. 7 at 11-14; Order at 112.) RESA argues that the Commission erred by failing to specifically consider the extension of Rider NMB to include PJM Item 1375 (Balancing Operating Reserve) (RESA App. for Rehearing (Apr. 29, 2016) at 93-95; Order at 73-75).

{¶ 306} Furthermore, RESA and OMAEG contend that the Rider NMB pilot program is unduly limiting, discriminatory, and unjust because it will only be available to certain customers, violating state policy pursuant to R.C. 4928.02(A). OMAEG specifically claims that, according to the terms of the approved pilot program, interested customers would be excluded from participation due to their opposition of the Stipulated ESP IV and all eligible customers, including the additional five Rate GT customers, would not be able to seek equal participation in the pilot program. OMAEG specifically notes that allowing a Commission-approved pilot program to entice customers to join one trade association over another would violate regulatory policies and practices of the Commission; however, that is the practical result of the current Rider NMB pilot program. (RESA App. for Rehearing (Apr. 29, 2016) at 96-100; OMAEG App. for Rehearing (May 2, 2016) at 57-60; Order at 112).

{¶ 307} FirstEnergy and IEU-Ohio first note that the Commission did not act unreasonably or unlawfully when it permitted the Companies to modify Rider NMB to include certain non-market-based PJM billing line items, explaining that the Commission relied on record evidence demonstrating that modifying Rider NMB as proposed by the Companies would result in lower costs to customers and that Rider NMB would continue to be subject to an annual review and approval process before the Commission (Order at 73, 94; Co. Ex. 154 at 17; Tr. Vol. V at 948-49, 982, 986, 1003-04). FirstEnergy also states that any double-billing concerns were sufficiently addressed in previous ESPs and, specifically, by FirstEnergy witness Mikkelsen's testimony in this proceeding (Tr. Vol. XXXIV at 7023). The Companies, IEU-Ohio, and Nucor also argue that OMAEG and RESA have failed to demonstrate that the pilot program is discriminatory. In fact, IEU-Ohio emphasizes that the Supreme Court of Ohio and this Commission have recognized that an EDU may enter into a pilot program with rates not uniformly available to all customers, further noting that the important determination to make is whether the classification is reasonable. *Weiss v. Pub. Util. Comm. of Ohio*, 90 Ohio St.3d 15, 2000-Ohio-5, 734 N.E.2d 775 (*Weiss*). As a final matter, the Companies and IEU-Ohio assert that the proffered arguments of RESA and OMAEG are not new, and were, in fact, addressed in the Commission's Order (Order at 73-75, 112; Tr. Vol. V at 941-49; Tr. Vol. XXXIV at 7021-22). Thus, FirstEnergy and Nucor contend the respective applications for rehearing should be denied as to these particular issues.

{¶ 308} With respect to OMAEG's claims that the Commission unreasonably included costs in Rider NMB which should have been excluded, the Commission was required, under the second prong of the three-part test, to determine if the Stipulations, as a package, benefit ratepayers and the public interest. In the *ESP IV* Opinion and Order, the Commission thoroughly considered and addresses the benefits of the Stipulations and made such modifications as the Commission deemed necessary (Order at 92-99). Nonetheless, we find that the record fully supports the changes to Rider NMB (Co. Ex. 154 at 17, Tr. Vol. 948-49, 982, 986, 1003-04). Further, we find that customer concerns about double-billing should be addressed with the individual customers' CRES supplier as the amicable resolution of such disputes is part and parcel of a fully functioning market. If a customer is unable to resolve such concerns, the customer has remedies at the Commission. R.C. 4928.16.

{¶ 309} With respect to the Rider NMB pilot program, the Commission finds that rehearing on this assignment of error should be denied. Although the Stipulations provide one avenue for customer participation in the Rider NMB pilot program, the Stipulations do not provide the only avenue. Customers who may benefit from participation in the Rider NMB pilot program should work with Staff and the Companies to determine if the customers' participation is appropriate, and the customer may then file an application with the Commission under R.C. 4905.31 for permission to participate in the Rider NMB pilot program, and the Commission will determine if such participation is in the public interest.

{¶ 310} Further, the Commission notes that Rider NMB pilot program is a pilot program which bears further study to determine if the actual results of the pilot program, rather than the projected results, are in the public interest. The Commission directs the Companies and Staff to continuously review the actual results of the Rider NMB pilot program and periodically report their findings to the Commission. Such review should include, at a minimum: whether there is an aggregate savings in transmission costs for all of the Companies' customers, whether and how much in transmission costs are being shifted to customers not participating in the pilot program, whether the benefits of the pilot program outweigh any costs, and whether Rider NMB results in an overall cost savings to customers. This review is necessary for the Commission to determine whether Rider NMB should be continued with the ability for customers to opt out, whether Rider NMB should be continued without the ability for customers to opt out, and whether Rider NMB should be terminated.[18] The Commission retains the right, during the term of *ESP IV*, to modify the provisions of Rider NMB based upon the results of the review by Staff.

x Economic Development Riders.

{¶ 311} OMAEG also alleges that Rider ELR is discriminatory and anti-competitive among numerous customers who are not provided the opportunity to participate, given the fact that the ELR program will be limited to customers currently taking service under Rider ELR and those historically eligible to take service under the rider, up to an additional 136,250 kW of curtailable load. As it claims its concerns and suggested modifications were not addressed in the Order, OMAEG also asserts that the Commission failed to appropriately address these arguments and provide record evidence for its decision, as required by R.C. 4903.09. (OMAEG App. for Rehearing (May 2, 2016) at 60-63.) Further, RESA, in its June 24, 2016, application for rehearing, asserts the Commission's May 25, 2016, Finding and Order was unjust and unreasonable as the Commission erred in adopting the Companies' Rider ELR tariff containing a limitation requiring shopping customers to use consolidated billing, which was inconsistent with the *ESP IV* Opinion and Order and unduly discriminates against customers using dual billing.

{¶ 312} In their memorandum contra, Nucor and IEU-Ohio contend the Commission's approval of the provisions of Stipulated ESP IV relating to Rider ELR was reasonable and supported by the record, specifically noting that limiting participation in

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18 Additionally, the Commission notes that RESA filed a motion to stay the implementation of Rider NMB modifications and pilot program, as approved by our Order, on May 25, 2016. Based on our conclusions above, this motion is now moot and is, therefore, denied.

the Rider ELR program is reasonable and consistent with prior Commission decisions regarding similar programs. Furthermore, Nucor argues that the cost recovery mechanism for the Rider ELR credit is also reasonable, emphasizing that this feature of Rider ELR has been approved by the Commission in previous ESPs and has been in effect for several years now. *FirstEnergy ESP III*, Second Entry on Rehearing (Jan. 30, 2013) at 14; *FirstEnergy ESP II* Order at XX; *FirstEnergy ESP I* Order at 10, 13-14. Furthermore, Nucor and IEU-Ohio also argue that these assignments of error have also adequately been addressed in the Commission's Order. *AEP Ohio ESP III*, Second Entry on Rehearing (May 28, 2015) at 25-26. (Order at 73, 94; Nucor Ex. 1 at 12; OEG Ex. 1 at 9-10; Tr. Vol. XXII at 4329; Tr. Vol. XXX at 6136-37, 6172-75.) FirstEnergy also notes that, while Rider ELR is now available to both non-shopping customers and shopping customers taking service under consolidated billing, the Companies did not remove the minimum bill provision, consistent with the Companies' proposed tariffs, which were subsequently approved in the Tariff Finding and Order. FirstEnergy further argues that RESA did not raise this issue prior to this point in time, stating that there is simply no evidentiary record to support the recommendation of RESA to allow dual billing customers to also participate in Rider ELR. Furthermore, FirstEnergy states that dual billing customers are not excluded from participation in Rider ELR, noting they must simply participate in either Rider ELR or dual billing program and this type of treatment is not considered discriminatory. *Weiss* at 16-19.

{¶ 313} The Commission finds that OMAEG's assignment of error with respect to the ELR should be denied. As discussed above, under the Supplemental Stipulation filed on May 28, 2015, new customers were given until May 31, 2015 to provide notice to the Companies of intent to participate in the ELR. Although we acknowledge that this is a narrow time window, there is no evidence that similarly-situated customers were unable to provide notice to the Companies on an equal footing. In fact, five new customers were added to the ELR program (Tr. Vol. II at 265). Likewise, there is no evidence that any party, including OMAEG, was excluded from negotiations leading up to the filing of the

Supplemental Stipulation. In light of the complete lack of evidence in support of OMAEG's claims, the Commission finds that this assignment of error should be denied.

{¶ 314} Further, with respect to RESA's assignment on dual billing, we agree that there is no record evidence to support RESA's claim that participants in ELR should be permitted to use dual billing with its supplier. In the absence of such evidence, we find that rehearing on this assignment of error should be denied.

xi Energy Efficiency Provisions and Renewable Resources.

{¶ 315} The Companies initially assert that the *ESP IV* Opinion and Order is unreasonable in that it is unclear regarding FirstEnergy's obligation to procure 100 MWs of wind or solar resources, noting that the Order seems to have unreasonably rejected that the procurement must be related to the enactment of new Federal or state environmental laws or regulations. FirstEnergy requests that the Commission adopt both conditions to the procurement as originally provided in the Third Supplemental Stipulation, as well as offer further instruction regarding the use of bilateral contracts and what actions FirstEnergy will be required to make in the event that such contracts are unavailable. Alternatively, FirstEnergy argues that, at the very least, the Commission should clarify its Order to explain that costs incurred and revenues collected from the purchase and sale of these resources will be netted in the newly created Rider ORR, and will be subject to Commission audit and review. (Co. App. for Rehearing (May 2, 2016) at 4-7; Order at 96-97; Tr. Vol. XXXVI at 7542-7543, 7650.)

{¶ 316} OCC/NOAC claim that the Order is unreasonable or unlawful because the Stipulated ESP IV's provision concerning energy efficiency is contrary to the public interest and governing law. Specifically, OCC/NOAC note that the Order runs counter to the Ohio General Assembly's determination in S.B. 310 that the public will benefit from freezing the energy efficiency and renewable energy mandates. (OCC/NOAC App. for Rehearing at 47-48.)

{¶ 317} Environmental Advocates initially argue that the Commission's Order unreasonably raised the cap on shared savings that the Companies may earn on energy savings from their efficiency programs from $10 million to $25 million, noting that the Commission erroneously concluded that increasing the shared savings cap would encourage the Companies to provide additional energy savings opportunities to customers and unreasonably relied on a prior Commission proceeding to increase the amount of the cap. *In re FirstEnergy*, Case No. 12-2190-EL-POR (*2012 FirstEnergy Portfolio Case*), Opinion and Order (Mar. 20, 2013) at 15, citing *In re AEP Ohio*, Case No. 11-5568-EL-POR, et al. (*AEP Ohio Portfolio Case*), Finding and Order (Mar. 21, 2012). Additionally, Environmental Advocates and OCC/NOAC state that, pursuant to R.C. 4928.662, the Companies would be able to count energy savings resulting from customer actions outside of any specific FirstEnergy program, threatening the intended result of the Commission to improve energy savings opportunities for customers. Further, Environmental Advocates claim the Commission's reliance on the *AEP Ohio Portfolio Case* is misplaced due to the significant factual differences between the two utilities and the mechanisms under review in each proceeding, particularly in respect to the proposed SFV rate design considered in the Order and the throughput balancing adjustment rider in the *AEP Ohio Portfolio Case*. (Environmental Advocates App. for Rehearing (May 2, 2016) at 16-23; OCC/NOAC App. for Rehearing (May 2, 2016) at 47-48.) Similarly, Environmental Advocates argue that the Commission failed to address whether it is reasonable and lawful for FirstEnergy to receive lost distribution revenues for energy savings that do not occur as a result of the Companies' energy efficiency programs, such as their Customer Action Program. *In re Application of FirstEnergy*, Case No. 09-1820-EL-ATA, et al., Finding and Order (June 30, 2010) at 10; *In re Application of FirstEnergy*, Case No. 09-1947-EL-POR, Opinion and Order (Mar. 23, 2011) at 18. (Order at 106-107.)

{¶ 318} Further, Environmental Advocates claim that the Commission unreasonably failed to address whether allowing the Companies' customers to opt out of paying for peak demand reduction programs while still receiving monetary credits for participation in the Rider ELR program violates R.C. 4928.6613, noting that Stipulated ESP IV allows certain utility customers to opt out of paying for the Companies' energy efficiency/peak-demand reduction (EE/PDR) portfolio plan while still receiving benefits from that plan in the form of monetary credits through Rider ELR (Environmental Advocates Application for Rehearing at 23-24). Environmental Advocates, OCC/NOAC, Sierra Club, and P3/EPSA also request the Commission deny the Companies' request for clarification regarding its obligation to procure 100 MWs of wind or solar resources, as they have failed to explain how the Commission's modifications to Stipulated ESP IV were unreasonable or unlawful, and, as such, does not constitute a proper ground for granting rehearing. Moreover, OCC/NOAC add that the requested provisions of the Third Supplemental Stipulation run directly contrary to the Commission's Order. (Order at 97; Co. Ex. 154 at 12; RESA Ex. 6 at 8-9.)

{¶ 319} In its memorandum contra, FirstEnergy, IEU-Ohio, and Nucor provide that, although the Commission was sufficiently clear in its Order in response to these arguments, Rider ELR customers may opt out of the Companies EE/PDR portfolio plans and continue to receive Rider ELR credits because those credits do not arise from the Companies' EE/PDR portfolio plans, but rather from the Stipulated ESP IV itself, consistent with R.C. 4928.6613. However, these parties also state that the Commission may clarify its Order to this point if it believes it to be necessary. (Order at 106-107.) Additionally, FirstEnergy argues that the Commission sufficiently addressed Environmental Advocates' argument regarding lost distribution revenues, but in the event the Commission desires to provide further clarification, the Commission should reject their recommended modification, as the ability to recover lost distribution revenues arising from savings from the Customer Action Program was an integral part of the Stipulated ESP IV and was supported by all of the signatory parties. Furthermore, the Companies assert that Environmental Advocates have failed to provide sufficient evidence for the Commission to adopt their recommendation, noting that the Customer Action Program is a Commission-approved energy efficiency program and should not be treated differently with respect to the recovery of lost distribution revenues. (Order at 94-95, 107; Tr. Vol. III at 498, 541, 559.)

{¶ 320} FirstEnergy also argues that the Commission was not acting unreasonably or unlawfully when it approved the revised cap on shared savings. First, the Companies note that the Commission has previously authorized FirstEnergy to count savings on a gross basis, which has been the practice even prior to S.B. 310, emphasizing that the Commission specifically considered this issue in the 2012 FirstEnergy POR Case. Additionally, FirstEnergy notes that the Commission relied on the evidence in the record for this proceeding to approve the increase in the shared savings cap, rather than merely relying on Commission precedent to substantiate the increase; however, the Companies add that, even if the Commission had relied on the *2012 FirstEnergy Portfolio Case* or the *AEP Ohio Portfolio Case*, the Commission would have come to the same result. Specifically, the Companies maintain that the AEP Ohio decoupling mechanism and the proposed SFV rate design are not materially different for purposes of shared savings and the increase in the shared savings cap is consistent with the balancing test utilized in those other proceedings in light of the Companies' foregoing of certain lost distribution revenue as part of its potential decoupling mechanism while also considering the need to increase incentives to exceed statutory EE/PDR mandates. (Order at 68-69, 95; Tr. Vol. XXXVI at 7639.) Finally, FirstEnergy asserts the Commission should not wait to determine the shared savings cap increase in Case No. 16-743-EL-POR, due to the fact that there was sufficient evidence presented in this proceeding to approve the shared savings cap and, even with the increase, the Companies will be entitled to less on a per company basis than other shared savings caps approved by the Commission. *AEP Ohio Portfolio Case,* Finding and Order (Mar. 21, 2012) at 8. (Tr. Vol. XXXVI at 7639; Tr. Vol. XXXVIII at 8183-84.) Thus, FirstEnergy argues the Commission should deny the Environmental Advocates and OCC/NOAC's applications for rehearing as they pertain to these issues.

{¶ 321} The Commission will grant rehearing on FirstEnergy's assignment of error regarding the procurement of renewable energy resources to clarify that costs incurred and revenues collected from the purchase and sale of the renewable energy resources under the Third Supplemental Stipulation will be netted in the newly created Rider ORR, and will be subject to Commission audit and review. We will not, however, revisit our modification rejecting the clause that the procurement must be related to the enactment of new Federal or state environmental laws or regulations. With respect to the issue of bilateral contracts, the Commission directs the Companies to work with Staff to determine whether the best use of ratepayer resources is to procure renewable resources through bilateral contracts or to construct new resources in this state, based upon the facts and circumstances at the time.

{¶ 322} The Commission will deny rehearing on OCC/NOAC's assignment of error that energy efficiency provisions violate the statutory freeze in energy efficiency mandates. The claim that the restart of the energy efficiency programs violated the governing law is simply wrong. FirstEnergy will recommence its energy efficiency programs in 2017 after the expiration of the statutory freeze.

{¶ 323} The Commission will grant rehearing on Environmental Advocates assignments of error in order to clarify certain provisions of the Stipulations and our Order. First, the Commission will clarify that customers participating in the ELR program retain their statutory right to opt out of the energy efficiency programs. The ELR programs existed long before the statutory energy efficiency and peak demand reduction mandates. Further, the Commission has long held that ELR has an economic development component and ELR is funded, in part, through the economic development rider, which is paid by all customers, including those who opt out of the energy efficiency programs.

{¶ 324} Further, the Commission will clarify that the Companies may count savings under the Customer Action Program towards the goal in the Third Supplemental Stipulation and the statutory mandates. Further, the Companies may receive lost distribution revenue to the extent that energy savings under the Customer Action Program are verifiable. However, the Companies may not receive shared savings for energy savings under the Customer Action Program. The Commission has never allowed shared savings for programs like the historic mercantile customer program which involves no action by the Companies to achieve the energy savings. The Companies have not demonstrated that this policy should be changed.

{¶ 325} Moreover, the Commission will clarify that the goal of 800,000 MWh of energy efficiency savings annually under the Third Supplemental Stipulation is simply a goal. The Companies are expected in the energy efficiency program portfolio plans to budget for the annual statutory energy efficiency mandate rather than the goal. The Commission expects the goal to be achieved by efficiently administering the approved programs and achieving energy savings for the least cost rather than by setting the program budget to the stipulated goal.

{¶ 326} Finally, the Commission will grant rehearing in order to stay the effective date of the increase in the shared savings cap. The Commission is mindful of the increases in customer bills stemming from the *ESP IV* as modified by this Fifth Entry on Rehearing. Therefore, in the interest of gradualism, we will stay the increase in the shared savings cap until such time as the Companies are no longer receiving revenue under Rider DMR. The Companies may increase the shared savings cap once they are no longer receiving revenues under Rider DMR.

xii Rider DCR.

{¶ 327} In addition to asserting that the extension of Rider DCR and increase in the revenue caps would not be in the public interest, OMAEG also contends that there is no evidence to support the necessity of Rider DCR, even with the distribution rate freeze, and the Commission's decision violates Commission precedent. *AEP Ohio ESP III* Order at 46. Initially, OMAEG argues that the Commission has failed to support the alleged necessity of Rider DCR, or the increase in its revenue caps, with any record evidence or rationale, contrary to R.C. 4903.09. Furthermore, OMAEG disputes the Commission's allowance of Rider DCR to include assets recorded in "General, Other and Service Company Allocated" plant accounts, as those assets are not directly related to maintaining reliability of distribution service, but rather constitute expenses associated with the general maintenance of the distribution system, and would be more appropriate to consider during a distribution base rate case. Additionally, OMAEG argues that the necessity of Rider DCR is questionable, given the fact that the Stipulated ESP IV provided two explicit exceptions to the base distribution rate freeze. Finally, in regard to the increase in the revenue caps, OMAEG contends that it was unreasonable for the Commission to approve this increase absent a review of the rates through a distribution rate case, especially when the Companies have provided no evidence to justify the increases, such as projected capital projects on the distribution system, and continue to meet all electric distribution targets under the current revenue caps. (OMAEG App. for Rehearing (May 2, 2016) at 32-37; Order at 92-93; Co. Ex. 154 at 13; OCC Ex. 27 at 16, 19-21; Tr. Vol. XX at 3901; Tr. Vol. XXXVI at 7575.)

{¶ 328} In this assignment of error, OMAEG claims that the Commission approved Rider DCR without record evidence in support of our decision. We disagree. Under the second prong of the three-prong test, the Commission was required to determine whether the Stipulations, *as a package*, benefit ratepayers and the public interest. The Commission thoroughly addressed the second prong in the *ESP IV* Opinion and Order, including citing to the evidence in support of our determination (Order at 92-99). Nonetheless, the record fully supports the extension of Rider DCR in modified *ESP IV* as proposed by the Stipulations. The Commission notes that FirstEnergy witness Mikkelsen testified in support of the continuation of Rider DCR (Co. Ex. 7 at 8-13) and the extension of Rider DCR to eight years (Co. Ex. 155 at 6). Further, FirstEnergy witness Fanelli testified in support of the amount of the revenue caps (Co. Ex. 50 at 3-4). Staff witness Nicodemus testified regarding the Companies' compliance with reliability standards (Staff Ex. 4 at 9-10). With respect to OMAEG's remaining assignments of error, the Commission finds that we thoroughly addressed the arguments raised by OMAEG above, and rehearing should be denied on that basis.

xiii Consideration of Quantitative and Qualitative Benefits under R.C. 4928.143(B).

{¶ 329} In its application for rehearing, NOPEC also contends that it is unlawful to consider alleged qualitative benefits that fall outside of R.C. 4928.143(B) for purposes of the second prong of the three-prong test (NOPEC App. for Rehearing (May 2, 2016) at 37-38).

{¶ 330} The Commission finds that NOPEC's argument that it is unlawful to consider qualitative benefits that fall outside of R.C. 4928.143(B) for purposes of the three-prong tests should be rejected. NOPEC claims that the Commission cannot consider qualitative benefits in the ESP versus MRO test. The Supreme Court has rejected that argument. *FirstEnergy*, 146 Ohio St. 3d 222, 2016-Ohio-3021, 54 N.E.3d 1218, at ¶ 21, 22. Further, if, in a stipulation for a proposed ESP, a utility undertakes to perform an act, and that act is in the public interest and promotes the policies of the state, the utility's agreement to perform the act should be considered a benefit under the ESP versus MRO Test. Nonetheless, NOPEC cites to no precedent in support of its position or any evidence that any specific provision of *ESP IV* is outside of the scope of R.C. 4928.143. NOPEC's assignment of error should be rejected.

xiv FirstEnergy's statutory right to withdraw its ESP.

{¶ 331} As its first assignment of error, the Companies note that the *ESP IV* Opinion and Order unlawfully restricted their right to withdraw their ESP application. FirstEnergy states that, pursuant to R.C. 4928.143(C)(2)(a), the Companies are statutorily permitted to withdraw an ESP that is modified by the Commission, which is also supported by Supreme Court of Ohio precedent. *In re Application of AEP Ohio*, 144 Ohio St.3d 1, 8, 2015-Ohio-2056, 40 N.E.3d 1060. Additionally, FirstEnergy notes that the Commission made several modifications to the Stipulated ESP IV; however, FirstEnergy seeks clarification of the "voluntary acceptance" of the modifications. Specifically, FirstEnergy requests that the Commission clarify the *ESP IV* Opinion and Order to state that the Companies' filing of tariffs before the conclusion of the application for rehearing and appeals process will be subject to the rehearing and appeal process and that the Companies' right to withdraw from the Stipulated ESP IV, as modified by the Commission, will not lapse until the conclusion of that process. (Co. App. for Rehearing (May 2, 2016) at 1-4.)

{¶ 332} In their memorandum contra, OCC/NOAC, OMAEG, and P3/EPSA assert that the Commission's Order does not unlawfully restrict FirstEnergy's right to withdraw its application for an ESP, noting the Commission was reasonably limiting the Companies' right to withdraw its ESP in order to bring finality and stability to the rates charged to customers, in accordance with R.C. 4928.143(C)(2)(b). P3/EPSA specifically state that the Commission acknowledged FirstEnergy's right to withdraw its application for an ESP and its right seek rehearing. (*ESP IV* Opinion and Order at 86, 99.)

{¶ 333} The Commission will grant rehearing to clarify that the Companies' filing of tariffs before the conclusion of the application for rehearing and appeals process will be subject to the rehearing and appeal process and that the Companies' right to withdraw from the *ESP IV*, as modified by the Commission, will not lapse until the conclusion of that process. However, once a final, non-appealable order has been issued, FirstEnergy must exercise its right to withdraw within a reasonable period of time or the filing of tariffs will be considered to constitute acceptance of modified *ESP IV*.

b. Commission conclusion.

{¶ 334} Therefore, in consideration of the entire record of this proceeding, the Commission finds that the Stipulations, as modified by the Commission, do not violate any important regulatory principle or practice.

E. *The ESP, as Modified by the Commission, Continues to Pass the MRO versus ESP Test.*

1. ASSIGNMENTS OF ERROR AND ARGUMENTS OF THE PARTIES

a. *Appropriate Application of ESP versus MRO Test.*

{¶ 335} P3/EPSA and RESA argue that, as *ESP IV* has an eight-year term, and R.C. 4928.143(E) requires a comprehensive review after the first four years to determine if the ESP should continue, the Commission should be limited to only consider the first four years of *ESP IV* when conducting its analysis of the ESP versus MRO test. OCC/NOAC and NOPEC further argue the Commission exceeded it authority in performing the ESP versus MRO test when it unlawfully considered qualitative benefits in its analysis (OCC/NOAC App. for Rehearing (May 2, 2016) at 50-51; NOPEC App. for Rehearing (May 2, 2016) at 24-28; Order at 98). NOPEC and Power4Schools also assert that, even if the Commission could consider qualitative benefits for purposes of the ESP versus MRO test, which they claim it cannot, the Commission erred to consider qualitative factors that fall outside the provisions of R.C. 4928.143(B), muddling the two tests and their different applications to Stipulated ESP IV. *CSP II* ¶ 32-34. (NOPEC App. for Rehearing at 35-38; Power4Schools App. for Rehearing at 8; Order at 119-20.)

{¶ 336} FirstEnergy argues, however, that the statute contains no language that would authorize the Commission to only consider one-half of a proposed ESP for purposes of the ESP versus MRO test. Additionally, FirstEnergy claims that the Commission has consistently held that it may include the consideration of qualitative factors in its analysis of the ESP versus MRO test, and such consideration has been upheld by the Supreme Court of Ohio. *CSP I*; *DP&L ESP II* Order at 48; *FirstEnergy ESP III* Order at 55-57; *AEP Ohio ESP II*, Opinion and Order (Aug. 8, 2012) at 73-77. Moreover, the Companies assert that the Supreme Court of Ohio has held that legislative history of a statute should not be considered unless the language of the statute is first determined to be ambiguous, which is not the case here. *Dunbar v. State*, 136 Ohio St.3d 181, 2013-Ohio-2163, 992 N.E.2d 1111. FirstEnergy states that adopting NOPEC's interpretation of the statutory language providing the method for conducting the ESP versus MRO test would essentially require the Commission to ignore the phrase "all other terms and conditions of the statute," contrary to rules of statutory construction and the Commission precedent, as illustrated above. R.C. 4928.143(C)(1).

{¶ 337} We find no merit in these arguments and assignments of error and note that we sufficiently addressed many of these arguments in the *ESP IV* Opinion and Order (Order at 112-13, 117). The Supreme Court of Ohio has held that the Commission is not bound to a strict price comparison to determine if an ESP is more favorable in the aggregate as compared to the expected results of an MRO. Contrarily, the Supreme Court found that the statute instructs the Commission to consider pricing and all other terms and conditions when evaluating whether the proposed ESP is, in fact, more favorable in the aggregate than an expected MRO. *CSP I* at ¶ 27; *FirstEnergy*, 146 Ohio St. 3d 222, 2016-Ohio-3021, 54 N.E.3d 1218, at ¶ 21-22. As such, we find that the Commission did not err when we considered qualitative factors for purposes of the ESP versus MRO test in the *ESP IV* Opinion and Order. Additionally, just as the Supreme Court found no ambiguity in the statute's language, we find that the statute remains unambiguous in this particular context and we will not consider the legislative history of R.C. 4928.143(C)(1).

{¶ 338} Moreover, in response to RESA and P3/EPSA's argument that we should be limited in our review to only consider the first four years of *ESP IV*, we note that these parties have failed to cite to any supporting precedent. Additionally, the statute makes no such instruction, but contrarily, directs the Commission to determine "whether the plan, including its then-existing pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, *continues to be more favorable in the aggregate and during the remaining term of the plan* as compared to the expected results that would otherwise apply" under an MRO. R.C. 4928.143(E) (emphasis added). This provision is merely intended to act as a "check-up" and we will not extrapolate a more stringent test in our decision today. As a final point, if we were to adopt RESA and P3/EPSA's interpretation, we may deter utility companies from filing ESP applications that exceed a three-year term, potentially preventing customers from experiencing the benefits derived from an ESP exceeding three years, such as the one approved in our Order. Accordingly, these assignments of error will be denied.

b. Quantitative Factors.

{¶ 339} Staff asserts that the approval of Rider DMR and the rejection of the Companies' Proposal would result in a plan which passes the MRO v. ESP test on a quantitative basis, as the ESP would result in approximately $51.1 million in benefits that would not otherwise be available under an MRO (Co. Ex. 206 at 18; Staff Ex. 14 at 2-4). FirstEnergy and MSC agree with Staff that the ESP is quantitatively at least $51.1 million more favorable than an MRO (Co. Ex. 206 at 20). Staff and FirstEnergy note that the $393 million proposed to be collected under Rider DMR may potentially be available to the Companies under an MRO, pursuant to R.C. 4928.142, which allows the Commission to adjust a utility's most recent SSO to address any emergency that threatens the utility's financial integrity (Co. Ex. 206 at 19-20; Staff Ex. 14 at 3-4). Additionally, Staff states it would advocate for equivalent revenues in a base rate proceeding. Accordingly, these parties assert that the Rider DMR revenues used to support grid modernization would essentially be "a wash" for purposes of the ESP versus MRO test.

{¶ 340} OMAEG, Sierra Club, OCC/NOAC, CMSD and P3/EPSA contend that Staff failed to consider a number of factors that would determine that Rider DMR, combined with the other provisions of the Companies' approved *ESP IV*, is not more favorable in the aggregate than an MRO as required by R.C. 4928.143(C)(1). While Staff and the Companies suggest that Rider DMR would have no impact for purposes of the ESP versus MRO test, OMAEG, Sierra Club, CMSD, NOPEC and P3/EPSA maintain that this would not be the case. Specifically, these parties argue that, pursuant to R.C. 4928.142(D), the Commission is authorized to adjust an EDU's most recent SSO price by any amount that the Commission determines to be necessary to "address any emergency that threatens the utility's financial integrity," but Staff provided no evidence as to whether "an emergency" existed for purposes of this statute that would allow FirstEnergy Corp. or the Companies to collect equivalent revenues under an MRO. Arguing that recovery of equivalent revenues would not be permitted under an MRO, OMAEG, OCC/NOAC, Sierra Club, CMSD, NOEPC, and P3/EPSA claim the costs would be higher under an ESP, thereby making the ESP less favorable than the MRO under the statutory test. (Staff Ex. 14 at 3-4; Rehearing Tr. Vol. II at 429, 435, 437-40, 447, 450; Rehearing Tr. Vol. III at 511-19.) Moreover, CMSD and NOPEC contend that for the costs of Rider DMR to be considered "a wash" for purposes of this test, Staff would be required to show in this proceeding that equivalent revenues would be authorized in a contemporaneous MRO to address a threat to the Companies' financial integrity, adding that such a showing was not made and the evidence that the Companies would be willing to absorb millions of dollars in customer credits under their own proposal indicates a contrary situation (NOPEC App. for Rehearing (May 2, 2016) at 32-34; Co. Ex. 197 at 4). On a related note, Sierra Club argues that because R.C. 4928.142(D) only allows for adjustments to the SSO price that applies to non-shopping customers, an adjustment under this provision could not replace the non-bypassable charge sought under Rider DMR. Sierra Club adds that Staff presented no evidence in the record that the proposed Rider DMR revenues could be collected through an alternative means, adding that, unlike a base rate case or Rider AMI, customers would not receive anything in return for their additional payments. *Dayton Power & Light Co. v. Pub. Util. Comm.*, 4 Ohio St.3d 91, 103, 447 N.E.2d 733 (1983); *Office of Consumers' Counsel v. Pub. Util. Comm.*, 67 Ohio St.2d 153, 164, 167, 423 N.E.2d 820 (1981).

{¶ 341} Additionally, as the proposed Rider DMR also includes the possibility for a two-year extension, OMAEG contends that the difference between costs of the ESP and the MRO would be even more significant (Rehearing Tr. Vol. II at 453; Rehearing Tr. Vol. IV at 977). As a result, NOPEC, Sierra Club, and CMSD claim that, at a minimum, the ESP containing Rider DMR is quantitatively $341.9 million less favorable than an MRO, and assuming the same level of funding during the two-year extension period, $603.9 million less favorable (Staff Ex. 13 at 7). Additionally, although CMSD acknowledges that there may be a quantifiable benefit associated with maintaining an investment grade rating for FirstEnergy Corp., no such analysis has been provided during this proceeding. Finally, restating many of their arguments provided earlier relating to the alleged economic development benefits attributed to maintaining FirstEnergy Corp.'s headquarters and nexus of operations in Akron, Ohio, CMSD, OMAEG, Sierra Club, OCC/NOAC contend that this condition of Rider DMR not be considered a benefit for purposes of the statutory ESP versus MRO test. CMSD adds that inclusion of this "benefit" to the ESP versus MRO test would violate R.C. 4903.10, as the Companies could have made these arguments during the initial hearing. OHA further contends that the Commission may not rely on the other benefits of the Stipulated ESP IV, for purposes of the ESP versus MRO test, because no party has agreed to incorporate Rider DMR into the Stipulated ESP IV. At the very least, OHA argues that additional rehearing would be required to determine whether the modified Stipulated ESP IV, incorporating Rider DMR, would pass the Commission's three-prong test and the statutory MRO versus ESP test.

{¶ 342} Moreover, to the extent that Staff and the Companies argue that maintaining FirstEnergy's corporate headquarters in Akron, Ohio is a benefit for purposes of the ESP versus MRO test, P3/EPSA, OCC/NOAC, OMAEG, CMSD and Sierra Club contend that there is no reasonable basis for its inclusion since there was no indication that the headquarters would be moved prior to the proposal of Rider DMR and there is sufficient evidence in the record to show that FirstEnergy had already committed to keep its headquarters in Akron, Ohio (Co. Ex. 154 at 17; Rehearing Tr. Vol. X at 1603-04). Accordingly, OMAEG, OCC/NOAC, P3/EPSA, CMSD, and NOPEC argue that the inclusion of Rider DMR with the already approved portions of Stipulated ESP IV would not result in an ESP that is quantifiably more favorable than an MRO.

{¶ 343} FirstEnergy notes that the intended uses of the Rider DMR revenues would be considered distribution-related cash outflows and would be recoverable in a base rate case or the Companies' existing Rider AMI or comparable rider. Furthermore, FirstEnergy contends that grid modernization related expenses are recoverable outside of ESPs, citing to the creation of Rider AMI. (Co. Ex. 206 at 9; Rehearing Tr. Vol. X at 1607.) In response to arguments that Rider DMR would not be considered a "wash" for purposes of the ESP versus MRO test, FirstEnergy claims that such arguments were rejected by the Commission and the Supreme Court of Ohio. *FirstEnergy ESP III* Order at 50-52, 55-57; *FirstEnergy*, 146 Ohio St. 3d 222, 2016-Ohio-3021, 54 N.E.3d 1218. FirstEnergy also emphasizes the fact that the base rate freeze is part of the Stipulated ESP IV, and when considering the results of an MRO for purposes of this test, one must eliminate conditions arising under the ESP, thus, the base rate freeze would not exist if there was no ESP in place. Despite many intervenors arguing that the condition to maintain FirstEnergy Corp.'s headquarters in Akron, Ohio already existed, FirstEnergy notes that without Rider RRS in place, there is no such previous commitment and Staff recognized this fact when it placed this condition on Rider DMR (Co. Ex. 154 at 17).

{¶ 344} In addition, as assignments of error raised in their applications for rehearing, NOPEC, OCC/NOAC, OMAEG, and Power4Schools state that the Commission erred in its quantitative analysis because it failed to remove $51.1 million in shareholder funding from the ESP versus MRO test and failed to quantify the costs of Riders GDR, DCR, and Unbundled Distribution Rate Rider, noting such costs could prove to be quite significant. (NOPEC App. for Rehearing (May 2, 2016) at 30; Power4Schools App. for Rehearing (May 2, 2016) at 5-8; OCC/NOAC App. for Rehearing (May 2, 2016) at 51-53; OMAEG App. for Rehearing (May 2, 2016) at 66-67; Order at 119). NOPEC further asserts that it is unlawful to value the placeholder Rider GDR and Rider RCE at zero, noting that omitting costs associated to these two riders prevents the Commission from conducting an accurate analysis of the ESP versus MRO test (NOPEC App. for Rehearing (May 2, 2016) at 31-32). Lastly, OMAEG and NOPEC note that the Commission erred in its Order by including the $51.1 million attributed to economic development, job retention, and low income funding from the quantitative analysis (NOPEC App. for Rehearing (May 2, 2016) at 35; OMAEG App. for Rehearing (May 2, 2016) at 67; Order at 113, 119.)

{¶ 345} In its memorandum contra, FirstEnergy contends that the Commission was correct to treat Rider DCR as a "wash" for purposes of the ESP versus MRO test, notably because these distribution-related capital costs would also be recoverable under an MRO through a base distribution rate case and there is no quantifiable cost associated with this provision in the Stipulated ESP IV (Order at 119; Co. Ex. 50 at 7; Tr. Vol. XX at 3929). Along those same lines, the Companies contend that Rider GDR was appropriately removed from consideration for the purposes of this test as there are no recoverable amounts yet projected for this rider (Order at 93). The Companies further argue that funding commitments have been recognized in prior ESPs before the Commission and FirstEnergy witness Mikkelsen thoroughly explained that these commitments were made specifically as part of Stipulated ESP IV and would not exist otherwise. *FirstEnergy ESP III* Order at 48-56; *FirstEnergy ESP II* Order at 45. (Tr. Vol. XXXVI at 7735-36.)

c. *Qualitative Factors.*

{¶ 346} Moreover, Staff, FirstEnergy, and MSC note that, in the event the Commission were to determine that Rider DMR would not result "as a wash," Rider DMR, when combined with the already-approved portions of the Stipulated ESP IV that provide a base rate freeze, rate options, energy efficiency, and resource diversity, is still preferable to the MRO on a qualitative basis, emphasizing once again the importance of grid modernization for the state of Ohio (Co. Ex. 206 at 20-21). Further, FirstEnergy notes that Rider DMR would enhance the qualitative benefits of *ESP IV* by advancing Ohio policy by encouraging smart grid programs and infrastructure, as well as distributed generation (Co. Ex. 14 at 4; Rehearing Tr. Vol. II at 464; Rehearing Tr. Vol. IV at 844-45). FirstEnergy also adds that the Companies will face considerable harm in the event their investment grade rating status is lost (Co. Ex. 206 at 6-8; Staff Ex. 13 at 5-6).

{¶ 347} Although Staff witness Turkenton testified that the qualitative benefits provided in the Order would still exist under Rider DMR, in addition to grid modernization and increasing diversity of supply and suppliers, OMAEG, Sierra Club, OHA, OEC/EDF, and NOPEC once again assert that there are no real commitments that the revenues received under Rider DMR are to be used for distribution grid modernization. OMAEG adds that Staff witness Choueiki even acknowledged that Rider DMR was created in order to provide necessary credit support to the FirstEnergy Corp. and the Companies, instead of grid modernization. Further, OMAEG and NOPEC also contend that Staff's purported qualitative benefit of diversity of suppliers and supplies is also largely overstated, noting that Rider DMR may actually deter other generation suppliers from entering the market upon seeing the competitive advantage provided to FirstEnergy Corp. and its subsidiaries. (OMAEG Ex. 39 at 7-8; Rehearing Tr. Vol. III at 584, 702-03, 957-58; Rehearing Tr. Vol. IV at 960, 1001.) OCC notes that there was a considerable failure on behalf of Staff to provide evidence that ratepayers will actually experience these qualitative benefits, such that the Commission would violate R.C. 4903.09 in the event that Rider DMR is approved. Sierra Club also notes that even if these purported qualitative benefits existed under Rider DMR, they would not outweigh the considerable cost of approving the rider.

{¶ 348} CMSD also notes that Staff and the Companies failed to establish that Rider DMR is of "equivalent value" to the original Rider RRS arrangement approved by the Commission, thus, failing to satisfy the severability provision found in the Third Supplemental Stipulation. Specifically, CMSD and OHA point out that the proposed Rider DMR does not attempt to replace the retail rate stability benefits, resource diversity benefits, and avoidance of negative economic impacts that Staff relied upon when approving Rider RRS. Further, CMSD argues that approving Rider DMR would jeopardize FirstEnergy's commitment for a distribution rate freeze over the course of *ESP IV*, as the charges under Rider DMR would be considered a distribution-related rate.

Thus, CMSD contends that the qualitative benefits associated with Rider DMR are extremely limited when compared to the Companies' Proposal.

{¶ 349} FirstEnergy initially notes that many of the intervenors' arguments are premised on the basis that Rider DMR is either qualitatively inferior to the original Rider RRS mechanism or the Companies' Proposal or lacks sufficient qualitative benefits to warrant approval. FirstEnergy notes that these arguments make no mention of a comparative result under an MRO, which is the actual test to be utilized by the Commission. Furthermore, the Companies claim that all of the qualitative benefits the Commission relied on in its Order to determine the ESP was, in fact, more favorable than an MRO, which includes the base distribution rate freeze, still apply to the Stipulated ESP IV incorporating Rider DMR.[19] (Order at 119-120). Without unnecessarily duplicating its earlier arguments in response to intervenors claiming that there was no real commitment by the Companies to invest in grid modernization, FirstEnergy simply notes that the revenues received under Rider DMR will provide credit support to enable the Companies to maintain investment grade ratings and access the necessary capital required to engage in their grid modernization initiative over the term of Stipulated ESP IV. As such, the Companies assert that the ability to maintain their investment grade ratings is certainly a qualitative benefit of Rider DMR, adding that a quantitative analysis of such a benefit would be nearly impossible to calculate. (Co. Ex. 206 at 5-8; Staff Ex. 13 at 5-6; Rehearing Tr. Vol. X at 1627-28.)

{¶ 350} Additionally, FirstEnergy asserts that several other qualitative benefits still exist under the Stipulated ESP IV, including, but not limited to: base distribution rate freeze and the resulting rate stability; supplier web portal and proposed changes to the supplier tariffs and electric service regulations, which will support retail competition by removing barriers; continuation of Rider ELR and the associated economic development,

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19 These benefits include the base rate freeze, various rate options, the CO_2 emission reductions, energy efficiency programs, grid modernization, a potential SFV rate design, and resource diversity through battery technology and renewable resources.

job retention, and system reliability benefits with that rider; support of the competitive retail market; continuation of the Automaker credits, which encourages economic development and increased production in this state; a slower phase-out of Rider EDR(d); continuation of a TOD pricing option under Rider GEN, providing customers more opportunities to learn about time-differentiated pricing; Rider NMB pilot program, allowing customers the opportunity to better align costs with actual cost causation; commercial HLF/TOU rate, which will allow customers to reduce costs and learn about time-of-use rates; business case filing for grid modernization initiatives; environmental efficiency efforts and resource diversification commitments; and a commitment to file a future application to transition to decoupled residential base distribution rates (Co. Ex. 8 at 11-12; Co. Ex. 50 at 9; Co. Ex. 154 at 9-18; Co. Ex. 155 at 5, 11-13; Tr. Vol. II at 244, 274; Tr. Vol. III at 622-23; Tr. Vol. XX at 3901, 3940).

2. COMMISSION DECISION

{¶ 351} The Commission finds that *ESP IV*, as modified by this Fifth Entry on Rehearing, is more favorable in the aggregate than the expected results of an MRO under R.C. 4928.142. The Supreme Court of Ohio has held that R.C. 4928.143(C)(1) "does not bind the commission to a strict price comparison. On the contrary, in evaluating the favorability of a plan, the statute instructs the commission to consider 'pricing and all other terms and conditions'" (emphasis in the original). *CSP I* at ¶ 27 (quoting R.C. 4928.143(C)(1)). *Accord In re Application of Ohio Edison Co.*, Slip Opinion 2016-Ohio-3021 at ¶ 22.

{¶ 352} Under modified *ESP IV*, generation rates to be charged to SSO customers will continue to be established through a CBP; therefore, generation rates in the modified *ESP IV* should be equivalent to the results which would be obtained under R.C. 4928.142. Further, the record demonstrates that there are quantitative and qualitative benefits contained in modified *ESP IV* that make modified *ESP IV* more favorable in the aggregate than the expected results under 4928.142. These benefits, which further the policy objective enumerated in R.C. 4928.02 include modernization of the grid through deployment of advanced technology and procurement of renewable energy resources and promotion of competition by enabling competitive providers to offer innovative products to serve customers' needs.

{¶ 353} The Commission finds that, on a quantitative basis, the ESP is more favorable quantitatively than an MRO. In rehearing testimony, Staff witness Turkenton testified that *ESP IV* contains $51.1 million in quantitative benefits over an MRO (Staff Ex. 14 at 3). Ms. Turkenton noted that the $51.1 million in benefits are funded by shareholders over an eight-year period and will be used for economic development, low-income customers and a customer advisory agency in the Companies' service territory. (Staff Ex. 14 at 3.) FirstEnergy witness Mikkelsen agreed with Staff's assessment of the quantitative benefits; Ms. Mikkelsen also claimed that the quantitative benefits of FirstEnergy Corp. maintaining its corporate headquarters in Akron Ohio, which the Companies value at $568 million annually, are equal to or greater than the revenues proposed under Rider DMR (Co. Ex. 206 at 19-20; Co. Ex. 205 at 4-5). OCC witness Kahal acknowledged that there is economic value to Akron in retaining FirstEnergy Corp.'s headquartes in Akron (Rehearing Tr. Vol. VIII at 1404). Staff witness Turkenton testified that, although Staff is proposing additional distribution revenues of $131 million per year for three years through Rider DMR, these revenues would have no impact on the ESP versus MRO test because equivalent revenues could potentially be recovered through an MRO application under R.C. 4928.142 (Staff Ex. 14 at 3-4).

{¶ 354} In determining whether revenues equivalent to Rider DMR could be recovered through a hypothetical MRO application, the Commission first notes that R.C. 4928.142 authorizes the Commission under an MRO to assess such charges as the Commission "determines necessary to address any emergency that threatens the utility's financial integrity or to ensure that the resulting revenue available to the utility for providing the standard service offer is not so inadequate as to result, directly or indirectly in a taking of property without compensation pursuant to Section 19 of Article I, Ohio Constitution." R.C. 4928.143(D). The Commission has never approved an application under this section; thus, we have never determined the standards under which we would review an application under this section. Therefore, for purposes of the ESP versus MRO test, we must construe this section as if a hypothetical application for an MRO had been submitted based upon the same facts as are in the record in this case.

{¶ 355} The Commission notes that electric utilities, like all public utilities, can seek emergency rate relief under R.C. 4909.16, and the Commission has provided factors or indicators for determining whether emergency rate relief can be granted. *In re Cleveland Elec. Illum. Co.*, Case No. 88-170-EL-AIR, et al., Opinion and Order (Aug. 23, 1988), 1988 WL 1617994 (Ohio P.U.C.). Although we cannot interpret the provision in R.C. 4928.143(D) as simply replicating or being redundant to R.C. 4909.16, the factors specified by the Commission for cases brought under R.C. 4909.16 provide guidance for factors the Commission may examine in a hypothetical application for a charge under R.C. 4928.143.

{¶ 356} One of the indicators the Commission would consider in an application under R.C. 4909.16 which is applicable to the facts of this proceeding is whether an electric utilities' bonds are rated "BBB-" by S&P, "at the 'ragged' edge of investment grade" as characterized by the Commission. Case No. 88-170-EL-AIR at 8. In the present proceeding, the record is clear that the FirstEnergy Corp.'s bond rating is "BBB-" by S&P, one notch above the cutoff for investment grade (Staff Ex. 13 at 5). As noted by the Commission above, the record also demonstrates that S&P takes an "umbrella" approach to credit ratings and that a downgrade to FirstEnergy Corp. would result in a downgrade to the Companies (Rehearing Tr. Vol. III at 595-596, 680). Further, on April 28, 2016, S&P revised FirstEnergy Corp.'s rating outlook from stable to negative (Staff Ex. 13 at 5, fn. 4; Att. 3). Likewise, on January 20, 2016, Moody's issued a credit opinion stating that certain factors could lead to a downgrade of FirstEnergy Corp. to below investment grade (Staff Ex. 13 at 4; OMAEG Ex. 37 at 9). Although Moody's rates FirstEnergy Corp. and its affiliates separately, Cleveland Electric Illuminating and Toledo Edison are both one notch above the cutoff for investment grade while Ohio Edison is three notches above investment grade; and a downgrade to FirstEnergy Corp. would significantly impact the Companies. We believe that a potential downgrade to below investment grade could be construed as an "emergency that threatens the utility's financial integrity" under R.C. 4928.142(D).

{¶ 357} Accordingly, we find that, based upon the facts presented in this case, it is likely that the Commission would grant relief in response to a hypothetical application under R.C. 4928.142(D). Therefore, we agree with the testimony of Staff witness Turkenton that revenues under Rider DMR should be excluded from the quantitative analysis because equivalent revenues are likely to be recovered under a hypothetical MRO application pursuant to R.C. 4928.142(D) and that, on a quantitative basis, the ESP is more favorable than an MRO in the amount of $51.1 million (Staff Ex. 14 at 3-4).

{¶ 358} With respect to the qualitative analysis, the Commission finds that the *ESP IV*, as modified by this Fifth Entry on Rehearing, is more favorable than an MRO. Rider DMR will provide credit support to FirstEnergy, which will allow the Companies to access capital markets and obtain favorable borrowing terms and conditions, enabling investment in a more extensive grid modernization program (Staff Ex. 15 at 14-15). In rehearing testimony, RESA witness Crockett-McNew and Staff witnesses agreed that grid modernization will promote customer choice and promote the state's competitiveness in the global marketplace (RESA Ex. 7 at 7; Staff Ex. 15 at 15-16; Staff Ex. 14 at 4). Moreover, the Stipulations previously approved by the Commission provide that the Companies will: (1) modernize distribution infrastructure through the filing of a business plan for the deployment of smart grid technology and advanced metering infrastructure in accordance with state policy set forth in R.C. 4928.02(D) (Co. Ex. 154 at 9-10); (2) promote resource diversity by investing in utility scale battery technology and by procuring or constructing new renewable energy resources (Co. Ex. 154 at 11-12; Co. Ex. 155 at 13); and (3) encourage energy efficiency by reforming rate design to eliminate disincentives for the Companies to promote energy efficiency and conservation programs and to promote the principle of cost causations (Co. Ex. 154 at 12-13; Co. Ex. 155 at 13).

{¶ 359} Further, consistent with the *ESP IV* Opinion and Order issued in this case and based upon the testimony presented on rehearing, we find that there are additional qualitative benefits of the ESP, which would not be provided in an MRO (Order at 119; Staff Ex. 14 at 4; Co. Ex. 206 at 20). These qualitative benefits include: (1) continuation of the distribution base rate freeze until June 1, 2024, to provide rate certainty, predictability and stability for customers (Co. Ex. 154 at 13); (2) continuation of multiple rate options and programs to preserve and enhance rate options for various customers provided in previous ESPs (Co. Ex. 154 at 14-15); (3) establishment of a goal to reduce CO_2 emissions by FirstEnergy Corp. with periodic reporting requirements (Co. Ex. 154 at 11; Co. Ex. 155 at 13); (4) promotion of cost-effective energy efficiency programs, with a goal of saving 800,000 MWh of electricity annually (Co. Ex. 154 at 11-12); and (5) programs to promote the use of energy efficiency programs by small businesses, in accordance with state policy set forth in R.C. 4928.02(M) (Co. Ex. 155 at 5).

{¶ 360} Therefore, the Commission finds that, based upon the entire record of this proceeding and as modified in this Fifth Entry on Rehearing, *ESP IV*, including its pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, is more favorable in the aggregate as compared to the expected results that would otherwise apply under an MRO pursuant to R.C. 4928.142.

{¶ 361} Finally, as discussed above, in this Fifth Entry on Rehearing, the Commission has adopted the Staff's alternative proposal, in the form of Rider DMR, to the Companies' Proposal presented in their application for rehearing, and the Commission has directed the Companies to terminate Rider RRS. Therefore, as described in more detail below, all assignments of error regarding the ESP versus MRO test, as originally determined by the Commission in the *ESP IV* Opinion and Order and based upon Rider

RRS as originally modified and approved by the Commission, are moot and should be denied.

IV. PROCEDURAL MATTERS

A. *Pending Motions for Protective Order*

{¶ 362} Numerous motions for protective orders have been filed in the docket in this proceeding regarding documents filed under seal.[20] The Commission notes that R.C. 4905.07 provides that all facts and information in the possession of the Commission shall be public, except as provided in R.C. 149.43, and as consistent with the purpose of Title 49 of the Revised Code. R.C. 149.43 specifies that the term "public records" excludes information which, under state or federal law, may not be released. The Supreme Court of Ohio has clarified that the "state or federal law" exemption is intended to cover trade secrets. *State ex rel. Besser v. Ohio State Univ.*, 89 Ohio St.3d 396, 399, 2000-Ohio-207, 732 N.E.2d 373. Similarly, Ohio Adm.Code 4901-1-24 allows the Commission to protect the confidentiality of information contained in a filed document "to the extent that state or federal law prohibits release of the information, including where the information is deemed * * * to constitute a trade secret under Ohio law, and where non-disclosure of the information is not inconsistent with the purposes of Title 49 of the Revised Code." Moreover, Ohio law defines a trade secret as "information * * * that satisfies both of the following: (1) It derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use. (2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." R.C. 1333.61(D).

{¶ 363} Applying the requirements that the information have independent economic value and be the subject of reasonable efforts to maintain its secrecy pursuant to

[20] Specifically, the Commission is referencing pending motions for protective order that were filed on or after March 31, 2016, that have not otherwise been addressed in this proceeding.

R.C. 1333.61(D), as well as the six-factor test set forth by the Ohio Supreme Court in *State ex rel. Plain Dealer v. Ohio Dept. of Ins.*, 80 Ohio St.3d 513, 524-525, 1997-Ohio-75, 687 N.E.2d 661, we find that the documents filed under seal in this docket contain trade secret information. Their release, therefore, is prohibited under state law. We also find that nondisclosure of this information is not inconsistent with the purposes of Title 49 of the Revised Code. Finally, we note that the filings and documents have been redacted to remove the confidential information and the public versions of the pleadings and documents have been docketed in this proceeding. Accordingly, we find that all pending motions for protective order are reasonable and should be granted. Further, the protective orders previously granted in this proceeding shall be extended in accordance with the time frame set forth below.

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

B. *Assignments of Error and Arguments Relating to Previous Attorney Examiner Rulings*

1. THE COMPANIES' MOTION TO STRIKE ARGUMENTS REGARDING THE LEGISLATIVE HISTORY OF S.B. 221

{¶ 365} NOPEC initially notes that the Commission erred in granting the Companies' motion to strike arguments regarding the legislative history of S.B. 221, which

NOPEC claims the Commission is permitted to consider pursuant to R.C. 1.49. Further, NOPEC asserts that Supreme Court of Ohio precedent permits the Commission to consider the draft legislation and Legislative Service Commission (LSC) bill analysis as evidence to support its interpretation of legislative intent. (*ESP IV* Opinion and Order at 36-37.)

{¶ 366} FirstEnergy argues that NOPEC simply asserts the same arguments it raised in its initial brief to this proceeding, adding that, based on the arguments provided in the ESP versus MRO test analysis, the Commission may only consider legislative history in the event the statute is determined to be ambiguous. Consistent with its earlier arguments, FirstEnergy notes that R.C. 4928.143(C)(1) is not ambiguous as to the inclusion of qualitative factors in the Commission's consideration, therefore, the Commission acted reasonably when it granted the Companies' motion to strike portions of NOPEC's initial brief. (*ESP IV* Opinion and Order at 37.) We agree with FirstEnergy that we sufficiently addressed this issue in our *ESP IV* Opinion and Order and we will not expand on that discussion at this time. Accordingly, NOPEC's assignments of error raised pertaining to these issues are denied.

2. Rulings of the Attorney Examiner to Exclude Evidence from the Record

{¶ 367} During Rehearing, the attorney examiners granted in part the Companies' motions to strike portions of the Rehearing testimony of several intervening parties' witnesses, as portions of their testimony were determined to be cumulative, inadmissible hearsay, or beyond the scope of Rehearing (Rehearing Tr. Vol. IV at 771-74, 780, 801-03, 862-66, 875, 882; Rehearing Tr. Vol. V at 1127, 1149-51).

{¶ 368} OMAEG, Sierra Club, NOPEC, P3/EPSA, and OCC/NOAC argue that the attorney examiners erred in striking portions of the testimony of five witnesses,[21] all of

[21] Sierra Club witness Comings, OCC/NOAC witness Wilson, OCC witnesses Kahal and Rose, and P3/EPSA witness Kalt.

whom provided, to some extent, updated data and price forecasts to include in the analysis of the Companies' Proposal. These parties note that striking various portions of intervenor testimony that sought to update price forecasts is not only prejudicial to the parties of this proceeding, but directly conflicts with the Commission's ability to review all appropriate and necessary information to make an informed decision as to the actual value of the Companies' Proposal and Rider DMR to FirstEnergy's customers. Furthermore, CMSD states that it strongly disagrees with the attorney examiners' denial of the motion to strike FirstEnergy witness Murley's testimony and urges the Commission to reconsider that ruling (Rehearing Tr. Vol. IX at 1434). OMAEG also states that the attorney examiner erred in striking portions of Dr. Choueiki's testimony (Rehearing Tr. Vol. V at 1264-65). FirstEnergy contends that the attorney examiners were well within their authority, pursuant to Ohio Adm.Code 4901-1-27, to strike these portions of intervenor and Staff testimony and argues their rulings were correct. FirstEnergy initially states that these intervening parties have provided no legal basis for reversing the attorney examiners' routine evidentiary rulings. Additionally, FirstEnergy notes that the attorney examiners were correct to strike cumulative material contained in intervenor testimony or material that went beyond the scope of Rehearing, as directed by the Commission's prior decisions in this proceeding. Further, FirstEnergy claims that the attorney examiners were correct to exclude inadmissible hearsay contained in intervenor testimony, specifically the Rehearing testimony of Sierra Club witness Comings (Rehearing Tr. Vol. IV at 771-74). As a final matter, the Companies assert that the attorney examiners correctly excluded a portion of Dr. Choueiki's testimony, noting he was speculating on the preemptive powers of FERC, inconsistent with Supreme Court of Ohio precedent (Rehearing Tr. Vol. V at 1264-65).

{¶ 369} As an initial matter, we note that these assignments of error and arguments are now moot, as the Commission is modifying the *ESP IV* Opinion and Order to approve Rider DMR rather than maintain the original Rider RRS mechanism or approve the Companies' Proposal, to which these updated forecasts and financial data would apply. As such, it is unnecessary to evaluate these arguments at this time. Nonetheless, we find that the attorney examiners' rulings to grant in part and deny in part portions of the Rehearing testimony presented by the aforementioned witnesses did not deviate from Commission practice and were consistent with applicable law and Commission rules, specifically Ohio Adm.Code 4901-1-27. Furthermore, such decisions were consistent with the prior decisions of this proceeding, which limited the scope of Rehearing to only the Companies' Proposal and Rider DMR (First Entry on Rehearing at 3; Third Entry on Rehearing at 9, 11-12; June 3, 2016 Entry at 4). We similarly find that the attorney examiners were correct in their ruling regarding Ms. Murley's testimony, further noting that FirstEnergy's recommendation to include a portion of the results of her projected economic impact analysis to the overall calculation of Rider DMR has summarily been rejected, and, thus, this argument is also moot.

C. *FirstEnergy's Motions to Strike Portions of Rehearing Briefs*[22]

{¶ 370} FirstEnergy filed motions to strike portions of the Rehearing briefs of NOPEC, IMM, OHA, and Direct Energy, as well as portions of the Rehearing reply briefs filed by NOPEC and Sierra Club. Direct Energy, OHA, and NOPEC filed memoranda contra FirstEnergy's motion to strike portions of their Rehearing briefs, to which FirstEnergy filed replies. Further, Sierra Club and NOPEC filed memoranda contra FirstEnergy's motion to strike portions of their Rehearing reply briefs, to which FirstEnergy filed replies.

{¶ 371} In its motions to strike portions of NOPEC's Rehearing brief and Rehearing reply brief, FirstEnergy asserts that NOPEC improperly relied on testimony that was excluded from the record and it is highly improper to allow NOPEC to argue this information in its Rehearing brief (Rehearing Tr. Vol. IV at 780, 786, 801-03, 864-66, 875-76, 884). In its memorandum contra, NOPEC notes that, pursuant to Ohio Adm.Code 4901-1-

22 P3/EPSA filed a motion to strike correspondence filed in the docket by FirstEnergy on May 4, 2016. However, during the evidentiary hearing, the attorney examiners entertained arguments regarding that document and it was admitted into the record. (Co. Ex. 198; Rehearing Tr. Vol. II at 284). As such, that motion to strike, and subsequent filings in response to that motion, are now moot and will not be addressed.

15(F), the Commission stands in the place of an appellate court in initially reviewing whether an attorney examiner's improper exclusion of evidence, preserved by proffer, affected a party's substantial rights.

{¶ 372} In its motion to strike portions of IMM's Rehearing brief, FirstEnergy asserts IMM improperly relies upon material that is not in the evidentiary record, specifically, FirstEnergy witness Mikkelsen's testimony that was stricken by Ms. Mikkelsen when she was on the stand (Rehearing Tr. Vol. I at 46).

{¶ 373} In its motion to strike portions of OHA's Rehearing brief, FirstEnergy asserts that OHA relied on a news article containing hearsay statements that are not a part of the evidentiary record and testimony that the attorney examiners specifically excluded from the record (Rehearing Tr. Vol. VIII at 1380-83). In its memorandum contra, OHA states that it is voluntarily removing the quoted statement on page 12 of its Rehearing brief, noting this was an inadvertent error and the statement's inclusion makes no difference on the substantive arguments forwarded by OHA. However, as to the newspaper articles cited in its Rehearing brief, OHA argues that these statements are not hearsay as they were not offered for the truth of the matter asserted.

{¶ 374} In its motion to strike portions of Direct Energy's Rehearing brief, the Companies assert that Direct Energy relied upon material that is not in the evidentiary record and, moreover, is information of which the attorney examiners expressly declined to take administrative notice when OCC first raised this issue. FirstEnergy also notes there is no basis for taking administrative notice of this information. In its memorandum contra, Direct Energy notes that taking administrative notice of this information is acceptable, as FirstEnergy has failed to explain how it would be prejudiced and this information is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Ohio Evid. R. 201(B)(2). Furthermore, Direct Energy notes that this information would be useful to the Commission's determination of whether the base distribution rate freeze would, in fact, be a benefit to customers, as alleged by FirstEnergy.

{¶ 375} In its motion to strike portions of Sierra Club's Rehearing reply brief, FirstEnergy claims that Sierra Club either improperly relied upon testimony, or exhibits to such testimony, which the attorney examiners excluded from the record as either cumulative or beyond the scope of Rehearing (Rehearing Tr. Vol. IV at 780, 801-03, 862-66, 875, 882-84; Rehearing Tr. Vol. V at 1127, 1149-51). Additionally, FirstEnergy notes that Sierra Club's arguments constitute a procedurally improper surreply to the Companies reply brief, filed on February 26, 2016. Sierra Club asserts in its memorandum contra that it properly relied on evidence that was proffered at hearing and its Rehearing reply brief did not include an improper surreply.

{¶ 376} Consistent with our *ESP IV* Opinion and Order, we continue to find that new information should not be introduced after the closure of the record and parties should not rely upon evidence which has been stricken from the record (*ESP IV* Opinion and Order at 37). We note that the same analysis may be applied in this Fifth Entry on Rehearing, as many of FirstEnergy's motions to strike either deal with hearsay statements or testimony that was excluded from the record (*ESP IV* Opinion and Order at 35-37). As argued by FirstEnergy, the appropriate use of a "proffer" is simply to preserve a party's right to appeal an evidentiary ruling excluding it. It is not, however, an additional opportunity to introduce new evidence into the record without providing parties sufficient opportunity to respond to it. *In re the Applications of TNT Holland Motor Express, Inc. to Amend Certificates Nos. 300-R & 407-R, Case No. 89-582-TR-AAC,* Opinion and Order (Aug. 12, 1993). Moreover, even if we were to assume that its interpretation was correct, NOPEC acknowledged that in order for its argument to have weight, we would be required to find that the attorney examiner improperly excluded evidence, which is simply not the case here. Furthermore, our rules and past precedent prescribe the process for submitting post-hearing briefs and we are not inclined to deviate from that process today. Ohio Adm.Code 4901-1-31; *In re the Complaint of the City of Reynoldsburg, Ohio,* Case No. 08-846-EL-CSS, Opinion and Order (Apr. 5, 2011) at 27-28.

{¶ 377} As to our authority to take administrative notice, we have previously held that the Commission may take administrative notice of facts outside the record of a case if the complaining parties have had an opportunity to prepare and respond to the evidence and they are not prejudiced by its introduction. *FirstEnergy ESP III*, Second Entry on Rehearing (Jan. 30, 2013) at 3-4. Direct Energy raises arguments in its Rehearing brief, reply brief, and memorandum contra FirstEnergy's motion to strike to make it seem as if it is requesting administrative notice of all this information for the first time; however, the Companies are quite correct that the attorney examiner declined to take administrative notice of the Staff Report in Case No. 07-0551-EL-AIR during Rehearing (Rehearing Tr. Vol. X at 1580). Moreover, Direct Energy made no attempt to argue against, or even object to, the attorney examiner's ruling denying OCC's motion to take administrative notice over the two separate days in which it could have made such arguments (Rehearing Tr. Vol. IX at 1508-13; Rehearing Tr. Vol. X at 1580). We will not modify the attorney examiner's earlier ruling and refuse to add additional information that could have been presented during Rehearing. We find it would be inappropriate to allow this information to be considered at this point in the proceeding, as the record is now closed and the Companies would not have the opportunity to prepare and respond to that information.[23] Furthermore, because Direct Energy chose to rely on the Staff Report, rather than the Opinion and Order issued in that proceeding, we agree with FirstEnergy that the entirety of the footnote must be stricken. Accordingly, FirstEnergy's motions to strike portions of the Rehearing and Rehearing reply briefs will be granted in their entirety, except for the statement voluntarily withdrawn by OHA, to which the Companies' motion to strike is moot. The stricken portions of these briefs, as detailed above, have been disregarded by the Commission for purposes of its decision in this Fifth Entry on Rehearing.

[23] We are also denying OCC's request to take administrative notice of the materials from Case No. 07-551-EL-AIR for the reasons noted above.

D. Moot Assignments of Error

{¶ 378} Upon reviewing the remaining assignments of error raised in the applications for rehearing filed on April 29, 2016, and May 2, 2016, this Commission finds many of these assignments of error are moot as they pertain to the original Rider RRS mechanism as approved by this Commission in the Order or were otherwise adequately addressed in this Fifth Entry on Rehearing. As we are modifying our Order to approve Staff's alternative proposal, in the form of proposed Rider DMR, we need not take time to address the merits of the assignments of error raised, or responsive arguments contained in memoranda contra, relating to the original Rider RRS mechanism or reiterate our reasoning already provided in our analysis of the Companies' Proposal. Accordingly, the following assignments of error are denied.[24]

- The Commission's approval of Rider RRS is unreasonable and unlawful because it represents a reversal by the Commission from the General Assembly's legislative directives to promote competition, a reversal that is solely intended to benefit the utility's affiliate at the expense of ratepayers. (RESA App. for Rehearing (Apr. 29, 2016) at 10-13; P3/EPSA App. for Rehearing (Apr. 29, 2016) at 7-10).
- The Commission erred in finding, as a matter of law, that Rider RRS constitutes "terms, conditions, or charges," as required by R.C. 4928.143(B)(2)(d). (RESA App. for Rehearing at 14-15; P3/EPSA App. for Rehearing (Apr. 29, 2016) at 10-12).
- The Commission erred in finding, as a matter of law, that Rider RRS constitutes "limitations on customer shopping," as required by R.C. 4928.143(B)(2)(d). (RESA App. for Rehearing at 15-17; P3/EPSA App. for Rehearing (Apr. 29, 2016) at 12-14).
- The Commission erred in finding, as a matter of law, that Rider RRS, will "have the effect of stabilizing" retail electric service rates, as required by R.C. 4928.143(B)(2)(d). (RESA App. for Rehearing (Apr. 29, 2016) at 17-20; P3/EPSA App. for Rehearing (Apr. 29, 2016) at 14-17).
- The Commission erred in finding, as a matter of law, that Rider RRS constitutes a program to implement "economic development" under R.C. 4928.143(B)(2)(i).

[24] We note that several assignments of error contained arguments relating to both the original Rider RRS mechanism and other components of the Stipulated ESP IV. To the extent the Commission was able to discern the arguments pertaining to those other components, they have been adequately addressed in the Fifth Entry on Rehearing. Similarly, to the extent these assignments of error deal with the original Rider RRS mechanism, they will be denied. Although this list is relatively comprehensive, we acknowledge the fact that there may be additional assignments of error raised pertaining to Rider RRS that are not included in this list, but are similarly denied on the same basis.

(RESA App. for Rehearing (Apr. 29, 2016) at 20-22; P3/EPSA App. for Rehearing (Apr. 29, 2016) at 17-19).

- The Commission erred, as a matter of law, in finding that the provisions of the *ESP IV*, including Rider RRS, do not violate the pro-competition policies of R.C. 4928.02. (RESA App. for Rehearing (Apr. 29, 2016) at 22-25; P3/EPSA App. for Rehearing (Apr. 29, 2016) at 19-22).
- The Commission erred, as a matter of law, by not addressing and adopting the argument that Rider RRS violates the separation of services requirements of R.C. 4928.03 by merging competitive and regulatory services. (RESA App. for Rehearing (Apr. 29, 2016) at 26; P3/EPSA App. for Rehearing (Apr. 29, 2016) at 22-23).
- The Commission erred, as a matter of law, by not addressing and adopting the argument that the provisions of *ESP IV*, including Rider RRS, violates the corporate separation requirements of R.C. 4928.17. (RESA App. for Rehearing (Apr. 29, 2016) at 27-28; P3/EPSA App. for Rehearing (Apr. 29, 2016) at 23-25).
- The Commission erred, as a matter of law, by not addressing and adopting the argument that Rider RRS does not violate R.C. 4905.22 by imposing an unreasonable charge that includes an unknown future charge or unknown market risk. (RESA App. for Rehearing (Apr. 29, 2016) at 29; P3/EPSA App. for Rehearing (Apr. 29, 2016) at 25-26).
- The Commission erred when it approved Rider RSR on the basis of highly uncertain financial projections that it believed were "better" than financial projections presented by other witnesses, without regard to whether they were sufficiently reliable to meet FirstEnergy's burden of proof. (RESA App. for Rehearing (Apr. 29, 2016) at 45; P3/EPSA App. for Rehearing (Apr. 29, 2016) at 40-41).
- The Commission erred when it approved Rider RRS on the basis of highly uncertain financial projections without addressing the need for or adopting annual and aggregate limits on the charges that can be imposed on ratepayers. (RESA App. for Rehearing (Apr. 29, 2016) at 46-48; P3/EPSA App. for Rehearing (Apr. 29, 2016) at 41-44).
- The Commission erred when it approved Rider RRS without providing a coherent formula for calculating the limitations on average customer bills that it provides during the first two years of Rider RRS. (RESA App. for Rehearing (Apr. 29, 2016) at 48-49; P3/EPSA App. for Rehearing (Apr. 29, 2016) at 44).
- The Commission erred in finding that the financial projections by witness Rose are reliable. (RESA App. for Rehearing (Apr. 29, 2016) at 49-51; P3/EPSA App. for Rehearing (Apr. 29, 2016) at 45-47).
- The Commission erred in finding that the financial projections by witness Lisowski are reliable without citing specific record evidence. (RESA App. for Rehearing (Apr. 29, 2016) at 52; P3/EPSA App. for Rehearing (Apr. 29, 2016) at 47-48).
- The Commission failed to consider all of witness Kalt's analyses and erred in finding that witness Kalt's sensitivity analysis was not reliable. (RESA App. for

Rehearing (Apr. 29, 2016) at 53-57; P3/EPSA App. for Rehearing (Apr. 29, 2016) at 48-52).

- The Commission erred in finding that it could properly ignore downward price trends in the price of natural gas in evaluating the reliability of financial projections. (RESA App. for Rehearing (Apr. 29, 2016) at 57; P3/EPSA App. for Rehearing (Apr. 29, 2016) at 52-53).
- The Commission erred in finding that it is proper to average contradictory financial projections by two witnesses, who disagree as to whether Rider RRS will produce a charge or a credit to ratepayers, and to predict on that basis that Rider RRS will result in a net credit to ratepayers over its eight-year term. (RESA App. for Rehearing (Apr. 29, 2016) at 58-59; P3/EPSA App. for Rehearing (Apr. 29, 2016) at 53-54).
- The Commission erred in finding that a two-year limit on rate increases related to Rider RRS will "protect customers" from price fluctuations. (RESA App. for Rehearing (Apr. 29, 2016) at 59-61; P3/EPSA App. for Rehearing (Apr. 29, 2016) at 54-56).
- The Commission erred in finding that short-term harmful effects of Rider RRS on customers' bills can be ignored if they are somehow outweighed by later positive effects. (RESA App. for Rehearing (Apr. 29, 2016) at 61-62; P3/EPSA App. for Rehearing (Apr. 29, 2016) at 56-57).
- The Commission erred in assuming that the Sammis and Davis-Besse plants will close unless Rider RRS is approved without addressing evidence to the contrary. (RESA App. for Rehearing (Apr. 29, 2016) at 62-70; P3/EPSA App. for Rehearing (Apr. 29, 2016) at 57-64).
- The Commission erred in finding that the provisions of *ESP IV* including Rider RRS will promote economic development. (RESA App. for Rehearing (Apr. 29, 2016) at 70; P3/EPSA App. for Rehearing (Apr. 29, 2016) at 65).
- The Commission erred in finding that Rider RRS will provide rate stability. (RESA App. for Rehearing (Apr. 29, 2016) at 72-77; P3/EPSA App. for Rehearing (Apr. 29, 2016) at 66-71).
- The Commission erred in finding that Rider RRS does not provide an anti-competitive subsidy to FirstEnergy's affiliate. (RESA App. for Rehearing (Apr. 29, 2016) at 77-81; P3/EPSA App. for Rehearing (Apr. 29, 2016) at 71-75).
- The Commission erred in failing to order that FirstEnergy must return all of the amounts it collects from customers under Rider RRS if Rider RRS is invalidated. (RESA App. for Rehearing (Apr. 29, 2016) at 84-85; P3/EPSA App. for Rehearing (Apr. 29, 2016) at 78-79).
- The Commission erred in approving Rider RRS and allowing the collection of generation costs from customers based on a power purchase agreement that was not produced by a competitive process. (RESA App. for Rehearing (Apr. 29, 2016) at 85-89; P3/EPSA App. for Rehearing (Apr. 29, 2016) at 79-83).

- The Commission erred in approving Rider RRS and recovery of legacy costs because it will allow FirstEnergy to recover transition revenues or any equivalent revenues in violation of R.C. 4928.38. (RESA App. for Rehearing (Apr. 29, 2016) at 89-90; P3/EPSA App. for Rehearing (Apr. 29, 2016) at 83-84).
- The Commission erred in approving the Stipulation's severability provision that does not require a refund if Rider RRS is invalidated and that only applies the severability provision if a court of competent jurisdiction invalidates Rider RRS. (RESA App. for Rehearing (Apr. 29, 2016) at 91-92; P3/EPSA App. for Rehearing (Apr. 29, 2016) at 85-86).
- The Commission not only erred in approving Rider RRS, it also erred in allowing the rider to be effective as of June 1, 2016. (RESA App. for Rehearing (Apr. 29, 2016) at 92-93; P3/EPSA App. for Rehearing (Apr. 29, 2016) at 86-87).
- The Commission's award of a subsidy to FES to the prejudice of FES' competitors was unreasonable and unlawful. (Dynegy App. for Rehearing (Apr. 29, 2016) at 2).
- The Commission's failure to require competitive bidding for any PPA to be included in Rider RRS was unreasonable and unlawful. (Dynegy App. for Rehearing (Apr. 29, 2016) at 2-5).
- The Commission's holding that Rider RRS is authorized by R.C. 4928.143(B)(2)(d) was unreasonable and unlawful. (Dynegy App. for Rehearing (Apr. 29, 2016) at 6-12).
- The Commission's holding that Rider RRS is authorized by R.C. 4928.143(B)(2)(i) was unreasonable and unlawful. (Dynegy App. for Rehearing (Apr. 29, 2016) at 12-13).
- The Commission's failure to find that the Stipulations (including Rider RRS) violate R.C. 4928.17, which requires corporate separation between an electric utility and its generation affiliate, was unreasonable and unlawful. (Dynegy App. for Rehearing (Apr. 29, 2016) at 14-16).
- The Commission's failure to find that Rider RRS violates R.C. 4905.22 as an unreasonable charge was unreasonable and unlawful. (Dynegy App. for Rehearing (Apr. 29, 2016) at 16-19).
- The Commission's finding that its oversight over Rider RRS is sufficient was unreasonable and unlawful. (Dynegy App. for Rehearing (Apr. 29, 2016) at 19-21).
- The Commission's failure to substantively address concerns that Rider RRS threatens competitive markets and impedes the development of new sources of generation in Ohio was unreasonable and unlawful. (Dynegy App. for Rehearing (Apr. 29, 2016) at 22-25).
- The Commission ignores evidence that the Sammis, Davis-Besse, and OVEC plants are not closing. (Dynegy App. for Rehearing (Apr. 29, 2016) at 25-28).
- The Commission's finding that Rider RRS promotes fuel diversity was unreasonable and unlawful. (Dynegy App. for Rehearing (Apr. 29, 2016) at 28-29).
- The Commission's finding that Rider RRS promotes grid reliability was unreasonable and unlawful. (Dynegy App. for Rehearing (Apr. 29, 2016) at 29-31).

- The Commission's finding that Rider RRS promotes retail rate stability was unreasonable and unlawful. (Dynegy App. for Rehearing (Apr. 29, 2016) at 31-32).
- 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"; and Rider RRS would not "have the effect of stabilizing or providing certainty regarding retail electric service." (Sierra Club App. for Rehearing (Apr. 29, 2016) at 7-16).
- 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. (Sierra Club App. for Rehearing (Apr. 29, 2016) at 19).
- 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. (Sierra Club App. for Rehearing (Apr. 29, 2016) at 16-18).
- The Commission's Order is unlawful and unreasonable because it fails to apply the governing legal standards to demonstrate that Rider RRS is just and reasonable. (Sierra Club App. for Rehearing (Apr. 29, 2016) at 18).
- 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. (Sierra Club App. for Rehearing (Apr. 29, 2016) at 20-36).
- The Order is unlawful and unreasonable because the Commission disregarded that FirstEnergy 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. (Sierra Club App. for Rehearing (Apr. 29, 2016) at 36-42).
- 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. (Sierra Club App. for Rehearing (Apr. 29, 2016) at 36-42).

- 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. (Sierra Club App. for Rehearing (Apr. 29, 2016) at 42-46).
- 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. (Sierra Club App. for Rehearing (Apr. 29, 2016) at 46-50).
- 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. (Sierra Club App. for Rehearing (Apr. 29, 2016) at 50-52).
- In light of FERC's recent ruling, the Commission should hold that no costs associated with the Affiliate PPA can be flown through to customers under Rider RRS until the Affiliate PPA is reviewed and approved by FERC. (OMAEG App. for Rehearing (May 2, 2016) at 8).
- The Commission erred in finding that the Stipulated ESP IV benefits ratepayers and is in the public interest, failing to rely on record evidence to support its finding in contravention to R.C. 4903.09. (OMAEG App. for Rehearing (May 2, 2016) at 12-15).
- The Commission erred in determining that Rider RRS functions as a limitation on customer shopping for retail electric generation service under R.C. 4928.143(B)(2)(d). (OMAEG App. for Rehearing (May 2, 2016) at 20-23).
- The Commission erred by unreasonably and unlawfully concluding that the Companies met their burden to demonstrate that Rider RRS will have the effect of stabilizing or providing certainty regarding retail electric generation service, as required by R.C. 4928.143(B)(2)(d). (OMAEG App. for Rehearing (May 2, 2016) at 23-26).
- The Commission erred in finding that Rider RRS is consistent with state policy given it operates as an ant-competitive subsidy that holds customers captive to an affiliate agreement subject to affiliate abuse. (OMAEG App. for Rehearing (May 2, 2016) at 26-30).

- The Commission erred in finding that Rider RRS is consistent with state policy as the affiliate agreement creates market deficiencies and market power in the wholesale market. (OMAEG App. for Rehearing (May 2, 2016) at 30-31).
- The Commission erred in approving Rider RRS and the recovery of legacy costs constituting transition revenues, or the equivalent thereof, in violation of R.C. 4928.38. (OMAEG App. for Rehearing (May 2, 2016) at 31-32).
- The Commission erred by failing to address the financial need of the affiliate plants subject to the Companies Affiliate PPA, as required by the established AEP Ohio ESP III Order factors. (OMAEG App. for Rehearing (May 2, 2016) at 40-42).
- The Commission erred in determining that the affiliate plants are necessary to maintain system reliability and support supply diversity. (OMAEG App. for Rehearing (May 2, 2016) at 42-47).
- The Commission erred in finding that the Stipulated ESP IV contributes or promotes economic development within the state of Ohio, as required by the established AEP Ohio ESP III Order factors. (OMAEG App. for Rehearing (May 2, 2016) at 47-51).
- The Commission erred in determining that the Stipulated ESP IV appropriately distributes risk between the Companies and its customers, as required by the established AEP Ohio ESP III Order factors. (OMAEG App. for Rehearing (May 2, 2016) at 51-54).
- The Commission erred in failing to clearly define its modification to Stipulated ESP IV directing the Companies to ensure that average customer bills do not increase for a period of two years. (OMAEG App. for Rehearing (May 2, 2016) at 70).
- The Commission's Order is unlawful because it failed to consider the effect of the non-bypassable Rider RRS on large-scale government aggregation as required by R.C. 4928.20(K). (NOPEC App. for Rehearing (May 2, 2016) at 3-6).
- The Commission erred in approving the severability provision of the Third Stipulation and Recommendation by not modifying it to require payments made under Rider RRS to be refunded in the event a court of competent jurisdiction invalidates the rider, like the Commission did in the Ohio Power Company PPA Opinion and Order. (NOPEC App. for Rehearing (May 2, 2016) at 6-7).
- Rider RRS is unlawful because it does not fall within any of the provisions enumerated under R.C. 4928.143(B) and the Commission's finding that Rider RRS provides stability and certainty is also unreasonable and against the manifest weight of the evidence. (NOPEC App. for Rehearing (May 2, 2016) at 10-15).
- The Commission erred by finding that Rider RRS, as part of the "Economic Stability Program," meets the requirements of an economic development program under R.C. 4928.143(B)(2)(i). (NOPEC App. for Rehearing (May 2, 2016) at 15-18).
- Rider RRS is unlawful because it requires customers to fund an unlawful, anti-competitive subsidy under R.C. 4928.02(H). (NOPEC App. for Rehearing (May 2, 2016) at 18-21).

- Rider RRS is unlawful because it permits the recovery of unlawful transition charges prohibited by R.C. 4928.38. (NOPEC App. for Rehearing (May 2, 2016) at 21-23).
- The Commission erred in finding that the Stipulated ESP IV provided a benefit to the public interest if Rider RRS would be a net charge to consumers over the eight-year ESP term. Additionally, it was unjust and unreasonable for the Commission to find that FirstEnergy consumers will receive a net credit from Rider RRS over the eight-year term of the ESP. (OCC/NOAC App. for Rehearing (May 2, 2016) at 8-20).[25]
- The Commission's approval of Rider RRS is unreasonable and unlawful.[26] (OCC/NOAC App. for Rehearing (May 2, 2016) at 28-43).
- The Commission erred by unreasonably relying on FirstEnergy's Rider RRS projections and disregarding projections by intervenors opposing Rider RRS. (OCC/NOAC App. for Rehearing (May 2, 2016) at 49-50).
- The Commission unreasonably and unlawfully found that Rider RRS does not breach Ohio's policy to ensure effective competition and protect consumers from market power and market deficiencies. (OCC/NOAC App. for Rehearing at 45-47.)
- The Commission erred by modifying the Stipulated ESP IV implementing a mechanism to limit the increase to average customers' bills caused by Rider RRS during the first two years of the ESP in an unjust and unreasonable manner. (OCC/NOAC App. for Rehearing (May 2, 2016) at 54-55).
- The Commission erred by authorizing to defer expenses for future recovery under the mechanism it adopted to limit Rider RRS collections during year two of the ESP. (OCC/NOAC App. for Rehearing (May 2, 2016) at 56-57).
- The Commission erred by modifying the Stipulated ESP IV in a manner that allows FirstEnergy to retain PJM capacity performance bonus payments thereby creating an unjust and unreasonable incentive for the Companies not to offer the PPA units. (OCC/NOAC App. for Rehearing (May 2, 2016) at 57-59).
- The Commission erred by not modifying the Stipulated ESP IV to protect consumers from the onerous severability provision.[27] (OCC/NOAC App. for Rehearing (May 2, 2016) at 59-62).
- The Commission unreasonably and unlawfully considered the financial integrity of FirstEnergy's affiliate-owned plants as justification for approving the costly and unlawful PPA. (OCC/NOAC App. for Rehearing (May 2, 2016) at 69-70).
- The Commission's Order is unreasonable and should be modified so that charges under Rider RRS are subject to refund.[28] (OCC/NOAC App. for Rehearing (May 2, 2016) at 73-75).

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[25] This includes all arguments raised under OCC/NOAC's Assignment of Error 4(a).

[26] This includes all arguments raised under OCC/NOAC's Assignment of Error 5(a).

[27] This includes all arguments raised under OCC/NOAC Assignment of Error 7(c), except for the arguments pertaining to the competitive bidding of low-income programs, which is addressed in this Fifth Entry on Rehearing.

- The Commission's Order is unlawful and unreasonable by failing to find that Rider RRS is authorized under R.C. 4928.143(B)(2)(d) because it relates to default service. (Co. App. for Rehearing (May 2, 2016) at 7-9).[29]
- The Commission's Order is erroneous because it wrongly describes changes in the proposed PPA as having been the product of settlement negotiations relating to the ESP proceeding. (Co. App. for Rehearing (May 2, 2016) at 9-10).
- The Commission erred in finding that Rider RRS meets the criteria of R.C. 4928.143(B)(2)(d) for inclusion as a component of an ESP because Rider RRS is not a charge relating to a limitation on shopping. (CMSD App. for Rehearing (May 2, 2016) at 7-11).
- The Commission erred in finding that Rider RRS meets the criteria of R.C. 4928.143(B)(2)(d) for inclusion as a component of an ESP because the Rider RRS arrangement will not stabilize or provide certainty regarding retail electric service. (CMSD App. for Rehearing (May 2, 2016) at 11-17).
- The Commission erred in finding that Rider RRS meets the criteria of R.C. 4928.143(B)(2)(i) for inclusion as a component of an ESP because the Rider RRS arrangement is not an economic development program in any sense of that term, but is simply a charge imposed on distribution ratepayers to provide a guaranteed return to a single, specified provider of generation service. (CMSD App. for Rehearing (May 2, 2016) at 17-21).
- The Commission's refusal to address the federal preemption issue in its Order was unreasonable because the failure to this issue exposes FirstEnergy customers to significant financial risk. (CMSD App. for Rehearing (May 2, 2016) at 21-23).
- The Commission's authorization of Rider RRS is unlawful because the Federal Power Act preempts the Commission from implementing the Rider RRS arrangement. (CMSD App. for Rehearing (May 2, 2016) at 23-25).
- The Commission erred in approving the Third Supplemental Stipulation because the Rider RRS arrangement is contrary to both state and federal pro-competition policies, and is inconsistent with the state policy embodied in the Ohio Uniform Depository Act. (CMSD App. for Rehearing (May 2, 2016) at 26-28).
- Rider RRS is unreasonable and unlawful pursuant to R.C. 4905.22, because it will require Power4Schools to pay FES twice for electric generation. (Power4Schools App. for Rehearing (May 2, 2016) at 2-3).
- The Commission erred in finding that the Partial Stipulation does not violate regulatory principles or practices, as Rider RRS violates R.C. 4928.143(B)(2). (Power4Schools App. for Rehearing (May 2, 2016) at 4-5).

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[28] It appears to the Commission that OCC/NOAC Assignments of Error 9 and 10 are in fact the same, so both assignments of error, in their entirety, are considered moot.

[29] Although the Companies sixth, seventh, and eighth assignments of error also pertain to Rider RRS, those assignments of error were granted in the First Entry on Rehearing in order to conduct the additional evidentiary hearing to discuss the merits of the Companies' Proposal and Rider DMR.

- The Commission erred in finding that the Partial Stipulation does not violate regulatory principles or practices, as Rider RRS cannot be considered an economic development program under R.C. 4928.143(B)(2)(i). (Power4Schools App. for Rehearing (May 2, 2016) at 5).
- The Commission erred in finding that the Partial Stipulation does not violate regulatory principles or practices, as the Order requires the Companies' distribution customers to subsidize FES' generation. (Power4Schools App. for Rehearing (May 2, 2016) at 8-9).
- The Commission erred in finding that the Partial Stipulation does not violate regulatory principles or practices, as Rider RRS unlawfully permits the Companies to collect additional transition costs or equivalent revenues from customers in violation of R.C. 4928.38. (Power4Schools App. for Rehearing (May 2, 2016) at 9-10).
- The Commission erred by finding that the Partial Stipulation benefits ratepayers and the public interest. (Power4Schools App. for Rehearing (May 2, 2016) at 10-11).
- The Order erroneously concluded that Rider RRS is not an "anticompetitive subsidy" inconsistent with R.C. 4928.02(H). (Environmental Advocates App. for Rehearing at 3-12).
- The Order erroneously approved Rider RRS as reasonable and consistent with R.C. 4928.02(A), despite the Companies' failure to solicit any alternative hedging offers or conduct any competitive procurement process to demonstrate that the underlying non-competitive affiliate deal will not result in unreasonable prices for customers. (Environmental Advocates App. for Rehearing at 12-16).

E. *General Denial of Assignments of Error Not Specifically Addressed in this Fifth Entry on Rehearing*

{¶ 379} As a final matter, any assignments of error raised by the Companies or the intervening parties in this proceeding that have not otherwise been addressed in this Fifth Entry on Rehearing are hereby denied.

V. ORDER

{¶ 380} It is, therefore,

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

{¶ 382} ORDERED, That the Companies' motions to strike portions of the Rehearing briefs and Rehearing reply briefs of NOPEC, OHA, Sierra Club, IMM, and Direct Energy are granted, as set forth herein. It is, further,

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

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

{¶ 385} ORDERED, That the applications for rehearing filed by FirstEnergy, OCC/NOAC, NOPEC, RESA, OMAEG, and Environmental Advocates be denied in part and granted in part, as set forth herein. It is, further,

{¶ 386} ORDERED, That the applications for rehearing filed by CMSD, Power4Schools, Sierra Club, P3/EPSA, Dynegy, and MAREC be denied. It is, further,

{¶ 387} ORDERED, That proposed Rider DMR be approved, as modified by the Commission. It is, further,

{¶ 388} ORDERED, That the Companies shall file proposed tariffs consistent with this Fifth Entry on Rehearing. It is, further,

{¶ 389} ORDERED, That the Companies shall file tariffs withdrawing the existing Riders RRS and RCE. It is, further,

{¶ 390} ORDERED, That a copy of this Fifth Entry on Rehearing be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Asim Z. Haque, Chairman

Lynn Slaby w/ concurrence

Lynn Slaby

M. Beth Trombold

M. Beth Trombold

Thomas W. Johnson

M. Howard Petricoff

GAP/MJA/vrm

Entered in the Journal

OCT 1 2 OCT 1 2 2016

Barcy F. McNeal

Barcy F. McNeal
Secretary

THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE APPLICATION OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY FOR AUTHORITY TO PROVIDE FOR A STANDARD SERVICE OFFER PURSUANT TO R.C. 4928.143 IN THE FORM OF AN ELECTRIC SECURITY PLAN.	CASE NO. 14-1297-EL-SSO

CONCURRING OPINION OF CHAIRMAN ASIM Z. HAQUE

Entered in the Journal on October 12, 2016

{¶ 1} As this is a rather lengthy Entry, I will attempt, in plain language, to express what the Commission has decided in this case today.

I. WHAT WE DECIDED TODAY

{¶ 2} Today, the Commission rejects FirstEnergy's modified RRS, or "virtual PPA" proposal. FirstEnergy filed its virtual PPA proposal in response to a ruling by the Federal Energy Regulatory Commission (FERC) to effectively preclude the Companies from implementing the Commission's original PPA decisions made in March. FirstEnergy's original PPA proposal created a nexus between the operation of FirstEnergy's generation fleet in Ohio, and associated ratepayer dollars. While the variables/math associated with calculating the new virtual PPA mechanism are still tied to generation, the proposal is indeed "virtual," as the nexus to the operation of the generation fleet, and the associated benefits related to reliability, resource diversity, and economic development, no longer exist. As a result, the Commission has rejected FirstEnergy's virtual PPA request, and is adopting a distribution-based mechanism created by the Commission Staff and embodied in the newly created Distribution Modernization Rider (DMR).

{¶ 3} The DMR's primary purpose is to ensure that FirstEnergy retains a certain level of financial health and creditworthiness so that it can invest in future distribution modernization endeavors. As a result of the original stipulation settlement in this case, FirstEnergy was ordered to file a grid modernization plan with the Commission. It has, in fact, already done so. I have said on a number of occasions now, in a number of different venues, that the Commission intends on having a very robust conversation about the future of the grid and the electric industry. The Commission will evaluate FirstEnergy's grid modernization plan after having that public conversation. It will then order the Companies to implement certain endeavors to advance the electric industry in their footprint for the betterment of their consumers and businesses. FirstEnergy will then be able to recover for those endeavors under a traditional regulatory paradigm through the Rider Advanced Metering Infrastructure (AMI).

{¶ 4} This is undoubtedly unconventional. Typical public utility regulation functions to provide utilities with recovery and a return for expenditures made in constructing/maintaining service. Rider DMR, however, will serve to provide FirstEnergy with an infusion of capital so that it will be healthy enough to make these modernization investments when called upon. After this initial infusion, again, Rider AMI will function as the corresponding traditional regulatory mechanism, providing a return for monies expended to construct/maintain service.

{¶ 5} I am reluctant to throw darts and tie DMR recovery to certain grid modernization endeavors without having the full and public conversation that I want to have, and thus, Rider DMR may feel a bit premature. However, this case is before us today, and now. I do not want to find ourselves in a position where we have developed a trajectory for the future of the electric industry, only to be thwarted in the FirstEnergy footprint due to a lack of available funds, or an exorbitant price tag resulting from the parent company's lack of creditworthiness and corresponding difficulty in raising front-end capital. As a condition to receiving revenues under Rider DMR, FirstEnergy must comply with what the Commission orders in its grid modernization filing (in tandem with maintaining FirstEnergy Corp.'s headquarters in Akron and not selling the company). This is both a "carrot" and "stick" approach.

II. HOW DID WE GET HERE?

{¶ 6} This is a very fair question. It is clear based upon the record of the case, in tandem with FirstEnergy's roughly $4.5 billion request from the Commission, that FirstEnergy is presently experiencing financial challenges. Parties in the case have expressed that these challenges are self-created, while FirstEnergy maintains that wholesale markets are the driver for their hardship. FirstEnergy, however, is not the only utility nationally that is invested in either coal-fired or nuclear generation in a restructured state. That is, their wholesale market difficulties are not unique to them.

{¶ 7} If FirstEnergy truly needs $4.5 billion dollars to achieve full financial health, then the Commission decision today falls well short of that expressed need. The Commission does not intend to be, nor will it be, nor should it be the entire solution for FirstEnergy's current financial difficulty. In fact, we calculated Rider DMR to account for Ohio's share (22%) of FirstEnergy Corp.'s credit issues. The Commission is an economic regulator. It is not a bank. It is not a trust fund. We authorize rates and charges that come directly from the pockets of consumers and businesses in this state. We have no rainy day fund to dip into.

{¶ 8} I do, however, want our regulated utilities to be healthy so that they can invest in bettering the delivery of services to consumers and businesses in the State of Ohio. Again, Rider DMR is meant to assist FirstEnergy in deploying the grid of the future while simultaneously providing it with a boost to improve its credit rating and financial health. Our regulated utilities also bear the responsibility to make tough decisions to improve their own financial health. I speak not only of FirstEnergy, but all of our regulated utilities. Today, in this case, we have attempted to create an appropriate balance.

{¶ 9} FirstEnergy requested that the Commission grant Rider DMR in the amount of $558 million per year for 8 years. This equates to a roughly $4.5 billion price tag, which does not include the additional revenue that FirstEnergy requested based upon its valuation of its positive economic impact to Akron. The Commission today authorizes FirstEnergy to recover Rider DMR in the amount of $132.5 million per year to be grossed up for federal taxes (~$204 million assuming current tax rate) for three years. Not only is the Commission decision today comparatively far better than FirstEnergy's as to cost, but, as discussed above, we expect this capital infusion will eventually result in grid modernization endeavors that will better the lives of consumers and businesses in the FirstEnergy footprint for decades to come.

III. Precedential Value

{¶ 10} I am not terribly concerned that we are setting dangerous precedent in this case by providing recovery based mathematically upon the financial condition of a utility. Other state public utility commissions have dealt with similar scenarios (California/PG&E - Texas/Oncor - New Hampshire/Public Service), and this Commission monitored closely the financial health of Columbia Gas of Ohio in the early to mid 90's. Each of our electric utilities has, though, expressed its intent to operate within a fully regulated paradigm. Regardless of how the utilities get to a fully regulated world, this should result in more steady earnings and de-risking of their books.

{¶ 11} Going forward, in the event that the Commission sees our regulated distribution utilities suffer as a result of actions from parent companies or affiliates, the Commission should very seriously consider ring-fencing the distribution utilities to protect the State. That is, our regulated distribution utilities should not be utilized to subsidize market difficulties, risky behavior, etc. associated with parent and affiliate companies. Electricity is an essential good with a captive customer base. Our regulated distribution utilities get a regulated rate of return for everything that they do. There is no reason why these regulated distribution utilities should ever be in a position of true financial harm whereby they can't make necessary investments to better the delivery of power and innovate. The Commission will closely monitor this going forward.

Asim Z. Haque

/vrm

Entered in the Journal

Barcy F. McNeal
Secretary

THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE APPLICATION OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY FOR AUTHORITY TO PROVIDE FOR A STANDARD SERVICE OFFER PURSUANT TO R.C. 4928.143 IN THE FORM OF AN ELECTRIC SECURITY PLAN.	CASE NO. 14-1297-EL-SSO

CONCURRING OPINION OF COMMISSIONER LYNN SLABY

Entered in the Journal on October 12, 2016

{¶ 1} I concur but write separately,

{¶ 2} The purpose of Rider DMR is to provide a distribution modernization incentive for the Companies. We acknowledge and stress that the Companies need to be able to obtain capital for needed investments at the lowest possible costs. The concern being that if the Companies are faced with an investment downgrade, they would not be able to raise the capital for investing in their distribution system.

{¶ 3} I place a significant value on the economic impact on the Companies' headquarters remaining in Akron. The loss of a company of this size would have a significant economic impact on both the local area and the entire northern portion of the State of Ohio. Unfortunately, Akron, as well as other cities in Ohio, has seen the negative economic impact of a loss of a major company. I have lived through the loss of numerous rubber companies moving out of the Akron area. We projected at that time that for every job lost in manufacturing, three to five support jobs were lost. This meant that there was a substantial loss of small businesses, in addition to large companies, that could no longer be supported. Therefore, unemployment went up and population declined. At least one expert in this case testified that the total economic impact associated with the headquarters is $568 million each year. Aside from this monetary impact, the Companies employ about 1,360 individuals, supporting 2,047 additional jobs. All of this amounts to an approximate direct and indirect support of 3,407 jobs.

{¶ 4} The issue in this case is unique to the Public Utilities Commission. We have the responsibility to assure the people of Ohio have safe, reliable, electric service at an affordable price. This requires us to make every effort to balance the pressures of providing sufficient revenues to the Companies, while keeping the cost to all classes of customers at a minimum.

{¶ 5} The uniqueness of this case is that the testimony from numerous parties presented almost an insurmountable amount of expert testimony. The Staff has chosen to use the cash flow from operations (CFO), pre working capital, to debt ratio to arrive at an appropriate figure. Many other methodologies could have been used. In order not to be downgraded, Moody's originally indicated it would take a range between 14 and 15 percent. The Staff chose to use 14.5 percent as a compromise. Moody's later adjusted that percentage to 14 to 16 percent. It is not clear from the record why Moody's adjusted their CFO/debt ratio. I, therefore, am concerned that not adjusting Staff's recommendation up to 15 percent may place the company in jeopardy of being downgraded.

{¶ 6} There is another step in deciding an appropriate number to use. We have to examine the impact any rate adjustment would have on all classes of customers. Here again experts have differed. We must be cognizant that high utility rates could have a significant impact of whether or not they stay in business. Small to medium size businesses may be the incubators for job growth. Therefore, we have to be aware of the precarious balance that is needed between the residential consumer, as well as the needs of big and small business enterprises. In the event the cost of doing business in a given area becomes too high because of utility rates, businesses will not be able to survive. Likewise, there would be a disincentive to locate in the area.

{¶ 7} The majority has used the CFO/debt ratio as the appropriate methodology to determine the sum needed to prevent an investment downgrade from happening. I would have rather used at least 15 percent for the computation. However, because utilizing 15 percent would not have resulted in a drastic difference, and because I agree with the core tenents and purpose of Rider DMR, I will reluctantly concur.

Lynn Slaby

Lynn Slaby

/vrm

Entered in the Journal

OCT 1 2 2016

Barcy F. McNeal

Barcy F. McNeal
Secretary

THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE APPLICATION OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY FOR AUTHORITY TO PROVIDE FOR A STANDARD SERVICE OFFER PURSUANT TO R.C. 4928.143 IN THE FORM OF AN ELECTRIC SECURITY PLAN.

CASE NO. 14-1297-EL-SSO

EIGHTH ENTRY ON REHEARING

I. Summary 6

II. Procedural History and Applicable Law 6

A. Procedural History 6

B. Applicable Law 13

III. Discussion 14

A. Jurisdiction to Consider Companies' Proposal and Rider DMR 14

B. The Commission's finding that the Stipulations, as modified by the Fifth Entry on Rehearing, continue to meet the three-prong test for the consideration of stipulations. 18

1. Overview of Commission's Decision and Applicable Three-Prong Test 18

2. The Commission's Finding that the Stipulations were the Product of Serious Bargaining among Capable, Knowledgeable Parties. 19

3. The Commission's Finding that The Stipulations, As a Package, Benefit Ratepayers and the Public Interest 21

a. The Commission's findings that the Companies faced a serious risk of a credit downgrade, which would result in adverse effects on the Companies and their customers, and that Rider DMR will help facilitate the Companies' access to the capital markets for investments in the distribution system and other short-term obligations 21

b. The Commission's finding that Rider DMR will help promote grid modernization. 25

c. The Commission's finding that Rider DMR will help promote economic development. 27

d. The Commission's findings that several suggested modifications regarding Rider DMR should be rejected. 28

i. The Commission's finding that several proposals regarding the calculation of Rider DMR revenue should be rejected. 28

ii. The Commission's finding that Rider DMR should not be subject to refund. 33

iii. The Commission's finding that Rider DMR revenues should be excluded from the SEET calculation. 33

iv. The Commission's finding that additional proposed modifications regarding the use of revenues collected under Rider DMR should be rejected. 36

v. The Commission's finding to reject OEG's recommendations for Rider DMR's cost allocation and rate design. 37

e. The Commission's finding that "ring fencing" measures should not be implemented at this time. 38

f. The Commission's finding that the Companies should file a base distribution rate case by the end of ESP IV. 38
g. The Commission's finding that the increases in the revenue caps under Rider DCR would be terminated if ESP IV was terminated prior to its currently approved eight-year term. 39
h. The Commission's finding that the Rider NMB Opt-Out pilot program should be approved, as modified by the Commission in its Fifth Entry on Rehearing. 41
i. The Commission's finding that Rider GDR should be approved, provided the scope of potential costs to be included in the rider be limited. 42
j. The Commission's finding that competitive bidding was unnecessary for the low-income customer assistance programs and initiatives. 43

4. The Stipulations, as Modified by the Commission, Violate No Important Regulatory Principles or Practices 44

a. The Commission's finding that Rider DMR complies with R.C. 4928.02. 44
b. The Commission's finding that Rider DMR is authorized under R.C. 4928.143(B)(2)(h) 45
c. The Commission's decision to refrain from addressing whether Rider DMR is authorized under R.C. 4928.143(B)(2)(i). 51
d. The Commission's finding that Rider DMR is not an unlawful subsidy. 54
e. The Commission's finding that the revenues collected under Rider DMR do not constitute unlawful transition revenues. 57
f. The Commission's finding that R.C. 4905.22 is not applicable to an ESP, and, even if this statute was applicable, Rider DMR would nonetheless comply with R.C. 4905.22. 59
g. The Commission's finding that the record evidence does not support the Retail Competition Enhancement Rider (Rider RCE). 61
h. The Commission's findings regarding energy efficiency provisions and renewable resource requirements. 62
   i. The Commission's finding to stay the effective date of the increase in the shared savings cap 62
   ii. The Commission's finding that the Companies should budget for the annual statutory energy efficiency mandate rather than the goal of 800,000 MWh of annual energy efficiency savings. 64
   iii. The Commission's finding that the Companies are authorized to collect lost distribution revenue to the extent that energy savings under the Customer Action Program are verifiable. 66
   iv. The Commission's finding that it was appropriate to remove the 50 basis point adder to the return on equity in the calculation for Rider AMI. 67

v. The Commission's findings that customers who have opted out of EE and PDR programs may still participate in the Rider ELR program and receive credits thereunder and that the cost of the ELR program credits should be collected from all customers. 68

i. The Commission's finding that the Companies' statutory right to withdraw does not end until at least the issuance of a non-appealable order....70

j. Sierra Club and OMAEG's assertion that the Fifth Entry on Rehearing 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 Ohio Adm.Code 4901:1-35-06(A)....71

k. Sierra Club's and OMAEG's assignments of error contending that the Fifth Entry on Rehearing is unlawful and unreasonable because the Commission failed to satisfy its duty under R.C. 4903.09 on multiple issues....72

C. The Commissions finding that the ESP IV, as Modified by the Commission, Continues to be more favorable in the aggregate than the expected results of an MRO....74

1. The Commission's Finding that *ESP IV*, as Modified by the Commission, is Quantitatively More Favorable than the Expected Results of an MRO....74

i. The Commission's finding that revenues collected under Rider DMR have no quantitative impact for purposes of the ESP versus MRO test. 74

ii. The Commission's finding that Rider DCR has no quantitative impact for purposes of the ESP versus MRO test....79

2. The Commission's Finding that *ESP IV*, as Modified by the Commission, is Qualitatively More Favorable than the Expected Results of an MRO. 80

i. The Commission's finding that Rider DMR will provide easier access to capital markets and allow the Companies to invest in grid modernization initiatives in their distribution systems....81

ii. The Commission's finding that Rider DMR will promote diversity of supplies and suppliers and promote Ohio's competitiveness in the global marketplace....82

iii. The Commission's finding that the five qualitative benefitspreviously relied upon by the Commission in its original Order will continue to exist under *ESP IV*, as modified by the Fifth Entry on Rehearing. 84

IV. Procedural Matters....85

A. FirstEnergy's Motions to Strike....85

B. OCC/NOAC's assignment of error alleging that FirstEnergy's application for rehearing does not satisfy the requirements of R.C. 4903.10....87

C. Moot Assignments of Error....88

D. General Denial of Assignments of Error Not Specifically Addressed in this Eighth Entry on Rehearing....89

V. Order....89

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I. SUMMARY

{¶ 1} On rehearing, the Commission finds that the application for rehearing of the Commission's Fifth Entry on Rehearing filed by FirstEnergy, be denied in part and granted in part, and the applications for rehearing of the Commission's Fifth Entry on Rehearing filed by Sierra Club, CMSD, Nucor, OEG, IGS, NOPEC, Environmental Advocates, OMAEG, P3/EPSA, and OCC/NOAC be denied.

II. PROCEDURAL HISTORY AND APPLICABLE LAW

A. *Procedural History*

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

{¶ 3} R.C. 4928.141 provides that an electric distribution utility shall provide customers within its certified territory a standard service offer (SSO) of all competitive retail electric services necessary to maintain essential electric services to customers, including firm supply of electric generation services. The SSO may be either a market rate offer (MRO) in accordance with R.C. 4928.142 or an electric security plan (ESP) in accordance with R.C. 4928.143.

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

{¶ 5} On March 31, 2016, the Commission issued its Opinion and Order in *ESP IV*, approving FirstEnergy's application and stipulations[1] with several modifications (Order or *ESP IV* Opinion and Order). As part of that *ESP IV* Opinion and Order, we approved a modified version of FirstEnergy's original proposal for a retail rate stability rider (Rider RRS).

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

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

{¶ 8} The attorney examiner granted FirstEnergy's request by Entry issued April 29, 2016. By Entry issued May 10, 2016, the attorney examiner directed the Companies to file their proposed tariffs, consistent with the *ESP IV* Opinion and Order, by May 13, 2016, noting such tariffs would be effective June 1, 2016, subject to Commission review and approval.

{¶ 9} On May 13, 2016, FirstEnergy filed proposed tariffs in Case Nos. 14-1297-EL-SSO and 16-541-EL-RDR. Staff filed its review and recommendations regarding the Companies' proposed tariff filing on May 20, 2016, concluding that it was consistent with the *ESP IV* Opinion and Order. Thereafter, by Finding and Order issued May 25, 2016 (Tariff Finding and Order), the Commission found that, in accordance with Staff's review and recommendations, the Companies' proposed tariff filing was consistent with the *ESP IV*

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

Opinion and Order, did not appear to be unjust or unreasonable, and, therefore, was approved for rates effective June 1, 2016.

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

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

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

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

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[2] Of the eight assignments of error alleged by FirstEnergy in its May 2, 2016 application for rehearing, the following assignments of error would be rendered moot in the event its proposed modifications to Rider RRS are approved: " 6. The Order is unreasonable because it requires the Companies to bear the burden for any capacity performance penalties."; "7. The Order is unreasonable because the Commission prohibited cost

recommended an expedited procedural schedule in order for the Commission to consider the proposed modifications to Rider RRS.

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

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

{¶ 16} On May 31, 2016, OCC/NOAC filed a second application for rehearing, regarding the Tariff Finding and Order, asserting that the Commission had unreasonably found the tariff rates filed by FirstEnergy to be consistent with the *ESP IV* Opinion and Order

recovery for Plant outages greater than 90 days."; and "8. The Order is unreasonable because it does not reflect the ruling by the Federal Energy Regulatory Commission Order issued on April 27, 2016 in Docket Number EL16-34-000." We will refer to the mechanism in the Companies' Proposal as the modified Rider RRS.

as the tariff rates failed to implement Rider RRS as approved and ignored other Commission modifications as described in the *ESP IV* Opinion and Order.

{¶ 17} Additionally, on June 24, 2016, RESA filed its second application for rehearing, asserting the Tariff Finding and Order was unjust and unreasonable as the Commission erred in adopting the Companies' Economic Load Response Program Rider (Rider ELR) tariff containing a limitation requiring shopping customers to use consolidated billing, which was inconsistent with the *ESP IV* Opinion and Order and unduly discriminates against customers using dual billing. OMAEG also filed a second application for rehearing on June 24, 2016, regarding the Tariff Finding and Order. On July 5, 2016, FirstEnergy filed memoranda contra RESA and OMAEG's second applications for rehearing.

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

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

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

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

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

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

{¶ 24} On August 5, 2016, P3/EPSA filed an application for rehearing, asserting that the Commission's Third Entry on Rehearing was unreasonable and unlawful. Specifically, P3/EPSA argue that the Commission erred to find that: FirstEnergy's application for rehearing was comprised of three parts; the Companies' sixth, seventh, and eighth assignments of error provided sufficient detail on which grounds the Companies claim that the *ESP IV* Opinion and Order was unreasonable and unlawful; and the Commission has jurisdiction to consider the Companies' Proposal, pursuant to R.C. 4903.10. FirstEnergy filed a memorandum contra P3/EPSA's application for rehearing on August 15, 2016, stating that these arguments were sufficiently addressed in the Third Entry on Rehearing and no new facts or circumstances warranted additional review of these arguments by the Commission.

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

{¶ 26} On September 6, 2016, OCC/NOAC gave notice to the Commission that they were appealing several decisions issued in this proceeding, including the Tariff Finding and Order, the attorney examiner's Entry issued on June 3, 2016, and the Commission's Third Entry on Rehearing issued on July 6, 2016.

{¶ 27} On October 12, 2016, the Commission issued its Fifth Entry on Rehearing in this proceeding (Fifth Entry on Rehearing), rejecting the Companies' proposal to modify Rider RRS and adopting Staff's alternative proposal to establish Rider DMR. The Commission also elected to make additional modifications to the Stipulations, as approved in the Opinion and Order, as well as denied several pending applications for rehearing.

{¶ 28} On November 11, 2016, Sierra Club filed an application for rehearing of the Fifth Entry on Rehearing.

{¶ 29} Thereafter, on November 14, 2016, applications for rehearing of the Fifth Entry on Rehearing were filed by the following parties in this proceeding: FirstEnergy; CMSD; Nucor; OEG; IGS; NOPEC; Environmental Advocates; OMAEG; P3/EPSA; and OCC/NOAC.

{¶ 30} FirstEnergy, OCC/NOAC, NOPEC, Environmental Advocates, Sierra Club, OMAEG, CMSD, and IEU-Ohio filed memoranda contra the applications for rehearing on November 25, 2016.

{¶ 31} On December 7, 2016, the Commission granted the applications for rehearing filed on November 11, 2016, and November 14, 2016, in this proceeding, in order to allow further consideration of the issues raised in the applications for rehearing (Sixth Entry on Rehearing).[3]

B. *Applicable Law*

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

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

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3 On January 6, 2017, OCC filed an application for rehearing of the Sixth Entry on Rehearing, which was later denied in its entirety by the Commission on February 1, 2017 (Seventh Entry on Rehearing).

III. Discussion

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

{¶ 34} Sierra Club, OMAEG, and P3/EPSA argue that the Commission lacks jurisdiction to consider Rider DMR as an alternative proposal because it is not a proper issue for rehearing under R.C. 4903.10.[4] Sierra Club and OMAEG initially contend that rehearing is not the proper mechanism for evaluating and approving an entirely new rider proposal that has no connection to the issues that were the subject of the Commission's Opinion and Order in this proceeding. Rather, as Sierra Club and P3/EPSA allege, R.C. 4903.10 limits parties to only challenging and seeking reconsideration of matters that the Commission "determined in the proceeding." P3/EPSA adds that Rider DMR violates the statute as it is not a "matter specified in such application." Furthermore, Sierra Club asserts there was no reason that Staff or the Companies could not have proposed a credit support rider like Rider DMR before the Commission issued its Opinion and Order, thus violating R.C. 4903.10(B). OMAEG also alleges that the parties experienced prejudice, at a minimum, by the expenditure of additional time and resources. Sierra Club adds that this proceeding is far different from the *CG&E Case*, noting nothing in that case provided the Commission the opportunity to evaluate and approve a brand new rider proposal that has no connection to the issues that were debated during the original hearing.

{¶ 35} FirstEnergy responds by stating the Commission's consideration of Rider DMR is not barred by R.C. 4903.10, as the Commission has previously found, further noting that the Companies are under no burden to anticipate unprecedented actions by the FERC when preparing for an evidentiary hearing and the intervenors have provided no evidence supporting the fact that the FERC Order was foreseeable (Third Entry on Rehearing at 10, 19; Rehearing Tr. Vol. I at 43). FirstEnergy notes that Sierra Club and P3/EPSA have also

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4 OMAEG's assignment of error questions the jurisdiction of the Commission to consider the Companies' Proposal, and any alternatives thereto, on rehearing. We will only discuss the argument as it pertains to Rider DMR. To the extent the assignment of error is limited to Modified Rider RRS, we will deny rehearing.

misinterpreted the plain language of the statute. The Companies argue that the statute's first step requires a party to "apply for a rehearing in respect to any matters determined in the proceeding," which FirstEnergy asserts it appropriately did when raising its sixth, seventh, and eighth assignments of error in its May 2, 2016, application for rehearing. FirstEnergy then contends that it was within the Commission's discretion to hold rehearing on those matters and limit the scope of such rehearing. The Companies further assert that the Commission was not restricted to solely making changes to Rider RRS; rather, the Commission is entitled to make changes to its decisions as it deems reasonable in light of the issues raised in the applications for rehearing. Thus, FirstEnergy concludes that, having granted rehearing and having properly specified the scope of rehearing, the Commission maintained its broad discretion to modify its Order within the scope of that rehearing, including alternatives to the Companies' Proposal, such as Rider DMR. As a final matter, FirstEnergy contends that the attempts of Sierra Club and P3/EPSA to distinguish this proceeding from the *CG&E Case* are misplaced, as the fact that Rider DMR was proposed by Staff is of no consequence. FirstEnergy notes that satisfaction of all of the statutory requirements set forth in R.C. 4903.10 was sufficient to allow the Commission to consider alternatives to the Companies' Proposal, including Staff's proposed Rider DMR.

{¶ 36} We agree with FirstEnergy that these arguments have been thoroughly considered, and subsequently rejected, in the Commission's Fifth Entry on Rehearing, and that rehearing should be denied on that basis (Fifth Entry on Rehearing at 12-14; see also Third Entry on Rehearing at 9-12, 14-16, 19). Nonetheless, upon further consideration, we find no merit in these jurisdictional and procedural arguments. We continue to find that the Supreme Court of Ohio's ruling in the *CG&E Case* applies to the facts and circumstances of this case and that our determination is consistent with the language of the *CG&E Case* (Third Entry on Rehearing at 9-12; Fifth Entry on Rehearing at 12-14).

{¶ 37} As noted in the *CG&E Case*, we have broad authority to modify our orders on rehearing and determine whether a subsequent hearing is necessary to consider proposed modifications. In fact, Sierra Club cites to the relevant Supreme Court of Ohio precedent in support of this broad authority, in which the Court held that "[f]ollowing a rehearing, the commission need only be *of the opinion* that the original order should be changed for it to modify the same." *Columbus & S. Ohio Elec. Co. v. Pub. Util. Comm.*, 10 Ohio St.3d 12, 15, 460 N.E.2d 1108 (1984)(emphasis in the original). Further, we again emphasize that parties have experienced no prejudice by the Commission's consideration of Rider DMR, as the parties were afforded ample opportunity to review Rider DMR and participate in the subsequent evidentiary hearing, including producing their own witnesses and cross-examining Staff and FirstEnergy witnesses as well as filing additional briefs (Third Entry on Rehearing at 19; Fifth Entry on Rehearing at 13). In addition, we reject OMAEG's overly broad definition as to what constitutes prejudice, which would preclude the Commission from ever granting rehearing for the purpose of collecting additional evidence, in contradiction of the plain language of R.C. 4903.10 and the Commission's authority. We again hold that no party has demonstrated they were prejudiced by this process.

{¶ 38} In response to Sierra Club and OMAEG's argument that there was no reason Staff could not have proposed Rider DMR before the Commission issued its Opinion and Order, we note that it was proper for Staff to submit its alternative proposal at that stage of the hearing process as the FERC Order effectively made it impractical for the Companies to comply with the Commission's Order. Additionally, Staff contended it was not possible to propose Rider DMR during the early stages of this proceeding, indicating that the projected cost in the initial years of the original Rider RRS mechanism made it financially impractical for Staff to recommend that both Rider RRS and Rider DMR be approved by the Commission. As circumstances changed, Staff believed that Rider DMR became viable only because the original Rider RRS mechanism was no longer viable, adding that the Companies' Proposal failed to provide the same level of benefits to customers as the original Rider RRS (Fifth Entry on

Rehearing at 11-12). Consistent with our previous decisions, the Commission agrees that introducing Rider DMR during the original hearing, simultaneously with the original Rider RRS, would not have been conceivable nor in the public interest.

{¶ 39} While Sierra Club is correct that the Third Entry on Rehearing did not explicitly address Rider DMR, the Third Entry on Rehearing, which noted the possibility of further evidentiary hearings, was issued on May 11, 2016. On May 20, 2016, the attorney examiner set the matter for hearing, established the scope of the hearing and provided any party, including Staff, with the opportunity to provide alternatives to the Companies' proposed modification to the approved ESP. Rider DMR was not proposed by Staff until the filing of the Staff rehearing testimony on June 29, 2016. Therefore, it would have been impossible for the Commission to explicitly address Rider DMR in the Third Entry on Rehearing as Rider DMR had not been proposed yet. Accordingly, we will affirm our determination in the Fifth Entry on Rehearing that the mere scope of the changes proposed in an alternative proposal, or the fact that Staff had proposed the alternative remedy, are not sufficient bases for distinguishing this case from the *CG&E Case*, in which the Court stated "[u]nder R.C. 4903.10(B), if the commission determines upon rehearing that its 'original order or any part thereof is in any respect unjust or unwarranted, or should be changed,' [the Commission] can abrogate or modify the order." *CG&E Case* at ¶ 15. (Fifth Entry on Rehearing at 12-14; see also Third Entry on Rehearing at 11.) Sierra Club has provided no supporting authority that would indicate otherwise. As the Commission appropriately granted rehearing and limited the scope of rehearing to the Companies' Proposal, or alternatives thereto, we find that we had authority to consider Rider DMR, pursuant to R.C. 4903.10 (Fifth Entry on Rehearing at 12-13; Third Entry on Rehearing at 11; see also June 3, 2016 Entry at 4).

{¶ 40} Accordingly, we will reject the arguments raised by Sierra Club, OMAEG, and P3/EPSA and deny rehearing on the related assignments of error pertaining to these jurisdictional and procedural issues raised in their November 11, 2016, and November 14, 2016, applications for rehearing.

B. *The Commission's finding that the Stipulations, as modified by the Fifth Entry on Rehearing, continue to meet the three-prong test for the consideration of stipulations.*

1. OVERVIEW OF COMMISSION'S DECISION AND APPLICABLE THREE-PRONG TEST

{¶ 41} As we discussed in the Order and Fifth Entry on Rehearing, the parties filed stipulations, which the parties specifically describe as the culmination of discussions and accommodation of diverse interests. Ohio Adm.Code 4901-1-30 authorizes parties to Commission proceedings to enter into a stipulation. Although not binding on the Commission, the terms of such an agreement are accorded substantial weight. *Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, 125, 1992-Ohio-122, 592 N.E.2d 1370, citing *Akron v. Pub. Util. Comm.*, 55 Ohio St.2d 155, 157, 378 N.E.2d 480 (1978). This concept is particularly valid where the stipulation is unopposed by any party and resolves all issues presented in the proceeding in which it is offered.

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

{¶ 43} The Supreme Court of Ohio has endorsed the Commission's analysis using these criteria to resolve issues in a manner economical to ratepayers and public utilities. *Indus.*

Energy Consumers of Ohio Power Co. v. Pub. Util. Comm., 68 Ohio St.3d 559, 1994-Ohio-435, 629 N.E.2d 423, citing *Consumers' Counsel* at 126. The Court stated in that case that the Commission may place substantial weight on the terms of a stipulation, even though the stipulation does not bind the Commission.

{¶ 44} In the Fifth Entry on Rehearing, the Commission found that the Stipulations, as modified by the Commission, satisfied the three-prong test for the consideration of stipulations. The Commission also noted that the three-prong test was the appropriate standard to apply in this proceeding. (Fifth Entry on Rehearing at 99-150.)

{¶ 45} Initially, CMSD contends that the Commission acted unreasonably and unlawfully when it applied the three-prong test, alleging that this standard is inappropriate for the Commission's consideration of Rider DMR. CMSD asserts that, because no party to this proceeding endorsed Rider DMR and it is not the subject of any of the submitted Stipulations, the rider should be evaluated on its own merits, rather than as a package.

{¶ 46} In its memorandum contra intervenor applications for rehearing, FirstEnergy argues that the Commission was correct to utilize the three-prong test for evaluating the Stipulated ESP IV.

{¶ 47} We note that this issue was thoroughly addressed in our Order and Fifth Entry on Rehearing (Order at 40-41, 43, 79, 81; Fifth Entry on Rehearing at 104-105). As noted in our Fifth Entry on Rehearing, the Commission must only review the three-prong test as it pertains to Stipulated ESP IV, as a package, as modified by the Commission in its orders. Accordingly, we find no merit in this argument and the assignment of error will, therefore, be denied.

2. THE COMMISSION'S FINDING THAT THE STIPULATIONS WERE THE PRODUCT OF SERIOUS BARGAINING AMONG CAPABLE, KNOWLEDGEABLE PARTIES.

{¶ 48} In the Fifth Entry on Rehearing, the Commission determined that the Stipulations were the result of serious bargaining among capable, knowledgeable parties in accordance with the first prong of the three-prong test for the consideration of stipulations (Fifth Entry on Rehearing at 101-105).

{¶ 49} NOPEC also argues that the Commission acted unreasonably and unlawfully when it applied the three-prong test, alleging that this standard is inappropriate for the Commission's consideration of Rider DMR. However, NOPEC focuses on the serious bargaining surrounding Rider DMR, noting that that no serious bargaining could have taken place as parties were not provided an opportunity to negotiate Rider DMR. NOPEC, like CMSD, also claims that the Commission should have found that Stipulated ESP IV did not pass the first prong of the three-prong test and evaluated each individual provision of Stipulated ESP IV on its own merits, rather than as a package. Similarly, because the requirement to maintain the FirstEnergy Corp. headquarters and nexus of operations has been removed from the Stipulated ESP IV and the agreement no longer represents the bargained-for package agreed to by the parties, NOPEC alleges it is unlawful for the Commission to continue to evaluate whether the Stipulated ESP IV satisfies the three-prong test.

{¶ 50} In its memorandum contra, FirstEnergy asserts that the Commission was correct to find that the Stipulations were the product of serious bargaining. Specifically, FirstEnergy contends that the Commission declined to find that a "modification of a stipulation means that the stipulation is not the result of serious bargaining among capable, knowledgeable parties" (Fifth Entry on Rehearing at 104). The Companies claim that holding otherwise would contradict Commission precedent and create unreasonable uncertainty for future settlement negotiations. As a final matter, FirstEnergy notes that no signatory party has withdrawn its support from the Stipulated ESP IV, even after the adoption of Rider DMR.

{¶ 51} We agree with FirstEnergy and note that this issue was thoroughly addressed in our Fifth Entry on Rehearing (Fifth Entry on Rehearing at 104-105). Parties to any stipulation are well aware that a stipulation is a recommendation only and that the stipulation is subject to modification by the Commission. We also note that none of the signatory parties to the

Stipulations in this proceeding filed an application for rehearing on this basis. Accordingly, we find no merit in this argument and the assignment of error should, therefore, be denied.

3. THE COMMISSION'S FINDING THAT THE STIPULATIONS, AS A PACKAGE, BENEFIT RATEPAYERS AND THE PUBLIC INTEREST

{¶ 52} In the Fifth Entry on Rehearing, the Commission determined that the Stipulations, as a package, benefited ratepayers and the public interest (Fifth Entry on Rehearing at 106-22).

a. The Commission's findings that the Companies faced a serious risk of a credit downgrade, which would result in adverse effects on the Companies and their customers, and that Rider DMR will help facilitate the Companies' access to the capital markets for investments in the distribution system and other short-term obligations.

{¶ 53} In their applications for rehearing, Sierra Club argues that the Companies failed to show that they face a serious risk of a credit downgrade that would have adverse effects on the Companies and their customers. Specifically, Sierra Club argues that the Commission erred in finding that the Companies face a serious risk of a credit downgrade because the Companies previously asserted that they could provide $561 million in net credits under the Companies' Proposal.

{¶ 54} Sierra Club, OMAEG, and Environmental Advocates also claim that, assuming there is a serious risk of a credit downgrade, Rider DMR would not facilitate the Companies' access to the capital markets because there is no evidence demonstrating that the rider will prevent a downgrade. OMAEG, OCC/NOAC, P3/EPSA, and Sierra Club argue that neither Staff nor the Companies have provided sufficient evidence to show that Rider DMR is necessary in order for the Companies to avoid falling below investment grade. CMSD further notes that there is no assurance that the proposed amount of $131 million in annual revenues through Rider DMR would prevent a downgrade in FirstEnergy Corp.'s or the Companies' credit ratings. OMAEG and Sierra Club also question whether the evidence showed that Rider

DMR is necessary to improve the investment grade ratings of the Companies and FirstEnergy Corp., noting that both currently have investment grade ratings and are able to access the capital markets. OMAEG asserts that there is no guarantee that Rider DMR would even prevent a downgrade of FirstEnergy Corp. or the Companies' credit ratings, noting that FirstEnergy Corp. would still require a substantial amount of additional funding to achieve the desired cash flow from operations (CFO) to debt ratio. As there was no evidence presented that other subsidiaries of FirstEnergy Corp. would be willing to contribute some portion of that amount, OMAEG claims that Rider DMR would likely have no impact on maintaining or improving FirstEnergy Corp.'s credit grade rating. Sierra Club, CMSD, and Environmental Advocates argue the Commission erred by approving Rider DMR because the evidence does not show that the Companies have any role in creating FirstEnergy Corp.'s current credit predicament; rather, these parties contend that the real underlying reason for the continued financial distress is due to the merchant generation owned by the Companies' affiliate. Moreover, Sierra Club argues that other affiliates will not be expected to pay their share of the burden to improve the overall financial health of FirstEnergy Corp., imposing a greater burden on the Companies' customers. OCC/NOAC add that, even accepting that such a risk exists, the Commission erred when it failed to quantify the extent of the "serious risk," arguing that any borrowing costs saved as a result of improving or maintaining the credit grade rating would be significantly outweighed by the additional cost attributed to Rider DMR. Sierra Club also contends that the Commission improperly relied upon Moody's Investors' Services (Moody's) and Standard & Poor (S&P) reports, adding that the Companies should have instead been required to produce their own projections about their financial well-being.

{¶ 55} In its memorandum contra, FirstEnergy initially asserts that many of the arguments raised by intervening parties are not new, and, therefore, rehearing should be denied as to these issues. The Companies contend that Rider DMR was adopted, in part, because the Companies face a serious risk of a credit downgrade and such a downgrade will adversely affect customers by making it more costly to access the capital markets for grid modernization projects. Additionally, the Companies assert that a properly constructed Rider DMR, in addition to other simultaneous actions taken by the Companies and FirstEnergy Corp. as part of the collective effort, should be able to avoid a credit rating downgrade. In fact, FirstEnergy adds that FirstEnergy Corp. has implemented several aggressive initiatives as a part of this effort. Furthermore, FirstEnergy again notes that the Commission previously found that the Companies face the serious possibility of a credit downgrade in the near future, necessitating a need for credit support at this time.

{¶ 56} FirstEnergy states there is sufficient evidence in the record, including intervenor testimony, showing that the credit ratings of FirstEnergy Corp. and the Companies falling to a non-investment grade rating is a matter of concern, which in turn would result in several potential negative consequences, including, but not limited to, more restrictive and expensive borrowing terms for necessary capital, the inability to make investments to ensure the delivery of safe and reliable electric service, the inability to make investments toward grid modernization, and more costly electric service for customers located in the Companies' service territories. Moreover, FirstEnergy adds that Moody's and S&P had both recently issued negative outlooks on FirstEnergy Corp. and expressed concern with its financial health moving forward, noting that those reports also specifically cited concerns regarding the outcome of this proceeding as a factor influencing their ultimate decision. In response to Sierra Club, FirstEnergy notes that Sierra Club provides no evidence as to why the admitted Moody's and S&P reports are unreliable, adding that, even if the projections were unreliable, these agencies will still rely upon this information when making their credit rating decisions in the future. The Companies note that these credit agencies are currently looking to the Commission to provide some assistance to the Companies in order to meet these financial metric targets.

{¶ 57} FirstEnergy adds that Sierra Club and OMAEG wrongly assume that current investment grade ratings eliminate the need for the Commission to implement Rider DMR, noting that there was substantial evidence on the record demonstrating a current need for credit support to prevent a possible downgrade in the near future. (Co. Ex. 206 at 7-8; Direct Ex. 1 at 3-4; Staff Ex. 13, Att. 3 at 2; Rehearing Tr. Vol. III at 723-24.) FirstEnergy also notes that despite the benefits offered in the Companies' Proposal, the Commission agreed that the Companies face significant financial challenges in the short-term.

{¶ 58} In its memorandum contra, Sierra Club states that FirstEnergy has failed to demonstrate the necessity of these revenue increases to protect the Companies' credit ratings by failing to provide forward-looking projections. Moreover, Sierra Club notes that FirstEnergy also failed to provide evidence of the costs that customers would face in the event FirstEnergy Corp. was downgraded.

{¶ 59} We find that these assignments of error were thoroughly addressed in the Fifth Entry on Rehearing, in which we found that the Companies did face a serious risk of a credit downgrade and such a downgrade would result in adverse effects on the Companies and their customers (Fifth Entry on Rehearing at 90-96). We will not duplicate that lengthy discussion in this decision. However, we will note that the consequences of the perceived risk were not limited to increased borrowing costs; rather, in addition to this concern, the record indicated that the Companies would face extreme hardship to have access to the capital markets at all in the event of a credit downgrade. Additionally, in response to Sierra Club's assertion that the Commission improperly relied on Moody's and S&P's reports, we agree with FirstEnergy and find that, whether this Commission agrees with the reports of these credit rating agencies or not, these reports will be the basis of their future credit rating decisions and offer the best available information as to what those decisions may entail. Further, we find that, given the disputed reliability of financial projections, the historic financial information in the record of this case is sufficient evidence demonstrating that FirstEnergy Corp., and consequently, the Companies, face a serious risk of a credit downgrade. Therefore, rehearing on these assignments of error will be denied.

b. The Commission's finding that Rider DMR will help promote grid modernization.

{¶ 60} CMSD, Environmental Advocates, OMAEG, Sierra Club, P3/EPSA, and OCC/NOAC contend that Rider DMR will not promote grid modernization because there is no requirement that the Companies directly spend Rider DMR revenues on grid modernization and that such benefits are illusory and have nothing to do with distribution modernization. Sierra Club again adds that FirstEnergy's customers will receive no commensurate benefit for the revenue collected under Rider DMR.

{¶ 61} OCC/NOAC assert that the Commission erred in finding that the creation of a grid modernization program is in the public interest because the Commission's finding was not supported by evidence, violating R.C. 4903.09. Specifically, OCC/NOAC note that the main tenets of the grid modernization plan considered in the Stipulated ESP IV will be determined in an entirely different proceeding and there is no indication as to how much these grid modernization efforts will cost. Moreover, OCC/NOAC point out that, due to this additional proceeding, FirstEnergy failed to meet its burden to show that any customer benefits would arise from this plan, or the details of any projected benefits. As a final point, OCC/NOAC contend that the Commission's conditions on the collection of Rider DMR revenues fail to benefit customers or the public interest.

{¶ 62} FirstEnergy argues that Rider DMR would provide sufficient credit support in order for the Companies to access the capital markets and acquire the necessary funds to invest in grid modernization projects. In order to accelerate grid modernization efforts, FirstEnergy argues that it will require a fair amount of capital support or access to capital markets with fair borrowing terms. FirstEnergy asserts that Rider DMR may be the appropriate method to ensure that the Companies have the necessary capital for investments in grid modernization. Specifically, FirstEnergy contends the increased revenues through Rider DMR would be used to: (1) improve the Companies' credit metrics; (2) strengthen the Companies' credit ratings; (3) preserve the Companies' ability to obtain capital at a reasonable cost; and (4) allow the

Companies' to implement capital intensive programs, like grid modernization. Contrary to the arguments presented by Sierra Club, the Companies further argue that there are additional obligations they face in the short-term that may affect their ability to make the necessary investments in their distribution system without the support provided by Rider DMR.

{¶ 63} Furthermore, FirstEnergy contends that the Commission did cite to record evidence when discussing the benefits associated with grid modernization in its Order and Fifth Entry on Rehearing, noting that the specific requirements for the grid modernization initiative will be determined in the grid modernization plan proceeding. Also, the Companies note that the grid modernization benefits associated with Rider DMR are significant and will help foster state policy through the development of distribution grid modernization.

{¶ 64} Finally, FirstEnergy asserts that there are two major issues with the intervenors' belief that all monies received through Rider DMR should be directly used to fund grid modernization. The first issue is that the revenue collected under Rider DMR will only represent a fraction of the significant capital investment necessary to implement grid modernization projects throughout the distribution grid. Secondly, the Companies will need to access capital at a reasonable cost to ensure that these modernization efforts are realized, necessitating immediate credit support to improve relevant financial metrics. Thus, FirstEnergy requests the Commission deny rehearing on these grounds.

{¶ 65} We reject the assignments of error raised by CMSD, Environmental Advocates, OMAEG, Sierra Club, P3/EPSA, and OCC/NOAC, as the arguments supporting the assignments of error were thoroughly addressed in the Fifth Entry on Rehearing (Fifth Entry on Rehearing at 50-51, 96-97). Specifically, we noted that we were persuaded by the testimony of RESA witness Crockett-McNew who testified that the Companies should focus on the regulated side of the business and modernize the grid, including "expansion of smart meters, data access and system design to allow for greater reliability and technically advanced competitive market offers." (RESA Ex. 7 at 6; Fifth Entry on Rehearing at 50-51). We also relied on the testimony of Staff witness Choueiki, in which he stated that Rider DMR is intended to "enable the Companies to procure funds to jumpstart their distribution grid modernization initiatives." (Staff Ex. 15 at 15; Fifth Entry on Rehearing at 90-91). As we also noted, Stipulated ESP IV required the Companies to file a grid modernization business plan (Fifth Entry on Rehearing at 88-89, 107). Consistent with our finding in the Fifth Entry on Rehearing, moving forward with the consideration of a grid modernization plan is in the public interest and is consistent with state policy to "[e]ncourage innovation and market access for cost-effective supply- and demand-side retail electric service including, but not limited to, demand-side management, time-differentiated pricing, waste energy recovery systems, *smart grid programs, and implementation of advanced metering infrastructure*." R.C. 4928.02(D) (emphasis added) (Fifth Entry on Rehearing at 88-89). Therefore, rehearing on these assignments of error will be denied.

c. *The Commission's finding that Rider DMR will help promote economic development.*

{¶ 66} Sierra Club contends that the Commission erred to find that Rider DMR will help promote economic development, noting that FirstEnergy Corp.'s executed lease made it incapable of moving its headquarters until 2025. OMAEG argues that Rider DMR will instead harm economic development in Ohio and that Ms. Murley's economic impact analysis failed to consider other impacts Rider DMR may have on the economy outside of the Akron area. OCC/NOAC state that, because the Commission failed to adopt Staff's recommendation to make Rider DMR subject to refund, the condition that FirstEnergy Corp. maintain its corporate headquarters and nexus of operations in Akron, Ohio does very little to provide the necessary protections to customers.

{¶ 67} FirstEnergy asserts that Rider DMR promotes economic development in at least three different ways: (1) to the extent Rider DMR fosters the implementation of grid modernization or other distribution system-related projects, there will be resulting economic benefits from those projects; (2) to the extent Rider DMR enables a modernized and reliable grid, the Companies service territories will become more attractive places for business to locate or expand; and (3) the economic benefits derived from maintaining FirstEnergy Corp.'s headquarters in Akron, Ohio. As to the third benefit, FirstEnergy notes that the Commission found ample evidence of the economic benefit of maintaining the headquarters in Akron, noting that no evidence was produced to dispute the findings of FirstEnergy witness Murley's economic impact study, which indicated a $568 million annual economic impact (Fifth Entry on Rehearing at 111-12). FirstEnergy also notes that, even if the lease had been admitted as an exhibit in this proceeding, there was no evidence in the record to show that it may have been in FirstEnergy's economic interest to terminate the lease early. Moreover, FirstEnergy notes that OMAEG's arguments regarding Ms. Murley's testimony were already considered, and summarily rejected, by the Commission (Fifth Entry on Rehearing at 77-78, 112).

{¶ 68} We find that the assignments of error raised by Sierra Club and OMAEG should be denied, as they were fully considered and addressed in the Fifth Entry on Rehearing (Fifth Entry on Rehearing at 111-12).

d. The Commission's findings that several suggested modifications regarding Rider DMR should be rejected.

i. The Commission's finding that several proposals regarding the calculation of Rider DMR revenue should be rejected.

{¶ 69} CMSD initially asserts that the Commission erred by violating Commission precedent against determining the amount of a rate increase based upon the amount of revenue necessary to satisfy rating agency metrics, rather than determining an amount that would produce a fair and reasonable rate of return on investment. *In re the Application of The Cleveland Elec. Illum. Co. for Authority to Amend and Increase Certain of its Filed Schedules Fixing Rates and Charges for Elec. Service*, Case No. 79-537-EL-AIR, Opinion and Order (July 10, 1980). Additionally, Sierra Club argues that any allocation of credit support of the Companies' customers should reflect the responsibility of the Companies for FirstEnergy Corp.'s CFO to debt shortfall, relative to the other FirstEnergy Corp. subsidiaries. Several intervenors raised their concerns as to whether the gross up for income taxes was necessary when calculating Rider DMR revenue. OMAEG also argues that the Fifth Entry on Rehearing was unjust and unreasonable due to the fact the Companies considered no tax rate other than the composite tax rate of 36 percent, in violation of R.C. 4905.22. Additionally, OMAEG claims that the amount the Companies will actually have to pay in taxes may be significantly lower due to bonus depreciation.

{¶ 70} In response to CMSD's argument, FirstEnergy initially contends that the precedent CMSD cites in support of its assertion is neither binding nor informative in this proceeding, as the matter in that case arose under an application for a rate increase pursuant to R.C. 4909.18. FirstEnergy adds that ESPs are expressly excepted from the requirements of R.C. Chapter 4909. Moreover, even if the case were statutorily applicable, FirstEnergy claims that it would nonetheless lack persuasion, as it involved the Commission's rejection of a single witness's analysis used to support a recommended ROE. FirstEnergy also contends that using CFO to debt ratios as the allocation factor would not be appropriate, as it would lead to a meaningless comparison and ignores the fact that FirstEnergy Corp. does not generate any revenues of its own, but holds some debt separately from its subsidiaries. Additionally, the Companies agree with the Commission's decision to gross-up the required revenue to account for additional income taxes, stating that omitting such a calculation would leave the Companies short of the target CFO. The Companies further contend that OMAEG's argument is misplaced, as the Commission allowed for a gross-up at the Federal corporate income tax rate, and not the Companies' average composite tax rate of 36 percent. FirstEnergy also notes OMAEG's argument that the actual tax rate may be significantly lower due to bonus depreciation is unsupported by the record, adding that FirstEnergy witness Mikkelsen explained that the composite tax rate does not change frequently or dramatically, making it an ideal representation of taxes for purposes of this calculation.

{¶ 71} However, in its own application for rehearing, FirstEnergy alleges that the Commission should have adopted the Companies' numerous recommendations as to the calculation of Rider DMR in order to accomplish the Commission's stated objectives. First, the Companies allege that the Commission improperly limited the term of Rider DMR to three, or potentially five, years, noting that the uncertainty created from such a short-term rider may make it more difficult for the Companies to access the capital markets and fall short of supplying the capital necessary for the Companies' grid modernization needs. Rather, the Companies argue that Rider DMR should remain in place for the entire *ESP IV* term, and if the Commission so chooses, it may conduct a review as an element of the fourth-year review under R.C. 4928.143(E). Next, FirstEnergy contends that the Commission improperly failed to include in Rider DMR any value attributed to the condition that FirstEnergy Corp.'s headquarters and nexus of operations remain in Akron, Ohio, despite accepting the testimony of FirstEnergy witness Murley that the annual economic impact of the headquarters is $568 million. As such, FirstEnergy requests that the Commission grant rehearing in order to amend the revenue calculation for Rider DMR to appropriately account for the value of maintaining FirstEnergy Corp.'s headquarters and nexus of operations in Akron, Ohio or, alternatively, to include such value as a new component of Rider EDR. As its third assignment of error regarding the calculation of Rider DMR, FirstEnergy contends that the Commission erred in its finding that a CFO to debt ratio of 14.5 percent, rather than 15 percent, was appropriate to use in determining the proper amount of revenue to be generated by the rider, further stating using the midpoint of Moody's updated target range would provide sufficient protection to account for other potential risks and would be consistent with Staff witness Buckley's methodology. As its fourth assignment of error, the Companies assert that the Commission improperly found that a four-year average of CFO to debt ratios from 2011 to 2014, rather than a three-year average from 2012 through 2014, is appropriate in determining the revenue amount to be generated by Rider DMR. FirstEnergy adds that the three-year range from 2012 through 2014 represents a more accurate depiction of the Companies' deteriorating creditworthiness, as this timeframe represents the years in which the CFO to debt ratio fell below Moody's target 14 to 16 percent range. FirstEnergy also notes the Commission's decision to utilize the data from 2011 simply because it is "part of the historic average" makes little sense when such data includes a period of time that are not similar to present and future circumstances. Finally, the Companies contend that the Commission improperly found that Staff's allocation factor based on energy operating revenues was appropriate to use in determining the amount of revenue to be generated by Rider DMR, noting that the 22 percent allocation factor understates the significance of the Companies to FirstEnergy Corp. Rather, the Companies argue that using net income would be a more appropriate basis for the allocation factor, given that it is neither limited to gross cash inflows nor influenced by the level of shopping in each utility's service territory, resulting in the more representative 40 percent allocation factor.[5]

{¶ 72} *In response to FirstEnergy's various assignments of error,* Environmental Advocates and Sierra Club argue that FirstEnergy's application for rehearing only bolsters the intervenors' concerns that Rider DMR is meant to support FirstEnergy Corp.'s unregulated subsidiaries, rather than invest in grid modernization. Initially, OMAEG once again claims that FirstEnergy failed to demonstrate that the credit support it is requesting is necessary, given the current investment grade ratings of FirstEnergy Corp. and the operating utilities. Moreover, Environmental Advocates, OMAEG, Sierra Club, and OCC/NOAC contend that, as approved by the Commission, Rider DMR is only intended to jumpstart grid modernization efforts; thus, granting FirstEnergy's request to allow Rider DMR to cover the entire time period for its grid modernization efforts would be improper. Furthermore, even assuming that Rider DMR was needed to improve credit ratings, OCC/NOAC note that FirstEnergy acknowledged that it did not know how much time would be required to improve credit ratings, and Sierra Club again claims that FirstEnergy has failed to demonstrate the necessity of these revenue

5 Alternatively, the Companies assert that distribution sales, customer counts, and distribution employee headcounts would also be acceptable to use as the basis for the allocation factor and are supported by the record. The use of any of these alternative allocation factors, or the Companies' recommendation of net income, would result in an allocation factor between 34 to 40 percent.

increases to protect the Companies' credit ratings by failing to provide forward-looking projections. Environmental Advocates, Sierra Club, OMAEG, and OCC/NOAC also disagree with the suggestion of incorporating all, or at least a portion of, the $568 million economic impact benefit into the required revenue calculation for Rider DMR, stating that numerous intervenors questioned the validity of FirstEnergy witness Murley's calculations, especially for the fact that she failed to account for the economic consequences of the costs to customers and only attempted to quantify the alleged benefits. Additionally, NOPEC alleges that the Commission already thoroughly considered and addressed the arguments raised by FirstEnergy in its application for rehearing. NOPEC, OMAEG, and OCC/NOAC also specifically note that the Commission's adoption of the allocation factor based on energy operating revenues was reasonable, as Staff witness Buckley indicated the fact that there are a significant number of shopping customers in the Companies' service territories only supports the use of energy operating revenues as a more valid basis for allocation. Sierra Club adds that FirstEnergy has not provided any information as to the CFO to debt ratios, or other relevant credit metric information, for the individual Companies or other FirstEnergy Corp. subsidiaries, making the allocation decision almost impossible to determine. Sierra Club and OMAEG further note that the Companies' request to use the 15 percent target ratio does not represent the minimum amount necessary; rather, this ratio serves as the midpoint to the most recent Moody's report. OCC/NOAC and OMAEG contend the four-year average of CFO to debt ratios was appropriate as that time period represents information since the last significant restructuring of FirstEnergy Corp. and signifies a more reliable historic trend to utilize. These intervening parties also argue that FirstEnergy is only proposing these modifications to the calculation of Rider DMR in order to serve its own interests and arbitrarily increase the amount of revenues to be collected through the rider.

{¶ 73} We find that the parties have raised no new arguments and that these issues were comprehensively addressed in the Fifth Entry on Rehearing. With respect to arguments raised regarding the allocation factor, we note that Staff witness Buckley was merely acknowledging that there are several appropriate methods to determining the allocation factor; however, based on the record and his financial background, he recommended that energy operating revenues be used, indicating that this allocation factor would be the most credible because using net income may overcompensate the Companies' contribution of services to FirstEnergy Corp. due to the high number of shopping customers in their service territories (Fifth Entry on Rehearing at 93-96; Rehearing Tr. Vol. III at 553-54, 738-39).

ii. The Commission's finding that Rider DMR should not be subject to refund.

{¶ 74} OCC/NOAC argue that the Commission should have made Rider DMR subject to refund, as an additional protection for customers.

{¶ 75} FirstEnergy notes that OCC/NOAC have provided no record support for this recommendation have not addressed the inherent flaws with such a recommendation, such as that making the revenues refundable may undermine the very purpose of the rider, which is to provide credit support, and that refunding revenues may constitute retroactive ratemaking.

{¶ 76} The Commission has held on two occasions that Rider DMR should not be subject to refund as this would be counterproductive to the purpose of the rider and impose additional risks on the Companies (Fifth Entry on Rehearing at 97; Seventh Entry on Rehearing at 4-5). OCC/NOAC have raised no new arguments in support of this assignment of error. Thus, OCC/NOAC's assignment of error should be denied.

iii. The Commission's finding that Rider DMR revenues should be excluded from the SEET calculation.

{¶ 77} OCC/NOAC, OMAEG, and NOPEC argue that revenues collected under Rider DMR should not be excluded from the calculation of the annual SEET, noting that all ESP provisions should be included in the SEET and that Rider DMR is an ESP provision, pursuant to R.C. 4928.143(F). NOPEC argues the Commission's decision was arbitrary and that, as a creature of statute, the Commission is bound by the plain language of R.C. 4928.143(F) and must include Rider DMR revenues in the SEET calculation. OCC/NOAC contend that the Supreme Court of Ohio has already provided guidance as to what this statute requires, holding that the reference to "adjustments" in the statute refers to any provisions that are included in the ESP that resulted in excessive earnings. Further, OCC/NOAC argue that while the Supreme Court has upheld the Commission's decision to exclude earnings that were not derived from the ESP, the same analysis would not apply in this case as Rider DMR revenues will be derived from the ESP. *In re Columbus S. Power Co.*, 134 Ohio St.3d 392, 983 N.E.2d 685. OCC/NOAC add that excluding such revenues from the SEET may deprive customers of refunds they would have otherwise received and is not in the public interest. Moreover, OMAEG claims that if the revenues collected under Rider DMR do, in fact, represent an amount for necessary credit support, then logically these revenues would never equate to excessive earnings. For these reasons, OCC/NOAC, OMAEG, and NOPEC request the Commission grant rehearing.

{¶ 78} FirstEnergy contends that the Commission has already considered and thoroughly addressed these arguments, stating that including Rider DMR revenue in the SEET calculation "would introduce an unnecessary element of risk to the Companies and undermine the purpose of providing credit support to the Companies." (Fifth Entry on Rehearing at 98). Moreover, FirstEnergy asserts that it was proper to exclude Rider DMR from SEET largely for three reasons: (1) Rider DMR charges constitute "extraordinary items"; (2) there are no comparable companies with a rider mechanism such as Rider DMR, thus, making it impossible to create a valid comparison for purposes of the SEET calculation; and (3) the Order provides for SEET exclusions "associated with any additional liability or write-off of regulatory assets due to implementing the Companies' *ESP IV*." (Co. Ex. 206 at 22-23).

{¶ 79} In its own application for rehearing, FirstEnergy alleges that the Commission erred by concluding that it would revisit its decision to exclude Rider DMR revenues from the SEET calculation when evaluating any request by the Companies to extend Rider DMR.

FirstEnergy states that, given the Commission's decision to exclude Rider DMR revenues from the SEET calculation during the initial three-year period, the exclusion should continue for as long as Rider DMR is in effect. The Companies note that the basis of the Commission's decision to exclude these revenues from SEET was that including them would introduce unnecessary risk and undermine the purpose of providing credit support, which they also allege would apply in any year that Rider DMR is in effect. Thus, the Companies request the Commission grant rehearing and find that Rider DMR revenues should be excluded from the SEET calculation while Rider DMR is in effect.

{¶ 80} In their memoranda contra, NOPEC and OCC/NOAC contend that, pursuant to the plain language of R.C. 4928.143(F), Rider DMR revenues must be included in the SEET calculation because they were approved as part of an ESP proceeding. Moreover, OCC/NOAC again note that the purpose of Rider DMR will not be compromised if these revenues are included in the SEET calculation, as the rider was only authorized to provide necessary credit support to the Companies, not excessive earnings. Thus, NOPEC and OCC/NOAC urge the Commission to deny FirstEnergy's application for rehearing on this basis, and instead find that R.C. 4928.143(F) requires that all Rider DMR revenues received during *ESP IV* be included in the SEET calculation.

{¶ 81} The Commission affirms our ruling that the revenue collected under Rider DMR should be excluded from SEET for the initial three-year period. At the time we issued the Fifth Entry on Rehearing, we found the arguments made by the Companies to be persuasive and continue to do so today, to the extent such arguments are relating to the initial three-year period of Rider DMR. Intervenors have raised no new arguments for our consideration, and we fully considered those arguments in the Fifth Entry on Rehearing. (Fifth Entry on Rehearing at 85-86, 98). However, the Commission notes that we will also reconsider whether to continue excluding Rider DMR revenues from SEET when we evaluate any possible extension of Rider DMR as a portion of our extensive review of Rider DMR (Fifth Entry on

Rehearing at 98). Moreover, intervenors' arguments raise hypothetical concerns in any event and, thus, are also premature. Accordingly, we find that rehearing on these assignments of error should also be denied.

iv. The Commission's finding that additional proposed modifications regarding the use of revenues collected under Rider DMR should be rejected.

{¶ 82} Sierra Club asserts that the Commission should have adopted its recommendations to further benefit the Companies' customers, including that the Commission require that all Rider DMR revenues be set aside in a separate account(s) within the Companies and restrict disbursements from this account(s), that the Commission restrict the use of revenues collected under Rider DMR to grid modernization projects or other projects benefiting customers, and such projects be implemented within a reasonable amount of time, and that the Companies be precluded from receiving double recovery on capital investments made with Rider DMR revenues, particularly recovery of depreciation payments. Finally, in its next assignment of error, Sierra Club contends that the Commission's decision to refrain from adopting Sierra Club's recommendations was made without any evidentiary basis and is against the manifest weight of the evidence.

{¶ 83} FirstEnergy initially argues that the Commission has already considered and rejected Sierra Club's recommendations, stating that "placing restrictions on the use of Rider DMR funds would defeat the purpose of Rider DMR." (Fifth Entry on Rehearing at 86, 127). The Companies add that there is a significant difference between the revenues necessary to provide credit support to access capital to pay for grid modernization projects and the capital necessary to pay for such projects, the former being that which Rider DMR was intended. FirstEnergy also notes that the Commission's determination was based on ample evidence in the record.

{¶ 84} We agree that these arguments were already raised by Sierra Club and subsequently rejected by this Commission (Fifth Entry on Rehearing at 86-87, 127). Moreover, the Commission agrees with FirstEnergy in that our decision was based on a significant record that demonstrated the following: (1) the Companies are facing a serious risk of a credit downgrade that would have adverse effects upon the Companies' ability to access the capital markets; (2) Rider DMR is intended to provide credit support to the Companies in order to avoid such a downgrade; and (3) maintaining the Companies' current ratings will allow the Companies to access capital markets at a reasonable cost to fund grid modernization projects (Fifth Entry on Rehearing at 126-27). Therefore, we find these assignments of error should be denied.

v. The Commission's finding to reject OEG's recommendations for Rider DMR's cost allocation and rate design.

{¶ 85} In their applications for rehearing, Nucor and OEG raise a single assignment of error arguing that the Commission should grant rehearing of the Fifth Entry on Rehearing and adopt the alternative Rider DMR cost allocation and rate design as recommended by OEG witness Baron, stating that this alternative recommendation would be more reflective of cost causation and significantly mitigate the impact of the rider on the residential class. Nucor and OEG note that, while the Commission recognized the alternative recommendation proposed by OEG, it did not address why this alternative proposal would be inappropriate. OEG explains its alternative proposal would result in the same rate impacts for residential customers as the cost allocation methodology adopted by the Commission; however, OEG alleges its proposal would remain superior because the non-residential DMR cost allocation would incorporate a distribution component to recover distribution-related costs.

{¶ 86} Rehearing on this assignment of error should be denied. We do not agree that the record supports the claim that the rate impacts on residential customers would be the same under OEG witness Baron's proposal as under Staff witness Turkenton's proposal. Upon further consideration of OEG's alternative proposal, the Commission continues to find that such a cost allocation would disproportionately affect residential customers as well as smaller commercial customers, including schools and churches. We affirm our decision to adopt Ms. Turkenton's recommendation, as that rate design and cost allocation would result in a fair and equitable distribution of costs (Rehearing Tr. Vol. II at 431; Fifth Entry on Rehearing at 97-98).

e. *The Commission's finding that "ring fencing" measures should not be implemented at this time.*

{¶ 87} In its application for rehearing, NOPEC contends that the Commission unreasonably failed to implement ring fencing at this time, noting that the Staff's periodic review of the costs associated with Rider DMR will fail to protect the Companies from continuing credit problems. In response, FirstEnergy asserts that no witness recommended that the Commission impose such measures in this proceeding, and that OCC witness Kahal even acknowledged that these measures would be premature at this time (OCC Ex. 46 at 14).

{¶ 88} The Commission agrees with FirstEnergy and finds that this assignment of error should be denied as the evidence, including the testimony of OCC witness Kahal, demonstrates that such measures are unnecessary at this time (OCC Ex. 46 at 14; Fifth Entry on Rehearing at 96).

f. *The Commission's finding that the Companies should file a base distribution rate case by the end of ESP IV.*

{¶ 89} In its application for rehearing, FirstEnergy alleges that it was premature for the Commission to direct the Companies to file a distribution rate case at the end of *ESP IV*, noting that there was no evidence to justify such an order and arguing that a more reasonable alternative would be to allow the Companies to file their next SSO application and determine, at that time, whether a distribution rate case would be appropriate. The Companies also assert that the distribution rate freeze was considered a benefit to customers in the Order and the Fifth Entry on Rehearing (Order at 92-93, 119; Fifth Entry on Rehearing at 115), and the SEET mechanism would ensure the Companies would not recover excessive earnings.

{¶ 90} NOPEC asserts this assignment of error should also be rejected by the Commission, noting that any continued distribution rate freeze under a future ESP would be illusory, just as it is in this proceeding. Further, NOPEC again asserts that the base distribution rate case was held in 2007 and financial circumstances have changed significantly since that time, specifically noting the capital costs have reached historic lows. OMAEG also remarks on the Commission's broad authority to modify ESPs and stipulations based on the evidence in the record and argues that the Commission acted reasonably and within its authority when determining that a base distribution rate case should be filed upon the conclusion of *ESP IV*. NOPEC, OMAEG, and OCC/NOAC urge the Commission to affirm its decision and allow an opportunity to have the Companies' authorized rate of return properly scrutinized, citing the reasoning conveyed by Staff witness McCarter when she stated "Staff believes it is a prudent regulatory practice to gain a holistic understanding of the regulated distribution company on a regular basis." (Staff Ex 6 at 13).

{¶ 91} The Commission finds that our decision to require FirstEnergy to file a distribution case should be affirmed. The Opinion and Order in FirstEnergy's last distribution rate case was issued on January 21, 2009. *In re FirstEnergy*, Case No. 07-551-EL-AIR et al., Opinion and Order (Jan. 21, 2009). Although mechanisms such as FirstEnergy's Rider DCR reduce regulatory lag and promote gradualism in setting distribution rates, we agree with Staff witness McCarter that it is sound regulatory practice to conduct regular distribution rate cases. Accordingly, rehearing on this assignment of error should be denied.

g. The Commission's finding that the increases in the revenue caps under Rider DCR would be terminated if ESP IV was terminated prior to its currently approved eight-year term.

{¶ 92} The Companies request that the Commission grant rehearing in order to clarify that the revenue cap increases would continue until rendered moot by a replacement plan following the termination of *ESP IV*, noting that, in the event *ESP IV* is terminated as a result of the R.C. 4928.143(E) fourth year review, there may be a lengthy transition process before a new plan would be approved. Further, the Companies argue that R.C. 4928.143(E) authorizes the Commission to impose conditions on the ESP's termination in order to accommodate any potential transition to another plan. FirstEnergy also states that, as these caps represent its historical capital expenditure trends, it is reasonable to make such an extension.

{¶ 93} NOPEC asserts FirstEnergy ignores the fact that if *ESP IV* were terminated pursuant to R.C. 4928.143(E) their historical capital expenditure trends would no longer be valid. As such, NOPEC argues that it would be unreasonable and unlawful to permit the Companies to receive these annual increases after the Commission has found that the Companies have excessive earnings or that the ESP is no longer more favorable in the aggregate than an MRO. Moreover, OCC/NOAC add that FirstEnergy will still be able to collect general costs under Rider DCR, regardless if the caps are terminated. Additionally, OCC/NOAC claim FirstEnergy failed to provide any evidence that they would be unable to provide reliable electric service and stable rates for customers in the event the caps are terminated.

{¶ 94} We agree with FirstEnergy that R.C. 4928.143(E) authorizes the Commission to impose conditions on an ESP's termination in order to accommodate any potential transition to another plan. Therefore, the Commission will grant rehearing and clarify that, if *ESP IV* is terminated pursuant to R.C. 4928.143(E), the Rider DCR revenue cap increases currently in place will continue until the Commission establishes a new SSO. If FirstEnergy exercises its right to terminate *ESP IV* at some point in the future following rehearing or an appeal, the Rider DCR revenue cap increases yet to be implemented at the time of termination will also be terminated along with the remaining provisions of *ESP IV*. However, FirstEnergy will be permitted to continue to recover costs already incurred under Rider DCR.

h. The Commission's finding that the Rider NMB Opt-Out pilot program should be approved, as modified by the Commission in its Fifth Entry on Rehearing.

{¶ 95} The Companies claim that the Commission modified the Rider NMB Opt-Out pilot program in two key ways: (1) directed that customers who may benefit from participation may file an application under R.C. 4905.31 for permission to participate, at which point the Commission will determine if such participation is in the public interest; and (2) reserved the right to terminate or modify the program without specifying the process to be used by the Commission to make such decisions (Fifth Entry on Rehearing at 139-40). As to the first issue, the Companies argue that the Commission improperly expanded the pilot program to any interested customer and provided no guidance as to how the Commission would determine if a customer's participation in the program would be in the public interest. In order to ensure the program is manageable in size and fair to both the Companies and the eligible participants, FirstEnergy contends that the Commission should revert back to its Order, in which it approved the pilot program as agreed to by the signatory parties, or in the alternative, provide guidance as to how applications to participate in the pilot program will be processed. Similarly, FirstEnergy requests that the Commission prescribe a process in which the Companies and other interested parties may participate before either the program or the rider is modified or terminated.

{¶ 96} OMAEG contends that allowing eligible customers the opportunity to participate in the program through a reasonable arrangement application is appropriate, given the fact that the pilot program, as it was first proposed, was unduly discriminatory, anti-competitive, and in violation of R.C. 4928.02(A). However, OMAEG agrees with the Companies that the Commission should provide a clearly defined, expedited process for determining whether "customers' participation is appropriate" prior to filing a reasonable arrangement with the Commission.

{¶ 97} Rehearing on these assignments of error should be denied. The Commission has broad authority under R.C. 4905.31 to approve reasonable arrangements between electric distribution utilities and mercantile customers, and we simply acknowledged that broad authority in stating that a mercantile customer may join the pilot program through an application under R.C. 4905.31. We reject any implication that such applications would somehow limit the Commission's ability to determine the proper size of the pilot program or whether the participation of any given customer is in the public interest. With respect to the process which the Commission will use to determine if Rider NMB or the pilot program should be terminated, the Commission finds that it is unnecessary to detail such a process at this time. All parties will be given a full and fair opportunity to participate in any process set by the Commission to determine the future of Rider NMB and/or the pilot program before a decision is made by the Commission.

i. The Commission's finding that Rider GDR should be approved, provided the scope of potential costs to be included in the rider be limited.

{¶ 98} Additionally, OCC/NOAC argue that the Commission's approval of Rider GDR does not provide any benefits to customers and will cause the Companies to receive significantly excessive earnings, despite the Commission's modifications in its Fifth Entry on Rehearing. Specifically, OCC/NOAC contend that the Commission did not address the fact that the rider provides no incentive or requirement that FirstEnergy file for rate reductions resulting from changes in governmental regulations or whether Rider GDR will erase the benefits associated with a distribution rate freeze. OCC/NOAC add that Rider GDR is an open-ended collection mechanism and the Companies will be able to seek recovery for an endless amount of costs related to federal and state governmental directives, further shifting cost recovery risks onto consumers. OCC/NOAC state the fact that Staff will review such costs does not alleviate the concerns raised in the Fifth Entry on Rehearing and requests that the Commission grant rehearing.

{¶ 99} FirstEnergy notes that these assignments of error have previously been raised and were rejected by the Commission, both in the original Order as well as the Fifth Entry on Rehearing.

{¶ 100} With respect to these assignments of error, the Commission thoroughly addressed these arguments in the *ESP IV* Opinion and Order and the Fifth Entry on Rehearing (Order at 67; Fifth Entry on Rehearing at 116). OCC/NOAC have raised no new arguments on rehearing; accordingly, rehearing on this assignment of error should be denied.

j. The Commission's finding that competitive bidding was unnecessary for the low-income customer assistance programs and initiatives.

{¶ 101} OCC/NOAC note the Commission also erred by failing to modify the Stipulated ESP IV to require competitive bidding of low-income programs, asserting that this modification would have resulted in a more cost-effective outcome for consumers and fostered more efficient use of such funds. In particular, OCC/NOAC claim that the Commission violated R.C. 4903.09 by failing to support its decision with record evidence.

{¶ 102} FirstEnergy notes that this assignment of error has previously been raised and was rejected by the Commission and was supported by the record evidence in this proceeding, in accordance with R.C. 4903.09.

{¶ 103} With respect to this assignment of error, the Commission thoroughly addressed these arguments in the *ESP IV* Opinion and Order and the Fifth Entry on Rehearing (Order at 96, 118-19; Fifth Entry on Rehearing at 117). Moreover, when addressing this argument in the Fifth Entry on Rehearing, we specifically cited our reasoning from the Order and explained our decision to modify the Stipulated ESP IV to further protect low-income customers by implementing an additional degree of oversight and review. OCC/NOAC have raised no new arguments on rehearing; accordingly, rehearing on this assignment of error should be denied.

4. THE STIPULATIONS, AS MODIFIED BY THE COMMISSION, VIOLATE NO IMPORTANT REGULATORY PRINCIPLES OR PRACTICES

{¶ 104} The Commission concluded in its Fifth Entry on Rehearing that the Stipulations, and as modified by the Commission, do not violate any important regulatory principles or practices and, thus, satisfy the third prong of three-prong test (Fifth Entry on Rehearing at 121-150).

a. The Commission's finding that Rider DMR complies with R.C. 4928.02.

{¶ 105} OMAEG and OCC/NOAC contend that Rider DMR does not advance state policy under R.C. 4928.02. Specifically, these parties continue to argue that Rider DMR will limit competitive retail generation, other generating companies may view Rider DMR as simply providing FirstEnergy Corp. a large cash infusion, thereby deterring new entry into the supply market. OMAEG and OCC/NOAC also raise the fact that Rider DMR contains no firm commitment or requirement that the Companies use the revenues collected under the rider to fund its distribution grid modernization. As such, OMAEG contends that Rider DMR is a way to provide credit support to the Companies and FirstEnergy Corp., not to modernize the grid. Further, OCC/NOAC contend the fact that the Companies need to jumpstart their grid modernization investments is also an unsupported fallacy, explaining that the Companies had already committed to filing a grid modernization business plan (Co. Ex. 154 at 9-10). OCC/NOAC also note that, due to the enhancements of Rider AMI, including the ability to collect money from customers based on a forward looking formula rate concept, there is no need for an additional jumpstart. Rather than promote diversity of supplies or suppliers in Ohio, OMAEG contends that Rider DMR will actually diminish the diversity of supplies and limit competitive retail generation choices for customers, in violation of R.C. 4928.02(C). Thus, OMAEG and OCC/NOAC maintain that Rider DMR fails to promote or advance the policies set forth in R.C. 4928.02.

{¶ 106} FirstEnergy argues that these points have previously been considered and rejected by the Commission. Specifically, FirstEnergy notes that the Commission found Rider DMR promotes state policy to "[e]nsure 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" and to "[e]ncourage innovation and market access for cost-effective supply- and demand-side retail electric service including, but not limited to, demand-side management, time-differentiated pricing, waste energy recovery systems, smart grid programs, and implementation of advanced metering infrastructure" (Fifth Entry on Rehearing at 122-23). Furthermore, FirstEnergy argues that the Commission also found that "Rider DMR, by incentivizing and supporting grid modernization, promotes additional provisions of state policy to: ensure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service; and ensure the availability of unbundled and comparable retail electric service that provides consumers with the supplier, price, terms, conditions, and quality options they elect to meet their respective needs. R.C. 4928.02(A); R.C. 4928.02(B)," adding that "the retention of FirstEnergy Corp.'s headquarters and nexus of operations in Akron, Ohio serves to facilitate the state's effectiveness in the global economy. R.C. 4928.02(N)." (Fifth Entry on Rehearing at 123).

{¶ 107} The Commission agrees with FirstEnergy and finds that these arguments were fully addressed in the Fifth Entry on Rehearing (Fifth Entry on Rehearing at 122-23). As such, these assignments of error will be denied.

b. The Commission's finding that Rider DMR is authorized under R.C. 4928.143(B)(2)(h).

{¶ 108} In their respective applications for rehearing, Sierra Club, OCC/NOAC, P3/EPSA, NOPEC, Environmental Advocates, and OMAEG assert that the Commission erred when it determined that Rider DMR is authorized under R.C. 4928.143(B)(2)(h). Additionally, these parties contend that Rider DMR should not be considered related to distribution service because there is no requirement that the Companies spend Rider DMR revenues on distribution modernization; rather, they argue that the revenues will be used to benefit FirstEnergy Corp. by providing it credit support. NOPEC claims that Staff witness Buckley even acknowledged that Rider DMR was related to credit support instead of distribution service. As additional evidence that Rider DMR is neither necessary nor related to the distribution system, OCC/NOAC, OMAEG, and NOPEC also argue the Companies already have the Advanced Metering Infrastructure (Rider AMI) and the Delivery Capital Recovery Rider (Rider DCR) to recover capital expenditures made on grid modernization and other distribution infrastructure investments. Given the plain language of R.C. 4928.143(B)(2)(h), NOPEC further contends that incentives are only appropriate when a utility is actually incurring costs for investment in infrastructure modernization, which is not the case here. OMAEG, OCC/NOAC and Sierra Club also argue the "sufficient progress" condition created in the Fifth Entry on Rehearing is vague and "essentially meaningless," given the fact that the scope of the grid modernization programs remain completely undefined. P3/EPSA go even further to state that this condition is the sole connection between Rider DMR and the promise of grid modernization, falling short of the statutory requirements, and adding that the conditions imposed by the Commission on Rider DMR are not sufficient to cure the fact that the rider is not related to distribution service.

{¶ 109} Many of the intervening parties also question whether Staff's review to ensure the Rider DMR revenues are used in support of grid modernization is meaningful and raise their concerns that the funds will be provided, instead, to FirstEnergy Corp. Sierra Club goes on to allege that there is some doubt as to whether the Commission can enforce its condition that Rider DMR funds be used in support of grid modernization. Further, Sierra Club, OMAEG, and P3/EPSA contend that Rider DMR cannot constitute "incentive ratemaking" as it is not connected to any costs incurred by the Companies to provide distribution service. CMSD similarly argues that Rider DMR cannot constitute "single-issue ratemaking" since it is not recovering specific costs or expenses. OCC/NOAC also claim that the Commission should have determined, at some time after the alternative proposal was submitted, that customers' and the Companies' expectations were aligned before approving Rider DMR, as required under R.C. 4928.143(B)(2)(h). As a separate assignment of error, OCC/NOAC argue that the Commission violated R.C. 4903.09 in finding that an incentive is needed for the Companies to invest in grid modernization, as the Commission failed to provide reasons as to why such an incentive is necessary. As a final note, Sierra Club and Environmental Advocates contend the Fifth Entry on Rehearing was unlawful because FirstEnergy failed to meet its burden that Rider DMR is related to distribution service and incentive ratemaking, and, consequently, the Commission's findings of such are against the manifest weight of the evidence. At the very least, Environmental Advocates argue the Commission should take this opportunity to grant rehearing in order to provide the framework of its detailed policy review of grid modernization and include certain provisions in the rider to ensure that the revenues are used solely for grid modernization, as well as ensure the revenues are spent prudently and subject to an annual true-up.

{¶ 110} FirstEnergy initially contends that the Commission thoroughly considered, and subsequently rejected, these arguments in its Fifth Entry on Rehearing, referencing the record on multiple occasions (Fifth Entry on Rehearing at 89-90). Moreover, FirstEnergy adds that Staff witnesses were clear that Rider DMR is meant to incentivize grid modernization by providing credit support to the Companies and enable them to access capital markets to secure financing at a reasonable cost for future distribution modernization projects (Rehearing Tr. Vol. II at 426, 429; Rehearing Tr. Vol. IV at 959, 1020-21, 1029). Additionally, although they also deal with distribution service, FirstEnergy notes that Rider AMI and Rider DCR serve different purposes than that of Rider DMR, which is to provide the Companies the ability to access the necessary capital for their grid modernization program at a reasonable cost. FirstEnergy also reiterates its earlier arguments that there is no record evidence indicating the Rider DMR funds will be provided to FirstEnergy Corp.; rather, these funds will be used for short-term obligations of the Companies and provide the necessary credit support to access capital markets and obtain lower financing costs for future grid modernization projects. Further, FirstEnergy states that the Commission is more than capable of enforcing the requirement that Rider DMR funds be used in support of grid modernization. In response to Sierra Club and CMSD's arguments that Rider DMR does not constitute "incentive ratemaking" or "single-issue ratemaking," the Companies assert that these parties wrongfully assume that cost-based ratemaking provisions apply to an ESP and that these arguments are irrelevant as the Commission determined that Rider DMR is a distribution modernization incentive (Fifth Entry on Rehearing at 90). Contrary to the assertions of many intervenors, FirstEnergy states that the Rider DMR charges are directly related to the Companies' ability to provide distribution service to customers. As a final point, FirstEnergy asserts that the Commission did determine that customers' and the Companies' expectations were aligned when examining the reliability of the Companies' distribution system (Fifth Entry on Rehearing at 90; Staff Ex. 4 at 6-10; Tr. Vol. XXVIII at 5840-41).

{¶ 111} However, in its application for rehearing, FirstEnergy agrees with Sierra Club and OMAEG that the "sufficient progress" condition is vague and introduces uncertainty, adding that while this provision is ultimately unnecessary, its inclusion or omission does not impact the Commission's conclusion that Rider DMR is authorized under R.C. 4928.143(B)(2)(h); rather, its inclusion threatens the effectiveness of the rider. The Companies note that this provision is not needed to create the required linkage between the rider and distribution service, as alleged by P3/EPSA, and add that the Commission will have the ability to govern the terms of the Companies' grid modernization programs in future, separate proceedings. As a final point, FirstEnergy argues that a simplified reading of this requirement may indicate that Rider DMR revenues be limited in the deployment of grid modernization programs, directly in contrast with the Commission's other findings in the Fifth Entry on Rehearing.

{¶ 112} While they agree with the Companies that the "sufficient progress" condition is vague and risks an arbitrary application, Environmental Advocates, OMAEG, and NOPEC argue that the Companies only desire to have this condition be removed because it would require them to invest in grid modernization, rather than use the money as a cash infusion to improve credit ratings and decrease debt. As such, these parties suggest that the Commission add more details and explicit timeframes as to what the expectations will be for the "sufficient progress" condition to be satisfied and ensure that such revenues are, in fact, used for grid modernization purposes. OCC/NOAC assert that FirstEnergy provides absolutely no evidentiary support for its assignment of error, adding that this provision provides the only link to using Rider DMR revenues for grid modernization efforts.

{¶ 113} The Commission agrees with FirstEnergy that we thoroughly addressed the arguments of Sierra Club, OCC/NOAC, P3/EPSA, Environmental Advocates, and OMAEG in the Fifth Entry on Rehearing, finding that Rider DMR is related to distribution service and acts as an incentive for the Companies to jumpstart their grid modernization initiatives to improve their distribution systems (Fifth Entry on Rehearing at 89-90). We would emphasize again that Rider DMR's purpose is to provide financial support to the Companies to allow them to access capital on more favorable terms, thereby jumpstarting grid modernization initiatives and reducing their future costs of providing distribution service. Moreover, we clearly indicated in the Fifth Entry on Rehearing that Staff will review Rider DMR to ensure that Rider DMR revenues are used, directly or indirectly, in support of grid modernization (Fifth Entry on Rehearing at 127-28). The Commission is fully capable of making such an assessment and such a review will provide further protection to FirstEnergy's customers and ensure that customers are indeed benefiting from these grid modernization initiatives. However, the Commission will clarify that we do not intend for this review to be conducted one time, at the end of the collection of Rider DMR. We intend for this review to be ongoing and conducted in real time. Accordingly, the Commission directs Staff to prepare a request for proposal (RFP) for a third party "monitor" to assist Staff and work with FirstEnergy and FirstEnergy Corp. to ensure that

Rider DMR funds are expended appropriately. This RFP should include quarterly interim updates on the use of Rider DMR to Staff, a mid-term report to be docketed in any proceeding in which the Companies seek an extension of Rider DMR, within 60 days after the filing of an application for extension, and a final report in a separate docket established for the review of Rider DMR, to be filed 90 days after the termination of Rider DMR or its extension. Further, we will extend the deadline for the filing of an application to extend Rider DMR to February 1, 2019, in order to allow the monitors sufficient time to review the use of Rider DMR funds prior to the extension proceeding, if any.

{¶ 114} Furthermore, in response to OCC/NOAC, we note that our decision was predicated on the fact that Rider DMR qualifies as a provision "regarding distribution infrastructure and modernization incentives" for the Companies. R.C. 4928.143(B)(2)(h). As discussed in the Fifth Entry on Rehearing, Rider DMR fits the plain language definition of an "incentive" and the evidence in the record demonstrated a need to focus FirstEnergy's efforts on areas that warrant improvement such as grid modernization (RESA Ex. 7 at 7; Staff Ex. 15 at 15; Co. Ex. 206 at 5-6; Rehearing Tr. Vol. IV at 956-57; 1015-16; Rehearing Tr. Vol. V at 1223, 1254-55; Fifth Entry on Rehearing at 88-90). Our discussion of need was directed more toward the need of the Companies to access reasonably priced capital in order to implement grid modernization projects, which we found to be a significant benefit to all customers in the Companies' distribution systems and will help foster state policy[6] (Fifth Entry on Rehearing at 88-90; see also Order at 22, 95-96). The Commission also recognizes that the signatory parties to Stipulated ESP IV agreed that incentivizing grid modernization in the Companies' service territories would be favorable (Order at 22). Additionally, as discussed in the Fifth Entry on Rehearing, Rider DMR essentially supplants the need for the 50 basis point adder to the return on equity for investment made for grid modernization, which was eliminated in response to OCC/NOAC's earlier application for rehearing (Fifth Entry on Rehearing at 108). As the

[6] The Commission attempted to review the language referred to in the Fifth Entry on Rehearing as specifically cited in OCC/NOAC's application for rehearing, but the page reference was erroneous.

intervening parties have failed to raise any new arguments from those already addressed, we find that these assignments of error should be denied.

{¶ 115} In response to FirstEnergy's application for rehearing, we will clarify that the "sufficient progress" language should not be interpreted to mean that Rider DMR revenues be limited in the deployment of grid modernization programs. We agree that Rider DMR may be used for other purposes related to improving the Companies' ability to access capital markets such as debt repayment and funding pension obligations (Rehearing Tr. Vol. X at 1607, 1610-11). Otherwise, rehearing on this assignment of error will be denied. As the parties are aware, the Commission has embarked on our PowerForward initiative to determine the future of grid modernization in this state. After PowerForward, FirstEnergy's grid modernization plan will be reviewed pursuant to the principles to be established in the PowerForward initiative. As such, it is impossible to further specify the milestones which FirstEnergy must achieve at this time.

c. ***The Commission's decision to refrain from addressing whether Rider DMR is authorized under R.C. 4928.143(B)(2)(i).***

{¶ 116} As the Commission determined that Rider DMR is authorized by R.C. 4928.143)(B)(2)(i), it was unnecessary for the purposes of the Fifth Entry on Rehearing to determine whether the rider was also authorized by R.C. 4928.143(B)(2)(i). In their application for rehearing, OCC/NOAC argue that Rider DMR should not be considered an economic development and job retention program under R.C. 4928.143(B)(2)(i) because the Companies are compensated through distribution rates for FirstEnergy Corp. expenses allocated to the Companies. OCC/NOAC further contend that Rider DMR would not qualify as an economic development program since the headquarters are already located in Akron, Ohio, and the statute is limited to new economic development in Ohio. As a final argument, OCC/NOAC assert that Rider DMR does not satisfy the statute because it is not an electric distribution company program.

{¶ 117} FirstEnergy initially responds by stating that there will be no double recovery of costs as the economic development benefits from Rider DMR are entirely separate from the allocation of FES expenses to the Companies. Moreover, FirstEnergy notes that maintaining the headquarters in Akron for the duration of Rider DMR will not only sustain the existing positive economic impact in that area, but will also lead to additional jobs and improved distribution system reliability through the expected grid modernization initiatives. Moreover, FirstEnergy adds that the statute is not limited to new development and preserving the economic benefits associated with the headquarters being located in Akron would satisfy the statutory requirements. Finally, the Companies assert that the headquarters condition would be considered a program of the Companies, rather than FirstEnergy Corp., as the condition is tied to the Companies' authority to continue to collect revenues through Rider DMR. Additionally, given these significant economic development benefits, FirstEnergy argues in its own application for rehearing that the Commission erred when it failed to find that Rider DMR was authorized under R.C. 4928.143(B)(2)(i).

{¶ 118} In response to FirstEnergy's assignment of error, CMSD and Sierra Club first assert that, as FirstEnergy Corp.'s headquarters and nexus of operations are already located in Akron, maintaining the headquarters in the same location cannot be construed as implementing an economic development or job retention program. Further, OMAEG again contends that the economic impact analysis conducted by FirstEnergy witness Murley was flawed in several respects, including that it was limited to the Akron, Ohio area and failed to address any costs to customers associated with Rider DMR. CMSD and Sierra Club also note that FirstEnergy had no intent to move its headquarters for the duration of *ESP IV*, as evidenced by the fact it already renewed its lease of those facilities through 2025. Finally, Sierra Club and CMSD argue that Staff already stated that "the Companies are already recompensed adequately for the presence of the headquarters," as that cost is built into their distribution rates. CMSD adds that FirstEnergy's real purpose to introduce the economic impact analysis results was not to seek authorization to collect that amount; rather, it was to bolster the argument that *ESP IV* passed the ESP versus MRO test. Similarly, Environmental Advocates assert the Companies have provided no evidence of the alleged benefits other than FirstEnergy witness Mikkelsen's testimony; rather, Environmental Advocates contend the evidence only shows that Rider DMR is meant to act as a credit support rider with no commensurate benefits flowing to customers. While agreeing that Rider DMR is actually meant to provide credit support to FirstEnergy Corp., Sierra Club, NOPEC and OCC/NOAC also contend that Rider DMR does not satisfy the plain language of the statute as it is not implementing any economic development programs. OCC/NOAC add that because this commitment was made by FirstEnergy Corp. instead of a distribution utility, Rider DMR would also fail to satisfy the statutory language in that respect. Moreover, Sierra Club argues that if the Commission finds Rider DMR to satisfy this statutory language, such a finding 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, 947 N.E.2d 655 (2011). Finally, Sierra Club asserts that R.C. 4928.143(B)(2)(i) only permits the rider to allocate "program costs" to customers. As the Companies would not be able to collect revenues based solely on the alleged benefits of Rider DMR, Sierra Club argues that the Companies would be limited to collecting only the costs of keeping the headquarters and nexus of operations in Akron, Ohio, minus any amounts for which they are already compensated, which were not introduced into the evidentiary record.

{¶ 119} The Commission finds that rehearing on these two assignments of error should be denied. Although OCC/NOAC are correct that the three FirstEnergy utilities operating in Ohio (Ohio Edison, Cleveland Electric Illuminating, and Toledo Edison) do recover certain shared service expenses allocated to the utilities, OCC/NOAC present no evidence of how much of the overall economic impact of the corporate headquarters is directly related to the expenses allocated to the utilities. Further, we are not persuaded by OCC/NOAC's claim R.C. 4928.143(B)(2)(i) only authorizes economic development programs that create new jobs rather than programs aimed at job retention; OCC/NOAC cite to no Commission or Supreme Court of Ohio precedent in support of this claim. With respect to FirstEnergy's assignment of error, we do agree that the record evidence supports FirstEnergy's claim of a $568 million annual economic impact through the retention of the FirstEnergy Corp. corporate headquarters, and we further agree that the facts demonstrate that retention of the FirstEnergy Corp. headquarters will retain a significant number of jobs vital to the region. We also agree that job retention programs are authorized economic development programs under 4928.143(B)(2)(i) and that nothing in 4928.143(B)(2)(i) precludes economic development programs authorized under that statute from assisting affiliates or parent companies of the utility. However, in the Fifth Entry on Rehearing, we adopted Staff's recommendation that R.C. 4928.143(B)(2)(h) provided the necessary and sufficient statutory authority for Rider DMR, and we affirm that decision now.

d. The Commission's finding that Rider DMR is not an unlawful subsidy.

{¶ 120} OMAEG, Environmental Advocates, OCC/NOAC, P3/EPSA, and NOPEC contend that Rider DMR will act as an anti-competitive subsidy for FirstEnergy Corp.'s generation services, in violation of R.C. 4928.02. As it alleges there is currently no requirement for grid modernization investment to occur or that revenues collected through Rider DMR be used for such initiatives, OMAEG argues Rider DMR functions as "an unlawful subsidy for FirstEnergy Corp. and increases costs for manufacturers who are forced to pay additional charges for their electric service, thereby impeding their ability to remain competitive in the global economy." These intervening parties also contend that, if the Companies issue a dividend to FirstEnergy Corp. of all, or any portion of, the revenues collected under Rider DMR, FirstEnergy Corp. would then have the ability to utilize those revenues for any purpose of its choosing, including transferring the money to FES. NOPEC and Environmental Advocates note that if the distribution customers of the Companies provide any financial benefit to FES or FirstEnergy Corp.'s other competitive subsidiaries, it would constitute an anti-competitive subsidy in violation of R.C. 4928.02(H). OCC/NOAC and P3/EPSA add that Rider DMR raises the same concerns that caused FERC to rescind the waiver of affiliate power sales restrictions underlying Rider RRS and does very little to protect customers relating to how the Rider DMR revenues will be used. As a final point, P3/EPSA contend that Staff's periodic review will not change the fact that this rider constitutes an illegal subsidy.

{¶ 121} Additionally, CMSD, NOPEC, OMAEG, and P3/EPSA argue that, according to information Staff witness Buckley relied upon in his testimony, the underlying reason for FirstEnergy Corp.'s current credit issues is the business risk associated with its unregulated generation subsidiaries. Thus, these parties argue that Rider DMR would do nothing to remedy the actual cause of FirstEnergy Corp.'s financial distress. OMAEG, OCC/NOAC, and P3/EPSA also contend that Staff's periodic review of how Rider DMR funds are utilized is inadequate to ensure the funds are properly used absent the implementation of further restrictions that such funds be used for distribution modernization. OMAEG and Environmental Advocates also reiterate their earlier arguments that there is no evidence that Rider DMR is necessary to support FirstEnergy Corp.'s credit rating or guarantee that Rider DMR would, in fact, prevent a downgrade of the Companies' credit ratings. As a final point, OMAEG and Environmental Advocates raise their earlier arguments, stating there is no record evidence to support a finding that FirstEnergy Corp. has taken steps to address its financial situation or that FirstEnergy Corp.'s other affiliates are adequately contributing, if at all, to the effort to provide credit support. In fact, OMAEG asserts the Commission's decision will only encourage FirstEnergy and FirstEnergy Corp. to continue making poor business decisions. Accordingly, OMAEG, OCC/NOAC, P3/EPSA, CMSD, and Environmental Advocates request the Commission grant rehearing on these assignments of error.

{¶ 122} FirstEnergy states that Dr. Choueiki made it clear that the purpose of Rider DMR is related to distribution service, specifically noting Staff's objective of modernizing the Companies' distribution grid. In fact, FirstEnergy contends that Dr. Choueiki stated numerous times during cross-examination that Staff's objective is to modernize the grid, which requires the Companies to have the financial capacity to implement such projects, and, thus, requires the ability to access capital on favorable terms. Notably, FirstEnergy witness Mikkelsen testified that the Companies intended to use the revenues collected under Rider DMR toward grid modernization improvement projects and, additionally, noted that the Commission would be able to review any information with respect to the Companies' operations and Rider DMR within their statutorily granted authority. Furthermore, FirstEnergy reiterates its claims that there is no mechanism in Rider DMR which would allow the transfer of revenues between the Companies and FES and that FirstEnergy Corp. has indicated that it will not be making any additional investments in FES in the future. The Companies also state that the Commission has directed FirstEnergy to modernize the distribution grid. Moreover, FirstEnergy argues that if the Commission were to accept the arguments of NOPEC, P3/EPSA, and Environmental Advocates, any source of revenue for the Companies would qualify as an unlawful subsidy to FES. FirstEnergy also asserts that because the annual shortfall amount required to meet Moody's CFO to debt ratio target range was allocated on a proportional basis to the Companies, there can be no subsidy. Thus, the Companies claim the amount of the shortfall of which they have been allocated reflects the appropriate portion they should be responsible for, further noting that several other constituents will be responsible for the remaining shortfall amount.

{¶ 123} The Commission notes that this issue was thoroughly addressed in the Fifth Entry on Rehearing and that the record clearly demonstrated that Rider DMR does not constitute an unlawful subsidy to FirstEnergy Corp (Fifth Entry on Rehearing at 126-29). As discussed in that decision, the record shows that the Companies require the ability to obtain capital for needed investments in their distribution systems in support of grid modernization and other necessary upgrades. Moreover, the Commission found that the Companies faced a serious risk of being downgraded to below investment grade, which would result in significant adverse effects upon the Companies' ability to access the capital markets, including, but not limited to, increases in future financing costs or more restrictive borrowing terms and conditions. This portion of the Fifth Entry on Rehearing is replete with references to the record from, not only Staff and FirstEnergy witnesses and exhibits, but also several intervenor witnesses and exhibits. The Commission further found that placing restrictions on the use of Rider DMR funds would defeat the purpose of the rider and, instead, directed Staff to periodically review how the Rider DMR funds are being utilized "to ensure that such funds are used, directly or indirectly, in support of grid modernization," further supporting the Commission's finding that Rider DMR will not act as an unlawful subsidy to the Companies' affiliates. A more thorough explanation of Staff's oversight and monitoring of FirstEnergy's use of Rider DMR revenues can be found in ¶113.

{¶ 124} As a final note, the Commission also found Rider DMR would recover a proportionate share of the CFO to debt ratio shortfall, which ensures that the Companies are not subsidizing affiliates. As we discussed in our Fifth Entry on Rehearing, testimony shows that additional actions have been undertaken by FirstEnergy Corp. and the Companies in order to improve their financial metrics and additional action will be required on their part to fully resolve their current financial dilemma (Fifth Entry on Rehearing at 95-96). Therefore, we find that the intervening parties have raised no new issues and these assignments of error should be denied.

e. The Commission's finding that the revenues collected under Rider DMR do not constitute unlawful transition revenues.

{¶ 125} Despite the Commission's finding that the Companies will use these funds to obtain more favorable terms when accessing the capital markets that will allow for necessary investment in grid modernization, NOPEC, OCC/NOAC, Environmental Advocates, OMAEG, and Sierra Club argue that there is no requirement in Rider DMR that the funds be used for these purposes. In fact, OCC/NOAC, OMAEG, Environmental Advocates, and NOPEC contend that the record shows the revenues collected under Rider DMR would be used to provide credit support to FirstEnergy Corp. and its unregulated affiliates, including FES, as a means to improve its credit rating. OCC/NOAC, OMAEG, and NOPEC also emphasize that R.C. 4928.38 prohibits the Commission from authorizing the receipt of transition revenues or "any equivalent revenues," noting that even though Rider DMR revenues would not be explicitly considered transition revenue, it would fall under the equivalency language of the statute due to the fact that these revenues need not be used for grid modernization. *In re Application of Columbus S. Power Co.*, 147 Ohio St.3d 439, 67 N.E.3d 734 (2016) (*AEP Ohio RSR Case*). Environmental Advocates add that the statute provides no exception for regulated utilities that have fully divested their generation. NOPEC and Sierra Club note, in the *AEP Ohio RSR Case*, the Supreme Court of Ohio held that riders that are designed to provide "sufficient revenue to maintain [a utility's] financial integrity and ability to attract capital during the ESP" constitute unlawful transition charges. NOPEC, OMAEG, and Environmental Advocates claim that the Commission attempts to adopt a much too narrow definition of transition revenues, as evidenced by recent Supreme Court of Ohio precedent rejecting the Commission's interpretation of R.C. 4928.38. *AEP Ohio RSR Case* at ¶21-22, ¶24, ¶36; *In re Application of Dayton Power and Light Co.*, 147 Ohio St.3d 166, 62 N.E.3d 179 (2016). These parties also state that it makes no difference that FirstEnergy has already transitioned their assets to FES. Therefore, NOPEC, OCC/NOAC, Environmental Advocates, OMAEG, and Sierra Club argue that the Commission should reject Rider DMR because it would collect unlawful transition revenues.

{¶ 126} In response, FirstEnergy notes that Rider DMR is proposed to help access capital to support distribution services rather than generation services. Additionally, FirstEnergy emphasizes the amount of revenue to be provided to the Companies is based on the Companies' proportional contribution to FirstEnergy Corp., and is completely unrelated to the operations of FES with respect to FirstEnergy Corp. FirstEnergy notes that the cases cited by the intervenors in support of their claims are completely inapposite to this proceeding as Rider DMR is not related to generation assets in any way. Moreover, the Companies emphasize there was nothing in the record to show a means by which the Companies would be able to directly transfer any funds to FES, explaining that the possibility of providing such a dividend is contrary to the facts of this proceeding.

{¶ 127} Consistent with our finding in our Fifth Entry on Rehearing, we disagree with claims that Rider DMR will collect transition revenue or its equivalent (Fifth Entry on Rehearing at 130). As we discussed in that decision, the Companies have already transferred their generation assets to FES and have utilized a competitive bidding process since their first ESP in 2009. Furthermore, the Commission noted that Rider DMR has been authorized under R.C. 4928.143(B)(2)(h) rather than R.C. 4928.143(B)(2)(d), the statute which authorized the AEP Ohio stability charge that was later overturned by the Supreme Court. *AEP Ohio RSR Case.* Moreover, Rider DMR is clearly a "distribution charge." Additionally, we again note Staff's oversight of the uses of Rider DMR revenues, pursuant to the process defined in ¶113, will ensure that these revenues will not be used to subsidize non-distribution functions of FirstEnergy Corp. subsidiaries. Thus, we find that these assignments of error should be denied, as they were thoroughly addressed in the Fifth Entry on Rehearing.

f. The Commission's finding that R.C. 4905.22 is not applicable to an ESP, and, even if this statute was applicable, Rider DMR would nonetheless comply with R.C. 4905.22.

{¶ 128} OMAEG and OCC/NOAC argue the Commission erred when it determined that R.C. 4905.22 does not apply to an ESP, stating that R.C. 4928.143(B)(2)(h) does not provide the Commission the ability to authorize provisions in an ESP that could result in virtually unlimited charges to customers or violate R.C. 4928.02. OCC/NOAC further assert that the Supreme Court has refused to apply the "notwithstanding" language in that statute to mean that it should take precedence over other provisions of R.C. Title 49; rather, the Court noted that if there is a recognized inconsistency between two or more statutes, the enactment that provides "notwithstanding" the other enactments prevails. *State ex rel. Carmean v. Bd. of Education*, 170 Ohio St. 415, 165 N.E.2d 918 (1960). As OCC/NOAC allege there is no inconsistency between R.C. 4905.22 and R.C. 4928.143, R.C. 4905.22 should be construed as providing a reasonable limit on the charges assessed under R.C. 4928.143, which is consistent with state policy. R.C. 4928.02(A). Additionally, OMAEG contends Rider DMR is an unreasonable charge because the Companies failed to consider any alternative tax gross-up factors to the 36 percent average tax rate for the Companies, there is no guarantee that Rider DMR revenues will be spent on distribution grid modernization efforts, the Companies failed to meet their burden to show that credit support for FirstEnergy Corp. is necessary, and there is no guarantee that Rider DMR will enable the Companies to access capital on more favorable terms.

{¶ 129} In response, FirstEnergy asserts that R.C. 4928.143 expressly provides that ESPs may include any of the provisions authorized in R.C. 4928.143(B)(2) "[n]otwithstanding any other provision of Title XLIX of the Revised Code to the contrary," further asserting that none of the exceptions would apply in this case. The Companies also contend that the case precedent cited by OCC/NOAC actually supports the proposition that this statute would take precedence over other R.C. Title 49 provisions. As a final point, the Companies claim that, although R.C. 4905.22 is inapplicable to this case, the Commission is still required to apply the ESP versus MRO test to determine whether the charges included in an ESP are reasonable.

{¶ 130} The Commission finds that these arguments have been thoroughly addressed in the Fifth Entry on Rehearing and, thus, require no additional explanation (Fifth Entry on Rehearing at 131-132). With the language used R.C. 4928.143(B)(2)(h), the General Assembly clearly intended that the Commission have flexibility in approving provisions related to distribution service contained in ESPs and that the strict requirements of R.C. Chapters 4905 and 4909 do not necessarily apply to such provisions. The Commission also stated in the Fifth Entry on Rehearing that, even if R.C. 4905.22 were to apply, Rider DMR would not be unreasonable under R.C. 4905.22. The Commission explained in detail that the Staff's calculation of Rider DMR was reasonable, as modified by the Commission (Fifth Entry on Rehearing at 93-96). Accordingly, claims that Rider DMR violated R.C. 4905.22 should be rejected and rehearing as to these assignments of error should be denied.

g. The Commission's finding that the record evidence does not support the Retail Competition Enhancement Rider (Rider RCE).

{¶ 131} As its sole assignment of error, IGS argues that the Commission unlawfully and unreasonably determined that the record evidence did not support the authorization and creation of a placeholder Retail Competition Enhancement Rider (Rider RCE), noting that the record evidence indicates that additional customer engagement is required to maximize the potential of SmartGrid deployment and incentivize shopping and is fully supported by the state policy set forth in R.C. 4928.02. IGS further states that any actual dollar amount to be included in Rider RCE and additional details regarding the operation of the rider would be determined in a separate case, in which interested parties would be able to fully participate. The Companies agree with the Commission's decision to grant rehearing and eliminate the unbundling proposal associated with Rider RCE in the Fifth Entry on Rehearing. However, the Companies contend that the Commission still needs to approve a zero placeholder rider that accurately reflects the retail competition incentive mechanism described in the Competitive Market Enhancement Agreement, noting Ms. Mikkelsen's testimony provides sufficient evidence for such a finding.

{¶ 132} In response, NOPEC and OCC/NOAC argue there is no evidentiary basis for the Commission to approve Rider RCE or its equivalent, noting this rider was not proposed as a part of Stipulated ESP IV, no witness supported this rider during the hearing, and IGS did not include this rider as a part of its written testimony. Rather, NOPEC asserts this rider only exists through a side agreement between IGS and FirstEnergy that was conceived during the latter part of the hearing process (OMAEG Ex. 24). NOPEC further contends that, while the Commission has approved zero placeholder riders in past proceedings, it has always done so after all parties had received adequate notice and opportunity for cross examination regarding the rider. As a bypassable rider, NOPEC asserts that SSO customers will be charged increased amounts in order to benefit the business interests of CRES providers. NOPEC urges the Commission to affirm its decision as to Rider RCE. OCC/NOAC further state that the

Commission already considered the testimony of FirstEnergy witness Mikkelsen and the remaining limited testimony of IGS witness White and concluded they were insufficient to substantiate Rider RCE.

{¶ 133} The Commission will affirm our decision that the limited testimony of FirstEnergy witness Mikkelsen, solicited on cross-examination, is insufficient to persuade the Commission to establish Rider RCE (Fifth Entry on Rehearing at 135-36; Tr. Vol. XXXVII at 7817-23, 7911-12, 7925-37). The record includes no information on whether it is necessary to incent shopping by the potentially affected customers in the Companies' service territories (Tr. Vol. XXXVII at 7928-31). In fact, the record demonstrates that, at the hearing, FirstEnergy did not endorse the establishment of Rider RCE. On cross examination, Ms. Mikkelsen was asked a direct question and gave a clear, unequivocal answer:

> Q. * * * Is the company requesting that the Commission approve the retail competitive incentive rider in its ESP in this proceeding?
>
> A. No.

Tr. XXXVII at 7819.

Accordingly, we find that rehearing on these assignments should be denied.

h. The Commission's findings regarding energy efficiency provisions and renewable resource requirements.

i. The Commission's finding to stay the effective date of the increase in the shared savings cap

{¶ 134} The Companies contend that the Commission had no basis for staying the effective date of the increase in the shared savings cap, noting that this is a completely independent concept from Rider DMR, the increase was a provision provided for by the bargaining parties as a part of the Stipulated ESP IV, and the Commission lacked any record evidence supporting its decision, risking violation of R.C. 4903.09.

{¶ 135} Environmental Advocates claim that FirstEnergy has failed to rebut the Commission's reasoning for implementing the stay, adding that, while the Companies are correct these are two independent concepts, both concepts are provisions of the Stipulated ESP IV that would substantially increase the amounts charged in customer bills. Environmental Advocates note that, in the event the Commission affirms its decision to increase the shared savings cap, it would be reasonable of the Commission to also stay the increase in order to moderate the combined effect of these provisions. OCC/NOAC and OMAEG agree that it is reasonable for the Commission to balance such provisions in order to protect customers from undue rate increases. Moreover, OCC/NOAC add that FirstEnergy first introduced energy efficiency shared savings into this proceeding through the Third Supplemental Stipulation, and should not be able to argue when the Commission modifies the recommendations therein. On the other hand, Sierra Club expresses its concerns that staying the increase in the shared savings cap may not be the best way to address customer bill impacts. As the Commission has previously found that increasing the shared savings is in the public interest, Sierra Club suggests that the Commission should grant rehearing on this ground and reinstate the increase in the shared savings cap effective immediately. Additionally, Sierra Club and OMAEG note that the Commission should also affirm its decision to limit allocating shared savings to programs upon which the Companies have a direct impact and, thus, disallow the Companies' recovery of shared savings for energy savings resulting from the Customer Action Program.

{¶ 136} The Commission will deny rehearing to reconsider our order to stay the effective date of the increase in the shared savings cap. The record is clear that Rider DMR will recover $132.5 million from ratepayers annually, adjusted for recovery of taxes at the prevailing Federal corporate income tax rate (Fifth Entry on Rehearing at 93-94, 95). The record is also clear that the after-tax annual shared saving cap would be increased from $10 million to $25 million (Co. Ex. 154 at 11-12). The Commission determined that recovery of Rider DMR and the recovery of, potentially, an additional $15 million in annual shared savings revenue, in addition to the other provisions of *ESP IV*, may place too great of a burden on ratepayers.

Therefore, in the interests of gradualism, the Commission stayed the increase in the shared savings cap until the Companies are no longer receiving revenue under Rider DMR (Fifth Entry on Rehearing at 147). The Commission has clearly set forth the reasons for our decision to stay the increase in the annual shared savings cap and the basis for this decision in the record. R.C. 4903.09. Additionally, we once again emphasize that parties to any stipulation are well aware that a stipulation is a recommendation only and that the stipulation is subject to modification by the Commission.[7] Therefore, we will affirm our decision to say the increase in the annual shared savings cap until the Companies are no longer receiving revenue under Rider DMR.

ii. The Commission's finding that the Companies should budget for the annual statutory energy efficiency mandate rather than the goal of 800,000 MWh of annual energy efficiency savings.

{¶ 137} In their application for rehearing, Environmental Advocates initially argue that the Commission erred by not requiring the Companies to comply with the provision in the Third Supplemental Stipulation to "strive to achieve 800,000 MWh of annual energy savings," rather than the annual statutory energy efficiency mandate. Environmental Advocates add that in order for this goal to be met, FirstEnergy must be able to establish sufficient program budgets, which are based on the projected incentive payments to implement energy efficiency measures, in order to produce the requisite level of energy savings. Otherwise, customers will likely lose this benefit entirely. The Companies agree with the position of Environmental Advocates, provided that the Commission also grants rehearing to authorize the increase in the shared savings cap to $25 million annually. In support of its request, the Companies argue the Commission should affirm its decision in the Order to approve the 800,000 MWh goal for purposes of the Companies' 2017-19 EE/PDR portfolio program, stating that exceeding the statutory benchmarks will benefit customers and that the Commission had no basis for

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7 We note that no signatory parties have indicated a desire to withdraw from the Stipulations based on the Commission's decision to stay the effective date of the increase in the shared savings cap and no signatory parties have raised this issue on rehearing, with the exception of the Companies.

requiring the Companies to budget to the energy efficiency benchmarks instead of the 800,000 MWh goal.

{¶ 138} OCC/NOAC initially argue that FirstEnergy has failed to meet the rehearing standard under R.C. 4903.10 by failing to provide evidence to show that the Commission's reduction in the shared savings cap or the reduction in the goal for the 2017-19 EE/PDR portfolio program was unlawful or unreasonable. OCC/NOAC also add that no environmental groups joined the Third Supplemental Stipulation and no party to that agreement has opposed the Commission's decision, other than FirstEnergy. Instead of utilizing the language as alleged by FirstEnergy, OCC/NOAC state the signatory parties elected to utilize more generalized language. Moreover, OCC/NOAC also request the Commission deny Environmental Advocates' arguments, as their arguments are not based on record evidence in this proceeding. Contrarily, Sierra Club argues that the Commission should grant FirstEnergy's assignment of error, noting that, if the Companies are required to budget based on the statutory mandate, there is no possible way that they will achieve the 800,000 MWh energy efficiency savings goal.

{¶ 139} The Commission will affirm our clarification provided in the Fifth Entry on Rehearing that the goal of 800,000 MWh of energy efficiency savings annually is simply a goal. FirstEnergy should strive to achieve this goal by efficiently administering its approved programs and by promoting the most cost effective programs possible rather than by simply increasing spending on the approved programs. As stated above, the Commission must be mindful of the rate impacts of all of the provisions of *ESP IV*. All other issues regarding achieving the annual goal of 800,000 MWh of energy efficiency savings should be addressed in the Companies' energy efficiency program portfolio plan proceedings. *See In re the Application of Ohio Edison Co., The Cleveland Elec. Illum. Co. and The Toledo Edison Co. for Approval of Their Energy Efficiency and Peak Demand Reduction Program Portfolio Plans for 2017 through 2019*, Case No. 16-743-EL-POR. Therefore, rehearing on this assignment of error should be denied.

iii. The Commission's finding that the Companies are authorized to collect lost distribution revenue to the extent that energy savings under the Customer Action Program are verifiable.

{¶ 140} Additionally, Environmental Advocates contend that the Commission unreasonably allowed FirstEnergy to recover lost distribution revenue based on energy savings resulting from the Customer Action Program without explaining its reasoning, in violation of R.C. 4903.09, and in deviation from Commission precedent. *In re Application of FirstEnergy,* Case No. 09-1820-EL-ATA, et al., Finding and Order (June 30, 2010) at 10; *FirstEnergy ESP II Case,* Opinion and Order (Aug. 25, 2010) at 14. Rather, Environmental Advocates note that, in the past, the Commission has typically limited the lost distribution revenue mechanism to contexts where measured savings are the result of actual utility programs. Without an adequate rationale for its contrary position in this case, Environmental Advocates request that the Commission grant rehearing to address these issues.

{¶ 141} In response, FirstEnergy argues that the Commission sufficiently addressed Environmental Advocates' argument regarding lost distribution revenues and the Commission should deny rehearing, as the ability to recover lost distribution revenues arising from savings from the Customer Action Program was an integral part of the Stipulated ESP IV and was supported by all of the signatory parties. Furthermore, the Companies assert that Environmental Advocates have failed to provide sufficient evidence for the Commission to treat this program differently from other similar programs, noting that the Customer Action Program is a Commission-approved energy efficiency program and should not be treated differently with respect to the recovery of lost distribution revenues, especially when it will be subject to the general measurement and verification protocols before any savings could be counted.

{¶ 142} We agree with FirstEnergy that this issue has been thoroughly addressed in the Fifth Entry on Rehearing (Fifth Entry on Rehearing at 143-44, 146-47.). Environmental

Advocates have raised no new arguments on rehearing. Thus, rehearing on this assignment of error will be denied.

iv. The Commission's finding that it was appropriate to remove the 50 basis point adder to the return on equity in the calculation for Rider AMI.

{¶ 143} Although the Companies acknowledge that Rider DMR, in part, and the 50 basis point adder in Rider AMI generally serve as incentives related to grid modernization, they argue that the Commission erred by concluding that Rider DMR supplanted the need for the adder. FirstEnergy adds that the adder will provide an incentive to use capital acquired with the assistance of Rider DMR on grid modernization projects over other types of investments, such as investments in the transmission system, or other short-term obligations of the Companies. Moreover, FirstEnergy asserts the Commission withdrew the 50 basis point adder without sufficient supporting evidence to do so.

{¶ 144} Contrary to the position of FirstEnergy, OCC/NOAC note that when the Commission authorized Rider DMR with an incentive for FirstEnergy to use the funds for grid modernization, it effectively displaced the need for the 50 basis point adder, consistent with the Commission's reasoning in its Fifth Entry on Rehearing.

{¶ 145} The Commission finds that rehearing on this assignment of error should be denied. As noted in the Fifth Entry on Rehearing, the 50 basis point adder was a provision of the Third Supplemental Stipulation, authorized by R.C. 4928.143(B)(2)(h), in order to provide the Companies with an incentive to invest in grid modernization. (Co. Ex. 154 at 10). In the Third Supplemental Stipulation, the smart grid modernization provisions were linked to Rider RRS, which the Companies forecasted would return an aggregate amount of $561 million (in nominal dollars) to ratepayers over the eight-year term of *ESP IV* (Co. Ex. 155 at 11-12); in fact, this linkage was explicit: "[i]n addition to promoting stable customer rates through Rider RRS, the Companies agree to empower customers through grid modernization initiatives . . . " (Co.

Ex. 154 at 9). On rehearing, the Commission eliminated Rider RRS and replaced it with Rider DMR, which will provide the Companies with annual revenue of $132.5 million, adjusted for recovery of taxes at the prevailing Federal corporate income tax rate (Fifth Entry on Rehearing at 95, 98). As discussed above, Rider DMR is authorized pursuant to R.C. 4928.143(B)(2)(h) and is an incentive to the Companies to invest in grid modernization (Fifth Entry on Rehearing at 88-90; Staff Ex. 15 at 15). Therefore, the 50 basis point adder and Rider DMR are authorized by the same statutory provision and are both intended to incent the Companies to take the same action: to invest in grid modernization. Accordingly, in determining whether the stipulations in this case, as a package, continued to benefit ratepayers and the public interest, the Commission found in the Fifth Entry on Rehearing that the purpose of the 50 basis point adder had been supplanted by Rider DMR. Because the 50 basis point adder was no longer necessary or appropriate, the Commission modified the Third Supplemental Stipulation to eliminate the 50 basis point adder (Fifth Entry on Rehearing at 106). Having thoroughly reviewed the record as it relates to the 50 basis point adder, we affirm our decision in the Fifth Entry on Rehearing.

v. The Commission's findings that customers who have opted out of EE and PDR programs may still participate in the Rider ELR program and receive credits thereunder and that the cost of the ELR program credits should be collected from all customers.

{¶ 146} Additionally, Environmental Advocates claim that the Commission unreasonably allowed the Companies' customers to opt out of paying for peak demand reduction programs while still receiving monetary credits for participation in the Rider ELR program, in violation of R.C. 4928.6613 and against Commission precedent. *AEP Ohio ESP III Case*, Entry on Rehearing (May 28, 2015) at 12; *In re Application of FirstEnergy*, Case No. 08-935-EL-SSO (*FirstEnergy ESP I Case)*, Second Opinion and Order (Mar. 25, 2009) at 10. In support of their argument, Environmental Advocates claim that, while a portion of the Rider ELR credit is funded through Rider EDR, the record and Commission's decision also shows that the Companies rely on Rider ELR to meet its PDR obligation under R.C. 4928.66 and funds a portion of the program through its EE/PDR rider, Rider DSE. In fact, Environmental Advocates claim that FirstEnergy included the ELR program in its current portfolio plan. OCC/NOAC note that the Commission's decision to order that the recovery of the ELR program credits should be collected through Rider EDR(e) from all customers was also unreasonable, noting that Rider ELR does not produce economic benefits that will benefit customers and the new rate design simply shifts the allocation of costs from one customer class to another.

{¶ 147} In response, FirstEnergy provides that, although the Commission was sufficiently clear in its Order and Fifth Entry on Rehearing in response to these arguments, Rider ELR customers may opt out of the Companies' EE/PDR portfolio plans and continue to receive Rider ELR credits because those credits do not arise from the Companies' EE/PDR portfolio plans, but rather from the Stipulated ESP IV itself, consistent with R.C. 4928.6613 (Order at 106-107; Fifth Entry on Rehearing at 146). The Companies and IEU-Ohio also contend that the Rider ELR credits approved in *FirstEnergy ESP I* came into existence prior to the Companies' first EE/PDR portfolio plan by approximately two years. Further, in its memorandum contra, IEU-Ohio contends that, because the ELR program predates the portfolio plan, its costs are recovered in part outside of the plan, and the program provides benefits that extend beyond compliance with EE/PDR requirements. Thus, a customer electing service under the ELR program should not be considered to take a benefit from the FirstEnergy portfolio plan. Moreover, IEU-Ohio emphasizes that the customer's right to opt out of the FirstEnergy portfolio plan is statutory. R.C. 4928.6611. IEU-Ohio also states that adopting Environmental Advocates' position would frustrate state energy policy and deter customers with demand response capabilities from taking service under the ELR program. R.C. 4928.02(D).

{¶ 148} The Commission finds that this issue was thoroughly addressed in the Fifth Entry on Rehearing and in that decision, we clarified that customers participating in the ELR program retain their statutory right to opt out of the energy efficiency programs, noting that the ELR programs existed long before the statutory energy efficiency and peak demand reduction mandates, as stated by the Companies. Additionally, the Commission explained that our long-standing precedent has held that ELR has an economic development component and ELR is funded, in part, through the economic development rider, which is paid by all customers, including those who opt out of the energy efficiency programs. Moreover, we agree, as noted by IEU-Ohio, that the decision cited by Environmental Advocates provides little guidance, as the Commission did not address whether a customer that participated in the AEP Ohio interruptible load program would be eligible to opt out of the utility's portfolio program costs and benefits. As such, these assignments of error will be denied.

i. The Commission's finding that the Companies' statutory right to withdraw does not end until at least the issuance of a non-appealable order.

{¶ 149} In their application for rehearing, OCC/NOAC request that the Commission grant rehearing to require the Companies invoke their right to withdraw from the ESP shortly after the Commission rules on rehearing and before any subsequent appeals are taken from that decision, noting this would be a reasonable limitation on the Companies' right to withdraw its ESP in order to bring finality and stability to the rates charged to customers, in accordance with R.C. 4928.143(C)(2). OCC/NOAC also argue that allowing a utility to withdraw from an ESP after a lengthy appellate process and Supreme Court decision would create logistical difficulties for the Commission.

{¶ 150} FirstEnergy argues that the statutory right to withdraw does not have an express time limit, adding that a utility will be unable to make an informed decision as to whether it should provide service under an ESP until the final terms of that ESP are determined. Moreover, FirstEnergy asserts the Commission is capable of handling the unusual circumstances where a utility withdraws from an ESP subsequent Supreme Court decision, as evidenced by the recent Dayton Power and Light ESP proceeding. R.C. 4928.143(C)(2)(b); *In re* *the Application of the Dayton Power and Light Co. to Establish a Standard Service Offer in the Form of an Elec. Security Plan,* Case No. 12-426-EL-SSO (*DP&L ESP II Case*), Finding and Order (Aug. 26, 2016).

{¶ 151} Consistent with our findings in the Fifth Entry on Rehearing, we agree with FirstEnergy that the Companies' filing of tariffs before the conclusion of the application for rehearing and appeals process will be subject to the rehearing and appeal process and that the Companies' right to withdraw from the *ESP IV* will not lapse until the conclusion of that process (Fifth Entry on Rehearing at 149-50). We again note, however, once a final, non-appealable order has been issued, FirstEnergy must exercise its right to withdraw within a reasonable period of time or the filing of tariffs will be considered to constitute acceptance of the modified *ESP IV*. As a final point, OCC/NOAC ignore the fact that Commission action is, at times, necessary to implement the decisions of the Supreme Court when those decisions are not self-executing. As the Supreme Court has held "[i]f the Commission makes a modification to a proposed ESP that the utility is unwilling to accept, R.C. 4928.143(C)(2)(a) allows a utility to withdraw the ESP application." *DP&L ESP II Case*, Seventh Entry on Rehearing (Dec. 14, 2016) at 4-5, 7-9, citing *In re Application of Ohio Power Co.*, 144 Ohio St.3d 1, 40 N.E.3d 1060 (2015). The Commission dismissed these exact same claims in the *DP&L ESP II Case* and, consistent with the reasoning set forth in the decisions of that proceeding and in our Fifth Entry on Rehearing, we find that rehearing as to OCC/NOAC's assignment of error should be denied.

j. Sierra Club and OMAEG's assertion that the Fifth Entry on Rehearing 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 Ohio Adm.Code 4901:1-35-06(A).

{¶ 152} In addition to its more specific assertions that the Companies failed to meet their burden under R.C. 4928.143(C)(1) and Ohio Adm.Code 4901:1-35-06(A) throughout this Eighth Entry on Rehearing, Sierra Club and OMAEG assert as separate assignments of error that the Companies failed to meet their burden of proof. Additionally, Sierra Club notes that the Companies' failure to meet their burden is partly due to the expedited hearing process that was set for the consideration of Rider DMR, which prevented a full and fair evaluation of the new proposal. OMAEG specifically notes the Companies failed to meet their burden on the following issues: to demonstrate a need for Rider DMR revenues, to show that Rider DMR will prevent a credit downgrade of FirstEnergy Corp., to determine the potential costs assessed to customers if the Companies and FirstEnergy Corp. are downgraded, to show that Rider DMR will incentivize grid modernization, and to demonstrate that the conditions imposed on Rider DMR are enforceable or beneficial to customers.

{¶ 153} The Commission agrees that R.C. 4928.143(C)(1) and Ohio Adm.Code 4901:1-35-06 impose the burden of showing that an application is just and reasonable on the electric distribution utility. However, there is no basis for asserting that FirstEnergy did not meet its burden in this case. We cannot fault the Companies for our decision to approve Rider DMR simply because Staff recommended it as an alternative to the Companies' Proposal. Additionally, this Commission has previously held on numerous occasions that the procedural schedule relating to the evaluation of Rider DMR was not prejudicial to any party and resulted in the fair and efficient consideration of the rider (Third Entry on Rehearing at 9-12; Fifth Entry on Rehearing at 12-14). Sierra Club has provided no evidence to indicate otherwise. Therefore, we will affirm our conclusion that the preponderance of evidence supports the establishment of Rider DMR (Fifth Entry on Rehearing at 87-97). Rehearing on these assignments of error should be denied.

k. ***Sierra Club's and OMAEG's assignments of error contending that the Fifth Entry on Rehearing is unlawful and unreasonable because the Commission failed to satisfy its duty under R.C. 4903.09 on multiple issues.***

{¶ 154} Sierra Club and OMAEG also generally assert that the Fifth Entry on Rehearing 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." Specifically, OMAEG asserts that the Commission failed to provide sufficient rationale for its decisions when determining that Rider DMR is a grid modernization incentive, that, absent Rider DMR, the Companies will be unable to access the capital markets, and whether any of the cited adverse consequences of a credit downgrade will actually occur or could potentially occur in the Companies' and FirstEnergy Corp.'s current financial state.

{¶ 155} Sierra Club cites to *Tongren v. Pub. Util. Comm.*, 85 Ohio St.3d 87, 706 N.E.2d 1255 (1999) in support of its contention that the Commission failed to satisfy its burden under R.C. 4903.09; however, the Supreme Court held in that case that the Commission had failed to make a complete record, as required by R.C. 4903.09, where the record was completely devoid of evidence upon which Staff had relied in making the recommendation which was ultimately followed. This is not the case here. The entirety of the Fifth Entry on Rehearing is replete with references to the record and evidence upon which the Commission relied to make its decisions. Moreover, the Supreme Court has also held that strict compliance with the terms of R.C. 4903.09 is not required; rather the Supreme Court has indicated the purpose of R.C. 4903.09 is to enable the Court to review the decisions of the Commission in order to determine whether "the facts found by the commission lawfully and reasonably justified the conclusions reached by the commission in its order and whether the evidence presented to the commission as found in the record supported the essential findings of fact so made by the commission," without resorting to combing through countless volumes of transcripts and admitted exhibits. *Commercial Motor Freight, Inc. v. Pub. Util. Comm.*, 156 Ohio St. 360, 102 N.E.2d 842 (1951). Sierra Club's real contention seems to be with the conclusions of the Commission and not the bases for those conclusions. We thoroughly examined all evidence and arguments presented to us during the course of this proceeding, and the Fifth Entry on Rehearing is reflective of that thorough analysis. Thus, we find these general assignments of error should be denied.

C. *The Commission's finding that the ESP IV, as Modified by the Commission, Continues to be more favorable in the aggregate than the expected results of an MRO.*

1. THE COMMISSION'S FINDING THAT *ESP IV*, AS MODIFIED BY THE COMMISSION, IS QUANTITATIVELY MORE FAVORABLE THAN THE EXPECTED RESULTS OF AN MRO.

i. **The Commission's finding that revenues collected under Rider DMR have no quantitative impact for purposes of the ESP versus MRO test.**

{¶ 156} The Commission found that the approval of Rider DMR and the rejection of the Companies' Proposal would result in a plan which passes the MRO versus ESP test on a quantitative basis, as the modified Stipulated ESP IV would result in approximately $51.1 million in benefits that would not otherwise be available under an MRO. Additionally, the Commission held that the Rider DMR revenues used to support grid modernization would essentially be "a wash" for purposes of the ESP versus MRO test. In their applications for rehearing, OCC/NOAC and NOPEC contend that the Commission unreasonably found that the Companies could recover revenues equivalent to Rider DMR revenues through a base rate case, thus determining that Rider DMR had no impact for purposes of the ESP versus MRO test. Further, OCC/NOAC argue that endorsing such a position would render the test meaningless, as the same argument could be made for any rider. Sierra Club contends that Rider DMR is dissimilar to Rider AMI and that revenues collected under Rider DMR could not be recovered under such a rider. On a related note, Sierra Club adds that there is no evidence in the record to support that the proposed Rider DMR revenues could be collected through an alternative means, adding that, unlike a base rate case or Rider AMI, customers would not receive anything in return for their additional payments under Rider DMR. *Dayton Power & Light Co. v. Pub. Util. Comm.*, 4 Ohio St.3d 91, 103, 447 N.E.2d 733 (1983); *Office of Consumers' Counsel v. Pub. Util. Comm.*, 67 Ohio St.2d 153, 164, 167, 423 N.E.2d 820 (1981). Similarly, Sierra Club, Environmental Advocates, OCC/NOAC, OMAEG, NOPEC, and CMSD argue that the Commission's determination that revenues equivalent to those that would be generated by Rider DMR could be authorized in a MRO proceeding is based on an erroneous interpretation of the criteria for granting emergency rate relief, ignores the distinction between R.C. 4909.16 and the emergency provision of R.C. 4928.142(D)(4), and lacks any evidentiary support from the record in this case. Specifically, CMSD notes that treating FirstEnergy's current situation as an emergency that threatens its financial integrity is completely baseless, given the fact that they expected to pay a projected $256 million net credit to customers over the eight-year term of Rider RRS. Environmental Advocates further allege that the process set forth under R.C. 4909.16 is meant to provide temporary relief to the utility in order to prevent injury to the utility, which, in turn, could injure its customers. *In re Toledo Edison Co.*, Case No. 84-1286-EL-AEM, Supp. Opinion and Order (May 12, 1987). NOPEC argues that, even if the facts could support the Commission's finding of an emergency situation under a hypothetical MRO statute, it nonetheless would not be justified in awarding the Companies the Rider DMR revenues. In support of its argument, NOPEC cites to a prior case in which the Commission, having determined that an emergency existed, elected not to grant any additional rate relief and, instead, allow the utilities to make accounting adjustments and continue to monitor the situation during the pending rate case. *In re Cleveland Elec. Illum. Co.*, Case No. 88-170-EL-AIR, Opinion and Order (Jan. 31, 1989). Thus, OCC/NOAC, NOPEC, OMAEG, CMSD, and Sierra Club request the Commission grant rehearing as to these assignments of error.

{¶ 157} In its memorandum contra, FirstEnergy notes that the intended uses of the Rider DMR revenues would be considered distribution-related cash outflows and would be recoverable in a base rate case or the Companies' existing Rider AMI or comparable rider, adding that grid modernization related expenses are recoverable outside of ESPs. In response to arguments that Rider DMR would not be considered a "wash" for purposes of the ESP versus MRO test, FirstEnergy claims that such arguments were rejected by the Commission and the Supreme Court of Ohio. *FirstEnergy ESP III* Order at 50-52, 55-57; *FirstEnergy*, 146 Ohio St.3d 222, 2016-Ohio-3021, 54 N.E.3d 1218. In response to Sierra Club's arguments, the Companies assert that Sierra Club ignores the vast amount of evidence supporting the position that these revenues could be recovered outside of an ESP proceeding. Additionally, FirstEnergy notes that, as Rider DMR revenues will be used for credit support and access to reasonably priced capital in order to jumpstart the Companies' grid modernization initiatives, such charges could be recovered outside of the ESP, pursuant to the Energy Policy Act of 2005. Additionally, in their application for rehearing, the Companies assert the Commission should have specified the additional bases for concluding that Rider DMR has no quantitative effect on the ESP versus MRO test, including that the Companies could receive Rider DMR revenues outside of an ESP in a base distribution rate case or other rate mechanism and, even if Rider DMR's costs to customers were included only on the ESP portion of the test, such costs are more than offset by the $568 million economic impact attributed to Rider DMR's headquarters condition.

{¶ 158} In response to FirstEnergy's assignment of error, CMSD argues there is no provision in R.C. 4928.142 that authorizes the recovery of distribution-related costs in an MRO proceeding based on the notion that such costs might be recognized for purposes of establishing the revenue requirement in an R.C. 4909.18 distribution rate case and, thus, means that the Rider DMR revenues would not represent a "wash" for purposes of the ESP versus MRO test. CMSD and OMAEG also reiterate their earlier arguments that the real purpose for Rider DMR is to provide a cash infusion to the Companies, rather than fund grid modernization programs, while also pointing out several alleged inconsistencies with FirstEnergy's concerns regarding the cash outflows from debt refinancing and pension expense. As its final point, CMSD and Sierra Club contend that FirstEnergy is incorrect to state that the Commission could authorize the collection of Rider DMR revenues in a distribution rate case or the Companies could recover such revenues under Rider AMI, noting, once again, that Rider DMR merely represents a cash infusion with no associated benefits by way of grid modernization. CMSD, OMAEG, and Sierra Club also reiterate their earlier arguments against the authority of Rider DMR under R.C. 4928.143(B)(2)(i) to contradict FirstEnergy's assertion that the quantifiable benefits of Rider DMR should include the estimated $568 million economic impact of the headquarters, noting that FirstEnergy already had a commitment to maintain its headquarters in Akron, Ohio through its lease agreement and by the terms of the Third Supplemental Stipulation. Thus, it would be improper for the Commission to assign a quantitative value of that economic benefit for purposes of the ESP versus MRO test when FirstEnergy has showed no intention of moving its headquarters and has provided no information as to the quantifiable benefits or costs of maintaining its location. NOPEC and OCC/NOAC also disagree with the assertion that the Commission should find comparable revenues would be recoverable in a base distribution rate case, noting that R.C. 4905.15 provides no provisions that would allow an electric distribution utility, or its parent, to recover for credit support, R.C. 4928.143(C)(1) limits the comparison of an ESP to only that of an MRO, and to state otherwise would be in complete contradiction with the plain meaning of the statute and statutory interpretation directives. *In re Columbus S. Power Co.*, 138 Ohio St.3d 448, 9 N.E.3d 1064 (2014). Sierra Club adds that, because Rider DMR is not based on the recovery of any costs incurred by the Companies or attributable to any investments in distribution modernization initiatives, Rider DMR revenues could not be collected through a base rate case. *Consumers' Counsel v. Pub. Util. Comm.*, 67 Ohio St.2d 153, 423 N.E.2d 820 (1981).

{¶ 159} The Commission finds that the issues raised by OCC/NOAC, CMSD, and Sierra Club were thoroughly addressed in the Fifth Entry on Rehearing (Fifth Entry on Rehearing at 153-57, 160-63). We also add that there was ample evidence in the record to make such conclusions in that decisions, notably the testimony of FirstEnergy witness Mikkelsen and Staff witness Turkenton (Co. Ex. 206 at 19-20; Staff Ex. 14 at 3-4; Rehearing Tr. Vol. II at 482-83). The Commission, acknowledging that we have never approved an application under R.C. 4928.142(D), looked to other comparable statutes to consider the types of evaluative factors that we could utilize under that section and determined that R.C. 4909.16 provided guidance for our analysis under a hypothetical MRO application, even though the same standards applicable to R.C. 4909.16 would not necessarily apply to R.C. 4928.142(D).[8] With such criteria

8 In ¶¶354 and 355 of the Fifth Entry on Rehearing, the Commission inadvertently referenced "R.C. 4928.143(D)" and "R.C. 4928.143" instead of R.C. 4928.142(D) and R.C. 4928.142, respectively.

in mind, we determined that the risk of the Companies' and FirstEnergy Corp.'s credit ratings dropping to below investment grade, along with the consequences resulting from such a decline, would be sufficient to constitute an emergency that threatens the utility's financial integrity, rather than simply only relying on the current credit ratings of the Companies, as alleged by CMSD. Further, CMSD ignores the fact that Rider DMR will provide the necessary financial support to the Companies in the short-term in order to access the capital markets for grid modernization purposes and cover short-term obligations. The fact that the modified Rider RRS was projected to provide a $256 million net credit to customers over eight years does not change the fact that the Companies require financial assistance now. The Commission also finds that the arguments of intervening parties that FirstEnergy failed to provide evidence of such a financial emergency are baseless, as there was an abundance of evidence presented by FirstEnergy, Staff, and even several of the intervening parties, upon which the Commission relied to make such a determination. We would also like to address Sierra Club's allegation that we "ignored" the arguments raised in its post-hearing brief and note that we thoroughly reviewed and considered all arguments presented by the parties and, based on that analysis, made our determinations. Furthermore, we find it very difficult for Sierra Club to make such an allegation when we summarized, and subsequently rejected, their arguments relating to the quantitative effect of Rider DMR on the ESP versus MRO test in our decision (Fifth Entry on Rehearing 153-55, 160-63). Again, it seems Sierra Club's main contention is that we disagreed with their recommendations, which is not an appropriate justification to grant rehearing. Accordingly, these assignments of error and, consequently, any assignments of error contending that the costs associated with Rider DMR should be considered in our quantitative analysis, should be denied.

{¶ 160} In response to FirstEnergy's application for rehearing, we are not persuaded by FirstEnergy's assertion that Rider DMR revenue could be recovered through a base distribution rate case. We do agree that certain costs of grid modernization, specifically the costs of any acquisition and deployment of advanced metering, including the costs of any meters prematurely retired as a result of the advanced metering implementation, may be recovered outside of an ESP, pursuant to our statutory authority under R.C. 4905.31. Moreover, we also agree that the $568 million annual economic impact of the retention of the FirstEnergy Corp. headquarters is an economic benefit under the ESP and should be included as a consideration in the ESP versus MRO test. Accordingly, rehearing on this assignment of error by the Companies should be granted in part and denied in part.

ii. The Commission's finding that Rider DCR has no quantitative impact for purposes of the ESP versus MRO test.

{¶ 161} In addition, OCC/NOAC argue in their application for rehearing that the Commission violated R.C. 4903.09 by solely relying on previous case law in support of its finding that the costs of Rider DCR would have no quantitative impact for purposes of the ESP versus MRO test. Further, OCC/NOAC assert that the Commission failed to address the testimony of OCC witnesses Effron and Kahal, which allegedly show that the Companies are over-earning on their distribution service. Similarly, because of the evidence of over-earning, OCC/NOAC add that prior cases finding that Rider DCR had no quantitative impact for purposes of the ESP versus MRO should not be applicable.

{¶ 162} In its memorandum contra, FirstEnergy contends that the Commission was correct to treat Rider DCR as a "wash" for purposes of the ESP versus MRO test, notably because these distribution-related capital costs would also be recoverable under an MRO through a base distribution rate case and there is no quantifiable cost associated with this provision in the Stipulated ESP IV (Order at 119). Further, the Companies assert that OCC/NOAC provide no supporting authority for its position and ignores the fact that the prior precedent relied upon by the Commission has also been upheld by the Supreme Court, making this matter a settled proposition. *FirstEnergy ESP III* Opinion and Order at 55-56. Additionally, the Companies contend that the Commission did thoroughly consider, and subsequently rejected, OCC/NOAC's arguments and testimony regarding the Companies' alleged over-earning on its distribution service in its Order and Fifth Entry on Rehearing (Order at 119; Fifth Entry on Rehearing at 116).

{¶ 163} We agree with FirstEnergy and find that these arguments have been thoroughly addressed in our Order and Fifth Entry on Rehearing, in addition to prior Commission decisions in other ESP proceedings (Order at 119; Fifth Entry on Rehearing at 116). *FirstEnergy ESP III* Opinion and Order at 55-56; *In re Columbus S. Power Co.*, Case No. 11-346-EL-SSO, Opinion and Order at 31. Thus, there is no reason for us to reiterate that reasoning again. Further, it is well-known that the Commission may refer to its past decisions in support of its findings in a case, much like the parties are entitled to reference past Commission decisions in their briefs and applications for rehearing without introducing those decisions into the evidentiary record first. This practice is particularly essential when dealing with riders and other mechanisms that have a long-standing presence before the Commission. OCC/NOAC's assignments of error as to this issue will be denied.

2. THE COMMISSION'S FINDING THAT *ESP IV*, AS MODIFIED BY THE COMMISSION, IS QUALITATIVELY MORE FAVORABLE THAN THE EXPECTED RESULTS OF AN MRO.

{¶ 164} In its application for rehearing, CMSD argues that the Commission erred in its application of the ESP versus MRO test by failing to balance the quantitative and qualitative benefits. CMSD notes that the Commission elected to find that *ESP IV* was more favorable than the MRO based on qualitative benefits alone, without regard to a correctly administered quantitative analysis. Additionally, CMSD contends that the additional costs that a customer would incur under an ESP should be proportional to the qualitative benefits the ESP would provide, and because the Commission failed to make such a determination, the ESP versus MRO test analysis is unreliable.

{¶ 165} In response, FirstEnergy first claims that CMSD's arguments misrepresent the findings in the Fifth Entry on Rehearing, in which the Commission posited a very thorough review of both the quantitative and qualitative benefits of *ESP IV*. The Companies add that the result of that analysis was that *ESP IV* is more beneficial than an MRO by at least $51.1 million of quantitative benefits from shareholder funded commitments, in addition to several significant qualitative benefits. Considering the Commission's finding that Rider DMR had no quantitative impact for purposes of the ESP versus MRO test, FirstEnergy asserts that CMSD's argument is meritless. Furthermore, the Companies assert that CMSD cites no supporting authority for its proportional test, noting that R.C. 4928.143(C)(1) has no such requirement. Finally, the Companies argue that the Commission evaluated the quantitative and qualitative benefits, both independently and taken together, and each case supported the Commission's finding that *ESP IV*, as modified by the Commission, was more favorable in the aggregate than the results of an MRO. Moreover, the Companies add that if the quantitative benefits had not outweighed the qualitative benefits, the analysis would have ultimately resulted in the same outcome. *In re the Application of Columbus S. Power Co. and Ohio Power Co.*, Case No. 11-346-EL-SSO, Opinion and Order (Aug. 8, 2012) at 75-77.

{¶ 166} The Commission is not persuaded by CMSD's arguments regarding the proportionality of quantitative costs relative to qualitative benefits, noting that R.C. 4928.143(C)(1) provides no such requirement. Furthermore, the Commission agrees with FirstEnergy that we conducted a thorough analysis of both quantitative and qualitative benefits to determine that *ESP IV*, as modified by our Order and Fifth Entry on Rehearing, is more favorable in the aggregate than the results of an MRO (Order at 112-20; Fifth Entry on Rehearing at 151-65). As such, we find CMSD's assignments of error should be denied.

i. The Commission's finding that Rider DMR will provide easier access to capital markets and allow the Companies to invest in grid modernization initiatives in their distribution systems.

{¶ 167} In their applications for rehearing, OMAEG, Sierra Club, and CMSD once again assert that there are no real commitments that the revenues received under Rider DMR are to be used for distribution grid modernization. Instead, these parties assert that Rider DMR was designed only to provide a cash infusion to the Companies to support FirstEnergy Corp.'s credit rating. OMAEG adds that Staff witness Choueiki even acknowledged that Rider DMR was created in order to provide necessary credit support to FirstEnergy Corp. and the Companies, instead of grid modernization. Sierra Club further argues that Rider DMR is unnecessary for grid modernization to occur and that the alleged grid modernization benefits of Rider DMR are illusory, as Rider DMR is intended to provide support to FirstEnergy Corp. and its subsidiaries. CMSD again raises the concern that there is no guarantee that Rider DMR will prevent a ratings downgrade, and as a result, contends that the Commission erred in finding that Rider DMR will encompass grid modernization benefits.

{¶ 168} In their memorandum contra, the Companies first assert that the Commission has already considered and rejected these arguments in the Fifth Entry on Rehearing (Fifth Entry on Rehearing at 160-64). Without unnecessarily duplicating its earlier arguments in response to intervenors claiming that there was no real commitment by the Companies to invest in grid modernization, FirstEnergy simply notes that the revenues received under Rider DMR will provide credit support to enable the Companies to maintain investment grade ratings and access the necessary capital required to engage in their grid modernization initiatives over the term of *ESP IV*. As such, the Companies assert that the ability to maintain their investment grade ratings is certainly a qualitative benefit of Rider DMR.

{¶ 169} We find that these arguments have been fully addressed and we will not duplicate the reasoning set forth in the Fifth Entry on Rehearing in this decision (Fifth Entry on Rehearing at 160-64). Accordingly, these assignments of error should be denied.

ii. The Commission's finding that Rider DMR will promote diversity of supplies and suppliers and promote Ohio's competitiveness in the global marketplace.

{¶ 170} OMAEG reiterates its earlier arguments that Rider DMR's purported qualitative benefit of diversity of suppliers and supplies is also largely overstated, noting that Rider DMR may actually deter other generation suppliers from entering the market upon seeing the competitive advantage provided to FirstEnergy Corp. and its subsidiaries. OMAEG adds that Rider DMR will actually have a detrimental effect on economic development in the state of Ohio.

{¶ 171} FirstEnergy notes that the Commission has previously considered and rejected these arguments and OMAEG has offered no additional information that would warrant changing the Commission's earlier finding (Fifth Entry on Rehearing at 158, 163). Additionally, the Companies reiterate there was a considerable amount of evidence in the record that showed encouraging the deployment of advanced technology throughout the distribution system will cause competitive suppliers to enter the market and to offer more innovative products to retail customers. The Companies also argue that the Commission similarly recognized the extensive economic benefits resulting from maintaining FirstEnergy Corp.'s headquarters in Akron, Ohio, as quantified in FirstEnergy witness Murley's economic impact analysis (Fifth Entry on Rehearing at 77).

{¶ 172} We agree that these arguments were thoroughly addressed in our Fifth Entry on Rehearing, in which we found that Rider DMR will promote diversity of supplies and suppliers and promote Ohio's competeveness in the global marketplace (Fifth Entry on Rehearing at 163-64). In support of our findings, we specifically referenced the rehearing testimony of RESA witness Crockett-McNew and Staff witnesses, in which they agreed that grid modernization will promote customer choice and promote the state's competitiveness in the global marketplace (Fifth Entry on Rehearing at 163-64; RESA Ex. 7 at 7; Staff Ex. 15 at 15-16; Staff Ex. 14 at 4). We also recognized the economic impact of maintaining FirstEnergy Corp.'s headquarters in Ohio, further noting that no other witness was able to produce evidence contradicting Ms. Murley's estimated economic impact of $568 million on Ohio's economy (Fifth Entry on Rehearing at 77). Thus, OMAEG's assignments of error as to these issues should be denied.

iii. The Commission's finding that the five qualitative benefits previously relied upon by the Commission in its original Order will continue to exist under *ESP IV*, as modified by the Fifth Entry on Rehearing.[9]

{¶ 173} In its application for rehearing, Sierra Club argues that the Commission unreasonably found certain qualitative benefits to exist under *ESP IV*. Specifically, Sierra Club takes issue with the Commission's recognition of the CO_2 reduction commitment and the 800,000 MWh reduction goal, contending such benefits are illusory and should not be considered qualitative benefits for purposes of the ESP versus MRO test because they are unenforceable. OMAEG also incorporates its arguments against these alleged benefits from its May 2, 2016 application for rehearing.

{¶ 174} In response, FirstEnergy argues that Sierra Club's assertions were rejected previously by the Commission (Order at 94-95). Furthermore, the Companies assert that they have filed their report with the Commission describing FirstEnergy Corp.'s carbon reduction efforts, and will continue to do so every five years through 2045. The Companies note further that they will strive to achieve this goal even if the Environmental Protection Agency's Clean Power Plan is overturned. Similarly, the Companies contend that, as they are committed to achieving substantial annual energy savings, they fully intend to uphold their commitment that they have presented to the Commission.

{¶ 175} Consistent with the *ESP IV* Opinion and Order and Fifth Entry on Rehearing issued in this case and based upon the testimony presented on rehearing, we find that these constitute tangible qualitative benefits will provide some value during *ESP IV* that would not

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[9] These qualitative benefits include: (1) modernizing distribution infrastructure through the filing of a business plan for the deployment of smart grid technology and advanced metering infrastructure in accordance with state policy set forth in R.C. 4928.02(D); (2) promoting resource diversity by investing in utility scale battery technology and by procuring or constructing new renewable energy resources; (3) encouraging energy efficiency; (4) continuing the distribution base rate freeze until June 1, 2024; and (5) providing multiple rate options and programs to preserve and enhance rate options for various customers (Fifth Entry on Rehearing at 163-64).

otherwise be available under an MRO (Order at 119; Fifth Entry on Rehearing at 163-64). As such, we find that Sierra Club's assignments of error as to these issues should be denied.

IV. PROCEDURAL MATTERS

A. *FirstEnergy's Motions to Strike*

{¶ 176} FirstEnergy filed motions to strike portions of the applications for rehearing filed by NOPEC and OMAEG on November 25, 2016 and December 2, 2016, respectively. OMAEG filed a memorandum contra FirstEnergy's motion to strike portions of its application for rehearing, to which FirstEnergy filed a reply.

{¶ 177} In its motion to strike portions of NOPEC's application for rehearing, FirstEnergy asserts that NOPEC improperly relied on material that is not in the evidentiary record and would be extremely prejudicial to the Companies. Moreover, FirstEnergy notes that NOPEC relies on news articles for this information, which the attorney examiners have already determined constitutes inadmissible hearsay. NOPEC did not file a memorandum contra asserting that the information should remain in its application for rehearing.

{¶ 178} In its motion to strike portions of OMAEG's memorandum contra applications for rehearing, FirstEnergy contends that OMAEG's argument that the Commission erred in extending the Companies' right to withdraw its ESP constitutes an untimely application for rehearing and its inclusion in a memorandum contra would be prejudicial to the Companies because they will have no opportunity to respond. As this section in OMAEG's memorandum contra fails to attempt to refute any argument raised in the applications for rehearing, FirstEnergy claims it is improper under both the Ohio Administrative Code and Commission precedent. Ohio Adm.Code 4901-1-35; *In re the Establishment of Carrier-to-Carrier Rules* , Case No. 06-1344-TP-ORD, Entry on Rehearing (Oct. 17, 2007) at 3; *In re the Regulation of the Elec. Fuel Component Contained within the Rate Schedules of Ohio Power Co.*, Case No. 98-101-EL-EFC, et al., Entry on Rehearing (July 15, 1999) at 8.

{¶ 179} In response, OMAEG asserts that its argument was proper, noting that the Companies' right to withdraw from the ESP is directly related to the assignments of error raised by the Companies in their application for rehearing. Specifically, OMAEG claims that each time FirstEnergy proposes an additional modification to Stipulated ESP IV, in addition to considering the modification, the Commission should also consider whether it is appropriate to allow the Companies to withdraw its ESP after collecting costs pursuant to their filed tariffs. Further, OMAEG asserts the Companies face no prejudice by OMAEG's argument, as they thoroughly addressed this issue in their own memorandum contra. Finally, while the Companies assert that Ohio Adm.Code 4901-1-35 contains no provisions allowing memoranda in support, OMAEG contends that there is also nothing in the rule prohibiting such supportive arguments. Thus, OMAEG requests that the Commission deny the motion to strike. Alternatively, OMAEG requests leave to file a memorandum in support of OCC/NOAC's application for rehearing.

{¶ 180} In its reply, FirstEnergy argues that OMAEG's position is clearly incorrect, noting that OMAEG fails to explain how the Companies' right to withdraw its ESP would be affected by the Commission's subsequent ruling on the Companies' application for rehearing since that statutory right is independent from the Commission's modifications to Stipulated ESP IV. Further, the Companies contend that its application for rehearing contained no assignment of error addressing their right to withdraw the ESP. Additionally, the Companies assert that OMAEG's argument vary from those raised by OCC/NOAC and, thus, the Companies are prejudiced with the inability to respond to those separate arguments. FirstEnergy requests that the Commission grant its motion to strike, given that OMAEG's argument was inconsistent with Ohio Adm.Code 4901-1-35 and prior Commission practice, and notes that any request for leave to file a memorandum in support of OCC/NOAC's application for rehearing would only unnecessarily delay these proceedings.

{¶ 181} Consistent with our prior decisions in this proceeding, we continue to find that new information should not be introduced after the closure of the record (*ESP IV* Opinion and Order at 37; Fifth Entry on Rehearing at 171). We note that the same analysis may be applied in this Eighth Entry on Rehearing, as FirstEnergy's motion to strike portions of NOPEC's application for rehearing deal with hearsay statements and other evidence not included in the record (*ESP IV* Opinion and Order at 35-37). We find it would be inappropriate to allow this information to be considered at this point in the proceeding, as the record is now closed and the Companies would not have the opportunity to prepare and respond to that information. We also find that FirstEnergy's motion to strike portions of OMAEG's memorandum contra should be granted for the reasons stated in FirstEnergy's motion. While OMAEG may be correct that Ohio Adm.Code 4901-1-35 contains no explicit prohibition against supportive arguments in memoranda contra, the Commission has previously interpreted this rule to limit arguments presented in memoranda contra to those directly adverse to the assignments of error raised in applications for rehearing. We also agree that the additional delay from allowing OMAEG to file a memorandum in support of OCC/NOAC's application for rehearing would be unnecessary and OMAEG has not shown good cause to remedy its procedural mistake.

{¶ 182} Accordingly, FirstEnergy's motions to strike portions of NOPEC's application for rehearing and OMAEG's memorandum contra applications for rehearing will be granted in their entirety. The stricken portions of these filings, as detailed above, have been disregarded by the Commission for purposes of its decision in this Eighth Entry on Rehearing. OMAEG's additional request for leave to file a memorandum in support of OCC/NOAC's application for rehearing should also be denied.

B. *OCC/NOAC's assignment of error alleging that FirstEnergy's application for rehearing does not satisfy the requirements of R.C. 4903.10.*

{¶ 183} In its application for rehearing, OCC/NOAC also allege that FirstEnergy's application for rehearing does not satisfy the requirements of R.C. 4903.10 because it failed to set forth specifically how the Commission's Fifth Entry on Rehearing was unlawful or unreasonable.

{¶ 184} The Commission finds no merit in OCC/NOAC's assignment of error. FirstEnergy clearly identified its assignments of error, in compliance with the statute, and the Commission was able to substantively address those assignments of error. Moreover, our decision is consistent with prior holdings in this proceeding (Third Entry on Rehearing at 9-12, 19; Fifth Entry on Rehearing at 14). Therefore, OCC/NOAC's assignment of error will be denied.

C. *Moot Assignments of Error*

{¶ 185} Upon reviewing several remaining assignments of error raised in the applications for rehearing filed on November 11, 2016, and November 14, 2016, this Commission finds the following assignments of error are moot as they pertain to the Rider RRS mechanism as originally approved by this Commission in the Order or were otherwise addressed in the Fifth Entry on Rehearing:

- The Commission's finding that Modified Rider RRS constitutes a "charge" and a "limitation on customer shopping" pursuant to R.C. 4928.143(B)(2)(d) is unreasonable and unlawful (P3/EPSA App. for Rehearing at 13-16).
- The Commission erred in upholding the attorney examiners' rulings that resulted in striking portions of testimony related to the Companies' Proposal that should have been considered by the Commission in rendering its decision on the lawfulness of Modified Rider RRS (OMAEG App. for Rehearing at 37-46).
- The Commission erred in determining that the Companies' Proposal is authorized under R.C. 4928.143(B)(2)(d) (OMAEG App. for Rehearing at 10-12).

{¶ 186} As we modified our Order in the Fifth Entry on Rehearing to approve Staff's alternative proposal, in the form of Rider DMR, we need not take time to address the merits of the assignments of error raised, or responsive arguments contained in memoranda contra, relating to the Rider RRS mechanism or reiterate our reasoning for the denial of the Companies'

Proposal provided in the Fifth Entry on Rehearing (Fifth Entry on Rehearing at 43-51). Accordingly, the assignments of error raised by P3/EPSA and OMAEG pertaining to Rider RRS and the Companies' Proposal are denied.

D. *General Denial of Assignments of Error Not Specifically Addressed in this Eighth Entry on Rehearing*

{¶ 187} As a final matter, any assignments of error raised by the Companies or the intervening parties in this proceeding that have not otherwise been addressed in this Eighth Entry on Rehearing are hereby denied.

V. ORDER

{¶ 188} It is, therefore,

{¶ 189} ORDERED, That the Companies' motions to strike portions of NOPEC's application for rehearing and OMAEG's memorandum contra the applications for rehearing are granted, as set forth herein. It is, further,

{¶ 190} ORDERED, That the applications for rehearing filed by FirstEnergy be denied in part and granted in part, as set forth herein. It is, further,

{¶ 191} ORDERED, That the applications for rehearing filed by Sierra Club, OCC/NOAC, CMSD, Nucor, NOEPC, OEG, IGS, Environmental Advocates, OMAEG, and P3/EPSA be denied. It is, further,

{¶ 192} ORDERED, That a copy of this Eighth Entry on Rehearing be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Asim Z. Haque, Chairman

M. Beth Trombold

Thomas W. Johnson

Lawrence K. Friedeman

Daniel R. Conway

GAP/MJA/sc

Entered in the Journal

AUG 1 6 2017

Barcy F. McNeal

Barcy F. McNeal
Secretary

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Authority to Provide 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

APPLICATION FOR REHEARING OF THE FIFTH ENTRY ON REHEARING BY THE OHIO ENVIRONMENTAL COUNCIL, ENVIRONMENTAL DEFENSE FUND, AND ENVIRONMENTAL LAW & POLICY CENTER

Pursuant to Ohio Revised Code ("R.C.") 4903.10 and Ohio Admin. Code 4901-1-35, the Ohio Environmental Council, Environmental Defense Fund, and Environmental Law & Policy Center (collectively, "Environmental Intervenors") hereby file this application for rehearing of the October 12, 2016 Fifth Entry on Rehearing ("Entry") of the Public Utilities Commission of Ohio ("Commission") in this proceeding. The Commission's Entry approved a Stipulated Electric Security Plan ("Stipulated ESP") proposed by the Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company (collectively "FirstEnergy Utilities" or "Companies"), and most specifically approved a Distribution Modernization Rider ("Rider DMR") to fund a cash influx meant to support the credit ratings of the Companies and their parent Company ("FirstEnergy Corp.").

The Entry is unlawful and unreasonable, and deserving of rehearing for the following reasons, as further explained in the accompanying Memorandum in Support[1]:

A. The Commission Lacks Statutory Authority in an Application for an Electric Security Plan to Approve the Rider DMR.

    1. The Entry unreasonably allows the revenue from Rider DMR to "indirectly" support grid modernization investments thereby providing no actual restriction requiring the funds to be used for grid modernization.
    2. The Entry is inconsistent with established Commission policy and precedent pertaining to approval of distribution riders in prior ESP cases.

B. Rider DMR impermissibly provides FirstEnergy with the equivalent of transition revenues in violation of R.C. 4928.38.

C. Rider DMR provides an impermissible anticompetitive subsidy inconsistent with R.C. 4928.02(H).

D. By allowing FirstEnergy to use Rider DMR revenues for credit support, the Commission erred by granting emergency financial relief to FirstEnergy under R.C. 4928.142(D), even though FirstEnergy never applied for, or presented any evidence, to establish that it was entitled to emergency financial relief.

E. The Entry unreasonably holds that FirstEnergy does not have to comply with its stipulation obligation to "strive to achieve over 800,000 MWh of energy savings annually" through its energy efficiency programs.

F. The Entry contravenes R.C. 4928.66 by permitting utility customers to participate in one of FirstEnergy's peak demand reduction programs under Rider ELR even after opting out of paying for those programs.

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[1] Furthermore, Environmental Intervenors hereby reassert and preserve the Assignments of Error enumerated in our May 2, 2016 Application for Rehearing filed in this case.

G. The Entry unreasonably allows FirstEnergy to recover lost distribution revenues based on energy savings resulting from customer action alone rather than any affirmative utility program.

Dated: November 14, 2016

Respectfully submitted,

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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

MEMORANDUM IN SUPPORT OF APPLICATION FOR REHEARING BY THE OHIO ENVIRONMENTAL COUNCIL, ENVIRONMENTAL DEFENSE FUND, AND ENVIRONMENTAL LAW & POLICY CENTER

I. INTRODUCTION

The Ohio Environmental Council, Environmental Defense Fund, and Environmental Law & Policy Center (collectively, "Environmental Intervenors") seek rehearing of the October 12, 2016 Fifth Entry on Rehearing ("Entry") of the Public Utilities Commission of Ohio ("Commission" or "PUCO") in this case approving a Stipulated Electric Security Plan ("Stipulated ESP") proposed by the Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company (collectively "FirstEnergy Utilities" or "Companies"). The hallmark of the Commission's Entry on Rehearing is replacement of previously approved Rider RRS with the new Distribution Modernization Rider ("Rider DMR"). The Commission justified approval of Rider DMR as credit support to ensure the Companies are not downgraded from investment grade. Fifth Entry on Rehearing at 87-88. The Commission's stated rationale for this "credit support" is that it will allow the Companies to receive more favorable terms when accessing the credit markets to finance distribution improvements. The Entry requires two concessions for Rider DMR's approximately $600 million of up-front cash influx to the Companies and its unregulated parent holding company. First, the Commission will seek a "demonstration" of sufficient progress by the Companies in the implementation and deployment of grid modernization programs approved by the Commission. Second, FirstEnergy must keep its corporate headquarters and nexus of operations of FirstEnergy Corp. in Akron, Ohio, and there can be no change in "control" of the Companies as that term is defined in R.C. 4905.402(A)(1). *Id.* at 96.

Rider DMR, despite its name, does not specifically work to incent investment in grid modernization. Although some of the Rider's revenues could be used directly for such purposes, its core function is to provide credit support to the Companies and their parent holding company. PUCO Staff testimony in this proceeding clearly enumerates the sole purpose of this Rider would be "to allow the Ohio Regulated Distribution Utilities to provide the appropriately allocated support for FirstEnergy Corporation to maintain investment grade by the major credit rating agencies." Staff Ex. 13 at 2. Rider DMR does little more than give the Companies up-front cash for merely promises in return. As proposed and as approved in the Entry, Rider DMR is contrary to public interest, and in fact inflicts an unlawful and reasonable financial injury on ratepayers.

We do not dispute that FirstEnergy Corp. and the Companies are in financial distress. There are volumes of testimony, exhibits, hearing transcripts, and briefs that go into detail that the major credit rating institutions (Moody's and S&P) have designated negative ratings or near negative ratings to the Companies and/or FirstEnergy Corp. We do not dispute that if

FirstEnergy Corp. falls below investment grade that the Companies will have difficulty obtaining financing in the capital markets. However, we must dispute the idea that charging additional fees to customers to make up for credit problems brought on by poor decisions by the Companies' unregulated sister affiliates is sound public policy. The Chairman's Concurring Opinion states that this decision is "undoubtedly unconventional." Concurring Opinion of Chairman Asim Z. Haque ("Haque Concurrence") at 2. Unfortunately, it is beyond unconventional, and as outlined below, the Commission's Rehearing Entry is unreasonable and unlawful. Therefore, Environmental Intervenors respectfully request rehearing of the Entry to rescind approval of Rider DMR.

II. ARGUMENT

A. The Commission Lacks Statutory Authority in an Application for an Electric Security Plan to Approve the Rider DMR.

In its Fifth Entry, the Commission found that Rider DMR is a valid provision in an ESP authorized under R.C. 4928.143(B)(2)(h). Fifth Entry on Rehearing at 89. The Commission attempts to explain how Rider DMR is an incentive for grid modernization by finding that the Rider "is necessary to assist the Companies in accessing the capital markets in order to make needed investments." *Id.* at 90-91. The Commission reasoned that, based on testimony, it was "clear that the Rider was related to distribution rather than generation, and amounted to an incentive for the company to 'jump start' the Companies' grid modernization efforts." *Id.*

However, the testimony presented by the Staff clouds this "clear" conclusion. Staff Witness Turkenton indicated that this is a form of credit support, rather than a rider designed specifically to assist in grid modernization. In response questions related to how the Staff's proposed $131 million per year rider is allocated, and whether "the fact that this is a distribution rider under the distribution portion of the ESP statute" influences her thinking, Staff Witness Turkenton replied:

> "[I]t is named "distribution modernization rider," but I believe Staff Witnesses Buckley and Dr. Choueiki and myself believe that this is a form of credit support for the company to be able to access -- access the capital markets and hopefully they will, in turn, modernize the grid. So there is a distribution component to it, but I don't know that staff believes that it is a distribution rider, per se. That late recovery will happen when they apply for this in the SmartGrid rider."

Rehearing Transcript, Vol. II at p.429, lines 11-21.

Rider DMR, under any name, does not specifically work to incent investment in grid modernization because the Companies are not required to spend any of the DMR revenues on grid initiatives. First, although some of the revenues could be used directly or indirectly for such purposes, its core function is to provide credit support to the Companies and their parent holding company. Furthermore, it is not structured to provide regulated recovery of costs or investments, but an upfront acquisition of customer money. The Entry failed to provide any safeguards to ensure that the Companies effectively implement grid modernization by not making Rider DMR subject to an annual true-up, consistent with distribution riders in prior ESP cases. This is unlawful and unreasonable as contrary to otherwise approved and appropriate ratemaking.

1. The Entry unreasonably and unlawfully allows the revenue from Rider DMR to "indirectly" support grid modernization investments thereby providing no actual restriction requiring the funds to be used for grid modernization.

The Commission, in approving Rider DMR as a valid provision in an ESP authorized under R.C. 4928.143(B)(2)(h), relies heavily on hopes that the "Companies may use revenue under Rider DMR to make the large cash up front investments to fund grid modernization." Fifth Entry on Rehearing at 128. Yet, without any qualification, the Commission allows the Companies and FirstEnergy Corp. to use the revenue to "indirectly support grid modernization" such as "lowering the costs of borrowing funds" and may include "reducing outstanding pension obligations" or "reducing debt." *Id.*

Assuming, arguendo, that removal of a credit market barrier is legally synonymous with the statutory term "incentive," there is little on the record to support that the Commission's decision fully and adequately removes said barriers. During the very lengthy hearings in the present case, the Companies failed to submit actual direct evidence of the degree to which they were having difficulties accessing capital for grid modernization. Further, there was no guarantee that with Rider DMR approved for $132.5 million per year, that the Companies would be able to fund grid modernization. There was no grid modernization proposal by Staff; there was instead a proposal for a Rider to provide cash to FirstEnergy Corp. – an unregulated utility holding Company – to help its diminishing credit rating. As cited above, PUCO Staff testimony in this proceeding clearly enumerates the sole purpose of this Rider would be "to allow the Ohio Regulated Distribution Utilities to provide the appropriately allocated support for FirstEnergy Corporation to maintain investment grade by the major credit rating agencies." Staff Ex. 13 at 2.

The Staff in its proposal laid it on the Commission to figure out the details of what FirstEnergy actually must do to provide the grid modernization benefit as consideration for the customers' "investment," and the Commission has in this Entry simply and unreasonably punted that back to the Company to *hopefully* invest.

The Commission, stating that it "will not place restrictions on the use of Rider DMR funds," directed Staff to "periodically review how the Companies, and FirstEnergy Corp., use the Rider DMR funds to ensure that such funds are used, directly or indirectly in support of grid modernization." Fifth Entry on Rehearing at 127-128. Yet, despite the rhetoric in this rehearing, and even the statements of the Chairman in his Concurring Opinion, the policy of this state vis-a-vis grid modernization is not being advanced in this case. First, a "periodic review" of FirstEnergy Corp., who could receive a lion's share of the Rider DMR revenue, by the Staff is illusory. As the Entry states, the Commission "does not regulate FirstEnergy Corp." *Id.* at 96. If FirstEnergy Corp. fails this review, the Commission has no recourse. When one couples this ineffectual enforcement of the unregulated holding company with the complete lack of an established penalty in the Entry for the Companies' non-compliance, this provision is utterly unenforceable.

Thus, the Commission, here, has not adequately defined what would constitute grid modernization. The Commission should clarify that one of the priorities will be to identify policies/projects that promote the implementation of Energy Efficiency, Renewable Energy, and Distributed Generation. Not requiring all of the money to be directly used to modernize the distribution grid, betrays the reasoning that this is a grid modernization incentive rider properly approved under R.C. 4928.143.

The Commission suggests, however, that it will conduct a "detailed policy review of grid modernization." Fifth Entry on Rehearing at 96-97. The Commission, however, provided no details about what the goals of that proceeding will be, when this proceeding will occur, or even if there will be a full due process proceeding. It was the "hope" of Staff that the Commission would be the one to determine what kind of investment was envisioned and permitted by this Rider DMR. The Fifth Entry, however, did not. The Commission, on rehearing, now, should take the opportunity to provide the framework, with goals and enumerations of benefits to be seen by customers for the large upfront investment, and a reasonable and responsible return on the utilities' investment. Thus, instead of rewarding poor past financial decisions with hundreds of millions of customer dollars under Rider DMR, the Commission should set the table for future benefits for customers by requiring real investment. Allowing the revenue to be used to repay operational debts and expenses, and banking on a distribution grid investment "jumpstarted" with the remainder is not a plan for the future. A well thought out plan, either through a full vetting of the Companies' smart grid business plan filing (PUCO Case No. 16-0481-EL-UNC) or other mechanism, requiring reasonable cost recovery, and quarterly filings and true-ups will pay dividends to all (not just to FirstEnergy Corp.).

2. The Entry is inconsistent with established Commission policy and precedent pertaining to approval of distribution riders in prior ESP cases.

Moreover, the Commission failed to include safeguards in the rider to ensure that the revenues are used solely for grid modernization. The Commission should have required the Company to prove that the revenues are spent prudently, and the Commission should have also required an annual true-up.

In prior ESP cases where the Commission has approved a distribution tracker, the Commission has required that the rider be based on an actual distribution improvement plan and the rider must also be cost-based. *In re FirstEnergy ESP*, Case No. 08-0935-EL-SSO (Opinion and Order at pp. 40-41) (December 19, 2008). Here the Commission failed to incorporate these safeguards. FirstEnergy does not have a grid modernization plan and the rider is not subject to an annual audit and hearing process to determine whether the revenues collected were spent for grid modernization and for equipment that is used and useful. Additionally, the rider does not have a true-up provision that would require FirstEnergy to refund or credit customers for any amounts not prudently spent. The record even lacks any evidence as to the potential amount of benefits to customers in terms of lower financing costs for distribution projects if FirstEnergy receives the specified credit support. These problems show that the Commission unreasonably approved Rider DMR without having any basis to determine whether the benefits that customers would receive in return for the $600 million in credit support would be worth the cost.

In his Concurring Opinion, Chairman Haque states that this decision is "undoubtedly unconventional" and that "[t]ypical public utility regulation function is to provide utilities with recovery and a return for expenditures made in constructing/maintaining service." Haque Concurrence at 2. This statement emphasizes how this decision goes directly against Commission's own precedent. The Commission on rehearing must rescind this Rider as contrary to that core function of utility regulation. Anything less than rescinding this Rider is illegal overreach of the Commission's authority.

B. Rider DMR impermissibly provides FirstEnergy with the equivalent of transition revenues in violation of R.C. 4928.38.

The Ohio Revised Code defines transition costs as costs unrecoverable in a competitive environment, and further, bars the Commission from authorizing the "receipt of transition revenues or any equivalent revenues" after December 31, 2010. *See* R.C. 4928.39; *see also* R.C. 4928.38. While the Companies would not directly utilize its Rider DMR to fund the maintenance and operation of unregulated plants, the ultimate destination of Rider DMR's revenue is to its financially distraught unregulated competitive enterprise at the expense of regulated customers. The Commission in its Entry, disagreed with the conclusion raised by a number of intervenors that Rider DMR would result in an illegal collection transition charges. Fifth Hearing on Entry at 130. The Commission bases this conclusion, however, on two rather strained lines of reasoning and is in direct contravention to Ohio's deregulation statute and recent Ohio Supreme Court precedent.

Under R.C. 4928.38, the utility's receipt of transition revenues shall terminate at the end of the market development period. With the termination of that approved revenue source, the utility shall be fully on its own in the competitive market. The commission shall not authorize the receipt of transition revenues or any equivalent revenues by an electric utility except as expressly authorized in sections 4928.31 to 4928.40 of the Revised Code. Here, the Commission's Entry takes a strict reading of the statute and determined that there is no (and can be no) "transition" because the Companies no longer own any generation. This reasoning is clearly flawed, however.

First, the statute does not make an exception for regulated utilities that have fully divested their generation. Revenues to protect generation investments contrary to deregulation can and do come in many forms, and while the distribution companies do not own generation, the holding company that is benefitted does. Evidence on the record throughout this rehearing show the credit support rider seeks to simply channel money to FirstEnergy Corp. as cover to support the financial integrity of its parent company due to losses associated with its competitive generation business and/or pay down the utility's debt for debt issuances that were used to finance or refinance legacy generating plants.[2]

OCC Witness Kahal showed in testimony that the effect of Rider DMR would be to mandate that utility customers subsidize FirstEnergy's unregulated operations as those operations share in the benefit of improved or protected credit ratings, and thus would have the effect of increasing FirstEnergy Corp. profits and making more cash available to pay increased dividends to shareholders. OCC Ex. 46 at 13. As the First Quarter 2016 FirstEnergy Corp. earnings report,

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[2] The Commission may also consider taking administrative notice of FirstEnergy's most recent 10K, which shows the company's existing debt issuances. The Commission can also take administrative notice of the Commission cases where the company sought approval to issue this debt. Clearly some of the debt on the Company's books was used to finance or re-finance the original construction and improvements to the legacy plants.

explained, FirstEnergy Corp. holds collateral exposure of up to $406 million with the vast majority (about 90 percent) being non-utility. *Id.* Witness Kahal's conclusion is simple yet profound -- "improvement of the FE credit ratings provides an important and tangible benefit to the unregulated operations, providing an expense savings (or even the avoidance of contract default if collateral cannot be posted as required)." *Id.*

To further show not only the potential for this tangible benefit to FirstEnergy Corp., but an actual example, we need only look to the cause and effect of poor financial decisions on FirstEnergy's Sammis plant. During the pendency of the hearing, FirstEnergy Corp. announced the shutdown of four of the units of the Sammis plants. This plant recently underwent a $1.8 billion state-of-the-art upgrade of the air quality control systems. Companies Ex. 32 at 10. A mere five years after those upgrades, FirstEnergy Corp. considered the plant uneconomic and needed of a bailout in the form of a PPA funded by Rider RSS. While the Commission in its entry seems to cite the shutdown of the Sammis units as a positive, the truth of the matter is that is the glaring example of poor and costly past decisions by the unregulated generation companies and customers being forced to pay to alleviate the effects of that on the regulated companies.

Moreover, two recent Ohio Supreme Court cases interpreting Riders proposed in AEP and DP&L's SSO cases further clarify this prohibition by showing that riders similar to Rider DMR will be considered transition charges. *See In re App. of Columbus S. Power Co.*, 2016-Ohio-1608, 2016 WL 1592905 (Apr. 21, 2016); *In re App. of Dayton Power & Light Co.*, 2016-Ohio-3490, 147 Ohio St. 3d 166. The Court determined that even though something was not explicitly labeled as transition revenue, it can still be considered "transition revenue." *In re App. of Columbus S. Power Co.*, 2016-Ohio-1608 at ¶21.

In the *AEP ESP II* case, the Commission approved AEP-Ohio's proposal for Rider RDR, and that rider's $826 million in non-fuel generation revenues in each year of the ESP. *Id.* at 17. As the Ohio Supreme Court pointed out, the Commission approved this Rider against the opposition of a number of parties because AEP is not receiving transition revenues or recovering stranded costs through the RSR. *Id.* at 32. This conclusion was based on the fact that "AEP did not argue that the revenues received under its prior electronic-transition plan were insufficient to cover costs." Nevertheless, the Ohio Supreme Court ruled that "the fact that AEP did not explicitly seek transition revenues does not foreclose a finding that the company is receiving the equivalent of transition revenue." The Court in *AEP* stated AEP's Rider RSR's intended effect of "provid[ing] AEP-Ohio with sufficient revenue to ensure it maintains its financial integrity as well as its ability to attract capital" did not justify its approval by the PUCO.

Further, the Court observed in *AEP* that the Rider RSR's intended effect of "provid[ing] AEP-Ohio with sufficient revenue to ensure it maintains its financial integrity as well as its ability to attract capital" did not justify its approval by the PUCO. The same purpose, to provide the utility with sufficient revenue to ensure it maintains its financial integrity, is the core of Modified Rider RRS. It is hard to believe that the Court would find these indistinguishable riders not deserving of the same fate.

The Commission tries to reason its way out of this obvious contravention of Supreme Court precedent by concluding that the transition charges that were struck down in the *DP&L*

and *AEP* cases are wholly dissimilar from Rider DMR because those Riders were approved under R.C. 4928.143(B)(2)(d), and not R.C. 4928.143(B)(2)(h). *Id.* This, too, is flawed reasoning, and also due to the fact that there is no exception in the statute for generation related Riders that are approved under particular subsections of the ESP code.

Furthermore, the revenues that FirstEnergy would collect from Rider DMR would be transition revenues, because the revenues would pay off debt used to finance (or re-finance) the generating plants. It is quite foreseeable that the Ohio Supreme Court would invalidate the Companies' attempt to tie this rider to generation costs - past or present. The Commission on rehearing, therefore, should remove Rider DMR, or otherwise modify the Entry to ensure that the revenue does not go to an unregulated entity to pay off generation related debt.

C. Rider DMR provides an impermissible anti-competitive subsidy inconsistent with R.C. 4928.02(H).

The order failed to adequately address the argument that Rider DMR is an anti-competitive subsidy inconsistent with the text and spirit of R.C. 4928.02(H). Under R.C. 4928.02(H), the Commission is required to:

> Ensure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa, including by prohibiting the recovery of any generation-related costs through distribution or transmission rates.

The Ohio Supreme Court, ruling on an earlier version of R.C. 4928.02(H) (then codified at R.C. 4928.02(G)), held that the statute "prohibits public utilities from using revenues from competitive generation-service components to subsidize the cost of providing noncompetitive distribution service, or vice versa." *Elyria Foundry Co. v. Pub. Util. Comm.*, 2007-Ohio-4164, ¶50, 114 Ohio St. 3d 305, 315, 871 N.E.2d 1176, 1187. Ohio law clearly requires that each affiliate must stand on its own, and cross-subsidization is unlawful. The Commission's decision in the instant case violates this principle in two ways: (1) by using distribution customer money to make up for problems on the unregulated side, and (2) to benefit the unregulated side by fixing its credit support.

The Commission's Entry found that the record demonstrates that Rider DMR does not constitute an unlawful subsidy to FirstEnergy Corp. Fifth Entry on Rehearing at 126. The initial basis for the Commission's finding, however, lies in explaining that there cannot be a subsidy, because the Companies (and/or its parent holding company) need the Rider DMR for necessary credit support. The mere fact that the revenue from Rider DMR is needed does not mean that it is not a subsidy. However, there is no guarantee that Rider DMR will prevent a downgrade in the credit ratings of FirstEnergy Corp. or the Companies. No witness nor any evidence has been presented from the credit rating agencies to support the finding that the Commission's amount, or any amount, of cash influx from the Companies' captive distribution customers will forestall a downgrade or allow for more favorable terms. The Companies' assertions that are the underpinning of the Commission's decision are mere conjecture. The people of Northern Ohio are not those to blame for the credit fiasco facing the Companies or its unregulated parent. Customers do not owe the Companies for the Companies' monopoly; rather, the Company in exchange for its monopoly power owes the customers the duty to stay healthy and provide services. It is not the Commission's job to bail out utilities that make bad business decisions.

That rationale patently overlooks the fact that the Companies will be reaping distribution revenue from its customers, and funneling it to its unregulated parent Company. The Commission's narrow reading of the anti-competitive subsidy prohibition is inconsistent with the plain language of the statute.

Citing the Companies' Witness Mikkelsen's rebuttal testimony, the Commission supported its conclusion by enumerating what the Companies *may* do with the revenue. The Commission further cites to areas where the Companies contend that all of its stakeholders are sharing in the burden of improving its financial health. Fifth Entry on Rehearing at 128. Companies' Witness Ms. Mikkelsen's rebuttal testimony lays out a number of measures that she suggests represent how FirstEnergy employees, management, shareholders and other "constituents" have "significantly invested, and continue to invest" in credit support. Companies' Ex. 206 at pg. 17. Yet these "investments" certainly do not represent anything approaching the costs proposed to be borne on the distribution customers. Furthermore, when examined, each of these "constituents" have not provided adequate credit support – or in some cases any credit support.

For example, Ms. Mikkelsen enumerates that the FirstEnergy Management and Employees contributed to credit support through completed reductions in medical and other benefits, staffing reductions, and a cash flow improvement plan. Companies' Ex. 206 at 17. However, she offers no evidence as to the degree of these efforts, the quantitative impact these efforts have made toward the credit support needed by FirstEnergy Corp., or the contents or timeframe of the plan. Similarly, the Companies' witness adds no evidence or detail as to the measures provided by shareholders. *Id.* Ms. Mikkelsen further asserts that the FirstEnergy Corp. subsidiaries in New Jersey, Pennsylvania, and West Virginia have contributed to credit support through a number of regulatory cases. *Id.* at 18. However, the cases cited by the Companies and presumably relied upon by the Commission had nothing to do with providing credit support (certainly not the type requested of the Companies' customers). Tr. Vol X at 1634-1668. The efforts to help credit support that the Commission relies upon, here, are applications for base rate cases, capital recovery filings, and vegetation management cases. These applications are designed to recoup moneys based on costs already allocated by the companies for other purposes or develop rate design and cost – they have not and cannot be considered as contributions to cash infusion to assist with credit support.

D. By allowing FirstEnergy to use Rider DMR revenues for credit support, the Commission erred by granting emergency financial relief to FirstEnergy under R.C. 4909.16 even though FirstEnergy never applied for, or presented any evidence to establish, that it was entitled to emergency financial relief.

As stated numerous times above, the Commission's credit support Rider DMR seeks to simply channel money to FirstEnergy Corp. to cover to support the financial integrity of its parent company due to losses associated with its competitive generation business. If a distribution utility is in need of a cash influx for solvency, it can rely on the emergency rate relief statute. In the present case, however, the Commission failed to follow state law, court rulings, and its own precedent in providing the Companies' emergency rate relief. The Entry even recognizes this fact and states that "the Commission notes that electric utilities, like all public utilities, can seek emergency rate relief under R.C. 4909.16 and the Commission has provided factors or indicators for determining whether emergency rate relief can be granted." Fifth Entry on Rehearing at 162.

Under R.C. 4909.16, "[w]hen the public utilities commission deems it necessary to prevent injury to the business or interests of the public or of any public utility of this state in case of any emergency to be judged by the commission, it may temporarily alter, amend, or, with the consent of the public utility concerned, suspend any existing rates, schedules, or order relating to or affecting any public utility or part of any public utility in this state." Ohio Rev. Code 4909.16. Decades-old caselaw interpreting the rate relief statute requires an applicant to put on evidence and prove that some emergency exists, and that the PUCO's finding of an emergency is reasonable. *Gen. Motors Corp. v. Pub. Utilities Comm'n*, 54 Ohio St. 2d 357, 376 N.E.2d 1345 (1978).

This process exists to provide *temporary* relief, and has been used to provide only the assistance absolutely necessary to prevent injury to the utility that could in turn injure the public. The "ultimate question for the Commission is whether, absent emergency relief, the utility will be financially imperiled or its ability to render service will be impaired. If the applicant utility fails to sustain its burden of proof on this issue, the commission's inquiry is at an end." *In the Matter of the App. of the Toledo Edison Co. for Auth. to Change Certain of Its Filed Schedules Fixing Rates & Charges for Elec. Serv.*, 84-1286-EL-AEM, 1987 WL 1466442, at 3 (F.E.D.A.P.J.P. May 12, 1987). The only evidence presented by the Companies concerning its need for this emergency relief is that the credit rating agencies *may* downgrade the Companies and/or the Companies' parent company, and therefore the Companies *may* have difficulty accessing the credit markets.

Yet, important details to determine whether this is an actual emergency in need of a temporary relief approval are missing. There was no evidence presented as to when the downgrade may occur. There was no evidence provided as to the magnitude of the costs incurred due to a downgrade and whether those costs would be significant when passed on to customers. Accepting the argument that there would be significant costs to customers, no evidence was presented that those costs would be higher than the upfront costs that customers are forced to pay under an approved Rider DMR. Utilizing the proper procedure under R.C. 4909.16 would have provided the opportunity for this evidence to be submitted, and supported or refuted by stakeholders. Most significantly, following R.C. 4909.16 would provide the Commission with the ability to properly rule on emergency rate relief.

The Commission here has ignored the appropriate procedure in Ohio to seek emergency relief due to hardship. Ohio law necessitates that the Companies request emergency *temporary* rate relief under R.C. 4909.16 and submit the substantive evidence necessary to show that it in fact needs temporary relief. Even if it had, the Companies' condition does not rise to the type of "extraordinary" situation that is required for the Commission to confer emergency rate relief, and its request is purely a cash grab.

For example, in *In the Matter of the Application of the Toledo Edison Co. for Auth. to Change Certain of Its Filed Schedules Fixing Rates & Charges for Elec. Serv.*, 84-1286-EL-AEM, 1987 WL 1466442, at *7 (F.E.D.A.P.J.P. May 12, 1987), the company was awarded temporary emergency rate relief where its "lowest investment grade ratings have seriously limited the company's financial flexibility", and continuing adequate service was actually in jeopardy. The court held that it be granted emergency rate relief, and only granted the "relief which is the *minimum needed by the company to carry on its operations*", which was less than the company requested in its application. Toledo Edison submitted large amounts of testimony proving that the company would be at risk of failing to provide adequate service before the Commission was willing to provide any type of assistance to the company. The Commission then determined the minimum amount of relief necessary to ensure adequate service continued.

The difference between *Toledo* and the instant case, however, is that adequate service is <u>not</u> a concern in this setting. So even if FirstEnergy had applied under R.C. 4909.16 for emergency temporary rate relief, it has not met the burden required for the Commission to grant such a request. Yet, even if the Commission had the authority to find that FirstEnergy's financial condition necessitated emergency rate relief under R.C. 4909.16, it would surely be significantly less money than what FirstEnergy has requested here. "Section 4909.16, Revised Code, vests the Commission with broad powers in determining when an emergency exists and in tailoring a remedy to meet the emergency", and, as in the *Toledo* case, it has limited the amount of monetary relief to only that necessary and limited the time period in which the rate relief applies in order to ensure the amount charged to the customers is only what is necessary to ensure adequate service continues, not to give the utility a windfall.

The Commission concluded that it believes that a potential downgrade to below investment grade could be constituted as an "emergency that threatens the utility's financial integrity" under R.C 4928.142(D). However, despite this admission, the Commission unlawfully failed to require the Companies to properly apply for such emergency relief. R.C. 4928.142(D)(4) states, in part: "the commission may adjust the electric distribution utility's most recent standard service offer price by such just and reasonable amount that the commission determines necessary to address any emergency that threatens the utility's financial integrity…" Ohio Rev Code 4928.142. However, the Commission's reliance on this provision is patently misplaced, as this is an Application for an ESP under R.C. 4928.143 (not an MRO under 4928.142).

E. The Entry unreasonably holds that FirstEnergy does not have to comply with its stipulation obligation to "strive to achieve over 800,000 MWh of energy savings annually" through its energy efficiency programs.

The Entry unreasonably nullifies FirstEnergy's stipulation commitment to offer energy efficiency and peak demand reduction programs that "would strive to achieve over 800,000 MWh of energy savings annually, subject to customer opt outs." Third Supplemental Stipulation at 11. In the Entry, the Commission *sua sponte* revisited the meaning of this provision:

> [T]he goal of 800,000 MWh of energy efficiency savings annually under the Third Supplemental Stipulation is simply a goal. The Companies are expected in the energy efficiency program portfolio plans to budget for the annual statutory energy efficiency mandate rather than the goal. The Commission expects the goal to be achieved by efficiently administering the approved programs and achieving energy savings for the least cost rather than by setting the program budget to the stipulated goal.

Fifth Entry on Rehearing at 147. We do not dispute that the 800,000 MWh is a goal, not a binding target. However, in order to effectively carry out the commitment to "strive" to meet that goal, FirstEnergy must be able to establish program budgets sufficient to produce the requisite level of energy savings. Thus, this interpretation of the Third Supplemental Stipulation – reached without any input from the parties – is unreasonable because it renders this provision of the Third Supplemental Stipulation meaningless.

As a practical matter, the Companies' energy efficiency programs predominantly operate by providing customers with monetary incentives to implement efficiency measures. For example, the bulk of programs in the FirstEnergy Utilities' proposed portfolio plans for 2013-2015 offered subsidies for efficient products and equipment, discounted energy audits, and incentives for building improvements. *In re FirstEnergy Utilities' App. for Approval of Their Energy Efficiency and Peak Demand Reduction Program Plans for 2013-2015*, Case No. 12-2190-EL-POR, Application Att. A (July 31, 2012) at 24-61 (program descriptions).

Accordingly, a significant majority of the funding for these programs goes directly to incentive payments. *Id.* at App. B (program budgets). Therefore, even if the Companies are able to run these programs more "efficiently," such efficiencies are highly unlikely to produce the target level of savings if the budget is not sufficient to cover the incentive payments necessary for customers to implement the relevant efficiency measures. The only realistic way for FirstEnergy to "strive" for the 800,000 MWh goal is to propose a plan that is projected to actually reach that target, along with adequate funding for such a plan. The Commission will then have the opportunity to review that plan to ensure that it is cost-effective in accordance with Ohio Admin. Code 4901:1-39-04(B).

The Commission has refused to interpret a stipulation in a way that "would render meaningless" its "express provisions." *In the Matter of the App. of The Cincinnati Gas & Electric Company for an Increase in Electric Rates*, Case No. 91-410-EL-AIR, Opinion and Order (May 12, 1992) at 16. In this case, it is the Commission's own rehearing order that would render FirstEnergy's commitment to an 800,000 MWh energy savings goal effectively meaningless. The Commission specifically referenced the role of the Stipulated ESP in "provid[ing] for the implementation of energy efficiency programs, with a goal of saving 800,000 MWh of energy annually" as part of its rationale for approving it as reasonable and in the public interest. Opinion and Order at 87; *see also id.* at 94; Haque Concurrence at 6. If the Commission does not permit FirstEnergy to set a reasonable energy efficiency program budget adequate to provide that level of savings, that benefit of the Stipulated ESP will almost certainly be lost to customers. We therefore ask the Commission to reconsider this aspect of the Fifth Entry on Rehearing.

F. The Entry contravenes R.C. 4928.6613 by permitting utility customers to participate in one of FirstEnergy's peak demand reduction programs under Rider ELR even after opting out of paying for those programs.

The Entry unlawfully and unreasonably ruled that FirstEnergy customers may receive credits for providing peak demand reduction through Rider ELR, even after having opted out of participating in, and paying for, FirstEnergy's energy efficiency ("EE") and peak-demand reduction ("PDR") programs. Rider ELR provides for FirstEnergy to pay eligible customers a credit in return for each kilowatt-month of interruptible load – an amount by which the customer will reduce its demand if called upon under the terms of the ELR tariff. In the Entry, the Commission approved Section A.1.6 of the original Stipulation filed in this case, which states that "ELR customers may opt out of the opportunity and ability to obtain direct benefits from the Companies' EE/PDR Portfolio Plans as provided in S.B. 310." Co. Ex. 2 at 8. The Commission rejected the argument that this provision violates R.C. 4928.6613, which directs that no opt-out customer "shall be . . . eligible to participate in, or directly benefit from, programs arising from electric distribution utility portfolio plans approved by the public utilities commission." However, in doing so, the Commission unreasonably characterized FirstEnergy's peak demand reduction program under Rider ELR as solely an economic development program, inconsistent with the record in this case and the Commission's own past orders showing that Rider ELR is also part and parcel of FirstEnergy's peak demand reduction programs.

The Commission reasoned that a customer who has opted out of paying for FirstEnergy's EE/PDR programs may still participate in the ELR program, and thus receive credits for interruptible load recovered through FirstEnergy Rider DSE (the EE/PDR rider) and Rider EDR (an economic development rider), because Rider ELR is an economic development program:

> The ELR programs existed long before the statutory energy efficiency and peak demand reduction mandates. Further, the Commission has long held that ELR has an economic development component and ELR is funded, in part, through the economic development rider, which is paid by all customers, including those who opt out of the energy efficiency programs.

Fifth Entry on Rehearing at 146.

This reasoning presents only half the picture. It is true that a portion of the Rider ELR credit is funded through Rider EDR, an economic development rider. However, as the record in this case and the Commission's own decisions unequivocally demonstrate, FirstEnergy *also* relies on Rider ELR to meet its peak demand reduction obligation under R.C. 4928.66 and funds a significant portion of the program through its energy efficiency/peak demand reduction rider, Rider DSE. Most importantly, FirstEnergy *expressly includes the ELR program in its currently effective EE/PDR portfolio plan* as part of the utility's compliance strategy for meeting the peak demand reduction requirements of R.C. 4928.66. *FirstEnergy 2013-2015 EE/PDR Plan Case*, Application Atts. A, B, C at 13.

Additionally, FirstEnergy witness Mikkelsen herself testified that the separate EDR portion of the ELR funding is "associated with economic development, which is why it is included in the economic development rider and recovered through the economic development rider," (Tr. II at 274), but that the DSE portion represents the approximate capacity value of the interruptible load in *reducing demand*. Tr. III at 497. These undisputed facts show that Rider ELR is an integral part of FirstEnergy's compliance with its peak demand reduction obligations under R.C. 4928.66, separate from its economic development purpose.

Moreover, the Commission's declaration that the ELR program is an economic development program is directly contrary to its previous characterization of interruptible load programs in previous orders. In fact, the Commission expressly *rejected* the request of Ohio Power Company ("AEP Ohio") in its ESP 3 case to shift recovery of the costs of its interruptible load program to its economic development rider, asserting that the interruptible load program "reduces AEP Ohio's peak demand and encourages energy efficiency and, therefore, it is appropriate that the costs of the program are recovered through the EE/PDR rider." *In re Ohio Power Company*, Case No. 13-2385-EL-SSO *et al.*, Entry on Rehearing (May 28, 2015) at 12. The Commission then reiterated that characterization in determining whether R.C. 4928.65 requires that utilities disclose the cost of interruptible load programs on customer bills as a "cost of the utility's compliance with . . . [t]he peak demand reduction requirements under section 4928.66 of the Revised Code," declaring that "the *primary benefit* to customers from the interruptible programs is the reduction in peak demand." *In the Matter of the Amendment of Chapters 4901:1-10 and 4901:1-21*, Case No. 14-1411-EL-ORD, Third Entry on Rehearing (Aug. 26, 2015) at 4 (emphasis added); *see also* Second Entry on Rehearing (July 1, 2015) at 9.

Even the opinion originally approving the current cost recovery mechanism for Rider ELR in 2009 noted that "*[a]s a demand response program under Section 4928.66, Revised Code*, any revenue shortfall resulting from the application of the . . . interruptible credit in Rider ELR and Rider OLR will be recovered as part of an unavoidable Demand Side Management and Energy Efficiency Rider (Rider DSE)." *In re FirstEnergy*, Case Nos. 08-935-EL-SSO *et al.*, Second Opinion and Order (Mar. 25, 2009) at 10 (emphasis added). The Commission has failed to provide any reason for its abrupt about-face in describing the purpose of interruptible load programs.

Meanwhile, it is irrelevant that Rider ELR predates R.C. 4928.66. FirstEnergy also had energy efficiency programs well before that provision came into effect in 2008. *See, e.g.*, Case Nos. 92-391-EL-AAM *et al.*, Entry (Oct. 29, 1992); Case Nos. 95-299-EL-AIR *et al.*, Opinion and Order at 18-19 (Apr. 11, 1996); Case Nos. 04-1932-EL-ATA *et al*, Finding and Order (Feb. 14, 2007) at 4-5. Those programs are included in FirstEnergy's portfolio plan, as is the ELR program. R.C. 4928.6613 plainly applies to all such programs, without exception.

Finally, it is worth noting that, in practical terms, the Rider DSE funding for the ELR program is a significant amount of money. Company Witness Mikkelsen testified that, prior to the Stipulated ESP the Rider ELR program cost about $35 million dollars annually – with half of that coming from Rider DSE – and the expansion of Rider ELR in the Stipulated ESP could add more than $8 million to the annual Rider DSE cost. Tr. XXXVII at 7783-7784. That means that FirstEnergy customers could pay well over $20 million through the utility's EE/PDR rider for the portion of the ELR program that is *not* aimed at economic development, but rather represents the value of a customer's peak demand reduction. R.C. 4928.6613 states that a customer cannot receive such direct benefits "arising from" an EE/PDR portfolio plan after opting out of paying for it, and basic fairness counsels the same result. The Commission's approval of this portion of the Stipulation was therefore unlawful and unreasonable.

G. The Entry unreasonably allows FirstEnergy to recover lost distribution revenues based on energy savings resulting from customer action alone rather than any affirmative utility program.

The Entry unreasonably and unlawfully approved FirstEnergy's request to recover lost distribution revenues based on energy savings measured through the Customer Action Program ("CAP") without providing "the reasons prompting" that decision as required by R.C. 4903.09. Fifth Entry on Rehearing at 146-147. The Companies use the CAP to measure savings resulting from independent customer actions outside of the utilities' normal energy efficiency programs, such as customers buying a more efficient lightbulb or installing more efficient appliances without a utility incentive. Tr. XXXVII at 7860-7865. As the Commission itself recognized in denying FirstEnergy the ability to earn shared savings incentive payments for CAP savings, this program "involves no action by the Companies to achieve the energy savings." Fifth Entry on Rehearing at 147. The Commission has not allowed utilities to recover lost distribution revenues for such savings in the past, and offered no rationale for changing that approach here.

The Commission has previously authorized the recovery of lost distribution revenues as a "decoupling" mechanism to ensure that energy efficiency programs do not prevent utilities from recovering their distribution revenue requirement. Otherwise programs that produced energy savings would reduce utility revenue recovery through volumetric rates, and would therefore discourage utilities from helping customers save energy. *In re AEP Request for Approval of Its Program Portfolio Plan*, Case No. 09-1089-EL-POR, Opinion and Order (May 31, 2010) at 26. In this case, the CAP does not create any new energy savings, it only measures customers' own adoption of energy efficiency measures outside of utility programs. Therefore, paying the Companies lost distribution revenues for this program serves no purpose in encouraging FirstEnergy to implement energy efficiency programs.

In past cases, the Commission has expressly limited the lost distribution revenue mechanism to contexts where measured savings are the result of actual utility programs. For example, in the context of smart grid deployment the Commission stated that "approval of lost distribution revenues is limited to those lost revenues which can be demonstrated to be the result of FirstEnergy's proposed alternative pricing program." *In the Matter of the App. of FirstEnergy* *for Approval of Ohio Site Deployment of the Smart Grid Modernization Initiative*, Case Nos. 09-1820-EL-ATA *et al.*, Finding and Order (June 30, 2010) at 10. Similarly, in past stipulated FirstEnergy ESPs, the Companies have not been able to recover lost distribution revenues for energy savings from historic mercantile self-directed projects that were undertaken prior to implementation of utility efficiency programs. *E.g.*, *In re FirstEnergy*, Case No. 10-388-EL-SSO, Opinion and Order (Aug. 25, 2010) at 14. The Entry itself recognized that the CAP is analogous to such historic mercantile projects since they both "involve[] no action by the Companies to achieve the energy savings," and therefore held that, as with historic mercantile projects, FirstEnergy should not receive shared savings based on savings from the CAP. Fifth Entry on Rehearing at 147. Just as FirstEnergy should not receive incentive payments based on energy savings it had no role in creating, so too the utility should not be able to recover revenues for such savings under a mechanism designed to encourage utilities to affirmatively promote energy efficiency.

The Entry does not address these issues at all, merely setting forth the holding that "Further, the Companies may receive lost distribution revenue to the extent that energy savings under the Customer Action Program are verifiable." Fifth Entry on Rehearing at 146-147. However, R.C. 4903.09 requires the Commission to provide "the reasons prompting" its decisions. The Commission unreasonably and unlawfully failed to provide the required rationale for its holding here, and on rehearing should hold that FirstEnergy may not recover lost distribution revenues for savings measured through the Customer Action Program.

III. CONCLUSION

Financial hardship of the unregulated parent and unregulated affiliates of a distribution company, is not under the purview of the Commission. For the reasons set forth above, the Commission's approval of Rider DMR, is unlaw, unreasonable, and should be vacated in its entirety. The Environmental Intervenors respectfully request that the Commission grant rehearing to ensure the Companies' ESP, and specifically Rider DMR, complies with all applicable Ohio law.

Dated: November 14, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Application for Rehearing has been electronically filed with the Public Utilities Commission of Ohio and has been served upon the parties of record in this proceeding via electronic mail on November 14, 2016.

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Ohio Revised Codes

R.C. 4903.09 Written opinions filed by commission in all contested cases.

In all contested cases heard by the public utilities commission, a complete record of all of the proceedings shall be made, including a transcript of all testimony and of all exhibits, and the commission shall file, with the records of such cases, findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact.

R.C. 4903.13 Reversal of final order - notice of appeal.

A final order made by the public utilities commission shall be reversed, vacated, or modified by the supreme court on appeal, if, upon consideration of the record, such court is of the opinion that such order was unlawful or unreasonable. The proceeding to obtain such reversal, vacation, or modification shall be by notice of appeal, filed with the public utilities commission by any party to the proceeding before it, against the commission, setting forth the order appealed from and the errors complained of. The notice of appeal shall be served, unless waived, upon the chairman of the commission, or, in the event of his absence, upon any public utilities commissioner, or by leaving a copy at the office of the commission at Columbus. The court may permit any interested party to intervene by cross-appeal.

R.C. 4905.02 Public utility defined.

(A) As used in this chapter, "public utility" includes every corporation, company, copartnership, person, or association, the lessees, trustees, or receivers of the foregoing, defined in section 4905.03 of the Revised Code, including any public utility that operates its utility not for profit, except the following:

(1) An electric light company that operates its utility not for profit;

(2) A public utility, other than a telephone company, that is owned and operated exclusively by and solely for the utility's customers, including any consumer or group of consumers purchasing, delivering, storing, or transporting, or seeking to purchase, deliver, store, or transport, natural gas exclusively by and solely for the consumer's or consumers' own intended use as the end user or end users and not for profit;

(3) A public utility that is owned or operated by any municipal corporation;

(4) A railroad as defined in sections 4907.02 and 4907.03 of the Revised Code;

(5) Any provider, including a telephone company, with respect to its provision of any of the following:

(a) Advanced services as defined in 47 C.F.R. 51.5;

(b) Broadband service, however defined or classified by the federal communications commission;

(c) Information service as defined in the "Telecommunications Act of 1996," 110 Stat. 59, 47 U.S.C. 153(20);

(d) Subject to division (A) of section 4927.03 of the Revised Code, internet protocol-enabled services as defined in section 4927.01 of the Revised Code;

(e) Subject to division (A) of section 4927.03 of the Revised Code, any telecommunications service as defined in section 4927.01 of the Revised Code to which both of the following apply:

(i) The service was not commercially available on September 13, 2010, the effective date of the amendment of this section by S.B. 162 of the 128th general assembly.

(ii) The service employs technology that became available for commercial use only after September 13, 2010, the effective date of the amendment of this section by S.B. 162 of the 128th general assembly.

(B)

(1) "Public utility" includes a for-hire motor carrier even if the carrier is operated in connection with an entity described in division (A)(1), (2), (4), or (5) of this section.

(2) Division (A) of this section shall not be construed to relieve a private motor carrier, operated in connection with an entity described in division (A)(1), (2), (4), or (5) of this section, from compliance with either of the following:

(a) Chapter 4923. of the Revised Code;

(b) Rules governing unified carrier registration adopted under section 4921.11 of the Revised Code.

R.C. 4905.22 Service and facilities required - unreasonable charge prohibited.

Every public utility shall furnish necessary and adequate service and facilities, and every public utility shall furnish and provide with respect to its business such instrumentalities and facilities, as are adequate and in all respects just and reasonable. All charges made or demanded for any service rendered, or to be rendered, shall be just, reasonable, and not more than the charges allowed by law or by order of the public utilities commission, and no unjust or unreasonable charge shall be made or demanded for, or in connection with, any service, or in excess of that allowed by law or by order of the commission.

R.C. 4905.04 Power to regulate public utilities and railroads.

The public utilities commission is hereby vested with the power and jurisdiction to supervise and regulate public utilities and railroads, to require all public utilities to furnish their products and render all services exacted by the commission or by law, and to promulgate and enforce all orders relating to the protection, welfare, and safety of railroad employees and the traveling public, including the apportionment between railroads and the state and its political subdivisions of the cost of constructing protective devices at railroad grade crossings.

4905.32 Schedule rate collected.

No public utility shall charge, demand, exact, receive, or collect a different rate, rental, toll, or charge for any service rendered, or to be rendered, than that applicable to such service as specified in its schedule filed with the public utilities commission which is in effect at the time. No public utility shall refund or remit directly or indirectly, any rate, rental, toll, or charge so specified, or any part thereof, or extend to any person, firm, or corporation, any rule, regulation, privilege, or facility except such as are specified in such schedule and regularly and uniformly extended to all persons, firms, and corporations under like circumstances for like, or substantially similar, service.

R.C. 4905.402 Acquiring or merging with domestic telephone or electric utility company or holding company.

(A) As used in this section:

(1) "Control" means the possession of the power to direct the management and policies of a domestic telephone company or a holding company of a domestic telephone company, or the management and policies of a domestic electric utility or a holding company of a domestic electric utility, through the ownership of voting securities, by contract, or otherwise, but does not include the power that results from holding an official position or the possession of corporate office with the domestic company or utility or the holding company. Control is presumed to exist if any person, directly or indirectly, owns, controls, holds the power to vote, or holds with the power to vote proxies that constitute, twenty per cent or more of the total voting power of the domestic company or utility or the holding company.

R.C. 4909.04 Valuation of property to determine justice of rates.

(A) The public utilities commission, for the purpose of ascertaining the reasonableness and justice of rates and charges for the service rendered by public utilities or railroads, or for any other purpose authorized by law, may investigate and ascertain the value of the property of any public utility or railroad in this state used or useful for the service and convenience of the public, using the same criteria that are set forth in section 4909.05 of the Revised Code. At the request of the legislative authority of any municipal corporation, the commission, after hearing and determining that such a valuation is necessary, may also investigate and ascertain the value of the property of any public utility used and useful for the service and convenience of the public where the whole or major portion of such public utility is situated in such municipal corporation.

(B) To assist the commission in preparing such a valuation, every public utility or railroad shall:

(1) Furnish to the commission, or to its agents, as the commission requires, maps, profiles, schedules of rates and tariffs, contracts, reports of engineers, and other documents, records, and papers, or copies of any of them, in aid of any investigation and ascertainment of the value of its property;

(2) Grant to the commission or its agents free access to all of its premises and property and its accounts, records, and memoranda whenever and wherever requested by any such authorized agent;

(3) Cooperate with and aid the commission and its agents in the work of the valuation of its property in such further particulars and to such extent as the commission requires and directs.

(C) The commission may make all rules which seem necessary to ascertain the value of the property and plant of each public utility or railroad.

R.C. 4909.10 Hearing to ascertain value of property - notice.

For the purpose of ascertaining the value of the property of any public utility or railroad in this state, including municipally owned or operated public utilities, the public utilities commission may cause a hearing to be held at such time and place as the commission designates. Before any hearing is had, the commission shall give the public utility or railroad affected thereby, and if a substantial portion of said public utility or railroad is situated in any municipal corporation, then to the mayor of such municipal corporation, at least thirty days' written notice specifying the time and place of hearing and give such further notice by publication or otherwise as it deems necessary to apprise the public of the time and place of hearing. This section does not prevent the commission from making any preliminary examination or investigation into the matters referred to in this section, or from inquiring into such matters in any other investigation or hearing. All public utilities or railroads affected, and any municipal corporation in which the whole or the major portion of said public utility or railroad is located, are entitled to be heard and to introduce evidence at such hearing. The commission may resort to any other source of information available. The evidence introduced at such hearing shall be reduced to writing and certified under the seal of the commission.

R.C. 4909.15 Fixation of reasonable rate.

(A) The public utilities commission, when fixing and determining just and reasonable rates, fares, tolls, rentals, and charges, shall determine:

(1) The valuation as of the date certain of the property of the public utility used and useful or, with respect to a natural gas, water-works, or sewage disposal system company, projected to be used and useful as of the date certain, in rendering the public utility service for which rates are to be fixed and determined. The valuation so determined shall be the total value as set forth in division (C)(8) of section 4909.05 of the Revised Code, and a reasonable allowance for materials and supplies and cash working capital as determined by the commission.

The commission, in its discretion, may include in the valuation a reasonable allowance for construction work in progress but, in no event, may such an allowance be made by the commission until it has determined that the particular construction project is at least seventy-five per cent complete.

In determining the percentage completion of a particular construction project, the commission shall consider, among other relevant criteria, the per cent of time elapsed in construction; the per cent of construction funds, excluding allowance for funds used during construction, expended, or obligated to such construction funds budgeted where all such funds are adjusted to reflect current purchasing power; and any physical inspection performed by or on behalf of any party, including the commission's staff.

A reasonable allowance for construction work in progress shall not exceed ten per cent of the total valuation as stated in this division, not including such allowance for construction work in progress.

Where the commission permits an allowance for construction work in progress, the dollar value of the project or portion thereof included in the valuation as construction work in progress shall not be included in the valuation as plant in service until such time as the total revenue effect of the construction work in progress allowance is offset by the total revenue effect of the plant in service exclusion. Carrying charges calculated in a manner similar to allowance for funds used during construction shall accrue on that portion of the project in service but not reflected in rates as plant in service, and such accrued carrying charges shall be included in the valuation of the property at the conclusion of the offset period for purposes of division (C)(8) of section 4909.05 of the Revised Code.

From and after April 10, 1985, no allowance for construction work in progress as it relates to a particular construction project shall be reflected in rates for a period exceeding forty-eight consecutive months commencing on the date the initial rates reflecting such allowance become effective, except as otherwise provided in this division.

The applicable maximum period in rates for an allowance for construction work in progress as it relates to a particular construction project shall be tolled if, and to the extent, a delay in the in-service date of the project is caused by the action or inaction of any federal, state, county, or municipal agency having jurisdiction, where such action or inaction relates to a change in a rule, standard, or approval of such agency, and where such action or inaction is not the result of the failure of the utility to reasonably endeavor to comply with any rule, standard, or approval prior to such change.

In the event that such period expires before the project goes into service, the commission shall exclude, from the date of expiration, the allowance for the project as construction work in progress from rates, except that the commission may extend the expiration date up to twelve months for good cause shown.

In the event that a utility has permanently canceled, abandoned, or terminated construction of a project for which it was previously permitted a construction work in progress allowance, the commission immediately shall exclude the allowance for the project from the valuation.

In the event that a construction work in progress project previously included in the valuation is removed from the valuation pursuant to this division, any revenues collected by the utility from its customers after April 10, 1985, that resulted from such prior inclusion shall be offset against future revenues over the same period of time as the project was included in the valuation as construction work in progress. The total revenue effect of such offset shall not exceed the total revenues previously collected.

In no event shall the total revenue effect of any offset or offsets provided under division (A)(1) of this section exceed the total revenue effect of any construction work in progress allowance.

(2) A fair and reasonable rate of return to the utility on the valuation as determined in division (A)(1) of this section;

(3) The dollar annual return to which the utility is entitled by applying the fair and reasonable rate of return as determined under division (A)(2) of this section to the valuation of the utility determined under division (A)(1) of this section;

(4) The cost to the utility of rendering the public utility service for the test period used for the determination under division (C)(1) of this section, less the total of any interest on cash or credit refunds paid, pursuant to section 4909.42 of the Revised Code, by the utility during the test period.

(a) Federal, state, and local taxes imposed on or measured by net income may, in the discretion of the commission, be computed by the normalization method of accounting, provided the utility maintains accounting reserves that reflect differences between taxes actually payable and taxes on a normalized basis, provided that no determination as to the treatment in the rate-making process of such taxes shall be made that will result in loss of any tax depreciation or other tax benefit to which the utility would otherwise be entitled, and further provided that such tax benefit as redounds to the utility as a result of such a computation may not be retained by the company, used to fund any dividend or distribution, or utilized for any purpose other than the defrayal of the operating expenses of the utility and the defrayal of the expenses of the utility in connection with construction work.

(b) The amount of any tax credits granted to an electric light company under section 5727.391 of the Revised Code for Ohio coal burned prior to January 1, 2000, shall not be retained by the company, used to fund any dividend or distribution, or utilized for any purposes other than the defrayal of the allowable operating expenses of the company and the defrayal of the allowable expenses of the company in connection with the installation, acquisition, construction, or use of a compliance facility. The amount of the tax credits granted to an electric light company under that section for Ohio coal burned prior to January 1, 2000, shall be returned to its customers within three years after initially claiming the credit through an offset to the company's rates or fuel component, as determined by the commission, as set forth in schedules filed by the company under section 4905.30 of the Revised Code. As used in division (A)(4)(b) of this section, "compliance facility" has the same meaning as in section 5727.391 of the Revised Code.

(B) The commission shall compute the gross annual revenues to which the utility is entitled by adding the dollar amount of return under division (A)(3) of this section to the cost, for the test period used for the determination under division (C)(1) of this section, of rendering the public utility service under division (A)(4) of this section.

(C)

(1) Except as provided in division (D) of this section, the revenues and expenses of the utility shall be determined during a test period. The utility may propose a test period for this determination that is any twelve-month period beginning not more than six months prior to the date the application is filed and ending not more than nine months subsequent to that date. The test period for determining revenues and expenses of the utility shall be the test period proposed by the utility, unless otherwise ordered by the commission.

(2) The date certain shall be not later than the date of filing, except that it shall be, for a natural gas, water-works, or sewage disposal system company, not later than the end of the test period.

(D) A natural gas, water-works, or sewage disposal system company may propose adjustments to the revenues and expenses to be determined under division (C)(1) of this section for any changes that are, during the test period or the twelve-month period immediately following the test period, reasonably expected to occur. The natural gas, water-works, or sewage disposal system company shall identify and quantify, individually, any proposed adjustments. The commission shall incorporate the proposed adjustments into the determination if the adjustments are just and reasonable.

(E) When the commission is of the opinion, after hearing and after making the determinations under divisions (A) and (B) of this section, that any rate, fare, charge, toll, rental, schedule, classification, or service, or any joint rate, fare, charge, toll, rental, schedule, classification, or service rendered, charged, demanded, exacted, or proposed to be rendered, charged, demanded, or exacted, is, or will be, unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law, that the service is, or will be, inadequate, or that the maximum rates, charges, tolls, or rentals chargeable by any such public utility are insufficient to yield reasonable compensation for the service rendered, and are unjust and unreasonable, the commission shall:

(1) With due regard among other things to the value of all property of the public utility actually used and useful for the convenience of the public as determined under division (A)(1) of this section, excluding from such value the value of any franchise or right to own, operate, or enjoy the same in excess of the amount, exclusive of any tax or annual charge, actually paid to any political subdivision of the state or county, as the consideration for the grant of such franchise or right, and excluding any value added to such property by reason of a monopoly or merger, with due regard in determining the dollar annual return under division (A)(3) of this section to the necessity of making reservation out of the income for surplus, depreciation, and contingencies, and;

(2) With due regard to all such other matters as are proper, according to the facts in each case,

(a) Including a fair and reasonable rate of return determined by the commission with reference to a cost of debt equal to the actual embedded cost of debt of such public utility,

(b) But not including the portion of any periodic rental or use payments representing that cost of property that is included in the valuation report under divisions (C)(4) and (5) of section 4909.05 of the Revised Code, fix and determine the just and reasonable rate, fare, charge, toll, rental, or service to be rendered, charged, demanded, exacted, or collected for the performance or rendition of the service that will provide the public utility the allowable gross annual revenues under division (B) of this section, and order such just and reasonable rate, fare, charge, toll, rental, or service to be substituted for the existing one. After such determination and order no change in the rate, fare, toll, charge, rental, schedule, classification, or service shall be made, rendered, charged, demanded, exacted, or changed by such public utility without the order of the commission, and any other rate, fare, toll, charge, rental, classification, or service is prohibited.

(F) Upon application of any person or any public utility, and after notice to the parties in interest and opportunity to be heard as provided in Chapters 4901., 4903., 4905., 4907., 4909., 4921., and 4923. of the Revised Code for other hearings, has been given, the commission may rescind, alter, or amend an order fixing any rate, fare, toll, charge, rental, classification, or service, or any other order made by the commission. Certified copies of such orders shall be served and take effect as provided for original orders.

R.C. 4909.154 Consideration of management policies, practices, and organization of public utility.

In fixing the just, reasonable, and compensatory rates, joint rates, tolls, classifications, charges, or rentals to be observed and charged for service by any public utility, the public utilities commission shall consider the management policies, practices, and organization of the public utility. The commission shall require such public utility to supply information regarding its management policies, practices, and organization. If the commission finds after a hearing that the management policies, practices, or organization of the public utility are inadequate, inefficient, or improper, the commission may recommend management policies, management practices, or an organizational structure to the public utility. In any event, the public utilities commission shall not allow such operating and maintenance expenses of a public utility as are incurred by the utility through management policies or administrative practices that the commission considers imprudent.

R.C. 4928.01 Competitive retail electric service definitions.

(A) As used in this chapter:

...

(6) "Electric distribution utility" means an electric utility that supplies at least retail electric distribution service.

...

(26) "Regulatory assets" means the unamortized net regulatory assets that are capitalized or deferred on the regulatory books of the electric utility, pursuant to an order or practice of the public utilities commission or pursuant to generally accepted accounting principles as a result of a prior commission rate-making decision, and that would otherwise have been charged to expense as incurred or would not have been capitalized or otherwise deferred for future regulatory consideration absent commission action. "Regulatory assets" includes, but is not limited to, all deferred demand-side management costs; all deferred percentage of

income payment plan arrears; post-in-service capitalized charges and assets recognized in connection with statement of financial accounting standards no. 109 (receivables from customers for income taxes); future nuclear decommissioning costs and fuel disposal costs as those costs have been determined by the commission in the electric utility's most recent rate or accounting application proceeding addressing such costs; the undepreciated costs of safety and radiation control equipment on nuclear generating plants owned or leased by an electric utility; and fuel costs currently deferred pursuant to the terms of one or more settlement agreements approved by the commission.

…

(27) "Retail electric service" means 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. For the purposes of this chapter, retail electric service includes one or more of the following "service components": generation service, aggregation service, power marketing service, power brokerage service, transmission service, distribution service, ancillary service, metering service, and billing and collection service.

R.C. 4928.02 State policy.

It is the policy of this state to do the following throughout this state:

(A) Ensure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service;

(B) Ensure the availability of unbundled and comparable retail electric service that provides consumers with the supplier, price, terms, conditions, and quality options they elect to meet their respective needs;

(C) 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;

(D) Encourage innovation and market access for cost-effective supply- and demand-side retail electric service including, but not limited to, demand-side management, time-differentiated pricing, waste energy recovery systems, smart grid programs, and implementation of advanced metering infrastructure;

(E) Encourage cost-effective and efficient access to information regarding the operation of the transmission and distribution systems of electric utilities in order to promote both effective customer choice of retail electric service and the development of performance standards and targets for service quality for all consumers, including annual achievement reports written in plain language;

(F) Ensure that an electric utility's transmission and distribution systems are available to a customer-generator or owner of distributed generation, so that the customer-generator or owner can market and deliver the electricity it produces;

(G) Recognize the continuing emergence of competitive electricity markets through the development and implementation of flexible regulatory treatment;

(H) Ensure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa, including by prohibiting the recovery of any generation-related costs through distribution or transmission rates;

(I) Ensure retail electric service consumers protection against unreasonable sales practices, market deficiencies, and market power;

(J) Provide coherent, transparent means of giving appropriate incentives to technologies that can adapt successfully to potential environmental mandates;

(K) Encourage implementation of distributed generation across customer classes through regular review and updating of administrative rules governing critical issues such as, but not limited to, interconnection standards, standby charges, and net metering;

(L) Protect at-risk populations, including, but not limited to, when considering the implementation of any new advanced energy or renewable energy resource;

(M) Encourage the education of small business owners in this state regarding the use of, and encourage the use of, energy efficiency programs and alternative energy resources in their businesses;

(N) Facilitate the state's effectiveness in the global economy.

In carrying out this policy, the commission shall consider rules as they apply to the costs of electric distribution infrastructure, including, but not limited to, line extensions, for the purpose of development in this state.

R.C. 4928.03 Identification of competitive services and noncompetitive services.

Beginning on the starting date of competitive retail electric service, retail electric generation, aggregation, power marketing, and power brokerage services supplied to consumers within the certified territory of an electric utility are competitive retail electric services that the consumers may obtain subject to this chapter from any supplier or suppliers. In accordance with a filing under division (F) of section 4933.81 of the Revised Code, retail electric generation, aggregation, power marketing, or power brokerage services supplied to consumers within the certified territory of an electric cooperative that has made the filing are competitive retail electric services that the consumers may obtain subject to this chapter from any supplier or suppliers. Beginning on the starting date of competitive retail electric service and notwithstanding any other provision of law, each consumer in this state and the suppliers to a consumer shall have comparable and nondiscriminatory access to noncompetitive retail electric services of an electric utility in this state within its certified territory for the purpose of satisfying the consumer's electricity requirements in keeping with the policy specified in section 4928.02 of the Revised Code.

R.C. 4928.07 Separate pricing of services on bill.

To the maximum extent practicable on or after the starting date of competitive retail electric service, an electric utility, electric services company, electric cooperative, or governmental aggregator subject to certification under section 4928.08 of the Revised Code shall separately price competitive retail electric services, and the prices shall be itemized on the bill of a customer or otherwise disclosed to the customer. Although a competitive retail electric service shall be supplied to any consumer on such a basis, such an electric utility, electric services company, electric cooperative, or governmental aggregator may repackage the service on or after the starting date and offer it on a bundled basis with other retail electric services to meet consumer preferences. Such repackaging by an electric utility shall be subject to sections 4905.33 to4905.35 of the Revised Code. Repackaging by such an electric services company, electric cooperative, or governmental aggregator shall be subject to the limitation that no such entity, as to a competitive retail electric service for which the company, cooperative, or aggregator is subject to certification, shall furnish free service or service for less than actual cost for the purpose of destroying competition.

R.C. 4928.15 Schedules for provision of noncompetitive service.

(A) Except as otherwise provided in sections 4928.31 to 4928.40 of the Revised Code, no electric utility shall supply noncompetitive retail electric distribution service in this state on or after the starting date of competitive retail electric service except pursuant to a schedule for that service that is consistent with the state policy specified in section 4928.02 of the Revised Code and filed with the public utilities commission under section 4909.18 of the Revised Code. The schedule shall provide that electric distribution service under the schedule is available to all consumers within the utility's certified territory and to any supplier to those consumers on a nondiscriminatory and comparable basis. Distribution service rates and charges under the schedule shall be established in accordance with Chapters 4905. and 4909. of the Revised Code. The schedule shall include an obligation to build distribution facilities when necessary to provide adequate distribution service, provided that a customer requesting that service may be required to pay all or part of the reasonable incremental cost of the new facilities, in accordance with rules, policy, precedents, or orders of the commission.

(B) Except as otherwise provided in sections 4928.31 to 4928.40 of the Revised Code and except as preempted by federal law, no electric utility shall supply the transmission service or ancillary service component of noncompetitive retail electric service in this state on or after the starting date of competitive retail electric service except pursuant to a schedule for that service component that is consistent with the state policy specified in section 4928.02 of the Revised Code and filed with the commission under section 4909.18 of the Revised Code. The schedule shall provide that transmission or ancillary service under the schedule is available to all consumers and to any supplier to those consumers on a nondiscriminatory and comparable basis. Service rates and charges under the schedule shall be established in accordance with Chapters 4905. and 4909. of the Revised Code.

(C) A self-generator shall have access to backup electricity supply from its competitive electric generation service provider at a rate to be determined by contract.

R.C. 4928.17 Corporate separation plans.

(A) Except as otherwise provided in sections 4928.142 or 4928.143 or 4928.31 to 4928.40 of the Revised Code and beginning on the starting date of competitive retail electric service, no electric utility shall engage in this state, either directly or through an affiliate, in the businesses of supplying a noncompetitive retail electric service and supplying a competitive retail electric service, or in the businesses of supplying a noncompetitive retail electric service and supplying a product or service other than retail electric service, unless the utility implements and operates under a corporate separation plan that is approved by the public utilities commission under this section, is consistent with the policy specified in section 4928.02 of the Revised Code, and achieves all of the following:

(1) The plan provides, at minimum, for the provision of the competitive retail electric service or the nonelectric product or service through a fully separated affiliate of the utility, and the plan includes separate accounting requirements, the code of conduct as ordered by the commission pursuant to a rule it shall adopt under division (A) of section 4928.06 of the Revised Code, and such other measures as are necessary to effectuate the policy specified in section 4928.02 of the Revised Code.

(2) The plan satisfies the public interest in preventing unfair competitive advantage and preventing the abuse of market power.

(3) The plan is sufficient to ensure that the utility will not extend any undue preference or advantage to any affiliate, division, or part of its own business engaged in the business of supplying the competitive retail electric service or nonelectric product or service, including, but not limited to, utility resources such as trucks, tools, office equipment, office space, supplies, customer and marketing information, advertising, billing and mailing systems, personnel, and training, without compensation based upon fully loaded embedded costs charged to the affiliate; and to ensure that any such affiliate, division, or part will not receive undue preference or advantage from any affiliate, division, or part of the business engaged in business of supplying the noncompetitive retail electric

service. No such utility, affiliate, division, or part shall extend such undue preference. Notwithstanding any other division of this section, a utility's obligation under division (A)(3) of this section shall be effective January 1, 2000.

(B) The commission may approve, modify and approve, or disapprove a corporate separation plan filed with the commission under division (A) of this section. As part of the code of conduct required under division (A)(1) of this section, the commission shall adopt rules pursuant to division (A) of section 4928.06 of the Revised Code regarding corporate separation and procedures for plan filing and approval. The rules shall include limitations on affiliate practices solely for the purpose of maintaining a separation of the affiliate's business from the business of the utility to prevent unfair competitive advantage by virtue of that relationship. The rules also shall include an opportunity for any person having a real and substantial interest in the corporate separation plan to file specific objections to the plan and propose specific responses to issues raised in the objections, which objections and responses the commission shall address in its final order. Prior to commission approval of the plan, the commission shall afford a hearing upon those aspects of the plan that the commission determines reasonably require a hearing. The commission may reject and require refiling of a substantially inadequate plan under this section.

(C) The commission shall issue an order approving or modifying and approving a corporate separation plan under this section, to be effective on the date specified in the order, only upon findings that the plan reasonably complies with the requirements of division (A) of this section and will provide for ongoing compliance with the policy specified in section 4928.02 of the Revised Code. However, for good cause shown, the commission may issue an order approving or modifying and approving a corporate separation plan under this section that does not comply with division (A)(1) of this section but complies with such functional separation requirements as the commission authorizes to apply for an interim period prescribed in the order, upon a finding that such alternative plan will provide for ongoing compliance with the policy specified in section 4928.02 of the Revised Code.

(D) Any party may seek an amendment to a corporate separation plan approved under this section, and the commission, pursuant to a request from any party or on its own initiative, may order as it considers necessary the filing of an amended corporate separation plan to reflect changed circumstances.

(E) No electric distribution utility shall sell or transfer any generating asset it wholly or partly owns at any time without obtaining prior commission approval.

R.C. 4928.37 Receiving transition revenues.

(A)

(1) Sections 4928.31 to 4928.40 of the Revised Code provide an electric utility the opportunity to receive transition revenues that may assist it in making the transition to a fully competitive retail electric generation market. An electric utility for which

transition revenues are approved pursuant to sections 4928.31 to 4928.40 of the Revised Code shall receive those revenues through both of the following mechanisms beginning on the starting date of competitive retail electric service and ending on the expiration date of its market development period as determined under section4928.40 of the Revised Code:

(a) Payment of unbundled rates for retail electric services by each customer that is supplied retail electric generation service during the market development period by the customer's electric distribution utility, which rates shall be specified in schedules filed under section 4928.35 of the Revised Code;

(b) Payment of a nonbypassable and competitively neutral transition charge by each customer that is supplied retail electric generation service during the market development period by an entity other than the customer's electric distribution utility, as such transition charge is determined under section 4928.40 of the Revised Code. The transition charge shall be payable by each such retail electric distribution service customer in the certified territory of the electric utility for which the transition revenues are approved and shall be billed on each kilowatt hour of electricity delivered to the customer by the electric distribution utility as registered on the customer's meter during the utility's market development period as kilowatt hour is defined in section 4909.161 of the Revised Code or, if no meter is used, as based on an estimate of kilowatt hours used or consumed by the customer. The transition charge for each customer class shall reflect the cost allocation to that class as provided under bundled rates and charges in effect on the day before the effective date of this section. Additionally, as reflected in section 4928.40 of the Revised Code, the transition charges shall be structured to provide shopping incentives to customers sufficient to encourage the development of effective competition in the supply of retail electric generation service. To the extent possible, the level and structure of the transition charge shall be designed to avoid revenue responsibility shifts among the utility's customer classes and rate schedules.

(2)

(a) Notwithstanding division (A)(1)(b) of this section, the transition charge shall not be payable on electricity supplied by a municipal electric utility to a retail electric distribution service customer in the certified territory of the electric utility for which the transition revenues are approved, if the municipal electric utility provides electric transmission or distribution service, or both services, through transmission or distribution facilities singly or jointly owned or operated by the municipal electric utility, and if the municipal electric utility was in existence, operating, and providing service as of January 1, 1999.

(b) The transition charge shall not be payable on electricity supplied or consumed in this state except such electricity as is delivered to a retail customer by an electric distribution utility and is registered on the customer's meter during the utility's market development period or, if no meter is used, is based on an estimate of kilowatt hours used or consumed by the customer. However, no transition charge shall be payable on electricity that is both produced and consumed in this state by a self-generator.

(3) The transition charge shall not be discounted by any party.

(4) Nothing prevents payment of all or part of the transition charge by another party on a customer's behalf if that payment does not contravene sections 4905.33 to 4905.35 of the Revised Code or this chapter.

(B) The electric utility shall separately itemize and disclose, or cause its billing and collection agent to separately itemize and disclose, the transition charge on the customer's bill in accordance with reasonable specifications the commission shall prescribe by rule under division (A) of section 4928.06 of the Revised Code.

R.C. 4928.38 Commencing and terminating transition revenues.

Pursuant to a transition plan approved under section 4928.33 of the Revised Code, an electric utility in this state may receive transition revenues under sections 4928.31 to 4928.40 of the Revised Code, beginning on the starting date of competitive retail electric service. Except as provided in sections 4905.33 to 4905.35 of the Revised Code and this chapter, an electric utility that receives such transition revenues shall be wholly responsible for how to use those revenues and wholly responsible for whether it is in a competitive position after the market development period. The utility's receipt of transition revenues shall terminate at the end of the market development period. With the termination of that approved revenue source, the utility shall be fully on its own in the competitive market. The commission shall not authorize the receipt of transition revenues or any equivalent revenues by an electric utility except as expressly authorized in sections 4928.31 to 4928.40 of the Revised Code.

4928.40 Establishing transition charge for each customer class.

(A) Upon determining under section 4928.39 of the Revised Code the allowable transition costs of an electric utility authorized for collection as transition revenues under sections 4928.31 to 4928.40 of the Revised Code, the public utilities commission, by order under section 4928.33 of the Revised Code, shall establish the transition charge for each customer class of the electric utility and, to the extent possible, each rate schedule within each such customer class, with all such transition charges being collected as provided in division (A)(1)(b) of section 4928.37 of the Revised Code during a market development period for the utility, ending on such date as the commission shall reasonably prescribe. The market development period shall end on December 31, 2005, unless otherwise authorized under division (B)(2) of this section. However, the commission may set the utility's recovery of the revenue requirements associated with regulatory assets, as established pursuant to section 4928.39 of the Revised Code, to end not later than December 31, 2010. The commission shall not permit the creation or amortization of additional regulatory assets without notice and an opportunity to be heard through an evidentiary hearing and shall not increase the charge recovering such revenue requirements associated with regulatory assets. Factors the commission shall consider in prescribing the expiration date of the utility's market development period and the transition charge for each customer class and rate schedule of the utility include, but are not limited to, the total allowable amount of transition costs of the electric utility as determined under section 4928.39 of the Revised Code; the relevant market price for the delivered supply of electricity to customers in that customer class and, to the extent possible, in each rate schedule as determined by the commission; and such shopping incentives by customer class as are considered necessary to induce, at the minimum, a twenty per cent load switching rate by customer class halfway through the utility's market development period but not later than December 31, 2003. In no case shall the commission establish a shopping incentive in an amount exceeding the unbundled component for retail electric generation service set in the utility's approved transition plan under section 4928.33 of the Revised Code, and in no case shall the commission establish a transition charge in an amount less than zero.

4928.66 Implementing energy efficiency programs.

(D) The commission may establish rules regarding the content of an application by an electric distribution utility for commission approval of a revenue decoupling mechanism under this division. Such an application shall not be considered an application to increase rates and may be included as part of a proposal to establish, continue, or expand energy efficiency or conservation programs. The commission by order may approve an application under this division if it determines both that the revenue decoupling mechanism provides for the recovery of revenue that otherwise may be forgone by the utility as a result of or in connection with the implementation by the electric distribution utility of any energy efficiency or energy conservation programs and reasonably aligns the interests of the utility and of its customers in favor of those programs.

R.C. 4928.141 Distribution utility to provide standard service offer.

(A) Beginning January 1, 2009, an electric distribution utility shall provide consumers, on a comparable and nondiscriminatory basis within its certified territory, a standard service offer of all competitive retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service. To that end, the electric distribution utility shall apply to the public utilities commission to establish the standard service offer in accordance with section 4928.142 or 4928.143 of the Revised Code and, at its discretion, may apply simultaneously under both sections, except that the utility's first standard service offer application at minimum shall include a filing under section 4928.143 of the Revised Code. Only a standard service offer authorized in accordance with section

4928.142 or 4928.143 of the Revised Code, shall serve as the utility's standard service offer for the purpose of compliance with this section; and that standard service offer shall serve as the utility's default standard service offer for the purpose of section 4928.14 of the Revised Code. Notwithstanding the foregoing provision, the rate plan of an electric distribution utility shall continue for the purpose of the utility's compliance with this division until a standard service offer is first authorized under section 4928.142 or 4928.143 of the Revised Code, and, as applicable, pursuant to division (D) of section 4928.143 of the Revised Code, any rate plan that extends beyond December 31, 2008, shall continue to be in effect for the subject electric distribution utility for the duration of the plan's term. A standard service offer under section 4928.142 or 4928.143 of the Revised Code shall exclude any previously authorized allowances for transition costs, with such exclusion being effective on and after the date that the allowance is scheduled to end under the utility's rate plan.

(B) The commission shall set the time for hearing of a filing under section 4928.142 or 4928.143 of the Revised Code, send written notice of the hearing to the electric distribution utility, and publish notice in a newspaper of general circulation in each county in the utility's certified territory. The commission shall adopt rules regarding filings under those sections.

R.C. 4928.142 Standard generation service offer price - competitive bidding.

(A) For the purpose of complying with section 4928.141 of the Revised Code and subject to division (D) of this section and, as applicable, subject to the rate plan requirement of division (A) of section 4928.141 of the Revised Code, an electric distribution utility may establish a standard service offer price for retail electric generation service that is delivered to the utility under a market-rate offer.

(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.

(2) The public utilities commission shall modify rules, or adopt new rules as necessary, concerning the conduct of the competitive bidding process and the qualifications of

bidders, which rules shall foster supplier participation in the bidding process and shall be consistent with the requirements of division (A)(1) of this section.

(B) Prior to initiating a competitive bidding process for a market-rate offer under division (A) of this section, the electric distribution utility shall file an application with the commission. An electric distribution utility may file its application with the commission prior to the effective date of the commission rules required under division (A)(2) of this section, and, as the commission determines necessary, the utility shall immediately conform its filing to the rules upon their taking effect. An application under this division shall detail the electric distribution utility's proposed compliance with the requirements of division (A)(1) of this section and with commission rules under division (A)(2) of this section and demonstrate that all of the following requirements are met:

(1) The electric distribution utility or its transmission service affiliate belongs to at least one regional transmission organization that has been approved by the federal energy regulatory commission; or there otherwise is comparable and nondiscriminatory access to the electric transmission grid.

(2) Any such regional transmission organization has a market-monitor function and the ability to take actions to identify and mitigate market power or the electric distribution utility's market conduct; or a similar market monitoring function exists with commensurate ability to identify and monitor market conditions and mitigate conduct associated with the exercise of market power.

(3) A published source of information is available publicly or through subscription that identifies pricing information for traded electricity on- and off-peak energy products that are contracts for delivery beginning at least two years from the date of the publication and is updated on a regular basis. The commission shall initiate a proceeding and, within ninety days after the application's filing date, shall determine by order whether the electric distribution utility and its market-rate offer meet all of the foregoing requirements. If the finding is positive, the electric distribution utility may initiate its competitive bidding process. If the finding is negative as to one or more requirements, the commission in the order shall direct the electric distribution utility regarding how any deficiency may be remedied in a timely manner to the commission's satisfaction; otherwise, the electric distribution utility shall withdraw the application. However, if such remedy is made and the subsequent finding is positive and also if the electric distribution utility made a simultaneous filing under this section and section 4928.143 of the Revised Code, the utility shall not initiate its competitive bid until at least one hundred fifty days after the filing date of those applications.

(C) Upon the completion of the competitive bidding process authorized by divisions (A) and (B) of this section, including for the purpose of division (D) of this section, the commission shall select the least-cost bid winner or winners of that process, and such selected bid or bids, as prescribed as retail rates by the commission, shall be the electric distribution utility's standard service offer unless the commission, by order issued before the third calendar day following the conclusion of the competitive bidding process for the market rate offer, determines that one or more of the following criteria were not met:

(1) Each portion of the bidding process was oversubscribed, such that the amount of supply bid upon was greater than the amount of the load bid out.

(2) There were four or more bidders.

(3) At least twenty-five per cent of the load is bid upon by one or more persons other than the electric distribution utility. All costs incurred by the electric distribution utility as a result of or related to the competitive bidding process or to procuring generation service to provide the standard service offer, including the costs of energy and capacity and the costs of all other products and services procured as a result of the competitive bidding process, shall be timely recovered through the standard service offer price, and, for that purpose, the commission shall approve a reconciliation mechanism, other recovery mechanism, or a combination of such mechanisms for the utility.

(D) The first application filed under this section by an electric distribution utility that, as of July 31, 2008, directly owns, in whole or in part, operating electric generating facilities that had been used and useful in this state shall require that a portion of that utility's standard service offer load for the first five years of the market rate offer be competitively bid under division (A) of this section as follows: ten per cent of the load in year one, not more than twenty per cent in year two, thirty per cent in year three, forty per cent in year four, and fifty per cent in year five. Consistent with those percentages, the commission shall determine the actual percentages for each year of years one through five. The standard service offer price for retail electric generation service under this first application shall be a proportionate blend of the bid price and the generation service price for the remaining standard service offer load, which latter price shall be equal to the electric distribution utility's most recent standard service offer price, adjusted upward or downward as the commission determines reasonable, relative to the jurisdictional portion of any known and measurable changes from the level of any one or more of the following costs as reflected in that most recent standard service offer price:

(1) The electric distribution utility's prudently incurred cost of fuel used to produce electricity;

(2) Its prudently incurred purchased power costs;

(3) Its prudently incurred costs of satisfying the supply and demand portfolio requirements of this state, including, but not limited to, renewable energy resource and energy efficiency requirements;

(4) Its costs prudently incurred to comply with environmental laws and regulations, with consideration of the derating of any facility associated with those costs. In making any adjustment to the most recent standard service offer price on the basis of costs described in division (D) of this section, the commission shall include the benefits that may become available to the electric distribution utility as a result of or in connection with the costs

included in the adjustment, including, but not limited to, the utility's receipt of emissions credits or its receipt of tax benefits or of other benefits, and, accordingly, the commission may impose such conditions on the adjustment to ensure that any such benefits are properly aligned with the associated cost responsibility. The commission shall also determine how such adjustments will affect the electric distribution utility's return on common equity that may be achieved by those adjustments. The commission shall not apply its consideration of the return on common equity to reduce any adjustments authorized under this division unless the adjustments will cause the electric distribution utility to earn a return on common equity that is significantly in excess of the return on common equity that is earned by publicly traded companies, including utilities, that face comparable business and financial risk, with such adjustments for capital structure as may be appropriate. The burden of proof for demonstrating that significantly excessive earnings will not occur shall be on the electric distribution utility. Additionally, the commission may adjust the electric distribution utility's most recent standard service offer price by such just and reasonable amount that the commission determines necessary to address any emergency that threatens the utility's financial integrity or to ensure that the resulting revenue available to the utility for providing the standard service offer is not so inadequate as to result, directly or indirectly, in a taking of property without compensation pursuant to Section 19 of Article I, Ohio Constitution. The electric distribution utility has the burden of demonstrating that any adjustment to its most recent standard service offer price is proper in accordance with this division.

(E) Beginning in the second year of a blended price under division (D) of this section and notwithstanding any other requirement of this section, the commission may alter prospectively the proportions specified in that division to mitigate any effect of an abrupt or significant change in the electric distribution utility's standard service offer price that would otherwise result in general or with respect to any rate group or rate schedule but for such alteration. Any such alteration shall be made not more often than annually, and the commission shall not, by altering those proportions and in any event, including because of the length of time, as authorized under division (C) of this section, taken to approve the market rate offer, cause the duration of the blending period to exceed ten years as counted from the effective date of the approved market rate offer. Additionally, any such alteration shall be limited to an alteration affecting the prospective proportions used during the blending period and shall not affect any blending proportion previously approved and applied by the commission under this division.

(F) An electric distribution utility that has received commission approval of its first application under division (C) of this section shall not, nor ever shall be authorized or required by the commission to, file an application under section 4928.143 of the Revised Code.

R.C. 4928.143 Application for approval of electric security plan - testing.

(A) For the purpose of complying with section 4928.141 of the Revised Code, an electric distribution utility may file an application for public utilities commission approval of an electric security plan as prescribed under division (B) of this section. The utility may file that application prior to the effective date of any rules the commission may adopt for the purpose of this section, and, as the commission determines necessary, the utility immediately shall conform its filing to those rules upon their taking effect.

(B) Notwithstanding any other provision of Title XLIX of the Revised Code to the contrary except division (D) of this section, divisions (I), (J), and (K) of section 4928.20, division (E) of section 4928.64, and section 4928.69 of the Revised Code:

(1) An electric security plan shall include provisions relating to the supply and pricing of electric generation service. In addition, if the proposed electric security plan has a term longer than three years, it may include provisions in the plan to permit the commission to test the plan pursuant to division (E) of this section and any transitional conditions that should be adopted by the commission if the commission terminates the plan as authorized under that division.

(2) The plan may provide for or include, without limitation, any of the following:

(a) Automatic recovery of any of the following costs of the electric distribution utility, provided the cost is prudently incurred: the cost of fuel used to generate the electricity supplied under the offer; the cost of purchased power supplied under the offer, including the cost of energy and capacity, and including purchased power acquired from an affiliate; the cost of emission allowances; and the cost of federally mandated carbon or energy taxes;

(b) A reasonable allowance for construction work in progress for any of the electric distribution utility's cost of constructing an electric generating facility or for an environmental expenditure for any electric generating facility of the electric distribution utility, provided the cost is incurred or the expenditure occurs on or after January 1, 2009. Any such allowance shall be subject to the construction work in progress allowance limitations of division (A) of section 4909.15 of the Revised Code, except that the commission may authorize such an allowance upon the incurrence of the cost or occurrence of the expenditure. No such allowance for generating facility construction shall be authorized, however, unless the commission first determines in the proceeding that there is need for the facility based on resource planning projections submitted by the electric distribution utility. Further, no such allowance shall be authorized unless the facility's construction was sourced through a competitive bid process, regarding which process the commission may adopt rules. An allowance approved under division (B)(2)(b) of this section shall be established as a nonbypassable surcharge for the life of the facility.

(c) The establishment of a nonbypassable surcharge for the life of an electric generating facility that is owned or operated by the electric distribution utility, was sourced through a competitive bid process subject to any such rules as the commission adopts under division (B)(2)(b) of this section, and is newly used and useful on or after January 1, 2009, which surcharge shall cover all costs of the utility specified in the application, excluding costs recovered through a surcharge under division (B)(2)(b) of this section. However, no surcharge shall be authorized unless the commission first determines in the proceeding that there is need for the facility based on resource planning projections submitted by the electric distribution utility. Additionally, if a surcharge is authorized for a facility pursuant to plan approval under division (C) of this section and as a condition of the continuation of the surcharge, the electric distribution utility shall dedicate to Ohio consumers the capacity and energy and the rate associated with the cost of that facility. Before the commission authorizes any surcharge pursuant to this division, it may consider, as applicable, the effects of any decommissioning, deratings, and retirements.

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

(e) Automatic increases or decreases in any component of the standard service offer price;

(f) Consistent with sections 4928.23 to 4928.2318 of the Revised Code, both of the following:

(i) Provisions for the electric distribution utility to securitize any phase-in, inclusive of carrying charges, of the utility's standard service offer price, which phase-in is authorized in accordance with section 4928.144 of the Revised Code;

(ii) Provisions for the recovery of the utility's cost of securitization.

(g) Provisions relating to transmission, ancillary, congestion, or any related service required for the standard service offer, including provisions for the recovery of any cost of such service that the electric distribution utility incurs on or after that date pursuant to the standard service offer;

(h) Provisions regarding the utility's distribution service, including, without limitation and notwithstanding any provision of Title XLIX of the Revised Code to the contrary, provisions regarding single issue ratemaking, a revenue decoupling mechanism or any other incentive ratemaking, and provisions regarding distribution infrastructure and modernization incentives for the electric distribution utility. The latter may include a long-term energy delivery infrastructure modernization plan for that utility or any plan providing for the utility's recovery of costs, including lost revenue, shared savings, and avoided costs, and a just and reasonable rate of return on such infrastructure modernization. As part of its determination as to whether to allow in an electric distribution utility's electric security plan inclusion of any provision described in division (B)(2)(h) of this section, the commission shall examine the reliability of the electric distribution utility's distribution system and ensure that customers' and the electric distribution utility's expectations are aligned and that the electric distribution utility is placing sufficient emphasis on and dedicating sufficient resources to the reliability of its distribution system.

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

(C)

(1) The burden of proof in the proceeding shall be on the electric distribution utility. The commission shall issue an order under this division for an initial application under this section not later than one hundred fifty days after the application's filing date and, for any subsequent application by the utility under this section, not later than two hundred seventy-five days after the application's filing date. Subject to division (D) of this section, the commission by order shall approve or modify and approve an application filed under division (A) of this section if it finds that the electric security plan so approved, 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 of the Revised Code. Additionally, if the commission so approves an application that contains a surcharge under division (B)(2)(b) or (c) of this section, the commission shall ensure that the benefits derived for any purpose for which the surcharge is established are reserved and made available to those that bear the surcharge. Otherwise, the commission by order shall disapprove the application.

(2)

(a) If the commission modifies and approves an application under division (C)(1) of this section, the electric distribution utility may withdraw the application, thereby terminating it, and may file a new standard service offer under this section or a standard service offer under section 4928.142 of the Revised Code.

(b) If the utility terminates an application pursuant to division (C)(2)(a) of this section or if the commission disapproves an application under division (C)(1) of this section, the commission shall issue such order as is necessary to continue the provisions, terms, and conditions of the utility's most recent standard service offer, along with any expected increases or decreases in fuel costs from those contained in that offer, until a subsequent offer is authorized pursuant to this section or section 4928.142 of the Revised Code, respectively.

(D) Regarding the rate plan requirement of division (A) of section 4928.141 of the Revised Code, if an electric distribution utility that has a rate plan that extends beyond December 31, 2008, files an application under this section for the purpose of its compliance with division

(A) of section 4928.141 of the Revised Code, that rate plan and its terms and conditions are hereby incorporated into its proposed electric security plan and shall continue in effect until the date scheduled under the rate plan for its expiration, and that portion of the electric security plan shall not be subject to commission approval or disapproval under division (C) of this section, and the earnings test provided for in division (F) of this section shall not apply until after the expiration of the rate plan. However, that utility may include in its electric security plan under this section, and the commission may approve, modify and approve, or disapprove subject to division (C) of this section, provisions for the incremental recovery or the deferral of any costs that are not being recovered under the rate plan and that the utility incurs during that continuation period to comply with section 4928.141, division (B) of section 4928.64, or division (A) of section 4928.66 of the Revised Code.

(E) If an electric security plan approved under division (C) of this section, except one withdrawn by the utility as authorized under that division, has a term, exclusive of phase-ins or deferrals, that exceeds three years from the effective date of the plan, the commission shall test the plan in the fourth year, and if applicable, every fourth year thereafter, to determine whether the plan, including its then-existing pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, continues to be more favorable in the aggregate and during the remaining term of the plan as compared to the expected results that would otherwise apply under section 4928.142 of the Revised Code. The commission shall also determine the prospective effect of the electric security plan to determine if that effect is substantially likely to provide the electric distribution utility with a return on common equity that is significantly in excess of the return on common equity that is likely to be earned by publicly traded companies, including utilities, that face comparable business and financial risk, with such adjustments for capital structure as may be appropriate. The burden of proof for demonstrating that significantly excessive earnings will not occur shall be on the electric distribution utility. If the test results are in the negative or the commission finds that continuation of the electric security plan will result in a return on equity that is significantly in excess of the return on common equity that is likely to be earned by publicly traded companies, including utilities, that will face comparable business and financial risk, with such adjustments for capital structure as may be appropriate, during the balance of the plan, the commission may terminate the electric security plan, but not until it shall have provided interested parties with notice and an opportunity to be heard. The commission may impose such conditions on the plan's termination as it considers reasonable and necessary to accommodate the transition from an approved plan to the more advantageous alternative. In the event of an electric security plan's termination pursuant to this division, the commission shall permit the continued deferral and phase-in of any amounts that occurred prior to that termination and the recovery of those amounts as contemplated under that electric security plan.

(F) With regard to the provisions that are included in an electric security plan under this section, the commission shall consider, following the end of each annual period of the plan, if any such adjustments resulted in excessive earnings as measured by whether the earned return on common equity of the electric distribution utility is significantly in excess of the return on common equity that was earned during the same period by publicly traded companies, including utilities, that face comparable business and financial risk, with such adjustments for capital structure as may be appropriate. Consideration also shall be given to the capital requirements of future committed investments in this state. The burden of proof for demonstrating that significantly excessive earnings did not occur shall be on the electric distribution utility. If the commission finds that such adjustments, in the aggregate, did result in significantly excessive earnings, it shall require the electric distribution utility to return to consumers the amount of the excess by prospective adjustments; provided that, upon making such prospective adjustments, the electric distribution utility shall have the right to terminate the plan and immediately file an application pursuant to section 4928.142 of the Revised Code. Upon termination of a plan under this division, rates shall be set on the same basis as specified in division (C)(2)(b) of this section, and the commission shall permit the continued deferral and phase-in of any amounts that occurred prior to that termination and the recovery of those amounts as contemplated under that electric security plan. In making its determination of significantly excessive earnings under this division, the commission shall not consider, directly or indirectly, the revenue, expenses, or earnings of any affiliate or parent company.

R.C. 4928.662 Measurement and determination of compliance with demand reduction requirements.

For the purpose of measuring and determining compliance with the energy efficiency and peak demand reduction requirements under section 4928.66 of the Revised Code, the public utilities commission shall count and recognize compliance as follows:

(A) Energy efficiency savings and peak demand reduction achieved through actions taken by customers or through electric distribution utility programs that comply with federal standards for either or both energy efficiency and peak demand reduction requirements, including resources associated with such savings or reduction that are recognized as capacity resources by the regional transmission organization operating in Ohio in compliance with section 4928.12 of the Revised Code, shall count toward compliance with the energy efficiency and peak demand reduction requirements.