**BEFORE**
**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| **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** |

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**APPLICATION FOR REHEARING OF**
**THE PJM POWER PROVIDERS GROUP**
**AND**
**THE ELECTRIC POWER SUPPLY ASSOCIATION**

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Now come the PJM Power Providers Group[1] and the Electric Power Supply Association[2] ("P3/EPSA") and pursuant to R.C. 4903.10, request that the Public Utilities Commission of Ohio ("Commission") grant rehearing on its October 12, 2016 Fifth Entry on Rehearing in the above-styled proceeding. Specifically, the Fifth Entry on Rehearing is unreasonable and unlawful in the following respects:

1. The Commission's holding that it was vested with jurisdiction to consider Rider DMR is unreasonable and unlawful.

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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 application for rehearing 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 application for rehearing 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.

2. The Commission's finding that Rider DMR was authorized by R.C. 4928.143(B)(2)(h) as regarding "distribution service" is unreasonable and unlawful.

3. The Commission's failure to restrict Rider DMR revenues from subsidizing the Companies' generation affiliate is unreasonable and unlawful.

4. The Commission's finding that Modified Rider RRS constitutes a "charge" and a "limitation on customer shopping" pursuant to R.C. 4928.143(B)(2)(d) is unreasonable and unlawful.

The facts and arguments that support these grounds for rehearing are set forth in the attached Memorandum in Support.

Respectfully submitted,

/s/ Gretchen L. Petrucci
Michael J. Settineri (0073369), Counsel of Record
Gretchen L. Petrucci (0046608)
Ilya Batikov (0087968)
Vorys, Sater, Seymour and Pease LLP
52 E. Gay Street
Columbus, Ohio 43215
614-464-5462
mjsettineri@vorys.com
glpetrucci@vorys.com
ibatikov@vorys.com

*Counsel for PJM Power Providers Group and the Electric Power Supply Association*

## TABLE OF CONTENTS

## MEMORANDUM IN SUPPORT

## I. INTRODUCTION

On October 12, 2016, the Public Utilities Commission of Ohio (the "Commission") issued its Fifth Entry on Rehearing in regard to the Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company's (collectively, "the Companies") application for their fourth electric security plan ("ESP IV") under R.C. 4928.143. The Commission's decision addressed for the first time the Companies' Modified Retail Rate Stability Rider ("Modified Rider RRS") and Staff's Distribution Modernization Rider ("Rider DMR") proposal.

While finding that Modified Rider RRS was authorized under R.C. 4929.143(B)(2)(d), the Commission declined to adopt that proposal, concluding that it "does not include important secondary benefits related to reliability, resource diversity, and economic development when compared to Rider RRS as originally modified and approved by the Commission."[3]

Next, the Commission addressed Rider DMR, concluding that Staff's proposed rider was authorized as a provision "regarding the utility's distribution service" under R.C. 4928.143(B)(2)(h) that "address[es] a demonstrated need for credit support for the Companies in order to ensure that the Companies have access to capital markets in order to make investments in their distribution system."[4] Through Rider DMR, the Companies are authorized to collect $132.5 million annually, to be grossed up for federal income taxes, for three years, with the possibility of an extension for up to an additional two years.[5] However, the Commission refused

[3] Fifth Entry on Rehearing at 45-46.

[4] *Id.* at 87, 89.

[5] Fifth Entry on Rehearing at 95-97.

to impose any requirement that these funds be dedicated toward grid modernization initiatives, and did not restrict how these funds may otherwise be spent.[6]

The PJM Power Providers Group and the Electric Power Supply Association ("P3/EPSA") submit that the Commission's decision is unreasonable and unlawful. First, the Commission acted unreasonably and unlawfully by concluding that it was vested with jurisdiction to consider Rider DMR, notwithstanding the fact that Rider DMR was not properly presented to the Commission on rehearing under R.C. 4903.10. Second, the Commission acted unreasonably and unlawfully in concluding that Rider DMR is authorized by R.C. 4928.143(B)(2)(h) as a provision "regarding the [Companies'] distribution service." Third, the Commission acted unreasonably and unlawfully in failing to restrict the Companies from using Rider DMR funds to unlawfully subsidize their competitive generation affiliate, FirstEnergy Solutions Corp. ("FES"). Finally, although the Commission ultimately rejected Modified Rider RRS on other grounds, its decision that Modified Rider RRS (based on a virtual PPA) was conceptually authorized under R.C. 4928.143(B)(2)(d) is unreasonable and unlawful, as Modified Rider RRS is neither a "charge" nor a "limitation[] on customer shopping" as required by that statute.

As discussed further below, the Commission should reverse its decision, reject Rider DMR, and find that Modified Rider RRS is unauthorized under Ohio law.[7] The Commission must follow its governing statutes, and as to Rider DMR, conclude that nothing in Ohio law authorizes the Commission to force ratepayers to give **their money** to FirstEnergy Corp. and its competitive affiliate.

[6] Fifth Entry on Rehearing at 127.

[7] P3/EPSA do not waive any other argument against Rider DMR and the Commission's decisions on rehearing, and expressly reserve the right to raise any argument raised by any other party on application for rehearing in further appeals in this proceeding.

## II. ARGUMENT

### A. The Commission's holding that it was vested with jurisdiction to consider Rider DMR is unreasonable and unlawful.

Rider DMR was introduced and proposed by the Commission's Staff for the first time during the rehearing proceeding on the Companies' Modified Rider RRS proposal, but in a manner that plainly failed to comply with R.C. 4903.10. The Commission's jurisdiction to consider matters on rehearing is fixed by R.C. 4903.10 and the rule promulgated thereunder, Ohio Adm. Code 4901-1-35. Because the Commission is a creation of the General Assembly under the police power of the state, it only has such jurisdiction and authority to act as is vested in it by statute. *Ohio Bus Line, Inc. v. Pub. Util.,* 29 Ohio St.2d 222 (1972), paragraph one of the syllabus. Bound by R.C. 4903.10, the Commission could not consider Rider DMR on rehearing and lacked jurisdiction to approve the rider.

The Commission, disagreeing with P3/EPSA's argument in its initial brief, found that it had jurisdiction over Rider DMR and largely relied on the Supreme Court's decision in *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St.3d 300, 856 N.E.2d 213 (2006) (the "*CG&E Case*"),[8] a decision that is wholly inapposite to the facts and posture of this case. On rehearing, the Commission should abide by its jurisdictional limits and acknowledge that it lacks authority to address Rider DMR.

[8] Fifth Entry on Rehearing at 12.

*1. R.C. 4903.10 Limits the Commission's Jurisdiction to Consider Matters in the Context of a Rehearing Application.*

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*"[9] and (2) a hearing must be held "*on the matter specified in such application.*"[10]

Rider DMR fails to satisfy either limitation. First, as the record shows, Rider DMR is a completely distinct proposal from the original Rider RRS proposal considered by the Commission in the first phase of this proceeding, asserted under a separate provision of the electric security plan statute and with an unrelated goal. Therefore, it in no way relates to any matters that were previously "determined in this proceeding." Second, Rider DMR was not proposed through an application for rehearing, and therefore, is not a proper subject for a hearing that, by statute, must be held "on the matter specified in [an application for rehearing]." Therefore, the Commission lacks jurisdiction to consider Rider DMR, and its conclusion finding otherwise is unreasonable and unlawful.

*2. Rider DMR is not a matter "determined in this proceeding."*

R.C. 4903.10 requires that in order for the Commission to have jurisdiction over Rider DMR on rehearing, Rider DMR must concern a matter "determined in the proceeding."[11] But Rider DMR is not a matter that was previously "determined in this proceeding." In fact, Rider DMR as presented in rehearing was wholly distinct from the original Rider RRS, with different

[9] R.C. 4903.10 (Emphasis added).

[10] *Id.* (Emphasis added).

[11] R.C. 4903.10.

policy objectives, mechanics, and claimed impact to ratepayers.[12] As a result, Rider DMR does not address a matter "determined in [this] proceeding" and the Commission lacked jurisdiction to consider it in this case.

Staff proposed Rider DMR as a *new* rider to serve as an alternative to Rider RRS, but any relationship between the two proposals ends there.[13] That Rider DMR is not a matter that was previously "determined in this proceeding" becomes starkly clear when considering the key differences between Rider DMR and original Rider RRS:

| | **Original Rider RRS** | **Rider DMR** |
|---|---|---|
| **Alleged objective:** | To safeguard customers against volatility in retail rates.[14] | To provide the Companies with credit support to jump start grid modernization.[15] |
| **Mechanics:** | The Companies would acquire the generation output of specified generation plants through a power purchase agreement, which generation would be sold into the PJM markets, with customers receiving a charge or credit based on the netting of the costs and revenues from such sales.[16] | Ratepayers would pay a fixed annual charge, representing a portion of revenues necessary for FirstEnergy Corp. to obtain a cash flow from operations pre-working capital to debt ratio 14.5%.[17] |
| **Claimed Impact on Ratepayers:** | As determined in the March 31, 2016 Decision, a $256 million net credit over the eight-year term of ESP IV.[18] | An annual charge of $132.5 million, grossed up for federal taxes, for three years, with the possibility of an extension for up to an additional two years.[19] |

Because a rehearing on Rider DMR was not "in respect to any matters determined in the proceeding," the Commission lacked jurisdiction to address that proposal under R.C. 4903.10.

[12] Their only real similarity is that both proposals result in the unlawful collection of ratepayer dollars for the benefit of unregulated entities.

[13] Staff Ex. 15 (Choueiki Rehearing Testimony) at 14-15.

[14] Company Ex. 7 (Mikkelson Direct Testimony) at 29.

[15] Fifth Entry on Rehearing at 87-88.

[16] Company Ex. 1 at 9.

[17] Fifth Entry on Rehearing at 93.

[18] March 31, 2016 Decision at 85.

[19] Fifth Entry on Rehearing at 95-97.

*3. Rider DMR was not presented through an application for rehearing.*

R.C. 4903.10 requires that a rehearing proceeding be held "on the matter specified in such application [for rehearing]." No party in this proceeding, including the Companies, filed an application for rehearing seeking Rider DMR.[20] Because Rider DMR was not included in an application for rehearing, the Commission was without jurisdiction to consider Rider DMR within the scope of this rehearing proceeding.

*4. The Commission's authority to abrogate or modify its original order on rehearing is subject to the limitations in R.C. 4903.10.*

While the Commission has authority to abrogate or modify its original order on rehearing, the scope of the Commission's authority is constrained by the limitations of R.C. 4903.10; that is: (i) rehearing must still relate to "any matters determined in the proceeding" and (ii) rehearing must be held "on the matter specified in such application [for rehearing]." Yet the Fifth Entry on Rehearing suggests that the Commission has unfettered authority to modify its original order to address a new matter, even if such matter is entirely unrelated to the issues raised in its original decision *and* even if such matter was not raised by the parties to the proceeding through an application for rehearing. This unlawful assertion of authority runs against the plain purpose of R.C. 4930.10, which is to allow parties to challenge the Commission's findings on the matters addressed in the original hearing, not create a venue for the consideration of wholly unrelated matters.

[20] *See, e.g.* Rehearing Tr. Vol. 10 at 1762.

*5. The CG&E Case does not support the Commission's jurisdiction over Rider DMR.*

The Commission's rationale for its determination that it has jurisdiction over Rider DMR is sparse. The Commission did note that its "determination is consistent with the *CG&E Case*."[21] In fact, the *CG&E Case* offers no support for the Commission's unlawful assertion of jurisdiction over Rider DMR.

In the *CG&E Case*, The Cincinnati Gas & Electric Company ("CG&E") filed an application for rehearing urging the Commission to adopt an alternative proposal. CG&E's application for rehearing devoted almost a full page to the alternative proposal, with further detail provided in an attached memorandum in support.[22] The Court found that the Commission properly "treated CG&E's alternative proposal as an assignment of error on rehearing."[23]

Here, no party submitted an application for rehearing proposing the adoption of Rider DMR. Because the *CG&E Case* is predicated on a timely-filed application for rehearing that specifically describes an alternative proposal, and these circumstances do not exist with respect to Rider DMR, the *CG&E Case* lends no support to the claim that the Commission has jurisdiction to consider Rider DMR.

In sum, in order for the Commission to have jurisdiction over Rider DMR under R.C. 4903.10, Rider DMR must relate to a matter "determined in [this] proceeding" and be the subject of an application for rehearing. Neither of those conditions was satisfied with Rider DMR. The

[21] Fifth Entry on Rehearing at 12.

[22] *See In the Matter of the Application of The Cincinnati Gas & Electric Company to Modify Its Nonresidential Generation Rates to Provide for Market-Based Standard Service Offer Pricing and to Establish an Alternative Competitive-Bid Service Rate Option Subsequent to the Market Development Period*, Case Nos. 03-93-EL-ATA, et al., CG&E Application for Rehearing at 2, 4-5 (Oct. 29, 2004).

[23] The *CG&E Case,* 111 Ohio St.3d at ¶ 15.

Commission's conclusion that it had jurisdiction over Rider DMR is therefore unreasonable and unlawful.

### B. The Commission's finding that Rider DMR was authorized by R.C. 4928.143(B)(2)(h) as regarding "distribution service" is unreasonable and unlawful.

Through the Commission's approval of Rider DMR, the Companies are allowed to collect an annual amount equal to $132.5 million, to be grossed up for federal taxes, with no commitment that the Companies undertake any grid modernization projects or any requirement that the dollars collected fund any grid modernization projects. In fact, the moneys collected under Rider DMR may be transferred to the Companies' parent company, FirstEnergy Corp., where that money can be spent on any number of items, like funding FirstEnergy Corp.'s maturing debt, pension obligations, or supporting FirstEnergy Corp.'s unregulated businesses, that are completed unmoored from the Companies' distribution service.[24] R.C. 4928.143(B)(2)(h) does not authorize such a rider, and the Commission is unreasonable and unlawful for finding otherwise.[25]

#### *1. Rider DMR is a rider for credit support, not a rider "regarding" the Companies' distribution service.*

R.C. 4928.143(B)(2)(h) provides for the inclusion of the following in an ESP:

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

[24] *See, e.g.* Rehearing Tr. Vol. 4 at 1008; Rehearing Tr. Vol. 10 at 1609; Rehearing Tr. Vol. 10 at 1607, Fifth Entry on Rehearing at 127.

[25] Fifth Entry on Rehearing at 89-90.

Therefore, to be authorized under this statute, Rider DMR must be in regard to "the utility's distribution service." Rider DMR fails this threshold requirement, because, despite being called a "Distribution Modernization Rider," Rider DMR has nothing to do with distribution service. Indeed, the record is clear that the rider's sole function is credit support—specifically, to provide a cash infusion to the Companies for the purpose of shoring up the Companies' (and FirstEnergy Corp.'s) credit rating, rather than for any "distribution service."[26]

*2. Rider DMR does not incentivize grid modernization.*

The Commission evidently believes that a nexus to distribution exists, explaining that "Rider DMR is an incentive" since "Staff intends for Rider DMR to jump start the Companies' grid modernization efforts."[27] Even under the Commission's approved definition of "incentive" as "something that stimulates one to take action, work harder, etc.,"[28] Rider DMR cannot be said to "incentivize" the modernization of the Companies' distribution infrastructure because there are no requirements that tie the receipt of Rider DMR revenues to grid modernization efforts, or any restrictions on how the Companies spend or transfer Rider DMR revenues. For example, Rider DMR revenues could be transferred to FirstEnergy Corp. through dividends, where that money could be spent on a host of things entirely unrelated to distribution infrastructure, such as maturing debt, funding of pensions, or other items, distributions to shareholders, or used to

[26] Staff's testimony was clear on this point. Staff witness Buckley, for example, acknowledged that the credit support provided by DMR "is not for the provision of a distribution service by the distribution companies to the ratepayers." Rehearing Tr. Vol. 3 at 611. Likewise, Staff witness Turkenton noted that Rider DMR "is a form of credit support for the company [sic] to be able to access -- access the capital markets and hopefully they will, in turn, modernize the grid." Rehearing Tr. Vol. 2 at 429. Ms. Turkenton further noted that despite the rider's name, "this is a form of credit support for the company [sic] to be able to access -- access the capital markets and hopefully they will, in turn, modernize the grid." *Id.* The Commission also agreed that Rider DMR functions to "address a demonstrated need for credit support for the Companies." Fifth Entry on Rehearing at 87.

[27] Fifth Entry on Rehearing at 90.

[28] *Id.*

provide support to FirstEnergy Corp.'s unregulated merchant business.[29] In short, what happens with Rider DMR dollars is entirely at the prerogative of the Companies and/or FirstEnergy Corp. Without some relationship between the rider's proceeds and tangible investments in grid modernization, it is unreasonable and unlawful for the Commission to conclude that Rider DMR incentivizes grid modernization.

*3. The Commission's conditions do not validate Rider DMR under R.C. 4928.143(B)(2)(h).*

The Commission expressly stated in its Fifth Entry on Rehearing that it was not imposing any restrictions on the use of Rider DMR revenues.[30] The Commission did condition recovery of Rider DMR revenues subject to the Companies' satisfaction of three conditions: "(1) continued retention of the corporation headquarters and nexus of operations of FirstEnergy Corp. in Akron, Ohio; (2) no change in 'control' of the Companies as that term is defined in R.C. 4905.401(A)(1); and (3) a demonstration of sufficient progress in the implementation and deployment of grid modernization programs approved by the Commission."[31]

None of these three conditions cure the fatal deficiency in Rider DMR—that the rider is not "regarding the utility's distribution service" under R.C. 4928.143(B)(2)(h). This is certainly true as to the first two conditions—which do not remotely concern distribution service—but is equally true as to the third condition, i.e., that the Companies demonstrate "sufficient progress in the implementation and deployment of grid modernization programs approved by the Commission."

[29] Rehearing Tr. Vol. 10 at 1607; Rehearing Tr. Vol. 3 at 584.

[30] Fifth Entry on Rehearing at 127.

[31] Fifth Entry on Rehearing at 96.

Ohio law is clear that a rider may only be approved for inclusion in an ESP if it satisfies one of the enumerated provisions in R.C. 4928.143(B)(1) or (B)(2).[32] Therefore, a defect with a rider proposal's satisfaction of an express requirement of Chapter 4928.143 cannot be cured by bootstrapping a "condition" that the rider recipient abide by the Commission's directives in a separate and future proceeding. Standing alone, Rider DMR is a credit support rider, with no restrictions on how revenues are spent, and no requirement that such revenues be dedicated to grid modernization improvements. Thus, Rider DMR is not "regarding" the Companies' distribution service, and therefore, is not authorized under R.C. 4928.143(B)(2)(h). This failure to satisfy the express requirements of subsection (B)(2)(h) continues *whether or not* the Companies are able to show sufficient progress under future grid modernization programs. Therefore, even with this condition, the Commission's decision approving Rider DMR under R.C. 4928.143(B)(2)(h) is unreasonable and unlawful.

### C. The Commission's failure to restrict Rider DMR revenues from subsidizing the Companies' generation affiliate is unreasonable and unlawful.

As approved by the Commission, there are no restrictions on the use of Rider DMR revenues, no requirement that the Companies spend any of the revenues received on grid modernization, and no requirement that Rider DMR revenues be spent solely within the Companies.[33] Moreover, nothing prohibits the Companies from transferring those funds to their affiliate, FirstEnergy Solutions Corp. ("FES") via dividends paid to FirstEnergy Corp.[34]

R.C. 4928.02(H) provides that it is the policy of the State of Ohio to:

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[32] *See In re Columbus S. Power Co.,* 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 32 ("By its terms, R.C. 4928.143(B)(2) allows plans to include only 'any of the following' provisions. It does not allow plans to include 'any provision.' So if a given provision does not fit within one of the categories listed 'following' (B)(2), it is not authorized by statute.").

[33] *See* Rehearing Tr. Vol. 4 at 957; Rehearing Tr. Vol. 3 at 647-648; Rehearing Tr. Vol. 3 at 958; Rehearing Tr. Vol. 10 at 1604, 1607-1608; Fifth Entry on Rehearing at 127.

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

> Ensure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa, including by prohibiting the recovery of any generation-related costs through distribution or transmission rates.[35]

Without a restriction on the transfer of Rider DMR revenues to FES, Rider DMR violates the anti-competitive subsidy restrictions in R.C. 4928.02(H). This is also the same concern that the Federal Energy Regulatory Commission raised in its April 27, 2016 decision rescinding the Companies' affiliate waivers relating to the Rider RRS PPA—i.e., 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."[36]

In its Fifth Entry on Rehearing, the Commission expressly rejected placing any restrictions on the use of Rider DMR funds.[37] But to alleviate concerns that Rider DMR is an unlawful subsidy, the Commission directed Staff to "periodically review how the Companies, and FirstEnergy Corp., use the Rider DMR funds to ensure that such funds are used, directly or indirectly in support of grid modernization."[38] The Commission concluded that "this Staff review will ensure that there is no unlawful subsidy of the Companies' affiliates."[39]

But the Commission's directive of a Staff review does nothing to remedy the concern that Rider DMR is an unlawful anti-competitive subsidy. Indeed, the Commission's reasoning on

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[35] R.C. 4928.02(H).

[36] *Electric Power Supply Association et al. v. FirstEnergy Solutions Corporation, et. al*, 155 FERC. ¶ 61,101, Order Granting Complaint at ¶ 54. (internal citations omitted).

[37] Fifth Entry on Rehearing at 127.

[38] *Id.* at 127-128.

[39] *Id.* at 128.

this point is logically inconsistent. On the one hand, the Commission expressly refused to "place restrictions on the use of Rider DMR funds."[40] Yet, on the other hand, while conceding that no such restrictions exist, the Commission still urges that a Staff review would ensure that "such funds are used, directly or indirectly in support of grid modernization."[41] Given the express absence of any restrictions on the use of Rider DMR funds, Staff's review effectively cannot guard against the use of Rider DMR funds for anti-competitive purposes.

If the Commission continues to believe that Rider DMR will not be an unlawful anti-competitive subsidy, at a minimum it should expressly prevent the Companies from transferring Rider DMR revenues, via FirstEnergy Corp., to FES.

### D. The Commission's finding that Modified Rider RRS constitutes a "charge" and a "limitation on customer shopping" pursuant to R.C. 4928.143(B)(2)(d) is unreasonable and unlawful.

While ultimately rejecting Modified Rider RRS on other grounds, the Commission nonetheless determined that Modified Rider RRS was conceptually authorized under R.C. 4928.143(B)(2)(d).[42] This determination is unreasonable and unlawful, as Modified Rider RRS is neither a "charge" nor a "limitation on customer shopping" as required by R.C. 4928.143(B)(2)(d).

#### *1. Modified Rider RRS is not a "charge" as required by R.C. 4928.143(B)(2)(d).*

The Commission found that Modified Rider RRS "would consist of a charge, or *credit*, incurred by customers under *ESP IV*."[43] The Commission further found that "for the first few

[40] *Id.* at 127.

[41] *Id.* at 127-128. Notably, the Commission believes that paying pension obligations can indirectly relate to supporting grid modernizations.

[42] Fifth Entry on Rehearing at 43-46.

[43] *Id.* at 44 (emphasis added).

years under [Modified Rider RRS], customers are likely to see a net charge."[44] Therefore, the Commission reasoned, Modified Rider RRS "would, *at times*, consist of a charge to customers."[45]

While the Commission concluded that Modified Rider RRS would consist of a charge "at times," the Commission acknowledged that Modified Rider RRS could also consist of a credit at other times. But the word "credit" does not appear anywhere in Section 4928.143(B)(2)(d). Selective compliance with the "charge" requirement of this statute at only certain times during the term of ESP IV is insufficient to satisfy R.C. 4928.143(B)(2)(d). In ruling that Modified Rider RRS satisfies R.C. 4928.143(B)(2)(d) while recognizing that (at least in theory), Modified Rider RRS could produce a credit, the Commission effectively read the word "credit" into subsection (B)(2)(d). This is impermissible. *See In re Columbus S. Power Co.,* 128 Ohio St.3d 512, ¶ 32 (2011) ("[I]f a given provision does not fit within one of the categories listed 'following' (B)(2), it is not authorized by statute"); *In re Application of Columbus S. Power Co.,* Slip Opinion No. 2016-Ohio-1608, ¶ 49 ("[I]n construing a statute, we may not add or delete words.").

Because Modified Rider RRS can theoretically switch between a payment from the Companies to ratepayers, *or* a payment from the ratepayers to the Companies, it is not solely a "charge." Section 4928.143(B)(2)(d) does not authorize a "credit," only a "charge" whereby the utility charges the ratepayer a fee. The Commission would exceed its authority in allowing a rider that would produce a "credit," i.e., a payment *from* the utility *to* the ratepayer, under this provision. Therefore, the Commission's conclusion that Modified Rider RRS is a "charge" under R.C. 4928.143(B)(2)(d) is unreasonable and unlawful.

[44] *Id.*

[45] *Id.* (emphasis added).

*2. Modified Rider RRS is not a "limitation on customer shopping" as required by R.C. 4928.143(B)(2)(d).*

The Commission further found that Modified Rider RRS relates to "limitations on customer shopping for retail electric generation service."[46] Specifically, the Commission concluded that "[M]odified Rider RRS is a financial limitation on customer shopping for retail electric generation service."[47] The Commission explained that "[M]odified Rider RRS would flow through to both shopping and non-shopping customers the net difference between an assumed cost (and assumed quantity) of generation service and actual market rates."[48] By doing this, the Commission reasoned, "[M]odified Rider RRS would function as a financial limitation on complete reliance on the retail market for the pricing of retail generation service."[49]

The relevant statutory language in this case requires that the provision create a "limitation on customer shopping." In its plain sense, the term "limitation" is understood to denote "the act of controlling the size or extent of something" or "control[ling] how much of something is possible or allowed."[50] But Modified Rider RRS does not "control" the extent to which customers may shop for their generation. For example, the Commission made no finding that Modified Rider RRS either controls the "size or extent" of the class of the Companies' ratepayers that shop for generation with a competitive retail electric service ("CRES") provider, or prohibits the Companies' ratepayers from migrating to or from the Standard Service Offer.

[46] *Id.* at 44.

[47] *Id.* at 45.

[48] *Id.*

[49] *Id.*

[50] Merriam-Webster Online Dictionary, *http://www.merriam-webster.com* (accessed August 15, 2016).

**Indeed, the Companies acknowledged that Modified Rider RRS "does not place any restriction on the ability of retail customers to shop for their energy."**[51]

The requirement relating to "limitations on customer shopping for retail electric generation service" is plain and unambiguous, **and the Commission should not and cannot ignore it.** *See Doe v. Marlington Local Sch. Dist. Bd. of Educ.*, 122 Ohio St.3d 12, 2009-Ohio-1360, ¶ 29 ("It is our duty to apply the statute as the General Assembly had drafted it; it is not our duty to rewrite it."). Because Modified Rider RRS is nonbypassable and does not prohibit or restrict the Companies' ratepayers from shopping for generation through a CRES provider or migrating to or from the Companies' SSO load, under the plain meaning of R.C. 4928.143(B)(2)(d), Modified Rider RRS is not a "limitation" on shopping. Therefore, the Commission's precedential conclusion that Modified Rider RRS is a limitation on customer shopping under R.C. 4928.143(B)(2)(d) is unreasonable and unlawful.

## III. CONCLUSION

The law is clear that the Commission must follow its governing statutes. Yet, the Commission held that it has jurisdiction over Rider DMR even though the rider was not a matter determined in the prior proceedings and was not mentioned in any application for rehearing. The Commission also ignored the plain language of 4928.143(B)(2)(h), finding that Rider DMR is a charge authorized under that statute, even though the rider in no way relates to distribution service and is a clear subsidy to FirstEnergy Corp. and its competitive affiliate. And just as important, the Modified Rider RRS is not a charge or limitation on shopping as required by the plain and unambiguous language of R.C. 4928.143(B)(2)(d). The Commission can and should

[51] Rehearing Tr. Vol. 1 at 49.

correct its errors before utility customers are forced to give their money to FirstEnergy Corp. and its competitive affiliate.

Respectfully submitted,

/s/ Gretchen L. Petrucci
Michael J. Settineri (0073369), Counsel of Record
Gretchen L. Petrucci (0046608)
Ilya Batikov (0087968)
Vorys, Sater, Seymour and Pease LLP
52 E. Gay Street
Columbus, Ohio 43215
614-464-5462
mjsettineri@vorys.com
glpetrucci@vorys.com
ibatikov@vorys.com

*Counsel for PJM Power Providers Group and the Electric Power Supply Association*

## CERTIFICATE OF SERVICE

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/s/ Gretchen L. Petrucci
Gretchen L. Petrucci

cdunn@firstenergycorp.com
jlang@calfee.com
talexander@calfee.com
dakutik@jonesday.com
cmooney@ohiopartners.org
drinebolt@ohiopartners.org
tdoughtery@theoec.org
sam@mwncmh.com
fdarr@mwncmh.com
mpritchard@mwncmh.com
mkurtz@BKLlawfirm.com
kboehm@BKLlawfirm.com
jkylercohn@BKLlawfirm.com
larry.sauer@occ.ohio.gov
Maureen.willis@occ.ohio.gov
joliker@igsenergy.com
schmidt@sppgrp.com
ricks@ohanet.org
stnourse@aep.com
mjsatterwhite@aep.com
yalami@aep.com
wttpmlc@aol.com
mkl@smxblaw.com
gas@smxblaw.com
lhawrot@spilmanlaw.com
campbell@whitt-sturtevant.com
glover@whitt-sturtevant.com
dwilliamson@spilmanlaw.com
meissnerjoseph@yahoo.com
trhayslaw@gmail.com
lesliekovacik@toledo.oh.gov
cynthia.brady@exeloncorp.com
david.fein@exeloncorp.com
lael.campbell@exeloncorp.com
christopher.miller@icemiller.com
gregory.dunn@icemiller.com
jeremy.grayem@icemiller.com
BarthRoyer@aol.com
athompson@taftlaw.com
Marilyn@wflawfirm.com
blanghenry@city.cleveland.oh.us
hmadorsky@city.cleveland.oh.us
kryan@city.cleveland.oh.us
bojko@carpenterlipps.com
gkrassen@bricker.com
dstinson@bricker.com
dborchers@bricker.com
mfleisher@elpc.org
kfield@elpc.org
todonnell@dickinsonwright.com
jeffrey.mayes@monitoringanalytics.com
twilliams@snhslaw.com
sechler@carpenterlipps.com
gpoulos@enernoc.com
mjsettineri@vorys.com
glpetrucci@vorys.com
thomas.mcnamee@ohioattorneygeneral.gov
thomas.lindgren@ohioattorneygeneral.gov
sfisk@earthjustice.org
msoules@earthjustice.org
tony.mendoza@sierraclub.org
laurac@chappelleconsulting.net
gthomas@gtpowergroup.com
stheodore@epsa.org
mdortch@kravitzllc.com
rparsons@kravitzllc.com
dparram@taftlaw.com
charris@spilmanlaw.com
dwolff@crowell.com
rlehfeldt@crowell.com
dfolk@akronohio.gov
Kevin.moore@occ.ohio.gov
William.michael@oc.ohio.gov
rsahli@columbus.rr.com
ajay.kumar@occ.ohio.gov
callwein@keglerbrown.com
ghiloni@carpenterlipps.com
kristin.henry@sierraclub.org
rkelter@elpc.org
mwarnock@bricker.com
whitt@whitt-sturtevant.com

Summary: App for Rehearing Application for Rehearing electronically filed by Mrs. Gretchen L. Petrucci on behalf of PJM Power Providers Group and Electric Power Supply Association