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 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 OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP

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Pursuant to Section 4903.10, Ohio Revised Code (Revised Code), and Rule 4901-1-35, Ohio Administrative Code (O.A.C), the Ohio Manufacturers' Association Energy Group (OMAEG) hereby respectfully requests rehearing of the Public Utilities Commission of Ohio's (Commission) October 12, 2016 Fifth Entry on Rehearing (Fifth Entry) issued in the above-captioned matters regarding the electric security plan (ESP) proposed by Ohio Edison Company, the Cleveland Electric Illuminating Company and the Toledo Edison Company (the Companies). OMAEG contends that the Order is unlawful and unreasonable in the following respects:

A. The Commission erred in finding that it had jurisdiction to consider the Companies' Modified Retail Rate Stability Rider (Rider RRS) Proposal and alternatives on rehearing in violation of Section 4903.10, Revised Code.

B. The Commission erred in determining that the Companies' Modified Rider RRS Proposal is authorized under Section 4928.143(B)(2)(d), Revised Code.

C. The Commission erred in determining that Staff's proposed distribution modernization rider (Rider DMR) is authorized under Section 4928.143(B)(2)(h), Revised Code.

D. The Commission erred in determining that Rider DMR is not an unlawful subsidy to FirstEnergy Corp. in violation of Section 4928.02(H), Revised Code.

E. The Commission erred in finding that Rider DMR advances state policy under Section 4928.02, Revised Code.

F. The Commission erred in determining that Rider DMR revenues should be excluded from Significantly Excessive Earnings Test (SEET) calculations in violation of Section 4928.143(E), Revised Code.

G. The Commission erred in finding that Rider DMR complies with Section 4905.22, Revised Code.

H. The Commission erred in finding that Rider DMR does not constitute an unlawful transition charge in violation of Section 4928.38, Revised Code.

I. The Commission erred in finding that the ESP IV, as modified by Rider DMR, is more favorable in the aggregate than an market rate offer (MRO) as required by Section 4928.143(C)(1), Revised Code.

J. The Commission's Order unlawfully and unreasonably fails to comply with legal standards governing utility company proceedings.

K. The Commission erred in upholding the attorney examiners' rulings that resulted in striking portions of testimony related to the Modified Rider RRS Proposal that should have been considered by the Commission in rendering its decision on the lawfulness of Modified Rider RRS.

Additionally, to the extent necessary to preserve its appellate rights,[1] OMAEG hereby incorporates all other arguments and Commission errors alleged and addressed in its prior Applications for Rehearing filed in the above-captioned proceeding.[2]

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[1] R.C. 4903.11; R.C. 4903.13; see also *In re Application of Columbus S. Power Co.*, Slip Opinion No. 2016-Ohio-1608 at ¶56.

[2] Application for Rehearing of the Ohio Manufacturers' Association Energy Group (May 2, 2016); Application for Rehearing of the Ohio Manufacturers' Association Energy Group (June 24, 2016); Joint Interlocutory Appeal, Request for Certification to Full Commission and Application for Review by the Office of the Ohio Consumers' Counsel, Northwest Ohio Aggregation Coalition, and the Ohio Manufacturers; Association Energy Group (June 8, 2016); also see Memorandum Contra Ohio Edison Company, The Cleveland Electric Illuminating Company, And the Toledo Edison Company's Application for Rehearing on Behalf of the Ohio Manufacturers' Association Energy Group (May 12, 2016).

For these reasons, and as further explained in the Memorandum in Support attached hereto, OMAEG respectfully requests that the Commission grant its Application for Rehearing.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

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I. INTRODUCTION AND PROCEDURAL HISTORY

On August 4, 2014, the Companies filed an application with the Commission to establish a standard service offer (SSO), in the form of a fourth electric security plan (ESP IV), to provide generation service pricing for the period of June 1, 2016 through May 31, 2019,[3] later modified to an eight-year term beginning June 1, 2016 through May 31, 2024.[4] OMAEG, which is comprised of many members with manufacturing facilities located in the Companies' service territories, was granted intervention in the above-captioned proceeding on December 1, 2014. Since the initial filing of ESP IV, the Companies have filed four stipulations, which collectively present a new ESP, termed the "Stipulated ESP IV" by the Companies.[5] A hearing on the ESP proposed in the Application commenced on August 31, 2015 and continued through October 29, 2015. A second hearing commenced on January 14, 2016 and concluded on January 22, 2016.

On March 31, 2016, the Commission issued its Order, approving the Companies' Stipulated ESP IV, including Rider RRS, with little modification.[6] In its decision, the Commission, among other things, authorized the Companies to flow through Rider RRS the net effects of purchasing generation output from the W.H. Sammis plant, the Davis-Besse Nuclear Power Station plant and FirstEnergy Solutions' (FES) entitlement to the output of the Ohio Valley Electric Corporation (OVEC) pursuant to a purchase power agreement between the Companies and its unregulated affiliate, FES (Affiliate PPA).[7]

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[3] Companies Ex. 1 at 3 (Application).

[4] Companies Ex. 154 at 7 (Third Supp. Stip.).

[5] As explained by the Third Supp. Stip. at 2, the Third Supp. Stip., together the "Prior Stipulations" (defined as the December 22, 2014 Stipulation, the May 28, 2013 Supplemental Stipulation, and the June 4, 2014 Second Supplemental Stipulation) form the "Stipulated ESP IV," which must be considered as a package.

[6] *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, et. al., Opinion and Order (March 31, 2016) (Order).

[7] Order at 78-79.

Subsequently on April 27, 2016, the Federal Energy Regulatory Commission (FERC), in a unanimous decision, granted a complaint filed by the Electric Power Supply Association (EPSA) and others and rescinded the Companies' "waiver as to the Affiliate PPA and [found] that, prior to transacting under the Affiliate PPA, [FES] must submit the Affiliate PPA for review and approval under *Edgar* and *Allegheny* in accordance with 18 C.F.R. § 35.39(b)."[8]

On May 2, 2016, the Companies, OMAEG, and numerous other parties filed applications for rehearing regarding several aspects of the Commission's March 31, 2016 Order.[9] Specifically, the Companies included in their application for rehearing a modified proposed Rider RRS, which was explained in the accompanying testimony of witness Eileen Mikkelsen. This Modified Rider RRS Proposal included different terms and conditions than the initial Rider RRS, which was approved by the Commission in its March 31, 2016 Order and was the subject of the April 27, 2016 FERC Order.

The Companies subsequently filed compliance tariffs on May 13, 2016, which the Staff of the Public Utilities Commission of Ohio (Staff) recommended for approval.[10] The tariffs filed were not related to the Commission-approved Rider RRS, but instead were related to the new Modified Rider RRS Proposal, which was materially different from the initial Rider RRS proposed by the Companies and authorized by the Commission. Nonetheless, the Commission

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[8] *Electric Power Supply Assn., et. al. v. FirstEnergy Solutions Corp., et. al.*, 155 FERC ¶ 61,101 at P 53 (April 27, 2016).

[9] To the extent necessary to preserve OMAEG's appellate rights, the assignments of error raised therein are hereby incorporated in this subsequent application for rehearing.

[10] *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 Staff Review and Recommendation (May 20, 2016) (May 20 Staff Recommendation).

approved the Companies' proposed tariff filing on May 25, 2016, with an effective date of June 1, 2016.[11]

On June 3, 2016, the attorney examiner in this proceeding established a procedural schedule for an additional evidentiary hearing to begin July 11, 2016 and limited the scope of the hearing to the provisions of, and alternatives to, the Companies' Modified Rider RRS Proposal (or Companies' Proposal).[12] The Staff filed testimony June 29, 2016, which included a recommendation for implementing a distribution modernization rider (Rider DMR) as an alternative proposal to the Companies' proposed Modified Rider RRS Proposal (Rider DMR or Staff's Proposal).[13] Rider DMR would collect from customers $131 million annually to "provide appropriately allocated support for FirstEnergy Corp. to maintain investment grade by the major credit rating agencies."[14] In response to Staff's Proposal, the Companies proposed modifications to Rider DMR, including an annual amount of recovery from customers of $558 million for credit support, and an additional amount, not to exceed $568 million, for economic development and to maintain FirstEnergy Corp.'s headquarters and nexus of operations in Akron, Ohio.[15] Additionally, the Companies proposed that Rider DMR be extended to an eight-year term, consistent with the ESP IV.[16]

Parties filed initial post-rehearing briefs on August 15, 2016 and post-rehearing reply briefs on August 29, 2016. The Commission issued its decision on October 12, 2016, rejecting

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[11] *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 Finding and Order (May 25, 2016) (May 25 Order).

[12] Attorney Examiner Entry at 4 (June 3, 2016).

[13] Rehearing Testimony of Hisham M. Choueiki (June 29, 2016); Rehearing Testimony of Tamara S. Turkenton (June 29, 2016); Rehearing Testimony of Joseph P. Buckley (June 29, 2016).

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

[15] Companies Ex. 205 at 3-4 (Murley Rebuttal); Companies Ex. 206 at 14 (Mikkelsen Rebuttal and Surrebuttal).

[16] Companies Ex. 206 at 15 (Mikkelsen Rebuttal and Surrebuttal).

the Companies' proposed modified Rider RRS and adopting Staff's proposed Rider DMR with modifications.[17] Additionally, the Commission addressed several issues raised by intervening parties on rehearing and related to the Companies' Stipulated ESP IV.[18]

Through its approval of Rider DMR, the Commission has unreasonably and unlawfully saddled captive distribution customers with approximately $204 million dollars annually for three years,[19] and possibly five years, to subsidize a company that has failed to make sound business decisions. While the Companies assert that maintaining FirstEnergy Corp. headquarters and nexus of operations in Akron, Ohio is a "significant contributor" to the Ohio economy,[20] the Companies have failed to consider the economic impact on other businesses within the state of Ohio who will be forced to pay substantial additional costs for electricity. Rider DMR in no way advances the policy of the state of Ohio to "[e]nsure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service."[21]

II. ARGUMENT

A. The Commission erred in finding that it had jurisdiction to consider the Companies' Modified Retail Rate Stability Rider (Rider RRS) Proposal and alternatives on rehearing in violation of Section 4903.10, Revised Code.

The Commission erred in finding that the Companies' Modified Rider RRS Proposal was appropriate for inclusion in its application for rehearing under Section 4903.10, Revised Code, which requires that an application for rehearing "shall be in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable

[17] Fifth Entry on Rehearing at 1 (October 12, 2016).

[18] Id.

[19] Fifth Entry on Rehearing, Concurring Opinion of Chairman Asim Z. Haque at 4 (October 12, 2016).

[20] Companies Ex. 205 at 6 (Murley Rebuttal).

[21] Section 4928.02(A), Revised Code.

or unlawful."[22] An application that fails to provide, with specificity, how the Commission acted unreasonably or unlawfully, should be denied.[23] In its March 31, 2016 Order, the Commission approved the Companies' Rider RRS and Stipulated ESP IV, stating that Rider RRS "form[s] the centerpiece of the proposed ESP IV."[24] Subsequently, the Companies submitted an application for rehearing, which included a new Rider RRS proposal (Modified Rider RRS Proposal or Companies' Proposal) that did not relate in any way to the Commission's modifications to Rider RRS or include any specificity regarding how the Commission's Order with respect to Rider RRS was unreasonable or unlawful.[25] Rather, the Companies' new Modified Rider RRS Proposal was an attempt to introduce an entirely new proposal to the Commission, disguised as a modification and in contravention of the requirements in Section 4903.10, Revised Code.

The Companies' new Modified Rider RRS Proposal included an entirely new rate design based on new calculations and new testimony, which were not responsive to the Commission's March 31, 2016 Order or based on existing record evidence. In apparent recognition of that fact and in an attempt to ignore process and procedure, the Companies filed rehearing testimony simultaneous with their application for rehearing to explain the new proposal. These actions were an inappropriate use of the Commission's procedural process to advance the Companies' own agenda regarding Rider RRS and introduce entirely new and improper extra record evidence. The new Modified Rider RRS Proposal should have arisen out of an entirely new ESP filing, subject to the requirements of Section 4928.143, Revised Code.

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[22] Section 4903.10, Revised Code.

[23] *Discount Cellular, Inc. v. Pub. Util. Comm.*, 112 Ohio St.3d 360, ¶59-60 (2007); *City of Marion v. Pub. Util. Comm.*, 161 Ohio St. 276, 278, 119 N.E.2d 67 (1954).

[24] Order at 78.

[25] Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company's Application for Rehearing at 12-23.

Additionally, Section 4903.10, Revised Code, states that in the event a rehearing is granted and additional evidence is permitted, the Commission "shall not upon such rehearing take any evidence that, with reasonable diligence, could have been offered upon the original hearing."[26] Nothing in the Companies' new Modified Rider RRS Proposal was precluded from being offered at the original hearing and should have been provided at the original hearing. For example, in its Third Supplemental Stipulation, the Companies proposed that it would "maintain its corporate headquarters and its nexus of operations in Akron, Ohio for the duration of Rider RRS" under the committee heading titled "Economic Development, Reliability and Low Income."[27] Therefore, the Companies' Modified Rider RRS Proposal, as supported by Ms. Mikkelsen's testimony, as well as Ms. Murley's testimony regarding the economic development benefits associated with maintaining the corporate headquarters in Akron, Ohio all could have and should have been provided during the original hearing. The Companies chose not to provide such information. They should not have been provided a second chance to raise these issues and present new testimony on rehearing.

The Commission's determination that intervening parties "experienced no prejudice" as a result of its consideration of the new Modified Rider RRS Proposal is not only erroneous but irrelevant. The intervening parties were prejudiced, at a minimum, by the expenditure of additional time and resources. Nonetheless, regardless of whether intervening parties were prejudiced or received an opportunity to present testimony and cross examine witnesses in a new rehearing, the fact remains that the Commission's decision to consider the Companies' new Modified Rider RRS Proposal was unlawful under Section 4903.10, Revised Code. Therefore,

[26] Section 4903.10(B), Revised Code.

[27] Companies Ex. 154 at 17 (Third Supplemental Stipulation).

the Commission erred in determining that it had jurisdiction to consider the Companies' Modified Rider RRS Proposal in its application for rehearing.

If the Commission lacked jurisdiction to consider the Companies' new Modified Rider RRS Proposal, it similarly lacked jurisdiction to consider alternatives to the Companies' Proposal, such as the Staff's Proposal to implement Rider DMR and the Companies' modifications to Staff's Proposal.

B. The Commission erred in determining that the Companies' Modified Rider RRS Proposal is authorized under Section 4928.143(B)(2)(d), Revised Code.

Although the Commission correctly recognized that the Companies' Modified Rider RRS Proposal fails to include benefits related to reliability, resource diversity, and economic development, the Commission erred in determining that Modified Rider RRS is authorized under Section 4928.143(B)(2)(d), Revised Code.[28]

Section 4928.143, Revised Code, provides that "[a]n electric security plan shall include provisions relating to the supply and pricing or electric generation service."[29] Further, the statute delineates specific provisions, which may be included in a utility company's proposed ESP, including, among other items, "terms, conditions, or charges relating to limitations on customer shopping for retail electric generation service . . . as would have the effect of stabilizing or providing certainty regarding retail electric service."[30]

The Commission's finding that Modified Rider RRS will act as a hedge to "mitigate the effects of market volatility" and provide "more stable pricing"[31] blatantly ignores the risks and

[28] Fifth Entry on Rehearing at 43.

[29] Section 4928.143(B)(1), Revised Code.

[30] Section 4928.143(B)(2)(d), Revised Code.

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

negative impacts of Modified Rider RRS. Modified Rider RRS in no way provides stability or certainty regarding retail electric service

For customers who take service from a certified retail electric supplier, an additional charge (or credit) under Modified Rider RRS actually disrupts the certainty that customers have obtained through shopping for their retail electric service in the competitive market.[32] This is especially impactful for large companies and manufacturers who have negotiated fixed price contracts and rely on predictability in making their business decisions.[33] For example, if a customer is on a fixed-rate contract, Modified Rider RRS will destabilize their otherwise fixed rate, adding uncertainty. An additional charge does not decrease volatility in electricity pricing; rather, it increases manufacturing costs and prohibits companies from taking advantage of competitive market rates, especially when they are historically low.[34] Increased electricity costs have the domino effect of increasing manufacturing costs, which will either be paid by their customers or cause companies to become less competitive in the global marketplace and potentially go out of business.[35] Moreover, increased electricity prices and the lack of stability regarding electricity prices will impact investment decisions of companies looking to locate in Ohio, possibly deterring them from locating in a state with higher electricity costs than their competitors.[36]

Further, as testified to by Companies witness Mikkelsen, there is no guarantee that customers will actually receive a credit in any given year pursuant to Modified Rider RRS.[37] In

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

[33] OMAEG Ex. 37 at 12 (Lause Rehearing).

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

[35] OMAEG Ex. 37 at 12 (Lause Rehearing).

[36] OMAEG Ex. 37 at 12 (Lause Rehearing); Tr. Vol. II at 335-337.

[37] Tr. Vol. I at 133.

reality, the Companies' proposed hedge operates by requiring customers to pay costs associated with Modified Rider RRS through 2018, pay costs associated with administering the rider, and then hopefully receive some money back from the Companies through a bill reduction later during the eight-year period of the ESP.[38] This creates a significant risk for customers without any evidence indicating that customers want or are willing to pay for a rate stabilizing mechanism such as Modified Rider RRS.[39]

If there is any certainty associated with Modified Rider RRS, it is that it disrupts the certainty that manufacturers derive from shopping with a competitive supplier.[40] Modified Rider RRS thwarts manufacturers' ability to benefit from fixed price supply contracts that enable them to make prudent decisions about their operations[41] by adding a layer of charges and variability to their electricity costs. Modified Rider RRS acts as a variable rate that is dependent on a fluctuating market, which in no way stabilizes rates or crates rate certainty. Therefore, the Commission erred in determining that the Companies' proposed Modified Rider RRS is authorized under Section 4928.143(B)(2)(d).

C. The Commission erred in determining that Staff's proposed distribution modernization rider (Rider DMR) is authorized under Section 4928.143(B)(2)(h), Revised Code.

As previously discussed, Section 4928.143, Revised Code, provides that "[a]n electric security plan shall include provisions relating to the supply and pricing of electric generation service."[42] The statute also states that an ESP may include, among other things, "provisions regarding distribution infrastructure and modernization incentives for the electric distribution

[38] Tr. Vol. II at 334.

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

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

[41] OMAEG Ex. 37 at 12 (Lause Rehearing).

[42] Section 4928.143(B)(1), Revised Code.

utility."[43] Specifically, these provisions "include a long-term energy delivery infrastructure modernization plan for that utility or any plan providing for the utility's recovery of costs, including lost revenue, shared savings, and avoided costs, and a just and reasonable rate of return on such infrastructure modernization."[44] Although Staff witness Dr. Choueiki references this statute in his testimony in support of Staff's proposed Rider DMR,[45] Rider DMR is noticeably void of these statutory requirements.

Despite its name, Rider DMR is not related to incentive ratemaking and does not incentivize grid modernization. Rather, it is a form of credit support for FirstEnergy Corp. in order to allow FirstEnergy Corp. to access the capital markets and then "hope that [FirstEnergy Corp.] modernize[s] the grid."[46] In fact, Staff witness Buckley specifically states that Staff is recommending Rider DMR be created to allow for recovery of $131 million from Ohio customers "to allow the Ohio Regulated Distribution Utilities to provide the appropriately allocated support for First Energy Corporation (FE) to maintain investment grade by the major credit rating agencies."[47] Further, as explained by Staff witness Turkenton, money collected as cost recovery for grid modernization projects is for plant infrastructure, while monies collected through Rider DMR is for credit support.[48]

The Commission inaccurately states that Rider DMR is related to distribution, rather than generation. The Commission even recognizes there is no requirement that the revenue collected under Rider DMR be used to modernize or invest in the grid; rather, Staff only "*intends* for Rider

[43] Section 4928.143(B)(2)(h), Revised Code.

[44] Section 4928.143(B)(2)(h), Revised Code.

[45] Staff Ex. 15 at 15 (Choueiki Rehearing).

[46] Tr. Vol. II at 426 and 429.

[47] Staff Ex. 13 (Buckley Rehearing).

[48] Tr. Vol. II at 473-474.

DMR to jump start the Companies' grid modernization efforts."[49] Staff's intentions are insufficient as the record is clear that Rider DMR contains no firm commitments or requirements that the Companies actually invest in distribution grid modernization.[50] Additionally, the Commission's conditional approval of Rider DMR on "a demonstration of sufficient progress" in implementing grid modernization programs,[51] is similarly insufficient as "sufficient progress" is left undefined. The Companies' commitment to file a business plan is also insufficient as the Companies have made no commitment to actually spend the funds received on grid modernization.[52] The Commission did not approve any specific grid modernization programs and it is currently unclear when the Companies will begin investing in grid modernization, if at all.[53] Further, the Commission failed to discuss whether the revenues collected under Rider DMR will be collected from customers independently of any additional cost recovery that the Companies may receive under Rider AMI and Rider DCR for grid modernization projects. Thus, Rider DMR operates primarily as a cash infusion for the Companies and FirstEnergy Corp., rather than an incentive to modernize the grid as required under Section 4928.143(B)(2)(h), Revised Code.

Therefore, given that the core purpose of Rider DMR is credit support for FirstEnergy Corp., with a "hope" that investment in grid modernization is a byproduct,[54] Rider DMR fails to satisfy the statutory requirements of Section 4928.143(B)(2)(h), Revised Code. The Commission's Order is unlawful and unreasonable because FirstEnergy failed to meet its burden

[49] Fifth Entry on Rehearing at 90 (emphasis added).

[50] See e.g., Tr. Vol. II at 433; Tr. Vol. III at 584; Tr. Vol. III at 702-703; Tr. Vol. III at 957-958; Tr. Vol. IV at 1001.

[51] Fifth Entry on Rehearing at 96.

[52] Tr. Vol. II at 472.

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

[54] Tr. Vol. II at 426 and 429.

of demonstrating that the DMR is related to incentive ratemaking, and the Commission's finding that Rider DMR provides an incentive for grid modernization lacks record support.

D. The Commission erred in determining that Rider DMR is not an unlawful subsidy to FirstEnergy Corp. in violation of Section 4928.02(H), Revised Code.

Not only does Rider DMR fail to satisfy the statutory requirements for inclusion in an ESP, but Rider DMR, at its core, is nothing more than a "corporate bailout of FirstEnergy Corp. in the form of a subsidy by Ohio consumers,"[55] in violation of Section 4928.02(H), Revised Code.

Section 4928.02(H), Revised Code, states that it is the policy of the state 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;[56]

The primary purpose of Rider DMR is to provide credit support for the Companies and FirstEnergy Corp. to maintain investment grade credit rating[57] and allow FirstEnergy Corp. adequate time to implement a long-term financial solution.[58] This was recognized by the Commission in its decision.[59] As stated by Dr. Choueiki, Rider DMR is designed to provide a "cash infusion" to the Companies and FirstEnergy Corp. to begin grid modernization initiatives.[60] There is no mandate, however, that the cash collected from customers actually be

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[55] OMAEG Ex. 39 at 4 (Lause Rebuttal).

[56] Section 4928.02(H), Revised Code.

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

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

[59] Fifth Entry on Rehearing at 127.

[60] Tr. Vol. IV at 956-957.

used for such initiatives[61] and no requirement that actual investment occur.[62] Although the Commission directed Staff to "periodically review how the Companies, and FirstEnergy Corp., use the Rider DMR funds" to ensure that funds are being used to support grid modernization, the Commission explicitly stated that it "will not place restrictions on the use of Rider DMR funds," only that they be used "directly or indirectly" to support grid modernization.[63] The Commission then stated that the Companies and FirstEnergy Corp. could use Rider DMR revenues to reduce pension obligations, reduce debt, or take other steps to reduce the costs of accessing capital.[64] Thus, it appears that the Commission views these actions as indirect support of grid modernization, even though the funds may never be used to actually implement a specific grid modernization program.

Without Rider DMR funds being used to fund grid modernization investment or distribution infrastructure, Rider DMR functions as an unlawful subsidy for FirstEnergy Corp. in violation of Section 4928.02(H), Revised Code. The result is an increase in costs for manufacturers who are forced to pay additional charges for their electricity service, thereby impeding their ability to remain competitive in the global economy.[65] Through its authorization of Rider DMR, the Commission has chosen FirstEnergy Corp. above all other businesses in Ohio.

The evidence does not support the assertion that Rider DMR is necessary to improve the credit rating of FirstEnergy Corp.[66] Conversely, the evidence demonstrates that such a corporate

[61] Tr. Vol. IV at 957.

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

[63] Fifth Entry on Rehearing at 127-128.

[64] Fifth Entry on Rehearing at 128.

[65] OMAEG Ex. 39 at 6 (Lause Rebuttal).

[66] Fifth Entry on Rehearing at 126.

bailout is not necessary. Currently, FirstEnergy Corp. is rated Baa3 by Moody's rating services and BBB- by Standard and Poor's rating services, which is the final notch of investment grade rating.[67] Two of the Ohio distribution utilities, the Toledo Edison Company and the Cleveland Electric Illuminating Company are one notch above non-investment grade and the other Ohio distribution utility, the Ohio Edison Company, is three notches above non-investment grade.[68] Regardless of the Commission's concerns regarding the umbrella approach of Standard and Poor's credit ratings,[69] neither FirstEnergy Corp. nor the Ohio utilities are currently at a non-investment grade credit rating. The Ohio utilities' credit grade ratings in particular are adequate to issue new debt on reasonable terms.[70] In fact, in its decision addressing the impact of a credit rating downgrade, the Commission only states that "a downgrade *may* result in more restrictive terms and conditions" or "*may* trigger requirements that the Companies or FirstEnergy Corp. post cash as collateral."[71] As testified to by OMAEG witness Lause, even if FirstEnergy Corp. were downgraded to a notch below investment grade (which they are not currently), there is no guarantee that such a movement will increase borrowing costs or have adverse consequences for the Companies or FirstEnergy Corp.[72] A subsidy, in the form of Rider DMR, is not the only avenue to address FirstEnergy Corp.'s, or its subsidiaries', credit ratings.[73]

Further, there is no guarantee that Rider DMR will *prevent* a downgrade of FirstEnergy Corp or the Companies' credit rating.[74] There is also no guarantee that Rider DMR will enable

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[67] Staff Ex. 13 at 5 (Buckley Rehearing).

[68] Tr. Vol. I at 185-186; OCC Ex. 46 at 10 (Kahal Rebuttal).

[69] Fifth Entry on Rehearing at 126.

[70] Staff Ex. 13 at 6 (Buckley Rehearing).

[71] Entry on Rehearing at 127 (emphasis added).

[72] Tr. Vol. V at 1073-1074.

[73] Staff Ex. 13 at 6 (Buckley Rehearing).

[74] Tr. Vol. II at 576.

FirstEnergy Corp. to achieve the cash flow operations (CFO) to debt level of 14.5 percent or a funds from operations (FFO) to debt level of at least 12 percent.[75] Based on the 22 percent allocation figure determined by Staff witness Buckley,[76] in order for Rider DMR to provide the desired credit support for FirstEnergy Corp., other subsidiaries of FirstEnergy Corp. need to provide the remaining 78 percent in credit support.[77] There is no evidence to show that other subsidiaries of FirstEnergy Corp. in other jurisdictions will in fact provide this similar cash flow support to FirstEnergy Corp.[78] Thus, Rider DMR may have no impact at all on maintaining or improving FirstEnergy Corp.'s credit grade rating, and yet Ohio consumers stand to pay approximately $204 million annually to no avail.

There is little evidence in the record to show that FirstEnergy Corp. has been addressing its financial situation for over the last three years. Although the Commission cites to Ms. Mikkelsen's testimony regarding "aggressive corporate-wide initiatives," these actions, which have all been taken in other jurisdictions, can hardly be characterized as "aggressive."[79] Moreover, Ms. Mikkelsen is admittedly unaware of whether FirstEnergy Corp. executives and management have continued to receive bonuses or taken a reduction in pay in the past three years.[80] Nor is Ms. Mikkelsen aware of whether FirstEnergy Corp.'s alleged short-term and long-term bonus incentive programs or pay reductions will continue in 2016 or beyond.[81] Rather than receive a costly corporate bailout from Ohio ratepayers, FirstEnergy Corp. should be required to make fiscally responsible financial business decisions, like all other public

[75] Tr. Vol. III at 531-534; Fifth Entry on Rehearing at 93 and 95.

[76] Staff Ex. 13 at 3 (Buckley Rehearing).

[77] OCC Ex. 49 at 3 (Kahal Rebuttal).

[78] Id. at 5 and 8.

[79] Fifth Entry on Rehearing at 95-96; Companies Ex. 206 at 17-18 (Mikkelsen Rebuttal and Surrebuttal).

[80] Tr. Vol. X at 1631.

[81] Id. at 1736-1737.

companies, to address key areas such as cutting advertising costs or executive compensation, curtailing or rationalizing capital spending, and reviewing the level of dividend payments to shareholders.[82] FirstEnergy Corp.'s management actions such as strengthening the balance sheet and exploring ring fencing are viable options that should be pursued by the Companies and FirstEnergy Corp. rather than pursuing a utility customer subsidy through Rider DMR.[83]

The only guarantee regarding Rider DMR is that customers will be charged an additional $612 million in credit support for FirstEnergy Corp. over a three year period, which could be extended two more years.[84] This will cause manufacturers to become less competitive in the global market as operational costs, such as electricity, will rise, forcing manufacturers to charge customers more or absorb additional costs.[85] Further, Rider DMR establishes bad public policy and sends the message to new businesses looking to locate in Ohio and businesses looking to expand in Ohio that the state will pick winners and losers and unlawfully subsidize one company over another.[86] Moreover, a subsidy such as Rider DMR creates no incentive for FirstEnergy Corp. to take fiscally responsible actions as they can rely on receiving a corporate bailout from the Commission, paid for by customers.[87] As stated by OCC witness Kahal, "it is unfair to hold utility customers accountable for those FE Corp policy decisions and force them to subsidize shareholders and FE Corp's unregulated operations."[88] Maintaining and improving credit ratings

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

[83] OCC Ex. 46 at 13 (Kahal Rebuttal).

[84] Fifth Entry on Rehearing at 95 and 97; Fifth Entry on Rehearing, Concurring Opinion of Chairman Asim Z. Haque at 4 (October 12, 2016).

[85] OMAEG Ex. 39 at 11 (Lause Rebuttal).

[86] Id.

[87] Id. at 9.

[88] OCC Ex. 46 at 4 (Kahal Rebuttal).

are management's responsibility,[89] and should not fall on the shoulders of ratepayers in the form of a customer-funded subsidy.

Therefore, the Commission erred in determining that Rider DMR is not an unreasonable and unlawful corporate subsidy to FirstEnergy Corp. in violation of Section 4928.02(H), Revised Code. Rider DMR has the effect of increasing electricity prices for Ohio manufacturers, which results in increased costs and thwarts their ability to remain competitive in the global economy. Through its authorization of Rider DMR, the Commission has unlawfully subsidized FirstEnergy Corp., choosing it above all other businesses in Ohio.

E. The Commission erred in finding that Rider DMR advances state policy under Section 4928.02, Revised Code.

Section 4928.02, Revised Code, states that it is the policy of the state of Ohio to:

> (C) Ensure diversity of electricity supplies and suppliers, by giving consumers effective choices over the selection of those supplies and suppliers and by encouraging the development of distributed and small generation facilities.
>
> (D) Encourage innovation and market access for cost-effective supply- and demand-side retail electric service including, but not limited to, demand-side management, time-differentiated pricing, and implementation of advanced metering infrastructure.[90]

The Commission's assertion that the credit support provided under Rider DMR will incentivize and support grid modernization, ensure adequate, reliable, and reasonably price retail electric service, ensure diversity of electricity supplies, and facilitate the state's effectiveness in the global economy[91] fails to consider the negative impacts of Rider DMR on captive customers

[89] Id. at 6.

[90] Sections 4928.02(C) and (D), Revised Code.

[91] Fifth Entry on Rehearing at 122-123.

who will be forced to pay an additional $204 million annually with no guaranteed return of benefits.

First, and as previously demonstrated, Rider DMR includes no firm commitment or requirement that the Companies spend money on distribution grid modernization[92] or that the money received from Rider DMR be marked for grid modernization initiatives.[93] As explained by Staff witness Dr. Choueiki, Rider DMR is necessary to provide credit support to the Companies and FirstEnergy Corp.; not to modernize the grid.[94] Rather, revenues collected under Rider DMR will be used to assist the Companies in receiving more favorable terms when accessing the capital markets, which will in turn enable the Companies to obtain funds and "jumpstart" their grid modernization efforts.[95] One can only "hope that [FirstEnergy Corp.] modernize[s] the grid."[96] Moreover, in its approval of Rider DMR, the Commission is not requiring any specific level of commitment to grid modernization on behalf of the Companies. Rather, the Commission only states that it will address the Companies' pending grid modernization application and then grant approval of grid modernization programs in light of a policy review that will be conducted in the near future.[97] These conditions are not firm commitments to grid modernization and therefore do not advance the state policy to modernize the distribution grid as required by Ohio law.

Second, Rider DMR does not ensure diversity of supplies or suppliers in violation of Section 4928.02(C), Revised Code. In reality, the corporate bailout of the Companies and

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[92] See e.g., Tr. Vol. II at 433; Tr. Vol. III at 584; Tr. Vol. III at 702—703; Tr. Vol. III at 957-958; Tr. Vol. IV at 1001.

[93] Tr. Vol. III at 702-703.

[94] Tr. Vol. IV at 960.

[95] Staff Ex. 15 at 15 (Choueiki Direct).

[96] Tr. Vol. II. at 426 and 429 (quoting Staff witness Turkenton).

[97] Fifth Entry on Rehearing at 96-97.

FirstEnergy Corp. under Rider DMR will actually *diminish* diversity of supply and limit competitive retail generation choices for customers in the long-term.[98] As previously discussed, the Commission-approved corporate subsidy of FirstEnergy Corp. will deter new entry into the generation supply market, decreasing the diversity of both supply and suppliers.[99] Choosing to assist one generation supplier over another through a customer-funded Rider DMR does not advance the state policy of encouraging competition or ensuring diversity of supply and suppliers as required by Section 4928.02(C), Revised Code.

Rather, Rider DMR and the customer-funded subsidy that results from Rider DMR, has a much greater negative impact on the state of Ohio. The additional charge to customers of $204 million annually creates increased costs for customers, including manufacturers. These additional costs are either borne by customers or cause manufacturers to close or move their businesses out the state if they cannot recover or cover their increased costs.[100] Additionally, the increased electricity costs deters new business entry and development in the state as businesses may choose to locate elsewhere due to high electricity costs and a subsidy provided to one company over another.[101] Rider DMR prevents all customers, including businesses and electricity-intensive manufacturers, from taking advantage of the competitive market for generation services.[102]

Therefore, the Commission erred in determining that Rider DMR advances state policy under Section 4928.02, Revised Code, as Rider DMR includes no commitment to grid

[98] OMAEG Ex. 39 at 7 (Lause Rebuttal).

[99] OMAEG Ex. 39 at 7 (Lause Rebuttal).

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

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

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

modernization, negatively impacts diversity of supply and suppliers, and deters new entry into the competitive retail markets.

F. The Commission erred in determining that Rider DMR revenues should be excluded from Significantly Excessive Earnings Test (SEET) calculations in violation of Section 4928.143(E), Revised Code.

In approving Rider DMR, the Commission states that Rider DMR revenues should be excluded from the SEET calculations. This is unreasonable, unjust and unlawful.

Section 4928.143(E), Revised Code, requires the Commission to determine the effect of an ESP and whether that effect is "substantially likely to provide the electric distribution utility with a return on common equity that is significantly in excess of the return on common equity that is likely to be earned by publicly traded companies, including utilities, that face comparable business and financial risk, with such adjustments for capital structure as may be appropriate."[103] Pursuant to the statute, the SEET calculation assesses the impact of the entire ESP and includes revenues collected under the entire ESP. The statute does not envision isolating revenues collected from one specific rider and excluding those revenues from the SEET test. If a refund results pursuant to the SEET calculation, there would be no way to determine whether such refund is a result of Rider DMR or another rider in the Companies' ESP.

The Commission's rationale for excluding the Rider DMR revenues from the SEET calculation is misplaced.[104] Conversely, not including the revenues associated with Rider DMR would defeat the purpose of the rider to provide credit support. If the purpose of Rider DMR is to provide necessary credit support funds to FirstEnergy Corp. in order for it to maintain investment grade credit rating, then the amount provided should be what is sufficient to achieve

[103] Section 4928.143(E), Revised Code.

[104] Companies Initial Brief on Rehearing at 41; Companies Ex. 206 at 22 (Mikkelsen Rebuttal and Surrebuttal); Fifth Entry on Rehearing at 98.

that goal. Necessary credit support does not equate to excessive earnings for FirstEnergy Corp. Logically, if the Companies have significantly excessive earnings, from Rider DMR and the other riders in the approved ESP, then the Companies should be treated the same as all other distribution utilities and be required to refund any excessive earnings to customers. This will in no way impede their ability to use the Rider DMR revenues for credit support and to maintain investment grade rating. Moreover, including the Rider DMR revenues in the SEET calculations will impose no additional risk on the Companies if the rider is actually used for its purported purpose.

Excluding Rider DMR from SEET calculations would only result in an inaccurate assessment of the Companies' ESP and defeat the purpose of Section 4928.143(E), Revised Code, to protect customers from excessive rates by electric distribution utilities. Therefore, the Commission erred in determining that Rider DMR revenues should be excluded from the SEET calculations in violation of Section 4928.143(E), Revised Code.

G. The Commission erred in finding that Rider DMR complies with Section 4905.22, Revised Code.

Section 4905.22, Revised Code, operates in conjunction with Section 4928.143, Revised Code, and states that "[a]ll charges made or demanded for any service rendered, or to be rendered, shall be just, reasonable, and not more than the charges allowed by law or by order of the public utilities commission and no unjust or unreasonable charge shall be made or demanded for, or in connection with, any service, or in excess of that allowed by law or by order of the commission."[105]

As a prefatory matter, the Commission states that Section 4905.22, Revised Code, does not apply to Rider DMR because Rider DMR is authorized under Section 4928.143(B)(2)(h),

[105] Section 4905.22, Revised Code.

Revised Code, as a provision "regarding distribution infrastructure and modernization incentives for the electric distribution utility."[106] In stating so, the Commission seems to imply in its decision that the language within the statute permits it to approve provisions in ESPs related to distribution service that are unjust and unreasonable.[107] However, this cannot be what the General Assembly intended when it authorized legislation governing ratemaking for Ohio utilities and customer protections for Ohio consumers.

The Commission then states that even if Section 4905.22, Revised Code, did apply to Rider DMR, Rider DMR is not an unreasonable charge.[108] However, based on the record evidence, Rider DMR is both unjust and unreasonable for a multitude of reasons. First, the adjustment of Rider DMR at the Federal corporate income tax rate is unreasonable and baseless.[109] Companies witness Mikkelsen testified that Rider DMR should be grossed-up for income taxes at the 36 percent average tax rate for the Companies.[110] However, in her testimony, Ms. Mikkelsen admits that she did not consider a tax rate other than the 36 percent (which was based on a Rider DCR update filing from July 1, 2015) and she is unaware whether the proposed tax rate accounts for reductions in taxable income that may arise from claiming bonus depreciation.[111] Thus, the Companies seek to collect an additional $72 million dollars annually from customers to account for income taxes when their tax rate may be significantly

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[106] Section 4928.143(B)(2)(h), Revised Code; Fifth Entry on Rehearing at 131.

[107] Fifth Entry on Rehearing at 131 (The Commission states "[w]ith this language, the General Assembly clearly intended that the Commission have flexibility in approving provisions related to distribution service contained in ESPs and that the strict requirements of R.C. Chapters 4905 and 4909 do not necessarily apply to such provisions." Given that Section 4905.22, Revised Code, requires that all charges be just and reasonable, the Commission's arguments indicate that it believes it can approve unjust and unreasonable charges as long as they meet the requirements of Section 4928.143(B)(2)(h), Revised Code.

[108] Fifth Entry on Rehearing at 131.

[109] Fifth Entry on Rehearing at 95.

[110] Companies Ex. 206 at 11 (Mikkelsen Rebuttal and Surrebuttal).

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

lower due to bonus depreciation. This is an unreasonable request in both the amount being requested as well as the lack of diligence to determine whether the tax percentage being requested is what is actually paid by the Companies.

Second, Rider DMR, as approved by the Commission, offers no guarantee that the Companies will spend the revenues collected under Rider DMR on distribution grid modernization efforts. While the Commission conditioned recovery of revenues under Rider DMR contingent upon "a demonstration of sufficient progress in the implementation and deployment of grid modernization programs approved by the Commission,"[112] the Commission stopped short of requiring the Companies to actually invest in grid modernization and at a certain level. Rather, the Commission states only that it will undertake a "detailed policy review of grid modernization in the near future" and will address the grid modernization business plan filed by the Companies after that policy review.[113] This is unjust and unreasonable. While, the Companies' grid modernization business plan was filed pursuant to the Stipulated ESP IV and before Rider DMR was proposed,[114] the plan lacks specific details, including costs and a deployment schedule.[115] Moreover, the Commission's promise to undertake a grid modernization policy review in the near future provides no additional assurances to ratepayers as the Order contains no detailed timeline for completion or guarantee that such a review will occur prior to the expiration of Rider DMR. Thus, the Commission has authorized the Companies to begin collecting significant revenues from customers immediately, with no guarantee or

[112] Fifth Entry on Rehearing at 96.

[113] Fifth Entry on Rehearing at 96-97.

[114] [114] See *In the Matter of the Filing by Ohio Edison Company, the Cleveland Electric Illuminating Company, and The Toledo Edison Company of a Grid Modernization Business Plan,* Case No. 16-481-EL-UNC (February 29, 2016).

[115] *In the Matter of the Filing by Ohio Edison Company, the Cleveland Electric Illuminating Company, and The Toledo Edison Company of a Grid Modernization Business Plan,* Case No. 16-481-EL-UNC (February 29, 2016).

commitment to actually invest in grid modernization initiatives. This is not only unreasonable, but also undermines Staff's stated objective of proposing Rider DMR to support grid modernization and develop one of the nation's most intelligent distribution grids.[116]

Third, as explained previously, the Companies have failed to demonstrate that credit support for FirstEnergy Corp. is necessary. FirstEnergy Corp. is currently at a Baa3 rating by Moody's and a BBB- rating by Standard & Poor's, which are both above non-investment grade rating.[117] Moreover, the Ohio operating utilities are all above non-investment grade rating.[118] As such, there is no immediate need to provide the Companies, or FirstEnergy Corp.. with such a substantial amount of credit support. There is no evidence that adverse consequences, such as those noted by the Commission,[119] *will* actually occur if FirstEnergy Corp. drops below investment grade rating. In fact, OMAEG witness Lause testified that he was personally aware of a company that does not have an investment grade rating but can borrow money at what is equivalent to investment grade rating.[120]

Finally, Rider DMR is unreasonable as there is no guarantee that Rider DMR will result in achieving its purpose of enabling the Companies to access capital on more favorable terms.[121] The Commission approved Staff's recommended 22 percent allocation figure,[122] which means constituents from other jurisdictions would need to provide an additional 78 percent in credit support to meet the CFO to debt ratio and provide adequate credit support to FirstEnergy Corp. However, the Companies are unaware of whether FirstEnergy Corp. intends to seek a

[116] Tr. Vol. IV at 960; Staff Ex. 15 at 16 (Choueiki Rehearing).

[117] Staff Ex. 13 at 5 (Buckley Rehearing).

[118] Tr. Vol. I at 185-186; OCC Ex 46 at 10 (Kahal Rebuttal).

[119] Fifth Entry on Rehearing at 92.

[120] Tr. Vol. V at 1073-1074.

[121] Companies Ex. 206 at 8 (Mikkelsen Rebuttal and Surrebuttal).

[122] Fifth Entry on Rehearing at 95.

commitment from other constituents to achieve the targeted CFO to debt ratio.[123] Moreover, while the Commission cites to examples of shareholder initiative and cases in other jurisdictions involving rate increases,[124] all of these initiatives and cases commenced prior to the decision by Moody's to downgrade FirstEnergy Corp. and FES to negative.[125] As previously stated, Ms. Mikkelsen is unaware of whether FirstEnergy Corp.'s management has continued to receive bonuses, the amount of those bonuses, or whether management has taken any pay reductions in the past three years, which would all aid in improving FirstEnergy Corp.'s financial situation.[126] It is still speculative whether Rider DMR, if implemented and collected from customers, would actually assist in providing adequate credit support to FirstEnergy Corp.

Therefore, the Commission erred in finding that Rider DMR is not unjust and unreasonable under Section 4905.22, Revised Code. The evidence clearly demonstrates that Rider DMR is an unjust and unreasonable subsidy that will cost customers approximately $612 million with no guarantee of return in the form of grid modernization, economic development or other benefits.

H. The Commission erred in finding that Rider DMR does not constitute an unlawful transition charge in violation of Section 4928.38, Revised Code.

Ohio law prohibits the Commission from authorizing "the receipt of transition revenues or any equivalent revenues by an electric utility[.] after the market development period has ended."[127] Additionally, the Supreme Court of Ohio has determined that the absence of labeling a charge as a transition revenue does not "foreclose a finding that the Company is receiving the

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[123] Tr. Vol. X at 1738.

[124] Fifth Entry on Rehearing at 95-96.

[125] Companies Ex. 206 at17-18 (Mikkelsen Rebuttal and Surrebuttal); Tr. Vol. X at 1793-1796.

[126] Tr. Vol. X at 1631.

[127] Section 4928.38, Ohio Revised Code.

equivalent of transition revenue."[128] Similarly, although Rider DMR is not labeled as transition revenue, the nature of the costs recovered through Rider DMR makes it an unlawful transition charge.[129]

Specifically, the purpose of Rider DMR is to provide credit support to FirstEnergy Corp. in order for FirstEnergy Corp. to achieve an investment grade rating.[130] Nothing in the Commission's order prevents the Companies from funneling revenues received under Rider DMR up to FirstEnergy Corp., for distribution to FirstEnergy Solutions (FES) or to shareholders. 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."[131] 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.[132] Thus, Rider DMR is inconsistent with recent precedent regarding transition revenues and is exactly the type of financial transition charge that the Supreme Court of Ohio recently found to be unlawful.[133]

Moreover, the Commission's assertion that Rider DMR cannot be a transition charge because the Companies already transitioned their assets to FES is without merit. The language in the statute prohibits transition revenues after a specific date, but does not place a statute of limitations on the prohibition. The fact remains that Rider DMR may be used to provide funding

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[128] *In Re Application of Columbus S. Power Co.*, 2016 WL 1592905 at *4 (2016).

[129] Id.

[130] Staff Ex. 13 at 2 (Buckley Direct).

[131] *In re Application of Columbus S. Power Co* at *5.

[132] Id. at *8.

[133] See e.g., *In re Application of Columbus S. Power Co.; In re Application of Dayton Power & Light Co.*, 147 Ohio St. 3d 166 (2016).

to FirstEnergy Corp. and FES, which constitutes an unlawful transition charge in violation of Section 4928.38, Revised Code.

Therefore, the Commission erred in finding that Rider DMR does not constitute an unlawful transition charge.

I. The Commission erred in finding that the ESP IV, as modified by Rider DMR, is more favorable in the aggregate than an market rate offer (MRO) as required by Section 4928.143(C)(1), Revised Code.

Pursuant to Section 4928.143(C)(1), Revised Code, before approving an ESP, the Commission must determine that the ESP is more favorable in the aggregate as compared to the expected results that would occur under an MRO.[134] The Commission has considered both quantitative and qualitative factors in determining whether a proposed ESP is more favorable in the aggregate than the expected results of an MRO.[135] Further, the Companies have the burden of demonstrating that their proposed ESP is, in fact, more favorable than an MRO.[136]

The Commission concludes that the entire ESP IV, with the inclusion of Rider DMR, is more favorable in the aggregate than an MRO.[137] This determination is based on erroneous assumptions regarding the quantitative and qualitative benefits associated with Rider DMR.

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[134] Section 4928.143(C)(1), Ohio Revised Code; see also *In the Matter of the Application of the Dayton Power and Light Company for Approval of its Electric Security Plan,* Case No. 12-426-EL-SSO, Opinion and Order at 48 (September 4, 2013).

[135] See *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. 12-1230-EL-SSO, Opinion and Order at 55-57 (July 18, 2012); *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to §4328.143, Ohio Rev. Code, in the Form of an Electric Security Plan, et al.,* Case No. 11-346-EL-SSO, et al., Opinion and Order at 73-77 (August 8, 2012); *In the Matter of the Application of The Dayton Power and Light Company For Approval of its Electric Security Plan, et al.,* Case No. 12-426-EL-SSO, et al., Opinion and Order at 48-52 (September 4, 2013).

[136] Section 4928.143(C)(1), Ohio Revised Code; see also *In the Matter of the Application of the Dayton Power and Light Company for Approval of its Electric Security Plan,* Case No. 12-426-EL-SSO, Opinion and Order at 48 (September 4, 2013).

[137] Fifth Entry on Rehearing at 160.

In reviewing the alleged quantitative benefits of the ESP, including Rider DMR, the Commission agrees with Staff witness Turkenton and the Companies that ESP IV contains $51.5 million in quantitative benefits over an MRO.[138] This calculation is based on part on the erroneous presumption that the additional $612 million in costs to customers under Rider DMR would have no impact on the ESP v. MRO test as equivalent revenues could be recovered through an MRO pursuant to Section 4928.142(D), Revised Code.[139] That provision permits the Commission to adjust a utility's *standard service offer (SSO) price* in the event of "any emergency that threatens its financial integrity."[140] However, there is no evidence in this proceeding to demonstrate that the Companies' or FirstEnergy Corp. is in the state of an emergency.[141] Additionally, the Commission is not adjusting the utility's SSP price as required by law. Instead the Commission states it is creating a nonbypassable distribution charge. Further, the Commission admits that it has "never approved an application under this section" and has "never determined the standards under which we would review an application under this section."[142] Therefore, the Commission's conclusion that it would "likely" grant relief in response to an application under Section 4928.142(D), Revised Code,[143] is nothing more than conjecture. The assertion that the receipt of Rider DMR revenues would be a quantitative wash for purposes of the ESP v. MRO test is also incorrect.[144]

From a qualitative perspective, the Commission and Staff cite to purported benefits arising from Rider DMR such as diversity of supply and grid modernization, which will in turn

[138] Fifth Entry on Rehearing at 163.

[139] Staff Ex. 14 at 3-4 (Turkenton Rehearing).

[140] Section 4928.142(D), Revised Code.

[141] Tr. Vol. II at 450.

[142] Entry on Rehearing at 162.

[143] Entry on Rehearing at 163.

[144] Staff Initial Rehearing Brief at 8.

promote customer choice and the states' competitiveness in the global market.[145] However, as previously discussed, revenues received from customers under Rider DMR are not required to be used for distribution grid modernization.[146] Additionally, the Commission is only requiring that Staff periodically review the use of Rider DMR funds to ensure that they are being used directly *or indirectly* in support of grid modernization.[147] "Forcing customers to provide over [$612] million to the Companies in the hopes that they will invest in grid modernization initiatives provides no guarantee that the actual investment will occur."[148] Thus, the purported qualitative benefit of grid modernization is merely a pretense for providing credit support to the Companies and FirstEnergy Corp.

Moreover, the purported qualitative benefit regarding diversity of supply and suppliers is overstated. As previously discussed, the credit support provided under Rider DMR results in an unlawful subsidy and corporate bailout of FirstEnergy Corp. This will actually have the effect of diminishing diversity of supply and suppliers as other generation suppliers may be deterred from entering the market when they see the competitive advantage provided to FirstEnergy Corp. and its competitive subsidiaries.[149]

Finally, Rider DMR actually harms economic development in the state of Ohio and does not provide any qualitative benefits associated with facilitating Ohio's effectiveness in the global economy.[150] The Commission approved-Rider DMR is conditioned upon "continued retention of

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[145] Entry on Rehearing at 163; Staff Ex. 14 at 4 (Turkenton Rehearing).

[146] See e.g., Tr. Vol. II at 433; Tr. Vol. III at 585; Tr. Vol. III at 702-703; Tr. Vol. III at 957-958; Tr. Vol. IV at 1001.

[147] Fifth Entry on Rehearing at 127-128.

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

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

[150] Fifth Entry on Rehearing at 122-123.

the corporate headquarters and nexus of operations of FirstEnergy Corp. in Akron, Ohio."[151] Staff witness Buckley states that this condition enhances economic development through job retention, additional spending by employees, and preservation of local property taxes.[152] However, Staff has not conducted any cost-benefit analysis quantifying the effect of keeping the corporate headquarters and nexus of operations in Akron, Ohio[153] or the impact of Rider DMR on customer bills and local businesses as a result of increased costs collected under the rider.[154] Further, the economic impact analysis conducted by Ms. Murley on behalf of the Companies focuses only on the economic and revenue impacts of the headquarters in Akron, Ohio, while ignoring the impacts of Rider DMR on various other sectors in the economy.[155] Ms. Murley failed to analyze the impact of Rider DMR on the six other Fortune 500 companies located in northeast Ohio; the impact of Rider DMR on other manufacturers in the state of Ohio; whether the increased costs to customers will impact their ability to invest additional dollars in the state of Ohio; whether the increased costs to customers will impact their ability to expand their companies in the state of Ohio; whether the increased costs to customers will impact their ability to fund other community projects in the state of Ohio; and whether the increased costs to customers will affect whether new companies decide to locate in Ohio.[156] Further, Ms. Murley's analysis does 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

[151] Fifth Entry on Rehearing at 96.

[152] Tr. Vol. III at 679-680.

[153] Tr. Vol. III at 694.

[154] Tr. Vol. III at 694-695.

[155] Tr. Vol. IX at 1492.

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

costs,[157] and her analysis does not include a cost-benefit analysis of maintaining the corporate headquarters in Akron, Ohio.[158] Although maintaining the FirstEnergy corporate headquarters and nexus of operations in Akron may assist with economic development in the city of Akron, the detrimental economic impact on the remainder of the state far outweighs any potential benefits.

The Commission also cites to additional purported qualitative benefits arising from other provisions in the Companies' ESP and described in the Commission's March 31, 2016 Opinion and Order.[159] OMAEG addressed these alleged benefits in its Application for Rehearing filed on May 2, 2016 and hereby incorporates these arguments herein.[160]

Therefore, the Commission erred in finding that the ESP IV, as modified by Rider DMR, is more favorable in the aggregate than an MRO as Rider DMR has the effect of costing customers an additional $612 million with no guaranteed return of grid modernization, diversity of supply and suppliers, or economic development benefits.

J. The Commission's Order unlawfully and unreasonably fails to comply with legal standards governing utility company proceedings.

In addition to violating a multitude of legal provisions regarding the lawfulness of Rider DMR and its inclusion in the Companies' ESP, the Commission's order is also unlawful and unreasonable as it is a departure from important legal standards governing utility company proceedings.

Section 4928.143(C)(1), Revised Code, states that "[t]he burden of proof in the proceeding shall be on the electric distribution utility." Additionally, Rule 4901:1-35-06(A),

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[157] Tr. Vol. IX at 1487-1488.

[158] Tr. Vol. IX at 1500-1502.

[159] Fifth Entry on Rehearing at 164.

[160] Application for Rehearing of the OMAEG at 65-70 (May 2, 2016).

O.A.C., places the burden of proof on the utility company "to show that the proposals in [its] application are just and reasonable." The Commission failed to follow this standard of review in considering the Rider DMR proposal. As discussed herein, the Companies repeatedly failed to meet their burden of proof with respect to a number of important issues regarding Rider DMR including:

- The Companies failed to demonstrate a need for Rider DMR revenues;
- The Companies failed to show that Rider DMR will prevent a downgrade of FirstEnergy Corp.;
- The Companies failed to show the potential costs assessed to customers if the Companies, and FirstEnergy Corp., are downgraded;
- The Companies failed to show that Rider DMR will incentivize grid modernization;
- The Companies failed to show that the Rider DMR conditions are enforceable or beneficial to customers.

Given the lack of record evidence to support the abovementioned arguments, the Companies failed to meet their burden of proof to demonstrate that the DMR is just and reasonable.[161] Therefore, the Commission's order approving Rider DMR is unreasonable and unlawful as it fails to meet the required standard of review in public utility proceedings.

Additionally, Section 4903.09, Revised Code, requires the Commission to include, with its written opinions, "reasons prompting the decisions arrived at, based upon said findings of fact." The Supreme Court of Ohio has stated that the Commission is required to "explain its decision and identify, in sufficient detail to enable review, the record evidence upon which its

[161] Section 4928.143(C)(1), Revised Code; Rule 4901:1-35-06(A), O.A.C.

orders are based."[162] The Commission failed to set forth proper rationale in support of its decision to approve Rider DMR in this proceeding. For example, in finding that Rider DMR is a grid modernization incentive, the Commission provides a dictionary definition of "incentive" and makes a conclusory statement that "Rider DMR is a distribution modernization incentive" as Staff "intends" for Rider DMR to jump start grid modernization.[163] In drawing this conclusion, the Commission ignores the large amount of record evidence demonstrating that the purpose of Rider DMR is to provide credit support, not to modernize or incentivize modernizing the grid as there is no guarantee or commitment that the Companies will in fact modernize the grid with the revenues collected from customers through Rider DMR.[164]

Additionally, in finding that Rider DMR is necessary to assist the Companies in accessing the capital markets, the Commission cites to no record evidence demonstrating that absent Rider DMR, the Companies will be unable to access the markets.[165] There is also no evidence in the record containing a reasonable estimate of the costs to customers if the Companies and FirstEnergy Corp. were in fact downgraded. Therefore, the Commission's conclusion that Rider DMR is necessary is unreasonable and unsupported by the weight of the evidence.

Finally, in stating that a downgrade of FirstEnergy Corp. will have adverse consequences for the Companies, the Commission cites to a list of possible consequences, stating these actions "may" occur.[166] However, there is no evidence in the record that any of these adverse

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[162] *In re Comm. Rev. of Capacity Charges of Ohio Power Co.*, 147 Ohio St.3d 59, 2016- Ohio-1607 at ¶53 (April 21, 2016). See also, *MCI Telecommunications Corp. v. Pub. Util. Comm.*, 32 Ohio St. 3d 306, 312, 513 N.E.2d 337 (1987).

[163] Fifth Entry on Rehearing at 90.

[164] Tr. Vol. II at 426 and 429; Fifth Entry on Rehearing at 90.

[165] Fifth Entry on Rehearing at 90-91.

[166] Fifth Entry on Rehearing at 92.

consequences will actually occur or could occur given the current financial state of the Companies and FirstEnergy Corp. (at or above investment grade).

Therefore, the Commission's order is unlawful and unreasonable because it failed to satisfy its responsibility under Section 4903.09, Revised Code, by failing to set forth its reasoning in reaching its decision, support its decision with appropriate evidence, and respond to contrary positions.

K. The Commission erred in upholding the attorney examiners' rulings that resulted in striking portions of testimony related to the Modified Rider RRS Proposal that should have been considered by the Commission in rendering its decision on the lawfulness of Modified Rider RRS.

On July 14 and July 15, the attorney examiners in this proceeding struck approximately 55 pages of testimony from six witnesses including Sierra Club witness Mr. Comings, OCC/NOAC witness Mr. Wilson, OCC witnesses Mr. Kahal and Dr. Rose, P3/EPSA witness Dr. Kalt, and Staff witness Dr. Choueiki. These decisions were unreasonable, unlawful and prejudicial to intervening parties as the information contained in the testimony was not only relevant to the current rehearing proceeding, but essential in providing the Commission with all of the appropriate and necessary information to make an informed decision regarding a provision to be included in the Companies' ESP that could cost customers over one billion dollars annually, depending on the proposal. Although the Commission determined that these arguments are now moot given that the Commission believed they related to the original Rider RRS mechanism, the testimony is relevant to the Companies' Modified Rider RRS Proposal and should have been considered by the Commission in rendering its decision on various aspects of Modified Rider RRS, including whether Modified Rider RRS is authorized under Section 4928.143(B)(2)(d), Revised Code.

Under Ohio Administrative Code 4901-1-15(F), a party adversely affected by an oral ruling may raise the propriety of that ruling in its initial brief as a distinct issue for the Commission's consideration. Accordingly, OMAEG raised the propriety of the attorney examiners' rulings in its initial brief on rehearing and respectfully requested that the Commission find that the attorney examiners erred in granting the motions to strike the various portions of testimony and precluding valuable testimony from becoming part of the record as the testimony presented was well within the scope of the rehearing proceeding, was not cumulative, and is critical to the issues before the Commission.[167] The Commission subsequently upheld the attorney examiners' rulings.[168] The Commission's finding was unjust and unreasonable.

Specific to Sierra Club witness Mr. Comings, the attorney examiners struck approximately 21 pages from Mr. Comings rehearing testimony, including relevant figures and exhibits, related to updated natural gas and capacity prices based on the Modified Rider RRS that the Companies' claimed would provide the same benefits as Rider RRS that was approved as part of the Stipulated ESP IV.[169] Portions of Mr. Comings' testimony were struck for two main reasons: 1) they were deemed cumulative in that they repeated previous arguments made in the proceeding;[170] and 2) they were deemed beyond the scope of rehearing established by the attorney examiners in the June 3rd entry.[171]

First and foremost, the portions of the testimony that were stricken could not have possibly repeated previous arguments as the data and cost (or value) calculations were based

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[167] OMAEG Initial Brief on Rehearing at 32-40.

[168] Fifth Entry on Rehearing at 168-169.

[169] Mikkelsen Rehearing at 6 ("The Proposal will preserve the benefits of the Stipulated ESP IV for customers as previously determined by the Commission.")

[170] Tr. Vol. IV at 775 and 780.

[171] Id. at 783-784 and 801.

upon the new Modified Rider RRS that has a different term, includes different inputs, and calculates forecasted annual energy revenue differently.[172] Additionally, the results of the recent capacity auctions are now known through the 2019/2020 delivery year and those capacity prices are an input to the Modified Rider RRS calculation that significantly alters the purported net benefit of the approved Rider RRS (which the Companies claim would be the same for Modified Rider RRS).

Pursuant to Ohio Rules of Evidence, Rule 403(B), "evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, or needless presentation of cumulative evidence."[173] The Companies' Proposal was a new modified Rider RRS with a new mechanism for calculating customer credits and charges.[174] As such, Mr. Comings' rehearing testimony directly addressed the new calculations by noting that the energy, capacity, and natural gas prices used by the Companies in their calculations is based on outdated forecasts from mid-2014,[175] which will become even more outdated and more unreasonable as time passes, as well as forecasted capacity prices for years that are now known. The stricken testimony also provided known, actual capacity prices through 2019/2020 delivery year. This is not cumulative testimony, but rather directly relevant to the reasonableness of the Companies' Proposal and its impact on customers, who will ultimately bear the risk of these outdated forecasts, especially in light of new forecasts and updated pricing information. The new Modified Rider RRS and estimated cost (or benefits) to customers should have been updated at

[172] Mikkelsen Rehearing at 5, 8, n.1 ("The monthly on-peak and off-peak generation output will be multiplied by average monthly on-peak and off-peak energy forwards for the [AEP-Dayton Hub] on the Intercontinental Exchange ('ICE')."

[173] Ohio Rules of Evidence, Rule 403.

[174] Mikkelsen Rehearing at 5.

[175] Sierra Club Ex. 100 at 7, 16-17, and 21-22 (Comings Rehearing).

the time the proposal was made in order to provide the Commission with the most accurate information.

Moreover, it is important to note that the Commission previously admitted multiple ICF forecasts into the record and the ICF reports are authored by the same reporting firm that the Companies relied upon in providing their own testimony regarding natural gas and capacity price forecasts.[176] Further, the probative value of the testimony outweighs any argument that it is cumulative.

Additionally, the June 3rd entry issued by the attorney examiners in this proceeding specifically states that "[t]he scope of the hearing will be limited to the provisions of, and alternatives to, the Modified RRS Proposal."[177] Thus, the scope of the rehearing includes not just the Companies' Proposal, but also alternatives to that proposal, which included Staff's alternative Rider DMR as well as alternatives such as pursuing the PPA through FERC. As a result, intervening parties should be permitted to present information regarding the Companies' new calculation of Rider RRS and the impact of that new calculation on customers as well as the impact on the ESP v. MRO test if the Modified Rider RRS is included and adopted as part of the ESP IV. Testimony regarding the fact that the Companies' own consulting firm is now projecting different energy prices than what the Companies are continuing to rely on in the calculations of the Modified Rider RRS, the Companies' estimate of the cost and benefits to customers, and the Companies' ESP v. MRO test results is information that the Commission

[176] Tr. Vol. IV at 773.

[177] Attorney Examiner Entry setting a procedural schedule and terminating the stay of discovery imposed in the May 20, 2016 Attorney Examiner Entry (June 3, 2016).

should have been provided and should have been considered when evaluating the Companies' Proposal.[178]

Further, Ms. Mikkelsen stated in her rehearing testimony that the Companies' Proposal "eliminates the risk to customers" insomuch as it eliminates any changes that could occur with respect to increased costs or reduced output of the generating units.[179] Mr. Comings rehearing' testimony that was stricken directly responds to Ms. Mikkelsen's assertion that the Companies' Proposal eliminates risk to customers.[180] Thus, it was clearly within the scope of the rehearing.

Specific to OCC/NOAC witness Mr. Wilson, the attorney examiners struck approximately 13 pages from Mr. Wilson's rehearing testimony, including relevant figures and exhibits, related to updated natural gas prices and ICF price forecasts. Portions of Mr. Wilson's rehearing testimony were struck for similar reasons: the portions were deemed cumulative;[181] and beyond the scope of rehearing.[182] As previously stated regarding Mr. Comings' stricken testimony, these arguments are without merit and the attorney examiners' decision to strike portions of Mr. Wilson's rehearing testimony was also improper.

Similar to Mr. Comings' rehearing testimony, Mr. Wilson's rehearing testimony also addresses the calculation changes contained in the modified Rider RRS, which directly impacts the purported net benefits to customers.[183] Further, the projections included in the Companies' original Rider RRS are now being used as proxy costs, proxy generation output, and proxy revenues for ancillary services and environmental attributes to calculate the Modified Rider RRS

[178] See generally, Sierra Club Ex. 100 (Comings Rehearing).

[179] Companies Ex. 197 at 10 (Mikkelsen Rehearing).

[180] Sierra Club Ex. 100 at 17 and 22 (Comings Rehearing).

[181] Tr. Vol. IV at 853 and 862.

[182] Id. at 865-866 and 875.

[183] OCC/NOAC Ex. 1 at 14-15 (Wilson Rehearing).

in the Companies' Proposal. Thus, intervening parties should have been afforded the opportunity to provide testimony regarding flaws in these proxy projections in order to provide the Commission with relevant information regarding whether these proxies are reasonable and appropriate in light of more updated and accurate data. Further, this information is relevant in addressing any quantifiable benefits under the ESP v. MRO test. Therefore, Mr. Wilson's rehearing testimony is neither cumulative nor beyond the scope of the rehearing and is highly probative for the Commission.

Specific to OCC witness Mr. Kahal, the attorney examiners struck approximately four pages from Mr. Kahal's testimony, which referred to Mr. Wilson's updated forecasts and projections. Portions of Mr. Kahal's testimony were struck given that the attorney examiners found that the forecasts and projections were beyond the scope of rehearing established by the attorney examiners in the June 3rd Entry.[184] As previously stated above, these updated forecasts and projections are directly responsive to the quantifiable benefits under the ESP v. MRO test, Ms. Mikkelsen's rehearing testimony stating that the Companies' Proposal results in less risk to customers, and the purported benefits of the Companies' Proposal to customers. Mr. Kahal's rehearing testimony is not beyond the scope of the rehearing and should have been considered by the Commission in its decision.

Specific to OCC witness Dr. Rose, the attorney examiners struck approximately six pages from Dr. Rose's rehearing testimony, which referred to Mr. Wilson's updated forecasts and projections. Portions of Dr. Rose's rehearing testimony were struck given that the attorney examiners found that it was cumulative and/or related to provisions that no longer exist.[185] Dr. Rose's testimony clearly responds to the Companies' Proposal as he asserts that the Modified

[184] Tr. Vol. V at 1083 and 1091.

[185] Tr. Vol. V at 1175 and 1179-1180.

Rider RRS does not change some of his previous concerns and arguments related to the original Rider RRS.[186] The mere fact that Dr. Rose's rehearing testimony includes similar information either for contextual purposes, or to illustrate that the Modified Rider RRS raises similar issues, does not mean that the testimony is wholly cumulative. Rather, Dr. Rose's testimony addresses a new Proposal set forth by the Companies and demonstrates that even though the Companies' Proposal includes a new calculation, the impact on customers and the overarching policy implications are the same (or worse).[187] Thus, Dr. Rose's rehearing testimony is not cumulative, is highly relevant, and should have been considered by the Commission in its decision.

Specific to P3/EPSA witness Dr. Kalt, the attorney examiners struck approximately 11 pages, including all exhibits, from Dr. Kalt's rehearing testimony. Portions of Dr. Kalt's testimony were struck for similar reasons as the portions were deemed cumulative,[188] and beyond the scope of rehearing.[189] Similar to Dr. Rose's testimony, Dr. Kalt's testimony is clearly responsive to the Companies' Proposal. While Dr. Rose references some portions of his previous testimony, he does so only to demonstrate that the Companies' new modified Rider RRS raises the same concerns as the original Rider RRS and results in significant costs to ratepayers.[190] Additionally, Dr. Kalt's references to the Companies' price projections that are included in the Companies' Proposal directly address the unreasonableness of using such outdated and unreliable projections as fixed proxy costs in the Modified Rider RRS

[186] OCC Ex. 45 at 8 (Rose Rehearing).

[187] Id. at 6 and 8-9.

[188] Tr. Vol. V at 1115-1116 and 1127.

[189] Id. at 1136 and 1149.

[190] P3/EPSA Ex. 17 at 6-9 and 14 (Kalt Rehearing).

calculations.[191] Therefore, Dr. Kalt's rehearing testimony is not cumulative or beyond the scope of rehearing and was improperly stricken from the record.

Specific to Staff witness Dr. Choueiki, the attorney examiners struck approximately two sentences from Dr. Choueiki's rehearing testimony related to concerns that the Companies' Proposal raises preemption issues and interferes with FERC's exclusive jurisdiction over wholesale power markets.[192] While preemption arguments are generally constitutional issues not addressed by the Commission, the context of these statements within Dr. Choueiki's testimony is appropriate and should not be stricken. Dr Choueiki's testimony includes rationale regarding why Staff does not support the Companies' Proposal, including a concern that the Proposal could have FERC implications.[193] It is reasonable for Dr. Choueiki to include this information in his testimony and it is relevant information for the Commission to consider in reviewing the Companies' Proposal. Therefore, portions of Dr. Choueiki's testimony should not have been stricken.

The exclusion of approximately 55 pages of testimony of such high probative value is prejudicial to intervening parties and the impartial adjudication of this entire proceeding. The Commission's finding that these arguments are now moot given that the updated forecasts and financial data applies to the original Rider RRS mechanism and the Companies' Proposal which were both rejected by the Commission, does not override the fact that the attorney examiners' erroneously struck portions of testimony that should have been considered by the Commission in rendering its decision on various aspects of Modified Rider RRS and whether it authorized under Section 4928.143(B)(2)(d), Revised Code.

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[191] Id. at 13-14 and 16-18.

[192] Tr. Vol. V at 1264-1265.

[193] Staff Ex. 15 at 14 and 16 (Choueiki Rehearing).

Moreover, in striking this testimony, the attorney examiners, and the Commission, failed to follow several important rules and statutes governing the legal standards in ESP proceedings. First, they unlawfully shifted the burden of proof in this proceeding on the intervening parties, rather than the utility company. As previously discussed, Section 4928.143(C)(1), Revised Code, and Rule 4901:1-35-06(A), O.A.C., both place the burden of proof on the utility company "to show that the proposals in [its] application are just and reasonable." In removing nearly 55 pages of testimony from intervenor and Staff witnesses' testimony, the attorney examiners, and Commission, shifted the Companies' burden of proof regarding the impact of the Modified Rider RRS Proposal on to intervening parties. Rather than require the Companies to prove the accuracy of their calculations and forecast and dispel the arguments filed by the intervenor and Staff witnesses, the attorney examiners, and the Commission, struck intervenor and Staff witnesses' testimony, which called those calculations into question. The failure to hold the Companies' to their burden of proof as required under Section 4928.143(C)(1), Revised Code, and Rule 4901:1-35-06(A), O.A.C., is unreasonable and unlawful.

Second, in striking the testimony from this proceeding, the attorney examiners, and the Commission, failed to set forth reasons for their findings in violation of Section 4903.09, Revised Code. As a rationale for its decision, the Commission states that the rulings "did not deviate from Commission practice" and "were consistent with applicable law and Commission rules."[194] However, the Commission failed to discuss how the portions of the testimony that were stricken are consistent with the law and Commission rules and practices. Further, while the Commission concludes that the rulings were consistent with the decision to limit the scope of the rehearing, as demonstrated above, the stricken testimony was within the limited scope of the rehearing. The Commission's conclusory statements, unsupported by record evidence, do not

[194] Fifth Entry on Rehearing at 169.

satisfy the requirements of Section 4903.09, Revised Code, to set for the reasons for arriving at such a conclusion.

Therefore, the Commission erred in upholding the attorney examiners' decisions specific to the aforementioned portions of rehearing testimony as that testimony should have been admitted and considered by the Commission in rendering its decision on the merits.

III. CONCLUSION

OMAEG respectfully requests that the Commission grant its application for rehearing of the issues set forth herein and find that Rider DMR is unjust, unreasonable, unlawful, and not in the public interest. The Commission should deny the implementation of Rider DMR, finding that it operates as an unlawful subsidy to FirstEnergy Corp., harms economic development in the state, and does not advance the policy of the state of Ohio to ensure diversity of electricity supplies and suppliers, or promote competitive retail generation choices. Not only does Rider DMR violate a number of Ohio laws and regulations regarding the provision of electric service, but it also has a detrimental effect on the ability of Ohio businesses to effectively manage their costs, make sound investment decisions, and expand operations in the state of Ohio. The domino effect is an increase in prices for consumers and negative consequences for businesses, who employ Ohio residents, as they may be forced to close or reduce operations due to increased costs. The costs of Rider DMR, to manufacturers, other businesses, and residential customers, far outweighs any alleged benefits.

Respectfully submitted,

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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 November 14, 2016.

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Summary: Application For Rehearing Of The Ohio Manufacturers' Association Energy Group electronically filed by Debra A Gaunder on behalf of Ohio Manufacturers' Association Energy Group