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

REPLY BRIEF ON REHEARING OF THE
OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP

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I. INTRODUCTION.

The three proposals pending on rehearing before the Public Utilities Commission of Ohio (Commission) have been touted for the supposed benefits they will bring to customers. But the record establishes—and the reality is—that there is really only one guarantee contained in each of the three proposals: customers' costs will increase over the next three to eight years to fund a corporate bailout for FirstEnergy Corp. Depending on the proposal, customers could be forced to pay $393 million over the next three years up to a staggering $9 billion over nearly eight years of the ESP IV. In exchange for these costs, customers will reap virtually no benefits. The initial briefs submitted in support of these proposals by their proponents do nothing to shake that conclusion. If at all, they only reinforce the notion that customers are being commandeered into supporting a massive corporate bailout and subsidy of FirstEnergy Corp. This outcome ignores the General Assembly's commitment to competition embodied in S.B. 3,[1] undermines Ohio's effectiveness in the global economy as contemplated by R.C. 4928.02(N), thwarts the ability of manufacturers to deliver economic benefits throughout this state, and is inconsistent with R.C. 4928.143.

Modified Rider RRS. The Companies[2] trumpet their Modified Rider RRS Proposal (Modified Rider RRS or Companies' Proposal) as a way to protect against rate volatility and retail price increases.[3] The assertion is meritless. Manufacturers and others that are served by contracts with competitive retail electric suppliers (CRES) are protected against these contingencies. Imposition of a non-bypassable generation-related charge such as Modified Rider

[1] Staff notes that the intent of the legislature was to encourage shopping by creating a robust competitive market, which has been successful in the Companies' service territory as "[f]ewer customers rely on [FirstEnergy Corp.] subsidiaries in Ohio for services." Staff Initial Rehearing Brief at 16.

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

[3] Companies Initial Rehearing Brief at 7.

RRS disrupts the stability offered by these CRES contracts, injects uncertainty to manufacturers' business decisions, and adds unnecessary costs to their operations.[4] The Companies' Proposal should be rejected. The Ohio Manufacturers' Association Energy Group (OMEAEG) is not alone in its view of the harms that Modified Rider RRS would unleash on customers. Notably, not even Staff recommends adoption of Modified Rider RRS, noting a "a particularly troubling aspect to the potential approval of Modified Rider RRS; specifically, the chance that ratepayers could pay the charges in the early years and lose the benefits of potential credits in the later years, entirely defeating the stated purpose of the Modified Rider RRS" to provide a hedge against future high power costs.[5] Staff also explained that "[t]he benefits previously anticipated from the original Rider RRS no longer exist," but "[s]erious legal issues [do] exist, calling into question whether an approval [of Modified Rider RRS] would withstand review."[6]

Rider DMR. Given that Staff recommended that the Companies' Proposal be rejected, Staff offered its own proposal to replace Modified Rider RRS with a new rider that would provide credit support to FirstEnergy Corp., named the Distribution Modernization Rider (Rider DMR or Staff's Proposal). Staff's Proposal should also be rejected because the benefits promised by Rider DMR are illusory and the rider amounts to nothing more than a corporate bailout for FirstEnergy Corp. The fatal flaw with Rider DMR is that there is no explicit guarantee that revenues will be used for investment in the distribution system to modernize the grid.[7] The only assurance under Rider DMR is that customers will be held captive to providing

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[4] OMAEG Ex. 37 at 11-12 (Lause Rehearing).

[5] Staff Initial Rehearing Brief at 4-5.

[6] Id. at 5.

[7] Tr. Vol. II at 433; Tr. Vol. IV at 957.

credit support to FirstEnergy Corp. to use as it wishes, a company they have no contractual relationship with whatsoever and a company over which the Commission has no jurisdiction whatsoever.

Companies' Modifications to Staff's Proposal. The Companies' proposed modifications to Rider DMR take an already flawed concept and only make it worse. Not content with Staff's Proposal to provide credit support to FirstEnergy Corp. through revenue received under an alleged distribution rider, the Companies claim that the level of Rider DMR revenue should be significantly increased, from $131 million annually over three years to potentially $1.126 billion annually over the nearly eight-year term of ESP IV,[8] effective for service rendered September 1, 2016.[9] Over the remaining term of the ESP IV, the Companies' Modifications to Staff's Proposal could cost customers up to approximately $9 billion.

The Companies offer the pretext that such modifications are necessary to "jumpstart grid modernization and benefit customers."[10] But the telltale sign that neither grid modernization nor the interests of customers are the driving motivations for the Companies' modifications lies in the fact that the Companies steadfastly refuse to commit to spending Rider DMR revenues on the distribution system for grid modernization.[11] Accordingly, Rider DMR is not related to the Companies' distribution service and is, therefore, not authorized under R.C. 4928.143(B)(2)(h).

At bottom, the benefits promised under each of the three rehearing proposals are a mirage. The only beneficiary of this subsidy and corporate bailout is FirstEnergy Corp. The Commission should not allow this to happen. FirstEnergy Corp.—not customers—should be

[8] Tr. Vol. X at 1810, 1813.

[9] Companies Initial Rehearing Brief at 40.

[10] Id. at 32.

[11] Tr. Vol. X at 1741-1742.

held accountable for the fiscally irresponsible decisions it has made over the years. For the reasons set forth below, as well as for the reasons articulated in OMAEG's Initial Rehearing Brief, all three rehearing proposals presented to the Commission should be denied in their entirety.

II. DISCUSSION.

A. The Companies' grounds for seeking approval of Modified Rider RRS are meritless.

The Companies tout Modified Rider RRS as an improvement over their earlier Rider RRS because it is no longer backed by a purchase power agreement (PPA) with FirstEnergy Solutions (FES).[12] That characterization cannot be reconciled with the facts or the law. As OMAEG witness Lause explained, Modified Rider RRS "has the same negative impact on customers."[13] Echoing this sentiment, the Staff has observed that "Modified Rider RRS should be rejected. The benefits previously anticipated from the original Rider RRS no longer exist. Serious legal issues exist, calling into question whether an approval would withstand review. These concerns * * * weigh against approval."[14] The Commission should follow the recommendations made by OMAEG, Staff, and so many others and deny the Companies' Proposal.

1. Modified Rider RRS violates Ohio law as it is a transition charge.

As made abundantly clear from two recent decisions of the Supreme Court of Ohio, mechanisms that permit a utility to recover transition revenue or its equivalent are forbidden

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[12] Companies Initial Rehearing Brief at 4-5.

[13] OMAEG Ex. 37 at 7 (Lause Rehearing).

[14] Staff Initial Rehearing Brief at 5.

under Ohio law.[15] Contrary to the Court's decisions, the Companies' Proposal would authorize the collection of transition revenue or its equivalent and thus should not be approved.

The Companies claim that revenue received through Modified Rider RRS would not constitute transition revenue or its equivalent because they transferred their generating assets long ago.[16] Without ownership of generating assets, the Companies argue, there can be no recovery of generation costs. But as Staff witness Choueiki explained, Modified Rider RRS is still "at its core a generation rider."[17] Even though there is now no explicit link to a specific generator's performance, revenue received through Modified Rider RRS would still be tied to generation because the calculation of the revenue would be based on cost and output assumptions of generation units owned by FES.[18] This tie to generation belies any argument from the Companies that revenue would not be associated with generating units. Staff's Brief underscores this point, explaining that "[t]his tie to generation creates a significant risk" that the Supreme Court of Ohio will rule that Modified Rider RRS collects transition revenue or its equivalent.[19]

Equally unavailing is the argument that Modified Rider RRS revenue cannot constitute transition revenue or its equivalent because the revenue would go to the Companies rather than FES. The Companies concede that there is no prohibition on flowing Modified Rider RSS revenue to FirstEnergy Corp. via dividends.[20] The Companies further concede that there is no

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[15] *In re Application of Columbus S. Power Co.,* Slip Opinion No. 2016-Ohio-1608 at ¶ 22; *In re Application of Dayton Power and Light Company to Establish a Standard Service Offer in the Form of an Electric Security Plan*, Slip Opinion No. 2016-Ohio-3490 at ¶ 1.

[16] Companies Initial Rehearing Brief at 18.

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

[18] Companies Ex. 197 at 8 (Mikkelsen Rehearing).

[19] Staff Initial Rehearing Brief at 4.

[20] Tr. Vol. I at 73-75.

prohibition in place that would prevent FirstEnergy Corp. from then turning around and using that revenue to invest in FES.[21]

Any argument that Modified Rider RRS revenue will not enhance the financial integrity of the Companies must also fail because the Companies admit that the revenue could improve its credit ratings.[22] The Court has specifically struck down the collection of revenue through a rider that was proposed as a means to ensure that [AEP Ohio] was not financially harmed during its transition to a fully competitive generation market over the three-year ESP period."[23] The Court found that a rider that provided an electric distribution utility with "'sufficient revenue to ensure its financial integrity as well as its ability to attract capital'" was unlawful.[24] Similarly, collection of revenue associated with generation costs through Modified Rider RRS under an ESP would be unlawful as it is equivalent to a transition charge.[25] The revenue received would ensure the financial integrity of FirstEnergy Corp. and the Companies' unregulated affiliates.

2. Modified Rider RRS is inconsistent with the interests of rate stability and reasonably-priced electric services.

The Companies argue that Modified Rider RRS will protect customers against rate volatility and retail price increases.[26] The more likely result is that it will do no such thing. As Ms. Mikkelsen admits, there is no guarantee that customers will receive a credit in any given year under Modified Rider RRS.[27] This fact alone counsels strongly against adoption of the Companies' Proposal. If there is any certainty associated with Modified Rider RRS, it is that it

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[21] Id.

[22] Id. at 76.

[23] *In re Application of Columbus S. Power Co.*, Slip Opinion No. 2016-Ohio-1608 at ¶ 23.

[24] Id. at ¶ 36.

[25] Staff Initial Rehearing Brief at 4.

[26] Companies Initial Rehearing Brief at 7.

[27] Tr. Vol. I at 133.

disrupts the certainty that manufacturers derive from shopping with a competitive supplier.[28] The certainty and stability provided by fixed price supply contracts enables manufacturers to accurately estimate their costs and make prudent decisions about their operations.[29] Modified Rider RRS, however, thwarts manufacturers' ability to benefit from these supply contracts because it adds an additional layer of charges and variability to their electricity costs. Modified Rider RRS is a variable rate that is dependent on a market that fluctuates—it is no way stable by its very nature.

Modified Rider RRS harms manufacturers in another way by negating the benefits that accrue to them from low market prices.[30] Even Staff has characterized the purported hedging benefit offered by Modified Rider RRS as "dubious."[31] In Staff's view, any purported hedging attributes cannot be credited in light of recent data: "We now have the results of more capacity auctions and while the effect of these auctions on the estimated hedge benefit provided by the Modified Rider RRS is confidential, the direction is public and clearly negative."[32]

The Companies' assertions about the ability of Modified Rider RRS to solidify reasonably-priced electric services are no less dubious. When Staff witness Choueiki was asked whether he believed Modified Rider RRS would result in a net credit to customers he stated "Staff does not agree with the [C]ompanies' projections, that is correct."[33] Without any guarantee from the Companies, Staff, or anyone else that Modified Rider RRS will result in a net

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[28] OMAEG Ex. 37 at 11 (Lause Rehearing).

[29] Id. at 12.

[30] Id.

[31] Staff Initial Rehearing Brief at 18.

[32] Id. at 3 (citing Sierra Club Ex. 101 at 16, 22 (Comings Rehearing)).

[33] Tr. Vol. IV at 986.

credit, the claim that Modified Rider RRS will serve the interests of reasonably-priced electric services or have a stabilizing effect is wholly unconvincing.

3. The inclusion of Modified Rider RRS in the Companies' ESP IV renders it less favorable in the aggregate than an MRO.

The Companies assert that adoption of Modified Rider RRS would not alter the ESP v. MRO test.[34] This is incorrect for a variety of reasons. First, the Companies' assertion cannot be squared with the testimony of Staff witness Choueiki who stated that Modified Rider RRS—which no longer accounts for the operations of the Sammis and Davis-Besse plants—"eliminates two important benefits that the Commission highlighted in its Opinion and Order * * * ."[35] The Commission previously credited these plants with offering resource diversity benefits and economic benefits.[36] But under Modified Rider RRS, which removes the PPA between the Companies and FES (Affiliate PPA), these claimed benefits are gone. Given the elimination of two of the central pillars supporting the Commission's Order, the Companies cannot now credibly claim that the ESP v. MRO analysis is unaffected by the implementation of Modified Rider RRS.

Second, removing the Affiliate PPA between the Companies and FES means that Modified Rider RRS is no longer financially neutral to the Companies.[37] This belies the Companies' argument that "all other elements" of ESP IV remain unchanged. Instead of monies flowing to and from FES as originally contemplated by Rider RRS, the Modified Rider RRS places the responsibility on the Companies, and thus, the ratepayers. This construct could either vastly enrich the Companies (and their parent) at customers' expense or cause the Companies to

[34] Companies Initial Rehearing Brief at 8.

[35] Staff Ex. 15 at 13 (Choueiki Rehearing)

[36] Opinion and Order at 87-88, 114-120.

[37] OCC Ex. 44 at 13 (Kahal Rehearing).

suffer enormous losses, which will likely then become at the expense of customers.[38] Either way, this is a radical departure from what the Commission originally modified and approved.

Third, while the Companies still cling to their forecasts from 2014, the simple fact is that current data has shattered the foundations underlying those stale forecasts. Updated forecasts and known capacity pricing negate the Companies' projections of a net credit, which is why Staff disagrees with the promise of a credit offered by the Companies.[39] The Companies' steadfast unwillingness to reckon with the more current data is a telling sign that they know it portends financial distress for their customers and enrichment for the Companies and their parent.

4. Modified Rider RRS is damaging to the interests of economic development.

The Companies tout Modified Rider RRS as a way to promote economic development,[40] but the evidence suggests precisely the opposite. To support their economic development claims, they argue that Modified Rider RRS mitigates future price increases and volatility. As explained above, however, neither of these predictions is likely to materialize. If anything, Modified Rider RRS exacerbates the potential for future price increases. As Staff witness Choueiki testified, in light of recent data it is doubtful that credits will be forthcoming as promised by the Companies.[41]

Moreover, Modified Rider RRS will cause increased volatility for customers by layering on an additional generation-related charge to their bills. This will disrupt the certainty and stability provided by supply contracts, thereby interfering with the ability of manufacturers to accurately estimate their operating costs and make sound business decisions. The truth is that

[38] Id.

[39] Tr. Vol. IV at 986.

[40] Companies Initial Rehearing Brief at 13.

[41] Tr. Vol. IV at 986.

Modified Rider RRS is a solution in search of a problem. In spite of thousands of pages of evidence and transcripts, the Companies have simply failed to establish that customers encounter significant retail-rate volatility or that customers want a so-called hedging mechanism as protection against this phantom retail-rate volatility phenomenon.[42] To little surprise, the Companies' Initial Rehearing Brief does not attempt to plug this gaping evidentiary hole. Without this foundational showing, the Companies cannot credibly claim that Modified Rider RRS will tamp down retail-rate volatility.

In short, the purported economic developments heralded by Modified Rider RRS are a mirage. If anything, Modified Rider RRS will chill economic development and stifle competition.[43] Because this outcome is antithetical to the policies prescribed by R.C. 4928.02(N), the Companies' proposal should be denied.[44]

5. Modified Rider RRS revenues should not be excluded from the SEET.

If approved, the Commission should deny the Companies' request to exclude Modified Rider RRS revenues from the Significantly Excessive Earning Test (SEET). The Companies' cite Commission precedent in support of the claim that non-recurring, special, and extraordinary items may be excluded from the SEET.[45] But that precedent has no application here. First, Modified Rider RRS is recurring inasmuch as it will provide a regular line of charges (or credits) to the Companies throughout the duration of their ESP IV. Second, the claim that Modified Rider RRS is special because it is not related to utility operations is baseless. Elsewhere in their brief, the Companies identify a series of generation-related charges they are permitted to collect

[42] OCC/NOAC Ex. 1 at 33 (Wilson Rehearing).

[43] OMAEG Ex. 37 at 11-12 (Lause Rehearing).

[44] R.C. 4928.02(N) ("It is the policy of the state to * * * [f]acilitate the state's effectiveness in the global economy.").

[45] Companies Initial Rehearing Brief at 22.

from customers.[46] As a generation-related charge, Modified Rider RRS would fall into this class of charges that the Companies are already administering. This negates Modified Rider RRS' so-called "special" status. Third, given the Companies' admission that they are already collecting generation-related charges through other riders, there would be nothing extraordinary about the Companies collecting charges through yet another generation-related rider such as Modified Rider RRS.

The Companies also veer off course in suggesting that Modified Rider RRS revenues should be removed from the SEET because they are the only company operating under a so-called hedging mechanism akin to Modified Rider RRS.[47] To begin with, that contention is false. The Commission authorized AEP Ohio to initiate cost recovery through the PPA Rider because of its purported hedging attributes.[48] In any event, R.C. 4928.143(E) does not require the Commission to perform the SEET analysis by evaluating the Companies' earnings against other companies that have the *same* riders and tariffs. Indeed, it would be impossible to find such a company. One of the tasks the Commission is required to do under R.C. 4928.143(E) is identify companies that "face *comparable* business and financial risk * * * ."[49] In direct contravention of settled principles of statutory interpretation, the Companies' theory for excluding Modified Rider RRS revenue from the SEET would read the word "comparable" right

[46] Id. at 19.

[47] Companies Initial Rehearing Brief at 23.

[48] *In the Matter of the Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider, et al.*, Case No. 14-1693-EL-RDR, et al., Opinion and Order at 81 (March 31, 2016). OMAEG in no way concedes that AEP Ohio's PPA Rider actually provides a hedging function.

[49] Emphasis added.

out of the statute.[50] For all of these reasons, if approved, Modified Rider RRS revenue received by the Companies should be factored into the Commission's SEET analysis.

B. The Staff's grounds for seeking approval of Rider DMR are misguided.

While Staff should be commended for its opposition to the Companies' attempt to establish the ill-conceived Modified Rider RRS, its request to create a new rider is not a "viable alternative."[51] No matter how well intentioned Staff's Proposal is, the inescapable fact is that Rider DMR would amount to nothing more than a bailout of FirstEnergy Corp., thereby making manufacturers less competitive in the global marketplace by exposing them to rising costs associated with their electric service needs.[52] The creation of Rider DMR also sends the wrong message by rewarding the fiscally irresponsible business decisions that FirstEnergy Corp. has made over the years to place it in its current condition.[53] Choices have consequences; FirstEnergy Corp. should not be exempt from that well-worn principle.

1. Rider DMR is ill-suited to achieve the objective of grid modernization.

Staff's justifications for proposing to create a rider to provide credit support to an unregulated parent company are unpersuasive. Staff describes Rider DMR as a mechanism that will enable the Companies to provide "support for FirstEnergy Corporation to maintain investment grade by the major credit rating agencies."[54] As support for its proposal, Staff cites to the policy statute, in particular R.C. 4928.02(D), which provides that it is the policy of this state to "[e]ncourage innovation and market access for cost-effective supply- and demand-side

[50] *Cleveland Mobile Radio Sales, Inc. v. Verizon Wireless*, 113 Ohio St.3d 394, 2007-Ohio-2203, ¶ 12 ("A court is neither to insert words that were not used by the legislature nor to delete words that were used.").

[51] OMAEG Ex. 39 at 3 (Lause Rebuttal).

[52] Id.

[53] Id. at 9.

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

retail electric service including, but not limited to, demand-side management, time-differentiated pricing, waste energy recovery systems, smart grid programs, and implementation of advanced metering infrastructure[.]" Contrary to Staff's assertions, it is highly unlikely that Rider DMR will achieve the objectives outlined in R.C. 4928.02(D).

By Staff's own admission, the purpose of Rider DMR is not to support grid modernization initiatives, but rather, to provide credit support to the Companies' parent.[55] Although Staff hopes that this credit support to FirstEnergy Corp. will at some later point enable the Companies to invest in grid modernization initiatives, it is doubtful that Staff's aspiration will become a reality. Staff's Proposal is noticeably void of explicit requirements that the Companies use the revenue from Rider DMR to invest in grid modernization.[56] Moreover, there is no date certain for when the Companies would commence grid modernization initiatives, which raises the question of how long customers will be required to pay the Companies under Rider DMR before any grid modernization investment could or will be done.[57] Further, Staff testified that they will not add a condition or recommendation that requires the Companies to make a certain amount or level of investment in grid modernization, nor is Staff aware of the proportion of the revenues collected through Rider DMR that will be spent on grid modernization.[58] The lack of any specific conditions requiring Rider DMR revenues to be used on grid modernization initiatives disfavors its adoption. If customers are expected to pay at least $131 annually for the next three years, they should receive tangible benefits in return for their payments. Here, there is no guarantee that those tangible benefits will materialize. Authorizing

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[55] Staff Ex. 13 at 2 (Buckley Rehearing).

[56] Tr. Vol. II at 433; Tr. Vol. IV at 957.

[57] Tr. Vol. III at 644-645.

[58] Id. at 647-648; Tr. Vol. IV at 969.

cost recovery on such an illusory proposal would not be just and reasonable. If the Commission is inclined to authorize Staff's Proposal, it must impose explicit conditions requiring a date certain for the Companies to begin using Rider DMR revenue on grid modernization initiatives. Without these explicit conditions, Rider DMR is, as Staff witness Turkenton admitted, nothing more than a mechanism created with the "hope" that one day such grid modernization initiatives will be implemented.[59]

Staff is also incorrect in its assertion that Rider DMR is needed because of the Companies' weak financial position.[60] The Toledo Edison Company and Cleveland Electric Illuminating Company are one notch above non-investment grade and the Ohio Edison Company is three notches above non-investment grade.[61] Staff next claims that its credit-support objective will require a "company-wide effort * * * ."[62] In view of this, Staff recommends a 22% allocation factor.[63] But there is no information to suggest that other entities within the FirstEnergy Corp. family are committed to solving the problem.[64] Without other FirstEnergy Corp. entities' support, Staff's Proposal will fall short of providing the credit support that Staff deems sufficient to address the problem. Customers would then be left with subsidizing FirstEnergy Corp. in the amount of $393 million over three years, and possibly more if the credit support rider is extended, while FirstEnergy Corp. would still be in the same financial difficulties it is today. The responsibility for improving FirstEnergy Corp.'s credit ratings should be that of FirstEnergy Corp., not Ohio ratepayers. This is particularly true given that FirstEnergy Corp. is

[59] Tr. Vol II at 426.

[60] Staff Initial Rehearing Brief at 6.

[61] Tr. Vol. I at 185-186.

[62] Staff Initial Rehearing Brief at 7.

[63] Id.

[64] OCC Ex. 46 at 8 (Kahal Rebuttal).

the entity responsible for its own business decisions, including those regarding unregulated subsidiaries.

2. The inclusion of Rider DMR in the Companies' ESP IV renders it less favorable in the aggregate than an MRO.

Staff is mistaken in its assertion that approval of Rider DMR without Modified Rider RRS renders the Companies' ESP IV more favorable in the aggregate than an MRO.[65] To support its argument that the receipt of Rider DMR revenue would be a 'quantitative wash' for purposes of the ESP v. MRO test, Staff claims that equivalent Rider DMR revenue could be recovered through an MRO pursuant to R.C. 4928.142(D).[66] This is incorrect. That provision permits the Commission to adjust a utility's standard service offer (SSO) price only in the event of "any emergency that threatens its financial integrity." Staff witness Turkenton did not identify any emergency that threatens the Companies' financial integrity, thus equivalent Rider DMR revenue could not be recovered under an MRO.[67] Alternatively, Staff states that equivalent Rider DMR revenue could be recovered through a base rate proceeding.[68] That argument also fails though because the Companies have agreed to a distribution base rate freeze through the end of ESP IV.[69]

From a qualitative perspective, Staff states that inclusion of Rider DMR in the ESP IV is still preferable to an MRO because of the purported grid modernization benefits that Rider DMR will generate. As described at length above, that argument fails because there is no guarantee that these alleged grid modernization benefits will ever come to fruition. Revenue received

[65] Staff Initial Rehearing Brief at 8.

[66] Id.

[67] Tr. Vol. II at 450.

[68] Staff Initial Rehearing Brief at 8.

[69] Tr. Vol. I at 201.

through Rider DMR is not required to be used for grid modernization.[70] Staff witness Choueiki underscored this point by stating that Rider DMR is intended to provide credit support to FirstEnergy Corp., "not to modernizing the grid."[71] The claim that Rider DMR will enhance competitive options is equally misplaced.[72] The more logical inference is that Rider DMR will chill competive options. The subsidy granted to FirstEnergy Corp. could ultimately flow to its competitive subsidiaries. In view of this, competitive suppliers could be deterred from entering the market because of the competitive disadvantage they would be operating against.[73]

3. Staff's criticisms of OMAEG witness Lause miss the mark.

Staff errs in criticizing Mr. Lause's statement that Rider DMR revenue could work to the benefit of FES.[74] As Staff witness Buckley explained, "the [DMR] dollars aren't marked, so to the extent that Ohio Edison, for example, dividends up to FirstEnergy Corp., what they do with that money is FirstEnergy Corp.'s prerogative. So the money for the DMR is not going to be marked different than any other money that Ohio Edison were to receive."[75] In other words, FirstEnergy Corp. could transfer the revenues received from Rider DMR to another subsidiary that owns generation such as FES, exactly as Mr. Lause explained. Under this scenario, there could be a deterrent effect on other generators' willingness to compete alongside those that receive anticompetitive subsidies from Ohio ratepayers in accordance with Mr. Lause's predictions.

[70] Tr. Vol. II at 433.

[71] Tr. Vol. IV at 960.

[72] Staff Initial Rehearing Brief at 8.

[73] OMAEG Ex. 39 at 8 (Lause Rebuttal).

[74] Staff Initial Rehearing Brief at 12.

[75] Tr. Vol. III at 584.

Staff is likewise off base in criticizing Mr. Lause's testimony with respect to the statements he made about steps that FirstEnergy Corp. could take to remedy its financial distress.[76] Staff states that Mr. Lause was unaware of steps taken by FirstEnergy to address its financial situation. But Staff overlooks the fact that Mr. Lause was speaking prospectively about a plan that FirstEnergy Corp. should adopt for the future in lieu of Staff's Proposal.[77] Even crediting the notion that steps are being made to turn FirstEnergy Corp. around, the problem is that these steps are not working. Indeed, but for the fiscally irresponsible decisions of FirstEnergy Corp., there would be no need for the creation of Rider DMR at all. Mr. Lause's testimony that Staff's Proposal removes any incentive for FirstEnergy Corp. to behave in a fiscally responsible manner is unassailable given that Rider DMR revenue would be collected whether or not grid modernizations are effectuated.[78]

[76] Staff Initial Rehearing Brief at 12-13.

[77] OMAEG Ex. 39 at 9-10 (Lause Rebuttal)

[78] Id.

C. The Companies' grounds for modifying Staff's Proposal are meritless.

Not content with Staff's Proposal that would give the Companies $393 million over the next three years (with an option to extend the rider by another two years) without any explicit requirement to invest in grid modernization, the Companies contend that over the eight-year term of ESP IV they should instead receive $558 million annually for credit support and up to $568 million annually to account for maintaining the FirstEnergy Corp. headquarters and nexus of operations in Akron, Ohio.[79] If accepted, the Companies' modifications to Staff's proposal could amount to approximately $9 billion in customer charges over nearly eight years. FirstEnergy's justifications for modifying Staff's Proposal are meritless and should be denied by the Commission. While OMAEG vigorously opposes any type of Rider DMR concept, if the Commission is inclined to approve such a concept, the Rider DMR mechanism proposed by Staff (not the Companies) should be adopted.

1. The Companies' proposed timeline for evaluating the annual revenue need of Rider DMR is flawed.

The Companies are wrong to suggest that the Commission should modify the timeline Mr. Buckley used to calculate the average annual revenue need of $131 million.[80] Mr. Buckley used a timeline of roughly five years (2011 up through September 2015) whereas the Companies recommend a timeline of three years (2012 to 2014). Mr. Buckley arrived at this timeline because he thought it reflected a "better representation" of FirstEnergy Corp.'s circumstances.[81] In contrast, the Companies claim that making an adjustment to Mr. Buckley's timeline is necessary to account for a worsening trend of CFO to debt at FirstEnergy Corp. from 2012

[79] Companies Initial Rehearing Brief at 37-38.

[80] Id. at 32.

[81] Tr. Vol. III at 740-741.

through 2014 as well as to account for a one-year spike in capacity price in the ATSI zone.[82] But as Staff explains, trends (whether good or bad) are best captured through longer—not shorter—timelines.[83] Moreover, Ms. Mikkelsen admitted that the capacity-price spike had no effect on its credit metrics.[84]

Putting aside the Companies' pretexts for shortening the timeline, the reality is that the Companies have simply cherry-picked the years that will drive up the average annual revenue need. In the words of Staff, a longer timeline is more appropriate because it accounts for the "complete picture."[85] Mr. Buckley's recommended timeline captures the complete picture, the Companies' does not.

2. The Companies' proposed allocation factor lacks record support.

The Companies next err in suggesting that the allocation factor should be modified from 22% to 40%.[86] Staff's allocation factor is intended to reflect the principle that constituents of FirstEnergy Corp. as a whole, not just the Companies' customers, should be responsible for supporting the financial viability of FirstEnergy Corp.[87] In the Companies' view, Staff's use of gross operating revenues from 2015 to calculate the 22% allocation factor is inappropriate because it understates the Companies' relative contribution to FirstEnergy Corp. As Staff's Brief points out, it would be incorrect to rely on the effects of shopping as a reason to increase the allocation factor.[88] An increase in shopping means fewer customers rely on the Companies for all of their service needs, and thus, Ohio ratepayers should have less responsibility for the

[82] Companies Initial Rehearing Brief at 34.

[83] Staff Initial Rehearing Brief at 15.

[84] Tr. Vol. X at 816.

[85] Staff Initial Rehearing Brief at 15.

[86] Companies Initial Rehearing Brief at 36.

[87] Tr. Vol. III 535-536.

[88] Staff Initial Rehearing Brief at 16.

overall credit support of FirstEnergy Corp.[89] The Companies' request to increase the allocation factor disregards this fundamental point and shifts cost responsibility from FirstEnergy Corp.'s unregulated subsidiaries to Ohio ratepayers.

3. The Companies' proposal to gross-up Rider DMR revenue should be denied.

The Companies' request to gross-up Rider DMR revenue by $211 million per year should be denied.[90] The Companies propose that the revenue be grossed-up by 36% to reflect that the revenue is subject to income tax. But the Companies are unaware of whether the proposed tax rate accounts for the effects of bonus depreciation, tax abatements, or other tax relief provided to the Companies or FirstEnergy Corp.[91] Thus, the 36% gross-up figure could be overstated and give the Companies an unnecessary windfall. A further error is that the Companies overlook the fact that in some years corporations pay no income taxes at all.[92] It therefore follows that if no income taxes were paid in a given year, no gross-up for income taxes would be necessary.

In evaluating the Companies' request for a gross-up, it bears emphasizing that the purpose of Staff's Proposal is to improve the credit metrics of FirstEnergy Corp. As Staff observes, improvement of these metrics will depend on cash flow.[93] Contrary to the Companies' position, "[t]he nominal tax rate does not have any direct impact on cash flow. It is actual cash inflows and outflows that matter."[94] The Companies' gross-up methodology overlooks this principle.

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[89] Id.

[90] Companies Ex. 206 at 13 (Mikkelsen Rebuttal and Surrebuttal).

[91] Tr. Vol. X at 1799-1800.

[92] Staff Initial Rehearing Brief at 15.

[93] Id

[94] Id.

Even Staff asserts that the Companies are overreaching with their gross-up proposal and methodology.[95] Staff has likened the Companies' recommended gross-up calculation to the type of methodology typically performed in base rate cases.[96] The Commission is not being asked to set base rates in this proceeding. For all these reasons, the Companies' gross-up methodology should be denied.

4. Rider DMR should not have an eight-year duration.

The Companies' request to increase the duration of Rider DMR to eight years is unjust, unreasonable, and unconvincing. In their view, the term of Rider DMR should run concurrently with the term of their ESP IV, up through May 31, 2024.[97] But collecting charges from customers associated with credit support for nearly eight years is unacceptable and creates additional risk to customers without any offsetting benefits.[98] If FirstEnergy Corp.'s credit ratings improve after two or three years of receiving Rider DMR revenue (which is Staff's stated purpose of Rider DMR), then any additional Rider DMR revenue received by the Companies after that would amount to a windfall and be in violation of R.C. 4905.22's prohibition against unjust and unreasonable charges. Even Ms. Mikkelsen acknowledges there is an element of risk in this endeavor. She could not pinpoint when FirstEnergy Corp.'s credit rating could be expected to improve.[99] Given this much uncertainty, granting an eight-year term for Rider DMR would not appropriately balance the risk between the Companies' and their customers. This risk-

[95] Id. at 16 ("The [C]ompanies want much more than this.").

[96] Id.

[97] Companies Initial Rehearing Brief at 39.

[98] Staff Initial Rehearing Brief at 16-17.

[99] Tr. Vol. X at 1731.

sharing principle was a pillar of the Commission's March 31, 2016 Order and it should be similarly followed here to safeguard customers' interests.[100]

5. The Companies should not receive additional revenue to account for maintaining the FirstEnergy Corp. headquarters and nexus of operations in Akron, Ohio.

Citing to the testimony of Ms. Murley, the Companies claim that the Rider DMR revenue amount should be increased above the $558 million annually proposed by the Companies to account for the impacts of maintaining the FirstEnergy Corp. headquarters and nexus of operations in Akron, Ohio.[101] Such increase could be up to $568 million annually. The Companies claim that Staff's Proposal does not recognize the value of these impacts, but they are mistaken.

To begin with, maintaining the FirstEnergy Corp. headquarters and nexus of operation in Akron, Ohio was a provision in the Third Supplemental Stipulation.[102] That provision was adopted by the Commission in its March 31 Order and remained unchanged by the Companies' rehearing application and testimony.[103] Customers are already paying for and receiving any purported benefits from that provision. Asking customers to pay for this again could run the risk of a double-recovery issue. Moreover, FirstEnergy Corp. is committed to an eight-and-a-half year lease extension on its downtown office location (which will run through June 2025) and no witness for the Companies was aware of any evidence that the headquarters was about to move out of Akron, Ohio.[104] Requiring customers to pay to keep the headquarters and nexus of

[100] Order at 91-92.

[101] Companies Initial Rehearing Brief at 38.

[102] Companies Ex. 154 ("FirstEnergy will maintain its corporate headquarters and its nexus of operations in Akron, Ohio for the duration of rider RRS.").

[103] March 31 Order at 96-97; Companies Ex. 197 at 1-2, 5-7 (Mikkelsen Rehearing).

[104] Dynegy Ex. 1 at 11 (Ellis Direct); Tr. Vol. IX at 1467-1468; Tr. Vol. X at 1603-1604.

operations in Akron, Ohio is illogical because the decision has already been made to stay put. Any doubts about this are put to rest by Staff, where in their brief they state their "belie[f] that the [C]ompanies are already recompensed adequately for the presence of the headquarters * * * ."[105]

Moreover, even if this economic-impact provision was not already accounted for, the Commission should not credit Ms. Murley's estimate that the economic impacts amount to $568 million annually. As explained at length in OMAEG's Initial Rehearing Brief, Ms. Murley did not account for the negative economic development consequences that could arise from increasing customers' costs in accordance with the Companies' request. For example, she did not analyze whether increased costs would harm customers' ability to invest additional dollars in Ohio or limit their efforts to expand their companies in Ohio.[106] She did not address any costs to customers associated with Rider DMR, such as lost revenues associated with paying for the credit support portion of the rider or lost opportunity costs.[107] Also missing from her evaluation was any cost-benefit analysis of maintaining the corporate headquarters in Akron, Ohio.[108] Further, the IMPLAN modeling that Ms. Murley relied on to generate her conclusions was based on inputs that she did not verify.[109] Given all of these glaring flaws, none of which are cured by the Companies' Initial Rehearing Brief, the Commission should not credit Ms. Murley's testimony and should likewise reject the Companies' request to tack on an additional amount up to $568 million annually to the Rider DMR revenue requirement.

6. Rider DMR revenue should not be excluded from the SEET.

[105] Staff Initial Rehearing Brief at 18.

[106] Tr. Vol IX at 1539-1540.

[107] Id. at 1487-1488.

[108] Id. at 1500-1502.

[109] Id. at 1523.

The Commission should deny the Companies' request to exclude Rider DMR revenue from the SEET.[110] The Companies claim that removing Rider DMR revenue from the SEET calculation would defeat the purpose of the rider to provide credit support.[111] But as OCC makes clear, R.C. 4928.143(E) directs the Commission to conduct the SEET analysis in a way that addresses the impact of the approved ESP as a whole, not to isolate revenue associated with one particular rider.[112] Contrary to what the Companies argue, removing Rider DMR revenue would defeat the purpose of the SEET, not the other way around. The Companies next claim that Rider DMR revenue should be removed because it is extraordinary. But the Companies offer little more than circular logic to support this assertion: "Rider DMR revenues qualify as an extraordinary item because the twin purposes of Rider DMR * * * are extraordinary in nature."[113] Labeling something extraordinary does not make it so; if this were the case, utilities would be granted license to remove virtually any rider provision from the SEET that they wanted to simply through artful labeling. The reality is that—aside from the staggering costs to customers—there is nothing extraordinary about a rider that recovers costs associated with grid modernization. The Commission has previously stressed its interest in grid modernization efforts; in doing so, it in no way expressed the view that such efforts should be viewed as extraordinary.[114]

Another flawed justification offered by the Companies for removing Rider DMR revenue from the SEET calculation is that they would be the only company operating under a rider with

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[110] Companies Initial Rehearing Brief at 41.

[111] Id.

[112] OCC Initial Rehearing Brief at 54.

[113] Companies Initial Rehearing Brief at 42.

[114] See *In the Matter of the Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider, et al.*, Case No. 14-1693-EL-RDR, et al., Opinion and Order at 85 (March 31, 2016); Opinion and Order at 96, 111, and 118.

the express purpose of incenting grid modernization through improved access to capital markets.[115] In their view this would complicate the Commission's ability to select a representative peer group. But R.C. 4928.143(E) does not require the Commission to perform the SEET analysis by evaluating the Companies' earnings against other companies that have the *same* riders and tariffs. Indeed, it would be impossible to find such a company. One of the tasks the Commission is required to do under R.C. 4928.143(E) is identify companies that "face *comparable* business and financial risk * * * ."[116] The Companies' theory for excluding Rider DMR revenue would read the word "comparable" right out of the statute.[117]

7. The inclusion of Rider DMR in the Companies' ESP IV renders it less favorable in the aggregate than an MRO.

The Companies' wrongly assert that their modified and approved ESP IV, together with their proposed modifications to Rider DMR, is more favorable in the aggregate than an MRO.[118] They first argue that none of the qualitative benefits from the ESP IV would be impacted, but this is untrue. Rider DMR does not "enhance the qualitative benefits of ESP IV" by encouraging such things as smart grid programs and grid modernization. The Companies have not committed to invest in grid modernization.[119] Even worse, they are requesting to collect Rider DMR revenue before commencing grid modernization efforts.[120] It is therefore sheer guesswork whether Rider DMR will actually achieve its goals. Moreover, as Ms. Mikkelsen admits, Rider

[115] Companies Initial Rehearing Brief at 42.

[116] Emphasis added.

[117] *Cleveland Mobile Radio Sales, Inc.*, 2007-Ohio-2203, ¶ 12 ("A court is neither to insert words that were not used by the legislature nor to delete words that were used.").

[118] Companies Initial Rehearing Brief at 46.

[119] Tr. Vol. X at 1741-1742.

[120] Companies Ex. 2016 at 16 (Mikkelsen Rebuttal and Surrebuttal).

DMR does not preserve any qualitative benefits from ESP IV that are associated with rate stability or predictably-priced service.[121]

The Companies next posit that Rider DMR does not add quantitative costs to the test because Rider DMR revenue used to support grid modernization "would be a wash for purposes of the ESP v. MRO test."[122] This is wrong for much the same reasons that were discussed above with respect to similar contentions from Staff. First, equivalent Rider DMR revenue could not be recovered through an MRO pursuant to R.C. 4928.142(D). That provision permits the Commission to adjust *a utility's SSO price* only in the event of "any emergency that threatens its financial integrity." The Companies have failed to provide any evidence that an emergency exists. Absent this showing, equivalent revenue could not be recovered under an MRO and costs would be higher under an ESP in the ESP v. MRO test. The contention that equivalent revenue could be recovered in a base rate proceeding is also incorrect. Rider DMR revenue could not be recovered through a base rate proceeding because the Companies have agreed to a base rate freeze through the end of ESP IV.[123] Equally unavailing is the assertion that equivalent revenue could be recovered through Rider AMI. That claim fails because Rider AMI and Rider DMR are different in character and in purpose—namely, Rider AMI (unlike Rider DMR) is not designed to provide credit support to FirstEnergy Corp. The Companies' argument that revenues could be recovered through a mechanism similar to Rider DMR as part of an MRO is also incorrect. As OCC points out, a credit support rider could not arise under an MRO because an "MRO sets the

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[121] Tr. Vol. X at 1741-1742.

[122] Companies Initial Rehearing Brief at 44.

[123] Tr. Vol. X at 1712.

costs for generation. No more, no less."[124] Because the rider is designed to provide credit support, it could not receive authorization under an MRO.

D. Just and reasonable rate-design proposals are available for adoption by the Commission.

OMAEG vigorously opposes any form of Rider DMR. Nonetheless, if the Commission is inclined to approve such a mechanism, there are a few rate-design options that the Commission should consider. As Staff witness Turkenton explained, the Commission's evaluation of any rate-design proposal ought to be considered against the backdrop of whether it facilitates Ohio's effectiveness in the global economy as prescribed by R.C. 4928.02(N). The following rate-design options would be consistent with that objective.

As one alternative, the Commission could allocate the proposed Rider DMR costs on the basis of distribution revenues. As explained by some, an allocation made on the basis of distribution revenues would be in line with the ostensible purpose of Rider DMR, which is to incent modernization of the Companies' distribution infrastructure.[125] This alternative is simple to administer, is just and reasonable, and should be adopted.[126]

Alternatively, OEG witness Baron proposed another allocation methodology, which would allocate the costs based 50% on distribution and 50% on demand.[127] This allocation accounts for the fact that Rider DMR has been characterized by some as embodying not only distribution-related elements, but also certain economic-development related elements.[128] Given

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[124] OCC Initial Rehearing Brief at 11.

[125] See IEU-Ohio Initial Rehearing Brief at 6-7; Nucor Steel Marion Initial Rehearing Brief at 6.

[126] Id.

[127] OEG Ex. 7 at 3 (Baron Rehearing Rebuttal); Nucor Steel Marion Initial Rehearing Brief at 6-7.

[128] Id.

the dual-purpose nature of Rider DMR, an allocation that assigns costs based on this hybrid approach could also be appropriate.

While both of these alternatives have merit, an allocation that assigns all or a portion of the costs based on energy would unfairly shift costs to manufacturers and other energy-intensive customers.[129] Such an outcome would not properly facilitate the state's effectiveness in the local economy and should therefore be denied.

III. CONCLUSION.

For the foregoing reasons, all three of the rehearing proposals presented for the Commission's adoption should be denied. Customers should not be required to fund a corporate bailout of FirstEnergy Corp. simply because it operated in a fiscally irresponsible manner. Indeed, it is difficult for customers to accept that they could be commandeered into paying billions and billions of dollars over the next several years to fund an entity they have no direct contractual relationship with. Also difficult to fathom is why customers may be forced to prop up the credit metrics of an entity over which the Commission has no jurisdiction to regulate.

Notwithstanding the differences among the three rehearing proposals, they do share a common thread insofar as they will almost assuredly cause customers' costs to soar over the next three to eight years. That outcome cannot be squared with the policy to facilitate Ohio's effectiveness in the global economy and does not promote a competitive atmosphere that will allow Ohio's manufacturers to flourish.

Ultimately, in spite of all the seeming complexity this case entails, the question presented to the Commission is actually quite simple: should customers be required to fund a

[129] Id. at 4.

corporate bailout of FirstEnergy Corp.? The facts, the law, and the policies underlying Ohio's electric industry all compel the same answer: no.

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served upon the following parties via electronic mail on August 29, 2016.

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