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

APPLICATION FOR REHEARING OF THE FIFTH ENTRY ON REHEARING BY THE OHIO ENVIRONMENTAL COUNCIL, ENVIRONMENTAL DEFENSE FUND, AND ENVIRONMENTAL LAW & POLICY CENTER

Pursuant to Ohio Revised Code ("R.C.") 4903.10 and Ohio Admin. Code 4901-1-35, the Ohio Environmental Council, Environmental Defense Fund, and Environmental Law & Policy Center (collectively, "Environmental Intervenors") hereby file this application for rehearing of the October 12, 2016 Fifth Entry on Rehearing ("Entry") of the Public Utilities Commission of Ohio ("Commission") in this proceeding. The Commission's Entry approved a Stipulated Electric Security Plan ("Stipulated ESP") proposed by the Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company (collectively "FirstEnergy Utilities" or "Companies"), and most specifically approved a Distribution Modernization Rider ("Rider DMR") to fund a cash influx meant to support the credit ratings of the Companies and their parent Company ("FirstEnergy Corp.").

The Entry is unlawful and unreasonable, and deserving of rehearing for the following reasons, as further explained in the accompanying Memorandum in Support[1]:

A. The Commission Lacks Statutory Authority in an Application for an Electric Security Plan to Approve the Rider DMR.

    1. The Entry unreasonably allows the revenue from Rider DMR to "indirectly" support grid modernization investments thereby providing no actual restriction requiring the funds to be used for grid modernization.
    2. The Entry is inconsistent with established Commission policy and precedent pertaining to approval of distribution riders in prior ESP cases.

B. Rider DMR impermissibly provides FirstEnergy with the equivalent of transition revenues in violation of R.C. 4928.38.

C. Rider DMR provides an impermissible anticompetitive subsidy inconsistent with R.C. 4928.02(H).

D. By allowing FirstEnergy to use Rider DMR revenues for credit support, the Commission erred by granting emergency financial relief to FirstEnergy under R.C. 4928.142(D), even though FirstEnergy never applied for, or presented any evidence, to establish that it was entitled to emergency financial relief.

E. The Entry unreasonably holds that FirstEnergy does not have to comply with its stipulation obligation to "strive to achieve over 800,000 MWh of energy savings annually" through its energy efficiency programs.

F. The Entry contravenes R.C. 4928.66 by permitting utility customers to participate in one of FirstEnergy's peak demand reduction programs under Rider ELR even after opting out of paying for those programs.

[1] Furthermore, Environmental Intervenors hereby reassert and preserve the Assignments of Error enumerated in our May 2, 2016 Application for Rehearing filed in this case.

G. The Entry unreasonably allows FirstEnergy to recover lost distribution revenues based on energy savings resulting from customer action alone rather than any affirmative utility program.

Dated: November 14, 2016

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF APPLICATION FOR REHEARING BY THE OHIO ENVIRONMENTAL COUNCIL, ENVIRONMENTAL DEFENSE FUND, AND ENVIRONMENTAL LAW & POLICY CENTER

I. INTRODUCTION

The Ohio Environmental Council, Environmental Defense Fund, and Environmental Law & Policy Center (collectively, "Environmental Intervenors") seek rehearing of the October 12, 2016 Fifth Entry on Rehearing ("Entry") of the Public Utilities Commission of Ohio ("Commission" or "PUCO") in this case approving a Stipulated Electric Security Plan ("Stipulated ESP") proposed by the Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company (collectively "FirstEnergy Utilities" or "Companies"). The hallmark of the Commission's Entry on Rehearing is replacement of previously approved Rider RRS with the new Distribution Modernization Rider ("Rider DMR"). The Commission justified approval of Rider DMR as credit support to ensure the Companies are not downgraded from investment grade. Fifth Entry on Rehearing at 87-88. The Commission's stated rationale for this "credit support" is that it will allow the Companies to receive more favorable terms when accessing the credit markets to finance distribution improvements. The Entry requires two concessions for Rider DMR's approximately $600 million of up-front cash influx to the Companies and its unregulated parent holding company. First, the Commission will seek a "demonstration" of sufficient progress by the Companies in the implementation and deployment of grid modernization programs approved by the Commission. Second, FirstEnergy must keep its corporate headquarters and nexus of operations of FirstEnergy Corp. in Akron, Ohio, and there can be no change in "control" of the Companies as that term is defined in R.C. 4905.402(A)(1). *Id.* at 96.

Rider DMR, despite its name, does not specifically work to incent investment in grid modernization. Although some of the Rider's revenues could be used directly for such purposes, its core function is to provide credit support to the Companies and their parent holding company. PUCO Staff testimony in this proceeding clearly enumerates the sole purpose of this Rider would be "to allow the Ohio Regulated Distribution Utilities to provide the appropriately allocated support for FirstEnergy Corporation to maintain investment grade by the major credit rating agencies." Staff Ex. 13 at 2. Rider DMR does little more than give the Companies up-front cash for merely promises in return. As proposed and as approved in the Entry, Rider DMR is contrary to public interest, and in fact inflicts an unlawful and reasonable financial injury on ratepayers.

We do not dispute that FirstEnergy Corp. and the Companies are in financial distress. There are volumes of testimony, exhibits, hearing transcripts, and briefs that go into detail that the major credit rating institutions (Moody's and S&P) have designated negative ratings or near negative ratings to the Companies and/or FirstEnergy Corp. We do not dispute that if

FirstEnergy Corp. falls below investment grade that the Companies will have difficulty obtaining financing in the capital markets. However, we must dispute the idea that charging additional fees to customers to make up for credit problems brought on by poor decisions by the Companies' unregulated sister affiliates is sound public policy. The Chairman's Concurring Opinion states that this decision is "undoubtedly unconventional." Concurring Opinion of Chairman Asim Z. Haque ("Haque Concurrence") at 2. Unfortunately, it is beyond unconventional, and as outlined below, the Commission's Rehearing Entry is unreasonable and unlawful. Therefore, Environmental Intervenors respectfully request rehearing of the Entry to rescind approval of Rider DMR.

II. ARGUMENT

A. The Commission Lacks Statutory Authority in an Application for an Electric Security Plan to Approve the Rider DMR.

In its Fifth Entry, the Commission found that Rider DMR is a valid provision in an ESP authorized under R.C. 4928.143(B)(2)(h). Fifth Entry on Rehearing at 89. The Commission attempts to explain how Rider DMR is an incentive for grid modernization by finding that the Rider "is necessary to assist the Companies in accessing the capital markets in order to make needed investments." *Id.* at 90-91. The Commission reasoned that, based on testimony, it was "clear that the Rider was related to distribution rather than generation, and amounted to an incentive for the company to 'jump start' the Companies' grid modernization efforts." *Id.*

However, the testimony presented by the Staff clouds this "clear" conclusion. Staff Witness Turkenton indicated that this is a form of credit support, rather than a rider designed specifically to assist in grid modernization. In response questions related to how the Staff's proposed $131 million per year rider is allocated, and whether "the fact that this is a distribution rider under the distribution portion of the ESP statute" influences her thinking, Staff Witness Turkenton replied:

> "[I]t is named "distribution modernization rider," but I believe Staff Witnesses Buckley and Dr. Choueiki and myself believe that this is a form of credit support for the company to be able to access -- access the capital markets and hopefully they will, in turn, modernize the grid. So there is a distribution component to it, but I don't know that staff believes that it is a distribution rider, per se. That late recovery will happen when they apply for this in the SmartGrid rider."

Rehearing Transcript, Vol. II at p.429, lines 11-21.

Rider DMR, under any name, does not specifically work to incent investment in grid modernization because the Companies are not required to spend any of the DMR revenues on grid initiatives. First, although some of the revenues could be used directly or indirectly for such purposes, its core function is to provide credit support to the Companies and their parent holding company. Furthermore, it is not structured to provide regulated recovery of costs or investments, but an upfront acquisition of customer money. The Entry failed to provide any safeguards to ensure that the Companies effectively implement grid modernization by not making Rider DMR subject to an annual true-up, consistent with distribution riders in prior ESP cases. This is unlawful and unreasonable as contrary to otherwise approved and appropriate ratemaking.

1. The Entry unreasonably and unlawfully allows the revenue from Rider DMR to "indirectly" support grid modernization investments thereby providing no actual restriction requiring the funds to be used for grid modernization.

The Commission, in approving Rider DMR as a valid provision in an ESP authorized under R.C. 4928.143(B)(2)(h), relies heavily on hopes that the "Companies may use revenue under Rider DMR to make the large cash up front investments to fund grid modernization." Fifth Entry on Rehearing at 128. Yet, without any qualification, the Commission allows the Companies and FirstEnergy Corp. to use the revenue to "indirectly support grid modernization" such as "lowering the costs of borrowing funds" and may include "reducing outstanding pension obligations" or "reducing debt." *Id.*

Assuming, arguendo, that removal of a credit market barrier is legally synonymous with the statutory term "incentive," there is little on the record to support that the Commission's decision fully and adequately removes said barriers. During the very lengthy hearings in the present case, the Companies failed to submit actual direct evidence of the degree to which they were having difficulties accessing capital for grid modernization. Further, there was no guarantee that with Rider DMR approved for $132.5 million per year, that the Companies would be able to fund grid modernization. There was no grid modernization proposal by Staff; there was instead a proposal for a Rider to provide cash to FirstEnergy Corp. – an unregulated utility holding Company – to help its diminishing credit rating. As cited above, PUCO Staff testimony in this proceeding clearly enumerates the sole purpose of this Rider would be "to allow the Ohio Regulated Distribution Utilities to provide the appropriately allocated support for FirstEnergy Corporation to maintain investment grade by the major credit rating agencies." Staff Ex. 13 at 2.

The Staff in its proposal laid it on the Commission to figure out the details of what FirstEnergy actually must do to provide the grid modernization benefit as consideration for the customers' "investment," and the Commission has in this Entry simply and unreasonably punted that back to the Company to *hopefully* invest.

The Commission, stating that it "will not place restrictions on the use of Rider DMR funds," 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." Fifth Entry on Rehearing at 127-128. Yet, despite the rhetoric in this rehearing, and even the statements of the Chairman in his Concurring Opinion, the policy of this state vis-a-vis grid modernization is not being advanced in this case. First, a "periodic review" of FirstEnergy Corp., who could receive a lion's share of the Rider DMR revenue, by the Staff is illusory. As the Entry states, the Commission "does not regulate FirstEnergy Corp." *Id.* at 96. If FirstEnergy Corp. fails this review, the Commission has no recourse. When one couples this ineffectual enforcement of the unregulated holding company with the complete lack of an established penalty in the Entry for the Companies' non-compliance, this provision is utterly unenforceable.

Thus, the Commission, here, has not adequately defined what would constitute grid modernization. The Commission should clarify that one of the priorities will be to identify policies/projects that promote the implementation of Energy Efficiency, Renewable Energy, and Distributed Generation. Not requiring all of the money to be directly used to modernize the distribution grid, betrays the reasoning that this is a grid modernization incentive rider properly approved under R.C. 4928.143.

The Commission suggests, however, that it will conduct a "detailed policy review of grid modernization." Fifth Entry on Rehearing at 96-97. The Commission, however, provided no details about what the goals of that proceeding will be, when this proceeding will occur, or even if there will be a full due process proceeding. It was the "hope" of Staff that the Commission would be the one to determine what kind of investment was envisioned and permitted by this Rider DMR. The Fifth Entry, however, did not. The Commission, on rehearing, now, should take the opportunity to provide the framework, with goals and enumerations of benefits to be seen by customers for the large upfront investment, and a reasonable and responsible return on the utilities' investment. Thus, instead of rewarding poor past financial decisions with hundreds of millions of customer dollars under Rider DMR, the Commission should set the table for future benefits for customers by requiring real investment. Allowing the revenue to be used to repay operational debts and expenses, and banking on a distribution grid investment "jumpstarted" with the remainder is not a plan for the future. A well thought out plan, either through a full vetting of the Companies' smart grid business plan filing (PUCO Case No. 16-0481-EL-UNC) or other mechanism, requiring reasonable cost recovery, and quarterly filings and true-ups will pay dividends to all (not just to FirstEnergy Corp.).

2. The Entry is inconsistent with established Commission policy and precedent pertaining to approval of distribution riders in prior ESP cases.

Moreover, the Commission failed to include safeguards in the rider to ensure that the revenues are used solely for grid modernization. The Commission should have required the Company to prove that the revenues are spent prudently, and the Commission should have also required an annual true-up.

In prior ESP cases where the Commission has approved a distribution tracker, the Commission has required that the rider be based on an actual distribution improvement plan and the rider must also be cost-based. *In re FirstEnergy ESP*, Case No. 08-0935-EL-SSO (Opinion and Order at pp. 40-41) (December 19, 2008). Here the Commission failed to incorporate these safeguards. FirstEnergy does not have a grid modernization plan and the rider is not subject to an annual audit and hearing process to determine whether the revenues collected were spent for grid modernization and for equipment that is used and useful. Additionally, the rider does not have a true-up provision that would require FirstEnergy to refund or credit customers for any amounts not prudently spent. The record even lacks any evidence as to the potential amount of benefits to customers in terms of lower financing costs for distribution projects if FirstEnergy receives the specified credit support. These problems show that the Commission unreasonably approved Rider DMR without having any basis to determine whether the benefits that customers would receive in return for the $600 million in credit support would be worth the cost.

In his Concurring Opinion, Chairman Haque states that this decision is "undoubtedly unconventional" and that "[t]ypical public utility regulation function is to provide utilities with recovery and a return for expenditures made in constructing/maintaining service." Haque Concurrence at 2. This statement emphasizes how this decision goes directly against Commission's own precedent. The Commission on rehearing must rescind this Rider as contrary to that core function of utility regulation. Anything less than rescinding this Rider is illegal overreach of the Commission's authority.

B. Rider DMR impermissibly provides FirstEnergy with the equivalent of transition revenues in violation of R.C. 4928.38.

The Ohio Revised Code defines transition costs as costs unrecoverable in a competitive environment, and further, bars the Commission from authorizing the "receipt of transition revenues or any equivalent revenues" after December 31, 2010. *See* R.C. 4928.39; *see also* R.C. 4928.38. While the Companies would not directly utilize its Rider DMR to fund the maintenance and operation of unregulated plants, the ultimate destination of Rider DMR's revenue is to its financially distraught unregulated competitive enterprise at the expense of regulated customers. The Commission in its Entry, disagreed with the conclusion raised by a number of intervenors that Rider DMR would result in an illegal collection transition charges. Fifth Hearing on Entry at 130. The Commission bases this conclusion, however, on two rather strained lines of reasoning and is in direct contravention to Ohio's deregulation statute and recent Ohio Supreme Court precedent.

Under R.C. 4928.38, the utility's receipt of transition revenues shall terminate at the end of the market development period. With the termination of that approved revenue source, the utility shall be fully on its own in the competitive market. The commission shall not authorize the receipt of transition revenues or any equivalent revenues by an electric utility except as expressly authorized in sections 4928.31 to 4928.40 of the Revised Code. Here, the Commission's Entry takes a strict reading of the statute and determined that there is no (and can be no) "transition" because the Companies no longer own any generation. This reasoning is clearly flawed, however.

First, the statute does not make an exception for regulated utilities that have fully divested their generation. Revenues to protect generation investments contrary to deregulation can and do come in many forms, and while the distribution companies do not own generation, the holding company that is benefitted does. Evidence on the record throughout this rehearing show the credit support rider seeks to simply channel money to FirstEnergy Corp. as cover to support the financial integrity of its parent company due to losses associated with its competitive generation business and/or pay down the utility's debt for debt issuances that were used to finance or refinance legacy generating plants.[2]

OCC Witness Kahal showed in testimony that the effect of Rider DMR would be to mandate that utility customers subsidize FirstEnergy's unregulated operations as those operations share in the benefit of improved or protected credit ratings, and thus would have the effect of increasing FirstEnergy Corp. profits and making more cash available to pay increased dividends to shareholders. OCC Ex. 46 at 13. As the First Quarter 2016 FirstEnergy Corp. earnings report,

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[2] The Commission may also consider taking administrative notice of FirstEnergy's most recent 10K, which shows the company's existing debt issuances. The Commission can also take administrative notice of the Commission cases where the company sought approval to issue this debt. Clearly some of the debt on the Company's books was used to finance or re-finance the original construction and improvements to the legacy plants.

explained, FirstEnergy Corp. holds collateral exposure of up to $406 million with the vast majority (about 90 percent) being non-utility. *Id.* Witness Kahal's conclusion is simple yet profound -- "improvement of the FE credit ratings provides an important and tangible benefit to the unregulated operations, providing an expense savings (or even the avoidance of contract default if collateral cannot be posted as required)." *Id.*

To further show not only the potential for this tangible benefit to FirstEnergy Corp., but an actual example, we need only look to the cause and effect of poor financial decisions on FirstEnergy's Sammis plant. During the pendency of the hearing, FirstEnergy Corp. announced the shutdown of four of the units of the Sammis plants. This plant recently underwent a $1.8 billion state-of-the-art upgrade of the air quality control systems. Companies Ex. 32 at 10. A mere five years after those upgrades, FirstEnergy Corp. considered the plant uneconomic and needed of a bailout in the form of a PPA funded by Rider RSS. While the Commission in its entry seems to cite the shutdown of the Sammis units as a positive, the truth of the matter is that is the glaring example of poor and costly past decisions by the unregulated generation companies and customers being forced to pay to alleviate the effects of that on the regulated companies.

Moreover, two recent Ohio Supreme Court cases interpreting Riders proposed in AEP and DP&L's SSO cases further clarify this prohibition by showing that riders similar to Rider DMR will be considered transition charges. *See In re App. of Columbus S. Power Co.*, 2016-Ohio-1608, 2016 WL 1592905 (Apr. 21, 2016); *In re App. of Dayton Power & Light Co.*, 2016-Ohio-3490, 147 Ohio St. 3d 166. The Court determined that even though something was not explicitly labeled as transition revenue, it can still be considered "transition revenue." *In re App. of Columbus S. Power Co.*, 2016-Ohio-1608 at ¶21.

In the *AEP ESP II* case, the Commission approved AEP-Ohio's proposal for Rider RDR, and that rider's $826 million in non-fuel generation revenues in each year of the ESP. *Id.* at 17. As the Ohio Supreme Court pointed out, the Commission approved this Rider against the opposition of a number of parties because AEP is not receiving transition revenues or recovering stranded costs through the RSR. *Id.* at 32. This conclusion was based on the fact that "AEP did not argue that the revenues received under its prior electronic-transition plan were insufficient to cover costs." Nevertheless, the Ohio Supreme Court ruled that "the fact that AEP did not explicitly seek transition revenues does not foreclose a finding that the company is receiving the equivalent of transition revenue." The Court in *AEP* stated AEP's Rider RSR's intended effect of "provid[ing] AEP-Ohio with sufficient revenue to ensure it maintains its financial integrity as well as its ability to attract capital" did not justify its approval by the PUCO.

Further, the Court observed in *AEP* that the Rider RSR's intended effect of "provid[ing] AEP-Ohio with sufficient revenue to ensure it maintains its financial integrity as well as its ability to attract capital" did not justify its approval by the PUCO. The same purpose, to provide the utility with sufficient revenue to ensure it maintains its financial integrity, is the core of Modified Rider RRS. It is hard to believe that the Court would find these indistinguishable riders not deserving of the same fate.

The Commission tries to reason its way out of this obvious contravention of Supreme Court precedent by concluding that the transition charges that were struck down in the *DP&L*

and *AEP* cases are wholly dissimilar from Rider DMR because those Riders were approved under R.C. 4928.143(B)(2)(d), and not R.C. 4928.143(B)(2)(h). *Id.* This, too, is flawed reasoning, and also due to the fact that there is no exception in the statute for generation related Riders that are approved under particular subsections of the ESP code.

Furthermore, the revenues that FirstEnergy would collect from Rider DMR would be transition revenues, because the revenues would pay off debt used to finance (or re-finance) the generating plants. It is quite foreseeable that the Ohio Supreme Court would invalidate the Companies' attempt to tie this rider to generation costs - past or present. The Commission on rehearing, therefore, should remove Rider DMR, or otherwise modify the Entry to ensure that the revenue does not go to an unregulated entity to pay off generation related debt.

C. Rider DMR provides an impermissible anti-competitive subsidy inconsistent with R.C. 4928.02(H).

The order failed to adequately address the argument that Rider DMR is an anti-competitive subsidy inconsistent with the text and spirit of R.C. 4928.02(H). Under R.C. 4928.02(H), the Commission is required to:

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

The Ohio Supreme Court, ruling on an earlier version of R.C. 4928.02(H) (then codified at R.C. 4928.02(G)), held that the statute "prohibits public utilities from using revenues from competitive generation-service components to subsidize the cost of providing noncompetitive distribution service, or vice versa." *Elyria Foundry Co. v. Pub. Util. Comm.*, 2007-Ohio-4164, ¶50, 114 Ohio St. 3d 305, 315, 871 N.E.2d 1176, 1187. Ohio law clearly requires that each affiliate must stand on its own, and cross-subsidization is unlawful. The Commission's decision in the instant case violates this principle in two ways: (1) by using distribution customer money to make up for problems on the unregulated side, and (2) to benefit the unregulated side by fixing its credit support.

The Commission's Entry found that the record demonstrates that Rider DMR does not constitute an unlawful subsidy to FirstEnergy Corp. Fifth Entry on Rehearing at 126. The initial basis for the Commission's finding, however, lies in explaining that there cannot be a subsidy, because the Companies (and/or its parent holding company) need the Rider DMR for necessary credit support. The mere fact that the revenue from Rider DMR is needed does not mean that it is not a subsidy. However, there is no guarantee that Rider DMR will prevent a downgrade in the credit ratings of FirstEnergy Corp. or the Companies. No witness nor any evidence has been presented from the credit rating agencies to support the finding that the Commission's amount, or any amount, of cash influx from the Companies' captive distribution customers will forestall a downgrade or allow for more favorable terms. The Companies' assertions that are the underpinning of the Commission's decision are mere conjecture. The people of Northern Ohio are not those to blame for the credit fiasco facing the Companies or its unregulated parent. Customers do not owe the Companies for the Companies' monopoly; rather, the Company in exchange for its monopoly power owes the customers the duty to stay healthy and provide services. It is not the Commission's job to bail out utilities that make bad business decisions.

That rationale patently overlooks the fact that the Companies will be reaping distribution revenue from its customers, and funneling it to its unregulated parent Company. The Commission's narrow reading of the anti-competitive subsidy prohibition is inconsistent with the plain language of the statute.

Citing the Companies' Witness Mikkelsen's rebuttal testimony, the Commission supported its conclusion by enumerating what the Companies *may* do with the revenue. The Commission further cites to areas where the Companies contend that all of its stakeholders are sharing in the burden of improving its financial health. Fifth Entry on Rehearing at 128. Companies' Witness Ms. Mikkelsen's rebuttal testimony lays out a number of measures that she suggests represent how FirstEnergy employees, management, shareholders and other "constituents" have "significantly invested, and continue to invest" in credit support. Companies' Ex. 206 at pg. 17. Yet these "investments" certainly do not represent anything approaching the costs proposed to be borne on the distribution customers. Furthermore, when examined, each of these "constituents" have not provided adequate credit support – or in some cases any credit support.

For example, Ms. Mikkelsen enumerates that the FirstEnergy Management and Employees contributed to credit support through completed reductions in medical and other benefits, staffing reductions, and a cash flow improvement plan. Companies' Ex. 206 at 17. However, she offers no evidence as to the degree of these efforts, the quantitative impact these efforts have made toward the credit support needed by FirstEnergy Corp., or the contents or timeframe of the plan. Similarly, the Companies' witness adds no evidence or detail as to the measures provided by shareholders. *Id.* Ms. Mikkelsen further asserts that the FirstEnergy Corp. subsidiaries in New Jersey, Pennsylvania, and West Virginia have contributed to credit support through a number of regulatory cases. *Id.* at 18. However, the cases cited by the Companies and presumably relied upon by the Commission had nothing to do with providing credit support (certainly not the type requested of the Companies' customers). Tr. Vol X at 1634-1668. The efforts to help credit support that the Commission relies upon, here, are applications for base rate cases, capital recovery filings, and vegetation management cases. These applications are designed to recoup moneys based on costs already allocated by the companies for other purposes or develop rate design and cost – they have not and cannot be considered as contributions to cash infusion to assist with credit support.

D. By allowing FirstEnergy to use Rider DMR revenues for credit support, the Commission erred by granting emergency financial relief to FirstEnergy under R.C. 4909.16 even though FirstEnergy never applied for, or presented any evidence to establish, that it was entitled to emergency financial relief.

As stated numerous times above, the Commission's credit support Rider DMR seeks to simply channel money to FirstEnergy Corp. to cover to support the financial integrity of its parent company due to losses associated with its competitive generation business. If a distribution utility is in need of a cash influx for solvency, it can rely on the emergency rate relief statute. In the present case, however, the Commission failed to follow state law, court rulings, and its own precedent in providing the Companies' emergency rate relief. The Entry even recognizes this fact and states that "the Commission notes that electric utilities, like all public utilities, can seek emergency rate relief under R.C. 4909.16 and the Commission has provided factors or indicators for determining whether emergency rate relief can be granted." Fifth Entry on Rehearing at 162.

Under R.C. 4909.16, "[w]hen the public utilities commission deems it necessary to prevent injury to the business or interests of the public or of any public utility of this state in case of any emergency to be judged by the commission, it may temporarily alter, amend, or, with the consent of the public utility concerned, suspend any existing rates, schedules, or order relating to or affecting any public utility or part of any public utility in this state." Ohio Rev. Code 4909.16. Decades-old caselaw interpreting the rate relief statute requires an applicant to put on evidence and prove that some emergency exists, and that the PUCO's finding of an emergency is reasonable. *Gen. Motors Corp. v. Pub. Utilities Comm'n*, 54 Ohio St. 2d 357, 376 N.E.2d 1345 (1978).

This process exists to provide *temporary* relief, and has been used to provide only the assistance absolutely necessary to prevent injury to the utility that could in turn injure the public. The "ultimate question for the Commission is whether, absent emergency relief, the utility will be financially imperiled or its ability to render service will be impaired. If the applicant utility fails to sustain its burden of proof on this issue, the commission's inquiry is at an end." *In the Matter of the App. of the Toledo Edison Co. for Auth. to Change Certain of Its Filed Schedules Fixing Rates & Charges for Elec. Serv.*, 84-1286-EL-AEM, 1987 WL 1466442, at 3 (F.E.D.A.P.J.P. May 12, 1987). The only evidence presented by the Companies concerning its need for this emergency relief is that the credit rating agencies *may* downgrade the Companies and/or the Companies' parent company, and therefore the Companies *may* have difficulty accessing the credit markets.

Yet, important details to determine whether this is an actual emergency in need of a temporary relief approval are missing. There was no evidence presented as to when the downgrade may occur. There was no evidence provided as to the magnitude of the costs incurred due to a downgrade and whether those costs would be significant when passed on to customers. Accepting the argument that there would be significant costs to customers, no evidence was presented that those costs would be higher than the upfront costs that customers are forced to pay under an approved Rider DMR. Utilizing the proper procedure under R.C. 4909.16 would have provided the opportunity for this evidence to be submitted, and supported or refuted by stakeholders. Most significantly, following R.C. 4909.16 would provide the Commission with the ability to properly rule on emergency rate relief.

The Commission here has ignored the appropriate procedure in Ohio to seek emergency relief due to hardship. Ohio law necessitates that the Companies request emergency *temporary* rate relief under R.C. 4909.16 and submit the substantive evidence necessary to show that it in fact needs temporary relief. Even if it had, the Companies' condition does not rise to the type of "extraordinary" situation that is required for the Commission to confer emergency rate relief, and its request is purely a cash grab.

For example, in *In the Matter of the Application of the Toledo Edison Co. for Auth. to Change Certain of Its Filed Schedules Fixing Rates & Charges for Elec. Serv.*, 84-1286-EL-AEM, 1987 WL 1466442, at *7 (F.E.D.A.P.J.P. May 12, 1987), the company was awarded temporary emergency rate relief where its "lowest investment grade ratings have seriously limited the company's financial flexibility", and continuing adequate service was actually in jeopardy. The court held that it be granted emergency rate relief, and only granted the "relief which is the *minimum needed by the company to carry on its operations*", which was less than the company requested in its application. Toledo Edison submitted large amounts of testimony proving that the company would be at risk of failing to provide adequate service before the Commission was willing to provide any type of assistance to the company. The Commission then determined the minimum amount of relief necessary to ensure adequate service continued.

The difference between *Toledo* and the instant case, however, is that adequate service is <u>not</u> a concern in this setting. So even if FirstEnergy had applied under R.C. 4909.16 for emergency temporary rate relief, it has not met the burden required for the Commission to grant such a request. Yet, even if the Commission had the authority to find that FirstEnergy's financial condition necessitated emergency rate relief under R.C. 4909.16, it would surely be significantly less money than what FirstEnergy has requested here. "Section 4909.16, Revised Code, vests the Commission with broad powers in determining when an emergency exists and in tailoring a remedy to meet the emergency", and, as in the *Toledo* case, it has limited the amount of monetary relief to only that necessary and limited the time period in which the rate relief applies in order to ensure the amount charged to the customers is only what is necessary to ensure adequate service continues, not to give the utility a windfall.

The Commission concluded that it believes that a potential downgrade to below investment grade could be constituted as an "emergency that threatens the utility's financial integrity" under R.C 4928.142(D). However, despite this admission, the Commission unlawfully failed to require the Companies to properly apply for such emergency relief. R.C. 4928.142(D)(4) states, in part: "the commission may adjust the electric distribution utility's most recent standard service offer price by such just and reasonable amount that the commission determines necessary to address any emergency that threatens the utility's financial integrity…" Ohio Rev Code 4928.142. However, the Commission's reliance on this provision is patently misplaced, as this is an Application for an ESP under R.C. 4928.143 (not an MRO under 4928.142).

E. The Entry unreasonably holds that FirstEnergy does not have to comply with its stipulation obligation to "strive to achieve over 800,000 MWh of energy savings annually" through its energy efficiency programs.

The Entry unreasonably nullifies FirstEnergy's stipulation commitment to offer energy efficiency and peak demand reduction programs that "would strive to achieve over 800,000 MWh of energy savings annually, subject to customer opt outs." Third Supplemental Stipulation at 11. In the Entry, the Commission *sua sponte* revisited the meaning of this provision:

> [T]he goal of 800,000 MWh of energy efficiency savings annually under the Third Supplemental Stipulation is simply a goal. The Companies are expected in the energy efficiency program portfolio plans to budget for the annual statutory energy efficiency mandate rather than the goal. The Commission expects the goal to be achieved by efficiently administering the approved programs and achieving energy savings for the least cost rather than by setting the program budget to the stipulated goal.

Fifth Entry on Rehearing at 147. We do not dispute that the 800,000 MWh is a goal, not a binding target. However, in order to effectively carry out the commitment to "strive" to meet that goal, FirstEnergy must be able to establish program budgets sufficient to produce the requisite level of energy savings. Thus, this interpretation of the Third Supplemental Stipulation – reached without any input from the parties – is unreasonable because it renders this provision of the Third Supplemental Stipulation meaningless.

As a practical matter, the Companies' energy efficiency programs predominantly operate by providing customers with monetary incentives to implement efficiency measures. For example, the bulk of programs in the FirstEnergy Utilities' proposed portfolio plans for 2013-2015 offered subsidies for efficient products and equipment, discounted energy audits, and incentives for building improvements. *In re FirstEnergy Utilities' App. for Approval of Their Energy Efficiency and Peak Demand Reduction Program Plans for 2013-2015*, Case No. 12-2190-EL-POR, Application Att. A (July 31, 2012) at 24-61 (program descriptions).

Accordingly, a significant majority of the funding for these programs goes directly to incentive payments. *Id.* at App. B (program budgets). Therefore, even if the Companies are able to run these programs more "efficiently," such efficiencies are highly unlikely to produce the target level of savings if the budget is not sufficient to cover the incentive payments necessary for customers to implement the relevant efficiency measures. The only realistic way for FirstEnergy to "strive" for the 800,000 MWh goal is to propose a plan that is projected to actually reach that target, along with adequate funding for such a plan. The Commission will then have the opportunity to review that plan to ensure that it is cost-effective in accordance with Ohio Admin. Code 4901:1-39-04(B).

The Commission has refused to interpret a stipulation in a way that "would render meaningless" its "express provisions." *In the Matter of the App. of The Cincinnati Gas & Electric Company for an Increase in Electric Rates*, Case No. 91-410-EL-AIR, Opinion and Order (May 12, 1992) at 16. In this case, it is the Commission's own rehearing order that would render FirstEnergy's commitment to an 800,000 MWh energy savings goal effectively meaningless. The Commission specifically referenced the role of the Stipulated ESP in "provid[ing] for the implementation of energy efficiency programs, with a goal of saving 800,000 MWh of energy annually" as part of its rationale for approving it as reasonable and in the public interest. Opinion and Order at 87; *see also id.* at 94; Haque Concurrence at 6. If the Commission does not permit FirstEnergy to set a reasonable energy efficiency program budget adequate to provide that level of savings, that benefit of the Stipulated ESP will almost certainly be lost to customers. We therefore ask the Commission to reconsider this aspect of the Fifth Entry on Rehearing.

F. The Entry contravenes R.C. 4928.6613 by permitting utility customers to participate in one of FirstEnergy's peak demand reduction programs under Rider ELR even after opting out of paying for those programs.

The Entry unlawfully and unreasonably ruled that FirstEnergy customers may receive credits for providing peak demand reduction through Rider ELR, even after having opted out of participating in, and paying for, FirstEnergy's energy efficiency ("EE") and peak-demand reduction ("PDR") programs. Rider ELR provides for FirstEnergy to pay eligible customers a credit in return for each kilowatt-month of interruptible load – an amount by which the customer will reduce its demand if called upon under the terms of the ELR tariff. In the Entry, the Commission approved Section A.1.6 of the original Stipulation filed in this case, which states that "ELR customers may opt out of the opportunity and ability to obtain direct benefits from the Companies' EE/PDR Portfolio Plans as provided in S.B. 310." Co. Ex. 2 at 8. The Commission rejected the argument that this provision violates R.C. 4928.6613, which directs that no opt-out customer "shall be . . . eligible to participate in, or directly benefit from, programs arising from electric distribution utility portfolio plans approved by the public utilities commission." However, in doing so, the Commission unreasonably characterized FirstEnergy's peak demand reduction program under Rider ELR as solely an economic development program, inconsistent with the record in this case and the Commission's own past orders showing that Rider ELR is also part and parcel of FirstEnergy's peak demand reduction programs.

The Commission reasoned that a customer who has opted out of paying for FirstEnergy's EE/PDR programs may still participate in the ELR program, and thus receive credits for interruptible load recovered through FirstEnergy Rider DSE (the EE/PDR rider) and Rider EDR (an economic development rider), because Rider ELR is an economic development program:

> The ELR programs existed long before the statutory energy efficiency and peak demand reduction mandates. Further, the Commission has long held that ELR has an economic development component and ELR is funded, in part, through the economic development rider, which is paid by all customers, including those who opt out of the energy efficiency programs.

Fifth Entry on Rehearing at 146.

This reasoning presents only half the picture. It is true that a portion of the Rider ELR credit is funded through Rider EDR, an economic development rider. However, as the record in this case and the Commission's own decisions unequivocally demonstrate, FirstEnergy *also* relies on Rider ELR to meet its peak demand reduction obligation under R.C. 4928.66 and funds a significant portion of the program through its energy efficiency/peak demand reduction rider, Rider DSE. Most importantly, FirstEnergy *expressly includes the ELR program in its currently effective EE/PDR portfolio plan* as part of the utility's compliance strategy for meeting the peak demand reduction requirements of R.C. 4928.66. *FirstEnergy 2013-2015 EE/PDR Plan Case*, Application Atts. A, B, C at 13.

Additionally, FirstEnergy witness Mikkelsen herself testified that the separate EDR portion of the ELR funding is "associated with economic development, which is why it is included in the economic development rider and recovered through the economic development rider," (Tr. II at 274), but that the DSE portion represents the approximate capacity value of the interruptible load in *reducing demand*. Tr. III at 497. These undisputed facts show that Rider ELR is an integral part of FirstEnergy's compliance with its peak demand reduction obligations under R.C. 4928.66, separate from its economic development purpose.

Moreover, the Commission's declaration that the ELR program is an economic development program is directly contrary to its previous characterization of interruptible load programs in previous orders. In fact, the Commission expressly *rejected* the request of Ohio Power Company ("AEP Ohio") in its ESP 3 case to shift recovery of the costs of its interruptible load program to its economic development rider, asserting that the interruptible load program "reduces AEP Ohio's peak demand and encourages energy efficiency and, therefore, it is appropriate that the costs of the program are recovered through the EE/PDR rider." *In re Ohio Power Company*, Case No. 13-2385-EL-SSO *et al.*, Entry on Rehearing (May 28, 2015) at 12. The Commission then reiterated that characterization in determining whether R.C. 4928.65 requires that utilities disclose the cost of interruptible load programs on customer bills as a "cost of the utility's compliance with . . . [t]he peak demand reduction requirements under section 4928.66 of the Revised Code," declaring that "the *primary benefit* to customers from the interruptible programs is the reduction in peak demand." *In the Matter of the Amendment of Chapters 4901:1-10 and 4901:1-21*, Case No. 14-1411-EL-ORD, Third Entry on Rehearing (Aug. 26, 2015) at 4 (emphasis added); *see also* Second Entry on Rehearing (July 1, 2015) at 9.

Even the opinion originally approving the current cost recovery mechanism for Rider ELR in 2009 noted that "*[a]s a demand response program under Section 4928.66, Revised Code*, any revenue shortfall resulting from the application of the . . . interruptible credit in Rider ELR and Rider OLR will be recovered as part of an unavoidable Demand Side Management and Energy Efficiency Rider (Rider DSE)." *In re FirstEnergy*, Case Nos. 08-935-EL-SSO *et al.*, Second Opinion and Order (Mar. 25, 2009) at 10 (emphasis added). The Commission has failed to provide any reason for its abrupt about-face in describing the purpose of interruptible load programs.

Meanwhile, it is irrelevant that Rider ELR predates R.C. 4928.66. FirstEnergy also had energy efficiency programs well before that provision came into effect in 2008. *See, e.g.*, Case Nos. 92-391-EL-AAM *et al.*, Entry (Oct. 29, 1992); Case Nos. 95-299-EL-AIR *et al.*, Opinion and Order at 18-19 (Apr. 11, 1996); Case Nos. 04-1932-EL-ATA *et al*, Finding and Order (Feb. 14, 2007) at 4-5. Those programs are included in FirstEnergy's portfolio plan, as is the ELR program. R.C. 4928.6613 plainly applies to all such programs, without exception.

Finally, it is worth noting that, in practical terms, the Rider DSE funding for the ELR program is a significant amount of money. Company Witness Mikkelsen testified that, prior to the Stipulated ESP the Rider ELR program cost about $35 million dollars annually – with half of that coming from Rider DSE – and the expansion of Rider ELR in the Stipulated ESP could add more than $8 million to the annual Rider DSE cost. Tr. XXXVII at 7783-7784. That means that FirstEnergy customers could pay well over $20 million through the utility's EE/PDR rider for the portion of the ELR program that is *not* aimed at economic development, but rather represents the value of a customer's peak demand reduction. R.C. 4928.6613 states that a customer cannot receive such direct benefits "arising from" an EE/PDR portfolio plan after opting out of paying for it, and basic fairness counsels the same result. The Commission's approval of this portion of the Stipulation was therefore unlawful and unreasonable.

G. The Entry unreasonably allows FirstEnergy to recover lost distribution revenues based on energy savings resulting from customer action alone rather than any affirmative utility program.

The Entry unreasonably and unlawfully approved FirstEnergy's request to recover lost distribution revenues based on energy savings measured through the Customer Action Program ("CAP") without providing "the reasons prompting" that decision as required by R.C. 4903.09. Fifth Entry on Rehearing at 146-147. The Companies use the CAP to measure savings resulting from independent customer actions outside of the utilities' normal energy efficiency programs, such as customers buying a more efficient lightbulb or installing more efficient appliances without a utility incentive. Tr. XXXVII at 7860-7865. As the Commission itself recognized in denying FirstEnergy the ability to earn shared savings incentive payments for CAP savings, this program "involves no action by the Companies to achieve the energy savings." Fifth Entry on Rehearing at 147. The Commission has not allowed utilities to recover lost distribution revenues for such savings in the past, and offered no rationale for changing that approach here.

The Commission has previously authorized the recovery of lost distribution revenues as a "decoupling" mechanism to ensure that energy efficiency programs do not prevent utilities from recovering their distribution revenue requirement. Otherwise programs that produced energy savings would reduce utility revenue recovery through volumetric rates, and would therefore discourage utilities from helping customers save energy. *In re AEP Request for Approval of Its Program Portfolio Plan*, Case No. 09-1089-EL-POR, Opinion and Order (May 31, 2010) at 26. In this case, the CAP does not create any new energy savings, it only measures customers' own adoption of energy efficiency measures outside of utility programs. Therefore, paying the Companies lost distribution revenues for this program serves no purpose in encouraging FirstEnergy to implement energy efficiency programs.

In past cases, the Commission has expressly limited the lost distribution revenue mechanism to contexts where measured savings are the result of actual utility programs. For example, in the context of smart grid deployment the Commission stated that "approval of lost distribution revenues is limited to those lost revenues which can be demonstrated to be the result of FirstEnergy's proposed alternative pricing program." *In the Matter of the App. of FirstEnergy* *for Approval of Ohio Site Deployment of the Smart Grid Modernization Initiative*, Case Nos. 09-1820-EL-ATA *et al.*, Finding and Order (June 30, 2010) at 10. Similarly, in past stipulated FirstEnergy ESPs, the Companies have not been able to recover lost distribution revenues for energy savings from historic mercantile self-directed projects that were undertaken prior to implementation of utility efficiency programs. *E.g.*, *In re FirstEnergy*, Case No. 10-388-EL-SSO, Opinion and Order (Aug. 25, 2010) at 14. The Entry itself recognized that the CAP is analogous to such historic mercantile projects since they both "involve[] no action by the Companies to achieve the energy savings," and therefore held that, as with historic mercantile projects, FirstEnergy should not receive shared savings based on savings from the CAP. Fifth Entry on Rehearing at 147. Just as FirstEnergy should not receive incentive payments based on energy savings it had no role in creating, so too the utility should not be able to recover revenues for such savings under a mechanism designed to encourage utilities to affirmatively promote energy efficiency.

The Entry does not address these issues at all, merely setting forth the holding that "Further, the Companies may receive lost distribution revenue to the extent that energy savings under the Customer Action Program are verifiable." Fifth Entry on Rehearing at 146-147. However, R.C. 4903.09 requires the Commission to provide "the reasons prompting" its decisions. The Commission unreasonably and unlawfully failed to provide the required rationale for its holding here, and on rehearing should hold that FirstEnergy may not recover lost distribution revenues for savings measured through the Customer Action Program.

III. CONCLUSION

Financial hardship of the unregulated parent and unregulated affiliates of a distribution company, is not under the purview of the Commission. For the reasons set forth above, the Commission's approval of Rider DMR, is unlaw, unreasonable, and should be vacated in its entirety. The Environmental Intervenors respectfully request that the Commission grant rehearing to ensure the Companies' ESP, and specifically Rider DMR, complies with all applicable Ohio law.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Application for Rehearing has been electronically filed with the Public Utilities Commission of Ohio and has been served upon the parties of record in this proceeding via electronic mail on November 14, 2016.

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