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 APPLICATIONS FOR REHEARING BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL AND THE NORTHWEST OHIO AGGREGATION COALITION AND NOAC COMMUNITIES INDIVIDUALLY

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I. INTRODUCTION

In response to legal action[1] by the Office of the Ohio Consumers' Counsel ("OCC"), the Northwest Ohio Aggregation Coalition ("NOAC") and others, the Federal Energy Regulatory Commission (FERC) issued orders to provide Ohioans the benefits of competitive markets and lower electric rates.[2] FERC's ruling protected captive customers of monopoly utilities (like FirstEnergy) from cross-subsidizing the utilities' power sales with affiliates (like FirstEnergy Solutions). FERC's ruling has the potential to save each of FirstEnergy's 1.9 million captive electric consumers hundreds of dollars in above-market subsidies over the next eight years, while advancing the competitive market envisioned by the Ohio legislature.

[1] See *Electric Power Supply Association et al. v. FirstEnergy Solutions Corporation*, FERC Docket No. EL16-34-000, Complaint (Jan. 27, 2016) (EPSA Complaint).

[2] *Electric Power Supply Association et al. v. FirstEnergy Solutions Corporation*, FERC Docket No. EL16-34-000, Order Granting Complaint (Apr. 27, 2016).

Yet, the subsidy saga continues for FirstEnergy's captive customers. The PUCO has done an end-run around the FERC ruling. It approved a so-called Distribution Modernization Rider (aka "Credit Support Rider") that customers must fund in the amount of $204 million per year for at least the next three years (with the potential for a two-year extension). But that is apparently not enough for FirstEnergy. FirstEnergy, in its Application for Rehearing, seeks to collect even more from customers. The PUCO should reject such efforts, and deny FirstEnergy's Application for Rehearing. The OCC and NOAC primarily[3] file this Memorandum Contra the FirstEnergy Utilities ("Utilities or "FirstEnergy") Application for Rehearing. We oppose, inter alia, the Utility's attempt to make electric service even more expensive for the Ohioans they serve.

II. RECOMMENDATIONS

A. FirstEnergy's Application for Rehearing does not satisfy the requirements of R.C. 4903.10 because it failed to set forth specifically how the PUCO's Fifth Entry on Rehearing was unlawful or unreasonable.

Where a right to appeal is conferred by statute, the exercise of that right is conditioned upon complying with the accompanying mandatory requirements.[4] Under R.C. 4903.10, an application for rehearing must set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful and no party shall in any court urge or rely on any ground for reversal, vacation, or modification not so set forth in the application.[5] When an appellant's grounds for rehearing fail to

[3] OCC/NOAC also oppose certain other issues filed by other Parties in their Applications for Rehearing as noted in the applicable sections below.

[4] See *Zier* v. *Bureau of Unemployment Compensation*, 151 Ohio St., 123 (1949); *Kinsman Square Drug Co.* v. *Evatt, Tax Commr.*, 145 Ohio St., 52, 60 N. E. (2d), 668 (1945).

[5] See *Disc. Cellular, Inc. v. PUC*, 112 Ohio St.3d 360 (2007).

specifically allege in what respect the PUCO's order was unreasonable or unlawful, the requirements of R.C. 4903.10 have not been met.[6]

The Ohio Supreme Court has strictly construed the specificity test set forth in R.C. 4903.10.[7] Indeed, the Court has explained that, in its use of the language in the statute, "the General Assembly indicated clearly its intention to deny the right to raise a question on appeal where the appellant's application for rehearing used a shotgun instead of a rifle to hit that question."[8]

In its application for rehearing, FirstEnergy used a shotgun, not a rifle. That is, FirstEnergy's application is vague and unspecific. For example, FirstEnergy assignment of error 9 states: "The Fifth Entry on Rehearing is unlawful and unreasonable because the Commission erroneously and improperly failed to adopt a placeholder retail competition incentive mechanism set at zero as described in the Competitive Market Enhancement Agreement."[9] This assignment of error is so vague that it does not even include an explanation as to why the PUCO Entry is unlawful and unreasonable. The rest of the FirstEnergy Application for Rehearing is equally as vague and unspecific.[10] Therefore, the PUCO should deny the FirstEnergy application for rehearing because it does not satisfy the requirements under R.C. 4903.10.

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[6] See *Disc. Cellular, Inc. v. PUC*, 112 Ohio St.3d 360, 374-75 (2007).

[7] See *Disc. Cellular, Inc. v. PUC*, 112 Ohio St.3d 360 (2007); see *also Consumers' Counsel v. Pub. Util. Comm.* at 248 (recognizing a "strict specificity test" in R.C. 4903.10).

[8] See *Cincinnati v. Public Utilities Com.*, 151 Ohio St. 353, 378 (1949) (general grounds raised in the rehearing application could not support the specific ground later relied on by the appellant and therefore the court could not consider the issue); *Agin v. Pub. Util. Comm.*, 12 Ohio St.2d 97, 98 (1967) (a "casual similarity" between the grounds stated in the rehearing application and the statements in the appellants' brief does not meet the requirements of R.C. 4903.10).

[9] FirstEnergy Application for Rehearing at 5, 41.

[10] See, e.g., FirstEnergy Application for Rehearing at 1 ("The Fifth Entry on Rehearing is unlawful and unreasonable because the Commission erroneously and improperly limited the term of Rider DMR to thee (or potentially five) years, contrary to the record evidence and Rider DMR's purpose.")

B. The PUCO's failure to adopt FirstEnergy's recommended Modifications to the proposed PUCO Staff Credit Support Rider was not unreasonable or unlawful.

In their first assignment of error, FirstEnergy states that the PUCO erred by not adopting the changes suggested by the Utilities to Staff's proposed Distribution Modernization Rider ("Rider DMR" or "Credit Support Rider").[11] But, FirstEnergy's proposed changes to the Credit Support Rider have one inevitable result, more money inappropriately being collected from consumers.[12] The Credit Support Rider as approved by the PUCO is illegal, and FirstEnergy's proposed modifications are even more harmful to customers. The PUCO should reject the Credit Support Rider altogether as discussed by OCC/NOAC in their Application for Rehearing.[13]

1. The PUCO's refusal to approve the Credit Support Rider for eight years as FirstEnergy recommends was not unreasonable or unlawful.

FirstEnergy proposes to modify the PUCO approved Credit Support Rider by extending it to cover the entire term of the Electric Security Plan ("ESP").[14] This would mean that the rider would collect funds from customers for eight years, instead of 3 (or five, if extended).

However, FirstEnergy provides no evidence to show that the PUCO's approved timeline was unlawful or unreasonable. FirstEnergy fails to meet the rehearing standard (unreasonable or unlawful) required under R.C. 4903.10. Therefore, FirstEnergy's rehearing request should be denied.

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[11] FirstEnergy Application for Rehearing at 5-7.

[12] See OCC/NOAC Application for Rehearing at 10-16 (Nov. 14, 2016).

[13] OCC/NOAC Application for Rehearing at 10-16 (Nov. 14, 2016).

[14] FirstEnergy Application for Rehearing at 7-8.

With regard to their failure to support their rehearing claim, their only argument is that it will not achieve its purpose. This assertion is unsupported PUCO Staff thought three years was an adequate period of time for FirstEnergy Corp. to improve its credit ratings.[15] Staff suggested that a two year extension could be requested if FirstEnergy Corp.'s credit position had not improved after three years.[16] Nevertheless, the two year extension was not guaranteed, but merely suggested by PUCO Staff that FirstEnergy could request it if needed. It is expected that FirstEnergy would need to demonstrate the request, for the two year extension, to be just and reasonable before being approved by the PUCO.

But FirstEnergy's requested eight year term is arbitrary--FirstEnergy even admits this when it conceded that it did not know how much time is needed to improve credit ratings.[17] It is noteworthy that PUCO Staff viewed the credit support to be a "bridge" to allow time for FirstEnergy Corp. to implement a long-term solution.[18] In FirstEnergy's proposal to modify the approved Credit Support Rider, there is no way to turn off the spigot (collections from consumers) if credit ratings improve during the eight-year term FirstEnergy agues for, and credit support should no longer be needed.

The PUCO should not approve the Utilities' Application for Rehearing to extend the Credit Support Rider. A three-year term is adequate time to improve FirstEnergy

[15] PUCO Staff Ex. No. 13 at Q&A 12 (Rehearing Testimony of Joseph Buckley).

[16] Id.

[17] R. Tr. Vol. X at 1731-1732 (Mikkelsen).

[18] PUCO Staff Ex. No. 13 at Q&A 11 (Rehearing Testimony of Joseph Buckley).

Corp.'s credit ratings, as the PUCO Staff concluded.[19] Additional collection through that rider beyond the three-year term would be unnecessary.

For these reasons, FirstEnergy's Application for Rehearing seeking to extend the Credit Support Rider term to eight years should not be adopted by the PUCO. Rehearing on this issue should be denied.

2. The PUCO's failure to adopt FirstEnergy's recommendation to collect more money from customers for maintaining their headquarters in Akron, Ohio was not unreasonable or unlawful.

In its Application for Rehearing, FirstEnergy claims that the PUCO erred when it failed to authorize additional collections from consumers through the Credit Support Rider for maintaining its headquarters in Akron.[20] FirstEnergy seeks to have "some value" reflected, with the value on an annual basis going as high as $568 million.[21] If FirstEnergy succeeds in its Application for Rehearing that would be very expensive for customers. Instead of paying $204 million annually to FirstEnergy, consumers could end up paying $772 million per year ($204 million + $568) for credit support to FirstEnergy.

This is a staggering amount of money that OCC/NOAC recommends should not be charged to consumers.[22] As the PUCO Staff noted FirstEnergy is already recompensed adequately for the presence of the headquarters.[23] In fact, it is likely that FirstEnergy customers are paying a shared services bill regarding FirstEnergy's headquarters through their base rates. Ms. Mikkelsen testified that she "would expect to recover [from Ohio

[19] PUCO Staff Ex. No. 13 at Q&A 12 (Rehearing Testimony of Joseph Buckley).

[20] FirstEnergy Application for Rehearing at 9-12.

[21] Id. at 12.

[22] OCC/NOAC Initial Brief at 52-53.

[23] PUCO Staff Brief at 18.

utility customers] service company costs allocated to the companies in a base rate proceeding."[24] FirstEnergy's modifications to the Credit Support Rider are unjust and unreasonable, and the PUCO was correct in not approving FirstEnergy's proposal. Therefore, the PUCO should deny FirstEnergy's Rehearing request.

3. The PUCO's failure to adopt FirstEnergy's recommended CFO to debt ratio was not unreasonable or unlawful.

In determining the amount of credit support FirstEnergy should receive, the PUCO adopted Staff Witness Buckley's recommendation of using cash from operations ("CFO") to debt ratio of 14.5%.[25] FirstEnergy seeks rehearing claiming that the PUCO erred by not using a higher CFO (15%).[26] Rehearing on this matter should be denied.

FirstEnergy's rationale is self-serving. It will increase the annual credit support collections from Ohio's captive consumers. OCC/NOAC opposes the Credit Support Rider, but if the PUCO is going to authorize it, FirstEnergy's recommendation on rehearing should be denied. The CFO to debt ratio that the PUCO chose was not unreasonable. PUCO Staff witness Buckley had rating agency guidance from both January and April 2016[27] when he prepared his testimony. He chose the more conservative guidance. That was not unreasonable.

The PUCO Staff correctly opined that: "The slight change in the target range appears to have had no effect. Neither the ratings nor the outlook for the [Utilities] changed as a result of this new opinion. Apparently the change is unimportant to

[24] R. Tr. X at 1750:7-15.

[25] Fifth Entry on Rehearing at 93.

[26] FirstEnergy Application for Rehearing at 12-13.

[27] FirstEnergy Ex. 206 at 10 (Rehearing Rebuttal and Surrebuttal Testimony of Eileen Mikkelsen).

Moody's and, therefore, is unimportant to the analysis."[28] The PUCO should reject FirstEnergy's Application for Rehearing on this issue which would only serve to cost customers more money.

FirstEnergy also seeks rehearing claiming that the PUCO should have used a three year average (and not a four year average) of CFO to debt ratios.[29] FirstEnergy claims that the PUCO should not have included 2011 data in its analysis. But FirstEnergy fails to prove that it was unjust and unreasonable for the PUCO to do so. The years chosen represents the period since the last significant restructuring of FirstEnergy Corp., specifically the merger with Allegheny Energy. The PUCO correctly concluded that it represents the best baseline available and captures the most complete picture.[30] FirstEnergy's proposal to use three of the available years was selectively chosen for self-serving reasons (collecting more money from customers). The PUCO should reject this assignment of error.

4. The PUCO's failure to adopt FirstEnergy's recommendation to shift more costs of credit support to Ohio customers was not unreasonable or unlawful.

The PUCO found that Ohioans should pay their share of credit support to FirstEnergy Corp.[31] The PUCO determined that it would adopt its Staff's recommendation that 22% of the credit support should come from Ohioans.[32] FirstEnergy seeks rehearing claiming that the PUCO erroneously and improperly used

[28] PUCO Staff Brief at 14 (citation omitted).

[29] FirstEnergy Application for Rehearing at 13-15.

[30] Fifth Entry on Rehearing at 94, ¶198.

[31] Id.

[32] Id.

PUCO Staff allocation.[33] However, FirstEnergy provides no evidence to show that the PUCO's approved allocated share to Ohioans was unlawful or unreasonable. FirstEnergy fails to meet the rehearing standard (unreasonable or unlawful) required under R.C. 4903.10. Therefore, FirstEnergy's rehearing request should be denied.

Specifically, FirstEnergy asks the PUCO to increase Ohio customers' obligations from 22 percent to 40 percent. This means that Ohioans would pay much more under the Credit Support Rider. Ms. Mikkelsen testified that she objected to the 22% allocation to Ohio consumers because it underestimated the importance of the Ohio operations to FirstEnergy Corp. and thus "penalized" FirstEnergy.[34] FirstEnergy application for rehearing should be rejected on this matter.

The PUCO Staff explained why FirstEnergy is wrong and why the lower allocation of credit support costs should be made to Ohioans:

> [FirstEnergy] suggest[s] that in using operating revenues, the Staff understates the significance of the companies to the [FirstEnergy Corp.] family because the companies experience much greater shopping than the other operating companies. But this is exactly the point. The companies *are* a less significant part of the [FirstEnergy Corp.] family *because there is more shopping.* Fewer customers rely on [FirstEnergy Corp.] subsidiaries in Ohio for services. This is the reality of shopping and this was the intent of the legislature. Far from punishing the [Utilities] because of shopping, the Staff's approach shows the success of the legislative initiative. The [Utilities'] approach would deny this reality and pretend that the [Utilities] provide much more in services to Ohio customers than is the case. The significance of the companies to the [FirstEnergy Corp.] family has shrunk, the Staff's methodology recognizes this and should be adopted.[35]

[33] FirstEnergy Application for Rehearing at 16-20.

[34] R. Tr. X at 1719-1720; FirstEnergy Ex. 206 at 11 (Mikkelsen Rehearing Rebuttal).

[35] PUCO Staff Initial Brief at 16.

There is no error in the PUCO adopting a 22% allocation. Nor was there anything improper about the PUCO's finding.

If the credit rider is upheld by the PUCO, contrary to OCC/NOAC recommendations otherwise, the PUCO should, nonetheless protect Ohioans from paying more than their fair share. It should reject FirstEnergy's application on rehearing that attempts push onto Ohioans responsibility for 40 percent of the credit support.

5. The PUCO adoption of FirstEnergy's proposal regarding the exclusion of the Credit Support Rider revenues from the Significantly Excessive Earnings Test ("SEET") was unreasonable and unlawful.

The PUCO held that the revenues from the credit support rider should be excluded from the SEET calculation during the first three years of the rider.[36] It did rule that it would revisit its decision to exclude the revenues if the utilities requested an extension of the credit support rider.[37] FirstEnergy has sought rehearing claiming that the PUCO acted erroneously and improperly when it did not rule that SEET revenues should be excluded from SEET as long as the credit rider is in effect.[38] FirstEnergy claims that if the exclusion of credit support rider revenues was appropriate during the first three years, it should continue as long as the credit support rider is in effect.[39] According to FirstEnergy, "[t]here is no reason to rule otherwise."[40] But, fortunately, there is. That reason is the law--R.C. 4928.143(F).

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[36] Fifth Entry on Rehearing at 98. OCC/NOAC sought rehearing on this finding. See OCC/NOAC Application for Rehearing at 29.

[37] Id.

[38] FirstEnergy Application for Rehearing at 20-21.

[39] Id. at 20.

[40] Id.

The revenues from the Credit Support Rider must be included in the SEET test under R.C. 4928.143(F). That provision applies to all ESPs, regardless of the length. It requires the PUCO to conduct an annual review of the utility's total earnings under its ESP. In its annual review, the PUCO is required ("shall") to consider "if any such adjustments resulted in excessive earnings." If the PUCO finds that "such adjustments" did result in significantly excessive earnings, compared to similar companies, the utility must return the excess to customers.

Here the credit support revenues are derived from the ESP. They are an adjustment under the ESP that contributes to the earnings of the Utility. The earnings from the Credit Support Rider must be included in the SEET review under R.C. 4928.143(F). The law does not distinguish between revenues from the credit rider or an extension of the credit rider. All revenues of the credit rider must be included as part of the SEET review.

FirstEnergy argues that including the revenues in SEET would introduce risk and defeat the purpose of the rider.[41] First of all, the SEET calculation is to be applied to the overall earnings of a utility resulting from all of the "adjustments" included in an approved ESP. It does not specifically extract the revenues associated with one particular rider. So even if the revenues of the Credit Support Rider are included in the SEET calculation and a SEET refund is ordered, there is no defeating the purpose of the rider. In such a case, if a refund were ordered it would be because overall earnings were significantly excessive, demonstrating that ESP rates, including the credit support rider, were not just excessive, but significantly excessive.

[41] Id.

Second, the purpose of the Credit Support Rider, if it is determined to be legal and reasonable, is to provide necessary (but not significantly excessively) funds to support FirstEnergy Corp.'s investment grade credit ratings. The Credit Support Rider is not a license for FirstEnergy Corp. or its Ohio EDUs to make significantly excessive earnings. If the Utilities have significantly excessive earnings, as a result of Rider DMR and all other riders and rates, then they should be treated the same as other Ohio EDUs. The Utilities should be required to refund the significantly excessive earnings to their customers who are paying the excessive rates in the first place. Therefore the PUCO should reject FirstEnergy's argument to extend the SEET exclusion for the possible extension period of the Credit Support Rider.

C. The "sufficient progress" standard should be kept, if the PUCO intends to allow the Credit Support Rider (over OCC/NOAC objections), because it is just and reasonable and provides some protection to customers.

In its Application for Rehearing FirstEnergy claims the PUCO committed many errors in approving the Credit Support Rider.[42] OCC/NOAC agrees albeit for different reasons.

One of those errors FirstEnergy alleges is that the PUCO conditioned the continuation of the rider on "an ill-defined standard."[43] FirstEnergy here is referring to the PUCO's requirement that FirstEnergy cannot collect money from customers until it demonstrates, inter alia, that it has made "sufficient progress in the implementation and deployment of grid modernization programs approved by the Commission."[44]

[42] FirstEnergy Application for Rehearing at 21-42.

[43] Id.

[44] Fifth Entry on Rehearing at 96.

FirstEnergy claims that "sufficient progress" is "vague, potentially arbitrary, unduly counterproductive and ultimately unnecessary."[45] OCC/NOAC disagrees.

Initially, FirstEnergy claims that the "sufficient progress" standard "*could* violate the Companies' due process rights due to its vagueness."[46] This single sentence appears to be the sole basis of claiming that the PUCO's decision in this regard was "unlawful." The PUCO can and should address FirstEnergy's claim using a single sentence approach as well. Rehearing denied.

FirstEnergy does nothing to support its legal theory. It does not explain the vagueness doctrine. It cites no case law. No PUCO precedent.

But, FirstEnergy's minimalist approach does not square with the heavy burden of proof that accompanies such a constitutional challenge. Those challenging the constitutionality of a statute or order bear a heavy burden of proof--they must establish beyond a reasonable doubt that the provision is unconstitutional.[47] That means FirstEnergy must show that the order is so vague, imprecise and indefinite that men of common intelligence must necessarily guess at its meaning and differ as to its application.[48] And, the standard of vagueness applicable to administrative regulation is lower than that found in criminal statutes.[49] Administrative regulation requires merely

[45] FirstEnergy Application for Rehearing at 21-22.

[46] Id at 22 (emphasis added).

[47] *In re: Columbus S. Power Co*, 134 Ohio St.3d 392, 2012-Ohio-5690,¶12, citing Arnold v. Cleveland, 67 Ohio St.3d 35, 38-39, 616 N.E.2d 163.

[48] *Columbus v. Thompson*, 25 Ohio St.2d 26, syllabus (1970).

[49] *Salem v. Liquor Control Com.*, 34 Ohio St.2d 244, 246 (1973).

general notice.[50] General notice is given under the PUCO Order--FirstEnergy cannot collect money from customers until at least the grid modernization programs are approved. There is no basis for granting rehearing on this claim of error.

FirstEnergy also assails the "sufficient progress" requirement as unreasonable. FirstEnergy believes that the standard is "counterproductive," "unworkable" and "unnecessary." FirstEnergy explains that it contradicts the flexibility the PUCO granted it when the PUCO determined that the so called distribution modernization rider did not require $1 to be spent on grid modernization. FirstEnergy argues that it should be able to retain flexibility to use Rider DMR funding to address other "numerous substantial financial obligations and challenges." In particular, FirstEnergy mentions its pension obligations and maturing debt.[51] FirstEnergy alleges that progress on grid modernization will be addressed in a separate docket: "Whether 'sufficient progress' is being made will be a matter for those other cases, not this one."

While OCC/NOAC oppose the Credit Support Rider (and seeks its own rehearing on that), the condition of sufficient progress is not unreasonable. It is preferable to just handing the money over to the Utilities to use as it sees fit, in any manner. If FirstEnergy has its way, through the Credit Support Rider customers will be required to fund activities that may have no relation to the provision of utility service in Ohio. For instance, FirstEnergy mentions it has pension obligations and maturing debt, unrelated to grid modernization.[52] The Credit Support Rider, under FirstEnergy's take, could be used

[50] *In the Matter of the Complaint of Westside Cellular Inc.*, Case No. 93-1758-RC-CSS, Entry on Rehearing at 9 (Apr. 25, 2001)(relying upon *Salem*, supra, when it rejected claims that its orders were so vague as to violated due process).

[51] FirstEnergy Application for Rehearing at 23.

[52] Id.

for these purposes. That is wrong and the PUCO should not allow it. Charges under an ESP should be charges related to providing customers the standard service offer or discrete distribution projects.

But the Credit Support Rider, as ordered by the PUCO (and requested by FirstEnergy), doesn't fit the bill. As explained by FirstEnergy, it has numerous financial obligations unrelated to grid modernization. These would be some of the potential uses of Credit Support Rider revenues that will be collected from customers. FirstEnergy's Application for Rehearing would make the Credit Support an unlawful subsidy because the revenues could ultimately be used for the benefit of the Utilities' unregulated affiliate, FirstEnergy Solutions. The PUCO should deny rehearing on this issue.

1. The PUCO's failure to find the Credit Support Rider is not authorized under R.C. 4928.143(B)(2)(i) was not unreasonable or unlawful.

FirstEnergy claims that the PUCO erred in not finding that the Credit Support Rider is authorized under R.C. 4928.143(B)(2)(i) as a provision "under which the electric distribution utility may implement economic development, job retention, and energy efficiency programs."[53] FirstEnergy has misinterpreted the statute. Rehearing should be denied.

The "economic development" that is being claimed by FirstEnergy is nothing more than the value of keeping the headquarters in Akron.[54] These benefits include the salaries and economic benefits of having service corporation employees located in Ohio.[55]

[53] Id. at 25.

[54] See FirstEnergy Ex. 206 at 13 (Mikkelsen Rehearing Rebuttal).

[55] See FirstEnergy Ex. 205 at 5 (Murley Rehearing Rebuttal).

But R.C. 4928.143(B)(2)(i) speaks to economic development that has yet to be implemented because it uses the term "may implement."[56] Keeping the headquarters of FirstEnergy Corp. in Akron is not a new economic development plan. The headquarters have been located in Akron for a long time now.

Additionally, R.C. 4928.143(B)(2)(i) only applies to economic development that occurs related to a distribution utility, not the parent company.[57] The words in the statute specify that the "electric distribution utility" may implement economic development. The commitment to maintain headquarters is not an electric distribution utility commitment.

The Credit Support Rider does not qualify as an economic development provision under an electric security plan. The words just aren't there. The words that are there speak loudly. The PUCO should listen. Rehearing should be denied.

2. Credit Support Rider revenues could not be collected from customers under an MRO as part of a distribution case; there is no alternative basis for determining that Rider DMR would have no quantitative effect on the ESP v. MRO test.

FirstEnergy argues that the PUCO should have found that there were additional reasons that the Credit Support Rider does not have a quantitative effect on the ESP v. MRO test.[58] FirstEnergy claims that it could receive Credit Support Rider revenues outside of an ESP – through a distribution rate case or existing Rider AMI or similar

[56] R.C. 4928.143(B)(2)(i) (describes economic development plans that "may" be implemented as provisions of an ESP).

[57] See OCC Initial Brief at 74-77 (discussing how R.C. 4928.143(B)(2)(i) only applies to Economic Development plans implemented by the EDU).

[58] FirstEnergy Application for Rehearing at 26.

rider.[59] According to FirstEnergy, given state policy and PUCO Staff's support for gird modernization, the "[Utilities] would likely move forward with grid modernization outside of any ESP."[60] It concludes then that the PUCO should find Credit Support Rider has no quantitative effect on ESP v. MRO test. FirstEnergy is mistaken. Rehearing should be denied.

FirstEnergy's approach is flawed from the outset because it focuses on whether the Credit Support Rider can be obtained in *any* other way--outside an MRO filing. FirstEnergy mentions a distribution rate case or a rider provision would allow it to collect the Credit Support Rider. Under FirstEnergy's approach any provision of an ESP could be justified as a cost of an MRO so long as it could be obtained through *any* filing at the PUCO. But that is not the standard for determining if the MRO is more favorable to customers than an ESP. The correct analysis focuses on whether, *based upon the same facts as are in the record in this proceeding*,[61] the charge in question can be obtained under the market rate offer statute, R.C. 4928.142. And here the Credit Support Rider cannot.

The market rate offer is uniquely devoted to establishing the cost of providing generation service (standard service offer) that is delivered by the utility to customers. There are no credit support charges that are tied to the cost of providing generation services. Nor are there infrastructure modernization costs that are linked to providing generation service under a market rate offer. A MRO sets the SSO costs for generation.

[59] Id. at 26-27.

[60] Id. at 27.

[61] Fifth Entry on Rehearing at 162.

No more, no less. The MRO by law does not include non-SSO costs--all the trimmings (under R.C. 4928.143(B)(2)) that cost customers money under an ESP. To suggest that the Credit Support Rider could be a provision of a market rate offer reads words into the law (R.C. 4928.142) that are just not there. Neither the Utilities nor the PUCO can do that.

FirstEnergy is wrong to interpret the statute in a way that permits them to ignore hundreds of millions of dollars that customers will pay under its proposal. When the costs of the Credit Support Rider are included as part of the statutory test, massive ESP costs develop that have no counterpart on the MRO side. Quantitatively, the ESP with the Credit Support Rider is not more favorable in the aggregate for customers. The modified ESP, by law, must be disapproved. FirstEnergy's rehearing on this matter should be denied.

D. It was reasonable and lawful for the PUCO to protect customers from a 150% increase in the amount of profit (shared savings) that they pay to FirstEnergy for its energy efficiency programs.

The PUCO's Fifth Entry on Rehearing protects customers from a 150% increase in the amount of shared savings that they pay to FirstEnergy. The PUCO's reasoning is simple and straightforward: customers deserve protection from rate increases.[62]

FirstEnergy complains in its Application for Rehearing that the PUCO erred by "linking" the increased shared savings cap and the increase in customer bills under the Credit Support Rider.[63] It is ironic that FirstEnergy now objects to the PUCO's balancing

[62] See Fifth Entry on Rehearing ¶ 326 ("The Commission is mindful of the increases in customer bills stemming from the *ESP IV* as modified by this Fifth Entry on Rehearing").

[63] See FirstEnergy Application for Rehearing at 28 ("The Commission erred by inappropriately linking two unrelated and independent concepts (i.e., Rider DMR and the shared savings cap.").

the rate impacts of both the Credit Support Rider and energy efficiency shared savings; it is FirstEnergy that injected energy efficiency into this unrelated ESP case through the Third Supplemental Stipulation.[64]

Regardless, FirstEnergy misses the point. The Credit Support Rider is a rate increase. A 150% increase in shared savings is a rate increase. The PUCO has the authority and duty to protect customers from undue rate increases. This is precisely what the PUCO did by denying FirstEnergy the right to more than double the amount that it charges customers for shared savings from energy efficiency. Rehearing should be denied.

E. It was reasonable and lawful for the PUCO to conclude that customers should pay for energy efficiency programs that target the statutory benchmark and not for programs that target the much higher goal of 800,000 MWh annually.

FirstEnergy recommends that if the PUCO grants rehearing to authorize the increase in the shared savings cap (which it should not), then the PUCO should affirm its March 31, 2016 Order approving the 800,000 MWh goal of the Utilities 2017 energy efficiency and peak demand reduction portfolio.[65] However, FirstEnergy provides no evidence to show that the PUCO's reduction in the shared savings cap or the reduction in the goal for the Utilities' 2017 energy efficiency and peak demand reduction portfolio was unlawful or unreasonable. FirstEnergy fails to meet the rehearing standard (unreasonable or unlawful) required under R.C. 4903.10. Therefore, FirstEnergy's rehearing request should be denied.

[64] Third Supplemental Stipulation at 11.

[65] FirstEnergy Application for Rehearing at 29.

The PUCO reasonably concluded that FirstEnergy's energy efficiency portfolio should target, and budget for, the statutory benchmark.[66] The PUCO's conclusion varies from what parties agreed to under the Third Supplemental Stipulation --to "strive to achieve over 800,000 MWh of energy savings annually, subject to customer opt outs."[67] FirstEnergy and certain environmental advocates[68] A target of over 800,000 MWh exceeds the statutory benchmarks.

FirstEnergy and others argue on rehearing that the PUCO retreated from its earlier approval of the higher energy efficiency targets and that this provision authorizes FirstEnergy to charge customers for energy efficiency programs that target this level of energy savings instead of the lower statutory benchmark.[69] None of these environmental advocates is a party to the Third Supplemental Stipulation, and no party to that Settlement, other than FirstEnergy, has opposed the PUCO's interpretation in the Fifth Entry on Rehearing of the "strive to achieve" language.

The PUCO's interpretation of the Third Supplemental Stipulation is reasonable. The parties to the Third Supplemental Stipulation could have agreed to a settlement term that required FirstEnergy to target, and budget for, energy savings of 800,000 MWh. But they did not. Instead, they agreed to more general language requiring FirstEnergy to strive to reach this goal. The PUCO's interpretation of this term, which requires FirstEnergy to "budget for the annual statutory energy efficiency mandate rather than the goal," is consistent with the PUCO's desire to protect customers from overpaying for

[66] Fifth Entry on Rehearing at 147.

[67] Third Supplemental Stipulation at 11.

[68] These environmental advocates are the Ohio Environmental Council ("OEC"), Environmental Defense Fund ("EDF"), and Environmental Law & Policy Center ("ELPC").

[69] FirstEnergy Application for Rehearing at 29-31; OEC/EDF/ELPC Application for Rehearing at 23-25.

energy efficiency programs. As the PUCO concluded, this will encourage FirstEnergy to focus on efficient administration of programs and achieving energy savings for the least cost.[70]

The PUCO should also disregard the environmental advocates' arguments regarding the feasibility of achieving the 800,000 MWh goal. These parties argue that running the programs efficiently is unlikely to result in 800,000 MWh of energy savings because "a significant majority of the funding for these programs goes directly to incentive payments."[71] But this argument is based on documents that are not in evidence.[72] The PUCO should give no weight to the environmental advocates' arguments that are not based on record evidence in this case.[73] The environmental advocates also ignore the fact that the 800,000 MWh goal is "subject to customer opt outs."[74] With expanded nonresidential customer opt outs beginning January 1, 2017,[75] the 800,000 MWh goal could be substantially reduced. This would make it much more likely that FirstEnergy could achieve the higher energy savings goal without substantially increasing the customer-funded budget for energy efficiency programs. Therefore, the rehearing requests on this issue should be denied.

[70] Fifth Entry on Rehearing ¶ 326.

[71] OEC/EDF/ELPC Application for Rehearing at 24.

[72] See OEC/EDF/ELPC Application for Rehearing at 24 (citing FirstEnergy's 2012 energy efficiency portfolio application).

[73] See Fifth Entry on Rehearing at 37 (documents filed in another PUCO proceeding are not part of the evidentiary record and should be stricken).

[74] Third Supplemental Stipulation at 11.

[75] R.C. 4928.6611.

F. The PUCO's decision to remove the 50 basis point adder to return on equity (profit) in the calculation for the Advanced Metering Infrastructure/Modern Grid Rider ("Rider AMI") was not unlawful or unreasonable as FirstEnergy contends.

The PUCO appropriately revisited its decision to authorize FirstEnergy a 50 basis point adder for FirstEnergy's return on equity (profit) for its investment in AMI as a result of approving the Credit Support Rider. The PUCO stated:

> In the ESP IV Opinion and Order, we approved a 50 basis point adder to the return on equity for investment made for grid modernization (Order at 22-23). This provision provided the Companies with an incentive to invest in grid modernization pursuant to R.C. 4928.143(B)(2)(h). However, in this Fifth Entry on Rehearing, the Commission has approved Rider DMR, which was designed to provide the Companies with an incentive to invest in grid modernization (Staff Ex. 15 at 14-15,16), In light of the fact that the purpose of the 50 basis point adder has been supplanted by Rider DMR, we find that the 50 basis point adder is no longer necessary or appropriate, and we will modify the Stipulations to remove this provision.[76]

However, FirstEnergy incorrectly argued on rehearing that the PUCO's actions in this regard were unlawful and unreasonable.[77]

It is FirstEnergy's erroneous belief that the Credit Support Rider and the additional profit to be realized by the 50 basis point adder serve different purposes.[78] FirstEnergy alleges that the additional profit that the 50 basis point adder ensures grid modernization projects will earn additional profit over than other competing investment options.[79] According to FirstEnergy, this is different than the Credit Support Rider whose purpose is to jumpstart grid modernization and reduce future costs of providing

[76] Fifth Entry on Rehearing at 108.

[77] FirstEnergy Application for Rehearing at 31.

[78] Id.

[79] Id.

distribution service. However, the PUCO has authorized the Credit Support Rider with incentives for FirstEnergy to direct funds to grid modernization.

The PUCO placed the following conditions on FirstEnergy's collection of Credit Support Revenues. The PUCO stated:

> The Commission finds that recovery of revenue under Rider DMR should be conditioned upon: (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**.[80]

The ability of FirstEnergy to collect $204 million per year from its customers is dependent upon a demonstration of sufficient progress in the implementation and deployment of grid modernization programs approved by the PUCO. The PUCO's condition for collection should be more than sufficient incentive, as the $204 million per year collection dwarfs the additional profit provided by the 50 basis point adder that gives FirstEnergy, as an example, an additional $5,000 return on a million dollar investment.[81] As the PUCO found, Rider AMI serves the same purpose as Rider DMR[82] and therefore, it is at the very least appropriate to drop the 50 basis point adder as duplicative in purpose.

The PUCO's decision was not unlawful or unreasonable. The Utilities demand for additional profit must be viewed by the PUCO as an unnecessary incentive to be paid by

[80] Fifth Entry on Rehearing at 96 (emphasis added).

[81] $1,000,000 x 0.005 = $5,000.

[82] Fifth Entry on Rehearing at 108.

its already over-charged customers. Therefore, FirstEnergy's Application for Rehearing on this issue should be denied.

G. The PUCO's decision that directed the Utilities to file a base distribution rate case for rates to be in effect after the expiration of ESP IV was not unlawful or unreasonable as FirstEnergy contends.

The PUCO noted in the Fifth Entry on Rehearing that "by the end of ESP IV, it will have been 17 years since the Companies' last distribution rate case, and we direct the Companies to file a distribution rate case at that time."[83] FirstEnergy found the PUCO's decision to be unjust and unreasonable.[84] The Utilities argue that it is premature in 2016 to determine that a distribution rate case is required in 2024.[85] The Utilities cite no authority for their position. FirstEnergy just prefers to have the ultimate authority for determining when it files a distribution rate case.

However, as the PUCO correctly notes, in 2024, it will have been 17 years since the Utilities last distribution rate case was filed. That is too long a period for Utilities to go without a thorough review of their operations. The PUCO should instead heed the advice of PUCO Staff Witness McCarter who testified earlier in these proceedings that the utilities should file a distribution rate case no later than May 31, 2018.[86] Ms. McCarter conveyed the PUCO Staff's principle that a "holistic periodic review of each company's finances is necessary to ensure that all costs are being appropriately incurred and recovered."[87] She explained that a rate case permits the overall earnings of utilities to

[83] Id.

[84] FirstEnergy Application for Rehearing at 34.

[85] Id.

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

[87] Id.

be reviewed along with all expenses and revenues.[88] Ms. McCarter further declared that "Staff believes it is a prudent regulatory practice to gain a holistic understanding of the regulated distribution company on a regular basis."[89] This was sound advice that has largely gone unheeded in that the Utilities have been authorized to freeze their base rates through the end of ESP IV. However, that freeze should not go any further into the future.

The single-issue ratemaking provisions of S.B. 221 have allowed the electric utilities in Ohio to evade base rate reviews to the detriment of their consumers.[90] For reasons in the record the PUCO's decision to delay filing a rate case is not in the best interest of consumers. While OCC/NOAC recommends a distribution rate case should be filed sooner rather than later, the PUCO's decision was not unlawful or unreasonable. However, a review of the Utilities distribution rates and operations is long overdue. It should be required in eight years, as the PUCO directed (if not sooner). FirstEnergy's Application for Rehearing on this issue should be denied.

H. The PUCO did not act unreasonably or unlawfully when it ordered that increases in revenue caps that customers pay under the Delivery Capital Recovery Rider ("Rider DCR") would be terminated if ESP IV was terminated before its eight-year term.

In its March 31 Order, the PUCO approved Rider DCR in the Third Supplemental Stipulation. In addition, the PUCO approved annual increases in the revenue caps associated with Rider DCR. In the Fifth Entry on Rehearing, the PUCO ordered that in

[88] Id.

[89] Id.

[90] R.C. 4928.143(B)(2)(h).

the event that the PUCO terminates ESP IV under R.C. 4928.143(E), the annual increases in revenue caps under Rider DCR will also be terminated.

FirstEnergy contends that this decision in the Fifth Entry on Rehearing was unlawful and unreasonable because the "Third Supplemental Stipulation provided that the Commission's termination of ESP IV under the process in R.C. 4928.1434(E) -- *i .e.*, the review of an ESP in its fourth year – 'shall not effect the continued cost recovery' of Rider DCR."[91] FirstEnergy is wrong for several reasons.

First, termination of the revenue cap increases in the event that ESP IV is terminated under R.C. 4928.1434(E) does not violate the terms of the Stipulation. The Stipulation states that the termination of the ESP IV "shall not effect [sic] the continued cost recovery of Rider DCR."[92] Rider DCR is designed to allow FirstEnergy to recover reasonable investments in plant in service associated with distribution, subtransmission, and general and intangible plant, which was not included in the rate base of the Utilities' last distribution rate case. The Fifth Entry on Rehearing only speaks to terminating the increases in revenue caps, not the ability for FirstEnergy to collect general costs under Rider DCR. Therefore, the Fifth Entry on Rehearing is not unreasonable because terminating the increases in revenue caps will still allow the Utilities to collect the rider from customers as contemplated in the Stipulation.

Furthermore, FirstEnergy argues that continuing the scheduling of revenue caps increases during a transition is reasonable because the rider promotes reliable electric service and stable rates for customers. But, FirstEnergy fails to demonstrate, or even

[91] FirstEnergy Application for Rehearing at 35-36 citing Third Supp. Stip., p. 18.

[92] See Third Supp. Stip., p. 18.

argue, that it will be unable to provide such benefits to customers if the revenue caps are terminated. As such, FirstEnergy has not demonstrated that the PUCO's decisions are unlawful or unreasonable. Therefore, the PUCO should deny rehearing on this issue.

I. The PUCO did not act unreasonably or unlawfully when it determined that the record evidence does not support the authorization of a placeholder Retail Competition Enhancement Rider ("Rider RCE").

IGS[93] and FirstEnergy[94] both claim that the PUCO acted unreasonably when it determined that the record evidence does not support the authorization of a placeholder Rider RCE. IGS and FirstEnergy are wrong. The Fifth Entry on Rehearing is not unlawful or unreasonable on this issue.

FirstEnergy and IGS both argue that the PUCO should establish a placeholder Rider RCE because FirstEnergy witness Mikkelsen testified on cross-examination to the benefits of a retail competition incentive mechanism.[95] But, in the Fifth Entry on Rehearing the PUCO specifically stated that, "we find that the limited commentary of FirstEnergy witness Mikkelsen on cross-examination is insufficient by itself to support the creation of the rider."[96] The PUCO has already considered this evidence and determined that it is unpersuasive. FirstEnergy offers no new arguments in its assignment of error and, therefore, it should be denied.

IGS additionally argues that IGS witness White's limited testimony demonstrates that the PUCO was unlawful or unreasonable. IGS is still wrong. IGS withdrew the vast

[93] See IGS Application for Rehearing at 11-14.

[94] See FirstEnergy Application for Rehearing at 41.

[95] See IGS Application for Rehearing at 12; FirstEnergy Application for Rehearing at 41.

[96] Fifth Entry on Rehearing at ¶ 301.

majority of its testimony in this proceeding when it signed the Stipulation.[97] IGS now argues that the few lines of testimony it left in place demonstrate that the PUCO acted unlawfully and/or unreasonably in denying the placeholder Rider RCE. Once again, the PUCO has already considered this evidence and determined that it was unpersuasive and insufficient. The cited testimony from Mr. White is irrelevant to an RCE Rider.[98] As the PUCO stated "the testimony by IGS witness White does not support the creation of Rider RCE."[99] And, "absent the testimony of IGS witness White in support of Rider RCE, we find that there is insufficient evidence to support the creation of Rider RCE, even on a placeholder, zero-cost basis."[100] Merely, restating the testimony and/or evidence does not demonstrate how the PUCO's determination is unlawful or unreasonable. Therefore, the FirstEnergy and IGS assignments of error on this issue must be denied.

III. CONCLUSION

FirstEnergy's Application for rehearing, and others as indicated, should be rejected in large part as explained above. Denying the applications for rehearing will allow consumers to be protected from paying hundreds of millions of dollars more than that ordered by the PUCO.

[97] See IGS Letter of Notification Regarding Withdrawal of Testimony (January 19, 2016) ("…IGS withdraws all testimony previously submitted in this proceeding by Matthew White and Joseph Haugen including the request for administrative notice of Matthew White's Testimony in Case No. 14-1693-EL-RDR, et al. (Transcript Volume XXV at 5131), with the exception of pages 1-3; page 4, lines 1-3, 7-10; page 5, lines 18-22, page 6, lines 1-7; page 16, lines 20-22; page 17, lines 1-10; p. 19, lines 14-15 and Ex. MW-4 of the Supplemental Direct Testimony of Matthew White on August 18, 2015.").

[98] The words "RCE Rider" do not even appear in the testimony.

[99] Fifth Entry on Rehearing at ¶ 301.

[100] Id.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memo Contra Applications for Rehearing by the Office of the Ohio Consumers' Counsel, Northwest Ohio Aggregation Coalition and NOAC Communities Individually was served via electronic transmission, to the persons listed below, on this 25th day of November, 2016.

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Summary: Memorandum Memorandum Contra Applications for Rehearing by the Office of the Ohio Consumers' Counsel and the Northwest Ohio Aggregation Coalition and NOAC Communities Individually electronically filed by Ms. Deb J. Bingham on behalf of Sauer, Larry S.