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**

JOINT REHEARING REPLY BRIEF OF THE PJM POWER PROVIDERS GROUP AND THE ELECTRIC POWER SUPPLY ASSOCIATION

PUBLIC VERSION

August 29, 2016

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I. INTRODUCTION

This case began with The Cleveland Electric Illuminating Company, The Toledo Edison Company and Ohio Edison Company's (the "Companies") proposal for Rider RRS—a proposal that the PJM Power Providers Group[1] and the Electric Power Supply Association[2] ("P3/EPSA") correctly identified as a barely veiled bailout of the Companies' unregulated generation affiliate that had the effect of harming captive ratepayers. The Federal Energy Regulatory Commission ("FERC") agreed. Rather than abandoning their unlawful proposal, the Companies resurrected it in a way that they hoped avoided the reach of FERC's jurisdiction. Notwithstanding P3/EPSA's claim that the Commission lacked jurisdiction to consider it, the Commission rushed Modified Rider RRS to rehearing.

But then Staff unexpectedly introduced Rider DMR, causing the conversation within this proceeding to materially shift: from the ostensible benefits of retaining Ohio generation plants to the ostensible benefits of lower borrowing costs; from the financial wherewithal of the Companies' competitive generation affiliate to the credit-worthiness of FirstEnergy Corp., and from rate stability to grid modernization. But what Staff's proposal (or the Companies' modifications to that proposal) left intact is the basic claim that Ohio ratepayers should pay hundreds of millions or more for empty promises that fail to align with the evidence or sound regulatory policy.

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[1] P3 is a non-profit organization whose members are energy providers in the PJM Interconnection LLC ("PJM") region, conduct business in the PJM balancing authority area, and are signatories to various PJM agreements. Altogether, P3 members own over 84,000 megawatts ("MWs") of generation assets, produce enough power to supply over 20 million homes, and employ over 40,000 people in the PJM region, representing 13 states and the District of Columbia. This brief does not necessarily reflect the specific views of any particular member of P3 with respect to any argument or issue, but collectively presents P3's positions.

[2] EPSA is a national trade association representing leading competitive power suppliers, including generators and marketers. Competitive suppliers, which collectively account for 40 percent of the installed generating capacity in the United States, provide reliable and competitively priced electricity from environmentally responsible facilities. EPSA seeks to bring the benefits of competition to all power customers. This brief does not necessarily reflect the specific views of any particular member of EPSA with respect to any argument or issue, but collectively presents EPSA's positions.

Although the reasons for rejecting Modified Rider RRS and Rider DMR are numerous and palpable, P3/EPSA is not unsympathetic to the Commission's challenging task in this proceeding in balancing the interests of the Companies, intervenor parties, and ratepayers, particularly when the proposals before the Commission make grand claims of rate stability, customer credits in the hundreds of millions, and the potential to obtain "one of the nation's most intelligent distribution grids."[3] But there are simply too many legal and factual flaws with Rider DMR and Modified Rider RRS to gamble that ratepayers will actually realize any of these benefits. If grid modernization in particular is now Staff's goal, then a separate proceeding should be conducted to determine how a robust grid modernization program can be lawfully implemented. That is where a properly constructed grid modernization rider belongs, not in a rehearing proceeding that originated with a barely veiled bailout of the Companies' ailing generation affiliate.

The case against Rider DMR and Modified Rider RRS was cogently set out in P3/EPSA's Initial Rehearing Brief, as well as the briefs of other intervenor parties. To the contrary, Staff's initial rehearing brief contained little legal support for Rider DMR while the Companies simply parroted the testimony of Eileen Mikkelsen. In response to Staff's and the Companies' initial rehearing briefs, P3/EPSA submit this Reply Brief to make five key points for the Commission's consideration.

First, none of the proposals before the Commission in this proceeding will ultimately withstand review by the Supreme Court of Ohio. Rider DMR, both as proposed by Staff and as modified by the Companies, and Modified Rider RRS are all fatally deficient for a host of legal and policy reasons. If any of these proposals is approved by the Commission, the Companies will begin collecting revenue from Ohio ratepayers, continue collecting through the pendency of

[3] Staff Ex. 15 at 16.

the inevitable appeal to the Court, and still continue thereafter until the Commission issues an order effectuating the Court's decision. In light of current Court precedent, Ohio ratepayers will not be eligible to receive a refund for any unlawfully collected revenues. The Commission should avoid awarding the Companies with a windfall given the strong likelihood that the Court will rule against any of these proposals.

Second, the evidence presented by the Companies in this proceeding is simply not credible. This includes the Companies' claim that (i) Modified Rider RRS will produce a credit for ratepayers; (ii) the impetus for Modified Rider RRS is rate stability for ratepayers rather than a bare, unwarranted subsidy to the Companies, their parent and affiliates; (iii) Modified Rider RRS enjoys widespread support; and (iv) Modified Rider RRS revenues will not be shared with their competitive business affiliate, FirstEnergy Solutions Corp. ("FES").

Third, the Commission should reject Rider DMR for a host of statutory reasons, including (i) it is unjust and unreasonable under R.C. 4905.22, (ii) it is not authorized as a provision "regarding the utility's distribution service" under R.C. 4928.143(B)(2)(h), and (iii) it fails to qualify as an economic development program under R.C. 4928.143(B)(2)(i).

Fourth, many reasons compel the rejection of Modified Rider RRS, including (i) it will result in ratepayer charges in the hundreds of millions or more during the term of ESP IV; (ii) it will discourage, rather than promote, economic development in the state; (iii) it violates R.C. 4928.38 as an unlawful transition charge; and (iv) it raises the same concerns of affiliate abuse that FERC raised with regard to original Rider RRS.

Fifth, the Commission's primary role in this proceeding should be to safeguard the interests of ratepayers and the competitive markets, not the interest of FirstEnergy Corp., its shareholders or its competitive generation affiliate. When the interests of ratepayers and competitive markets are properly balanced against these countervailing interests, the only sensible and legally-appropriate decision for the Commission is to reject both Rider DMR and Modified Rider RRS.

For all the reasons set forth in P3/EPSA's Initial Rehearing Brief and the reasons set forth herein, the Commission should reject Modified Rider RRS and Rider DMR.

II. NONE OF THE PROPOSALS WILL WITHSTAND REVIEW BY THE SUPREME COURT OF OHIO

P3/EPSA (and others) have brought to the Commission's attention many legal inadequacies of the current pending rider proposals, specifically explaining that:

- The Modified Rider RRS proposal was not properly preserved for consideration on rehearing because it was not included in or part of the Companies' application for rehearing.

- The Commission lacks jurisdiction to consider Rider DMR because, as a brand new proposal raised for the first time on June 29, 2016, it is not a matter that could be raised on rehearing.

- The Modified Rider RRS and Rider DMR proposals are not authorized by the plain language of R.C. 4928.143(B)(2)(d), (B)(2)(i), and (B)(2)(h).

- With the Modified Rider RRS and Rider DMR proposals, the ESP IV will not be more favorable in the aggregate than an MRO.

- The Modified Rider RRS and Rider DMR proposals will result in the recovery of "transition revenues or any equivalent revenues," contrary to R.C. 4928.38.

- The Modified Rider RRS and Rider DMR proposals will violate R.C. 4905.22 because they are unjust and unreasonable charges.

These legal inadequacies have not and cannot be cured. As a result, the pending rider proposals will not withstand review by the Supreme Court of Ohio.

Importantly, the Commission must recognize that, in the event of an approval of one of these unlawful rider proposals and its related tariff sheets, the Companies will begin to collect from the ratepayers and will continue to collect that money, including during the appeal and following a Court reversal. This is because:

- *During appeals*: While the rate is in effect, the public utility must charge its customers in accordance with the Commission-approved rate schedule,[4] even during an appeal.
- *Upon reversing the ruling*: The fact that the Supreme Court of Ohio finds the Commission's order to be unreasonable or unlawful "affords no right of action for restitution of the increase in charges collected during the pendency of the appeal."[5]
- *Upon remand*: Any remand order from the Supreme Court of Ohio does not automatically render the rates unlawful; rather, the rate schedule remains in effect until the Commission executes the Court's mandate by an appropriate order.[6]

As of today, the Supreme Court of Ohio has consistently applied *Keco* and its progeny, refusing to grant refunds in appeals from Commission orders.[7] The result is that the Companies can collect millions of dollars under unlawful rates and ratepayers will have no recourse. For example, in *In re Columbus Southern Power Co.*, Columbus Southern Power Company unfairly collected $368 million under an unlawful rate and the ratepayers received no refund.[8]

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[4] *Lucas County Comm'rs v. Pub. Util. Comm.*, 80 Ohio St.3d 344, 347 (1997).
[5] *Keco Industries, Inc. v. Cincinnati & Suburban Bell. Tel. Co.*, 166 Ohio St. 254 (1957), paragraph two of the syllabus.
[6] *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.*, 46 Ohio St.2d 105 (1976), paragraph two of the syllabus.
[7] *Lucas County Comm'rs v. Pub. Util. Comm*, 80 Ohio St.3d 344 (1997); and *Green Cove Resort I Owners' Ass'n v. PUC*, 103 Ohio St.3d 125 (2004); *Ohio Consumers' Counsel v. Pub. Util. Comm*, 121 Ohio St.3d 362 (2009); *In re Columbus Southern Power Co.*, 138 Ohio St.3d 448 (2014).
[8] *Columbus Southern Power Co.*, at ¶56 ("AEP collected $368 million in POLR charges during the ESP, without any evidence that would justify the cost recovery. But under *Keco's* no-refund rule, AEP is permitted to keep it, resulting in a windfall for AEP.").

The Commission should not provide a similar legally prohibited windfall to the Companies when a Supreme Court reversal of any decision to approve Modified Rider RRS or Rider DMR will likely follow.

III. THE COMPANIES' EVIDENCE IS NOT CREDIBLE

On rehearing, the Companies presented one primary witness to support its proposals for both Modified Rider RRS and DMR – Ms. Mikkelsen. The Companies' evidence, however, demonstrates that multiple key aspects of the Companies' case on rehearing are not credible and, as such, should be rejected. The following points should be considered by the Commission when weighing the Companies' evidence.

A. The Companies Continue to Stand Behind Projections That are Clearly Inaccurate

During the initial phase of this proceeding, the Companies claimed that the original Rider RRS would result, over the entire eight-year period, in a net credit of $561 million to ratepayers.[9] On rehearing, the Companies continued to claim in testimony and at hearing that Modified Rider RRS will result in the exact same net credit of $561 million to ratepayers as the original Rider RRS.[10] The Companies made this claim despite the fact that:

- Modified Rider RRS uses a different formula than Rider RRS;[11] and
- Energy forward prices and capacity prices are known for the 2016-2018 time period *and they differ* from what had been used in the Companies' earlier projections.[12]

[9] Company Ex. 34 at Attachment JAR-1.
[10] Rehearing Tr. Vol. 1 at 53-55.
[11] Companies Ex. 197 at 5-6.
[12] Rehearing Tr. Vol. 1 at 55, 129-130, 145, 193-194; Rehearing Tr. Vol. 5 at 1187-1188; 1192, 1198-1199, 1204-12-06, 1207-1208.

While the Companies failed to take the effort to provide a credible calculation of the impact of their Modified Rider RRS, P3/EPSA witness Dr. Kalt presented the yearly impact of Modified Rider RRS based on those now-known inputs and the impact of Modified Rider RRS is significantly different (as had been predicted during the first phase of this proceeding).[13] Below is a comparison:

Calculations	**2016 (June-Dec.)**	**2017**	**2018**
Companies' under recovery (in millions), resulting in a rider charge	$155	$175	$84
Dr. Kalt's under recovery (in millions), resulting in a rider charge	$243	$410	$477
Difference	$88	$235	$393
TOTAL (2016-2018) Difference = $716 million			

The Companies' continued testimony that Modified Rider RRS will result in the same $561 million credit over the ESP IV as predicted for the original Rider RRS using outdated data is not credible.

B. The Companies Continue to Claim That Customers Need a Hedge to Provide Rate Stability When the Origin of Rider RRS was FES' Balance Sheet

Throughout this proceeding, the Companies have cynically stuck to their claim that the purpose of original Rider RRS was to provide Ohioans with a hedge against instability in retail rates. But the overwhelming evidence shows that rate stability was never the real aim of Rider RRS. Rather, the Companies first proposed original Rider RRS to the Commission as a way of shoring up the weak balance sheet of their ailing affiliate. Original Rider RRS was meant to "add value" to ESP IV and "provide some certainty in return for [FES'] plants."[14] But because a direct cash infusion to FES was not a permissible provision of an electric security plan ("ESP"),

[13] P3/EPSA Ex. 19; Sierra Club Ex. 89.
[14] Tr. Vol. 11 at 2290.

the Companies packaged their proposal as a rate-stability provision under R.C. 4928.143(B)(2)(d). P3/EPSA and other intervenors rightly objected that instability in retail rates was never a problem calling for a solution, and that in any event, Rider RRS was not going to be an effective means of guarding against rate instability.[15]

Despite their efforts to provide a direct subsidy to FES being stymied by FERC, the Companies continue to push for Modified Rider RRS under the auspices of rate stability, claiming that "[t]he benefits provided by Stipulated ESP IV are too important to the future of Ohio to be delayed."[16] But the record continues to reflect that rate stability is still mere window dressing—like their original proposal, Modified Rider RRS is a poorly-cloaked ratepayer-funded subsidy worth hundreds of millions or more.

C. The Companies Rely on Hearsay to Claim That the Stipulation Signatory Parties Support Modified Rider RRS

The Companies claim that Modified Rider RRS is "supported by nearly all of the Signatory Parties to Stipulated ESP IV."[17] But the only support for this claim is a self-serving letter filed by the Companies' counsel,[18] which constitutes classic inadmissible hearsay, and the tepid support of three parties, the Ohio Energy Group ("OEG"), Nucor Steel Marion, Inc. ("Nucor") and Material Sciences Corporation ("MSC").

In its brief, OEG noted that "Staff raises legitimate and important concerns with respect to FirstEnergy's revised RRS proposal."[19] OEG also acknowledged that it was supporting

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[15] *See, e.g.,* P3/EPSA Initial Brief at 15-16.
[16] Companies Application for Rehearing at 14. *See also* Companies Initial Rehearing Brief at 2.
[17] Companies Initial Rehearing Brief at 16.
[18] Companies Ex. 198.
[19] OEG Initial Rehearing Brief at 3.

Modified Rider RRS "in accordance with its obligations under the Stipulations filed in this proceeding."[20]

For their part, MSC and Nucor filed briefs that simply parroted the claims Companies witness Mikkelsen made regarding Modified Rider RRS in her pre-filed testimonies. The only fact that can be gleaned from this record is that support for Modified Rider RRS among the signatory parties is halfhearted and offered with the aim of securing the quid pro quo benefits obtained by these parties in the Stipulation, rather than out of any genuine conviction that Modified Rider RRS is good for Ohio.

D. The Companies Claim That no Modified Rider RRS Revenues Will Flow to Competitive Business Affiliates but Refuse to Segregate any of That Money

The Companies claim that revenues from Modified Rider RRS would not end up in the hands of FES because "[t]here are no contracts or any other form of an agreement between the Companies and FES that would require the Companies to share the revenues or expenses of modified Rider RRS with FES" and that "[t]his proposal was not designed to transfer regulated revenues to the competitive operations (including FES)."[21] But that is not the case. As intervenor parties established in this proceeding, there *is* a way to transfer Modified Rider RRS revenues to FES—by transferring those revenues through dividends from the Companies to FirstEnergy Corp. and then investing that money into FES.[22]

Tellingly, despite their contention that Modified Rider RRS, is "not designed" to transfer revenues to competitive operations, the Companies refuse to guarantee, limit, restrict or implement other means by which to insulate or "ring fence" the monies.[23] Given the Companies'

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[20] *Id.*
[21] Companies Ex. 197 at 11. *See also* Companies Initial Rehearing Brief at 14.
[22] See Section IV. D.
[23] Rehearing Tr. Vol. 1 at 71-73. "Ring fencing" is a way to partially insulate a utility or an entity from the actions of other members of the corporate family. Rehearing Tr. Vol. 3 at 730.

plain intent only a few months earlier to use Rider RRS revenues to “provide certainty” to FES, the Commission should be leery of the Companies’ steadfast refusal to offer any commitments or guarantees that Modified Rider RRS revenues would be segregated from FES. The risk of affiliate abuse in the form of captive ratepayer dollars subsidizing an unregulated competitive merchant business was precisely the concern that motivated FERC to rescind the Companies’ and FES’ affiliate waivers.[24] That concern is not lessened simply because FirstEnergy Corp. has announced plans to become a fully regulated utility holding company.[25] Until such plans are realized, the possibility of affiliate abuse remains, and the Commission should view the Companies’ refusal to segregate Modified Rider RRS dollars from FES with well-deserved suspicion.

IV. THE COMMISSION SHOULD REJECT RIDER DMR

A. Rider DMR Should be Considered—if at all—in a Separate Proceeding

While Staff and the Companies try their best to squeeze a new rider (Rider DMR) into the context of rehearing, Rider DMR simply fails to fit within the statutorily-approved framework to which the Commission must adhere.

First, as P3/EPSA explained in its Initial Rehearing Brief,[26] Rider DMR suffers from a fatal jurisdictional defect. Rider DMR is being considered for the first time on rehearing, but R.C. 4903.10 contains two significant limitations on the Commission’s jurisdiction to hear matters on rehearing: (1) the application for rehearing must be “in respect to any matters determined in the proceeding” and (2) a hearing must be held “on the matter specified in such application.”[27] Rider DMR does not satisfy either limitation. Because Rider DMR is an entirely

[24] See Section IV. D.
[25] Rehearing Tr. Vol. 10 at 1783-1786.
[26] *See* P3/EPSA Initial Rehearing Brief at 21-25.
[27] R.C. 4903.10 (Emphasis added).

different proposal from Rider RRS—with a different objective, different mechanics, and a different claimed outcome on ratepayers, Rider DMR does not address "any matters determined in this proceeding." Second, because Rider DMR was not proposed in an application for rehearing, it cannot be considered in this proceeding, which is limited to "the matter specified" in an application for rehearing. For that reason, the Commission lacks jurisdiction to consider Rider DMR in this case.

Next, even if the Commission had jurisdiction over Rider DMR (which it does not), Rider DMR is not authorized under any statute pertaining to an ESP, which is the subject matter of this proceeding. The Commission's ability to approve an ESP is circumscribed by the express provisions of R.C. Chapter 4928 and Rider DMR finds no authority under any provisions of that chapter. Specifically, as P3/EPSA noted in its Initial Rehearing Brief, and as further set out herein, Rider DMR is not authorized under either R.C. 4928.143(B)(2)(h), concerning "provisions regarding the utility's distribution service" or under R.C. 4928.143(B)(2)(i), concerning "economic development, job retention, and energy efficiency programs."

If Staff or the Companies truly believe that the Companies or their parent FirstEnergy Corp. require credit support in order for the Companies to proceed with grid modernization, then their only appropriate recourse would be to commence a separate proceeding, potentially within the context of the emergency relief provisions of R.C. 4909.16. On the existing record, it is questionable as to whether the Companies would meet the requirements of that statute.[28] But what is clear is that Rider DMR is not properly before the Commission in this proceeding.

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[28] For one, the Companies' credit ratings are all currently at investment grade. Rehearing Tr. Vol. 10 at 1612. Moreover, there is no testimony from Staff or the Companies that the Companies are undergoing an emergency.

B. Neither Staff nor the Companies Have Established That Rider DMR is Just and Reasonable as Required by R.C. 4905.22

In order to be lawful, Rider DMR must be a "just" and "reasonable" charge.[29] Staff and the Companies contend it is just and reasonable for Ohio ratepayers to pay hundreds of millions (if not billions) of dollars to the Companies' parent corporation—with no strings attached—and with only the hope that this additional revenue will maintain FirstEnergy Corp.'s and the Companies' investment-credit ratings, thereby presumably encouraging the Companies to jump-start grid modernization. But the Commission should not be persuaded that Rider DMR is the solution for this proceeding. Rider DMR is an ill-conceived proposal that is founded on speculation and wishful thinking, lacks evidentiary support, and is grossly unjust and unreasonable for a host of legal and policy reasons, including the grounds that P3/EPSA set forth in its Initial Rehearing Brief, and the grounds set forth herein.

1. Rider DMR forces ratepayers to pay for the business decisions of the Companies' parent corporation and unregulated generation affiliate.

Staff asks the Commission to approve Rider DMR because it would support FirstEnergy Corp.'s investment-grade credit rating, thereby avoiding a downgrade that Staff claims would increase the Companies' future borrowing costs.[30] Nothing in the record suggests that the Companies played any role in FirstEnergy's Corp.'s weakened credit metrics, yet Staff asks the Commission to ignore this fact in considering Rider DMR, contending in its brief that it "does not matter."[31] But Staff is wrong. It is unjust and unreasonable to require Ohio ratepayers to pay for the consequences of decision-making having nothing to do with the Companies and everything to do with FirstEnergy Corp. and its competitive businesses, all of whom are not regulated by the Commission.

[29] R.C. 4905.22.
[30] Staff Ex. 15, n. 26.
[31] Staff Initial Brief at 9.

Staff's recommendation that ratepayers pay $131 million a year in Rider DMR charges was calculated by allocating to the Companies 22% of the total revenue shortfall that needed to be met in order for FirstEnergy Corp. to achieve a Cash from Operations to Debt ("CFO to Debt") ratio of 14.5% from 2011-2015.[32] Staff's decision to make the Companies responsible for 22% of that shortfall was made on the basis of the percentage of revenues that the Companies contributed to FirstEnergy Corp. in 2015.[33] Similarly, the Companies' proposed allocation factor of 40% was based on the portion of total net income that the Companies contributed to FirstEnergy Corp.[34]

But in deciding that the Companies must shoulder 22%/40% of the total credit shortfall, neither Staff nor the Companies ever attempted to determine whether the Companies are <u>responsible for any</u> of FirstEnergy Corp.'s alleged credit woes, and if so, to what extent. For example, Staff did not evaluate how much of FirstEnergy Corp.'s shortfall was due to any shortfall in CFO to Debt specific to the Companies or any other FirstEnergy Corp. subsidiaries, such as its competitive business subsidiary, FES.[35]

While the Commission must proceed without the benefit of this information, what is in the record suggests that FirstEnergy's Corp.'s credit woes arise from issues involving its unregulated competitive businesses, rather than the Companies or other regulated subsidiaries. For example, in revising FirstEnergy Corp.'s outlook from stable to negative, Standard and Poor's ("S&P") noted that:

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[32] Staff Ex. 13 at 3-4; *see also* Staff Post Rehearing Brief at 7.
[33] *Id.* at 3.
[34] Companies Ex. 206 at 132.
[35] Rehearing Tr. Vol. 3. at 540-542; Rehearing Tr. Vol. 10 at 1618, 1630.

- FirstEnergy Corp.'s "higher-risk competitive businesses greatly increases the company's exposure to lower generation volumes and commodity prices."[36]
- "FirstEnergy's financial risk profile reflects our revised base-case scenario that does not include a PPA but includes sustained weak commodity prices, capital spending of about $3 billion, and minimal sales growth."[37]
- It could "affirm the rating and revise the outlook to stable . . . if the company's business risk profile materially improves by reducing the size of its higher-risk competitive business."[38]

Thus, it is FirstEnergy Corp.'s higher-risk competitive merchant businesses, like FES, and not the regulated businesses like the Companies that are the likely cause of FirstEnergy Corp.'s credit woes. Yet, Rider DMR places Ohio ratepayers in the position of providing cash to address the financial needs of FirstEnergy Corp. and its unregulated competitive businesses. By allocating to the Companies—and therefore, to Ohio ratepayers—the responsibility of addressing credit woes that originate from FirstEnergy Corp.'s competitive businesses, Rider DMR effectively ensures that an unregulated competitive entity like FES is not "on its own" as Senate Bill 3 required,[39] but instead has the (unwilling) backing of Ohio ratepayers. That is manifestly unjust and unreasonable.

2. FirstEnergy Corp. and the Companies do not need Rider DMR to maintain their investment grade credit rating.

Staff claims that without Rider DMR, FirstEnergy Corp. risks experiencing a downgrade, which, in turn, hampers the Companies' borrowing ability.[40] But there is a lack of record

[36] Staff Ex. 13, Attachment 3 at 3.
[37] *Id.*
[38] *Id.*
[39] R.C. 4928.38. *See also AK Steel Corp. v. Pub. Util. Comm.*, 95 Ohio St.3d 81 (2002) (providing general background concerning Senate Bill 3).

evidence to suggest that such a downgrade will occur, and what information is available suggests there is no risk of a downgrade to FirstEnergy Corp. in light of recent developments. The Commission simply lacks the appropriate evidentiary record in order to approve Rider DMR.

a. The record contains no forecasts of the FirstEnergy Corp.'s CFO to Debt Ratio.

Staff contends that FirstEnergy Corp. risks a downgrade unless it maintains a 14.5% CFO to Debt ratio, citing a January 20, 2016 Credit Opinion by Moody's.[41] Therefore, evidence of where FirstEnergy Corp.'s CFO to Debt ratio is heading would be highly probative to the Commission in evaluating the risk of a downgrade. But as noted by the Sierra Club in its Initial Rehearing Brief, the Companies wrongly refused to provide Staff with projections of FirstEnergy Corp.'s CFO to Debt ratio, forcing Staff to rely on historic data for the last five years.[42] The use of historic information was a "fall back" for Staff, and Staff witness Buckley conceded that "probably the best thing to do would be to look at forecasted numbers."[43] Without this information, which was readily available to the Companies, the Commission cannot accurately assess and cannot point to any record evidence that FirstEnergy Corp. will be unable to attain the targeted CFO to Debt ratio.

b. FirstEnergy Corp. is capable of maintaining its investment grade credit rating without the need for Rider DMR.

While the Commission cannot rely on the benefit of financial projections in assessing the likelihood that FirstEnergy Corp. will be downgraded, the available record evidence suggests that FirstEnergy Corp. is capable of maintaining its investment grade credit rating without the

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[40] Staff Ex. 13 at 4, Staff Ex. 15 at 15, Staff Rehearing Brief at 6-7. The Companies similarly claim that a downgrade would "drive up the Companies' cost of doing business, which ultimately impacts the Companies' customers. Companies Initial Rehearing Brief at 30.

[41] Staff Ex. 13 at 4. Moody's noted that a negative rating action could result if FirstEnergy Corp. did not maintain a CFO to Debt ratio of 14-15%. *Id.* at Attachment 3.

[42] The Companies contend that such financial information was "material nonpublic information." Rehearing Tr. Vol. 10 at 1617. In its brief, Sierra Club soundly refutes this contention. *See* Sierra Club, Initial Brief at 60-64.

[43] Rehearing Tr. Vol. 3 at 742.

need to resort to Rider DMR. For example, both Moody's and S&P give FirstEnergy Corp. an investment grade credit rating.[44] Also, while Staff relies on a January 20, 2016 Credit Opinion by Moody's indicating that a "negative rating action could also occur" if FirstEnergy Corp. does not maintain a CFO to Debt ratio of 14-15%,[45] it is telling that FirstEnergy Corp. has retained its investment credit rating in prior years,[46] despite having considerably lower CFO to Debt Ratios of 10.20% in 2014 and 12.40% in 2015.[47]

Staff also relies on statements by Moody's and S&P that a credit rating downgrade could result if FirstEnergy Corp. does not improve its credit metrics. Those publications indicate, however, that the problem lies not within FirstEnergy Corp.'s regulated subsidiaries, but rather its unregulated competitive businesses. But FirstEnergy Corp. has recently signaled its intent to become a fully regulated utility holding company. Any steps that FirstEnergy Corp. takes towards accomplishing that goal will be regarded positively by ratings agencies, and will likely eliminate any future possibility of a downgrade, obviating the need for Rider DMR.

In fact, both Moody's and S&P focus their concerns with FirstEnergy Corp.'s credit ratings on its competitive merchant business. In its January 20, 2016 Credit Opinion, Moody's notes as a "credit strength[]" the "scale and diversity of rate regulated cash flows" while noting as a "credit challenge[]" "[w]eak merchant market conditions."[48] Moody's explained that its decision to affirm FirstEnergy Corp's investment grade credit rating was based in part on the fact that its "merchant business has been significantly downsized over the past year," which lowered FirstEnergy Corp's risk profile.[49] Similarly, in its April 28, 2016 Research Update revising

[44] Staff Ex. 13, Attachments 2 and 3; P3/EPSA Ex. 21.
[45] Staff Ex. 13, Attachments 2.
[46] Rehearing Tr. Vol. 10 at 1780.
[47] Staff. Ex. 13 at 4.
[48] Staff Ex. 13, Attachment 2 at 2.
[49] *Id.* at 4.

FirstEnergy Corp.'s outlook from stable to negative, S&P noted that "[t]he higher-risk competitive businesses greatly increases [FirstEnergy Corp.'s] exposure to lower generation volumes and commodity prices" but that the outlook could be upgraded if "the company's business risk profile materially improves by reducing the size of its higher-risk competitive business."[50]

More recently—perhaps in response to the signals from the credit agencies—FirstEnergy Corp. announced in an earnings call that it plans to exit the merchant business and be a fully regulated utility holding company.[51] Following that announcement, on July 26, 2016, Moody's downgraded the credit rating of FirstEnergy's Corp.'s merchant business subsidiaries FES and Allegheny Energy Supply Company, LLC ("AES") from an investment grade (Baa3) to a non-investment grade (Ba2).[52] Meanwhile, Moody's did not disturb the credit ratings of either FirstEnergy Corp. or the Companies.[53] Moody's explained that its downgrade of FES and AES "reflect[ed] Moody's decision to delink the ratings on these companies from that of parent FirstEnergy [Corp.] following its decision to eventually exit the merchant business and transition to a purely regulated utility holding company."[54]

Given FirstEnergy Corp.'s stated goal of transitioning to a fully regulated utility holding company, it is reasonable to expect the company's credit metrics to improve as it works to divest itself of its competitive-merchant business. Moody's decision to downgrade FES and AES while retaining the investment grade credit rating for FirstEnergy Corp. and the Companies provides a strong indication that credit agencies will view FirstEnergy Corp. more favorably going forward. In light of FirstEnergy Corp.'s announcement that it will exit the merchant business, the record

[50] Staff Ex. 13, Attachment 3 at 3.
[51] Rehearing Tr. Vol. 10 at 1769-1770.
[52] P3/EPSA Ex. 21 at 1; Rehearing Tr. Vol. 10 at 1772.
[53] Rehearing Tr. Vol. 10 at 1774.
[54] P3/EPSA Ex. 21 at 1.

evidence suggests that there is considerably less risk of a downgrade to FirstEnergy Corp., and therefore, no need for Ohio ratepayers to undertake further credit support through Rider DMR.[55]

c. FirstEnergy Corp. can take further measures to maintain its investment grade credit rating without the need for Rider DMR.

In addition to divesting itself of its competitive businesses, the record reflects that FirstEnergy Corp. has additional means of maintaining its investment grade credit rating—none of which necessitate Ohio ratepayers providing credit support through Rider DMR. As Ohio Manufacturers' Association Energy Group ("OMAEG") witness Lause explained, there are a number of actions that FirstEnergy Corp. can take to improve its credit metrics:[56]

> For example, some key areas that could be addressed are Selling General and Administrative (SG&A) costs, including advertising, headcounts, and executive compensation. Other significant cash flow opportunities are curtailing or rationalizing capital spending and possibly reviewing the level of dividend payments being made to shareholders. While painful, some companies need to sell off some assets or curtain a portion of their operations in order to improve future cash flows. These are the types of fiscally responsible actions that public companies should be prepared to take and I would expect these cost saving measures to occur prior to a company seeking a corporate bailout in the form of a subsidiary from captive customers.

The record reflects that the Companies still have yet to undertake many of these steps. For example, Companies witness Mikkelsen could not recall if FirstEnergy Corp.'s management continued to receive bonuses during the past three years,[57] and did not know whether FirstEnergy Corp. intended to continue with future bonuses for management under its short-term and long-term incentives programs.[58] Additionally, Ms. Mikkelsen was unaware of whether management

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[55] Ironically, inasmuch as approving Rider DMR may encourage FirstEnergy Corp. to exit the merchant business sooner than it otherwise would, Rider DMR would have the effect of increasing the likelihood of plant closure in Ohio, contrary to the stated aims of the Commission during the first phase of this proceeding.
[56] OMAEG Ex. 39 at 10.
[57] Rehearing Tr. Vol. 10 at 1631.
[58] *Id.* at 1736.

was scheduled to take any pay reductions.[59] Further, Ms. Mikkelsen indicated that FirstEnergy Corp. previously reduced its annual dividend from $2.20 to $1.44 per share, which created a savings of over $300 million annually.[60] If FirstEnergy Corp. was to further reduce its dividend by a comparable amount, it could obtain hundreds of millions more in available cash flow.

By undertaking steps to improve its cash flow, coupled with following through with its stated goal of transitioning to a fully regulated utility holding company, FirstEnergy Corp. will be in a position to maintain its investment-grade credit rating without the necessity for forcing captive ratepayers to pay hundreds of millions or more in additional credit support through Rider DMR.

3. The record does not support Staff and the Companies' claim that ratepayers will be worse off under a downgrade than with Rider DMR.

The overarching premise of Rider DMR is that paying the Companies $131 million (or more) annually will ultimately benefit ratepayers. Specifically, Staff contends, Rider DMR will help FirstEnergy Corp. retain its investment-grade credit rating,[61] which in turn will ensure that the Companies' borrowing costs to finance grid modernization are lower than they would have been had a downgrade of FirstEnergy Corp. occurred.[62] In other words, according to Staff, "to the extent FirstEnergy Corporation falls below investment grade…future financing costs to the Companies could increase."[63] These increased borrowing costs would then presumably translate to higher rates for customers if and when the Companies undertake borrowing to finance grid modernization.[64]

[59] *Id.* at 1736-1737.
[60] Companies Ex. 206 at 17.
[61] Staff Ex. 13 at 2
[62] Staff Ex. 15 at 15, n. 26.
[63] *Id. See also* Staff Post-Hearing Brief at 6-7.
[64] Rehearing Tr. Vol. 3 at 723-724.

An unstated assumption of Rider DMR, therefore, is that the impact of increased borrowing costs to ratepayers from a downgrade of FirstEnergy Corp. would exceed the charge ratepayers would pay under Rider DMR. But there is nothing in the record to indicate that this would, in fact, be the case. Specifically, neither Staff nor the Companies have offered any evidence quantifying the impact of increased costs to customers that would result from a downgrade of FirstEnergy Corp. When asked, Staff Witness Buckley responded that the Companies' refusal to provide key information hampered Staff's ability to make these calculations:[65]

> Q. (By Mr. Fisk) And have you done any calculation of how much – by how much the borrowing costs for the companies would increase if FirstEnergy Corp. were downgraded.
>
> A. We have not specifically made those calculations. However, in a Data Request, we – we asked for general calculations or general expenses and weren't provided those. To be fair, there could be a lot of variations and a lot of play in - -in what happens.

The most Mr. Buckley could say was that:[66]

> There are a lot of things that can happen that affect borrowing costs. I don't think a downgrade would be positive. I don't think it would in any way lower the borrowing costs.

Similarly, the Companies did not attempt to quantify the impact to customers of increased borrowing costs. Ms. Mikkelsen said she did not think that quantification can occur today because "[i]t would be dependent on a number of future circumstance such as what level of debt is being sought, what the market conditions are at that time, [and] what the companies' credit

[65] *Id.* at 575-576.
[66] *Id.*

ratings are at that time."[67] But the fact that quantifying future borrowing costs involves a number of variables does not relieve Staff or the Companies from offering some quantifiable projections of these costs. For example, elsewhere in this proceeding, the Companies have not hesitated to submit involved multi-variable financial models, such as the projections of future energy and capacity prices by Companies witness Rose[68] or the economic impact analyses performed by Companies witness Murley.[69] But conveniently, the Companies made no attempt to offer such projections here, and, in fact, appeared to have stymied Staff's attempts at making these calculations as well.

Ultimately, the Commission must determine whether Rider DMR is just and reasonable, and under the circumstances, this requires evaluating the strength of Staff and the Companies' contention that Rider DMR could be financially beneficial for ratepayers. While Staff and the Companies contend that Rider DMR will be financially beneficial for ratepayers by avoiding the negative impact of the Companies' increased borrowing costs that would result from a downgrade of FirstEnergy Corp.'s investment-grade credit rating, nothing in the record offers any quantifiable evidence to suggest that this would be the case. When tasked with weighing the putative benefits of Rider DMR—which is entirely speculative and unsupported by any quantifiable information—against the certainty that ratepayers will spend $131 million a year (under Staff's formulation) to possibly over $1 billion a year (under the Companies' formulation), the Commission must conclude that Rider DMR is neither just nor reasonable.

[67] Rehearing Tr. Vol. 10 at 1627.
[68] *See, e.g.* Company Ex. 17.
[69] *See* Company Ex. 35, Companies Ex. 205.

4. Rider DMR will not guarantee grid modernization in the Companies' service territory.

Lastly, Rider DMR is unjust and unreasonable because Rider DMR contains no requirement that the Companies undertake any concrete grid modernization efforts. The ostensible purpose of Rider DMR is to "enable the Companies to procure funds to jumpstart their distribution grid modernization efforts."[70] But there are no guarantees whatsoever that ratepayers spending $131 million to $1.126 billion per year under Rider DMR will achieve any tangible grid modernization results. Specifically, while Staff "hopes" that the Companies will modernize the grid as the result of Rider DMR,[71] there are no commitments or guarantees regarding grid modernization whatsoever associated with Rider DMR. Specifically:

- The Companies would not be required to spend any of the revenues received through Rider DMR to grid modernization initiatives.[72]
- The Companies would not be required to undertake grid modernization initiatives within a certain time frame.[73]
- The Companies would not be required to make any certain level of investment in grid modernization.[74]
- Rider DMR revenues will not be required to be spent solely within the Companies.[75]
- The Companies are unwilling to make any commitments to spend Rider DMR money solely within the Companies, or solely for modernization efforts.[76]
- The Companies acknowledge that Rider DMR revenues could be spent on maturing debt, funding of pensions, or other items.[77]

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[70] Staff Ex. 15 at 15.
[71] Rehearing Tr. Vol. 2 at 429, 472,
[72] Rehearing Tr. Vol. 4 at 957.
[73] Rehearing Tr. Vol. 4 at 1008; Tr. Vol. 10 at 1609.
[74] Rehearing Tr. Vol. 3 at 647-648.
[75] *Id.* at 958.
[76] Rehearing Tr. Vol. 10 at 1604, 1607-1608.
[77] *Id.* at 1607.

- There are no prohibitions on using Rider DMR revenues for dividends to FirstEnergy Corp., which could spend that money at its "prerogative."[78]

- While the Companies have previously filed a grid modernization business plan proposing several modernization scenarios, it lacks any key details such as costs, a recommendation scenario, detailed deployment schedule, and other specifics.[79]

It is unjust and unreasonable to ask ratepayers to spend hundreds of millions (or even, in excess of a billion) dollars based solely on the "hope" that the Companies would elect to proceed with grid modernization.

For all of the foregoing reasons, and for the reasons stated in P3/EPSA's Initial Rehearing Brief, the Commission should find that Rider DMR would be an unjust and unreasonable charge under R.C. 4905.22.

C. Rider DMR is not Authorized Under R.C. 4928.143(B)(2)(h)

While Staff is silent on any statutory authority in its initial brief, the Companies try to shoehorn Rider DMR into R.C. 4928.143(B)(2)(h), which authorizes the inclusion of the following in an ESP:

> **<u>Provisions regarding the utility's distribution service, including, without limitation</u>** and notwithstanding any provision of Title XLIX of the Revised Code to the contrary, **<u>provisions regarding single issue ratemaking,</u>** a revenue decoupling mechanism or any other incentive ratemaking, and provisions **<u>regarding distribution infrastructure and modernization incentives for the electric distribution utility</u>**. (Emphasis added.)

As P3/EPSA explained in its Initial Rehearing Brief, and as further set out herein, R.C. 4928.143(B)(2)(h) does not authorize Rider DMR.

[78] Rehearing Tr. Vol. 3 at 584; Rehearing Tr. Vol. 10 at 1608.

[79] Administrative notice was taken of the business plan filing. (Rehearing Tr. Vol. 4 at 965-966) *See*, *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. 16-481-EL-UNC, Business Plan Filing (February 29, 2016).

1. Rider DMR is not a provision regarding the Companies' "distribution service."

Rider DMR is not a "provision[] regarding the utility's distribution service." Although Staff may have called their rider a "Distribution Modernization Rider," its purpose is solely for credit support to the Companies' parent, FirstEnergy Corp.—not for any "distribution service." Specifically, Rider DMR "is a form of credit support for the company [FirstEnergy Corp.] to be able to access -- access the capital markets and hopefully they will, in turn, modernize the grid."[80] Staff witness Buckley agreed that "[t]he credit support is not for the provision of a distribution service by the distribution companies to the ratepayers."[81]

A rider with the stated objective of providing credit support to a distribution utility's parent corporation is not a provision "regarding the utility's distribution service," particularly when the only thing tying such a provision to distribution is the "hope" of Commission Staff that the Companies would one day decide to undertake grid modernization. It bears repeating that once the Companies receive Rider DMR revenues, there is nothing to tie that money to the Companies' distribution service. For instance, there are no commitments or requirements that Rider DMR revenues be spent on grid modernization initiatives,[82] that the Companies make any certain level of grid modernization in order to receive revenues under the rider,[83] that grid modernization efforts commence within any particular time frame,[84] or that Rider DMR revenues even be spent within the Companies.[85]

[80] Rehearing Tr. Vol. 2 at 429.
[81] Rehearing Tr. Vol. 3 at 611.
[82] Rehearing Tr. Vol. 4 at 957.
[83] Rehearing Tr. Vol. 3 at 647-648.
[84] Rehearing Tr. Vol. 4 at 1008; Tr. Vol. 10 at 1609.
[85] Rehearing Tr. Vol. 10 at 1604, 1607-1608.

Moreover, Rider DMR is not validated merely because of a vague Staff recommendation that the Commission "direct the Companies to invest in modernizing the grid."[86] As noted above, Staff is not recommending that any level of grid modernization be made, that grid modernization take place within any particular time, or that Rider DMR revenues be used in connection with grid modernization. But even if the Commission did issue a specific directive, it would still not be sufficient to authorize Rider DMR because even with such a directive, Rider DMR would fail to satisfy the statutory requirement of R.C. 4928.143(B)(2)(h). That is to say, with or without such a directive, Rider DMR would still remain solely a credit support rider allegedly aimed at shoring up the investment-grade credit rating of FirstEnergy Corp. (and with it, the potential to shore up its competitive affiliate), not a "provision regarding [the Companies'] distribution service."

2. Rider DMR does not fall within the subset of "distribution service[s]" regarding "single issue ratemaking" or "distribution infrastructure and modernization incentives."

The Commission should reject any argument that Rider DMR is a provision "regarding single issue ratemaking" or a provision "regarding distribution infrastructure and modernization incentives for the electric distribution utility."

As an initial matter, the Commission does not need to address these claims. Whether something qualifies as "single issue ratemaking" or a provision "regarding distribution infrastructure and modernization incentives for the electric distribution utility" under subsection (B)(2)(h) is only relevant when dealing with a provision that "regard[s] the utility's distribution service." But, as explained above, Rider DMR does not meet this threshold requirement.

If the Commission decides to address such claims, then Rider DMR cannot be a form of "single issue ratemaking" or a provision regarding "distribution infrastructure and

[86] Staff Ex. 15 at 15.

modernization incentives." Companies' witness Mikkelsen defined "single issue ratemaking" as "[r]atemaking that relates to a single issue."[87] But if the Commission considers Rider DMR to be a provision in regards to "the utility's distribution service[,]" then Rider DMR cannot relate to a "single issue." Rather, it would rely on a convoluted series of unsupported assumptions that begins with credit support for FirstEnergy Corp. and "hopefully" ends with the Companies undertaking grid modernization. As Staff witness Turkenton explained:[88]

> …based on Dr. Choueiki's testimony and Mr. Buckley's testimony that this is credit support to the company for them to be able to access the capital markets. And then, in turn, by accessing the capital markets, we hope that they modernize the grid.

If Rider DMR is linked to grid modernization (which it is not), then Rider DMR must be considered to deal with multiple issues (i.e., credit support, the Companies' abilities to access the capital markets, and the "hope" that in turn, the Companies undertake grid modernization). Thus, Rider DMR cannot be considered "single issue ratemaking" that is in "regard to [the Companies'] distribution service."

Rider DMR is also not a provision regarding "distribution infrastructure and modernization incentives." Rider DMR cannot be said to "incentivize" the modernization of the Companies' distribution infrastructure because, as discussed above, there are no restrictions or requirements concerning how the Companies use or transfer Rider DMR revenues. Rider DMR revenues could be spent on a host of things entirely unrelated to distribution infrastructure, such as maturing debt, funding of pensions, or other items,[89] distributions to shareholders, or used to provide support to FirstEnergy Corp.'s unregulated merchant business. In short, what happens

[87] Tr. Vol. 10. at 1768.
[88] Rehearing Tr. Vol. 2 at 426.
[89] Rehearing Tr. Vol. 10 at 1607.

with Rider DMR dollars is entirely at the prerogative of the Companies and FirstEnergy Corp.[90] A no-strings-attached revenue infusion plainly fails to qualify as a charge for "distribution infrastructure and modernization incentive[]."

3. There is no record support that allows the Commission to make findings regarding alignment of customer and utility expectations concerning Rider DMR as required by R.C. 4928.143(B)(2)(h).

Even if the Commission concludes that Rider DMR is a "provision regarding [the Companies' distribution service," that alone is not enough to authorize Rider DMR under R.C. 4928.143(B)(2)(h). Rather, to approve Rider DMR under this statute, the Commission must be able to:

> [E]xamine the reliability of the electric distribution utility's distribution system and **ensure that customers' and the electric distribution utility's expectations are aligned** and that the electric distribution utility is placing sufficient emphasis on and dedicating sufficient resources to the reliability of its distribution system. (Emphasis added).

But neither Staff nor the Companies placed evidence of record that would enable to the Commission to conclude that ratepayers and the Companies' expectations are aligned with respect to Rider DMR.

Earlier in this proceeding, Ohio Consumers Counsel ("OCC") witness Williams testified on the question of whether the Companies' Rider DCR satisfied R.C. 4928.143(B)(2)(h), including with respect to the Commission's required findings concerning the alignment of customer and utility expectations. Mr. Williams noted that the Companies conducted a mandated customer perception survey, the results of which indicated [redacted]:[91]

> [redacted]

[90] Rehearing Tr. Vol. 3 at 584.
[91] OCC Ex. 28C at 20 (emphasis added).

[redacted]

Mr. Williams further noted that "[t]o the extent that the FirstEnergy customer perception survey **indicates that the Utility's customers are unwilling to pay more to avoid non-major outages**, **customers' and FirstEnergy expectations concerning reliability are not aligned**."[92]

Staff hopes that as a result of Rider DMR, the Companies will attain "the objective of developing one of the nation's most intelligent distribution grids."[93] But there is no evidence in the record reflecting that Ohio ratepayers are expecting to pay more—specifically $131 million to $1.126 billion a year more—for the putative goal of inducing the Companies to undertake grid modernization, even if it would enhance grid reliability.[94] This is particularly true under circumstances where any actual grid modernization investments will be separately recovered from ratepayers through Rider AMI.[95]

In sum, even if the Commission accepts the false premise that Rider DMR will in some way lead to the attainment of one of the nation's most intelligent distribution grids, there is nothing in the record that would enable the Commission to make the required finding that the Companies' and their customers' expectations are aligned with regard to the tremendous amount of credit support cash that customers are being asked to provide in order to realize that goal – a goal that still requires customers to also pay for cost recovery and return on and of investment. For that reason as well, Rider DMR is not authorized under R.C. 4928.143(B)(2)(h).

[92] *Id.* at 21 (emphasis added).
[93] Staff Ex. 15 at 16.
[94] Companies Initial Rehearing Brief at 26 (noting that Companies contemplate that grid modernization will improve reliability).
[95] *See* P3/EPSA Initial Brief at 61-62.

D. Rider DMR is not Authorized by R.C. 4928.143(B)(2)(i)

The Commission must deny the Companies' absurd claim that Staff's condition requiring FirstEnergy Corp. to continue maintaining its corporate headquarters in Akron qualifies Rider DMR as an economic development or job retention program under R.C. 4928.143(B)(2)(i).[96, 97] The Companies' interpretation ignores plain statutory language, and, if adopted, will lead to the absurd result that any provision in an ESP—no matter how dubious—may be validated only by tying it to the promise that a utility or its parent will continue locating its existing headquarters in Ohio.

R.C. 4928.143(B)(2)(i) authorizes:

> Provisions under which the electric distribution utility **may implement economic development, job retention, and energy efficiency programs**, **which provisions may allocate program costs** across all classes of customers of the utility and those of electric distribution utilities in the same holding company system. (Emphasis added).

The Companies are contending that Rider DMR is authorized under this statute merely because the Companies' parent FirstEnergy Corp. would continue to keep its current headquarters in Akron.[98] The Companies' interpretation contravenes the plain language of R.C. 4928.143(B)(2)(i) in several respects.

First, R.C. 4928.143(B)(2)(i) contemplates the recovery of a utility's "program costs"—i.e., the costs of implementing and running the economic development or job retention program. The Companies claim that retaining the Akron headquarters would create a total economic *impact* of $568 million[99]—which they seek to recover, in whole or in part, as part of the

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[96] *See* Companies Initial Rehearing Brief at 25, Companies Ex. 206 at 5 (contending that Rider DMR "functions as an economic development and job retention program").

[97] While not couching its support for Rider DMR expressly in terms of R.C. 4928.143(B)(2)(i), Staff similarly claims that "the point of the Staff's grid modernization initiative is to further economic development in Ohio." Staff Rehearing Brief at 17.

[98] Companies Initial Rehearing Brief at 25, Companies Ex. 206 at 5 at 5, 14, Rehearing Tr. Vol. 10 at 1600.

[99] Companies Initial Rehearing Brief at 38, Companies Ex. 205 at 4.

"additional amount to be included in rider DMR."[100] But total economic impact value is irrelevant for purposes of subsection (B)(2)(i), which contemplates only the allocation of "program costs," not a program's impacts.

The requirement that a utility recover its program *costs* in subsection (B)(2)(i) is reinforced by O.A.C. 4901:1-35-03(C)(9)(h), which states that a utility seeking authorization of a program under subsection (B)(2)(i) "provide a complete description of the proposal, **together with cost-benefit analysis or other quantitative justification,** and quantification of the program's projected impact on rates."

Neither Staff nor the Companies (including their witness Ms. Murley) ever performed any analysis to determine what the costs of retaining the Akron headquarters would be.[101] Because these costs were never quantified, and because the Companies are not even seeking to recover costs, Rider DMR is not authorized under R.C. 4928.143(B)(2)(i).

Additionally, subsection (B)(2)(i) authorizes the creation of a qualifying economic development, job retention, or energy program by the **electric distribution utility—**not its parent corporation. Here, the Companies contend that their **parent** FirstEnergy Corp. has implemented a qualifying (B)(2)(i) program merely by continuing to operate its Akron, Ohio headquarters. But even if this qualified as an economic development or job retention program (which it does not), it would still not meet the requirements of subsection (B)(2)(i) because the **Companies** have not implemented it.

Finally, the Commission should take stock of the absurd implications of the Companies' position. If the Commission accepts the argument that the mere retention of a utility's parent's headquarters in Ohio is an economic development or job retention program under subsection

[100] Rehearing Tr. Vol. 10 at 1600.
[101] Rehearing Tr. Vol. 3 at 694; Rehearing Tr. Vol. 10 at 1965, Rehearing Tr. Vol. 9 at 1489.

(B)(2)(i), then there is no practical limit to the inclusion of any given provision, no matter how inapposite or inappropriate, in an ESP so long as the proponent or its parent promises to do nothing more than retain their current nexus of operations in the state. The Companies' interpretation makes a mockery of this statute, and the Commission must not hesitate in rejecting it.

V. THE COMMISSION SHOULD REJECT MODIFIED RIDER RRS

A. Modified Rider RRS Will Lead to Millions if not Billions in Customer Charges

Throughout this rehearing proceeding, the Companies have maintained that Modified Rider RRS will produce a $561 million net credit for customers.[102] Curiously, on brief, the Companies appear to abandon that number and instead claim that Modified Rider RRS "does not affect the Commission's prior determination that Rider RRS will generate $256 million in net revenue [*i.e,* net credits to customers] over the eight-year term of ESP IV."[103] In any event, the uncontested evidence in this proceeding establishes that both of these figures are wrong—Modified Rider RRS will lead to over a billion dollars in customer charges during its first three years and at best, a net charge to customers of at least $154 million ($342 million net present value ("NPV")).[104]

1. Known energy forward and capacity prices prove that the Companies' projected $561 million credit is wrong.

The Companies' projections are easily proved wrong simply by applying known energy forward and capacity prices. P3/EPSA witness Dr. Joseph P. Kalt reviewed the forecast prepared

[102] Companies Ex.197 at 4; Rehearing Tr. Vol. 1 at 78; Rehearing Tr. Vol. 10 at 1699.

[103] Companies Initial Rehearing Brief at 6-7. The Commission reached the $256 million credit figure by simply averaging the Companies' projected credit of $561 million with OCC witness Wilson's projection of a $50 million charge. Opinion and Order at 85.

[104] *See* P3/EPSA Initial Rehearing Brief at 38-42; P3/EPSA Ex. 18C at 15-16; P3/EPSA Ex. 19, P3/EPSA Ex. 20C.

by Companies' witness Judah Rose in 2014.[105] That forecast was the basis for the Companies' claim in this proceeding that Modified Rider RRS will produce a credit of $561 million over the term of ESP IV.[106] In his analysis, Dr. Kalt reconciled Mr. Rose's forecast with up-to-date energy forward and capacity prices for the first few years of the term of Modified Rider RRS.[107] Dr. Kalt's analysis reveals that in light of this updated pricing information, ratepayers can expect to pay at least $1.13 billion in charges through 2018 under Modified Rider RRS, which when added to the Companies' projections for the remaining term of ESP IV comes to a $154 million net charge ($342 million NPV).[108]

2. The Companies' cannot critique Dr. Kalt because his calculation of $1.13 billion in charges relies upon the same methodology used by Dr. Rose.

The **Companies have offered no evidence whatsoever** to rebut the findings of Dr. Kalt. This is understandable given Dr. Kalt's methodologies were based on the same kind of information originally relied on by Companies' witness Rose when developing his forecasts. For example, like Dr. Rose, Dr. Kalt used currently available energy forward prices to project energy revenues for the initial years of the ESP IV.[109] The Companies cannot critique Dr. Kalt because to do so would be to critique Dr. Rose's forecasts.

Regardless, the Companies will likely use their reply brief to try to undermine Dr. Kalt's findings. The Companies may claim that energy forward prices are unreliable because trading volumes decline over time.[110] But notably, in developing his forecast in 2014 (the same forecast the Companies continue to rely on), Dr. Rose relied on the same kinds of energy forward prices

[105] Companies Ex. 197 at 4.
[106] See Companies Ex. 197 at 3, Sierra Club. Ex. 89, Opinion and Order at 85.
[107] P3/EPSA Ex. 19, 20C.
[108] *Id.*; Sierra Club. Ex. 89.
[109] P3/EPSA Ex. 19 and 20C.
[110] Rehearing Tr. Vol. 5 at 1247.

reviewed by Dr. Kalt and Staff.[111] And as Staff witness Choueiki noted, Staff only looked to the first three years of Modified Rider RRS [redacted], and believed that in that time frame, such forecasts [of energy forward] are "pretty reasonable."[112]

The Companies may also attempt to challenge Dr. Kalt's findings by trying to tie his findings to the shifting price of natural gas at the Henry Hub. But Dr. Kalt made it clear that his findings did not rely on the Henry Hub and instead were based on energy forward prices at the AEP Dayton Hub and the ICE exchange report, which again was the same kind of pricing information that the Companies relied on in their forecast.[113]

The information relied on by Dr. Kalt and Staff is reliable and demonstrates that keeping the Companies' proposal will lead to charges in the first three years in excess of one billion dollars, and a sizable net charge of no less than $154 million ($342 million NPV) over the term of ESP IV. The Companies have not offered and cannot offer any evidence to refute that fact. Modified Rider RRS should be rejected for that reason alone.

B. Millions (or Billions) of Charges Will not Lead to Economic Development

The Companies continue to claim that Modified Rider RRS will "promote economic development" in the state through its purported ability to stabilize electricity prices.[114] The Commission should reject the absurd notion that a charge that will cost Ohio ratepayers hundreds of millions (or more) will retain or grow businesses in the state.

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[111] Companies Ex. 17 at 33, 40, 61.
[112] Rehearing Tr. Vol. 5 at 1232. Similarly, Dr. Kalt's data reflects that reconciling the Companies' 2014 forecast with current energy forward and capacity prices for the first three years of Modified Rider RRS will lead to a significant net charge, rather than credits, over the term of ESP IV. *See* P3/EPSA Initial Rehearing Brief at 38-42; P3/EPSA Ex. 18C at 15-16 and P3/EPSA Ex. 19 and 20C.
[113] Rehearing Tr. Vol. 5 at 1192.
[114] Companies Ex. 197 at 12; Companies Initial Rehearing Brief at 13-14.

First, as discussed in P3/EPSA's Initial Rehearing Brief, Modified Rider RRS will have no discernible effect on stabilizing rates, but could also lead to heightened rate instability.[115] Second, it is palpably obvious that businesses will not look favorably on staying or relocating to Ohio when they will be forced to pay significantly more in above-market electricity rates as a result of Modified Rider RRS. As OMAEG witness Lause noted, with regard to manufacturing businesses "the Modified Rider RRS Proposal will have significant impacts on the business decisions of many manufacturing companies in the state of Ohio" who will either attempt to recover the increased costs of Modified Rider RRS through their customers or, could cause these businesses to go out of business.[116] Modified Rider RRS "could also deter new business investment in the state of Ohio as new companies looking to invest may choose to go elsewhere in light of increased or high electricity prices that are above market."[117] The Commission should reject the Companies' claim that Modified Rider RSS will encourage economic development in Ohio.

C. Modified Rider RRS is an Unlawful Transition Charge

The Companies dispute the characterization of Modified Rider RRS as an unlawful transition charge.[118] But the Companies are wrong—approving Modified Rider RRS will violate the prohibition against the recovery of "transition revenues or any equivalent revenues" under R.C. 4928.38. As P3/EPSA previously noted, despite the Companies' claims that Modified Rider RRS is not tied to any particular generation, it nonetheless relies on the specific cost and volume projections for FES' plants (i.e., Sammis, Davis-Besse, and FES' entitlement from the

[115] P3/EPSA Initial Rehearing Brief at 30-31.
[116] OMAEG Ex. 37 at 12.
[117] *Id.*
[118] Companies Initial Rehearing Brief at 17-19.

Ohio Valley Electric Corporation ("OVEC")), including certain "legacy costs."[119] That is why Dr. Choueiki called Modified Rider RRS a "generation rider."[120]

Contrary to the Companies' claims,[121] it is immaterial for purposes of this analysis whether or not the Companies carry any transition costs on their books, given the lack of any restrictions on transferring Modified Rider RRS revenues from the Companies through FirstEnergy Corp. via dividends and ultimately investing those revenues into its unregulated generation subsidiary, FES.[122]

As the Supreme Court of Ohio recently noted, "[b]y inserting the phrase 'any equivalent revenues' [into R.C. 4928.38], the General Assembly has demonstrated its intention to bar not only transition revenue associated with costs that were stranded during the transition to market following S.B. 3 but also any revenue that amounts to transition revenue by another name."[123] While the Companies may euphemistically label Modified Rider RRS charges as the "costs of the hedge,"[124] in reality, the Companies would be recovering pre-existing costs incurred by their affiliate FES, including legacy costs, that are "not recoverable through market-based rates"[125] in violation of R.C. 4928.38.

D. Modified Rider RRS Raises the Same Affiliate Transaction Concerns That Existed with Original Rider RRS

The Companies' original Rider RRS proposal was born of the attempt by FES to avoid the risks inherent in operating in a competitive marketplace. Soon after AEP Ohio made its initial power purchase agreement ("PPA") proposal to the Commission in early 2014, FES' Vice

[119] P3/EPSA Initial Rehearing Brief at 35-36.
[120] Staff Ex. 15 at 14.
[121] Companies Initial Rehearing Brief at 18.
[122] *See* P3/EPSA Initial Rehearing Brief at 36.
[123] *In re in re Columbus S. Power Co.*, 2016-Ohio-1608, ¶ 21.
[124] Companies Initial Rehearing Brief at 19.
[125] *In re in re Columbus S. Power Co.*, 2016-Ohio-1608, ¶ 15.

President of Commodity Operations, Donald Moul,[126] reviewed the AEP Ohio proposal, and because he knew that the Companies were filing an ESP shortly, "looked to see if there was something [FES] could add value to that ESP – and provide some certainty in return for our plants."[127] That certainty would come by way of a PPA with the Companies by which the Companies would have purchased all of FES' energy, capacity, and ancillaries from Sammis, Davis Besse, and its share of its entitlement from OVEC at prices sufficient to cover all of FES' costs, plus a return on and of investment.[128]

The Companies were forced to walk away from their proposal after FERC rescinded FES' and the Companies' affiliate waivers relating to the Rider RRS PPA.[129] In its April 27, 2016 decision, FERC reasoned that original Rider RRS "could be used to effectuate precisely the type of affiliate abuse that the Commission identified in Order No. 697-A," namely, that "'there exists the potential for a franchised public utility with captive customers to interact with a market-regulated power sales affiliate in ways that transfer benefits to the affiliates and its stockholders to the detriment of the captive customers.'"[130]

FERC's concern over affiliate abuse remains (and, in fact, is heightened) with Modified Rider RRS. While no longer relying on an express PPA between the Companies and FES, Modified Rider RRS achieves the same result. That is, it allows for the recovery of revenues representing the specific cost and volume projections for FES' plants, including legacy costs and a guaranteed return on and of equity. And as discussed above, it is immaterial that the Companies are not actually purchasing FES' output, because nothing in the Companies' proposal

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[126] Mr. Moul transferred to a new position at the time of hearing, to Senior Vice President, Fossil Operations and Environmental at FirstEnergy Generation , LLC. Tr. Vol. 10 at 2180.
[127] Tr. Vol. 11 at 2290.
[128] Companies Ex. 13 at 5; Companies Ex. 155 at 7.
[129] *Electric Power Supply Association et al. v. FirstEnergy Solutions Corporation, et. al*, 155 FERC. ¶ 61,101, Order Granting Complaint at ¶ 53.
[130] *Id.* at ¶ 54 (internal citations omitted).

prevents Modified Rider RRS revenues from being transferred to FES via FirstEnergy Corp. Specifically, (i) the Companies are not restricted from transferring Modified Rider RSS revenues to FirstEnergy Corp. by way of dividends;[131] and (ii) FirstEnergy Corp. is not prohibited from using the revenue received through those dividends to invest in FES during the term of Modified Rider RRS[132]—thereby creating the significant risk that through a few accounting maneuvers, the Companies can achieve the same outcome as original Rider RRS: to give FES more certainty than what the competitive marketplace currently provides.

In fact, FES could end up being **better off** under Modified Rider RRS than with the Companies' original proposal because at the same time FES could be receiving additional cash arising from Modified Rider RRS (by virtue of transfer through its parent corporation), it would also remain free to keep all revenues and profits from the sales of plant output in the PJM markets.[133] An added subsidy courtesy of Modified Rider RRS would enable FES to price its output without regard to its out-of-market costs, thereby allowing it to unfairly compete against other merchant generators in the wholesale market.[134] It could also allow FES to price its retail contracts for competitive retail electric service in Ohio at below-market prices.[135] The end result could jeopardize the viability of competitor merchant generators and retail CRES providers who must try to compete with FES without a state-sanctioned subsidy.[136]

In sum, while Modified Rider RRS circumvents the express PPA that was the focus of original Rider RRS, it entails the same—and ever greater—risks of affiliate abuse that FERC recognized in its April 27, 2016 decision. As Dynegy witness Dean Ellis noted, "[l]ike the

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[131] Rehearing Tr. Vol. 1 at 73-74.
[132] *Id.* at 228, 232.
[133] Rehearing Tr. Vol. 1 at 116.
[134] *See, generally,* Dynegy Ex. 1 at 5.
[135] *See, generally* Exelon Ex. 1 at 6-7.
[136] *Id.*

original Rider RRS proposal, the new Rider RRS proposal is nothing more than a cash infusion meant to benefit the Companies' parent corporation and FES."[137] The Commission should recognize the considerable harms posed by Modified Rider RRS to ratepayers, Ohio businesses and competitor merchant generators and reject the Companies' proposal.

VI. THE COMMISSION'S PRIORITY IN THIS PROCEEDING SHOULD BE PROTECTING RATEPAYERS AND THE COMPETITIVE MARKETS – NOT THE SHAREHOLDERS OF FIRSTENERGY CORP.

A. The Commission has no Obligation to FirstEnergy Corp. and its Shareholders

The Commission is a creature of statute and its authority is limited to the regulation of "public utilities," as set forth in R.C. 4905.04.[138] Importantly, the Supreme Court of Ohio has recognized that the Commission's statutory reach does not extend beyond the regulation of public utilities and to the investors of those public utilities:[139]

> "[T]his court has consistently recognized that the Public Utilities Commission is a creature of the General Assembly and may exercise no jurisdiction beyond that conferred by statute." Stated differently, the commission may not legislate in its own right. This, however, is what the commission has attempted to accomplish in the case at bar.
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> We are mindful of the policy considerations that prompted the commission's decision. The commission, CEI, and the *amici* argue strenuously that to rule as we have today will seriously disadvantage Ohio utilities in capital markets thereby "driv[ing] up the return on investment required by investors in Ohio utilities." This gloomy scenario, however, does not imbue the commission with the authority to rewrite the statutes. The statutes in question contain no provisions insulating investors from the type of losses sustained in the cancelled-plants venture.
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> * * * **Absent such explicit statutory authorization, however, the commission may not benefit the investors by guaranteeing the full return of their capital at the expense of the ratepayers.** Under the

[137] Dynegy Ex. 2 at 6.
[138] *Tongren v. Pub. Util. Comm.*, 85 Ohio St.3d 87, 88 (1999), citing *Columbus S. Power Co. v. Pub. Util. Comm.*, 67 Ohio St.2d 535 (1993); *Pike Natural Gas Co. v. Pub. Util. Comm.*, 68 Ohio St.2d 181 (1981); *Consumers' Counsel v. Pub. Util. Comm.* , 67 Ohio St.2d 153 (1981).
[139] *Office of Consumers' Counsel v. Pub. Util. Comm.* 67 Ohio St.2d 153, 166-167 (1981).

ratemaking formula now in effect consumers are not chargeable for utility investments and expenditures that are neither included in the rate base nor properly categorized as costs. What we previously stated in a rate base case is applicable to the case at bar: "* * * It is only proper that their [the investors] venture be found operational before they commence to recoup their capital outlays from the consumers." (emphasis added) (internal citations omitted).

Just as important, the General Assembly has directed the Commission to ensure that **every** public utility "furnish necessary and adequate service and facilities" and that **every** public utility's charges for any service rendered, or to be rendered, to be just and reasonable. R.C. 4905.22. Such protections include:

- *Protection against discriminatory charges* – Ohio law prohibits a utility from charging different rates when performing a "like and contemporaneous service under substantially the same circumstance and conditions."[140]

- *Protection against ineligible charges* – Ohio law prohibits a utility from charging costs that are not eligible for recovery under the statutory framework.[141]

- *Protection against subsidies* – Ohio law prohibits a utility from charging costs that are unlawful subsidies between competitive and noncompetitive retail electric service.[142]

The General Assembly has also directed the Commission to "[e]nsure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service[.]" R.C. 4928.02(H).

Thus, the Commission does not have any responsibility for the investors of a public utility but does have responsibility to protect ratepayers from unjust and unreasonable charges

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[140] *See, e.g., Building Industries Exhibit, Inc. v. Public Util. Comm.*, 150 Ohio St. 251(1948); and *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 109 Ohio St.3d 328 (2006), ¶24, quoting R.C. 4905.33 and referencing 4905.35.

[141] *See, e.g., Office of Consumers' Counsel v. Public Utilities Com.*, 67 Ohio St. 2d 153 (1981) (amortization of investment in unfinished projects not recoverable under the ratemaking formula).

[142] *See, e.g.*, R.C. 4928.02(H) and *Indus. Energy Users-Ohio v. Pub. Util. Comm*, 117 Ohio St.3d 486 (2008).

and to protect the competitive retail markets. With those guidelines in place, the Commission should act to protect the ratepayers and the competitive markets in this proceeding, rather than award FirstEnergy Corp. and its shareholders with a windfall cash subsidy.

B. The Commission is Obligated to Protect Ratepayers

The record is clear that all of the proposals would or have the potential to provide a windfall to FirstEnergy Corp. and its shareholders. For example, rather than any need by the Companies, it was the weak balance sheet of FES that was the impetus for original Rider RRS.[143] Likewise, the Companies only proposed Modified Rider RRS after FERC concluded that the original Rider RRS presented the "potential for the inappropriate transfer of benefits from [captive] customers to the shareholders of the franchised public utility,"[144] Like original Rider RRS, Modified Rider RRS transfers hundreds of millions of ratepayer dollars to the Companies, with no restrictions on that money being transferred to FirstEnergy Corp., and then distributed to shareholders through dividends or invested in FES.

Rider DMR also has the potential (intended or unintended) to provide FirstEnergy Corp. and its shareholders with a windfall. Under Staff's proposal, the Companies would collect $131 million a year from ratepayers for a minimum of three years with no restriction on how the money will be used or distributed within the FirstEnergy Corp. family. Even worse, under the Companies' DMR proposal, ratepayers would pay the Companies up to $4.64 billion over the entire term of the ESP IV.

Collectively, all of the proposals before the Commission will provide millions or billions of dollars for FirstEnergy Corp. to spend as it wishes. The Companies have presented no guarantee, restriction, limitation, etc. and, importantly, are **unwilling** to commit to a guarantee,

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[143] Original Tr. Vol. 33 at 6686-6687; Original Tr. Vol. 11 at 2290.

[144] *Electric Power Supply Association et al. v. FirstEnergy Solutions Corporation et al.*, 155 FERC ¶61,101 at ¶55.

restriction, limitation, etc. obligating any of the rider money to remain with the Companies and/or be used for a specific purpose of the Companies, such as grid modernization.[145]

The Commission must carefully consider these facts when weighing the putative benefits of Modified Rider RRS and Rider DMR (which are highly questionable) against the certainty that ratepayers would pay enormous charges during the term of ESP IV. And even if the Companies are able to withdraw the ESP IV (which is arguable given the tariff compliance filings), loss of the limited benefits of the ESP IV do not justify imposing **hundreds of millions or even billions of dollars** on all ratepayers under any of these pending rider proposals. The Commission must adhere to the General Assembly's mandates under R.C. 4905.22 to protect ratepayers from the unlawful and unreasonable charges that would be imposed by Modified Rider RRS and Rider DMR.

C. The Commission is Obligated to Protect the Competitive Markets

In addition to protecting ratepayers from unreasonable charges, the Commission must protect the competitive markets. As noted above, the Commission must "[e]nsure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service[.]" R.C. 4928.02(H). The Commission has, as recently as August 26, 2016, expressed the importance of competitive markets noting that the "[p]reservation of the integrity of the competitive bidding process [SSO auctions] is of the highest priority for the Commission."[146]

Rider DMR and Modified Rider RRS jeopardize the competitive markets. As noted in P3/EPSA's initial brief and in Section V.D of this brief, Modified Rider RRS is simply a

[145] Rehearing Tr. Vol. 1 at 58-59; 69-70, 71-72, 176; Rehearing Tr. Vol. 2 at 472-473; Rehearing Tr. Vol. 4 at 956-957; Rehearing Tr. Vol. 10 at 1609.

[146] In re *Application of The Dayton Power and Light Company to Establish a Standard Service Offer in the Form of an Electric Security Plan*, Case Nos. 08-1094-EL-SSO et al., Finding and Order at 10, August 26, 2016.

replacement for Rider RRS, which all along was intended to benefit the Companies' competitive business affiliate, FES. Rider DMR, although couched as a rider for a separate purpose, has the same potential for diversion of monies to FES by way of dividends being paid to FirstEnergy Corp. from the Companies.[147] In a proceeding that originated with the goal of helping FES' balance sheet, it is difficult if not impossible to separate Modified Rider RRS and Rider DMR from the unlawful purpose of providing anticompetitive subsidies to FES.

Rider DMR is especially troubling because it will have an anticompetitive effect even if the Companies are directed to not transfer monies to FirstEnergy Corp. Historically, FES has been an active participant in wholesale SSO supply procurements[148] and is certified to provide retail generation and power marketer services in Ohio.[149] As a participant in SSO auctions, like all other participants, FES' credit requirements under the Master SSO Supply Agreement are linked to its credit rating.[150] Prior to its downgrade and delinking from FirstEnergy Corp., FES enjoyed the lower credit requirements of an investment grade SSO supplier. This was a competitive advantage that no longer exists today, as credit agencies downgraded FES to below investment grade after separating FES from its parent corporation, FirstEnergy Corp., for investment grade rating purposes.[151]

Staff's Rider DMR, however, would help FES regain that investment grade rating and immediately restore FES' competitive advantage over other suppliers. Specifically, regardless whether the Companies transfer Rider DMR money to FirstEnergy Corp. (and then to FES),

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147 Rehearing Tr. Vol. 3 at 584; Rehearing Tr. Vol. 10 at 1608.
148 Exelon Ex. 1 at 14.
149 *Id.;* Tr. Vol. 11 at 2342.
150 Company Ex. 14, Attachment EBS-1, Sections 6.2-6.4. In relevant part, Section 6.2 provides that "[t]he Companies will determine the creditworthiness of an SSO Supplier or its Guarantor, if applicable. . . based on its most recent senior unsecured debt rating (of, if unavailable, its corporate issuer rating)."
151 P3/EPSA Ex. 21 at 1; Rehearing Tr. Vol. 10 at 1772.

FirstEnergy Corp.'s consolidated balance sheet[152] will show an immediate increase in cash flow from operations as a result of Rider DMR. As an affiliate of FirstEnergy Corp., FES in turn will benefit from that consolidated balance sheet and could have its own credit ratings raised to above investment grade. This means that FES will be able to avoid higher credit requirements as an SSO supplier.[153] Just as important to FES, it could avoid the millions in collateral calls that are linked to an investment downgrade, a higher cost of long-term debt and less onerous contract terms.[154]

The impact of Rider DMR on FirstEnergy Corp.'s consolidated balance sheet may also lead FirstEnergy Corp. to decide to reverse course and to not reduce the size of its competitive business segments.[155] If that occurs, FES would likely enjoy eight uninterrupted years of investment grade credit ratings and lower SSO credit requirements – courtesy of Rider DMR's unlawful and anticompetitive impact. Rider DMR's artificial revenue stream will benefit FES at the expense of other competitive market participants regardless whether the Commission orders the Companies to not transfer Rider DMR monies to FirstEnergy Corp. The Commission should make the integrity of the retail and wholesale competitive markets in Ohio a priority over the alleged financial woes of FirstEnergy Corp. and its shareholders.

Simply put, the interests of the ratepayers and competitive markets should prevail over the wants and needs of FirstEnergy Corp. and its shareholders. Accordingly, both Modified Rider RRS and Rider DMR should be rejected. But the failure of these proposals should not deter the Commission from continuing to promote grid modernization in the Companies' service territories through a separate grid modernization proceeding. Chairman Haque highlighted this

[152] Rehearing Tr. Vol. 1 at 145.
[153] Company Ex. 14, Attachment EBS-1, Sections 6.2-6.4
[154] Rehearing Tr. Vol. 8 at 1391 (testimony of Eileen Mikkelsen).
[155] Rehearing Tr. Vol. 10 at 1783-1786.

point in his March 31, 2016 concurring opinion, speaking to the utilities (and not to FirstEnergy Corp.):[156]

> Going forward, we need to have a conversation about your future. How can we work to better the lives of consumers in the State of Ohio while also ensuring that you maintain your economic viability? My hope is that we will have this important conversation within the confines of our gird modernization dockets and beyond.

That conversation can and should happen, but not within the limited context of this proceeding, which all along has been about providing an anticompetitive subsidy to FirstEnergy Corp. and its competitive business.

VII. CONCLUSION

In this case, the Commission is being called upon by the Companies to make multi-billion dollar decisions based on a record that is factually incomplete and legally deficient. If grid modernization is a priority of the Commission, then it should be fully explored and discussed in the appropriate context. The same can be said for credit shortcomings of the parent corporation and the underfunding of a pension plan.

The quality of a regulatory decision depends just as much on the substance of that decision as it does on the process by which that decision is made. Both the journey and the destination matter. The best, and indeed only truly viable path for this proceeding is to reject Modified Rider RRS and Rider DMR and pursue the conversations the Commission deems important in their appropriate forums. Litigation, windfalls and overturned Commission decisions are not in the best interest of Ohio consumers. Sound regulatory policy is.

[156] Opinion and Order, Concurring Opinion of then-Commissioner Haque at 10.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The Public Utilities Commission of Ohio's e-filing system will electronically serve notice of the filing of this document on the parties referenced on the service list of the docket card who have electronically subscribed to the case. In addition, the undersigned certifies that a courtesy copy of the foregoing document is also being served (via electronic mail) on the 29th day of August, 2016 upon all persons/entities listed below:

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