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

BRIEF ON REHEARING
OF
NORTHEAST OHIO PUBLIC ENERGY COUNCIL

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I. INTRODUCTION

On March 31, 2016, the Public Utilities Commission of Ohio ("Commission") issued its order ("March 31 Order") in this proceeding approving, with modifications, the Companies'[1] fourth electric security plan ("ESP IV"). As a part of ESP IV, the Commission also approved the Companies' controversial Retail Rate Stability rider ("Original Rider RRS"). The Original Rider RRS was a nonbypassable charge that required all distribution customers to pay a return of, and on, FirstEnergy Solution's ("FES") investment in its Sammis and Davis Besse generating facilities, as well as FES's share of power from the Ohio Valley Electric Corporation ("OVEC Entitlement") (collectively "PPA Units"). Specifically, the Companies were to enter into a purchase power agreement ("PPA") with FES under which they would purchase the power of the PPA Units and sell these resources' capacity, energy and ancillary services into PJM Interconnection, LLC ("PJM"). The actual costs of these resources plus a return on invested capital, net of associated market revenues, were to be recovered from all distribution customers through the nonbypassable Original Rider RRS.[2]

On April 27, 2016, the Federal Energy Regulatory Commission ("FERC") issued an order granting a complaint filed by numerous competitive electric service providers and rescinding the waiver of FERC's affiliate power sales restrictions previously granted to FES.[3] The FERC Order required that the PPA underlying Original Rider RRS be subject to FERC review under the standards adopted in *Boston Edison Co. Re: Edgar Electric Energy Co.*

[1] The "Companies" refer to FirstEnergy Corp.'s operating companies: The Cleveland Electric Illuminating Company, The Toledo Edison Company, and Ohio Edison Company.

[2] OCC/NOPEC Ex. 4 (Wilson Direct) at 5.

[3] 155 FERC ¶ 61,101 ("FERC Order").

("*Edgar*") and *Allegheny Energy Supply Co., LLC* ("*Allegheny*")[4] in accordance with 18 C.F.R. § 35.39(b).[5] The FERC Order was premised upon the same positions held by numerous intervenors in this proceeding: namely, that the nonbypassable Original Rider RRS charges "present the 'potential for the inappropriate transfer of benefits from [captive] customers to the shareholders of the franchised public utility.'"[6]

On May 2, 2016, the Companies filed their application for rehearing of the Commission's March 31 Order arguing, among other things, that the March 31 Order was unreasonable because it failed to consider the effect of the subsequent April 27, 2016 FERC Order. Choosing not to submit the PPA for FERC review under the *Edgar* and *Allegheny* standards, the Companies also filed, contemporaneously with their application for rehearing, the rehearing testimony of their witness Mikkelsen in which the Companies proposed modifications so substantial to the Original Rider RRS that they created a new RRS Rider ("New Rider RRS"). Specifically, the proposed New Rider RRS changes the Original Rider RRS in the following respects:

- The PPA Units' fixed and variable costs to be passed through New Rider RRS would not be the actual PPA Units' costs as proposed under the Original Rider RRS. Instead, the costs passed through the New Rider RRS would be their fixed and variable costs as forecast by the Companies' 2014 data.
- The energy revenues offsetting the calculated costs would be based on actual market energy prices, but would use, not actual PPA Unit generation amounts, but the monthly on-peak and off-peak generation amounts from the Companies' 2014 modeling and forecasts.
- Capacity revenues would be calculated using actual capacity prices, but the prices would be applied to forecasted, not actual cleared capacity quantities.

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[4] 55 FERC ¶ 61,382, at 62,167 (1991) (*Edgar*); 108 FERC ¶ 61,082, at P 18 (2004) (*Allegheny*).

[5] FERC Order at 22, ¶ 53.

[6] FERC Order at 22-23, ¶ 55, quoting Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 198; *see also Cross-Subsidization Restrictions on Affiliate Transactions*, Order No. 707, FERC Stats. & Regs. ¶ 31,264 at P 42, *order on reh'g*, Order No. 707-A, FERC Stats. & Regs. ¶ 31,272 (2008).

- New Rider RRS revenues would remain with the Companies rather than being passed through a PPA to FES.[7]

This severance of the linkage between FES and the PPA Units eliminated a vast array of purported public benefits upon which the Companies relied in proposing, and the Commission relied in approving the Original Rider RRS, including: (1) reliability of generation supply, (2) fuel/power supply diversity, (3) support to local economies, and (4) avoidance of costly transmission investment.[8]

On May 11, 2016, the Commission granted the Companies' and various intervenors' applications for rehearing for the purpose of further consideration of the issues raised in the applications for rehearing, and indicated that further hearing would be held on the Companies' New Rider RRS. The Commission procedurally erred by granting further rehearing on the New Rider RRS prior to the filing of the intervenors' memoranda contra the Companies' application for rehearing. In its memorandum contra, filed May 12, 2016, NOPEC strenuously contested the Commission's jurisdiction to entertain the New Rider RRS on rehearing. The Commission has yet to rule on NOPEC's memorandum contra, which NOPEC incorporates by reference into this brief..

On May 13, 2016, the Companies filed revised tariffs to comply with the Commission's March 31, 2016 Order. The Commission approved the tariffs by Finding and Order of May 25, 2016, including the Original Rider RRS.

By procedural entry of June 3, 2016, the attorney examiner set this matter for rehearing, limiting the scope of the proceeding to the provisions of, and alternatives to, the New Rider

[7] See OCC/NOAC Ex. 1, at 6-7 (Wilson Rehearing Direct); Companies Ex. 197, at 5-6 (Mikkelsen Rehearing Direct).

[8] OCC Ex. 44, at 12 (Kahal Rehearing Direct).

RRS.[9] During the rehearing proceeding, the Commission's Staff ("Staff") presented an alternative to the Companies' New Rider RRS, which Staff labels as the Distribution Modernization Rider ("Rider DMR"). Rider DMR dispenses with the pretense of the Original and New Rider RRS (that the riders were developed to provide customers with a hedge against price volatility), and proposes that the Companies' captive customers provide $131 million annually in "credit support" for the benefit of the Companies' and FES's parent, FirstEnergy Corporation ("FEC"). The credit support is to be offered for at least three years, and may be extended for an additional two years in undetermined amounts.[10]

Finally, the Companies offered rebuttal testimony that proposed further revisions to Staff's proposed Rider DMR, if they were to accept it under R.C. 4928.143(C). The Companies' revisions would require their captive customers to pay at least $558 million per year in credit support to FEC for the eight years of ESP IV, for a total of at least $ 4.464 billion dollars.[11] If the alleged economic benefits of maintaining the Companies' headquarters in Akron, Ohio, is factored into the Rider DMR calculations, FEC could receive an additional $568 million per year for a total annual Rider DMR benefit of $ 1.126 billion per year, or over $ 9 billion for the eight year term of ESP IV.[12] With the Companies' proposed revisions to Rider DMR, they also

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[9] Accordingly, NOPEC's brief on rehearing will be so limited, with the understanding that NOPEC's application for rehearing and memorandum contra the Companies' application for rehearing, as well as NOPEC's supporting brief and reply brief remain pending for the Commission's consideration.

[10] Staff Ex.13, at 7 (Buckley Rehearing Direct); Rehearing Tr. III, at 507-508 (Buckley Cross); Rehearing Tr. IV, at 976-977 (Choueiki Cross).

[11] The Companies' request is revealing and lends credence to OCC witness Wilson's estimated cost of the Original and New riders. The approximate $4.5 billion that the Companies seek in credit support significantly exceeds OCC/NOPEC witness Wilson's "high case" scenario of the expected cost of the Original Rider RRS of $3.6 billion, and the approximate $3.5 billion cost of the New Rider RRS proffered in his direct testimony on rehearing. OCC/NOPEC Ex. 9 (Wilson Second Supplemental) at 13 (Wilson Direct); OCC/NOAC Ex. 1, at 13 (Wilson Rehearing Direct).

[12] Companies Ex. 205, at 4 (Murley Rehearing Rebuttal); Companies Ex. 206, at 13-14 (Mikkelsen Rehearing Rebuttal/Surrebuttal)

abandon any pretense that Rider RRS (Original or New) was intended as a hedge to protect customers against rate volatility. Plain and simply, all riders proposed in this proceeding are designed with one overriding goal: that captive customers, rather than shareholders, support the Companies' financial integrity.[13] The Commission should follow FERC's lead and reject this "inappropriate transfer of benefits from [captive] customers to the shareholders of the franchised public utility.'"[14]

II. ARGUMENT

A. It is Unlawful for the Commission to Accept Evidence Supporting the New Rider RRS Proposal when it could have been Presented during the Initial Hearing. R.C. 4903.10. The Companies' Lawful Alternative is to either Accept the Modified ESP IV and Seek FERC Approval of the PPA or to Reject the Modified ESP IV and File a New ESP or MRO Application. R.C. 4928.143(C)(2).

The procedural posture of this proceeding is determinative of its outcome, inasmuch as the Companies' New Rider RRS proposal could have been presented at the original hearing in this matter as required by R.C. 4903.10. Because of the statutory proscription against introducing new proposals on rehearing, the Companies' only lawful alternative is either to accept or reject the March 31, 2016 Order as provided in R.C. 4928.143(C)(2). Indeed, as explained in NOPEC's memorandum contra the Companies' application for rehearing, the Companies effectively have rejected the Original Rider RRS by filing the New Rider RRS to take its place. Having rejected any portion of the ESP IV, as modified by the Commission, the Companies have terminated the ESP IV application.[15]

[13] OCC Ex. 46, at 10 (Kahal Rehearing Rebuttal).

[14] FERC Order at 22-23, ¶ 55, quoting Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 198; *see also Cross-Subsidization Restrictions on Affiliate Transactions*, Order No. 707, FERC Stats. & Regs. ¶ 31,264 at P 42, *order on reh'g*, Order No. 707-A, FERC Stats. & Regs. ¶ 31,272 (2008).

[15] R.C. 4928.143(C)(2).

The Ohio General Assembly forbids the Commission, upon rehearing, to "take any evidence that, with reasonable diligence, could have been offered during the original hearing."[16] In its rehearing testimony, the Companies tout the New Rider RRS as superior to the Original Rider RRS the Commission approved in its March 31, 2016 Order.[17] FE's position begs the question as to why, then, didn't FE propose the allegedly superior New Rider RRS in the first instance? The New Rider RRS proposal is pieced together based upon forecasted projections made in 2014 to support the Companies' position that the ESP IV was more favorable than a market rate offer ("MRO"). The Companies, with minimal due diligence, could have developed the same New Rider RRS proposal and presented it at the original hearing, but chose not to do so. It was error, over NOPEC's objections in its memorandum contra the Companies' application for rehearing and OCC's objection at hearing,[18]to admit Companies' witness Mikkelsen's testimony in support of New Rider RRS in violation of R.C. 4903.10.

The Companies claim that the issuance of the FERC Order necessitated proposing the New Rider RRS on rehearing, because it would be too time consuming to obtain FERC approval of the PPA underling the Original Rider RRS.[19] The Companies' argument is without merit. FERC's waiver of its affiliate transaction requirements did not prevent the Companies from proposing the allegedly superior New Rider RRS at the original hearing. Instead, it was the Companies' choice to present the Original Rider RRS, apparently in the hope that the waiver would protect the PPA (and its subsidies to shareholders) from FERC review, and that FERC's exclusive jurisdiction over wholesale rates would protect the PPA from Commission review. The

[16] R.C. 4903.10(B).

[17] Companies Ex. 197, at 6-7 (Mikkelsen Rehearing Direct); FE Application for Rehearing at 17-19.

[18] Rehearing Tr. I, at 32-43.

[19] Companies Application for Rehearing at 14.

potential rescission of the waiver was a risk of which the Companies was aware[20] and voluntarily accepted. The Companies cannot be heard now to complain.

Adherence to the statutory proscriptions on rehearing evidence does not mean that the Companies are without redress. Pursuant to R.C. 4928.143(C)(2), they may either accept or reject the March 31 Order. If they accept the Order, they may seek approval of the PPA underlying the Original Rider RRS at FERC. If they reject the March 31 Order (which they have done by proposing the New Rider RRS), they may file another application for an ESP (or, alternatively, an MRO). As discussed below, filing a new application would eliminate the prejudice to the intervenors on rehearing. Prejudice was caused by having to challenge a New Rider RRS proposal that is based on outdated 2014 forecasts and that eliminates the purported significant consumer benefits upon which the Commission relied in approving the stipulated ESP IV in the first place. These consumer benefits included the provision of resource diversity in Ohio and protections to local economies in the Original Rider RRS.[21]

Accordingly, the Commission lacks the legal authority to accept the evidence supporting the proposed New Rider RRS under the rehearing statute (R.C. 4903.10). Moreover, the Companies are limited to accepting the Commission's March 31 Order, or rejecting it and filing a new ESP or MRO application (R.C. 4928.143(C)(2)).

B. Standard of Review

Apart from the significant, unlawful procedural issues in this case, this rehearing raises three separate proposals for the Commission's consideration: (1) the Companies' New Rider RRS proposal, (2) Staff's alternative Rider DMR proposal, and (3) the Companies' proposed revisions to Staff's Rider DMR proposal. Based only on the Companies' counsel's statement,

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[20] Exelon Ex. 1, at 18-19 (Campbell Direct).

[21] See Staff Ex.15, at 13 (Choueiki Rehearing Direct); OCC Ex. 44, at 12-13 (Kahal Rehearing Direct).

the Companies' New Rider RRS proposal purportedly has the support of the signatory parties of the Third Stipulation and Recommendation in this proceeding ("Stipulation").[22] However, neither Staff's Rider DMR proposal, nor the Companies' proposed revisions to it, are supported by a stipulation. Thus, the New Rider RRS proposal and Staff's Rider DMR proposal are subject to separate standards of review.

The Commission's standard for reviewing partial stipulations will govern consideration of the New Rider RRS proposal, while Staff's Rider DMR proposal (and the Companies' proposed revisions to it will be governed by the traditional rehearing standard of whether the Commission's order is unlawful, unjust or unreasonable.[23]

C. The New Rider RRS Proposal

In approving partial stipulations offered to resolve proceedings before it, the Commission traditionally considers a three-prong analysis, which was endorsed by this Court in *Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, 592 N.E.2d 1370 (1992):

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

The Companies' New Rider RRS proposal fails each of these three prongs.

[22] Companies Ex. 198 (Dunn Correspondence). However, Staff was a signatory to the Stipulation and now opposes the New Rider. Rehearing Tr. IV, at 1231 (Choueiki Cross).

[23] R.C. 4903.10.

1. Serious Bargaining did not Occur with Respect to the New Rider RRS Proposal.

The Companies' own evidence shows that serious bargaining did not occur with respect to the New Rider RRS proposal. Due its desire for expedited treatment of its application for rehearing, the Companies prepared and filed the New RRS Rider proposal without full agreement of the signatories to the Stipulation,[24] and did not bother to contact the intervenors opposing the Stipulation.[25] Due this haste, significant substantive issues (discussed below) remain which reflects a lack of serious bargaining. Among these are Staff's opposition to New Rider RRS because it can be construed as a transition charge and because the New Rider RRS proposal eliminates the benefits of resource diversity and local economic development associated with the PPA Units, purported benefits upon which the Commission heavily relied in approving the Stipulation.[26]

2. The New RRS Violates Numerous Important Regulatory Principles or Practices.

The Companies seek approval of the New RRS under the same statutory standards as the Original Rider RRS. For this reason, NOPEC will not reiterate the arguments made in prior pleadings, but incorporates those portions of its pleadings by reference, including its arguments on brief that:

a. Rider RRS is Unlawful Because it does not Fall Under any of the Provisions of R.C. 4928.143(B). *In Re Application of Columbus Southern Power Co., et al.,* 128 Ohio St. 3d 512, 2011-Ohio-1788 [¶¶ 31-35], 945 N.E.2d 655.[27]

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[24] Companies Ex. 197, at 9 (Mikkelsen Rehearing Direct).

[25] This exclusion of the non-signatory intervenors runs afoul of the Ohio Supreme Court's admonition to the Commission regarding permitting the exclusion of parties with a significant stake in the proceeding from "the settlement table." *Time Warner AxS v. Pub. Util. Comm.*, 75 Ohio St.3d 229, fn. 2, 661 N.E.2d 1097 (1996).

[26] March 31 Order, at 87-88.

[27] NOPEC Initial Br., at 18.

b. Rider RRS is Unlawful Because it Harms Large Scale Governmental Aggregations by Imposing a Nonbypassable Generation Charge. R.C. 4928.20(K).[28]

In addition, the New Rider RRS proposal changes other arguments NOPEC advanced and presents new arguments, which are addressed in detail below.

c. New Rider RRS is Unlawful Because it Requires Customers to Fund an Unlawful, Anti-competitive Subsidy Under R.C. 4928.02(H).

R.C. 4928.02(H) provides that it is the policy of this state 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 <u>any generation-related costs through distribution or transmission rates.</u>*** [Emphasis supplied.]

Like Original Rider RRS, the New Rider RRS is a distribution rate under the authority of *In Re Ohio Power Company*, Case No. 10-1454-EL-RDR Finding and Order (January 11, 2012) (the "*Sporn Case*"). In the *Sporn Case*, AEP Ohio sought to recover the closing costs associated with its Sporn Unit 5 generating facility through a stand-alone rider, the Plant Closure Cost Recovery Rider ("PCCRR"). The costs included the unamortized balance plant balance that remained on AEP Ohio's books (approximately $56.1 million). Thus, the PCCRR rider clearly was a rate to recover the costs of generation-related service. However, AEP Ohio sought to recover the charge from all distribution customers as a nonbypassable charge, and it characterized the rider in its application as a "distribution" charge.

In the *Sporn Case*, the Commission recognized that whether a charge is to be classified as a distribution rate is dependent upon the class of customers to which it is applied. If a charge is

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[28] NOPEC Initial Br., at 26.

applied to all distribution customers, it is considered a distribution rate. In the *Sporn Case*, the Commission disallowed the PCCRR, finding:

> Additionally, the Commission notes that [AEP Ohio's] recovery of the closure costs would be contrary to the state policy found in Section 4928.02, Revised Code. That policy requires the Commission to avoid subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service***. [AEP Ohio] seeks to establish a nonbypassable charge that would be collected from all distribution customers by way of the PCCRR***. [Emphasis added.]

In this proceeding, under the *Sporn Case* precedent, the nonbypassable New Rider RRS would also be charged to all distribution customers and, thus, be considered a distribution charge. The plain language of R.C. 4928.02(H) prevents the Commission from allowing recovery of ***<u>any</u>*** generation-related costs through distribution rates. Because Rider RRS charges all distribution customers for the cost of the PPA Units' generation,[29] it is considered to be a distribution rate and is prohibited by R.C. 4928.02(H).[30]

a. The Subsidy Customers are being Asked to Pay is Anti-competitive.

In its Initial Brief, NOPEC explained that Original Rider RRS was anti-competitive under R.C. 4928.02(H), because it required ratepayers to guarantee that the PPA Units' generation earn a profit by covering the difference in the revenues from the sale of the power and the cost of generation. The fact that the New Rider RRS revenues do not flow directly to FES does not mean that the rider is not anti-competitive. The evidence of record shows that there is no restriction as to the purposes the Companies may use New Rider RRS revenues, including use of the revenues to benefit FES, the Companies other generating affiliates, or "any other

[29] Rehearing Tr. IV, at 1008 (Choueiki Cross).

[30] See *In Re Elyria Foundry Company*, 114 Ohio St.3d 305, 2007-Ohio-4164, 871 N.E.2d 1176,

operations."[31] It is a benefit that other competitive retail or wholesale providers do not enjoy, and thus is anti-competitive on its face.

b. New Rider RRS is an Unlawful Transition Charge Prohibited by R.C. 4928.38.

When SB 3 was enacted in 1999, it permitted Ohio's electric utilities the opportunity to collect "transition revenues"[32] to "assist it in making the transition to a fully competitive retail electric generation market."[33] However, the recovery of transition charges was permitted for only a limited period of time.[34] Utilities could collect certain transition costs until the end of the market development period, which ended December 31, 2005.[35] The collection period for transition costs identified as regulatory assets expired on December 31, 2010.[36] Moreover, the General Assembly emphatically provided that the Ohio electric utility was "wholly responsible for whether it is in a competitive position after the market development period," and further proclaimed that after the market development period concluded, the utility "shall be fully on its own in the competitive market."[37] In fact, R.C. 4928.38 expressly prohibits the PUCO from authorizing transition revenues or "any equivalent revenues" except as provided by statute. Moreover, the Ohio Supreme Court recently found that riders are unlawful transition charges when "intended to guarantee recovery of lost revenues" in the competitive marketplace.[38]

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[31] Dynegy Ex. 2, at 5-6 (Ellis Rehearing Direct), OEC/EDF Ex. 3, at 9 (Finnigan Rehearing Direct); Rehearing Tr. I, at 58, 70-75, 176-177 (Mikkelsen Cross).

[32] "Transition revenues" are defined under R.C. 4928.39.

[33] R.C. 4928.37.

[34] R.C. 4928.38.

[35] R.C. 4928.38.

[36] R.C. 4928.39.

[37] R.C. 4928.38.

[38] *In re Application of Columbus So. Power*, 2016-Ohio-1608, ¶ 23 ("*Columbus Southern*"); see, also, *In re Application of Dayton Power & Light Co.*, Slip Opinion 2016-Ohio-33490 ("*DP&L*") (reversed on authority of *Columbus Southern*).

Indeed, Staff's opposition to the Companies' proposed New Rider RRS is based upon the concern that New Rider RRS can be construed as a transition charge.[39]

At issue in *Columbus Southern* was AEP Ohio's Retail Stability Rider ("RSR"), which was "intended to guarantee recovery of lost revenues offered to CRES providers and from expected increases in customer shopping during the ESP."[40] Similar to AEP Ohio's RSR, the Companies' New Rider RRS also seeks to recover lost revenues, in this instance because the marketplace is not providing its generating facilities with sufficient revenues to recover the costs of operating its plants. As Staff witness Choueiki testified, all of New Rider RRS's credits and charges are an explicit function of 3,257 MWs of generation represented by FES's Davis Besse and Sammis plants, along with FES's OVEC entitlement.[41] When market prices are low, the Companies' captive distribution customers will pay the Companies the difference between these plants' forecasted fixed costs and the then-prevailing market price of the plants' forecasted energy and capacity output.[42]

Transition revenues represent the recovery of generation costs that were incurred by a utility under regulation that would not be recovered in a competitive environment.[43] By seeking to recover the fixed generation costs that are not recovered in the competitive generation market, New Rider RRS would recover revenues "equivalent" to transition revenues. New Rider RRS clearly is unlawful under R.C. 4928.38, *Columbus Southern* and *DP&L.*

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[39] Staff Ex. 15, at 14, 16 (Choueiki Rehearing Direct).

[40] *Columbus Southern*, at ¶ 23.

[41] Staff Ex. 15, at 14 (Choueiki Rehearing Direct); Rehearing Tr. IV, at 955 (Choueiki Cross).

[42] Staff Ex. 15, at 11-12.

[43] See *FirstEnergy Corp. v. Pub. Util. Comm.*, 95 Ohio St.3d 401, 202 Ohio-2430, ¶ 14.

c. New Rider RRS Renders the ESP IV Stipulation Unlawful under R.C. 4928.143(C), because it is Less Favorable than an MRO.

The Companies claim that the New Rider RRS does not change the Commission's analysis of the ESP v. MRO test contained in the March 31 Order. They submit that the quantitative benefits still equal $612.1 million, and that the qualitative benefits are enhanced because customers have greater price stability and certainty because the known 2014 forecasted costs and generation/capacity output are used to calculate the New Rider RRS, as opposed to the use of actual figures.[44] The Companies are flatly wrong. The New Rider RRS makes significant changes to the ESP v. MRO analysis that are detrimental to consumers, both quantitatively and qualitatively, and make the Stipulated ESP, as modified by the New Rider RRS, undeniably less favorable than an MRO.

i. The Quantitative Analysis.

As a threshold matter, the Attorney Examiner erred in striking intervenor testimony that provided updated forecasts of energy costs during the term of ESP IV,[45] choosing instead to rely on the outdated 2014 forecasts upon which the Companies rely. It is <u>inherently prejudicial</u> to allow the Companies to submit on rehearing a New Rider RRS proposal in light of the recent FERC Order, and to permit Staff to submit its Rider DMR proposal based upon concerns that the New Rider RRS could be construed as a transition charge under recent Ohio Supreme Court decisions, yet deny the intervenors the ability to present the most recent forecasts of energy prices. The Commission should overrule the Attorney Examiner's ruling striking the testimony, and consider the intervening witnesses' proffered testimony in considering the ESP v. MRO

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[44] Companies Ex. 197 at 18-20 (Mikkelsen Rehearing Direct).

[45] See OCC/NOAC Ex. 1, at 3, 12-17 (Wilson Rehearing Direct); EPSA Ex. 17, at 7-9, 13-15 (Kalt Rehearing Direct); Sierra Club Ex. 100, at 1-21 (Cummings Rehearing Direct).

test's quantitative analysis. To do otherwise would result in the Commission relying on a clearly stale record to reach a decision that affects the pocketbooks of over 2 million customers in northern Ohio. Indeed, even Staff does not agree with the Companies' forecasts,[46] and further believes that the New Rider RRS will not provide a credit to customers over the term of the ESP IV.[47]

The quantitative analysis presented by the proffered testimony of OCC witness Wilson shows that, based upon the latest available information from the Energy Information Administration "Annual Energy Outlook," New Rider RRS will produce a net detriment for customers over the eight year ESP IV of $1.334 billion using the Reference Case and $3.575 billion using OCC witness Wilson's case using current forward energy market data.[48]

The following table provides a comparison of the Companies' calculation of quantifiable benefits versus those using OCC witness Wilson's updated forecasts.

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[46] Rehearing Tr. IV, at 986 (Choueiki Cross).

[47] Rehearing Tr. IV, at 1250 (Choueiki Cross).

[48] OCC/NOAC Ex.1, at 13 (Wilson Rehearing Direct).

Companies' versus OCC Witness Wilson's Quantitative Benefits Comparison (in millions)		
	The Companies[49] (Nominal)	Wilson[50] (Nominal)
Economic Development Funding	($ 24.0)	($ 24.0)
Low Income Funding	($ 19.1)	($19.1)
Customer Advisory Agency Funding	($ 8.0)	($8.0)
Rider DCR	$ 0	$ 0*
Rider GDR	$ 0	N/A
Rider RRS	($ 561.0)	$1,344 to $3,575
TOTAL	**($ 612.1)**	**$ 1,292.9 to $ 3,523.9**
*For purposes of the limited scope of rehearing, NOPEC assumes the May 31 Order's analysis that Rider DCR costs of $240 to $330 million are a "wash" under the ESP v. MRO analysis.		

Based upon OCC witness Wilson's more recent, and thus more reliable forecasts, the Companies' proposed ESP IV under the New Rider RRS is between approximately $1.3 *billion* to $3.5 *billion* less favorable than an MRO.[51] Even using the Commission's methodology in the March 31 Order of averaging the Companies' and Mr. Wilsons' analyses, the ESP is between approximately $350 million to $1.5 billion less favorable than an MRO.

The enormous cost of New Rider RRS requires that it be rejected. The qualitative benefits identified by the Companies do not come anywhere close to outweighing the onerous burden this cost quantitatively places on over 2 million northern Ohio consumers.

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[49] Companies Ex. 155 (Mikkelsen Fifth Supplemental), at 12

[50] OCC/NOAC Ex. 1, at 13 (Wilson Rehearing Direct).

[51] Sierra Club witness Cummings testified that up to $8 billion (net present value) could be passed on to the Companies' captive ratepayers. Sierra Club Ex. 199, at 21 (Cummings Rehearing Direct).

ii. Qualitative Analysis

The Companies' argument that New Rider RRS provides enhanced qualitative benefits is not supported by the facts. Clearly, it provides less qualitative benefits than provided in the Original RRS, as discussed below in the third prong of the Commission's partial stipulation test.

3. The Settlement, as a Package, does not Benefit Customers and the Public Interest.

Clearly, a settlement package that shifts the risks to captive customers of up to $3.5 billion in costs cannot be said to benefit customers or be in the public interest. Just as importantly, the New Rider RRS completely eliminates significant benefits the Commission relied upon in approving the Stipulation in its March 31 Order.[52] Indeed, a primary reason for Staff's inability to support the New Rider RRS is its elimination of the purported benefits of supply diversity for the state of Ohio and protections of local economies that were provided by the linkage of the Original Rider RRS to the PPA Units.[53] The absence of these benefits, together with the onerous quantitative costs of the New RRS, demonstrates that the stipulated ESP IV, if it includes New Rider RRS, would no longer benefit customers as a package or be in the public interest.

Accordingly, because New Rider RRS causes the stipulated ESP IV to be less favorable than an MRO, the New Rider RRS should be rejected.

D. Staff's Rider DMR Proposal

As stated previously, Staff's alternative DMR proposal dispenses with the pretense that the rider to be approved in this proceeding is meant to benefit customers by providing a hedge against volatile electricity prices. Instead, Staff's Rider DMR proposal would provide "credit

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[52] OCC Ex. 44, at 12 (Kahal Rehearing Direct).

[53] Staff Ex. 15, at 13 (Choueiki Rehearing Direct). See, also, OCC Ex. 44, at 12 (Kahal Rehearing Direct).

support" for the benefit of FEC in the amount of $131 million per year for three years, with the potential to extend the credit support for an additional two years in an undetermined amount.[54] Staff's Rider DMR proposal is unlawful, unjust or unreasonable on numerous grounds.

1. Rider DMR is Unlawful Because it does not Satisfy any of the Provisions of R.C. 4928.143(B). *In Re Application of Columbus Southern Power Co., et al.,* 128 Ohio St. 3d 512, 2011-Ohio-1788 [¶¶ 31-35], 945 N.E.2d 655.

The Ohio Supreme Court has held that only the nine items enumerated in R.C. 4928.143(B)(2) may be included in an ESP. *In Re Application of Columbus Southern Power Co., et al.*, 128 Ohio St. 3d 512, 2011-Ohio-1788 [¶¶ 31-35], 945 N.E.2d 655. As a threshold matter, none of the nine criteria listed in R.C. 4928.143(B)(2) explicitly provide that an ESP may include a provision for credit support. Under a plain reading of the statute, Staff's proposed Rider DMR should be denied.

However, in its attempt to support its proposal, Staff asserts that Rider DMR satisfies the criteria of R.C. 4928.143(B)(2)(h),[55] because the credit support provided to FEC will permit it to maintain investment grade[56] and, in turn, help the FEC attract capital which will jumpstart the Companies' distribution grid modernization initiatives.[57] The difficulty with Staff's position is that the evidence of record shows that there are no restrictions on how Rider DMR revenues are to be used.[58] Staff admits as much.[59] There is no requirement that any of the Rider's revenues be

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[54] Staff Ex. 13, at 2, 6 (Buckley Rehearing Direct).

[55] R.C. 4928.143(B)(2)(h) permits distribution investment costs may to be included in an ESP, to wit:

> 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…

[56] Staff Ex. 13, at 2 (Buckley Rehearing Direct).

[57] Staff Ex. 15, at 15 (Choueiki Rehearing Direct).

[58] OMAEG Ex. 37, at 8 (Lause Rehearing Direct).

used to pay for any distribution or distribution-related asset, plant, property or equipment.[60] The credit support to FEC necessarily benefits its other affiliates, including unregulated generating affiliates such as FES.[61] Because the evidence of record does not support that the Rider DMR revenues are required to be used for the purposes listed in R.C. 4928.143(B)(2)(h), Staff's proposal must be denied.

2. Rider DMS is Unlawful Because it Requires Customers to Fund an Unlawful, Anti-competitive Subsidy Under R.C. 4928.02(H).

R.C. 4928.02(H) provides that it is the policy of this state 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. [Emphasis supplied.]

As stated above, the credit support to FEC necessarily benefits its other affiliates, including unregulated generating affiliates such as FES.[62] Because the nonbypassable Rider DMR charge is considered to be a noncompetitive distribution charge under the *Sporn Case*, it provides an unlawful subsidy to FEC's competitive generation services. Clearly, the subsidy is anti-competitive because other competitive electric suppliers do not receive credit support from captive ratepayers.[63] The Commission should reject Rider DMR on this basis.

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[59] Rehearing Tr. III, at 583-585 (Buckley Cross).

[60] Rehearing Tr. IV, at 956-957 (Choueiki Cross).

[61] OMAEG Ex. 39, at 4, 10 (Lause Rehearing Rebuttal); OCC Ex. 46, at 12 (Kahal Rehearing Rebuttal).

[62] OMAEG Ex. 39, at 4 (Lause Rehearing Rebuttal); OCC Ex. 46, at 12 (Kahal Rehearing Rebuttal); Rehearing Tr. III, at 510 (Buckley Cross).

[63] OMAEG Ex. 39, at 7 (Lause Rehearing Rebuttal).

3. Staff's Proposed Rider DMR is an Unlawful Transition Charge Prohibited by R.C. 4928.38.

Staff proposes Rider DMR to provide FEC credit support – to maintain investment grade credit by the major credit rating agencies – as a "bridge" to provide FEC time to implement a long term solution to improve its credit rating.[64] Although Staff witness Choueiki testified that the credit support provided by Rider DMR will assist the Companies in receiving more favorable terms when accessing capital markets, which in turn will allow the Companies to access funds to invest in distribution grid modernization, there is no requirement that the funds be used for that purpose.[65] Nothing in Staff's proposal prevents Rider DMR revenues from being used to support FES or FEC's other regulated or unregulated generation affiliates.[66] Indeed, regardless of the rider's name (be it the RRS or DMR), the record in this proceeding shows that the revenues received from Rider DMR arise from FES's uneconomic generating facilities, and that Rider DMR would provide credit support for FEC and its unregulated affiliates, including FES,[67] as a "bridge" to provide FEC time to implement a long term solution to its improve its credit rating. Notably, the Ohio Supreme Court found 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.[68] The PUCO should reject Rider DMR on this basis.

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[64] Staff Ex. 13, at 2, 6 (Buckley Direct).

[65] Staff Ex. 15, at 15 (Choueiki Direct); OMAEG Ex. 39, at 8 (Lause Rehearing Rebuttal); see, also Rehearing Tr. X (Mikkelsen Cross) ("Cash collected under the DMR could be used for a variety of reasons including pension funding.").

[66] OMAEG Ex. 39, at 10 (Lause Rehearing Rebuttal); Rehearing Tr. III, at 583-585 (Buckley Cross).

[67] OMAEG Ex. 39, at 4 (Lause Rehearing Rebuttal); OCC Ex. 46 , at 10, 13 (Kahal Rehearing Rebuttal).

[68] *Columbus Southern*, at ¶ 8.

4. An ESP that Contains Rider DMR is Less Favorable than an MRO and Unlawful under R.C. 4928.143(C).

Staff claims that an ESP that contains Rider DMR is more favorable than an MRO based upon the quantitative shareholder-funded benefits of $51.1 million that the Commission recognized in its March 31 Order, as well as qualitative benefits recognized under R.C. 4928.02(C) and (D).[69]

As to quantitative benefits, Staff ignores the minimum $131 million that consumers must pay for at least three years. Staff claims that this $393 million provided under the ESP is also potentially available to a utility under an MRO, pursuant to R.C. 4928.142, which provides that the Commission may adjust a utility's most recent standard service offer to address any emergency that threatens the utility's financial integrity. However, Staff has identified no emergency facing the Companies.[70] As noted by OCC witness Kahal, the Companies are willing to absorb at least $561 million of losses from the proposed New Rider RRS, and have the ability to issue long-term corporate debt on reasonable terms.[71] Thus, at a minimum, the ESP containing Rider DMR quantitatively is at least $342 million less favorable than an MRO. Assuming the same $131 million in revenues is recovered in two additional years of the ESP, the ESP is $604 million less favorable than an MRO.

On a qualitative basis, Staff asserts that the Rider DMR satisfies R.C. 4928.02(C), which provides that it is the policy of the state to encourage the modernization of the distribution grid. However, as shown above, there is absolutely no requirement whatsoever that Rider DMR funds be used to modernize the grid. Moreover, Rider DMR will not encourage a diversity of supplies or suppliers in the state. As shown above, Rider DMR is anti-competitive. The financial support

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[69] Staff Ex. 14, at 3-4 (Turkenton Rehearing Direct).

[70] Rehearing Tr. II, at 437-440 (Turkenton Cross); Tr. III, at 511-519 (Buckley Cross)..

[71] OCC Ex. 46, at 9 -10 (Kahal Rehearing Rebuttal).

of FEC and its generation affiliates will serve as a barrier to entry by other suppliers wishing to enter the state, but who do not have guaranteed captive ratepayer funds to support them.[72]

More problematic is that Staff's proposed Rider DMR falls to the same criticisms that Staff levels at the Companies' New Rider RRS: Rider DMR does not provide for resource diversity or the protection of local economies. More importantly, Staff's proposed Rider DMR does nothing to provide a hedge to protect northern Ohio's 2 million electric customers against rate volatility – the cornerstone of the Companies ESP IV application and the Commission's March 31 Order.

Accordingly, the Commission should find that an ESP including Rider DMR is less favorable than an MRO, and disallow Rider DMR.

5. Rider DMR is Not is in the Public Interest

Staff attempts to justify the significant cost of Rider DMR by claiming that it is better for consumers in the long run, considering that absent the credit support, the Companies' borrowing costs and, in turn, customers' distribution rates would increase. However, Staff performed no analysis to confirm its statement.[73] As recognized by OCC witness Kahal, even if Staff's proposal were successful in raising FEC's credit rating by one notch, and the Companies issue $1 billion in new debt, the Companies would realize an interest rate expense savings of approximately $2 million per year – a tiny fraction of the $ 131 million (or more) that customers would pay for Rider DMR.[74]

Moreover, ratepayers currently are providing credit support to the FEC through non-traditional ratemaking means utilizing various distribution riders (Rider DCR and AMI), as well

[72] OMAEG Ex. 39, at 7 (Lause Rehearing Rebuttal).

[73] Rehearing Tr. III, at 575-576 (Buckley Cross).

[74] OCC Ex. 44, at 9 (Kahal Rehearing Direct).

as through traditional base distribution rates.[75] Rider AMI already provides a return of, and on, investments in the grid modernizations Staff seeks to support with Rider DMR.[76] Rider DMR would provide double recovery in violation of regulatory principles and should be disallowed for this reason alone.

E. The Companies Revisions to Staff's DMR Proposal.

As stated previously, the Companies have proposed revisions to Staff's proposed DMR Rider that would require their captive customers to pay at least $558 million per year in credit support to FEC for the eight years of ESP IV, for a total of at least $ 4.464 billion dollars.[77] If the alleged economic benefits of maintaining the Companies' headquarters in Akron, Ohio, is factored into the Rider DMR calculations, FEC could receive up to an additional $568 million per year for a total annual DMR benefit of $ 1.126 billion per year, or over $ 9 billion for the eight year term of ESP IV.[78]

1. The Companies Proposal to Recover Economic Benefits Related to Maintaining their Headquarters in Akron is without Merit.

Staff's proposal that the Companies maintain their headquarters in Akron as a condition to receive Rider DMR revenues is nothing new. The Companies already have agreed to do so as a part of the Stipulation in this proceeding. The Companies' attempt to treat this condition as a new condition unique to Staff's Rider DMR proposal is improper, because it assumes Rider DMR is a stand-alone provision independent of the Stipulation. By the procedural entry issued

[75] Rehearing Tr. X, at 1757-1759 (Mikkelsen Cross).

[76] Rehearing Tr. IV, at 1227-1229 (Choueiki Cross) Rehearing Tr. X; at 1610 (Mikkelsen Cross).

[77] The Companies' request is revealing and lends credence to OCC witness Wilson's estimated cost of the Original and New riders. The approximate $4.5 billion that the Companies seek in credit support significantly exceeds OCC/NOPEC witness Wilson's "high case" scenario of the expected cost of the Original Rider RRS of $3.6 billion, and the approximate $3.5 billion cost of the New Rider RRS proffered in his direct testimony on rehearing. OCC/NOPEC Ex. 9 (Wilson Second Supplemental) at 13 (Wilson Direct); OCC/NOAC Ex. 1, at 13 (Wilson Rehearing Direct).

[78] Companies Ex. 205, at 4 (Murley Rehearing Rebuttal); Companies Ex. 206, at 13-14 (Mikkelsen Rehearing Rebuttal)

June 3, 2016, the Attorney Examiner limited evidence in this proceeding to the Companies' New RRS proposal and alternatives thereto (e.g. proposed Rider DMR). Thus, the June 3 Entry assumes that the remaining provisions of the Stipulation that are not contested on rehearing would remain in place. The Companies have not sought rehearing on this commitment. Additional onerous payments of potentially billions of dollars to the Companies for commitments to which they already have agreed as part of the overall Stipulation package are unreasonable, unwarranted and unprecedented. If the Companies are not happy with the condition that they maintain their headquarters in Akron, they remain free to reject the Commission's new ESP under R.C. 4928.143(C), and file a new application.

2. The Companies Revisions to Staff's Proposed Rider DMR are Irrelevant inasmuch as Rider DMR should be Rejected Under Staff's Proposal.

As explained above, Staff's proposed Rider DMR should be rejected as unlawful for numerous reasons. The Companies' suggested revisions to the proposed Rider DMR do not cure those infirmities, but only seek to significantly increase the revenues they can obtain from captive Ohio customers, while abandoning the cornerstone of their ESP IV proposal – the purported benefit to customers of providing a financial hedge to protect their customers against rate volatility.[79] Because Staff's proposed Rider DMR is unlawful, the Companies' suggested revisions to it are irrelevant and should be disregarded.

III. CONCLUSION

For the above reasons, NOPEC respectfully requests that the Commission reject the Companies' New Rider RRS proposal, Staff's Rider DMR proposal and the Companies' proposed revisions to Staff's Rider DMR proposal, and grant NOPEC's pending application for rehearing on the merits.

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[79] Rehearing Tr. X, at 1742 (Mikkelsen Cross).

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Brief on Rehearing was served *via electronic mail* upon the parties of record this 15th day of August, 2016.

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