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

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

Kimberly W. Bojko (0069402)
Danielle G. Walter (0085245)
Carpenter Lipps & Leland LLP
280 Plaza, Suite 1300
280 North High Street
Columbus, Ohio 43215
Telephone: (614) 365-4100
Email: Bojko@carpenterlipps.com
Ghiloni@carpenterlipps.com
(willing to accept service by email)

Counsel for OMAEG

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I. INTRODUCTION AND PROCEDURAL HISTORY

On August 4, 2014, the Ohio Edison Company, the Cleveland Electric Illuminating Company and the Toledo Edison Company (Companies) filed an application with the Public Utilities Commission of Ohio (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,[1] later modified to an eight-year term beginning June 1, 2016 through May 31, 2024.[2] The Ohio Manufacturers' Association Energy Group (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

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

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

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.[3] 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, which, among other things, approved the Companies' Stipulated ESP IV, including Rider RRS, with little modification.[4] In its decision, the Commission authorized the Companies to flow through Rider RRS (beginning June 1, 2016) the net effects of purchasing generation output from the W.H. Sammis plant and 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).[5] Specifically, the Commission unreasonably and unlawfully determined that the Stipulated ESP IV benefits ratepayers and is in the public interest through a projected net credit to customers of $256 million under Rider RRS for the eight-year term of the ESP.[6]

Shortly thereafter, the Federal Energy Regulatory Commission (FERC) issued a decision rescinding 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

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[3] 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.

[4] *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, Opinion and Order (March 31, 2016).

[5] Order at 78-79.

[6] Order at 78, 85.

Edgar and *Allegheny* in accordance with 18 C.F.R. § 35.39(b)."[7] The Companies, and several parties to this proceeding all filed applications for rehearing regarding several aspects of the Commission's March 31, 2016 Order, as well as the recent FERC ruling. In response to the applications for rehearing, which included a proposal by the Companies for a Modified Rider RRS, a new evidentiary hearing was held beginning July 11, 2016. During the evidentiary hearing, staff of the Public Utilities Commission of Ohio (Staff) presented an alternative proposal in the form of a Distribution Modernization Rider (Rider DMR) that 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."[8] In response to Staff's Proposal, the Companies submitted modifications to Rider DMR, including an annual amount of recovery from customers of $558 million for credit support, an additional amount, not to exceed $568 million, for economic development to retain the corporate headquarters in Akron, Ohio, and an extended eight-year term.[9]

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 the Companies' proposed modified Rider RRS and adopting Staff's proposed Rider DMR with some modifications (October 12 EOR).[10] Additionally, the Commission addressed several issues raised by intervening parties on rehearing and related to the Companies' Stipulated ESP IV.[11]

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

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

[9] Companies Ex. 206 at 14-15 (Mikkelsen Rebuttal and Surrebuttal).

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

[11] Id.

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,[12] and possibly five years, to subsidize a company that has failed to make sound business decisions. In its application for rehearing of the Commission's October 12 EOR, the Companies request that the Commission increase the amount authorized for recovery from customers through Rider DMR to include a value associated with keeping the corporate headquarters in Akron, Ohio,[13] while simultaneously removing any requirement that the Companies show progression towards modernizing the distribution grid.[14] This is both unreasonable and unlawful. Moreover, while the Companies assert that maintaining FirstEnergy Corp. headquarters and nexus of operations in Akron, Ohio is a "significant contributor" to the Ohio economy,[15] the Companies have failed to consider the economic impact on other businesses that are significant contributors to the Ohio economy who will be forced to pay substantial additional costs for electricity.

II. ARGUMENT

A. The Companies' request to modify the Fifth Entry on Rehearing and adopt their proposed modifications to Rider DMR are unjust and unreasonable.

The Companies provide a multitude of reasons why the Commission's adoption of Rider DMR is appropriate and necessary. However, rather than thank the Commission for allowing them to collect approximately $204 million annually in credit support from customers, the Companies instead want more, arguing that the Commission's calculation of Rider DMR "undercuts the financial objective" of the Companies, and requesting that the Commission

[12] October 12 EOR, Concurring Opinion of Chairman Asim Z. Haque at 4 (October 12, 2016).

[13] Companies Application for Rehearing at 11-12 (November 14, 2016).

[14] Id. at 22-24.

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

effectively increase the amount of revenue that will be collected from customers for credit support.[16] Additionally, as if an increased annual revenue collection was not enough, the Companies also request that the Commission extend the term of Rider DMR beyond the authorized three years and exclude Rider DMR revenues from the Significantly Excessive Earnings Test (SEET) calculation for the extended two year term. While OMAEG does not agree with the Commission's creation and implementation of Rider DMR that will collect approximately $204 million annually in credit support from customers for three years, and possibly five, for a potential total cost to customers of over $1 billion (as outlined in OMAEG's application for rehearing), the Companies' requests to further increase and expand that amount are unreasonable, unjust, unlawful and void of any substantive arguments related to the purported underlying purpose of Rider DMR to incentivize grid modernization.

1. The Companies' request to extend Rider DMR for a term of eight years is unjust and unreasonable.

The Companies allege that neither the three-year term of Rider DMR, nor the potential expanded five-year term, will provide them with enough credit support to access the needed capital for execution of their grid modernization plan.[17] As an initial matter, the Companies have failed to provide sufficient evidence to demonstrate that the credit support they are requesting is necessary. As stated in OMAEG's Application for Rehearing, 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.[18] Moreover, the Ohio operating utilities are all above non-investment grade rating.[19] As such, there is no immediate need to provide the Companies,

[16] Companies Application for Rehearing at 6.

[17] Id. at 8.

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

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

or FirstEnergy Corp., with such a substantial amount of credit support.[20] Secondly, the Companies' request to extend Rider DMR to an eight-year term will only serve to hold ratepayers captive to this unjust and unreasonable rider for an additional five years.

OMAEG agrees with the Companies that grid modernization needs will not end in 2019; however, this statement does not justify collecting over $1 billion[21] more from customers under Rider DMR. Nor does it mean that the Companies should be authorized to continue collecting from customers under Rider DMR "as far out as 2033," as the Companies suggest.[22] During the rehearing, Companies witness Mikkelsen was admittedly unaware of whether FirstEnergy Corp. management has continued to receive bonuses or taken a reduction in pay in the last three years.[23] Nor is Ms. Mikkelsen aware of whether FirstEnergy Corp.'s short-term and long-term bonus incentive programs or pay reductions will continue in 2016 or beyond.[24] The Commission's October 12 EOR provides the Companies with a significant amount of revenue under Rider DMR. It is unreasonable for the Companies to request more from ratepayers by extending an already unjust, unreasonable Rider DMR.

2. The Companies' request to increase the annual amount collected from customers under Rider DMR is unjust and unreasonable.

In addition to their request to extend Rider DMR an additional five years, the Companies also request that the Commission include in Rider DMR a value associated with the condition that FirstEnergy Corp. maintain its headquarters and nexus of operations in Akron,

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[20] OMAEG Application for Rehearing at 27.

[21] Assuming the Companies are not successful in increasing the amount collected under Rider DMR, if the currently approved amount of $204 million is continued for an additional 5 years, the Companies will collect over $1 billion more in revenue through Rider DMR.

[22] Companies Application for Rehearing at 8.

[23] Tr. Vol. X at 1631.

[24] Id. at 1736-1737.

Ohio.[25] In support of this request, the Companies reference the economic impact study conducted by witness Murley, which valued the economic benefits of maintaining the headquarters in Akron, Ohio at $568 million annually.[26] This conclusion fails to consider important facts related to the Companies' previous commitments regarding maintaining its headquarters in Akron, Ohio and relies on a flawed and overstated economic impact analysis.

The Companies have committed to maintaining their headquarters in Akron, Ohio on more than one occasion. First, the Third Supplemental Stipulation, filed by the Companies on December 1, 2015, includes a provision that FirstEnergy Corp. will maintain its corporate headquarters and nexus of operations in Akron, Ohio for the duration of Rider RRS.[27] Second, FirstEnergy Corp. signed an eight and a half-year lease extension on its downtown office headquarters to keep the office location through June 2025.[28] Additionally, both Ms. Mikkelsen and Ms. Murley testified that they have not been informed that FirstEnergy Corp. may move its corporate headquarters and are unaware of the likelihood of FirstEnergy Corp. moving its headquarters out of Akron, Ohio.[29] Thus, the Companies' request that the Commission assign an economic development dollar value to the condition that FirstEnergy Corp. maintain its corporate headquarters in Akron, Ohio is unreasonable given that the Companies have already agreed to do so in various commitments with various entities without requiring a dollar value and given the unlikelihood that they will move the headquarters.

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[25] Companies Application for Rehearing at 9.

[26] October 12 EOR at 110.

[27] Companies Ex. 154 at 17 (Third Supp. Stip.)

[28] Dynegy Ex. 1 at 11 (Ellis Direct).

[29] Tr. Vol. IX at 1467-1468; Tr. Vol. X at 1603-1604.

Moreover, Ms. Murley's estimate that maintaining the FirstEnergy Corp. headquarters in Akron, Ohio has an economic impact of $568 million is grossly overstated.[30] Although Ms. Murley acknowledges that economic development includes not only maintaining current businesses, but also attracting new businesses and expanding existing companies, her economic impact analysis and conclusions focus solely on maintaining one current business (FirstEnergy Corp.) in one isolated area (Akron, Ohio). Further, her analysis fails to address any costs to customers associated with Rider DMR, such as lost revenues or lost opportunity costs.[31] She fails to conduct a full cost-benefit analysis and therefore her conclusions do not consider whether the costs of maintaining the corporate headquarters and nexus of operations in Akron, Ohio outweigh the benefits. While maintaining the headquarters in Akron, Ohio may maintain some existing "economic boon *for that area*"[32] the Companies have failed to demonstrate that this condition has a positive economic impact on the entire state of Ohio, let alone an impact that amounts to $568 million annually. Absent such a showing, it is unreasonable for the Companies to request customers pay an additional amount under Rider DMR to account for any purported economic development benefits.

3. The Companies' request to use a 15 percent CFO to debt ratio to calculate Rider DMR is unjust and unreasonable.

Similarly, the Companies' request to use a 15 percent CFO to debt ratio[33] is also unjust and unreasonable and will only result in increased costs for customers. In its approval of Rider DMR, the Commission adopted Staff's recommendation of a 14.5 percent target CFO to debt

[30] Companies Application for Rehearing at 25.

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

[32] Staff Rehearing Brief at 18 (emphasis added).

[33] Companies Application for Rehearing at 12.

ratio.[34] This percentage falls within the range recommended by Moody's Investment Services in both January 2016 and the more recent report in April 2016.[35] Moreover, the 14.5 percent target ratio aligns with the Commission's intent for "Rider DMR to provide the minimum amount necessary to provide credit support for the Companies to facilities access to the credit markets."[36] The Companies' suggested 15 percent target ratio does not represent the "minimum amount necessary,"[37] but rather serves as a midpoint to the most recent Moody's report.[38] The Commission appropriately adopted Staff's recommendation of a 14.5 percent CFO to debt ratio and the Companies have offered no justifiable reason to modify the Commission's decision.

4. The Companies' request to use a three-year average of CFO to debt ratio to calculate Rider DMR is unjust and unreasonable.

The Companies' request to remove 2011 from the average of CFO to debt ratios used to determine the appropriate amount of revenue to be generated under Rider DMR is unjust and unreasonable, as well as unnecessary.[39] The Commission clearly considered the Companies' proposed modifications to Rider DMR in issuing its decision as the Commission removed the 2015 calendar year from the average CFO to debt ratio used in calculating Rider DMR.[40] This resulted in using a four-year average ratio, rather than Staff's proposed five-year average ratio, and an adjustment to Rider DMR from Staff's proposed $131 million annually to $132.5 million annually.[41] Now, the Companies seek to remove yet *another* year from the CFO to debt ratio

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[34] October 12 EOR at 93.

[35] Id.

[36] Id.

[37] October 12 EOR at 93.

[38] Direct Energy Ex. 1; Companies Ex. 206 at 10 (Mikkelsen Rebuttal and Surrebuttal).

[39] Companies Application for Rehearing at 13.

[40] October 12 EOR at 94.

[41] Id.

calculation merely because the CFO to debt ratio in that particular year was 14 percent and was within the Moody's report targeted range.[42] As the Commission stated, this is "irrelevant."[43] The average CFO to debt ratio calculation should represent a historic average. Scaling back an average from five years to three years will result in a significant alteration of the revenues ultimately to be collected under Rider DMR and ignores the fact that, in 2011, FirstEnergy Corp. had a 14 percent CFO to debt ratio, before experiencing a worsening trend in subsequent years.[44] It is unreasonable and inaccurate to alter an average calculation by removing a year from that average merely because it is unfavorable to your position. This is exactly what the Companies seek to do with their request. The Commission should affirm that the appropriate historic average of CFO to debt ratio in determining the amount of revenues to be collected under Rider DMR is a four-year average from 2011 to 2014.

5. The Companies' request to use a higher allocation factor to calculate Rider DMR is unjust and unreasonable.

Finally, the Companies' request to increase the Commission's 22 percent allocation factor[45] is wholly unreasonable and does not adequately represent the credit support contribution that actually should be made by Ohio ratepayers (if one at all). The Companies criticize Mr. Buckley's use of operating revenues to calculate the allocation factor because it shows only gross cash inflows and fails to account for the level of shopping in the Companies' service territory.[46] Rather, they suggest using net income to determine the appropriate

[42] Id.

[43] Id.

[44] Companies Application for Rehearing at 15.

[45] Id. at 16-18.

[46] Id. at 16-17.

contribution of the Ohio Companies to FirstEnergy Corp., representing the appropriate allocation factor.[47]

The Companies' recommendations should be rejected. While Staff witness Buckley admitted that net income could be used as an allocator, he also stated that there are a number of allocators that could be used and the energy operating revenue was the most reasonable and consistent measure.[48] Additionally, Ms. Mikkelsen's assertion that a 40 percent allocation figure better reflects the "significance of the Companies to FirstEnergy Corp."[49] fails to consider the CFO to debt shortfall assigned to the other subsidiaries of FirstEnergy Corp.[50] Moreover, it nearly doubles the cost of Rider DMR to Ohio ratepayers with little rationale or basis for such a significant increase.

B. The Companies' criticism of the Commission's conditional recovery of revenues under Rider DMR upon a demonstration of sufficient progress in the implementation and deployment of grid modernization programs is meritless.

In approving Rider DMR, the Commission placed three conditions on the recovery of revenue including:

1. Continued retention of the corporate headquarters and nexus of operations of FirstEnergy Corp. in Akron, Ohio;
2. No change in 'control' of the Companies as that term is defined in R.C. 4905.402(A)(1); and
3. A demonstration of sufficient progress in the implementation and deployment of grid modernization programs approved by the Commission.[51]

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[47] Id. at 20.

[48] Tr. Vol. III at 553-554.

[49] Tr. Vol. I at 1629-1630.

[50] Tr. Vol. X at 1630.

[51] October 12 EORat 96.

The third condition, which the Companies assert is misdirected, vague, and unnecessary,[52] is the only condition that actually ties Rider DMR to its purported purpose of grid modernization.

In its decision, the Commission found that Rider DMR operates as a "distribution modernization incentive" for the Companies and was created with the intent to "jump start" grid modernization efforts.[53] Thus, the requirement that the Companies demonstrate sufficient progress in implementing approved grid modernization programs[54] is not only justifiable, but expected and necessary under the law. The Commission's condition merely holds the Companies accountable for what they should be doing with revenues collected under Rider DMR given the Commission's authorization of Rider DMR under Section 4928.143(B)(2)(h), Revised Code.[55]

Nonetheless**,** OMAEG agrees that the phrase "sufficient progress" is vague and insufficient inasmuch as the Commission fails to define "sufficient progress" and leaves the determination to the sole discretion of the Commission.[56] Given that the Commission did not approve any specific grid modernization programs, it is unclear when the Companies will actually begin to invest in grid modernization, if at all. This is clearly contrary to the Section 4928.143(B)(2)(h), Revised Code. However, rather than completely abandon this condition, as requested by the Companies,[57] OMAEG requests that the Commission create a more firm and

[52] Companies Application for Rehearing at 22.

[53] October 12 EOR at 90.

[54] October 12 EOR96.

[55] October 12 EORat 89-90 (Section 4928.143(B)(2)(h), Revised Code, states that an electric security plan may include "[p]rovisions regarding the utility's distribution service, including, without limitation and notwithstanding any provision of Title XLIX of the Revised Code to the contrary, provisions regarding single issue ratemaking, a revenue decoupling mechanism or any other incentive ratemaking, and provisions regarding distribution infrastructure and modernization incentives for the electric distribution utility."

[56] October 12 EORat 97.

[57] Companies Application for Rehearing at 24.

stringent condition to require the Companies to be accountable for implementing and deploying specific grid modernization programs.

C. The Companies' assertion that Rider DMR is authorized under Section 4928.143(B)(2)(i), Revised Code, is erroneous.

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."[58] Further, the statute delineates specific provisions, which may be included in a utility's company's proposed ESP, including:

> (i) Provisions under which the electric distribution utility may implement economic development, job retention, and energy efficiency programs, which provisions may allocate program costs across all classes of customers of the utility and those of electric distribution utilities in the same holding company system.[59]

The Companies argue that Rider DMR is authorized for inclusion in their ESP IV under this provision given that the Commission conditioned recovery of Rider DMR on FirstEnergy Corp. maintaining its headquarters and nexus of operations in Akron, Ohio, which they opine provides economic benefits to Ohio customers.[60] Their conclusion, however, is incorrect as it relies on an economic analysis that contains many flaws and lacks completeness.

A complete analysis of economic development and job retention for the state of Ohio should include a review of not only the area of Akron, Ohio, but all other areas and regions within the state. Further, an analysis of economic development and job retention for the state of Ohio should include, not just maintaining current businesses, but also attracting new businesses

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

[59] Section 4928.143(B)(2)(i), Revised Code.

[60] Companies Application for Rehearing at 25.

and expanding existing companies.[61] However, the economic impact analysis relied on by the Companies in asserting that Rider DMR should be authorized as a provision that may implement economic development and job retention pursuant to Section 4928.143(B)(2)(i), Revised Code, focuses only on the economic and revenue impacts of maintaining the corporate headquarters in Akron, Ohio and ignores all other aspects of economic development in the rest of the state. Ms. Murley admittedly did not conduct an analysis of the impact of Rider DMR on the six other Fortune 500 companies located in northeast Ohio; she did not conduct an analysis on the impact of Rider DMR on other manufacturers in the state of Ohio; she did not conduct an analysis on whether the increased costs to customers will impact their ability to invest additional dollars in the state of Ohio; she did not conduct an analysis on whether the increased costs to customers will impact their ability to expand their companies in that state of Ohio; she did not conduct an analysis on whether the increased costs to customers will impact their ability to fund other community projects in the state of Ohio; and she did not conduct an analysis on whether the increased costs to customers will affect whether new companies decide to locate in Ohio.[62] Ms. Murley's analysis also fails to address any costs to customers associated with Rider DMR and the impact those costs will have on lost revenues and lost opportunity costs.[63] She fails to conduct a full cost-benefit analysis,[64] thereby ignoring whether the costs of maintaining the corporate headquarters and nexus of operations in Akron, Ohio outweigh the benefits.

Further, Ms. Murley's analysis includes a number of hypothetical assumptions[65] and conclusory figures, which she did not independently verify with actual figures even though she

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[61] Tr. Vol. IX at 1492. Companies witness Murley agreed with these statements.

[62] Id. at 1529-1540.

[63] Id. at 1487-1488.

[64] Id. at 1500-1502.

[65] Id. at 1521-1522.

acknowledged that there is usually a difference between the estimated and the actual results.[66] For example, she did not verify whether actual vendor purchases total $110 million; whether actual vendor purchases support 756 jobs; or whether actual vendor purchases generate $39.8 million in personal income.[67] Thus, her conclusions not only focus on one isolated area in the entire state of Ohio, but are also based on unverified assumptions related to spending. Given these deficiencies, her conclusions, and those adopted by the Companies, that the condition of maintaining the corporate headquarters and nexus of operations in Akron, Ohio promotes economic development, carries little weight.

Rider DMR has a much greater negative impact on the state of Ohio than any purported economic development benefits. An additional charge to customers will only increase productivity costs, thereby impeding the ability of current businesses located in Ohio from expanding, as well as deterring new businesses from locating in Ohio. While maintaining FirstEnergy Corp. corporate headquarters in Akron, Ohio may benefit the city of Akron, the detrimental economic impact on the remainder of the state far outweighs any potential benefits. Therefore, Rider DMR is not authorized under Section 4928.143(B)(2)(i), Revised Code.

D. The Companies' claim that Rider DMR has no quantitative effect on the ESP v. MRO test or, in the alternative, is offset by other quantifiable benefits, is inaccurate.

The Companies' assertion that revenues collected under Rider DMR would result in a 'quantitative wash' for purposes of the ESP v. Market Rate Offer (MRO) test is incorrect. First, the Commission's finding that equivalent Rider DMR revenue could be recovered through an MRO pursuant to Section 4928.142(D), Revised Code, as an "emergency that threatens [the

[66] Id. at 1523.

[67] Id. at 1481-1484.

Companies] financial integrity"[68] is based on conjecture. The Commission has admittedly "never approved an application under this section" and "never determined the standards under which we would review an application under this section."[69] To say that the Commission would "likely grant relief" and approve such a charge under the emergency provision of Section 4928.142(D), Revised Code, is speculative.

Additionally, the Companies' assertion that Rider DMR revenues could be recovered through a base distribution rate proceeding is equally unimpressive as the Companies have agreed to a distribution base rate freeze through the end of the ESP IV.[70] Moreover, the Companies' claim that they could recover similar Rider DMR revenues outside of an ESP as grid modernization-related expenses[71] ignores the record evidence in this proceeding, which demonstrates that Rider DMR does not incentivize grid modernization. As testified to by two Staff witnesses, Rider DMR was recommended by Staff "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."[72] Money collected as cost recovery for grid modernization projects is for plant infrastructure, while monies collected through Rider DMR is for credit support.[73] Thus, Rider DMR is a form a 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."[74] The Companies have admittedly made no commitment to actually spend the revenues received from Rider DMR on grid

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[68] Section 4928.143(D), Revised Code.

[69] October 12 EORat 162; see also OMAEG Application for Rehearing at 31 (November 14, 2016).

[70] Tr. Vol. I at 201.

[71] Companies Application for Rehearing at 27.

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

[73] Tr. Vol. II at 473-474 (Staff witness Turkenton).

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

modernization[75] and the specifics of Rider DMR contain no firm commitment or requirement that the Companies use the revenues from Rider DMR to invest in distribution grid modernization.[76] Moreover, Staff witness Buckley testified that it is unclear when the Companies will even begin investing in grid modernization, which raises the question of how long customers will be required to pay the Companies under Rider DMR before any grid modernization investment could or will be done.[77]

Finally, the Companies also allege that any costs associated with Rider DMR would be offset by the value associated with maintaining the corporate headquarters in Akron, Ohio.[78] As described at length above, that argument fails given the multitude of flaws in Ms. Murley's economic impact analysis. Moreover, it ignores many of the negative impacts associated with providing credit support to one company in the state of Ohio, while increasing electricity costs for a large number of customers, including manufacturers, who will be forced to either pass the additional costs on to customers, move their production outside of Ohio, or go out of business as they cannot recover their costs.[79] Regardless, the end result is a *detrimental* impact on the economic development within the state of Ohio, rather than added value as alleged by the Companies.

Therefore, the Companies' request that the Commission clarify that revenues collected under Rider DMR could be collected as part of a distribution rate case or, in the alternative, would be offset by economic development benefits should be rejected.

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[75] Tr. Vol. II at 472.

[76] 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.

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

[78] Companies Application for Rehearing at 27.

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

E. The Companies' request that the Commission reverse its decision regarding the shared savings cap is unreasonable.

In approving the Companies' Stipulated ESP IV, the Commission stayed the effective date of the shared savings cap increase that was included in the Third Supplemental Stipulation until the Companies are no longer receiving revenue under Rider DMR.[80] This decision is both reasonable and fair to ratepayers. Per the terms of the Third Supplemental Stipulation, costs related to energy efficiency and demand response will be recovered through Rider DSE and cost effective programs will be eligible for shared savings, with an increase in the shared savings cap from $10 million to $25 million.[81] This increase in the shared savings cap, combined with the approximate $204 million per year in costs to be collected pursuant Rider DMR, would have created significant increases in customers' charges. In recognition of these "increases in customer bills stemming from the ESP IV"[82] the Commission appropriately determined that a more gradual increase in rates would protect ratepayers from such a drastic increase, thereby staying the rise in the shared savings cap and limiting the amount of increased costs that could be passed onto customers.

The Companies allege that the Commission's decision to stay the effective date of the shared savings cap increases was inappropriate given that no party asked the Commission to do so.[83] This is irrelevant. The Commission has the authority to review the record before it and modify ESPs and stipulations accordingly.[84] The shared savings cap increase is part of the

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[80] Fifth Entry on Rehearing at 147.

[81] Companies Ex. 154 at 11-12 (Third Supp. Stip.)

[82] Fifth Entry on Rehearing at 147.

[83] Companies Application for Rehearing at 28.

[84] See Section 4928.143, Revised Code; *In the Matter of the Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider*, Case No. 14-1693-EL-RDR, Opinion and Order at 77-78 (March 31, 2016); *In re FirstEnergy*, Case No. 12-1230-EL-SSO, Opinion and Order at 42 (July 18, 2012); *In re Columbus Southern Power Co. and*

record to this proceeding as it is contained in the Third Supplemental Stipulation.[85] Therefore, the Commission appropriately considered the impact of that specific provision in rendering its decision to approve the Stipulated ESP IV, including Rider DMR. Further, Section 4903.09, Revised Code, requires the Commission to "file, with the records of such cases, findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact." Contrary to the Companies' assertions,[86] the Commission appropriately included a rationale for its decision to stay the effective date of the shared savings cap (i.e., the increases in customer bills).[87] Thus, the Commission met all requirements of Section 4903.09, Revised Code. If the Companies are unhappy with the Commission's approval of their Stipulated ESP IV, they are free to withdraw their ESP pursuant to Section 4928.143(C)(2)(a), Revised Code, and file a new ESP or SSO under a market rate offer.[88]

Similarly, OMAEG supports the Commission's decision to prohibit the recovery of shared savings under the Customer Action Program as the program involves no action by the Companies to actually achieve the energy savings.[89] Disallowing the Companies' recovery of shared savings for energy savings resulting from their Customer Action Program, in which the Companies merely measure the results of efficiency measures that customers took on their own

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Ohio Power Co., Case No. 11-5568-EL-POR, et al., Opinion and Order at 17 (March 21, 2012); *Duff v. Pub. Util. Comm.*, 56 Ohio St.2d 367, 379 (1978).

[85] Companies Ex. 154 (Third Supp. Stip.)

[86] Companies Application for Rehearing at 28-29.

[87] Fifth Entry on Rehearing at 147.

[88] Section 4928.143(C)(2)(a) states that "If the commission modifies and approves an application under division (C)(1) of this section, the electric distribution utility may withdraw the application, thereby terminating it, and may file a new standard service offer under this section or a standard service offer under section 4928.14 of the Revised Code."

[89] October 12 EOR at 147.

decision, [90] is consistent with the Commission's long standing policy and purpose of shared savings to "motivate and reward the utilities for exceeding energy efficiency standards on an annual basis."[91] The Commission appropriately explained that, as a policy, they have *never* allowed shared savings for programs that involve "no action by the Companies to achieve the energy savings."[92]

Thus, the Commission should uphold its decision and continue to conclude that electric distribution utilities should not be permitted to obtain a shared savings incentive for inaction.

F. The Companies' request that the Commission remove the requirement that the Companies file a distribution rate case at the end of the ESP IV is unjust and unreasonable.

In approving the extension of the Delivery Capital Recovery Rider (Rider DCR) and the continuation of the distribution base rate freeze, the Commission also directed the Companies to file a distribution rate case at the end of the eight-year term of the Stipulated ESP IV (i.e., June 2024). Although OMAEG believes that the Companies should be directed to file a rate case in lieu of allowing Rider DCR to continue or be increased, the Commission's requirement for the Companies to file a distribution rate case coupled with the approval of the settlement provisions in this case is reasonable and should be maintained.

The Companies argue that the Commission's decision to require them to file a distribution rate case is "premature and arbitrary" and not justified by the evidence of this proceeding.[93] Again, the Commission has broad authority to modify ESPs and stipulations based on the evidence in the record. Similar to the shared savings cap provision previously

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[90] October 12 EOR at 147.

[91] *In the Matter of the Application of Duke Energy Ohio, Inc, for the Recovery of Program Costs, Lost Distribution Revenue, and Performance Incentives Related to it Energy Efficiency and Demand Response Programs,* Case No. 14-457-EL-RDR, Finding and Order at 5 (May 20, 2015).

[92] October 12 EOR at 147 (emphasis added).

[93] Companies Application for Rehearing at 34.

discussed, the Third Supplemental Stipulation contains provisions that extend the Companies' base distribution rate freeze and extend and increase the revenue caps for Rider DCR through the eight-year term of the ESP.[94] The extension of the distribution base rate freeze and Rider DCR is, therefore, part of the record of this proceeding and the Commission appropriately considered the impact of those specific provisions in rendering its decision. Additionally, in complying with the requirements of Section 4903.09, Revised Code, the Commission justified its decision directing the Companies to file a distribution rate case at the end of the ESP IV, noting that "it will have been 17 years since the Companies' last distribution rate case."[95]

The benefit in a distribution rate case is the complete review and scrutiny of a utility company's distribution operations to ensure that customers and ratepayers are receiving service at a fair price with costs being "appropriately incurred and recovered."[96] Staff describes a distribution rate case as a "prudent regulatory practice to gain a holistic understanding of the regulated distribution company on a regular basis."[97] While distribution rate freezes prevent "base" rates from rising, total rates may still rise or fall depending on other riders in a utility company's approved ESP. In its March 31, 2016 Order, the Commission inextricably tied the distribution base rate freeze to Rider DCR, stating that in light of the distribution base rate freeze, it is "necessary and appropriate to continue the existing Rider DCR mechanism."[98] In doing so, the Commission not only authorized the extension of Rider DCR for an additional eight years, but also authorized an increase in the value of the revenue caps for Rider DCR by $30 million for the period June 1, 2016 through May 31, 2019; by $20 million for the period

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[94] Companies Ex. 154 at 13 (Third Supp. Stip.).

[95] October 12 EOR at 116.

[96] Staff Ex. 6 at 13 (McCarter Direct).

[97] Id.

[98] Opinion and Order at 93.

June 1, 2019 through May 31, 2022; and by $15 million for the period June 1, 2022 through May 31, 2024.[99] This nearly doubles the established revenue cap of $15 million per year under the current ESP and increases the revenue caps by an additional $180 million.[100] The increased rates under Rider DCR are not subject to the distribution rate freeze and, given the freeze, customers are prevented from any comprehensive review of the Companies' distribution operations. The result is that customers merely experience an increase in their bills with no recourse for reviewing the totality of their charges and the Companies' justification for setting its rates.

Therefore, the Commission's decision directing the Companies to file a distribution rate case at the end of the ESP IV is both reasonable and prudent. Given the significant amount of time that will have elapsed since the Companies' last rate case (i.e., 17 years), a distribution rate case will be invaluable to customers in establishing an appropriate baseline against which other rate or rider changes are measured. This will ensure that the effect of such rate or rider increases will not be implemented merely to perpetuate or increase excess earnings for the Companies.[101]

G. The Companies' criticism of the Commission's modifications to the Rider NMB pilot program is without merit.

The purpose of the Non-Market Based Services Rider (Rider NMB) pilot program is to allow certain select customers to opt-out of Rider NMB and obtain all transmission and ancillary services from a CRES provider in order to determine if those customers who opt-out

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[99] Companies Ex. 154 at 13 (Third Supp. Stip.).

[100] Id.; Companies Ex. 1 at 13 (Application).

[101] OCC Ex. 18 at 19 (Effron Direct).

will benefit.[102] However, as approved by the Commission, the pilot program is limited to select customers, including: members of the Industrial Energy Users (IEU), members of the Ohio Energy Group (OEG), Nucor Steel Marion, Inc., and Material Sciences Corporation,[103] all of whom are Signatory Parties or have agreed to not contest the Stipulation. Additionally, five additional Rate GT customers who otherwise would be ineligible for participation are permitted to participate in the pilot program pursuant to the Third Supplemental Stipulation.[104] According to the terms of the approved pilot program, interested customers are excluded from participation simply because they did not sign the Stipulation (or did not sign as a non-opposing party) and all eligible customers will not be permitted to avail themselves of the opportunity to participate equally in the pilot.

In its October 12 EOR, the Commission noted that the Stipulated ESP IV provides only one avenue for customers to participate in the Rider NMB pilot program.[105] The Commission directed customers who may benefit from participation in the pilot program to work with Staff and the Companies to determine if participation is appropriate and to file a reasonable arrangement application for permission to participate.[106] While OMAEG believes that the pilot program should be expanded through this proceeding as its current form is unduly limiting, unduly discriminatory, unjust, unreasonable and anti-competitive in clear contradiction of Section 4928.02(A), Revised Code, the Commission's decision to allow additional customer participation in the Rider NMB pilot program through another avenue is reasonable, just, and a move in the right direction to repair the poorly designed program.

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[102] Companies Ex. 3 at 3 (Supp. Stip.).

[103] Supp Stip at 3-4.

[104] Third Supp Stip. at 16-17.

[105] October 12 EOR at 139.

[106] Id.

Nonetheless, OMAEG agrees with the Companies that it would be beneficial for all parties (both the Companies and potential participants) if the Commission provided a clearly defined, expedited process for determining whether "customers' participation is appropriate" prior to filing a reasonable arrangement with the Commission.[107]

Therefore, the Commission should, on rehearing, affirm its decision to expand the Rider NMB pilot program in order to allow those customers who may benefit to participate in the program. Additionally, the Commission should more clearly define the process that customers must follow in order to participate.

H. The Commission erred in extending the Companies right to withdraw its ESP.

OMAEG supports the argument set forth by the Office of the Ohio Consumers' Counsel (OCC) regarding the Commission's decision to provide the Companies with an unfettered right to withdraw its ESP[108] and submits that the Commission erred in extending this right to the utility companies.

Pursuant to Section 4928.143(C)(1), Revised Code, the Commission may do one of three things when considering an ESP application: (1) "approve," (2) "modify and approve," or (3) "disapprove" the application.[109] If the Commission issues an order that "modifies and approves an application," the utility "may withdraw the application, thereby terminating it, and may file a new standard service offer."[110] Additionally, under Section 4903.10(B), Revised Code, if the Commission determines upon rehearing that its "original order or any part thereof is

[107] Companies Application for Rehearing at 40.

[108] Ohio Consumers' Counsel Application for Rehearing at 41-43 (November 14, 2016).

[109] Section 4928.143(C)(1), Revised Code.

[110] Section 4928.143(C)(2)(a), Revised Code.

in any respect unjust or unwarranted, or should be changed, the [C]ommission may abrogate or modify the same."[111]

In this case, the Commission modified and approved the Companies' Stipulated ESP IV and adopted Rider DMR on rehearing. However, the Commission's decision to permit the Companies to file tariffs, and begin collecting revenues from customers, before the conclusion of the application for rehearing and appeals process and still maintain their right to withdraw is unreasonable and unlawful.[112]

First, the Commission has previously supported the notion that the filing of tariffs consistent with an order issued by the Commission is deemed an acceptance of the order, thereby precluding any future withdrawal.[113] In this very case, the Commission recognized that utility companies do not have an unfettered right to withdraw when they stated that the Companies' filing of tariffs would be construed as "voluntary acceptance" of the Commission's modifications.[114] The Commission now seeks to depart from its previous decision with no justification or rationale for doing so.[115]

Second, allowing the Companies to withdraw their ESP at any time, even after reaping significant benefits under Rider DMR and pursuant to other provisions, is unreasonable and unjust. Essentially, the Commission's decision permits the Companies to recover costs from ratepayers pursuant to the ESP, and then allow them to withdraw their ESP if it becomes

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[111] Section 4901.10(B), Revised Code.

[112] October 12 EOR at 150.

[113] *In the Matter of the Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider,* Case No. 14-1693-EL-RDR, Opinion and Order at 106 (March 31, 2016).

[114] Opinion and Order at 86 (March 31, 2016) (stating "if the Companies proceed with Rider RRS by filing tariffs and finalizing a power purchase agreement with FES based upon the term sheet, we will construe such actions as the voluntary acceptance of the mechanism limiting average customer bills.")

[115] *Office of Consumers' Counsel v. Pub. Util. Comm.,* 10 Ohio St.3d 19, 461 N.E.2d 303, 305 (1984) (reversing an order of the Commission when the Commission failed to justify its decision reversing its own previous decision).

unfavorable sometime in the future or if they do not like the outcome of the rehearing or appeals process. In the interim, customers are required to pay charges pursuant to the tariffs, and the Companies' collect revenues, all which will later likely be nonrefundable to customers if the case or a charge is overturned by the Court. Given the length of time it could feasibly take to complete a rehearing and/or appeals process, the impact of this provision on customers is significant and could result in customers paying large amounts of revenue to the Companies with no recourse if those charges are later deemed unlawful or if the Companies voluntarily choose to withdraw their ESP once they have reaped the benefits of all of the favorable terms.

Therefore, OMAEG supports the argument set forth by the OCC on this issue and urges the Commission to reverse, on rehearing, its decision to provide the Companies with an unfettered right to withdraw its ESP.

III. CONCLUSION

Based on the aforementioned arguments, OMAEG respectfully requests that the Commission deny the Companies' application for rehearing as their requests are unreasonable and unlawful, grant OCC's request for rehearing regarding the Companies' right to withdraw its ESP, and grant OMAEG's requests for rehearing as set forth in its application for rehearing filed on November 14, 2016, as well as any other requests contained herein. Specifically, the Companies' requests to modify Rider DMR to increase the level and duration of Rider DMR are nothing more than attempts to saddle customers with additional costs in the form of a corporate bailout and subsidy. .

Respectfully submitted,

/s/ Danielle G. Walter________

Kimberly W. Bojko (0069402)
Danielle G. Walter (0085245)
Carpenter Lipps & Leland LLP
280 Plaza, Suite 1300
280 North High Street
Columbus, Ohio 43215
Telephone: (614) 365-4100
Email: Bojko@carpenterlipps.com
Ghiloni@carpenterlipps.com
(willing to accept service by email)

Counsel for OMAEG

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 25, 2016.

/s/ Danielle G. Walter__
Danielle G. Walter

Jeremy.grayem@icemiller.com
Gregory.dunn@icemiller.com
Christopher.miller@icemiller.com
athompson@taftlaw.com
barthroyer@aol.com
mswhite@igsenergy.com
joliker@igsenergy.com
cmooney@ohiopartners.org
mpritchard@mwncmh.com
fdarr@mwncmh.com
sam@mwncmh.com
Thomas.mcnamee@puc.state.oh.us
Thomas.lindgren@puc.state.oh.us
mkurtz@BKLlawfirm.com
kboehm@BKLlawfirm.com
jkylercohn@BKLlawfirm.com
stnourse@aep.com
mjsatterwhite@aep.com
yalami@aep.com
joseph.clark@directenergy.com
ghull@eckertseamans.com
myurick@taftlaw.com
zkravitz@taftlaw.com
Schmidt@sppgrp.com
ricks@ohanet.org
tobrien@bricker.com
mkl@bbrslaw.com
gas@bbrslaw.com
ojk@bbrslaw.com
wttmlc@aol.com
lhawrot@spilmanlaw.com
dwilliamson@spilmanlaw.com
Kevin.moore@occ.ohio.gov
sauer@occ.state.oh.us
leslie.kovacik@toledo.oh.gov
jscheaf@mcdonaldhopkins.com

Ajay.kumar@occ.ohio.gov
callwein@keglerbrown.com
rparsons@kravitzllc.com
mdortch@kravitzllc.com
msoules@earthjustice.org
asonderman@keglerbrown.com
david.fein@constellation.com
amy.spiller@duke-energy.com
Jeffrey.mayes@monitoringanalytics.com
mhpetricoff@vorys.com
laurac@chappelleconsulting.net
mjsettineri@vorys.com
Cynthia.brady@constellation.com
Lael.campbell@exeloncorp.com
Tony.mendoza@sierraclub.org
Sechler@carpenterlipps.com
burkj@firstenergycorp.com
cdunn@firstenergycorp.com
talexander@calfee.com
jlang@calfee.com
dakutik@jonesday.com
gpoulos@enernoc.com
glpetrucci@vorys.com
stheodore@epsa.org
gthomas@gtpowergroup.com
toddm@wamenergylaw.com
Jeanne.kingery@dukeenergy.com
ccunningham@akronohio.gov
mitch.dutton@fpl.com
drinebolt@ohiopartners.org
dstinson@bricker.com
TODonnell@dickinsonwright.com
trhayslaw@gmail.com
meissnerjoseph@yahoo.com
finnigan@edf.org
tdougherty@theOEC.org

Marilyn@wflawfirm.com
matt@matthewcoxlaw.com
gkrassen@bricker.com
dborchers@bricker.com
mfleisher@elpc.org

kryan@city.cleveland.oh.us
hmadorsky@city.cleveland.oh.us
blanghenry@city.cleveland.oh.us
selisar@mwncmh.com

Attorney Examiners:

Gregory.price@puc.state.oh.us
Mandy.chiles@puc.state.oh.us
Megan.addison@puc.state.oh.us