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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter 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

THE CLEVELAND MUNICIPAL SCHOOL DISTRICT'S
MEMORANDUM CONTRA THE COMPANIES' APPLICATION FOR REHEARING

I. INTRODUCTION

The Cleveland Municipal School District ("CMSD"), pursuant to Rule 4901-1-35, Ohio Administrative Code, hereby submits its memorandum contra the application for rehearing from the Commission's October 12, 2016 Fifth Entry on Rehearing filed herein by Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company ("FirstEnergy" or the "Companies") on November 14, 2016.

Among the grounds for rehearing set forth in FirstEnergy's rehearing application are several assignments of error that charge that the Commission, although finding that Rider DMR was authorized under R.C. 4928.143(B)(2)(h), erred by failing to find that there were alternative bases for approving Rider DMR. Why are alternative reasons for authorizing Rider DMR a matter of such concern for FirstEnergy? The answer is obvious. FirstEnergy recognizes that, as CMSD and other intervenors have argued, replacing the $256 million benefit the Commission ascribed to the rejected Rider RRS proposal with $612 million – and potentially over $1 billion –

in costs associated with the Commission-approved version of Rider DMR[1] will cause ESP IV to fail the R.C. 4928.143(C)(1) more-favorable-than-an-MRO test by a huge margin and that the Commission's attempts to overcome this obstacle are unlikely to stand up to judicial scrutiny on appeal.[2] Although FirstEnergy's concern is understandable, the alternative justifications it asks the Commission to adopt would compound the errors the Commission made in approving Rider DMR in the first place and would provide additional fodder for the appeal that is sure to come if the Commission does not reverse its decision and reject the inclusion of Rider DMR as an element of ESP IV.

In this memorandum contra, CMSD will focus on FirstEnergy's attempts to convince the Commission to buttress its approval of Rider DMR by adopting alternative theories to justify the inclusion of Rider DMR as an element of ESP IV, and will leave to others the response to FirstEnergy's claims that the revenues generated by the Commission-approved version of Rider DMR will be insufficient to preserve the investment-grade credit rating of the Companies'

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[1] The Commission-approved version of Rider DMR is to be designed to recover $132.5 million on annual basis, adjusted to recognize the tax effect resulting from the receipt of this additional revenue. *See* Fifth Entry on Rehearing, ¶ 202. Although the lead opinion does not quantify the tax effect, Chairman Haque's concurring opinion pegs the annual cost to customers, inclusive of the tax impact, to be $204 million. *See* Concurring Opinion of Chairman Asim Z. Haque, ¶ 9. Because Rider DMR will remain in effect for at least three years, the minimum cost to customers will be at least $612 million, but the cost could be as much as $1,020,000,000 if the Commission exercises its option to extend the term of Rider DMR for an additional two years.

[2] CMSD does not intend to reargue the assignments of error set out in its rehearing application. However, the fact that the Rider DMR annual revenues have now grown from the $131 million recommended by the Staff to $204 million, for a total cost to customers of between $612 million and just over $1 billion, certainly drives home the point that the cost to customers is totally disproportionate to any savings customers might ultimately realize in terms of the impact on the embedded cost of debt used in determining the cost of capital in a subsequent distribution rate case. To suggest that customers should pay $612 million to just over $1 billion to save a tiny fraction of that amount is unreasonable on its face, not to mention that any savings that might result could not be realized until eight years down the road due to the stipulated distribution rate freeze. Moreover, even if one ignores the fact that Rider DMR is not designed to pay for grid modernization, the newly-identified level of Rider DMR costs is even more disproportionate to any qualitative benefits that might be produced by a grid modernization program. Thus, although CMSD acknowledges that the Commission is not bound to a strict price comparison in performing the ESP v. MRO test, the Commission cannot simply close its eyes to results of the quantitative favorability analysis and declare that ESP IV passes the ESP v. MRO test because Rider DMR may provide qualitative benefits that could not be achieved in an MRO.

parent, FirstEnergy Corp. CMSD begins with FirstEnergy's notion that Rider DMR qualifies for inclusion in ESP IV under R.C. 4928.143(B)(2)(i) as an economic development/job retention program because the Commission has conditioned Rider DMR upon the FirstEnergy maintaining its headquarters and nexus of operations in Akron.[3]

II. ARGUMENT

A. FIRSTENERGY'S CLAIMS THAT THE COMMISSION ERRED BY FAILING TO RECOGNIZE THE VALUE OF MAINTAINING ITS HEADQUARTERS IN AKRON IN DETERMINING THE RIDER DMR REVENUE REQUIREMENT AND BY FAILING TO FIND THAT SUCH A MEASURE IS AUTHORIZED BY R.C. 4928.143(B)(2)(i) ARE WITHOUT MERIT.

In section A.2 of its rehearing application, FirstEnergy assigns as error the Commission's failure to incorporate the $568 million annual economic impact on the local economy its witness Murley ascribed to FirstEnergy's headquarters being located in Akron into Rider DMR revenue requirement.[4] In a related assignment of error set out in section B.2 or its rehearing application, FirstEnergy goes on to claim that, because the Commission conditioned its approval or Rider DMR on the FirstEnergy headquarters remaining in Akron, this condition should be viewed as an economic development program under R.C. 4928.143(B)(2)(i), which permits ESPs to include "(p)rovisions under which the electric distribution utility may implement economic development, job retention, and energy efficiency programs."[5] To suggest that this condition somehow converts maintaining FirstEnergy's headquarters in Akron into "an uncompensated economic development and job retention program"[6] is absurd.

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[3] Fifth Entry on Rehearing, ¶ 202.

[4] *See* FirstEnergy Application for Rehearing, 9-12.

[5] *See* FirstEnergy Application for Rehearing, 25-26.

[6] FirstEnergy Application for Rehearing, 9.

First, FirstEnergy's headquarters is already located in Akron, and has been for many years. Continuing the status quo cannot reasonably be construed as the "implementation" of an economic development or job retention program within the meaning of that term as employed in R.C. 4928.143(B)(2)(i). Second, the record clearly shows that FirstEnergy has no plans to move its headquarters during the term of ESP IV and that FirstEnergy Corp. recently renewed its lease for its headquarters facilities through 2025.[7] Indeed, FirstEnergy witness Mikkelsen specifically testified that FirstEnergy is committed to maintaining its headquarters in Akron and needs no incentive to do so.[8] Conditioning the collection of Rider DMR revenues on a requirement that FirstEnergy has already committed to meet cannot reasonably be interpreted as the "implementation" of an economic development or job retention program contemplated by R.C. 4928.143(B)(2)(i). Finally, as Staff was quick to recognize, "the companies are already recompensed adequately for the presence of the headquarters"[9] because the cost of the headquarters is built into the Companies' distribution base rates. There is no logic, ratemaking principle, or element of the statutory ratemaking formula that would support requiring ratepayers to pay for the value to the local economy associated with maintain a utility's headquarters in its current location, whatever it may be. This would be akin to charging ratepayers for, say, the value of street lighting service provided by the Companies on the theory that illuminating the streets is an economic development program that promotes job retention. Ratepayers compensate the Companies for the cost of services they provide, and cannot be charged a second time for the value of the services in terms of their benefit for the local economy. Because

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[7] *See* Dynegy Ex. 1 (Ellis Rehearing Testimony), 10-11.

[8] Mikkelsen Cross, Reh. Tr. X, at 1744.

[9] Staff Rehearing Brief, 18.

anyone with even a passing familiarity with utility ratemaking would understand this principle, the Commission should question FirstEnergy's true motivation in requesting that the Rider DMR revenue requirement include up to $568 million to compensate FirstEnergy for the value of maintain its headquarters in Akron.

As CMSD suggested on brief, the real reason FirstEnergy introduced evidence as to the economic impact on the Ohio economy of maintaining its headquarters in Akron was not because it had any expectation that it would be authorized to collect an additional $568 million through Rider DMR.[10] Rather, FirstEnergy recognized that replacing the $256 million benefit the Commission ascribed to Rider RRS with what is now calculated to be a $612 million – and potentially over $1 billion – cost associated with Rider DMR would cause ESP IV to fail the ESP v. MRO test. FirstEnergy knew that it could not present evidence on rehearing as to the value associated with maintaining its headquarters in Akron – which was already a commitment under the Third Supplemental Stipulation – to show the quantitative benefit to be included in the ESP column due to the R.C. 4903.10 prohibition against presenting on evidence on rehearing that could, with reasonable diligence, have been offered at the original hearing. Thus, although FirstEnergy presented Ms. Murley's estimate of the annual impact of maintaining its headquarters in Akron under the guise that the Companies should be directly compensated for this value through Rider DMR, FirstEnergy's real purpose was to get this $368 million number into the record to provide the Commission with a quantitative value to latch onto in order to prevent ESP IV from failing the ESP v. MRO test.

The Commission correctly rejected including the value of maintaining FirstEnergy's headquarters in Akron as part of the Rider DMR revenue requirement and should deny rehearing

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[10] *See* CMSD Rehearing Reply Brief, 23.

on this ground. However, as discussed *infra*, FirstEnergy has now revealed its true colors by arguing that the Commission should have offset the value of maintaining its headquarters in Akron against the Rider DMR costs.[11] The Commission got this right the first time in finding that the quantitative benefits of ESP IV totaled $51 million, and should not permit FirstEnergy to get away with this subterfuge by changing its conclusion on rehearing in response to this FirstEnergy argument. The Commission did not err by failing to find that Rider DMR is authorized for inclusion in ESP IV pursuant to R.C. 4928.143(B)(2)(i) or by failing to offset the value maintaining FirstEnergy's headquarters in Akron against the cost of Rider DMR.

B. CONTRARY TO FIRSTENERGY'S CLAIM, REVENUES EQUIVALENT TO THE REVENUES THAT WOULD BE GENERATED BY RIDER DMR COULD NOT LAWFULLY BE AUTHORIZED IN A DISTRIBUTION RATE CASE.

In section B.3 of its rehearing application, FirstEnergy assigns as error the Commission' failure to find, "as an additional reason why revenues from Rider DMR do not affect the ESP v. MRO test, that revenues from Rider DMR could be collected under an MRO as part of a distribution base rate case or other mechanism, or be offset by quantifiable benefits."[12] This claim is wrong on several counts.

The first problem with this ground for rehearing is that it totally miscasts the nature of the ESP v. MRO test. R.C. 4928.143(C)(1) requires the Commission to determine that the ESP, "including its pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, is more favorable in the aggregate as compared to the expected results that would otherwise apply under section 4928.142 of the Revised Code." R.C. Section 4928.142

[11] *See* FirstEnergy Application for Rehearing, 27-28.

[12] FirstEnergy Application for Rehearing, 26.

establishes the procedure for establishing a market-based price for standard service offer ("SSO") generation service under an MRO and has nothing whatever to do with distribution rates. Yes, an electric utility operating under an MRO could file an R.C. 4909.18 application for an increase in its distribution rates, but that does not mean, as FirstEnergy appears to suggest, that costs that might be recognized in a distribution rate case somehow go into the MRO columns for purposes of the ESP v. MRO test.

As the Commission correctly explained in its entry, the question is whether equivalent revenues to those that would be generated by Rider DMR could be approved in a hypothetical, contemporaneous MRO case based on the record actually before the Commission in the ESP proceeding.[13] Although the Commission incorrectly concluded that the "emergency" provision of R.C. 4928.142(D)(4) provided a basis for finding that revenues equivalent to those that would be generated by Rider DMR would "likely" be authorized in a hypothetical, contemporaneous MRO case,[14] there is no provision in the R.C. 4928.142 that authorizes the recovery of distribution-related costs in an MRO proceeding based on the theory that such costs might be recognized for purposes of establishing the revenue requirement in an R.C. 4909.18 distribution base rate case. Thus, contrary to FirstEnergy's misguided claim, equivalent revenues cannot be placed in the MRO cost column on the ground that these revenues could be authorized in an MRO proceeding, which means that such revenues do not, in fact, represent a wash with Rider DMR costs for purposes of the ESP v. MRO test. Accordingly, although CMSD continues to maintain that the Commission wrongly determined that equivalent revenues could be authorized in a hypothetical, contemporaneous MRO proceeding under the "emergency" provision of

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[13] *See* Fifth Entry on Rehearing, ¶ 354.

[14] *See* Fifth Entry on Rehearing, ¶ 357.

R.C. 4928.142(D), the Commission most certainly did not err by failing to find "that revenues from Rider DMR could be collected under an MRO as part of a distribution base rate case." Indeed, such a finding would be a clear violation of the statutory test.

Second, even if one were to ignore this underlying fatal flaw in FirstEnergy's theory, the fact is that revenues equivalent to those that would be generated by Rider DMR could not be authorized in a distribution rate case in any event. As FirstEnergy acknowledges elsewhere in its rehearing application, the purpose of Rider DMR is not to fund the grid modernization program, but, rather, to provide a cash infusion to the Companies in the hope that it will shore up FirstEnergy Corp.'s credit rating, thereby resulting in reduced borrowing costs in the future.[15] However, in discussing this ground for rehearing, FirstEnergy, after stating that "Rider DMR funds will likely be used for <u>credit support</u> for distribution grid modernization or other distribution infrastructure improvements, debt refinancing or pension funding" (emphasis added), goes on to claim that "(a)ll of these uses represent legitimate, distribution-related outlays that would otherwise be recoverable in a base rate case or in the Companies' existing Rider AMI or some similar rider."[16] In arguing that equivalent revenues could be recovered in a base rate case, FirstEnergy has muddled various elements of the statutory ratemaking formula set out in R.C. 4909.15.

The actual investment in grid modernization or other distribution infrastructure improvements, once made, would, of course, be included in rate base, and the Companies would ultimately recover that investment through the allowance for depreciation expense and would realize a return on the investment through the application of the authorized rate of return to the

[15] *See* FirstEnergy Application for Rehearing, 7.

[16] FirstEnergy Application for Rehearing, 7-8.

net original cost of the facilities in question. Similarly, to the extent that any actual cash outlays relating to grid modernization or other distribution infrastructure improvements are not capitalized, they would be recoverable in a rate case through the allowance for test-year expenses. However, the purpose of Rider DMR is not to fund investments in grid modernization or to pay expenses associated with the grid modernization effort, and there is certainly no dollar-for-dollar relationship between cash outlays for grid modernization and the revenue requirement Rider DMR is designed to recover. Moreover, this is not the only problem with FirstEnergy's theory.

CMSD is not sure what to make of FirstEnergy's claim that debt refinancing represents a cash outlay that would be recoverable in a base rate case because the interest on debt is a below-the-line item for ratemaking purposes and is recognized solely thought the embedded cost of debt component of the weighted cost of capital used to determine the authorized rate of return.[17] CMSD is also confused by FirstEnergy's reference to the outlay for pension funding. Pension expense is what it is, and, although the annual cost of this item is included as an allowable expense for ratemaking purposes,[18] the manner in which the pension obligation is funded is not plays no role in determining the cost of service in the context of a rate case. However, the point for the purpose at hand is that Rider DMR is not designed as a mechanism to pay for grid modernization, distribution infrastructure improvements, debt refinancing, or pension funding. Rather, the purpose of Rider DMR is to provide additional net income to the Companies in the form of a cash infusion designed to preserve the investment-grade credit rating of their parent,

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[17] *See* R.C. 4909.15(D)(2)(a).

[18] *See, e.g., In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Increase Rates for Distribution Service, Modify Certain Accounting Practices and for Tariff Approvals*, Case No. 07-551-EL-AIR (Opinion and Order dated January 21, 2009) at 16.

FirstEnergy Corp. Thus, the relevant inquiry is whether the Commission could authorize an equivalent cash infusion in a distribution rate case. The answer to that question is no.

Under the R.C. 4909.15 ratemaking formula, allowable net income is determined by applying the rate of return to the rate base. This Commission has squarely held that it would be inappropriate to determine the earnings opportunity to be accorded an applicant utility based on dollar amount required to satisfy rating agency metrics.

> There is much more involved in solidifying or improving applicant's present ratings than merely handing out rate increases, as Company witness Maugans acknowledged (transcript citations omitted). Adequate rate relief is an important step, but utility management also has a definite role to play as it is the company's performance over time that influences the rating agencies. The Commission recognizes that improved ratings will lead to lower future financing costs, but the real question is what price we should ask customers to pay presently for this future benefit. This is the very heart of the rate of return inquiry, and a balance must be struck. Were it not for this consideration, we could simply send the rate of return witnesses home and decide the earnings requirement question solely through an analysis of coverage ratios. There is quite clearly more to establishing a reasonable earnings opportunity than a mechanical calculation designed to satisfy the ratings agencies' coverage tests.[19]

There is no question that Rider DMR has been designed for the express purpose of generating revenues to satisfy a single rating agency metric: Moody's CFO-to-debt ratio benchmark for an investment grade rating. As the above language makes clear, the Commission does not determine authorized net income on this basis in an R.C. 4909.18 rate proceeding.[20] Thus, contrary to FirstEnergy's claim, the Commission would not authorize revenues in a distribution rate case equivalent to those that would be generated by Rider DMR. Indeed, the

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[19] *In the Matter of the Application of The Cleveland Electric Illuminating Company for Authority to Amend and Increase Certain of its Filed Schedules Fixing Rates and Charges for Electric Service,* Case No. 79-537-EL-AIR (Opinion and Order dated July 10, 1980), at 34.

[20] *See also Office of Consumers' Counsel v. Pub. Util. Comm., 67 Ohio St.2d 153, 164, 423 N.E.2d 820 (1981),* wherein the court held that the Commission is limited by statute to granting a utility a fair rate of return and cannot address a utility's difficulty in attracting capital in any other manner.

only argument FirstEnergy offers to rebut this obvious conclusion comes in a footnote in section B.3 of its rehearing application wherein FirstEnergy cites the Commission's order in the Companies' last distribution rate case for the proposition that "(f)or example, in a distribution base rate case, the Commission could make adjustments, as it deems appropriate, to test-year expense, or normalize test-year expenses, or provide an incentive rate of return on equity."[21] What the Commission's ability to adjust test-year expenses in a rate case has to do with authorizing a cash infusion to satisfy a rating agency metric escapes us, but CMSD can say with certainty that there is nothing in the referenced discussion in the cited case (which addressed a labor normalization adjustment) that remotely suggests that the Commission has authority to provide an incentive rate of return on equity in an R.C. 4909.18 rate proceeding. In fact, incentive ratemaking is a creature of the ESP statute, R.C. 4928.143 and is not authorized as a part of the R.C. 4909.15 ratemaking formula.[22] Thus, there is no basis for FirstEnergy's claim that the Commission could authorize equivalent revenues in a base rate case.

In this same vein, CMSD is also perplexed by FirstEnergy's suggestion the cash outlays associated with grid modernization, other distribution infrastructure improvements, debt refinancing, or pension funding could also be recoverable "in the Companies' existing Rider AMI or some similar rider." CMSD understood FirstEnergy's argument to be that revenues equivalent to those that would be generated by Rider DMR could also be authorized under an

[21] FirstEnergy Application for Rehearing, 27, citing *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Increase Rates for Distribution Service, Modify Certain Accounting Practices and for Tariff Approvals*, Case No. 07-551-EL-AIR (Opinion and Order dated January 21, 2009) at 13-14.

[22] In so stating, CMSD in no way intends to suggest that it believes that Rider DMR qualifies for inclusion in ESP IV as a version of incentive ratemaking. Rider DMR does not provide for a rate of return adder to incent investment in grid modernization. Rather, Rider DMR simply provides for a cash infusion with no limitation as to the use of the cash.

MRO, thereby creating a wash for purposes of the ESP v. MRO test. Plainly, a rider that can only be established pursuant to an ESP does nothing to advance that argument.

CMSD would again emphasize that FirstEnergy's contention that the Commission erred by failing to find "as an additional reason why revenues from Rider DMR do not affect the ESP v. MRO test, that revenues from Rider DMR could be collected under an MRO as part of a distribution base rate case or other mechanism," is based on the flawed premise that equivalent revenues that could be authorized in a distribution rate case could somehow be placed in the MRO cost column, thereby producing a wash for purposes of the ESP v. MRO test. As discussed above, this is not how the R.C. 4928.143(C)(1) more-favorable-than-an-MRO test works. The test is whether the equivalent revenues could be authorized under a provision of R.C. 4928.142, and, *thus, the question of whether equivalent revenues could be authorized* in a distribution rate case is irrelevant. However, even if one ignores the flaw in FirstEnergy's premise, the fact remains that the Commission could not authorize revenues equivalent to those that would be generated by Rider DMR in the context of distribution rate case. Rehearing on this ground should be denied.

C. THE COMMISSION DID NOT ERR BY FAILING TO ASCRIBE A QUANTIFIABLE BENEFIT TO FIRSTENERGY MAINTAINING ITS HEADQUARTERS AND NEXUS OF OPERATIONS IN AKRON FOR PURPOSES OF THE ESP V. MRO TEST.

As noted above, FirstEnergy also assigns as error in section B.3 of its rehearing application the Commission's failure to find, as an additional basis for approving Rider DMR, that the costs of Rider DMR are offset by quantifiable benefits. Specifically, as fleshed out in the discussion following this ground for rehearing, FirstEnergy now claims that the $568 million annual impact on the local economy that FirstEnergy witness Murley ascribed to FirstEnergy's headquarters being located in Akron should be considered to be a quantifiable benefit of Rider DMR that should be offset against the Rider DMR costs for purposes of the ESP v. MRO test.[23] Rehearing on this ground should be denied for several reasons.

First, FirstEnergy's commitment to maintain its headquarters in Akron was a term of the Third Supplemental Stipulation that provided the framework for the version of ESP IV approved by the Commission in its March 31, 2016 opinion and order in this case ("Order"). Notwithstanding the testimony of FirstEnergy witness Mikkelsen that the provision of the Third Supplemental Stipulation memorializing this commitment was not tied to a "particular incentive" provided via another provision of ESP IV,[24] the Commission appears to have accepted the notion that because the duration of the headquarters commitment was tied to the term of Rider RRS, this commitment disappeared when Rider RRS was rejected and was replaced with the condition that Rider DMR is contingent upon FirstEnergy maintaining its headquarters in Akron.[25] Be that as it may, the fact remains that maintaining the headquarters in Akron is not a new provision of ESP IV. At the initial hearing in this matter, neither Staff nor FirstEnergy claimed that the impact on the local economy of maintaining the headquarters in Akron, whatever it may be, should be regarded as a quantitative benefit of Rider DMR, and the Commission did not ascribe a quantitative benefit to this commitment in its Order.[26] In fact, the Commission did not even identify this commitment in its discussion of the qualitative benefits of the proposed ESP.[27] If FirstEnergy wished to propose that the Commission recognize the annual economic impact of

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[23] *See* FirstEnergy Application for Rehearing, 7-8.

[24] Mikkelsen Cross, Reh. Tr. X, at 1744.

[25] FirstEnergy Application for Rehearing, .

[26] *See* Order, 118-119

[27] *See* Order, 119-120.

maintaining its headquarters in Akron as a quantitative benefit of the proposed ESP IV, it clearly could have presented evidence of that impact during the original hearing. As previously discussed, R.C. 4903.10 precludes a party from presenting evidence on rehearing, which, with reasonable diligence, could have been offered at the initial hearing. Thus, although the Commission could consider the evidence of the economic impact of maintaining FirstEnergy's headquarters in Akron in the context of FirstEnergy's new argument that the associated value should have been built into the Rider DMR revenue requirement, it would have been plain error for the Commission to rely on this evidence to support a finding that this value should be taken into account for purposes of the ESP v. MRO test as FirstEnergy now claims.

Second, as must surely be obvious, it would be improper for the Commission to ascribe a quantitative value to FirstEnergy maintaining its headquarters in Akron for purposes of the ESP v. MRO test when the evidence shows that FirstEnergy has no intention of moving its headquarters in any event. Logic dictates that before the Commission could offset the value of the headquarters' location against the cost of Rider DMR, there would have to be a showing that, without Rider DMR, the headquarters would be moved. Plainly, there was no such showing in this case. Indeed, all the evidence was to the contrary.

Finally, but in this same vein, CMSD would point out that the term of the Third Supplemental Stipulation that required First Energy to maintain its headquarters in Akron represented a legally enforceable commitment. However, that changed when the Commission conditioned Rider DMR on FirstEnergy maintaining its headquarters, a measure that in no way precludes FirstEnergy from moving its headquarters, but merely imposes a financial consequence – the loss of Rider DMR revenues – if it does so. Because this condition provides no guarantee that FirstEnergy will not move its headquarters, it would be inappropriate to ascribe a quantitative value to the headquarters condition for purposes of the ESP v. MRO test. Thus, the Commission did not err by failing to offset the value of maintaining FirstEnergy's headquarters in Akron against the Rider DMR costs, and rehearing on this ground should be denied.

III. CONCLUSION

As suggested at the outset of this memorandum contra, FirstEnergy has asked the Commission to find alternative bases for approving Rider DMR because it knows full well that the basis upon which the Commission relied is on extremely shaky ground. As demonstrated by CMSD and others on brief, contrary to the Commission's finding, there is no prospect that Commission could have authorized equivalent revenues in a contemporaneous MRO proceeding under the "emergency" provision of R.C. 4928.143(D)(4), which means that, with the inclusion of Rider DMR, ESP IV fails the ESP v. MRO test. Thus, FirstEnergy wants the Commission to provide additional justification for approving Rider DMR in the hopes that if the Commission throws enough alternative rationales against the wall, one of them may stick on appeal. CMSD continues to maintain that, for those reasons set out in its rehearing briefs, the Commission erred in approving Rider DMR. However, none of the alternative basis advocated by FirstEnergy in its rehearing application have merit, and rehearing on these grounds should be denied

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been served upon the following parties by electronic mail this 25th day of November 2016.

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