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 R.C. 4928.143 in the Form of an Electric Security Plan.	)))))))	Case No. 14-1297-EL-SSO

****PUBLIC VERSION****

REHEARING REPLY BRIEF BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

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I. INTRODUCTION

In the continuing saga of a bailout for FirstEnergy[1], this rehearing features competing proposals (FirstEnergy and PUCO Staff) for transferring Ohioans' money to their electric utility. There is an estimated $3.6 billion for a virtual power purchase agreement ("PPA") through FirstEnergy's so-called Retail Rate Stability Rider ("Proposal"). Alternatively, there is up to $8.9 billion for credit support ("Credit Support Rider" or "CSR") and headquarter benefits through FirstEnergy's proposed modifications to the proposal of the PUCO Staff.[2] And there is the PUCO Staff's proposal for credit support of nearly $400 million using the Staff's three-year proposal (and not counting the Staff's wild card for a two-year extension where FirstEnergy could ask to charge consumers for any amount).

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[1] Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company.

[2] Staff's inaptly named Distribution Modernization Rider ("Rider DMR"), whether as proposed by Staff or as FirstEnergy proposes to modify it.

The Public Utilities Commission of Ohio ("PUCO") should protect 1.9 million Ohioans from paying massive subsidies to FirstEnergy. It should reject the FirstEnergy and PUCO Staff proposals, and let Ohioans spend their money on other things in their lives.

FirstEnergy tries to cloak the Proposal in legitimacy with phrases like "proxy generation"[3] and "proxy capacity [.]"[4] But facts matter. And the facts are that "[i]n contrast to Rider RRS as originally proposed, Modified Rider RRS charges and credits under the Proposal will not be based on the generation output of specific generating plants."[5] Ohioans footing the bill for the Proposal will pay charges on the order of hundreds of millions (if not billions) of dollars for virtual generation that is not being supplied to them. As FirstEnergy Witness Mikkelsen admitted, the Proposal is completely unrelated to the continued operation of the Sammis and Davis-Besse power plants (and the purported benefits that would have gone along with the plants' continued operation).[6] Without that relationship, the Proposal can be viewed only as a transition charge collected by FirstEnergy to bailout its parent, FirstEnergy Corp. ("FEC"), from the rigors of competition. But transition charges are illegal.[7] There are no bailouts for utilities – FirstEnergy and its affiliates should now be "fully on its own in the competitive

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[3] See, e.g., FE Brief at 5.

[4] See, e.g., id.

[5] See id.

[6] See R. Tr. I at 51:1-4 (Mikkelsen).

[7] See, e.g., *In re Application of Columbus S. Power Co.*, No. 2016-Ohio-1608 and *In re Application of Dayton Power and Light Co.*, 2016-Ohio-3490.

market []"[8] – and certainly not for parent companies the PUCO has no jurisdiction over, like FEC.

Both Staff and FirstEnergy acknowledge that the CSR is about giving FEC more money.[9] Period. Staff Witness Buckley's testimony is all about credit support.[10] Although Staff Witness Choueiki says that the extra money should be used for grid modernization, he admits that the PUCO must *first* decide whether FirstEnergy (really, FEC)[11] gets credit support.[12] Though it says that there may be some merit to a modified CSR,[13] FirstEnergy is not willing to commit to grid investment.[14] Instead, it asserts that it needs over eight times more money through the CSR than the nearly $400 million that Staff proposed.[15] The "more money" includes money to pay FEC to keep its headquarters in Ohio.[16] This notwithstanding that "the companies are already recompensed adequately for the presence of the headquarters []"[17] because Ohioans already pay for FEC's headquarters through base rates.[18] And let's not forget that the

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[8] R.C. 4928.38.

[9] See, e.g., PUCO Staff Ex. 13 at 2:15-18 (Buckley) see also id. at 5 (explaining that Staff's methodology is tied to FE's "long-term financial health"); id. at 6 (explaining that all parties need to be "invested in supporting FE as an investment grade entity."); FE Post-Hearing Brief at 27-32.

[10] See PUCO Staff Ex. 13.

[11] Moody's has placed FEC and its generation affiliates on notice that it may downgrade their credit ratings. It has not downgraded FirstEnergy or put it on ratings watch. See Direct Ex. 1; R. Tr. 171.

[12] Choueiki Testimony at 16:12-16 (*if* the Commission agrees with Buckley's recommendation, *then* the Commission should direct FE to invest in distribution assets).

[13] See FE Brief at 24-32.

[14] R. Tr. X at 1606 (Mikkelsen).

[15] See, e.g., FE Brief at 32-41.

[16] See, e.g., FE Brief at 37-41.

[17] See PUCO Staff Brief at 18. FirstEnergy Witness Mikkelsen conceded that the shared services provided by employees at FEC's Akron headquarters are allocated to the different operating companies, including FirstEnergy, and then recovered through base rates. R. Tr. X at 1749-1750 (Mikkelsen).

[18] See id.

commitment to retain the FEC headquarters in Akron was a commitment already agreed to in the stipulated ESP which was approved by the PUCO.

The Proposal and CSR are bad, and should be rejected, based on the existing record. It is unfortunate that the Attorney Examiners kept certain evidence out of the record and admitted other evidence that should have been excluded.[19] For example, evidence regarding the Proposal's cost to customers, and the cost's impact on the MRO v. ESP test, was excluded. So was evidence informative of how the cost of the FEC headquarters is already being paid for by customers through base rates. On the other hand, evidence that should have been provided during the original hearing (e.g., FirstEnergy Witness Mikkelsen's testimony supporting the Proposal and modified CSR) was admitted, contrary to R.C. 4903.10.[20] As a result of the rulings, the PUCO does not have a record before it that permits a full, fair, and complete evaluation of the Proposal or the CSR.

As explained more fully below, the Proposal and the CSR should be rejected. They are a bad deal for Ohioans.

II. RECOMMENDATIONS

On June 3, 2016, the Attorney Examiner set the scope of this rehearing. The scope was limited to "the provisions of, or alternatives to, the Modified RRS Proposal."[21] As part of the alternatives to Modified RRS proposal, the PUCO should consider

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[19] See OCC/NOAC's Brief at 58-78. OCC is not the only intervenor to question the propriety of the Attorney Examiners' rulings. See, e.g., OMAEG's Initial Brief on Rehearing at 10-17; P3/EPSA's Brief at 66-69.

[20] In relevant part, the statute states that the PUCO "shall not upon such rehearing take any evidence that, with reasonable diligence, could have been offered upon the original hearing."

[21] Entry at ¶15 (June 3, 2016).

modifying FirstEnergy's electric security plan changing it to a market rate-offer. Doing so would save customers millions, if not billions, of dollars.

If the PUCO is set on making customers pay for significant investments in the smart grid--though, again, the Staff would not require that "credit support" charges be spent on the smart grid--there are better ways to do that than allow vaguely purposed collections from customers for "credit support." Such a vast undertaking deserves all due consideration of potential issues that impact customers and the rates they will be saddled with to get the smart grid. If that is the course (which OCC does not support) the PUCO should at least undertake such a task in a separate proceeding, designed to address a myriad of issues that smart grid brings. These important issues include: privacy and security of customer usage data, costs/benefits of investment, cost responsibility, flow through of benefits, customer acceptance, obsolescence, risk sharing, reliability benefits, remote disconnection, opt-out, disconnection charges, retirement of obsolete meters, appropriate ratemaking treatment/standards, offerings supported by smart grid, and consumer education.

FirstEnergy has already made its business case filing for its grid modernization plan.[22] The PUCO should address any credit support needs in the context of that proceeding. There, proper consideration can be afforded the proposal to charge customers hundreds of millions (if not billions) of dollars for investment in smart grid technology.

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[22] *In the Matter of the Filing by Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company of a Grid Modernization Business Plan,* Case No. 16-0481-EL-UNC, Application (Feb. 29, 2016).

III. THE PUCO SHOULD NOT APPROVE ANY OF THE PENDING PROPOSALS BEFORE IT, BECAUSE NONE OF THEM ARE MORE FAVORABLE TO CUSTOMERS THAN A MARKET RATE OFFER UNDER OHIO LAW.

A. The Stipulated ESP, modified to include the Credit Support Rider proposed by the PUCO Staff, is not more favorable in the aggregate for customers than a market rate offer.

The PUCO Staff in its brief claims that the Stipulated ESP, modified to include its Credit Support Rider, passes the ESP v. MRO test on both a quantitative and a qualitative basis.[23] The PUCO Staff's opinion, however, is based on a misunderstanding of the statutory test. And the PUCO Staff relies upon alleged qualitative benefits of grid modernization that, contrary to R.C. 4903.09, are not based upon any evidence submitted in this proceeding.

The PUCO thus, should not rely upon its Staff's opinion that the ESP (with the Staff's Credit Support Rider) is more favorable in the aggregate for customers than a market rate offer. Instead the PUCO should determine the opposite: the stipulated ESP, modified to include the Credit Support Rider, cannot be adopted because it has not been shown to be more favorable in the aggregate to customers than a market rate offer.

1. In evaluating the cost of the electric security plan, the PUCO should not ignore the $393 million (plus) cost to customers for providing credit support under the Credit Support Rider.

Under the PUCO Staff's Credit Support Rider, in addition to paying the costs customers are currently being charged (as of June 1, 2016) under the approved ESP, customers would pay an extra $131 million per year, for a minimum of three years.[24] And if the credit issues with FirstEnergy Corp. still remain, FirstEnergy can seek an

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[23] PUCO Staff Brief at 8.

[24] PUCO Staff Ex. 13 at 2 (Buckley).

extension of the Credit Rider for an additional two years.[25] PUCO Staff Witness Buckley expressed the view that the extension request could be any amount --"whatever they would deem necessary."[26]

The PUCO Staff argues on brief that these significant costs to customers under its Credit Support Rider should be ignored in the statutory test because "Staff would advocate the equivalent of Rider DMR through either or both an MRO or base rate proceedings for these companies."[27] But this rationale ignoring costs imposed under the PUCO Staff's proposal is mistaken.

Charges for credit support are not permitted by law under a market rate offer. The PUCO Staff cannot point to a single provision under R.C. 4928.142 (the MRO statute) that permits credit support or distribution charges to be paid for by customers. That's because the MRO is uniquely devoted to establishing the cost of providing generation service that is delivered to the utility under a market rate offer. There are no credit support charges that are tied to the cost of providing generation service. Nor are there infrastructure modernization costs that are linked to providing generation service under a market rate offer. And similarly base rate proceedings do not give utilities (or the PUCO) the ability to charge customers rates based on maintaining investment ratings.[28]

That "Staff would advocate for" equivalent revenues in an MRO or base rate proceeding is of no consequence for purposes of determining whether the ESP is more

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[25] Id.

[26] R. Tr. III at 507-508.

[27] PUCO Staff Brief at 8.

[28] See, e.g., *In the Matter of the Application of the Cleveland Electric Illuminating Company for Authority to Amend and Increase Certain of its Filed Schedules Fixing Rates and Charges for Electric Service*, Case No. 19-537-EL-AIR, Opinion and Order at 34 (holding that rates should not be predicated upon satisfying rating agency metrics)(July 10, 1980).

favorable in the aggregate than an MRO. Otherwise, the statutory test is rendered meaningless because any party (including the PUCO Staff) can advocate for any proposal in any proceeding.

Under rules of statutory interpretation in Ohio, in interpreting the law, a just and reasonable result is intended.[29] It is neither just nor reasonable to interpret the statutory test to have no meaning. But that is just what the PUCO Staff does. The PUCO Staff is wrong to interpret the statute in a way that permits them to ignore hundreds of millions of dollars that customers will pay under its proposal.

When the costs of the Credit Support Rider are included as part of the statutory test, massive ESP costs develop that have no counterpart on the MRO side. Quantitatively, the ESP with the Credit Support Rider is not more favorable in the aggregate for customers than a MRO.

2. Any alleged qualitative benefits to customers of the PUCO Staff Proposal must be based on evidence in the record in this proceeding.

The PUCO Staff claims that on a qualitative basis that the ESP with the Credit Support Rider is more favorable than an MRO.[30] The PUCO Staff comes to that conclusion after reciting a litany of benefits that allegedly come from grid modernization.[31]

But there is no evidence in this record that "[a]ll customers will benefit from increased reliability" associated with the specific grid modernization that may be undertaken under the Credit Support Rider. There is no evidence in this record that all

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[29] R.C. 1.47.

[30] PUCO Staff Brief at 8.

[31] PUCO Staff Brief at 8.

customers will benefit from "efficiency" associated with the specific grid modernization that may be undertaken under the Credit Support Rider. And there is no evidence in this record that all customers will benefit from "competitive options that will become available as a result of this investment in the future" associated with the specific grid modernization that may be undertaken under the Credit Support Rider.

The PUCO must under R.C. 4903.09 make findings of fact based on the record in the proceeding. The PUCO cannot base its decision allowing FirstEnergy to charge customers hundreds of millions of dollars based on generalizations or beliefs held by individual PUCO Staff members or the PUCO Staff, as a whole. This is especially problematic in this case because the PUCO Staff proposal does not require grid modernization to go forward.[32] And there is no defined scope of what those grid modernization efforts (if any) will be. The PUCO should thus disregard the alleged qualitative benefits of grid modernization when conducting the ESP v. MRO test.

B. The Stipulated ESP, modified to include the Proposal, is not more favorable in the aggregate for customers than a market rate offer.

According to FirstEnergy, "[i]t is not necessary for the PUCO to reconstruct the ESP v. MRO analysis from whole cloth."[33] FirstEnergy alleges that the PUCO's findings pertaining to Rider RRS apply with equal force to the Proposal.[34] Quantitatively, FirstEnergy alleges that the stipulated ESP with the Proposal is $307.1 million more favorable for customers than a market rate offer.[35] The alleged quantitative benefits are solely based on the PUCO's finding of a projected net credit to customers of $256

[32] R. Tr. IV at 957 (Choueiki).

[33] FE Brief at 7.

[34] Id. at 8.

[35] Id. at 9.

million under Rider RRS[36] and $51 million in committed shareholder funding over the eight year term of the ESP.[37] Qualitatively, FirstEnergy alleges that the PUCO's findings with regard to the benefit of Rider RRS is unaffected by the Proposal.[38] FirstEnergy believes that the Proposal enhances the qualitative benefits by providing even greater rate stability.[39] FirstEnergy is wrong.

1. The quantitative benefits of the Proposal are vastly overstated and cannot be relied upon in determining whether the ESP is more favorable in the aggregate for customers than a market rate offer.

There is a fundamental problem with applying the PUCO's finding of a projected net credit of $256 million under Rider RRS to the Proposal. No one, not even FirstEnergy,[40] believes that there will be a $256 million net credit to customers under Rider RRS.

The PUCO's $256 million net credit assumption was based in large part on outdated forecasts FirstEnergy submitted in 2014 in this proceeding. The forecasts were outdated at the time they were filed. They are even more outdated now.

In reaching its conclusion that there would be a $256 million credit, the PUCO considered only one of OCC Witness Wilson's three cost estimates (the lowest, at a cost of $50 million to consumers). That cost estimate was based on the Energy Information

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[36] PUCO Opinion and Order at 78.

[37] PUCO Opinion and Order at 119.

[38] FE Ex. 197 at 10.

[39] FE Brief at 9.

[40] FirstEnergy's adherence to the Proposal instead of the Credit Support Rider (or modified Credit Support Rider) makes no sense unless one assumes that instead of a customer credit, customers will pays billions of dollars to FirstEnergy under the Proposal (as OCC projected). Otherwise, it is inexplicable that FirstEnergy would prefer to pay customers $256 million over eight years, instead of receiving $393 million plus (Staff Credit Rider) or receiving $568 million to $1.2 billion per year over eight years (FE modifications to Staff Credit Rider).

Agency (EIA) Annual Energy Outlook 2015 Reference Case.[41] The PUCO found that Mr. Wilson's projections based on the EIA Reference case were "reasonable and reliable."[42] The Commission rejected OCC Witness Wilson's claim that Rider RRS will result in a charge to FirstEnergy customers of $3.6 billion over the eight year term of the ESP. [43]

Since the PUCO's Order was issued, EIA issued a new reference case projection, the EIA Annual Energy Outlook 2016, Early Release. OCC and others submitted testimony updating the cost to customers of the Proposal,[44] with OCC/NOAC Witness Wilson including costs to customers based on the 2016 EIA Energy Outlook Reference case. The Attorney Examiners erroneously struck all intervenor testimony that provided updated cost information pertaining to the Proposal.[45] Now the PUCO does not have a reliable and reasonable projection of the costs of the Proposal to customers. Instead the Attorney Examiner rulings have placed the PUCO in the dark with respect to the cost of the Proposal to customers.

The record, however, does contain the opinion of the PUCO Staff-- **that there will not be a credit to customers under Rider RRS.** Dr. Choueiki testified, in response to FirstEnergy's Counsel, that "it's staff opinion that it [Rider RRS] is going to be a charge."[46] In separate questioning, Dr. Choueiki also indicated he did not agree with the

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[41] PUCO Order at 84.

[42] PUCO Order at 85.

[43] Opinion and Order at 82-85.

[44] OCC/NOAC Ex. 1; Sierra Club Ex. 100 (Cummings); EPSA/P3 Ex. 17 (Kalt).

[45] See, e.g., R. Tr. IV at 851-876.

[46] R. Tr. V at 1250.

companies' projection of the modified Rider RRS proposal as an overall credit.[47] Dr. Choueiki explained that the Staff had [redacted] And Dr. Choueiki's back of the envelope analysis did not even account for the reduced capacity revenues associated with recent PJM auctions,[49] which further diminishes the assumed net credit to customers. [50]

Dr. Choueiki's testimony significantly undermines FirstEnergy's assumed $256 million net credit to customers. And had other parties' testimony not been struck, the PUCO would have before it a more developed record with reasonable and reliable projections of the cost of the Proposal to customers.

The PUCO should conclude that the $256 quantifiable benefit of Rider RRS is outdated and not a reasonable and reliable projection of the cost of the Proposal to customers. The PUCO should conclude, as did Dr. Choueiki, that there will be no credit to customers under Rider RRS and the Proposal. In fact the PUCO should assume, like Dr. Choueiki, that the Proposal will result in a charge to consumers, which affects the more favorable in the aggregate test.

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[47] R. Tr. IV at 987.

[48] R. Tr. V at 1201 (Confidential).

[49] See EPSA/P3 Ex. 17 at 16.

[50] See, e.g. P3/EPSA ex. 18 c, Attachments JPK RH-1 and JPK RH-2, presenting the updated PJM capacity prices and their effect on the cost of the proposal.

The PUCO should consider the cost of the proposal, as testified to by OCC Witness Wilson (and others) and assess that cost of the Proposal and its effect on the MRO v. ESP test. This would require the PUCO to reverse the Attorney Examiner's ruling that specifically precluded OCC from presenting the testimony of its Witnesses Kahal and Wilson. Only then will the PUCO have before it reasonable and reliable projections of the cost to customers of the Proposal. And only then will the PUCO be able to fulfill its statutory duty under the law to determine if the ESP is more favorable in the aggregate to customers than a MRO.

2. The qualitative benefits to customers of the Proposal are less than the qualitative benefits previously determined for Rider RRS.

FirstEnergy claims that the PUCO's findings with regard to the benefits of Rider RRS is unaffected by the Proposal.[51] FirstEnergy believes that the Proposal enhances the qualitative benefits by providing even greater rate stability.[52]

OCC Witness Kahal, however, pointed out that the Proposal (Modified Rider RRS) is "profoundly different" than approved Rider RRS. This is because the Proposal "cuts the crucial link between the physical attributes and operation of the subject power plants (Davis Besse and Sammis) and the new Rider RRS."[53]

Earlier testimony from FirstEnergy had primarily focused on the public interest benefits associated with the continued operation of Davis Besse and Sammis.[54] Although the PUCO did not specifically include such benefits in its MRO v. ESP analysis,[55] the

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[51] FE Brief at 9.

[52] FE Brief at 9.

[53] OCC Ex. 44 at 7 (Kahal Rehearing Direct).

[54] See, e.g., FE Ex. 37 at 2-3; FE Ex. 39 at 5-7.

[55] Opinion and Order at 119-120.

continued operation of the plants was the most compelling of the reasons why the stipulated ESP was found to be in the public interest.[56] Indeed, much of the focus of the proceeding was on the effect of plant closures, and the economic impact of the plants on the region. Testimony also stressed the resource diversity that was enhanced by continuing to run the plants.[57]

OCC Witness Kahal noted that the vast record developed in the first phase of the proceeding is now meaningless given the Proposal. "The Proposed Modified Rider RRS does not depend on nor does it financially facilitate continued operation of these specific power plants. The vast array of these asserted benefits now disappear."[58] PUCO Staff Witness Dr. Choueiki agreed. Dr. Choueiki testified against the Proposal, citing as one of the reasons, that the Proposal "eliminates two important benefits that the Commission highlighted in its Opinion and Order [:] preserving resource diversity and protecting the local economies."[59]

OCC Witness Kahal also testified that under the Proposal, FirstEnergy utilities are absorbing the financial consequences of the hedge risk. If FirstEnergy's energy market outlook is correct, FirstEnergy's pre-tax earnings will be impaired by $561 million, with adverse implications for the Utilities' financial integrity. That certainly must be weighed against the qualitative benefits associated with the Proposal. Yet FirstEnergy has not done so. The adverse implications of the potential impairment far outweigh any

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[56] See Opinion and Order at 87.

[57] FE Ex. 28 at 6.

[58] OCC Ex. 44 at 7.

[59] PUCO Staff Ex. 15 at 13.

qualitative benefit associated with the Proposal. The PUCO should find that FirstEnergy has not shown the Proposal passes the statutory test.

IV. THE PROPOSALS BEFORE THE PUCO SHOULD BE REJECTED AS THEY WILL HARM CUSTOMERS

A. The PUCO should deny the Proposal because it is not in the public interest.

The Proposal requires that the PUCO accept FirstEnergy's forecasts, not actual market results. The notion that Ohioans will be better off relying on FirstEnergy's stale forecasts, rather than the actual results of a competitive market, is absurd. Approving the Proposal will force consumers to give up the benefits of low prices produced by a competitive market to pay significant, above-market premiums (in the millions – if not billions – of dollars) for an "insurance policy" that will likely never be needed. This is all for the sake of subsidizing FEC and its shareholders. The PUCO should deny the Proposal.

1. The PUCO did not rely on FirstEnergy's forecasts to establish rates customers would pay during the original stage of this proceeding, and should not do so now.

Some parties argue that FirstEnergy's reliance on "proxy costs," "proxy generation output," and "proxy capacity projected to clear" in connection with the Proposal makes it better than the original Rider RRS.[60] They argue that "certain potential risks that could have arisen by any differences between actual and assumed values"[61] will be reduced by relying on "inputs [that] are already evidence of record and relied upon by the Commission in this case."[62] These arguments do not hold water.

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[60] See FE Brief at 4-6; Material Sciences Brief at 6-9; NUCOR Steel Brief at 4.

[61] FE Brief at 5.

[62] FE Brief at 5.

The PUCO referenced FirstEnergy's projections in determining that Rider RRS was in the public interest. But the PUCO never intended to rely on the projections when passing on charges or credits to consumers. Rather, the PUCO modified the Stipulation to require FirstEnergy to submit updated "annual forecasted values" that would be subject to "quarterly true-ups to reflect actual values rather than the annual updates to Rider RRS proposed in the application."[63] In contrast, the proxies FirstEnergy proposes to "lock in" with the Proposal are two steps (annual forecasted values and the true-ups) removed from the actual values. They are not subject to the discipline of actual results in actual markets. They are completely fictitious and do not take into account changes that may occur in the complex and ever changing wholesale energy markets. Indeed, originally, the proxies were not even the final forecasts that the PUCO envisioned in its Order.[64]

To suggest that the PUCO has already relied on FirstEnergy's forecasts in the record for charging customers is false. The PUCO merely used the forecasts in the record to assess whether the proposal was in the public interest. It never intended to, nor did it order the forecasted values to be charged to customers. Instead, the PUCO ruled that customers' rates would be formed by actual values via updated, annual forecasts and true -ups. The Proposal removes both of these PUCO-required links to the real world. The Proposal has no basis in reality and is therefore not just and reasonable.

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[63] Opinion and Order at 90.

[64] The PUCO said that it would include FirstEnergy's projections in its "determination of an estimate of the net revenues under Rider RRS" that would subsequently be subject to true-up. Opinion and Order at 82.

2. The PUCO should reject FirstEnergy's invitation to rely on "proxy" costs, generation output, and capacity cleared as unjust and unreasonable. Real world evidence shows that consumers will not benefit from the "hedge" that the Proposal will purportedly provide.

Ohioans do not – and should not – be charged for their electric service based on "projections" or "proxies" of utilities' costs. Yet, if the PUCO unlawfully approves the Proposal, that is exactly what it will let FirstEnergy do. This is the real world where real people have to make real choices based on real facts. The PUCO should not permit utilities to charge customers based solely on their projections of costs and complex market clearing conditions over an eight-year period, let alone force Ohio consumers to use their real dollars to foot the bill.

The only thing certain about projections and proxies is that they are wrong. As the PUCO acknowledged, "projections and forecasts are predictions . . . of future conditions and are based upon what is happening now and multiple additional assumptions."[65] All parties agree that "what is happening now" will not persist for the next eight years. The many factors that affect retail prices will change. They will change in ways not accounted for by FirstEnergy's "multiple additional assumptions" in its projections.

[65] Opinion and Order at 80. The PUCO lists a sampling of these various assumptions in its Opinion and Order. See, e.g., Opinion and Order at 80-81 ("The Commission notes that Mr. [Judah] Rose forecasts higher energy prices in the future, based upon a number of factors, including higher forecast natural gas prices; greater reliance on natural gas as the price setting fuel; greater reliance on more costly units as demand grows and units retire; growth in demand for electricity; power plant retirements; new environmental regulations; new FERC policies; inflation; and carbon emission regulations."); id. at 81 ("Likewise, Mr. [Judah] Rose forecasts higher capacity prices in the future based upon: elimination of excess capacity due to plant retirements; demand growth; less capacity price suppression from demand response; less capacity imports from other regions; environmental regulations, rising financing and other capital costs; inflation; and greater natural gas infrastructure leading to higher costs as gas is shipped elsewhere.").

Recent evidence in the record proves this – and provides a reality check. It suggests that the real world is, and will be, much different than the world imagined by FirstEnergy. For example, PJM has released results of its most recent capacity auction. Staff noted in its initial brief on rehearing, although "the effects of these [PJM Capacity] auctions on the estimated hedge benefit provided by the Modified Rider RRS [are] confidential, the direction is public and clearly negative."[66] The costs to consumers for the Proposal's supposed "hedge benefit" has gone up significantly. It is cost prohibitive. Consumers will see no benefits. Ask PUCO Staff's Witness, Dr. Choueiki.[67]

This fact should not be lost on the PUCO. It has acknowledged that "[i]f energy market prices stay at the current low levels, customers will pay a charge under Rider RRS; however, if energy market prices rise from the current low levels, customers will begin to receive a credit under Rider RRS, which will mitigate the increases customers see on their bill [citations omitted]. The higher energy market prices rise, the greater the amount of credit customers will see."[68] This, of course, ignores the very real and likely consequences of the PUCO's first scenario: the lower energy market prices stay, the greater the charges levied on consumers. Instead of benefitting from low market prices, Ohioans will be forced to transfer the benefits of competitive markets to (ultimately) FEC's corporate coffers. The PUCO should not approve the Proposal because

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[66] PUCO Staff Brief at 3 (citations omitted). Additionally, FirstEnergy has announced that it will retire some of the generation that the "proxies" are based on, meaning that those proxy costs will actually go to zero. R. Tr. V at 1702.

[67] Dr. Choueiki testified that "it's staff opinion that it [Rider RRS] is going to be a charge." R. Tr. V at 1250. In separate questioning, Dr. Choueiki also indicated he did not agree with the companies' projection of the modified Rider RRS proposal as an overall credit. R. Tr. IV at 987.

[68] Opinion and Order at 80.

FirstEnergy's projections and proxies are wrong in a way that, if relied on, will harm consumers.

B. Staff's assertion that the PUCO cannot interpret federal law is wrong. The PUCO has a responsibility to interpret federal law and cannot take actions that would conflict with such law.

The PUCO Staff expresses concerns about the Proposal's legality. PUCO Staff's concerns have two bases: (1) recent Ohio Supreme Court case law striking down PUCO decisions for allowing unlawful transition charges under R.C. 4928.38;[69] and (2) the Proposal violates federal law.[70] The Staff's concerns are well founded. OCC agrees.

Yet PUCO Staff (inexplicably) says that "the [PUCO] cannot interpret federal law."[71] PUCO Staff cites to R.C. 4928.05(A) (2) that affirmatively gives the PUCO authority to act "to the extent that [its] authority is not preempted by federal law."[72] Taking actions that are "not preempted by federal law" inherently requires the PUCO to interpret such law and determine the bounds of its own jurisdiction. Thus, not only is it wrong to suggest that the PUCO cannot interpret federal law; state law actually *requires* that it do so. In fact, the PUCO has interpreted various federal laws in the normal course

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[69] PUCO Staff Brief at 3-4 (citing *In re application of Ohio Power Company*, Slip Opinion No. 2016-Ohio-1608 (Apr. 21, 2016); *In re Application of Dayton Power & Light Co.*, Slip Opinion No. 2016-Ohio-3490 (Jun. 20, 2016)). As discussed in its initial brief, OCC believes that, if approved by the PUCO, the Modified Rider RRS will meet the same fate as the unlawful transition charges in these two cases.

[70] As argued in its initial brief, OCC believes that the Proposal is subject to FERC review and ultimately illegal under federal law.

[71] PUCO Staff Brief at 4 (citing to R.C. 4928.05(A)(2)).

[72] R.C. 4928.05(A)(2).

of its business.[73] The question of whether the PUCO has interpreted federal law correctly is a different issue that, as the PUCO Staff recognizes, the federal courts will ultimately resolve.[74]

The PUCO cannot abdicate its responsibility here. As OCC pointed out in its initial brief, the Proposal runs afoul of FERC's April 27, 2016 order in response to the *ESPA complaint*. Even though FirstEnergy has gotten rid of the actual PPA, the modified "virtual PPA" Proposal still facilitates affiliate abuse that is prohibited by FERC restrictions on such practices. This requires that the PUCO reject the Proposal.[75]

C. The PUCO Staff's Credit Rider is not needed to jumpstart distribution modernization.

Under the credit support rider, customers would be required to fund hundreds of millions of dollars for credit support to "jumpstart" grid modernization.[76] Under the PUCO Staff Proposal customers would pay at least $393 million to incentivize (but not require) smart grid investment.[77] With FirstEnergy's adjustments to the PUCO Staff

[73] See, e.g., Case No. 99-1141-EL-ORD, *In the Matter of the Commission's Promulgation of Rules for Electric Transition Plans and of a Consumer Education Plan, Pursuant to Chapter 4928, Revised Code*, 1999 Ohio PUC LEXIS 674 at 115-116 (reconciling state requirements on RTEs with FERC's requirements); Case No. 11-346-EL-SSO, *In the Mater of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan; In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of Certain Accounting Authority*, 2012 Ohio PUC LEXIS 738, *178 (acknowledging that the PUCO will have to interpret and take into account the results of FERC Orders on the significantly excessive earnings test); Case No. 12-2051-EL-ORD, Re: Review of Chapter 4901:1-11, Ohio Administrative Code, Regarding Interconnection Service, at ¶26 (adopting, interpreting, and clarifying FERC SGIP rules and screens).

[74] PUCO Staff Brief at 4 ("While Staff does not endorse this view, a federal court might.").

[75] If the PUCO decides that it will not interpret federal law as required, then it should stay this proceeding until FERC or a federal court has the chance to do so. This will prevent customers from being unlawfully charged under the proposed rider.

[76] Dr. Choueiki testified that the jumpstart under the PUCO Staff proposal would address a number of issues that were commitments FirstEnergy agreed to in the Third Supplemental Stipulation. R. Tr. V at 1222. This seems like customers are now being asked to pay more money for initiatives FirstEnergy already agreed to undertake.

[77] PUCO Staff Ex. 13 at 7.

proposal, customers could potentially be charged $568 million to 1.2 billion per year for this eight year "jumpstart." [78]

But a fundamental problem, apart from the fact that grid modernization is not required,[79] is the unproven assumption that FirstEnergy needs to jumpstart its smart grid investment. Recall that as part of the ESP approved and being paid for by customers, FirstEnergy had already committed to making a smart grid filing.[80] It fulfilled that commitment when it filed its business plan in Case No. 16- 0481-EL-UNC.

As part of the stipulated ESP, FirstEnergy will be afforded very favorable rate treatment funded by its 2 million customers. Specifically, under restructured Rider AMI, the Companies will collect smart grid costs from customers beginning three months after the PUCO authorizes the grid modernization project.[81] This means that even before FirstEnergy spends its first dollar for smart grid, it could collect money from customers. And Rider AMI is in addition to the credit support rider (under the PUCO Staff's proposal) that customers would be paying for, perhaps even at the same time. [82]

Rider AMI, as restructured under the stipulated ESP, permits FirstEnergy to collect money from customers based on a forward looking formula rate concept, reconciled for actual costs incurred and revenues received.[83] This is akin to a fully projected test year concept --something the General Assembly specifically prohibited. [84]

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[78] FE Ex. 206 at 14-15 (Mikkelsen Rehearing Rebuttal/Surrebuttal).

[79] R. Tr. IV at 957 (Choueiki).

[80] FE Ex. 154 at 9-10.

[81] Id.

[82] R. Tr. V at 1229-1230 (Choueiki).

[83] Id.

[84] See R.C. 4909.15(C) limiting the test year to no more than six month prior to the Utility's application and ending not more than nine months after the application.

And the kicker is the customer-funded profits that FirstEnergy will earn through Rider AMI are significant -- 10.88%.[85] That profit level is fifty basis points higher than the current return being earned in FirstEnergy's Smart Grid pilot (under Rider AMI as currently structured).[86]

And yet, the PUCO Staff would have the PUCO believe, that despite these enhancements to Rider AMI, more money is needed to be collected from customers for smart grid to go forward. While all of this may be part of a master plan to build the smartest grid in the country, there has been no showing that a jump start is needed.

Neither FirstEnergy nor the PUCO Staff has identified the amount of credit support that is needed to incent FirstEnergy's gridsmart modernization. Rather the PUCO Staff and FirstEnergy have focused on credit metrics needed to maintain investment grade ratings. This goes to show what the "distribution modernization rider" is all about. It's not about grid modernization, it's about credit support. And consumers are being asked to write a check for that support when there is already sufficient funding. The PUCO should reject the PUCO Staff's proposal because it is not needed given the favorable conditions already built into the ESP it approved earlier this year.

D. The PUCO Staff's credit support proposal is illegal and harms customers.

The PUCO Staff's initial brief has failed to provide any support that their proposed Credit Support Rider (Rider DMR)[87] is not illegal or does not harm customers. They provided scant evidence upon which to base this new bailout that will cause

[85] FE Ex. 154 at 9-10.

[86] Tr. XXXVII at 7774-7775 (Mikkelsen).

[87] PUCO Staff Ex. 15 at 13 (Choueiki Direct)(The Purpose of this rider is to ""assist the Companies in receiving more favorable terms when accessing the capital market.").

customer to pay $400 million to $650 million.[88] Staff seems completely oblivious to the fact that their credit support proposal is illegal.[89] Furthermore, Staff mischaracterizes the testimony of OCC Witness Kahal with regards to Staff's credit support proposal. Finally, FirstEnergy's attempt to characterize Staff's credit support proposal as an economic development charge is fundamentally flawed.

1. Staff's credit support proposal is illegal.

Staff has failed to provide any evidence that their credit support proposal is not illegal. Instead, they claim it is "an entirely new concept"[90] in this proceeding, while claiming modified Rider RRS is a transition charge.[91] However, Staff fails to acknowledge that their credit support proposal also is a transition charge as defined by the Ohio Supreme Court.[92] Furthermore, the Credit Support Rider explicitly violates the policy provisions that preclude utilities from charging customers to subsidize their unregulated generation operations. While the PUCO Staff liberally cites a number of the policy guidelines laid down by the General Assembly,[93] they conveniently ignore R.C. 4928.02(H) which directly addresses the type of subsidy that PUCO Staff now proposes:

> 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

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[88] OCC Ex. 46 at 3 (Kahal Rehearing Rebuttal).

[89] Staff fails to mention any of the possible legal impediments to this proposal. See PUCO Staff Brief 5-14; See OCC/NOAC Brief at 34-39 (discussing the various reasons that Staff's proposal is illegal)

[90] PUCO Staff Brief at 5.

[91] PUCO Staff Brief at 4.

[92] See OCC/NOAC Brief at 37-39.

[93] PUCO Staff Brief at 5-6.

> any generation-related costs through distribution or transmission rates[.][94]

By using captive customer funds to bailout FirstEnergy Corp. for decisions made in the unregulated side of the business, PUCO Staff is creating an anticompetitive subsidy that flows from distribution rates to the unregulated competitive generation affiliates of the distribution utilities.[95] Additionally, PUCO Staff's credit support proposal fails to qualify as a legal provision under the ESP statute [96] and is an illegal transition charge.[97]

2. PUCO Staff's credit support proposal does not meet the requirements of an economic development provision as required under R.C. 4928.143(B)(2)(i). The CSR should not be required to be funded by customers.

FirstEnergy claims that Staff's credit support proposal (Rider DMR) is permitted under Ohio law as a valid program for economic development and job retention.[98] However the "economic development" that is being claimed by FirstEnergy is nothing more than the value of keeping the headquarters in Akron.[99] These benefits include the salaries and economic benefits of having service corporation employees located in Ohio.[100] However, these benefits are already paid for by Ohioans in base distribution rates. The EDUs are charged a service corporation bill which is collected from customers

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[94] R.C. 4928.02(H) (Emphasis added).

[95] OCC Ex. 46 at 13 (Kahal Rehearing Rebuttal)("Staff's proposal to protect FE Corp's credit ratings with ratepayer funds also benefits merchant plant operations through reduced collateral requirements").

[96] See OCC/NOAC Brief at 34-37.

[97] See OCC/NOAC Brief at 37-39.

[98] FE Brief at 25.

[99] See FE Ex. 206 at 13 (Mikkelsen Rehearing Rebuttal).

[100] See FE Ex. 205 at 5 (Murley Rehearing Rebuttal).

through base distribution rates.[101] Any further attempt to subsidize these costs is simply a double collection of these costs.

Additionally, the economic development provision of the statute is for economic development that has yet to be implemented.[102] Keeping the headquarters of FirstEnergy Corp. in Akron is not a new economic development plan. The headquarters have been located in Akron for a long time now. Furthermore, the provision only applies to economic development that occurs related to a distribution utility, not the parent company.[103] Finally, as Staff noted in their brief, "the Staff believes that the companies are already recompensed adequately for the presence of the headquarters [.]"[104] The notion that PUCO Staff's proposal is economic development is not supported by PUCO Staff themselves, and therefore should be rejected by the PUCO.

3. PUCO Staff mischaracterizes OCC Witness Kahal's testimony regarding their credit support proposal.

PUCO Staff categorizes OCC Witness Kahal's criticisms of their credit support proposal into six specific issues.[105] But the PUCO Staff criticisms mischaracterize the testimony of OCC Witness Kahal. And the PUCO Staff misses the bigger point-- that it is

[101] See R. Tr. X at 1750 (Mikkelsen)(FE Witness Mikkelsen testified that she "would expect to recover [from Ohio utility customers] service company costs allocated to the companies in a base rate proceeding.").

[102] R.C. 4928.143(B)(2)(i) (describes economic development plans that "may" be implemented as provisions of an ESP).

[103] See OCC Initial Brief at 74-77 (discussing how R.C. 4928.143(B)(2)(i) only applies to Economic Development plans implemented by the EDU).

[104] Staff states this point is "arguable", OCC does not believe this point is arguable, the service bill is a clear part of the record in the last rate case, and if those costs have changed, it should be determined in a subsequent rate case. However, OCC was prevented from presenting evidence on this topic, see OCC/NOAC Brief at 72-74.

[105] See PUCO Staff Brief at 9-12.

inappropriate to make customers (through an ESP) bailout a utility's parent that is in "financial distress" due to unregulated activities.

Staff's first criticism is that the credit support proposal is necessary to achieve the General Assembly's goals. But this approach ignores other goals, including avoiding anticompetitive subsidies.[106]

Staff goes on to claim Ohio customers will not be alone in providing support to FEC, and that a number of steps have been taken (primarily in the past) in other jurisdictions.[107] However, none of the other jurisdictions are providing the same sort of bailout that Staff is currently proposing.[108] Comparing a request for a rate increase as part of a distribution rate case to a mechanism that purely injects cash into the parent corporation is inappropriate.

PUCO Staff's third criticism misconstrues OCC Witness Kahal's testimony regarding FirstEnergy's high authorized return on equity.[109] PUCO Staff claims that Mr. Kahal states that no action is needed because of a higher authorized Return on Equity for FirstEnergy.[110] PUCO Staff is conflating the cash flow that is necessary to support FirstEnergy Corp.,[111] while Mr. Kahal is discussing how the distribution utilities are in a stronger financial position.[112] The Utilities have low business risks and are supported by

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[106] See R.C. 4928.02(H).

[107] PUCO Staff Brief at 9-10.

[108] See FE Ex. 206 at 18 (Mikkelsen Rehearing Rebuttal) (FE Witness Mikkelsen listed the various other jurisdictions and none of them are providing a direct cash infusion for credit support alone).

[109] See PUCO Staff Brief at 10.

[110] PUCO Staff Brief at 10.

[111] See Id.

[112] See OCC Ex. 46 at 5, 10 (Kahal Rehearing Rebuttal) (discussing the high authorized Return on Equity and strong credit ratings for the distribution utilities).

the high authorized return on equity that could be collected from customers.[113] Mr. Kahal is pointing out that the customers of the Ohio utilities are already paying their fair share through this high[114] return on equity that was authorized by the PUCO.

PUCO Staff's fourth criticism of OCC Witness Kahal is that he contends that the reduced borrowing costs from the credit support proposal outweigh the costs to customers.[115] However, this mischaracterizes Mr. Kahal's testimony, Mr. Kahal agrees that it could save FirstEnergy Corp. money, but, Ohio consumers would be providing a bailout that may cost customers vastly more than any benefit from decreased borrowing costs.[116]

OCC Witness Kahal testified that the benefits of improving credit ratings for FE Ohio utilities would be modest and only a small percentage of the $131 million per year cost to customers.[117] Mr. Kahal testified that on a one billion dollar issuance of debt, the interest rate savings would be $2 million dollars.[118] So the PUCO Staff is asking customers to pay $393 million for a potential $2 million in savings in the future. The answer to that ask must be "no."

PUCO Staff's final criticisms are that there may not be unsecured property to provide for issuance of secured debt (to provide for the issuance of secured debt by the

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[113] Id.

[114] See OCC Ex. 22 at 14 (Woolridge Direct)(discussing the how FE's current Return on equity is high and out of date, because capital costs have declined since it was authorized by the PUCO).

[115] PUCO Staff Brief at 11.

[116] OCC Ex. 46 at 8 (Kahal Rehearing Rebuttal)("When the full $1 billion is issued (which likely would be over a period of several years), this is an interest rate expense savings of $2 million per year—a tiny fraction of the $131 million (or more) ratepayer cost. While those savings would continue beyond the first three to five years, they would remain a small portion of the $400 million to $650 million cost customers are expected to pay under Staff's proposal.").

[117] OCC Ex. 46 at 6.

[118] Id. at 9.

distribution companies at lower interest rates),[119] and that OCC Witness Kahal claims that FirstEnergy Corp. has not proven financial need.[120] Both of these criticisms are flawed. PUCO Staff's argument regarding the debt fails because PUCO Staff Witness Buckley's testimony shows that the secured debt ratings are higher for the FirstEnergy companies than the unregulated businesses and the corporate parent.[121] Staff equates financial weakness with a definite showing of financial need;[122] this is wrong. OCC Witness Kahal is not contesting that FirstEnergy may be financially weak. He is instead stating that FirstEnergy and PUCO Staff have failed to provide evidence that FirstEnergy will be completely unable to access the capital they need to make investments.[123]

PUCO Staff's criticisms focus on individual issues rather than the overwhelming evidence that this is illegal, improper and harmful for Ohio consumers to provide credit support to FEC. As OCC Witness Kahal states:

> The problem with staff's proposal is that at its core it allocates to captive FE Ohio Utilities' customers a share of the responsibility for the parent's (FE Corp's) financial problems which are not the fault of these customers.[124]

PUCO Staff's CSR does not address this core issue. Nor does it address any of the arguments that the CSR is illegal. The PUCO should reject Staff's proposal.

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[119] PUCO Staff Brief at 11.

[120] PUCO Staff Brief at 12.

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

[122] PUCO Staff Brief at 12.

[123] OCC Ex. 46 at 9 (Kahal Rehearing Rebuttal).

[124] OCC Ex. 46 at 7 (Kahal Rehearing Rebuttal).

E. FirstEnergy Modifications to the PUCO Staff's Rider CSR should be rejected by the PUCO as being too costly for consumers.

1. FirstEnergy's proposed modifications to Staff's Credit Support Rider are harmful to Ohioans and should be rejected.

FirstEnergy finds its Proposal providing consumers $256 million in credits over the eight-year ESP term[125] preferable to a properly designed PUCO Staff Credit Rider.[126] Interestingly, Staff's Credit Rider Proposal, as designed, is intended to allow FirstEnergy to collect money from its customers (and lots of it), with no possibility of credits for those customers. FirstEnergy proposes to modify the PUCO Staff Proposal in two distinct ways in order to transform it into a "properly designed" [127] credit support rider. FirstEnergy wants to collect much more money for credit support ($558 million per year) plus money for the value of FirstEnergy's headquarters and nexus of operation being located in Akron, Ohio (up to $568 million per year).[128] And FirstEnergy wants the credit support to be provided over a much longer period of time (i.e., eight-year term of the ESP) [129] than PUCO Staff's proposed three years. FirstEnergy's modifications to the PUCO Staff's CSR would significantly increase the charges to consumers, with costs potentially skyrocketing to $1.13 billion per year.[130]

FirstEnergy cited to four assumptions the PUCO Staff used to calculate the Credit Support Rider that allegedly must be revised to enable the Utilities to jumpstart grid

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[125] Opinion and Order at 118.

[126] FE Brief at 24.

[127] FE Brief at 24.

[128] FE Brief at 45.

[129] FE Brief at 37.

[130] $558 million + 568 million = $1.126 billion.

modernization.[131] FirstEnergy identified the following "necessary" revisions to the Credit Support calculation:

1. The target goal for CFO to Debt should be 15 percent, rather than 14.5 percent;

2. The calculation of Rider DMR revenue should have used a three-year average from 2012-2014 instead of a five-year average;

3. To achieve the goal of a 15 percent CFO to Debt, it is necessary to use pre-tax revenues; and

4. An allocation factor of 40 percent should be used.[132]

OCC addressed its opposition to each of FirstEnergy's modifications to the credit support rider in their Initial Rehearing Brief, and will not repeat those arguments here.[133]

While OCC does not support Staff's Proposal for all the reasons outlined in its Initial Rehearing Brief, it cannot be denied that FirstEnergy's proposed modifications would be much more harmful to consumers if adopted. PUCO Staff's Post-Hearing Brief recommends FirstEnergy's proposed revisions to PUCO Staff's Proposal be rejected. OCC concurs with Staff's rationale for rejecting FirstEnergy's various modifications.

With regard to the adjusting the target goal of the CFO to debt ratio from 14.5 percent to 15 percent to reflect a slight adjustment in Moody's opinion, Staff found there to be no reason to make the recommended adjustment.[134] Staff correctly opined that: "The slight change in the target range appears to have had no effect. Neither the ratings nor the outlook for the [Utilities] changed as a result of this new opinion. Apparently the

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[131] FE Brief at 32.

[132] FE Brief at 32.

[133] OCC/NOAC Brief at 47-52.

[134] PUCO Staff Brief at 14.

change is unimportant to Moody's and, therefore, is unimportant to the analysis."[135] Therefore, the PUCO should reject this proposed adjustment by FirstEnergy.

PUCO Staff also rejected the FirstEnergy proposal to shorten the five year period that PUCO Staff used to calculate the revenue from the Credit Support Rider to three: using only data from 2012, 2013 and 2014. Instead, PUCO Staff correctly surmised that five years is the period that is available. In addition, five years represents the entire period since the last significant restructuring of FirstEnergy Corp., specifically the merger with Allegheny Energy. It thus represents the best baseline available and captures the most complete picture.[136] Five years is the most appropriate baseline to use, and Staff used it. FirstEnergy's proposal to use three of the available five years was selectively chosen for self-serving reasons (collecting more money from customers), and PUCO Staff was correct in its opposition. The PUCO should reject this adjustment.

The third adjustment FirstEnergy suggests is to increase the amount of money collected from customers, by grossing up the rider to account for taxes. Staff agreed that the amount to be collected through the Credit Support Rider should be adjusted for taxes but only in a limited sense. PUCO Staff opined:

> [t]he metrics sought to be influenced are based on cash flow. The nominal tax rate does not have any direct impact on cash flow. It is actual cash inflows and outflows that matter. To the extent that the companies experience actual cash outlays for income tax in a given year, and it must be recognized that even large corporations sometimes pay no tax at all in some years, an adjustment should be made to the proposed Rider DMR collections. The [Utilities] want much more than this. They seek the sort of 'gross up' that occurs in

[135] PUCO Staff Brief at 14 (citation omitted).

[136] PUCO Staff Brief at 14-15.

> base rate cases but that is not consistent with the nature of the undertaking here.[137]

It would be inappropriate for the PUCO to consider grossing up the Credit Support Rider revenues for income taxes based upon a corporate tax rate that is not reflective of the amount of taxes that the Utilities actually paid. Therefore, FirstEnergy's adjustment should be rejected.

FirstEnergy's final recommended adjustment to Staff's Credit Support Rider is to increase the amount that Ohio consumers pay, in relation to all other states that FirstEnergy operates in. Under FirstEnergy's modification the allocation percentage to Ohio consumers would increase from 22 percent to 40 percent. Ms. Mikkelsen testified that she objected to the 22% allocation to Ohio consumers because it underestimated the importance of the Ohio operations to FirstEnergy Corp. and thus "penalized" FirstEnergy.[138]

However, the PUCO Staff also found FirstEnergy's argument to be wrong for very valid reasons. Staff stated:

> [FirstEnergy] suggest[s] that in using operating revenues, the Staff understates the significance of the companies to the [FirstEnergy Corp.] family because the companies experience much greater shopping than the other operating companies. But this is exactly the point. The companies *are* a less significant part of the [FirstEnergy Corp.] family *because there is more shopping.* Fewer customers rely on [FirstEnergy Corp.] subsidiaries in Ohio for services. This is the reality of shopping and this was the intent of the legislature. Far from punishing the [Utilities] because of shopping, the Staff's approach shows the success of the legislative initiative. The [Utilities'] approach would deny this reality and pretend that the [Utilities] provide much more in services to Ohio customers than is the case. The significance of the companies to

[137] PUCO Staff Brief at 15-16.

[138] R. Tr. X at 1719-1720; FE Ex. 206 at 11 (Mikkelsen Rehearing Rebuttal).

> the [FirstEnergy Corp.] family has shrunk, the Staff's methodology recognizes this and should be adopted.[139]

As OCC noted in its Initial Rehearing Brief, the record does not support the notion that FirstEnergy intends to pursue funding from other constituents who could shoulder the responsibility to bailout FirstEnergy Corp.[140] If the PUCO approves its Staff's Credit Support Rider, which it should not, then it should not require Ohioans to pay more than their fair share. The PUCO should act to protect Ohioan by limiting their responsibility to no more than 22 percent as Staff recommends. It should reject suggestions to push onto Ohioans responsibility for 40 percent of the CFO deficiency.

Staff also rejected FirstEnergy's proposal to extend the term for collection of the Credit Support Rider to eight years.[141] Staff opined that FirstEnergy's proposal is "simply too long given the nature of the undertaking." Staff further found three years is "a sufficient amount of time for various measures to be taken to attempt to improve the financial situation and to begin to see the effects. It is a good point in time to reassess the companies' needs based on the circumstances as they then exist."[142] Staff also noted implementing the Credit Support Rider for a longer period than recommended builds in an element of risk that should not be introduced.[143] That risk would be borne by FirstEnergy's Ohio customers. Therefore, the PUCO should not consider authorizing the Credit Support Rider for longer than three years.

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[139] PUCO Staff Brief at 16.

[140] OCC/NOAC Brief at 50-51.

[141] PUCO Staff Brief at 16-17.

[142] PUCO Staff Brief at 16-17.

[143] PUCO Staff Brief at 16-17.

PUCO Staff rejected FirstEnergy modifications which would have increased the CSR from $131 million annually to $558 million annually. However, PUCO Staff failed to opine on the inclusion of the economic development value of FirstEnergy having the FirstEnergy Corp. headquarters and nexus of operations in Akron, Ohio.

2. FirstEnergy's modification to PUCO Staff's Proposal for the economic value of its headquarters remaining in Akron, Ohio should be rejected by the PUCO to protect Ohio consumers from significant charges.

PUCO Staff generally recognized there is economic value for the FirstEnergy Corp. headquarters remaining in Akron, Ohio. As such, PUCO Staff included in its proposal the requirement that the headquarters must remain in Akron for the duration of the ESP term for the following reasons:

> One of the conditions imposed by the Staff on its recommended Rider DMR is that the [FirstEnergy Corp.] headquarters should remain in Akron. The reason for this is quite simple. The point of the Staff's grid modernization initiative is to further economic development in Ohio. This economic development comes in many forms, direct construction, labor, innovation made available through the smarter grid, purchasing of equipment, improved reliability. The list goes on and on. It would make little sense to invest all of this effort into growing Ohio's economy but also to allow the headquarters operation to leave the state.

There are several flaws with the PUCO Staff's reasoning. First, there is no requirement that the revenues from the Credit Support Rider be used exclusively for grid modernization.[144] Second, even if the revenues are used for grid modernization, the economic benefits will be realized whether the headquarters remain in Ohio or not. The relocation of FirstEnergy Corp.'s headquarters will not result in the relocation of any of the investment in grid modernization. Interestingly, Duke Energy Ohio went through a

[144] OCC/NOAC Brief at 35-36.

full deployment of smart grid in its service territories and its headquarters are in Charlotte, North Carolina. However, there was no condition on Duke's investment in smart grid being tied to a requirement that its corporate headquarters be in Ohio. The PUCO Staff's Proposal in this regard should be rejected by the PUCO.

Furthermore, the cost of FirstEnergy's modification to the PUCO Staff CSR regarding the condition of the headquarters remaining in Akron, Ohio could reach up to $568 million per year. This is a staggering amount of money that OCC recommends should not be charged to consumers.[145] Even the PUCO Staff believes that FirstEnergy utilities are already recompensed adequately for the presence of the headquarters.[146] However, the Staff considers that point to be clearly arguable, and has left the ultimate decision up to the PUCO.[147]

3. Should the PUCO approve the PUCO Staff Credit Support Rider (or some variation of Staff's Proposal), the revenues collected should be included in the annual Significantly Excessive Earnings Test ("SEET") calculation.

FirstEnergy incorrectly opines that including the Credit Support Rider revenues in the SEET calculation would defeat the purpose of the rider to provide credit support to the Companies. While PUCO Staff did not address this issue in its brief, OCC opposed this FirstEnergy recommendation.[148] This argument is wrong. The purported purpose of the Rider DMR, is to provide funding to permit FE Corp. to maintain investment grade credit ratings.

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[145] OCC/NOAC Brief at 52-53.

[146] PUCO Staff Brief at 18.

[147] PUCO Staff Brief at 18.

[148] See OCC/NOAC Brief at 54-55.

The Credit Support Rider is not an opportunity for FirstEnergy to evade the law or to contribute to significantly excessive earnings of the FirstEnergy Utilities. If the Utilities have significantly excessive earnings, as a result of the Credit Support Rider and all other riders and rates, then the Utilities should be treated the same for SEET review purposes as other Ohio utilities. As required by law, the Utilities should be required to refund the significantly excessive earnings to their customers who paid the ESP rates producing those significantly excessive earnings. [149]

The SEET calculation is a test of the overall earning of the Utilities associated with the adjustments ordered under the ESP. It is not a test of the earnings associated with one particular rider such as Rider DMR.[150] The PUCO should reject FirstEnergy's recommendation and include any revenues that are collected through the Credit Support Rider in the annual SEET calculation.

FirstEnergy argued that excluding the Credit Support Rider revenues from the SEET calculation is consistent with the Commission's 09-786 Order because they are "extraordinary."[151] This argument is wrong and baseless. While it is extraordinary for a public utilities commission to order consumers to pay higher rates to support the credit needs of the utilities' unregulated parent, the revenue stream produced by the adjustment is not extraordinary.[152] Other Ohio utilities, such as Ohio Power, have riders with a stated purpose of distribution grid modernization (Rider DIR) or financial stability (Rider

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149 OCC Ex. 43 (Duann R. Testimony) at 11-12.

150 R. Tr. IV at 930.

151 FE Brief at 42.

152 OCC Ex. 43 at 8-9.

RSR), and the revenues collected under such riders are not excluded from SEET calculation.[153]

If the Credit Support Rider is approved at the amount requested by the Utilities, the earnings and return on equity of the Utilities will increase significantly. Under the proposed Rider DMR, more than $558 million (at least) per year will be collected by the Utilities.[154] $558 million is almost double the amount of the 2015 combined earnings (net income) of three Ohio EDUs ($142 million for Ohio Edison, $66 million for CEI, and $25 million for TE).[155] To protect consumers as the law envisions, these revenues should not be excluded from SEET.

FirstEnergy's argues that if the Credit Support Rider revenues are not excluded from the SEET calculation, the cash received by the Utilities for credit support in one year might have to be refunded to customers in the following year.[156] However, FirstEnergy's argument ignores the fact that excluding the Credit Support Rider revenues in the annual SEET review[157] is inconsistent with Ohio law[158] and prior PUCO orders.[159] Under Ohio law, revenues derived from an ESP that cause a utility to earn significantly excessive earnings should be returned to those consumers who paid the revenues.

Another reason FirstEnergy gives for excluding Credit Support Revenues from the SEET calculation is that if the revenues are not excluded, the PUCO would be unable

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[153] OCC Ex. 43 at 9-10.

[154] FE Ex. 206 at 12.

[155] Staff Ex. 13, Attachment 1.

[156] FE Ex. 206 at 22-24 (Rehearing Rebuttal of Mikkelsen).

[157] FE Ex. 198 at 18 (Rehearing Testimony of Mikkelsen).

[158] See R.C. 4928.143(F).

[159] See *In the Matter of the Investigation into the Development of the Significantly Excessive Earnings Test Pursuant to Amended Substitute Senate Bill 221 for Electric Utilities,* Case No. 09-786-EL-UNC, Finding and Order (June 30, 2010).

to conduct the comparison required by statute: a comparison of the return on common equity during the same period "by publicly traded companies, including utilities, that face comparable business and financial risk" FirstEnergy states: "[n]one of the comparable companies used in the SEET calculation has a Credit Support Rider designed to incent grid modernization through improved access to capital markets on more favorable terms and conditions, or a commitment to maintain a Fortune 200 company headquarters in the state."[160] However, the fact that no other utilities have this credit support mechanism should not be rationale for excluding these revenues from SEET. Instead it speaks to the inappropriateness and illegality of these proposed revenues.

Another argument by FirstEnergy is that the Credit Support Rider revenues also should be excluded because they are "associated with any additional liability or write-off of regulatory assets due to implementing the Companies' ESP IV."[161] However, FirstEnergy's interpretation is wrong. The "additional liability" cited by FirstEnergy clearly refers to the creation of a regulatory liability, not just taking on any new debts. There are a number of riders proposed under ESP IV, such as Rider DCR that would require capital investments in distribution assets and may require the Utilities to take on new debt. However, this requirement (taking on new debt) should not result in the revenues collected through Rider DCR, being excluded from SEET consideration.[162] If the Utilities' interpretation here is adopted by the PUCO, there would be very few rider revenues being included in the SEET calculation. This is contrary to the SEET statutes and PUCO rules. A rate or rider provision approved in an ESP, with certain exceptions, is

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[160] FE Brief at 42.

[161] FE Brief at 42 -43.

[162] OCC Ex. 43 at 9.

considered an "adjustment" in the SEET statute and; therefore, it should be included in the annual SEET calculation.[163]

Finally, FirstEnergy argues that: "[l]astly, because Credit Support Rider is designed to support the Companies' capital requirements for future capital investments related to grid modernization, the Commission may exclude Credit Support Rider revenues from the SEET calculation on the same basis as it has previously excluded the Utilities' deferred carrying charges from the SEET calculation"[164] FirstEnergy's assertion is wrong and not supported by the record in this proceeding and prior Commission Orders.

First, as addressed by numerous parties, FirstEnergy is not required to use the money collected through the Credit Support Rider for grid modernization.[165] The Credit Support Rider has only one purpose -- that is to bail out the Utilities' parent company, FirstEnergy Corp. -- for its bad investment decisions in the past. The Utilities have failed to demonstrate the Credit Support Rider is related to capital investments in Ohio. Second, the annual revenue *collected* through the Credit Support Rider is fundamentally different from a deferred carrying charge. A deferral means that the charge is *not being collected* until later and thus cannot be considered revenues for SEET purposes until the revenues are collected. Therefore, there is no reason to treat the annual revenues collected through the Credit Support Rider differently from the revenues collected through Rider DCR.[166]

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[163] OCC Ex. 43 at 7.

[164] FE Brief at 43.

[165] FE Ex. 206 at 9.

[166] OCC Ex. 43 at 9.

4. Should the PUCO approve the PUCO Staff Credit Support Rider, it should be collected subject to refund.

Mr. Buckley, in his testimony, conditioned the continued receipt of credit support collections from customers on FirstEnergy maintaining its headquarters and nexus of operation in Akron, Ohio.[167] Mr. Buckley even opined that if FirstEnergy did not maintain its headquarters and nexus of operations in Akron Ohio during the entire term of ESP IV, then the entire amount of the credit should be subject to refund.[168] However, FirstEnergy disagrees with PUCO Staff, and states:

> Staff's proposal that the Companies refund all Rider DMR revenues received if the headquarters condition is triggered is **practically unworkable** and, as demonstrated below regarding possibly refunding Rider DMR revenue as part of SEET proceedings, would defeat the purpose of Rider DMR by threatening the value of the credit support to be provided.[169]

Practically unworkable means it could be workable. And the PUCO should find a way to make subject to refund workable for consumers, if the PUCO Staff Proposal (or some variation of that proposal) is approved.

As discussed above, FirstEnergy seeks "[an] annual amount [that] would equal the $558 million associated with the credit support to jump start grid modernization and an additional amount not [to] exceed the economic development value of $568 million arising from having the FirstEnergy Corp. headquarters and nexus of operations in Akron, Ohio." Together, the two components of FirstEnergy's modifications to PUCO Staff's Proposal total a staggering $1.13 billion per year – more than eight times the value of PUCO Staff's Proposal -- over a much longer period of time (nearly eight years). If the

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[167] PUCO Staff Ex. No. 13 at Q&A 13 (Buckley) (emphasis added).

[168] PUCO Staff Ex. No. 13 at Q&A 13 (Buckley)(emphasis added).

[169] FE Brief at 41 (emphasis added).

Credit Support Rider is approved by the PUCO (which OCC opposes), consumers could be charged up to nearly $8.9 billion to support the financial integrity of FirstEnergy Corp. Staff's proposal is controversial, and undoubtedly must withstand a legal challenge on appeal. To protect consumers, these revenues should not be retained by FirstEnergy should an appeal overturn the PUCO's order and determine the Credit Support Rider is unlawful.

V. RATE DESIGN

PUCO Staff's credit support proposal, and FirstEnergy's modifications to the PUCO Staff's Credit Support Rider, directly harm consumers and should not be approved by the PUCO. But if approved (and it should not be), the PUCO should fairly apportion its costs among all customers.

Ohio Energy Group's ("OEG") has proposed one rate design alternative that could harm the residential class by allocating a disproportionate amount of the Credit Support Rider costs to FirstEnergy's residential customers. In its Rehearing Brief, OEG states that due to the unique nature of the Credit Support Rider, a hybrid cost allocation method based on 50 percent on distribution revenues and 50 percent based on demand (4 Coincident Peak) should be used.[170] That rate design recommendation was testified to by OEG Witness Baron and supported by Nucor Steel[171] and Material Sciences.[172] OCC opposes this cost allocation methodology because it would allocate a disproportionately

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[170] OEG Brief at 5.

[171] Nucor Steel Brief at 6-7.

[172] Material Sciences Brief at 26.

high level of costs to residential consumers to the benefit of high usage industrial and commercial customers.

However, OEG also proposed a reasonable alternative cost allocation methodology to lessen the impact on residential consumers. OEG recommended allocating the Credit Support Rider costs first only to the residential class based upon 50 percent demand and 50 percent energy. OEG then proposed to allocate the residual Credit Support Rider costs to the remaining classes based upon: 50 percent distribution revenues and 50 percent demand.[173]

OEG's alternative to allocate costs to residential customers based on 50 percent demand, 50 percent energy is reasonable and should be adopted by the PUCO, if it is to approve PUCO Staff Credit Support Rider or some variation of CSR. This allocation methodology was endorsed on the stand by Staff Witness Turkenton.[174] OEG has estimated that this alternative cost allocation methodology would lessen the rate impact on the residential class by $15.4 million per year.[175] OCC appreciates and supports OEG's alternative allocation methodology as it pertains to the allocation of costs to the residential class. OCC takes no position on the allocation of the residual Credit Support Rider costs as it applies to FirstEnergy's non-residential customers.

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[173] OEG Brief at 8 (emphasis removed).

[174] R. Tr. II at 431 (Turkenton) ("We do not have a staff proposal. My personal thoughts are because, as I indicated with Kurtz, what seems logical to me is that perhaps you could allocate this on a 50/50 basis being 50 percent demand, 50 percent energy, and then you could also charge it on a 50 percent demand basis and 50 percent energy basis but, again, I have not done a cost-of-service study. That just seems to be a more equitable avenue in my mind.")

[175] OEG Brief at 8.

VI. CONCLUSION

FirstEnergy is seeking an exorbitant amount of money from Ohioans. Ohioans footing the bill for the Proposal will pay charges on the order of hundreds of millions (if not billions) of dollars for virtual generation that is not being supplied to them. The PUCO Staff's credit support rider, while costing less, still extracts money from customers without a commitment that the money be spent on grid modernization. Credit support, if needed to jumpstart grid smart, should be addressed in the separate grid modernization proceeding, which will determine the scope of grid smart efforts. FirstEnergy's modifications to the PUCO Staff's CSR should be outright rejected as way, way too costly for customers, and for being tied to a commitment (maintaining headquarters) that customers already are paying for through current ESP rates.

The Public Utilities Commission of Ohio ("PUCO") should protect 1.9 million Ohioans from paying massive subsidies to FirstEnergy. It should reject the Proposal, the PUCO Credit Support Rider, and FirstEnergy's modifications to the CSR. The PUCO should adopt as an alternative a pure market rate offer.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Rehearing Reply Brief (Public Version) was served via electronic service upon the parties this 29th day of August 2016.

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