BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan.	))))))))	Case No. 14-1297-EL-SSO

MEMORANDUM CONTRA FIRSTENERGY'S APPLICATION FOR REHEARING BY THE ENVIRONMENTAL LAW & POLICY CENTER, OHIO ENVIRONMENTAL COUNCIL, AND ENVIRONMENTAL DEFENSE FUND

On November 14, 2016, the Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company (collectively "FirstEnergy Utilities" or "Companies") filed an Application for Rehearing of the October 12, 2016 Fifth Entry on Rehearing ("Entry") of the Public Utilities Commission of Ohio ("Commission") in this proceeding. In that Application, the Companies aver that the Commission's Entry contained several errors, namely that the Commission, in its approval of the Staff's proposed Distribution Modernization Rider ("Rider DMR"), did not allow as lucrative a cash influx to the Companies.

At the outset, the Environmental Law & Policy Center, Ohio Environmental Council, and Environmental Defense Fund (collectively, the "Environmental Intervenors") must reiterate that the Entry is unlawful and unreasonable, and deserving of rehearing for the reasons presented in our Application for Rehearing filed jointly on November 14, 2016. The Commission's Entry

approved a Stipulated Electric Security Plan ("Stipulated ESP") proposed by the Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company (collectively "FirstEnergy Utilities" or "Companies"), and most specifically approved a Distribution Modernization Rider ("Rider DMR") to fund a cash influx meant to support the credit ratings of the Companies and their parent Company ("FirstEnergy Corp.") to the tune of more than $600 million. However, we contend that Rider DMR, despite its name, does not specifically work to incent investment in grid modernization, and instead runs the risk of moral hazard.

Maintaining our absolute opposition to those enumerated errors[1] of the Commission's Entry, the Environmental Intervenors must still point out the errors in the Companies' opposition to the Entry. The Companies' Application for Rehearing, while setting forth nearly twenty assignments of error, essentially expresses their discomfort with only receiving a part of the multi-billion dollar handout they proposed without identifying any errors of law or reason in the Entry. Thus, pursuant to Ohio Admin. Code 4901-1-35(B), the Ohio Environmental Council, Environmental Defense Fund, and Environmental Law & Policy Center hereby file this Memorandum Contra to the Companies' Application for Rehearing.

1. The Commission properly rejected the Companies' counterproposal to Rider DMR.

The Companies, in their Application for Rehearing, complain about the handout of more than $600 million that the Commission granted to them. As they did throughout the hearing, the Companies claim that they instead need $4 billion to maintain creditworthy cash flow from

[1]Environmental Intervenors hereby reassert and preserve the Assignments of Error enumerated in our May 2, 2016 and November 14, 2016 Applications for Rehearing filed in this case.

operations to debt ratio for their unregulated parent holding company. The Companies contend that the Commission erroneously found that a cash from operations ("CFO") to debt ratio of 14.5 percent, rather than 15 percent, was appropriate to use in determining the proper amount of revenue to be generated by the rider, and improperly found that a four-year average of CFO to debt ratios from 2011 to 2014, rather than a three-year average from 2012 through 2014. However, neither the record nor the Companies' Application for Rehearing provide anything other than self-serving statements that they need or deserve more money.

The Companies further suggest, erroneously, that a three to five year time period of Rider DMR is insufficient credit support for the Companies. FirstEnergy Rehearing App. at 8. They argue that because grid modernization needs will not be met at the end of 2019, that they need an extra five years of credit support. *Id*. Yet, throughout the entire rehearing phase, the Companies neglected to provide any forward looking estimates about how much it would take to get back on financial footing, or what the duration of its problems truly is. The Companies merely attempt to layer onto this Rider costs and debts and liabilities covering nearly $2 billion. *Id.* This should be a signal to the Commission that the Companies do not intend to use the Rider DMR for grid modernization, but instead for cleaning up debt from unregulated activities.

Shortsightedness of the Companies and/or the parent holding company is not a viable assignment of error. The goal of the credit support Rider DMR, although dubious in our view, is to assist the Companies to get back onto proper financial footing so they can better obtain capital for important investments to benefit customers. The goal is not, as the Companies seem to contend, that Rider DMR is to cover the entire time period for its grid modernization efforts. *See*

FirstEnergy Rehearing App. at 6. As we stated in our own Application for Rehearing, we strongly dispute the idea that charging additional fees to customers to make up for credit problems brought on by poor decisions made by the Companies' unregulated sister affiliates is sound public policy. Environmental Intervenors App. at 6. The Commission should reject FirstEnergy's request, as the Companies have failed to demonstrate that its exaggerated Rider DMR request is lawful, reasonable, or in any way benefits customers. The Commission should be unpersuaded that it erred in rejecting FirstEnergy's multi-billion counterproposal.

2. The Companies' Request for an Economic Development Adder to Rider DMR for FirstEnergy Corp.'s Akron Headquarters Lacks Merit.

Beyond their assertion that the credit support should be five times higher than the generous amount ordered by the Commission in its Entry, the Companies contend that they somehow deserve a further handout to compensate them for the economic benefits of the parent holding company's headquarters ("adder"). FirstEnergy Rehearing App. at 11. The Companies maintain that not providing any value for the economic impact benefits of the Akron headquarters "unfairly ties management's hands." *Id.* The Companies proposed that Rider DMR be increased to $558 million annually associated with credit support, plus an additional amount associated with the economic development value of keeping the Companies' headquarters and nexus of operations in Akron, Ohio, continue annually over the term of the ESP. That "economic development value," espoused by Witness Murley's testimony, equals a "conservative estimate" of $568 million/year. This proposal, therefore, could be as much as $1.126 billion charged annually to customers.

a. The evidence to support the Companies' adder to Rider DMR is not trustworthy.

Despite having long been headquartered in Akron, and being compensated hundreds of millions of dollars under Rider DMR under the promise not to move, the Companies attempt to qualify as an economic development and job retention program. Yet, evidence as to why, and why *now*, its distribution customers should pay billions for the privilege of having an Ohio-headquartered utility holding company is non-existent. The Companies, through Witness Murley, provide merely an analysis of *what* the economic benefits (not costs) of having corporate headquarters in that particular city, but not *why* this is relevant to the Companies' customers to the tune of $4.5 billion or its connection with creditworthiness, or even its connection with distribution modernization investments. The Commission, in its Entry on Rehearing, gave short shrift to the Companies' argument for this unconscionable and unlawful economic development adder to Rider DMR, and this final salvo by the Companies provides no evidence to change this outright dismissal.

The Companies' suggest that Witness Murley's economic impact testimony was "unrebutted", and because it was admitted as evidence that the Commission was compelled to include the extra tax on customers. FirstEnergy Rehearing App. at 9. However, the Commission rightly noted that even though admitted as "evidence," the testimony was hardly "unrebutted." Many intervenors expressed opposition to the Companies' unlawful, unreasonable, and unconscionable multi-billion dollar proposal. For example, Ohio Manufacturers Association Energy Group, in its brief, detailed how the economic impact analysis conducted by Witness

Murley "grossly overstates the impact of maintaining the FirstEnergy Corp. corporate headquarters in Akron, Ohio and fails to account for the negative economic development consequences of such significant costs for customers." OMAEG Brief at 51-52. Ohio Consumers' Counsel even asked for the Commission to strike Witness Murley's testimony in its entirety. OCC Br. at 48.

As stated in OEC and EDF's initial brief, even if the need for an analysis of the economic development impact of the First Energy Corp. was valid, and even accepting that customers owe FirstEnergy Corp. for keeping its headquarters in Ohio, Companies' Witness Murley's analysis is less than trustworthy. OEC & EDF Brief at 37. Witness Murley did not, and could not, provide the actual analysis of the $568 million annual impact of the headquarters, or any actual analysis to ascertain the value of the services provided by the shared services employees within First Energy Corp. Tr. Vol IX at 1480. Secondly, Witness Murley did not analyze or address the *costs* of having the headquarters in Akron, if any, or include the costs of the millions of dollars of Rider DMR to the people of the area or any costs of this deal juxtaposed to the alleged benefits of keeping the headquarters. *Id* at 1488-89.

The Companies further attempt to implicate Staff in supporting the idea that customers should pay for purported economic development or job retention benefits from the Akron headquarters. FirstEnergy Rehearing App. at 11. Yet, Staff's post-hearing brief tells a different story. Staff's brief was clear that it recognized the shortcomings of the analysis (even citing to the objections of intervenors that Witness Murley's analysis was "[p]rimarily that she did only an

economic impact study rather than a cost/benefit analysis"), and left it to the Commission to decide. Staff Br. at 18. The Commission rightly decided against the adder.

b. The Companies' proposed Akron headquarters adder should not be approved as an economic development rider under R.C. 4928.143(B)(2)(i).

Along the same meritless grounds as above, the Companies contend that the Commission erred in not finding that the Rider DMR was authorized under R.C. 4928.143(B)(2)(i) as an economic development rider. Beyond again relying on Witness Murley's economic analysis, the Companies further suggest that the Akron headquarters should be compensated due to the benefits of: (1) spending on human resources and equipment; (2) a modernized grid; and (3) reduced outages. FirstEnergy Rehearing App. at 25-26. The Companies, however, provide no actual evidence that these benefits are solely derived from having the headquarters in Akron beyond Witness Mikklesen's self-serving testimony.

Ultimately, Rider DMR is questionably a grid modernization rider, is by no means an economic development rider, and is meant solely to be a credit support rider. There is no evidence on the record to show that FirstEnergy Corp. or the Companies are on the verge of receiving any credit rating devaluation due to the fact that its headquarters are located in Akron, Ohio. FirstEnergy did not, and could not, provide any such evidence in any stage of this long and detailed proceeding. The Commission should, thus, continue to disregard FirstEnergy's plea to squeeze an additional $568 million annual payout from its customers to repay itself for remaining in Akron, while its customers would see nothing in return.

3. The Companies' opposition to the Commission's demonstration of sufficient progress on grid modernization is misplaced.

The Commission, in its Entry, found that recovery of revenue under Rider DMR should be conditioned upon a number of factors, including "a demonstration of sufficient progress in the implementation and deployment of grid modernization programs approved by the Commission." Fifth Entry on Rehearing at 97. However, the Commission's suggestion that it would undertake a detailed policy review of grid modernization "in the near future" lacks necessary details in scope or timeframe. Environmental Intervenors view the Commission's "sufficient progress" determination as woefully indeterminant of what will or should be required of the Companies to benefit the customers who have given their utility (and their utility's unregulated holding company) hundreds of millions of dollars. *See* Environmental Intervenors App. for Rehearing at 10.

The Commission only suggests that *following* this review, the Commission would "address FirstEnergy's pending grid modernization application, and, informed by the results of that detailed policy review, the Commission will grant approval of the grid modernization programs as we deem appropriate in light of the policy review." This conclusion leaves the determination of what would be considered grid modernization to an undefined and indeterminate time, while the Company is still collecting hundreds of millions of customer dollars. These customer dollars are non-refundable, to boot. Fifth Entry at 97. The Commission further stated that nothing in the Commission's decision should be construed as approving any of the grid modernization programs and that "sufficient progress" will be determined at the sole

discretion of the Commission, and determined with respect to the implementation and deployment of grid modernization programs actually approved by the Commission. *Id.* This is course of action that does not represent sound public policy steeped in any technical, economic, or environmental justification or feasibility. Such a wait and see approach is akin to no approach at all, and may not result in requisite vetting of the only semblance of a grid modernization plan provided in this case - the Companies' smart grid business plan filing (PUCO Case No. 16-0481-EL-UNC) - that fully and adequately compensates customers for their Rider DMR payments.

Thus, Environmental Intervenors agree with the Companies that the Commission's "sufficient progress" determination is "misdirected and unduly vague" constituting an "eye of the beholder" test that risks arbitrary application. FirstEnergy Rehearing App. at 22. The Companies, however, oppose the Commission's "sufficient progress" determination for completely different reasons. The Companies aver that the Commission's vague "sufficient progress" determination is "unworkable," presumably because they believe it would actually require them to invest Rider DMR revenues in grid modernization. *Id.* at 23. As the Companies have pointed out throughout the rehearing process, their plan for the money received from customers through this cash influx is not meant for grid modernization. The Companies reveal, as they did throughout the hearing, that the FirstEnergy Corp. family of companies has "numerous substantial financial obligations and challenges to sustain investment grade credit rating." *Id.* at 23 (*citing* Fifth Entry on Rehearing at 127-28). Citing Witness Mikkelsen's testimony, the Companies identify paying off nearly a billion dollars in pension obligations and over a billion dollars in "maturing debt." *Id.*

(*see* footnote 76). Putting aside the questionably unlawful use of distribution customer money to potentially pay down generation debt incurred by unregulated affiliates, the Companies' proposal is unreasonable under a grid modernization rider.

Environmental Intervenors argue, here, that instead of scrapping the "substantial progress" requirement and determination as the Companies suggest, the Commission should instead add more details and tighter timeframes on what substantial progress means. Without a proper plan, the funds will fail to be used for grid modernization, the purpose for which the Commission has purportedly awarded them.

4. The Companies failed to provide evidence to support reversing the Commission's decision to stay the increase in shared savings cap.

FirstEnergy's Rehearing Application contests the Commission's decision to stay the increase in the FirstEnergy's shared savings cap until FirstEnergy ceases receiving revenue under Rider DMR. FirstEnergy Rehearing App. at 28-29 (*citing* Entry at 147). However, FirstEnergy has failed to rebut the Commission's reasoning that this step will mitigate the customer bill impact of Stipulated ESP IV "in the interest of gradualism." Entry at 147. Although FirstEnergy asserts that "Rider DMR and the shared savings cap increase are independent concepts," FirstEnergy Rehearing App. at 29, it is undisputed that both of these elements of the Stipulated ESP would increase customer bills by significant amounts. The Commission acted reasonably by staying the shared savings increase in order to moderate the combined effect of these provisions. Furthermore, the shared savings cap increase is unreasonable and unlawful for the reasons set forth in the Environmental Intervenors' first Application for Rehearing, and should not go into

effect regardless of the fate of Rider DMR. Environmental Intervenors' Rehearing App. at 16-23.

CONCLUSION

For the foregoing reasons, the Companies' Application for Rehearing of the Commission's Fifth Entry on Rehearing should be denied.

Dated: November 25, 2016

Respectfully submitted,

/s/ Trent Dougherty
Trent Dougherty (0079817)
Counsel of Record
Miranda Leppla (0086351)
1145 Chesapeake Ave., Suite I
Columbus, Ohio 43212
(614) 487-7506 - Telephone
(614) 487-7510 - Fax
tdougherty@theOEC.org
mleppla@theOEC.org

COUNSEL FOR OHIO ENVIRONMENTAL COUNCIL & ENVIRONMENTAL DEFENSE FUND

Madeline Fleisher (0091862)
Counsel of Record
21 W. Broad St., Suite 500
Columbus, OH 43215
P: 614-670-5586
mfleisher@elpc.org

COUNSEL FOR ENVIRONMENTAL LAW & POLICY CENTER

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Application for Rehearing has been electronically filed with the Public Utilities Commission of Ohio and has been served upon the parties of record in this proceeding via electronic mail on November 25, 2016.

/s/ Trent Dougherty
Trent Dougherty

cdunn@firstenergycorp.com
jlang@calfee.com
talexander@calfee.com
dakutik@jonesday.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
zkravitz@taftlaw.com
Schmidt@sppgrp.com
ricks@ohanet.org
wttpmlc@aol.com
lhawrot@spilmanlaw.com
dwilliamson@spilmanlaw.com
jscheaf@mcdonaldhopkins.com
marilyn@wflawfirm.com
gkrassen@bricker.com
dborchers@bricker.com
selisar@mwncmh.com
Amy.Spiller@duke-energy.com
jeffrey.mayes@monitoringanalytics.com
laurac@chappelleconsulting.net
mjsettineri@vorys.com
sechler@CarpenterLipps.com
athompson@taftlaw.com
Christopher.miller@icemiller.com
Gregory.dunn@icemiller.com
Jeremy.grayem@icemiller.com
blanghenry@city.cleveland.oh.us
meissnerjoseph@yahoo.com
trhayslaw@gmail.com
TODonnell@dickinsonwright.com
dstinson@bricker.com
Jeanne.Kingery@dukeenergy.com
gthomas@gtpowergroup.com
stheodore@epsa.org
glpetrucci@vorys.com
gpoulos@enernoc.com
david.fein@constellation.com
asonderman@keglerbrown.com
msoules@earthjustice.org
mdortch@kravitzllc.com
rparsons@kravitzllc.com
ghiloni@carpenterlipps.com

callwein@keglerbrown.com
Kevin.moore@occ.ohio.gov
larry.sauer@occ.state.oh.us
Ajay.kumar@occ.ohio.gov
maureen.willis@occ.ohio.gov
William.michael@occ.ohio.gov
tony.mendoza@sierraclub.org
sam@mwncmh.com
fdarr@mwncmh.com
mpritchard@mwncmh.com
cmooney@ohiopartners.org
joliker@igsenergy.com
Bojko@carpenterlipps.com
barthroyer@aol.com
mkl@smxblaw.com
gas@smxblaw.com
whitt@whitt-sturtevant.com
campbell@whitt-sturtevant.com
glover@whitt-sturtevant.com
mwarnock@bricker.com
ckilgard@taftlaw.com

Attorney Examiners:
Gregory.Price@puc.state.oh.us
Megan.Addison@puc.state.oh.us

Summary: Memorandum Memorandum Contra First Energy's Application for Rehearing by the Environmental Law & Policy Center, Ohio Environmental Council, and Environmental Defense Fund electronically filed by Mr. Trent A Dougherty on behalf of Environmental Law and Policy Center and Ohio Environmental Council and Environmental Defense Fund