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

EIGHTH ENTRY ON REHEARING

Entered into the Journal on August 16, 2017

I. SUMMARY

{¶ 1} On rehearing, the Commission finds that the application for rehearing of the Commission's Fifth Entry on Rehearing filed by FirstEnergy, be denied in part and granted in part, and the applications for rehearing of the Commission's Fifth Entry on Rehearing filed by Sierra Club, CMSD, Nucor, OEG, IGS, NOPEC, Environmental Advocates, OMAEG, P3/EPSA, and OCC/NOAC be denied.

II. PROCEDURAL HISTORY AND APPLICABLE LAW

A. *Procedural History*

{¶ 2} Ohio Edison Company (Ohio Edison), The Cleveland Electric Illuminating Company (Cleveland Electric Illuminating), and The Toledo Edison Company (Toledo Edison) (collectively, FirstEnergy or the Companies) are electric distribution utilities as defined in R.C. 4928.01(A)(6) and public utilities as defined in R.C. 4905.02 and, as such, are subject to the jurisdiction of this Commission.

{¶ 3} R.C. 4928.141 provides that an electric distribution utility shall provide customers within its certified territory a standard service offer (SSO) of all competitive retail electric services necessary to maintain essential electric services to customers, including firm supply of electric generation services. The SSO may be either a market rate offer (MRO) in accordance with R.C. 4928.142 or an electric security plan (ESP) in accordance with R.C. 4928.143.

{¶ 4} On August 4, 2014, FirstEnergy filed an application pursuant to R.C. 4928.141 to provide for an SSO to provide generation pricing for the period of June 1, 2016, through May 31, 2019. The application was for an ESP, in accordance with R.C. 4928.143 (*ESP IV*).

{¶ 5} On March 31, 2016, the Commission issued its Opinion and Order in *ESP IV*, approving FirstEnergy's application and stipulations[1] with several modifications (Order or *ESP IV* Opinion and Order). As part of that *ESP IV* Opinion and Order, we approved a modified version of FirstEnergy's original proposal for a retail rate stability rider (Rider RRS).

{¶ 6} On April 27, 2016, the Federal Energy Regulatory Commission (FERC) issued an order granting a complaint filed by the Electric Power Supply Association (EPSA), the Retail Energy Supply Association (RESA), Dynegy, Inc. (Dynegy), Eastern Generation, LLC, NRG Power Marketing LLC, and GenOn Energy Management, LLC, and rescinding a waiver of its affiliate power sales restrictions previously granted to FirstEnergy Solutions Corporation (FES). 155 FERC ¶ 61,101 (2016) (FERC Order).

{¶ 7} On April 29, 2016, FirstEnergy filed a motion for an extension of time to file its tariffs in this proceeding in order to fully consider the FERC Order and its impact on the Companies' tariffs to be filed pursuant to the *ESP IV* Opinion and Order.

{¶ 8} The attorney examiner granted FirstEnergy's request by Entry issued April 29, 2016. By Entry issued May 10, 2016, the attorney examiner directed the Companies to file their proposed tariffs, consistent with the *ESP IV* Opinion and Order, by May 13, 2016, noting such tariffs would be effective June 1, 2016, subject to Commission review and approval.

{¶ 9} On May 13, 2016, FirstEnergy filed proposed tariffs in Case Nos. 14-1297-EL-SSO and 16-541-EL-RDR. Staff filed its review and recommendations regarding the Companies' proposed tariff filing on May 20, 2016, concluding that it was consistent with the *ESP IV* Opinion and Order. Thereafter, by Finding and Order issued May 25, 2016 (Tariff Finding and Order), the Commission found that, in accordance with Staff's review and recommendations, the Companies' proposed tariff filing was consistent with the *ESP IV*

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[1] The applications and stipulations will collectively be referred to as "Stipulations" or "Stipulated ESP IV."

Opinion and Order, did not appear to be unjust or unreasonable, and, therefore, was approved for rates effective June 1, 2016.

{¶ 10} R.C. 4903.10 states that any party who has entered an appearance in a Commission proceeding may apply for rehearing with respect to any matters determined in that proceeding, by filing an application within 30 days after the entry of the order upon the journal of the Commission.

{¶ 11} On April 29, 2016, applications for rehearing regarding the *ESP IV* Opinion and Order were filed by the following parties: Sierra Club; Dynegy; the PJM Power Providers Group and EPSA (collectively, P3/EPSA); and RESA.

{¶ 12} Thereafter, on May 2, 2016, applications for rehearing regarding the *ESP IV* Opinion and Order were filed by the following parties in this proceeding: FirstEnergy; Mid-Atlantic Renewable Energy Coalition (MAREC); Cleveland Municipal School District (CMSD); The Ohio Schools Council, Ohio School Boards Association, Buckeye Association of School Administrators; and Ohio Association of School Business Officials, dba Power4Schools (Power4Schools); Northeast Ohio Public Energy Council (NOPEC); Environmental Law and Policy Center (ELPC), Ohio Environmental Council (OEC), and Environmental Defense Fund (EDF) (collectively, Environmental Advocates); the Ohio Manufacturers' Association Energy Group (OMAEG); and the Ohio Consumers' Counsel and Northwest Ohio Aggregation Coalition (collectively, OCC/NOAC).

{¶ 13} In its application for rehearing, and as a recommended solution to three of its proffered assignments of error, FirstEnergy proposed a modified calculation for Rider RRS as approved in the Order (Companies' Proposal or Proposal).[2] Additionally, FirstEnergy

2 Of the eight assignments of error alleged by FirstEnergy in its May 2, 2016 application for rehearing, the following assignments of error would be rendered moot in the event its proposed modifications to Rider RRS are approved: " 6. The Order is unreasonable because it requires the Companies to bear the burden for any capacity performance penalties."; "7. The Order is unreasonable because the Commission prohibited cost

recommended an expedited procedural schedule in order for the Commission to consider the proposed modifications to Rider RRS.

{¶ 14} Thereafter, by Entry on Rehearing issued May 11, 2016 (First Entry on Rehearing), the Commission granted the sixth, seventh, and eighth assignments of error stated in the Companies' application for rehearing in order to hold a hearing with respect to the proposed modifications to Rider RRS. Additionally, the Commission granted the applications for rehearing filed by the Companies, Sierra Club, P3/EPSA, Dynegy, RESA, MAREC, CMSD, Power4Schools, NOPEC, Environmental Advocates, OMAEG, and OCC/NOAC in order to allow further consideration of the matters specified in those applications for rehearing. The Commission stated in its First Entry on Rehearing that, "because of the number and complexity of the assignments of error raised in the applications for rehearing, as well as the potential for further evidentiary hearings in this matter," it found it appropriate to grant rehearing before receiving memoranda contra in order to allow parties the opportunity to begin discovery in anticipation of potential future hearings.

{¶ 15} On May 12, 2016, memoranda contra applications for rehearing were filed by FirstEnergy, Sierra Club, P3/EPSA, CMSD, NOPEC, Environmental Advocates, OMAEG, OCC/NOAC, Nucor Steel Marion (Nucor), Industrial Energy Users-Ohio (IEU-Ohio), Interstate Gas Supply, Inc. (IGS Energy), and Ohio Energy Group (OEG).

{¶ 16} On May 31, 2016, OCC/NOAC filed a second application for rehearing, regarding the Tariff Finding and Order, asserting that the Commission had unreasonably found the tariff rates filed by FirstEnergy to be consistent with the *ESP IV* Opinion and Order

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recovery for Plant outages greater than 90 days."; and "8. The Order is unreasonable because it does not reflect the ruling by the Federal Energy Regulatory Commission Order issued on April 27, 2016 in Docket Number EL16-34-000." We will refer to the mechanism in the Companies' Proposal as the modified Rider RRS..

as the tariff rates failed to implement Rider RRS as approved and ignored other Commission modifications as described in the *ESP IV* Opinion and Order.

{¶ 17} Additionally, on June 24, 2016, RESA filed its second application for rehearing, asserting the Tariff Finding and Order was unjust and unreasonable as the Commission erred in adopting the Companies' Economic Load Response Program Rider (Rider ELR) tariff containing a limitation requiring shopping customers to use consolidated billing, which was inconsistent with the *ESP IV* Opinion and Order and unduly discriminates against customers using dual billing. OMAEG also filed a second application for rehearing on June 24, 2016, regarding the Tariff Finding and Order. On July 5, 2016, FirstEnergy filed memoranda contra RESA and OMAEG's second applications for rehearing.

{¶ 18} On June 29, 2016, the Commission issued an Entry on Rehearing (Second Entry on Rehearing) in which it granted rehearing for further consideration of the matters specified in the applications for rehearing filed by OCC/NOAC and RESA on May 31, 2016, and June 24, 2016, respectively.

{¶ 19} On June 10, 2016, OCC/NOAC filed their third application for rehearing in this proceeding, presenting three assignments of error regarding the First Entry on Rehearing.

{¶ 20} On June 3, 2016, the attorney examiner issued an Entry establishing a procedural schedule for an additional hearing in this matter. The evidentiary hearing was scheduled to begin on July 11, 2016, the scope of which was limited to the provisions of, and alternatives to, the Companies' Proposal. The Entry indicated "[n]o further testimony will be allowed regarding other assignments of error raised by parties." Subsequent to that Entry, Staff submitted testimony on June 29, 2016, in preparation of the hearing, in which it recommended implementing a distribution modernization rider (Rider DMR) as an alternative proposal to the Companies' Proposal.

{¶ 21} On June 8, 2016, P3/EPSA, OCC/NOAC, and OMAEG filed requests for certification and applications for review of interlocutory appeals of the June 3, 2016, Entry. IEU-Ohio and FirstEnergy filed memoranda contra the requests for certification and applications for review of interlocutory appeals. By Entry issued June 30, 2016, the attorney examiner granted P3/EPSA, OCC/NOAC, and OMAEG's requests for certification, certifying their applications for interlocutory appeals for the Commission's review.

{¶ 22} On July 6, 2016, the Commission issued an Entry on Rehearing (Third Entry on Rehearing), in which it denied the applications for interlocutory appeal filed on June 8, 2016, specifically noting that the June 3, 2016 Entry was consistent with all Commission rules and applicable Commission and Supreme Court of Ohio precedent. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789, 856 N.E.2d 213 (*CG&E Case*). Third Entry on Rehearing at 9-12. Additionally, the Commission denied the applications for rehearing filed by OCC/NOAC on May 31, 2016, and June 10, 2016. Third Entry on Rehearing at 14-16, 19. The Commission also denied rehearing on the assignments of error raised in OMAEG's June 24, 2016, application for rehearing, noting that they merely repeated arguments raised by OCC/NOAC in their May 31, 2016, application for rehearing. Third Entry on Rehearing at 20. The Commission also indicated that, although it granted rehearing prior to the filing of memoranda contra on May 12, 2016, in order to provide parties sufficient time for discovery, it would "thoroughly consider all arguments raised in the memoranda contra in the ultimate disposition of the applications for rehearing." Third Entry on Rehearing at 19.

{¶ 23} The additional evidentiary hearing began, as scheduled, on July 11, 2016, and concluded on August 1, 2016 (Rehearing). During Rehearing testimony, 19 witnesses, including witnesses from FirstEnergy and Staff, presented testimony regarding the Companies' Proposal and Rider DMR.

{¶ 24} On August 5, 2016, P3/EPSA filed an application for rehearing, asserting that the Commission's Third Entry on Rehearing was unreasonable and unlawful. Specifically, P3/EPSA argue that the Commission erred to find that: FirstEnergy's application for rehearing was comprised of three parts; the Companies' sixth, seventh, and eighth assignments of error provided sufficient detail on which grounds the Companies claim that the *ESP IV* Opinion and Order was unreasonable and unlawful; and the Commission has jurisdiction to consider the Companies' Proposal, pursuant to R.C. 4903.10. FirstEnergy filed a memorandum contra P3/EPSA's application for rehearing on August 15, 2016, stating that these arguments were sufficiently addressed in the Third Entry on Rehearing and no new facts or circumstances warranted additional review of these arguments by the Commission.

{¶ 25} On August 31, 2016, the Commission issued an Entry on Rehearing (Fourth Entry on Rehearing), in which we granted rehearing for further consideration of the matters specified in the applications for rehearing filed by P3/EPSA.

{¶ 26} On September 6, 2016, OCC/NOAC gave notice to the Commission that they were appealing several decisions issued in this proceeding, including the Tariff Finding and Order, the attorney examiner's Entry issued on June 3, 2016, and the Commission's Third Entry on Rehearing issued on July 6, 2016.

{¶ 27} On October 12, 2016, the Commission issued its Fifth Entry on Rehearing in this proceeding (Fifth Entry on Rehearing), rejecting the Companies' proposal to modify Rider RRS and adopting Staff's alternative proposal to establish Rider DMR. The Commission also elected to make additional modifications to the Stipulations, as approved in the Opinion and Order, as well as denied several pending applications for rehearing.

{¶ 28} On November 11, 2016, Sierra Club filed an application for rehearing of the Fifth Entry on Rehearing.

{¶ 29} Thereafter, on November 14, 2016, applications for rehearing of the Fifth Entry on Rehearing were filed by the following parties in this proceeding: FirstEnergy; CMSD; Nucor; OEG; IGS; NOPEC; Environmental Advocates; OMAEG; P3/EPSA; and OCC/NOAC.

{¶ 30} FirstEnergy, OCC/NOAC, NOPEC, Environmental Advocates, Sierra Club, OMAEG, CMSD, and IEU-Ohio filed memoranda contra the applications for rehearing on November 25, 2016.

{¶ 31} On December 7, 2016, the Commission granted the applications for rehearing filed on November 11, 2016, and November 14, 2016, in this proceeding, in order to allow further consideration of the issues raised in the applications for rehearing (Sixth Entry on Rehearing).[3]

B. ***Applicable Law***

{¶ 32} R.C. Chapter 4928 provides an integrated system of regulation in which specific provisions were designed to advance state policies of ensuring access to adequate, reliable, and reasonably priced electric service in the context of significant economic and environmental challenges. In considering these cases, the Commission is cognizant of the challenges facing Ohioans and the electric power industry and is guided by the policies of the state as established by the General Assembly in R.C. 4928.02, as amended by Am.Sub.S.B. 221 (S.B. 221).

{¶ 33} In addition, S.B. 221 amended R.C. 4928.141, which provides that, beginning January 1, 2009, electric utilities must provide customers with an SSO, consisting of either a MRO or an ESP. The SSO is to serve as the electric utility's default service. R.C. 4928.143 sets forth the requirements for an ESP. Additionally, R.C. 4928.143(C)(1) provides that the Commission is required to determine whether the ESP, as modified by the Commission, including its pricing and all other terms and conditions, including deferrals and future recovery of the same, is more favorable in the aggregate as compared to the expected results that would otherwise apply under R.C. 4928.142.

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[3] On January 6, 2017, OCC filed an application for rehearing of the Sixth Entry on Rehearing, which was later denied in its entirety by the Commission on February 1, 2017 (Seventh Entry on Rehearing).

III. Discussion

A. *Jurisdiction to Consider Companies' Proposal and Rider DMR*

{¶ 34} Sierra Club, OMAEG, and P3/EPSA argue that the Commission lacks jurisdiction to consider Rider DMR as an alternative proposal because it is not a proper issue for rehearing under R.C. 4903.10.[4] Sierra Club and OMAEG initially contend that rehearing is not the proper mechanism for evaluating and approving an entirely new rider proposal that has no connection to the issues that were the subject of the Commission's Opinion and Order in this proceeding. Rather, as Sierra Club and P3/EPSA allege, R.C. 4903.10 limits parties to only challenging and seeking reconsideration of matters that the Commission "determined in the proceeding." P3/EPSA adds that Rider DMR violates the statute as it is not a "matter specified in such application." Furthermore, Sierra Club asserts there was no reason that Staff or the Companies could not have proposed a credit support rider like Rider DMR before the Commission issued its Opinion and Order, thus violating R.C. 4903.10(B). OMAEG also alleges that the parties experienced prejudice, at a minimum, by the expenditure of additional time and resources. Sierra Club adds that this proceeding is far different from the *CG&E Case*, noting nothing in that case provided the Commission the opportunity to evaluate and approve a brand new rider proposal that has no connection to the issues that were debated during the original hearing.

{¶ 35} FirstEnergy responds by stating the Commission's consideration of Rider DMR is not barred by R.C. 4903.10, as the Commission has previously found, further noting that the Companies are under no burden to anticipate unprecedented actions by the FERC when preparing for an evidentiary hearing and the intervenors have provided no evidence supporting the fact that the FERC Order was foreseeable (Third Entry on Rehearing at 10, 19; Rehearing Tr. Vol. I at 43). FirstEnergy notes that Sierra Club and P3/EPSA have also

4 OMAEG's assignment of error questions the jurisdiction of the Commission to consider the Companies' Proposal, and any alternatives thereto, on rehearing. We will only discuss the argument as it pertains to Rider DMR. To the extent the assignment of error is limited to Modified Rider RRS, we will deny rehearing.

misinterpreted the plain language of the statute. The Companies argue that the statute's first step requires a party to "apply for a rehearing in respect to any matters determined in the proceeding," which FirstEnergy asserts it appropriately did when raising its sixth, seventh, and eighth assignments of error in its May 2, 2016, application for rehearing. FirstEnergy then contends that it was within the Commission's discretion to hold rehearing on those matters and limit the scope of such rehearing. The Companies further assert that the Commission was not restricted to solely making changes to Rider RRS; rather, the Commission is entitled to make changes to its decisions as it deems reasonable in light of the issues raised in the applications for rehearing. Thus, FirstEnergy concludes that, having granted rehearing and having properly specified the scope of rehearing, the Commission maintained its broad discretion to modify its Order within the scope of that rehearing, including alternatives to the Companies' Proposal, such as Rider DMR. As a final matter, FirstEnergy contends that the attempts of Sierra Club and P3/EPSA to distinguish this proceeding from the *CG&E Case* are misplaced, as the fact that Rider DMR was proposed by Staff is of no consequence. FirstEnergy notes that satisfaction of all of the statutory requirements set forth in R.C. 4903.10 was sufficient to allow the Commission to consider alternatives to the Companies' Proposal, including Staff's proposed Rider DMR.

{¶ 36} We agree with FirstEnergy that these arguments have been thoroughly considered, and subsequently rejected, in the Commission's Fifth Entry on Rehearing, and that rehearing should be denied on that basis (Fifth Entry on Rehearing at 12-14; see also Third Entry on Rehearing at 9-12, 14-16, 19). Nonetheless, upon further consideration, we find no merit in these jurisdictional and procedural arguments. We continue to find that the Supreme Court of Ohio's ruling in the *CG&E Case* applies to the facts and circumstances of this case and that our determination is consistent with the language of the *CG&E Case* (Third Entry on Rehearing at 9-12; Fifth Entry on Rehearing at 12-14).

{¶ 37} As noted in the *CG&E Case*, we have broad authority to modify our orders on rehearing and determine whether a subsequent hearing is necessary to consider proposed modifications. In fact, Sierra Club cites to the relevant Supreme Court of Ohio precedent in support of this broad authority, in which the Court held that "[f]ollowing a rehearing, the commission need only be *of the opinion* that the original order should be changed for it to modify the same." *Columbus & S. Ohio Elec. Co. v. Pub. Util. Comm.*, 10 Ohio St.3d 12, 15, 460 N.E.2d 1108 (1984)(emphasis in the original). Further, we again emphasize that parties have experienced no prejudice by the Commission's consideration of Rider DMR, as the parties were afforded ample opportunity to review Rider DMR and participate in the subsequent evidentiary hearing, including producing their own witnesses and cross-examining Staff and FirstEnergy witnesses as well as filing additional briefs (Third Entry on Rehearing at 19; Fifth Entry on Rehearing at 13). In addition, we reject OMAEG's overly broad definition as to what constitutes prejudice, which would preclude the Commission from ever granting rehearing for the purpose of collecting additional evidence, in contradiction of the plain language of R.C. 4903.10 and the Commission's authority. We again hold that no party has demonstrated they were prejudiced by this process.

{¶ 38} In response to Sierra Club and OMAEG's argument that there was no reason Staff could not have proposed Rider DMR before the Commission issued its Opinion and Order, we note that it was proper for Staff to submit its alternative proposal at that stage of the hearing process as the FERC Order effectively made it impractical for the Companies to comply with the Commission's Order. Additionally, Staff contended it was not possible to propose Rider DMR during the early stages of this proceeding, indicating that the projected cost in the initial years of the original Rider RRS mechanism made it financially impractical for Staff to recommend that both Rider RRS and Rider DMR be approved by the Commission. As circumstances changed, Staff believed that Rider DMR became viable only because the original Rider RRS mechanism was no longer viable, adding that the Companies' Proposal failed to provide the same level of benefits to customers as the original Rider RRS (Fifth Entry on

Rehearing at 11-12). Consistent with our previous decisions, the Commission agrees that introducing Rider DMR during the original hearing, simultaneously with the original Rider RRS, would not have been conceivable nor in the public interest.

{¶ 39} While Sierra Club is correct that the Third Entry on Rehearing did not explicitly address Rider DMR, the Third Entry on Rehearing, which noted the possibility of further evidentiary hearings, was issued on May 11, 2016. On May 20, 2016, the attorney examiner set the matter for hearing, established the scope of the hearing and provided any party, including Staff, with the opportunity to provide alternatives to the Companies' proposed modification to the approved ESP. Rider DMR was not proposed by Staff until the filing of the Staff rehearing testimony on June 29, 2016. Therefore, it would have been impossible for the Commission to explicitly address Rider DMR in the Third Entry on Rehearing as Rider DMR had not been proposed yet. Accordingly, we will affirm our determination in the Fifth Entry on Rehearing that the mere scope of the changes proposed in an alternative proposal, or the fact that Staff had proposed the alternative remedy, are not sufficient bases for distinguishing this case from the *CG&E Case*, in which the Court stated "[u]nder R.C. 4903.10(B), if the commission determines upon rehearing that its 'original order or any part thereof is in any respect unjust or unwarranted, or should be changed,' [the Commission] can abrogate or modify the order." *CG&E Case* at ¶ 15. (Fifth Entry on Rehearing at 12-14; see also Third Entry on Rehearing at 11.) Sierra Club has provided no supporting authority that would indicate otherwise. As the Commission appropriately granted rehearing and limited the scope of rehearing to the Companies' Proposal, or alternatives thereto, we find that we had authority to consider Rider DMR, pursuant to R.C. 4903.10 (Fifth Entry on Rehearing at 12-13; Third Entry on Rehearing at 11; see also June 3, 2016 Entry at 4).

{¶ 40} Accordingly, we will reject the arguments raised by Sierra Club, OMAEG, and P3/EPSA and deny rehearing on the related assignments of error pertaining to these jurisdictional and procedural issues raised in their November 11, 2016, and November 14, 2016, applications for rehearing.

B. *The Commission's finding that the Stipulations, as modified by the Fifth Entry on Rehearing, continue to meet the three-prong test for the consideration of stipulations.*

1. OVERVIEW OF COMMISSION'S DECISION AND APPLICABLE THREE-PRONG TEST

{¶ 41} As we discussed in the Order and Fifth Entry on Rehearing, the parties filed stipulations, which the parties specifically describe as the culmination of discussions and accommodation of diverse interests. Ohio Adm.Code 4901-1-30 authorizes parties to Commission proceedings to enter into a stipulation. Although not binding on the Commission, the terms of such an agreement are accorded substantial weight. *Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, 125, 1992-Ohio-122, 592 N.E.2d 1370, citing *Akron v. Pub. Util. Comm.*, 55 Ohio St.2d 155, 157, 378 N.E.2d 480 (1978). This concept is particularly valid where the stipulation is unopposed by any party and resolves all issues presented in the proceeding in which it is offered.

{¶ 42} The standard of review for considering the reasonableness of a stipulation has been discussed in a number of prior Commission proceedings. See, e.g., *Cincinnati Gas & Elec. Co.*, Case No. 91-410-EL-AIR (Apr. 14, 1994); *Western Reserve Telephone Co.*, Case No. 93-230-TP-ALT (Mar. 30, 1994); *Ohio Edison Co.*, Case No. 91-698-EL-FOR, et al. (Dec. 30, 1993). The ultimate issue for our consideration is whether the agreement, which embodies considerable time and effort by the signatory parties, is reasonable and should be adopted. In considering the reasonableness of a stipulation, the Commission has used the following criteria: (1) Is the settlement a product of serious bargaining among capable, knowledgeable parties? (2) Does the settlement, as a package, benefit ratepayers and the public interest? (3) Does the settlement package violate any important regulatory principle or practice?

{¶ 43} The Supreme Court of Ohio has endorsed the Commission's analysis using these criteria to resolve issues in a manner economical to ratepayers and public utilities. *Indus.*

Energy Consumers of Ohio Power Co. v. Pub. Util. Comm., 68 Ohio St.3d 559, 1994-Ohio-435, 629 N.E.2d 423, citing *Consumers' Counsel* at 126. The Court stated in that case that the Commission may place substantial weight on the terms of a stipulation, even though the stipulation does not bind the Commission.

{¶ 44} In the Fifth Entry on Rehearing, the Commission found that the Stipulations, as modified by the Commission, satisfied the three-prong test for the consideration of stipulations. The Commission also noted that the three-prong test was the appropriate standard to apply in this proceeding. (Fifth Entry on Rehearing at 99-150.)

{¶ 45} Initially, CMSD contends that the Commission acted unreasonably and unlawfully when it applied the three-prong test, alleging that this standard is inappropriate for the Commission's consideration of Rider DMR. CMSD asserts that, because no party to this proceeding endorsed Rider DMR and it is not the subject of any of the submitted Stipulations, the rider should be evaluated on its own merits, rather than as a package.

{¶ 46} In its memorandum contra intervenor applications for rehearing, FirstEnergy argues that the Commission was correct to utilize the three-prong test for evaluating the Stipulated ESP IV.

{¶ 47} We note that this issue was thoroughly addressed in our Order and Fifth Entry on Rehearing (Order at 40-41, 43, 79, 81; Fifth Entry on Rehearing at 104-105). As noted in our Fifth Entry on Rehearing, the Commission must only review the three-prong test as it pertains to Stipulated ESP IV, as a package, as modified by the Commission in its orders. Accordingly, we find no merit in this argument and the assignment of error will, therefore, be denied.

2. THE COMMISSION'S FINDING THAT THE STIPULATIONS WERE THE PRODUCT OF SERIOUS BARGAINING AMONG CAPABLE, KNOWLEDGEABLE PARTIES.

{¶ 48} In the Fifth Entry on Rehearing, the Commission determined that the Stipulations were the result of serious bargaining among capable, knowledgeable parties in accordance with the first prong of the three-prong test for the consideration of stipulations (Fifth Entry on Rehearing at 101-105).

{¶ 49} NOPEC also argues that the Commission acted unreasonably and unlawfully when it applied the three-prong test, alleging that this standard is inappropriate for the Commission's consideration of Rider DMR. However, NOPEC focuses on the serious bargaining surrounding Rider DMR, noting that that no serious bargaining could have taken place as parties were not provided an opportunity to negotiate Rider DMR. NOPEC, like CMSD, also claims that the Commission should have found that Stipulated ESP IV did not pass the first prong of the three-prong test and evaluated each individual provision of Stipulated ESP IV on its own merits, rather than as a package. Similarly, because the requirement to maintain the FirstEnergy Corp. headquarters and nexus of operations has been removed from the Stipulated ESP IV and the agreement no longer represents the bargained-for package agreed to by the parties, NOPEC alleges it is unlawful for the Commission to continue to evaluate whether the Stipulated ESP IV satisfies the three-prong test.

{¶ 50} In its memorandum contra, FirstEnergy asserts that the Commission was correct to find that the Stipulations were the product of serious bargaining. Specifically, FirstEnergy contends that the Commission declined to find that a "modification of a stipulation means that the stipulation is not the result of serious bargaining among capable, knowledgeable parties" (Fifth Entry on Rehearing at 104). The Companies claim that holding otherwise would contradict Commission precedent and create unreasonable uncertainty for future settlement negotiations. As a final matter, FirstEnergy notes that no signatory party has withdrawn its support from the Stipulated ESP IV, even after the adoption of Rider DMR.

{¶ 51} We agree with FirstEnergy and note that this issue was thoroughly addressed in our Fifth Entry on Rehearing (Fifth Entry on Rehearing at 104-105). Parties to any stipulation are well aware that a stipulation is a recommendation only and that the stipulation is subject to modification by the Commission. We also note that none of the signatory parties to the

Stipulations in this proceeding filed an application for rehearing on this basis. Accordingly, we find no merit in this argument and the assignment of error should, therefore, be denied.

3. THE COMMISSION'S FINDING THAT THE STIPULATIONS, AS A PACKAGE, BENEFIT RATEPAYERS AND THE PUBLIC INTEREST

{¶ 52} In the Fifth Entry on Rehearing, the Commission determined that the Stipulations, as a package, benefited ratepayers and the public interest (Fifth Entry on Rehearing at 106-22).

a. The Commission's findings that the Companies faced a serious risk of a credit downgrade, which would result in adverse effects on the Companies and their customers, and that Rider DMR will help facilitate the Companies' access to the capital markets for investments in the distribution system and other short-term obligations.

{¶ 53} In their applications for rehearing, Sierra Club argues that the Companies failed to show that they face a serious risk of a credit downgrade that would have adverse effects on the Companies and their customers. Specifically, Sierra Club argues that the Commission erred in finding that the Companies face a serious risk of a credit downgrade because the Companies previously asserted that they could provide $561 million in net credits under the Companies' Proposal.

{¶ 54} Sierra Club, OMAEG, and Environmental Advocates also claim that, assuming there is a serious risk of a credit downgrade, Rider DMR would not facilitate the Companies' access to the capital markets because there is no evidence demonstrating that the rider will prevent a downgrade. OMAEG, OCC/NOAC, P3/EPSA, and Sierra Club argue that neither Staff nor the Companies have provided sufficient evidence to show that Rider DMR is necessary in order for the Companies to avoid falling below investment grade. CMSD further notes that there is no assurance that the proposed amount of $131 million in annual revenues through Rider DMR would prevent a downgrade in FirstEnergy Corp.'s or the Companies' credit ratings. OMAEG and Sierra Club also question whether the evidence showed that Rider

DMR is necessary to improve the investment grade ratings of the Companies and FirstEnergy Corp., noting that both currently have investment grade ratings and are able to access the capital markets. OMAEG asserts that there is no guarantee that Rider DMR would even prevent a downgrade of FirstEnergy Corp. or the Companies' credit ratings, noting that FirstEnergy Corp. would still require a substantial amount of additional funding to achieve the desired cash flow from operations (CFO) to debt ratio. As there was no evidence presented that other subsidiaries of FirstEnergy Corp. would be willing to contribute some portion of that amount, OMAEG claims that Rider DMR would likely have no impact on maintaining or improving FirstEnergy Corp.'s credit grade rating. Sierra Club, CMSD, and Environmental Advocates argue the Commission erred by approving Rider DMR because the evidence does not show that the Companies have any role in creating FirstEnergy Corp.'s current credit predicament; rather, these parties contend that the real underlying reason for the continued financial distress is due to the merchant generation owned by the Companies' affiliate. Moreover, Sierra Club argues that other affiliates will not be expected to pay their share of the burden to improve the overall financial health of FirstEnergy Corp., imposing a greater burden on the Companies' customers. OCC/NOAC add that, even accepting that such a risk exists, the Commission erred when it failed to quantify the extent of the "serious risk," arguing that any borrowing costs saved as a result of improving or maintaining the credit grade rating would be significantly outweighed by the additional cost attributed to Rider DMR. Sierra Club also contends that the Commission improperly relied upon Moody's Investors' Services (Moody's) and Standard & Poor (S&P) reports, adding that the Companies should have instead been required to produce their own projections about their financial well-being.

{¶ 55} In its memorandum contra, FirstEnergy initially asserts that many of the arguments raised by intervening parties are not new, and, therefore, rehearing should be denied as to these issues. The Companies contend that Rider DMR was adopted, in part, because the Companies face a serious risk of a credit downgrade and such a downgrade will adversely affect customers by making it more costly to access the capital markets for grid modernization projects. Additionally, the Companies assert that a properly constructed Rider DMR, in addition to other simultaneous actions taken by the Companies and FirstEnergy Corp. as part of the collective effort, should be able to avoid a credit rating downgrade. In fact, FirstEnergy adds that FirstEnergy Corp. has implemented several aggressive initiatives as a part of this effort. Furthermore, FirstEnergy again notes that the Commission previously found that the Companies face the serious possibility of a credit downgrade in the near future, necessitating a need for credit support at this time.

{¶ 56} FirstEnergy states there is sufficient evidence in the record, including intervenor testimony, showing that the credit ratings of FirstEnergy Corp. and the Companies falling to a non-investment grade rating is a matter of concern, which in turn would result in several potential negative consequences, including, but not limited to, more restrictive and expensive borrowing terms for necessary capital, the inability to make investments to ensure the delivery of safe and reliable electric service, the inability to make investments toward grid modernization, and more costly electric service for customers located in the Companies' service territories. Moreover, FirstEnergy adds that Moody's and S&P had both recently issued negative outlooks on FirstEnergy Corp. and expressed concern with its financial health moving forward, noting that those reports also specifically cited concerns regarding the outcome of this proceeding as a factor influencing their ultimate decision. In response to Sierra Club, FirstEnergy notes that Sierra Club provides no evidence as to why the admitted Moody's and S&P reports are unreliable, adding that, even if the projections were unreliable, these agencies will still rely upon this information when making their credit rating decisions in the future. The Companies note that these credit agencies are currently looking to the Commission to provide some assistance to the Companies in order to meet these financial metric targets.

{¶ 57} FirstEnergy adds that Sierra Club and OMAEG wrongly assume that current investment grade ratings eliminate the need for the Commission to implement Rider DMR, noting that there was substantial evidence on the record demonstrating a current need for credit support to prevent a possible downgrade in the near future. (Co. Ex. 206 at 7-8; Direct Ex. 1 at 3-4; Staff Ex. 13, Att. 3 at 2; Rehearing Tr. Vol. III at 723-24.) FirstEnergy also notes that despite the benefits offered in the Companies' Proposal, the Commission agreed that the Companies face significant financial challenges in the short-term.

{¶ 58} In its memorandum contra, Sierra Club states that FirstEnergy has failed to demonstrate the necessity of these revenue increases to protect the Companies' credit ratings by failing to provide forward-looking projections. Moreover, Sierra Club notes that FirstEnergy also failed to provide evidence of the costs that customers would face in the event FirstEnergy Corp. was downgraded.

{¶ 59} We find that these assignments of error were thoroughly addressed in the Fifth Entry on Rehearing, in which we found that the Companies did face a serious risk of a credit downgrade and such a downgrade would result in adverse effects on the Companies and their customers (Fifth Entry on Rehearing at 90-96). We will not duplicate that lengthy discussion in this decision. However, we will note that the consequences of the perceived risk were not limited to increased borrowing costs; rather, in addition to this concern, the record indicated that the Companies would face extreme hardship to have access to the capital markets at all in the event of a credit downgrade. Additionally, in response to Sierra Club's assertion that the Commission improperly relied on Moody's and S&P's reports, we agree with FirstEnergy and find that, whether this Commission agrees with the reports of these credit rating agencies or not, these reports will be the basis of their future credit rating decisions and offer the best available information as to what those decisions may entail. Further, we find that, given the disputed reliability of financial projections, the historic financial information in the record of this case is sufficient evidence demonstrating that FirstEnergy Corp., and consequently, the Companies, face a serious risk of a credit downgrade. Therefore, rehearing on these assignments of error will be denied.

b. The Commission's finding that Rider DMR will help promote grid modernization.

{¶ 60} CMSD, Environmental Advocates, OMAEG, Sierra Club, P3/EPSA, and OCC/NOAC contend that Rider DMR will not promote grid modernization because there is no requirement that the Companies directly spend Rider DMR revenues on grid modernization and that such benefits are illusory and have nothing to do with distribution modernization. Sierra Club again adds that FirstEnergy's customers will receive no commensurate benefit for the revenue collected under Rider DMR.

{¶ 61} OCC/NOAC assert that the Commission erred in finding that the creation of a grid modernization program is in the public interest because the Commission's finding was not supported by evidence, violating R.C. 4903.09. Specifically, OCC/NOAC note that the main tenets of the grid modernization plan considered in the Stipulated ESP IV will be determined in an entirely different proceeding and there is no indication as to how much these grid modernization efforts will cost. Moreover, OCC/NOAC point out that, due to this additional proceeding, FirstEnergy failed to meet its burden to show that any customer benefits would arise from this plan, or the details of any projected benefits. As a final point, OCC/NOAC contend that the Commission's conditions on the collection of Rider DMR revenues fail to benefit customers or the public interest.

{¶ 62} FirstEnergy argues that Rider DMR would provide sufficient credit support in order for the Companies to access the capital markets and acquire the necessary funds to invest in grid modernization projects. In order to accelerate grid modernization efforts, FirstEnergy argues that it will require a fair amount of capital support or access to capital markets with fair borrowing terms. FirstEnergy asserts that Rider DMR may be the appropriate method to ensure that the Companies have the necessary capital for investments in grid modernization. Specifically, FirstEnergy contends the increased revenues through Rider DMR would be used to: (1) improve the Companies' credit metrics; (2) strengthen the Companies' credit ratings; (3) preserve the Companies' ability to obtain capital at a reasonable cost; and (4) allow the

Companies' to implement capital intensive programs, like grid modernization. Contrary to the arguments presented by Sierra Club, the Companies further argue that there are additional obligations they face in the short-term that may affect their ability to make the necessary investments in their distribution system without the support provided by Rider DMR.

{¶ 63} Furthermore, FirstEnergy contends that the Commission did cite to record evidence when discussing the benefits associated with grid modernization in its Order and Fifth Entry on Rehearing, noting that the specific requirements for the grid modernization initiative will be determined in the grid modernization plan proceeding. Also, the Companies note that the grid modernization benefits associated with Rider DMR are significant and will help foster state policy through the development of distribution grid modernization.

{¶ 64} Finally, FirstEnergy asserts that there are two major issues with the intervenors' belief that all monies received through Rider DMR should be directly used to fund grid modernization. The first issue is that the revenue collected under Rider DMR will only represent a fraction of the significant capital investment necessary to implement grid modernization projects throughout the distribution grid. Secondly, the Companies will need to access capital at a reasonable cost to ensure that these modernization efforts are realized, necessitating immediate credit support to improve relevant financial metrics. Thus, FirstEnergy requests the Commission deny rehearing on these grounds.

{¶ 65} We reject the assignments of error raised by CMSD, Environmental Advocates, OMAEG, Sierra Club, P3/EPSA, and OCC/NOAC, as the arguments supporting the assignments of error were thoroughly addressed in the Fifth Entry on Rehearing (Fifth Entry on Rehearing at 50-51, 96-97). Specifically, we noted that we were persuaded by the testimony of RESA witness Crockett-McNew who testified that the Companies should focus on the regulated side of the business and modernize the grid, including "expansion of smart meters, data access and system design to allow for greater reliability and technically advanced competitive market offers." (RESA Ex. 7 at 6; Fifth Entry on Rehearing at 50-51). We also relied on the testimony of Staff witness Choueiki, in which he stated that Rider DMR is intended to "enable the Companies to procure funds to jumpstart their distribution grid modernization initiatives." (Staff Ex. 15 at 15; Fifth Entry on Rehearing at 90-91). As we also noted, Stipulated ESP IV required the Companies to file a grid modernization business plan (Fifth Entry on Rehearing at 88-89, 107). Consistent with our finding in the Fifth Entry on Rehearing, moving forward with the consideration of a grid modernization plan is in the public interest and is consistent with state policy to "[e]ncourage innovation and market access for cost-effective supply- and demand-side retail electric service including, but not limited to, demand-side management, time-differentiated pricing, waste energy recovery systems, *smart grid programs, and implementation of advanced metering infrastructure.*" R.C. 4928.02(D) (emphasis added) (Fifth Entry on Rehearing at 88-89). Therefore, rehearing on these assignments of error will be denied.

c. ***The Commission's finding that Rider DMR will help promote economic development.***

{¶ 66} Sierra Club contends that the Commission erred to find that Rider DMR will help promote economic development, noting that FirstEnergy Corp.'s executed lease made it incapable of moving its headquarters until 2025. OMAEG argues that Rider DMR will instead harm economic development in Ohio and that Ms. Murley's economic impact analysis failed to consider other impacts Rider DMR may have on the economy outside of the Akron area. OCC/NOAC state that, because the Commission failed to adopt Staff's recommendation to make Rider DMR subject to refund, the condition that FirstEnergy Corp. maintain its corporate headquarters and nexus of operations in Akron, Ohio does very little to provide the necessary protections to customers.

{¶ 67} FirstEnergy asserts that Rider DMR promotes economic development in at least three different ways: (1) to the extent Rider DMR fosters the implementation of grid modernization or other distribution system-related projects, there will be resulting economic benefits from those projects; (2) to the extent Rider DMR enables a modernized and reliable grid, the Companies service territories will become more attractive places for business to locate or expand; and (3) the economic benefits derived from maintaining FirstEnergy Corp.'s headquarters in Akron, Ohio. As to the third benefit, FirstEnergy notes that the Commission found ample evidence of the economic benefit of maintaining the headquarters in Akron, noting that no evidence was produced to dispute the findings of FirstEnergy witness Murley's economic impact study, which indicated a $568 million annual economic impact (Fifth Entry on Rehearing at 111-12). FirstEnergy also notes that, even if the lease had been admitted as an exhibit in this proceeding, there was no evidence in the record to show that it may have been in FirstEnergy's economic interest to terminate the lease early. Moreover, FirstEnergy notes that OMAEG's arguments regarding Ms. Murley's testimony were already considered, and summarily rejected, by the Commission (Fifth Entry on Rehearing at 77-78, 112).

{¶ 68} We find that the assignments of error raised by Sierra Club and OMAEG should be denied, as they were fully considered and addressed in the Fifth Entry on Rehearing (Fifth Entry on Rehearing at 111-12).

d. The Commission's findings that several suggested modifications regarding Rider DMR should be rejected.

i. The Commission's finding that several proposals regarding the calculation of Rider DMR revenue should be rejected.

{¶ 69} CMSD initially asserts that the Commission erred by violating Commission precedent against determining the amount of a rate increase based upon the amount of revenue necessary to satisfy rating agency metrics, rather than determining an amount that would produce a fair and reasonable rate of return on investment. *In re the Application of The Cleveland Elec. Illum. Co. for Authority to Amend and Increase Certain of its Filed Schedules Fixing Rates and Charges for Elec. Service*, Case No. 79-537-EL-AIR, Opinion and Order (July 10, 1980). Additionally, Sierra Club argues that any allocation of credit support of the Companies' customers should reflect the responsibility of the Companies for FirstEnergy Corp.'s CFO to debt shortfall, relative to the other FirstEnergy Corp. subsidiaries. Several intervenors raised their concerns as to whether the gross up for income taxes was necessary when calculating Rider DMR revenue. OMAEG also argues that the Fifth Entry on Rehearing was unjust and unreasonable due to the fact the Companies considered no tax rate other than the composite tax rate of 36 percent, in violation of R.C. 4905.22. Additionally, OMAEG claims that the amount the Companies will actually have to pay in taxes may be significantly lower due to bonus depreciation.

{¶ 70} In response to CMSD's argument, FirstEnergy initially contends that the precedent CMSD cites in support of its assertion is neither binding nor informative in this proceeding, as the matter in that case arose under an application for a rate increase pursuant to R.C. 4909.18. FirstEnergy adds that ESPs are expressly excepted from the requirements of R.C. Chapter 4909. Moreover, even if the case were statutorily applicable, FirstEnergy claims that it would nonetheless lack persuasion, as it involved the Commission's rejection of a single witness's analysis used to support a recommended ROE. FirstEnergy also contends that using CFO to debt ratios as the allocation factor would not be appropriate, as it would lead to a meaningless comparison and ignores the fact that FirstEnergy Corp. does not generate any revenues of its own, but holds some debt separately from its subsidiaries. Additionally, the Companies agree with the Commission's decision to gross-up the required revenue to account for additional income taxes, stating that omitting such a calculation would leave the Companies short of the target CFO. The Companies further contend that OMAEG's argument is misplaced, as the Commission allowed for a gross-up at the Federal corporate income tax rate, and not the Companies' average composite tax rate of 36 percent. FirstEnergy also notes OMAEG's argument that the actual tax rate may be significantly lower due to bonus depreciation is unsupported by the record, adding that FirstEnergy witness Mikkelsen explained that the composite tax rate does not change frequently or dramatically, making it an ideal representation of taxes for purposes of this calculation.

{¶ 71} However, in its own application for rehearing, FirstEnergy alleges that the Commission should have adopted the Companies' numerous recommendations as to the calculation of Rider DMR in order to accomplish the Commission's stated objectives. First, the Companies allege that the Commission improperly limited the term of Rider DMR to three, or potentially five, years, noting that the uncertainty created from such a short-term rider may make it more difficult for the Companies to access the capital markets and fall short of supplying the capital necessary for the Companies' grid modernization needs. Rather, the Companies argue that Rider DMR should remain in place for the entire *ESP IV* term, and if the Commission so chooses, it may conduct a review as an element of the fourth-year review under R.C. 4928.143(E). Next, FirstEnergy contends that the Commission improperly failed to include in Rider DMR any value attributed to the condition that FirstEnergy Corp.'s headquarters and nexus of operations remain in Akron, Ohio, despite accepting the testimony of FirstEnergy witness Murley that the annual economic impact of the headquarters is $568 million. As such, FirstEnergy requests that the Commission grant rehearing in order to amend the revenue calculation for Rider DMR to appropriately account for the value of maintaining FirstEnergy Corp.'s headquarters and nexus of operations in Akron, Ohio or, alternatively, to include such value as a new component of Rider EDR. As its third assignment of error regarding the calculation of Rider DMR, FirstEnergy contends that the Commission erred in its finding that a 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, further stating using the midpoint of Moody's updated target range would provide sufficient protection to account for other potential risks and would be consistent with Staff witness Buckley's methodology. As its fourth assignment of error, the Companies assert that the Commission 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, is appropriate in determining the revenue amount to be generated by Rider DMR. FirstEnergy adds that the three-year range from 2012 through 2014 represents a more accurate depiction of the Companies' deteriorating creditworthiness, as this timeframe represents the years in which the CFO to debt ratio fell below Moody's target 14 to 16 percent range. FirstEnergy also notes the Commission's decision to utilize the data from 2011 simply because it is "part of the historic average" makes little sense when such data includes a period of time that are not similar to present and future circumstances. Finally, the Companies contend that the Commission improperly found that Staff's allocation factor based on energy operating revenues was appropriate to use in determining the amount of revenue to be generated by Rider DMR, noting that the 22 percent allocation factor understates the significance of the Companies to FirstEnergy Corp. Rather, the Companies argue that using net income would be a more appropriate basis for the allocation factor, given that it is neither limited to gross cash inflows nor influenced by the level of shopping in each utility's service territory, resulting in the more representative 40 percent allocation factor.[5]

{¶ 72} *In response to FirstEnergy's various assignments of error, Environmental* Advocates and Sierra Club argue that FirstEnergy's application for rehearing only bolsters the intervenors' concerns that Rider DMR is meant to support FirstEnergy Corp.'s unregulated subsidiaries, rather than invest in grid modernization. Initially, OMAEG once again claims that FirstEnergy failed to demonstrate that the credit support it is requesting is necessary, given the current investment grade ratings of FirstEnergy Corp. and the operating utilities. Moreover, Environmental Advocates, OMAEG, Sierra Club, and OCC/NOAC contend that, as approved by the Commission, Rider DMR is only intended to jumpstart grid modernization efforts; thus, granting FirstEnergy's request to allow Rider DMR to cover the entire time period for its grid modernization efforts would be improper. Furthermore, even assuming that Rider DMR was needed to improve credit ratings, OCC/NOAC note that FirstEnergy acknowledged that it did not know how much time would be required to improve credit ratings, and Sierra Club again claims that FirstEnergy has failed to demonstrate the necessity of these revenue

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5 Alternatively, the Companies assert that distribution sales, customer counts, and distribution employee headcounts would also be acceptable to use as the basis for the allocation factor and are supported by the record. The use of any of these alternative allocation factors, or the Companies' recommendation of net income, would result in an allocation factor between 34 to 40 percent.

increases to protect the Companies' credit ratings by failing to provide forward-looking projections. Environmental Advocates, Sierra Club, OMAEG, and OCC/NOAC also disagree with the suggestion of incorporating all, or at least a portion of, the $568 million economic impact benefit into the required revenue calculation for Rider DMR, stating that numerous intervenors questioned the validity of FirstEnergy witness Murley's calculations, especially for the fact that she failed to account for the economic consequences of the costs to customers and only attempted to quantify the alleged benefits. Additionally, NOPEC alleges that the Commission already thoroughly considered and addressed the arguments raised by FirstEnergy in its application for rehearing. NOPEC, OMAEG, and OCC/NOAC also specifically note that the Commission's adoption of the allocation factor based on energy operating revenues was reasonable, as Staff witness Buckley indicated the fact that there are a significant number of shopping customers in the Companies' service territories only supports the use of energy operating revenues as a more valid basis for allocation. Sierra Club adds that FirstEnergy has not provided any information as to the CFO to debt ratios, or other relevant credit metric information, for the individual Companies or other FirstEnergy Corp. subsidiaries, making the allocation decision almost impossible to determine. Sierra Club and OMAEG further note that the Companies' request to use the 15 percent target ratio does not represent the minimum amount necessary; rather, this ratio serves as the midpoint to the most recent Moody's report. OCC/NOAC and OMAEG contend the four-year average of CFO to debt ratios was appropriate as that time period represents information since the last significant restructuring of FirstEnergy Corp. and signifies a more reliable historic trend to utilize. These intervening parties also argue that FirstEnergy is only proposing these modifications to the calculation of Rider DMR in order to serve its own interests and arbitrarily increase the amount of revenues to be collected through the rider.

{¶ 73} We find that the parties have raised no new arguments and that these issues were comprehensively addressed in the Fifth Entry on Rehearing. With respect to arguments raised regarding the allocation factor, we note that Staff witness Buckley was merely acknowledging that there are several appropriate methods to determining the allocation factor; however, based on the record and his financial background, he recommended that energy operating revenues be used, indicating that this allocation factor would be the most credible because using net income may overcompensate the Companies' contribution of services to FirstEnergy Corp. due to the high number of shopping customers in their service territories (Fifth Entry on Rehearing at 93-96; Rehearing Tr. Vol. III at 553-54, 738-39).

ii. The Commission's finding that Rider DMR should not be subject to refund.

{¶ 74} OCC/NOAC argue that the Commission should have made Rider DMR subject to refund, as an additional protection for customers.

{¶ 75} FirstEnergy notes that OCC/NOAC have provided no record support for this recommendation have not addressed the inherent flaws with such a recommendation, such as that making the revenues refundable may undermine the very purpose of the rider, which is to provide credit support, and that refunding revenues may constitute retroactive ratemaking.

{¶ 76} The Commission has held on two occasions that Rider DMR should not be subject to refund as this would be counterproductive to the purpose of the rider and impose additional risks on the Companies (Fifth Entry on Rehearing at 97; Seventh Entry on Rehearing at 4-5). OCC/NOAC have raised no new arguments in support of this assignment of error. Thus, OCC/NOAC's assignment of error should be denied.

iii. The Commission's finding that Rider DMR revenues should be excluded from the SEET calculation.

{¶ 77} OCC/NOAC, OMAEG, and NOPEC argue that revenues collected under Rider DMR should not be excluded from the calculation of the annual SEET, noting that all ESP provisions should be included in the SEET and that Rider DMR is an ESP provision, pursuant to R.C. 4928.143(F). NOPEC argues the Commission's decision was arbitrary and that, as a creature of statute, the Commission is bound by the plain language of R.C. 4928.143(F) and must include Rider DMR revenues in the SEET calculation. OCC/NOAC contend that the Supreme Court of Ohio has already provided guidance as to what this statute requires, holding that the reference to "adjustments" in the statute refers to any provisions that are included in the ESP that resulted in excessive earnings. Further, OCC/NOAC argue that while the Supreme Court has upheld the Commission's decision to exclude earnings that were not derived from the ESP, the same analysis would not apply in this case as Rider DMR revenues will be derived from the ESP. *In re Columbus S. Power Co.*, 134 Ohio St.3d 392, 983 N.E.2d 685. OCC/NOAC add that excluding such revenues from the SEET may deprive customers of refunds they would have otherwise received and is not in the public interest. Moreover, OMAEG claims that if the revenues collected under Rider DMR do, in fact, represent an amount for necessary credit support, then logically these revenues would never equate to excessive earnings. For these reasons, OCC/NOAC, OMAEG, and NOPEC request the Commission grant rehearing.

{¶ 78} FirstEnergy contends that the Commission has already considered and thoroughly addressed these arguments, stating that including Rider DMR revenue in the SEET calculation "would introduce an unnecessary element of risk to the Companies and undermine the purpose of providing credit support to the Companies." (Fifth Entry on Rehearing at 98). Moreover, FirstEnergy asserts that it was proper to exclude Rider DMR from SEET largely for three reasons: (1) Rider DMR charges constitute "extraordinary items"; (2) there are no comparable companies with a rider mechanism such as Rider DMR, thus, making it impossible to create a valid comparison for purposes of the SEET calculation; and (3) the Order provides for SEET exclusions "associated with any additional liability or write-off of regulatory assets due to implementing the Companies' *ESP IV*." (Co. Ex. 206 at 22-23).

{¶ 79} In its own application for rehearing, FirstEnergy alleges that the Commission erred by concluding that it would revisit its decision to exclude Rider DMR revenues from the SEET calculation when evaluating any request by the Companies to extend Rider DMR.

FirstEnergy states that, given the Commission's decision to exclude Rider DMR revenues from the SEET calculation during the initial three-year period, the exclusion should continue for as long as Rider DMR is in effect. The Companies note that the basis of the Commission's decision to exclude these revenues from SEET was that including them would introduce unnecessary risk and undermine the purpose of providing credit support, which they also allege would apply in any year that Rider DMR is in effect. Thus, the Companies request the Commission grant rehearing and find that Rider DMR revenues should be excluded from the SEET calculation while Rider DMR is in effect.

{¶ 80} In their memoranda contra, NOPEC and OCC/NOAC contend that, pursuant to the plain language of R.C. 4928.143(F), Rider DMR revenues must be included in the SEET calculation because they were approved as part of an ESP proceeding. Moreover, OCC/NOAC again note that the purpose of Rider DMR will not be compromised if these revenues are included in the SEET calculation, as the rider was only authorized to provide necessary credit support to the Companies, not excessive earnings. Thus, NOPEC and OCC/NOAC urge the Commission to deny FirstEnergy's application for rehearing on this basis, and instead find that R.C. 4928.143(F) requires that all Rider DMR revenues received during *ESP IV* be included in the SEET calculation.

{¶ 81} The Commission affirms our ruling that the revenue collected under Rider DMR should be excluded from SEET for the initial three-year period. At the time we issued the Fifth Entry on Rehearing, we found the arguments made by the Companies to be persuasive and continue to do so today, to the extent such arguments are relating to the initial three-year period of Rider DMR. Intervenors have raised no new arguments for our consideration, and we fully considered those arguments in the Fifth Entry on Rehearing. (Fifth Entry on Rehearing at 85-86, 98). However, the Commission notes that we will also reconsider whether to continue excluding Rider DMR revenues from SEET when we evaluate any possible extension of Rider DMR as a portion of our extensive review of Rider DMR (Fifth Entry on

Rehearing at 98). Moreover, intervenors' arguments raise hypothetical concerns in any event and, thus, are also premature. Accordingly, we find that rehearing on these assignments of error should also be denied.

iv. The Commission's finding that additional proposed modifications regarding the use of revenues collected under Rider DMR should be rejected.

{¶ 82} Sierra Club asserts that the Commission should have adopted its recommendations to further benefit the Companies' customers, including that the Commission require that all Rider DMR revenues be set aside in a separate account(s) within the Companies and restrict disbursements from this account(s), that the Commission restrict the use of revenues collected under Rider DMR to grid modernization projects or other projects benefiting customers, and such projects be implemented within a reasonable amount of time, and that the Companies be precluded from receiving double recovery on capital investments made with Rider DMR revenues, particularly recovery of depreciation payments. Finally, in its next assignment of error, Sierra Club contends that the Commission's decision to refrain from adopting Sierra Club's recommendations was made without any evidentiary basis and is against the manifest weight of the evidence.

{¶ 83} FirstEnergy initially argues that the Commission has already considered and rejected Sierra Club's recommendations, stating that "placing restrictions on the use of Rider DMR funds would defeat the purpose of Rider DMR." (Fifth Entry on Rehearing at 86, 127). The Companies add that there is a significant difference between the revenues necessary to provide credit support to access capital to pay for grid modernization projects and the capital necessary to pay for such projects, the former being that which Rider DMR was intended. FirstEnergy also notes that the Commission's determination was based on ample evidence in the record.

{¶ 84} We agree that these arguments were already raised by Sierra Club and subsequently rejected by this Commission (Fifth Entry on Rehearing at 86-87, 127). Moreover, the Commission agrees with FirstEnergy in that our decision was based on a significant record that demonstrated the following: (1) the Companies are facing a serious risk of a credit downgrade that would have adverse effects upon the Companies' ability to access the capital markets; (2) Rider DMR is intended to provide credit support to the Companies in order to avoid such a downgrade; and (3) maintaining the Companies' current ratings will allow the Companies to access capital markets at a reasonable cost to fund grid modernization projects (Fifth Entry on Rehearing at 126-27). Therefore, we find these assignments of error should be denied.

v. The Commission's finding to reject OEG's recommendations for Rider DMR's cost allocation and rate design.

{¶ 85} In their applications for rehearing, Nucor and OEG raise a single assignment of error arguing that the Commission should grant rehearing of the Fifth Entry on Rehearing and adopt the alternative Rider DMR cost allocation and rate design as recommended by OEG witness Baron, stating that this alternative recommendation would be more reflective of cost causation and significantly mitigate the impact of the rider on the residential class. Nucor and OEG note that, while the Commission recognized the alternative recommendation proposed by OEG, it did not address why this alternative proposal would be inappropriate. OEG explains its alternative proposal would result in the same rate impacts for residential customers as the cost allocation methodology adopted by the Commission; however, OEG alleges its proposal would remain superior because the non-residential DMR cost allocation would incorporate a distribution component to recover distribution-related costs.

{¶ 86} Rehearing on this assignment of error should be denied. We do not agree that the record supports the claim that the rate impacts on residential customers would be the same under OEG witness Baron's proposal as under Staff witness Turkenton's proposal. Upon further consideration of OEG's alternative proposal, the Commission continues to find that such a cost allocation would disproportionately affect residential customers as well as smaller commercial customers, including schools and churches. We affirm our decision to adopt Ms. Turkenton's recommendation, as that rate design and cost allocation would result in a fair and equitable distribution of costs (Rehearing Tr. Vol. II at 431; Fifth Entry on Rehearing at 97-98).

e. The Commission's finding that "ring fencing" measures should not be implemented at this time.

{¶ 87} In its application for rehearing, NOPEC contends that the Commission unreasonably failed to implement ring fencing at this time, noting that the Staff's periodic review of the costs associated with Rider DMR will fail to protect the Companies from continuing credit problems. In response, FirstEnergy asserts that no witness recommended that the Commission impose such measures in this proceeding, and that OCC witness Kahal even acknowledged that these measures would be premature at this time (OCC Ex. 46 at 14).

{¶ 88} The Commission agrees with FirstEnergy and finds that this assignment of error should be denied as the evidence, including the testimony of OCC witness Kahal, demonstrates that such measures are unnecessary at this time (OCC Ex. 46 at 14; Fifth Entry on Rehearing at 96).

f. The Commission's finding that the Companies should file a base distribution rate case by the end of ESP IV.

{¶ 89} In its application for rehearing, FirstEnergy alleges that it was premature for the Commission to direct the Companies to file a distribution rate case at the end of *ESP IV*, noting that there was no evidence to justify such an order and arguing that a more reasonable alternative would be to allow the Companies to file their next SSO application and determine, at that time, whether a distribution rate case would be appropriate. The Companies also assert that the distribution rate freeze was considered a benefit to customers in the Order and the Fifth Entry on Rehearing (Order at 92-93, 119; Fifth Entry on Rehearing at 115), and the SEET mechanism would ensure the Companies would not recover excessive earnings.

{¶ 90} NOPEC asserts this assignment of error should also be rejected by the Commission, noting that any continued distribution rate freeze under a future ESP would be illusory, just as it is in this proceeding. Further, NOPEC again asserts that the base distribution rate case was held in 2007 and financial circumstances have changed significantly since that time, specifically noting the capital costs have reached historic lows. OMAEG also remarks on the Commission's broad authority to modify ESPs and stipulations based on the evidence in the record and argues that the Commission acted reasonably and within its authority when determining that a base distribution rate case should be filed upon the conclusion of *ESP IV*. NOPEC, OMAEG, and OCC/NOAC urge the Commission to affirm its decision and allow an opportunity to have the Companies' authorized rate of return properly scrutinized, citing the reasoning conveyed by Staff witness McCarter when she stated "Staff believes it is a prudent regulatory practice to gain a holistic understanding of the regulated distribution company on a regular basis." (Staff Ex 6 at 13).

{¶ 91} The Commission finds that our decision to require FirstEnergy to file a distribution case should be affirmed. The Opinion and Order in FirstEnergy's last distribution rate case was issued on January 21, 2009. *In re FirstEnergy*, Case No. 07-551-EL-AIR et al., Opinion and Order (Jan. 21, 2009). Although mechanisms such as FirstEnergy's Rider DCR reduce regulatory lag and promote gradualism in setting distribution rates, we agree with Staff witness McCarter that it is sound regulatory practice to conduct regular distribution rate cases. Accordingly, rehearing on this assignment of error should be denied.

g. The Commission's finding that the increases in the revenue caps under Rider DCR would be terminated if ESP IV was terminated prior to its currently approved eight-year term.

{¶ 92} The Companies request that the Commission grant rehearing in order to clarify that the revenue cap increases would continue until rendered moot by a replacement plan following the termination of *ESP IV*, noting that, in the event *ESP IV* is terminated as a result of the R.C. 4928.143(E) fourth year review, there may be a lengthy transition process before a new plan would be approved. Further, the Companies argue that R.C. 4928.143(E) authorizes the Commission to impose conditions on the ESP's termination in order to accommodate any potential transition to another plan. FirstEnergy also states that, as these caps represent its historical capital expenditure trends, it is reasonable to make such an extension.

{¶ 93} NOPEC asserts FirstEnergy ignores the fact that if *ESP IV* were terminated pursuant to R.C. 4928.143(E) their historical capital expenditure trends would no longer be valid. As such, NOPEC argues that it would be unreasonable and unlawful to permit the Companies to receive these annual increases after the Commission has found that the Companies have excessive earnings or that the ESP is no longer more favorable in the aggregate than an MRO. Moreover, OCC/NOAC add that FirstEnergy will still be able to collect general costs under Rider DCR, regardless if the caps are terminated. Additionally, OCC/NOAC claim FirstEnergy failed to provide any evidence that they would be unable to provide reliable electric service and stable rates for customers in the event the caps are terminated.

{¶ 94} We agree with FirstEnergy that R.C. 4928.143(E) authorizes the Commission to impose conditions on an ESP's termination in order to accommodate any potential transition to another plan. Therefore, the Commission will grant rehearing and clarify that, if *ESP IV* is terminated pursuant to R.C. 4928.143(E), the Rider DCR revenue cap increases currently in place will continue until the Commission establishes a new SSO. If FirstEnergy exercises its right to terminate *ESP IV* at some point in the future following rehearing or an appeal, the Rider DCR revenue cap increases yet to be implemented at the time of termination will also be terminated along with the remaining provisions of *ESP IV*. However, FirstEnergy will be permitted to continue to recover costs already incurred under Rider DCR.

h. The Commission's finding that the Rider NMB Opt-Out pilot program should be approved, as modified by the Commission in its Fifth Entry on Rehearing.

{¶ 95} The Companies claim that the Commission modified the Rider NMB Opt-Out pilot program in two key ways: (1) directed that customers who may benefit from participation may file an application under R.C. 4905.31 for permission to participate, at which point the Commission will determine if such participation is in the public interest; and (2) reserved the right to terminate or modify the program without specifying the process to be used by the Commission to make such decisions (Fifth Entry on Rehearing at 139-40). As to the first issue, the Companies argue that the Commission improperly expanded the pilot program to any interested customer and provided no guidance as to how the Commission would determine if a customer's participation in the program would be in the public interest. In order to ensure the program is manageable in size and fair to both the Companies and the eligible participants, FirstEnergy contends that the Commission should revert back to its Order, in which it approved the pilot program as agreed to by the signatory parties, or in the alternative, provide guidance as to how applications to participate in the pilot program will be processed. Similarly, FirstEnergy requests that the Commission prescribe a process in which the Companies and other interested parties may participate before either the program or the rider is modified or terminated.

{¶ 96} OMAEG contends that allowing eligible customers the opportunity to participate in the program through a reasonable arrangement application is appropriate, given the fact that the pilot program, as it was first proposed, was unduly discriminatory, anti-competitive, and in violation of R.C. 4928.02(A). However, OMAEG agrees with the Companies that the Commission should provide a clearly defined, expedited process for determining whether "customers' participation is appropriate" prior to filing a reasonable arrangement with the Commission.

{¶ 97} Rehearing on these assignments of error should be denied. The Commission has broad authority under R.C. 4905.31 to approve reasonable arrangements between electric distribution utilities and mercantile customers, and we simply acknowledged that broad authority in stating that a mercantile customer may join the pilot program through an application under R.C. 4905.31. We reject any implication that such applications would somehow limit the Commission's ability to determine the proper size of the pilot program or whether the participation of any given customer is in the public interest. With respect to the process which the Commission will use to determine if Rider NMB or the pilot program should be terminated, the Commission finds that it is unnecessary to detail such a process at this time. All parties will be given a full and fair opportunity to participate in any process set by the Commission to determine the future of Rider NMB and/or the pilot program before a decision is made by the Commission.

i. The Commission's finding that Rider GDR should be approved, provided the scope of potential costs to be included in the rider be limited.

{¶ 98} Additionally, OCC/NOAC argue that the Commission's approval of Rider GDR does not provide any benefits to customers and will cause the Companies to receive significantly excessive earnings, despite the Commission's modifications in its Fifth Entry on Rehearing. Specifically, OCC/NOAC contend that the Commission did not address the fact that the rider provides no incentive or requirement that FirstEnergy file for rate reductions resulting from changes in governmental regulations or whether Rider GDR will erase the benefits associated with a distribution rate freeze. OCC/NOAC add that Rider GDR is an open-ended collection mechanism and the Companies will be able to seek recovery for an endless amount of costs related to federal and state governmental directives, further shifting cost recovery risks onto consumers. OCC/NOAC state the fact that Staff will review such costs does not alleviate the concerns raised in the Fifth Entry on Rehearing and requests that the Commission grant rehearing.

{¶ 99} FirstEnergy notes that these assignments of error have previously been raised and were rejected by the Commission, both in the original Order as well as the Fifth Entry on Rehearing.

{¶ 100} With respect to these assignments of error, the Commission thoroughly addressed these arguments in the *ESP IV* Opinion and Order and the Fifth Entry on Rehearing (Order at 67; Fifth Entry on Rehearing at 116). OCC/NOAC have raised no new arguments on rehearing; accordingly, rehearing on this assignment of error should be denied.

j. The Commission's finding that competitive bidding was unnecessary for the low-income customer assistance programs and initiatives.

{¶ 101} OCC/NOAC note the Commission also erred by failing to modify the Stipulated ESP IV to require competitive bidding of low-income programs, asserting that this modification would have resulted in a more cost-effective outcome for consumers and fostered more efficient use of such funds. In particular, OCC/NOAC claim that the Commission violated R.C. 4903.09 by failing to support its decision with record evidence.

{¶ 102} FirstEnergy notes that this assignment of error has previously been raised and was rejected by the Commission and was supported by the record evidence in this proceeding, in accordance with R.C. 4903.09.

{¶ 103} With respect to this assignment of error, the Commission thoroughly addressed these arguments in the *ESP IV* Opinion and Order and the Fifth Entry on Rehearing (Order at 96, 118-19; Fifth Entry on Rehearing at 117). Moreover, when addressing this argument in the Fifth Entry on Rehearing, we specifically cited our reasoning from the Order and explained our decision to modify the Stipulated ESP IV to further protect low-income customers by implementing an additional degree of oversight and review. OCC/NOAC have raised no new arguments on rehearing; accordingly, rehearing on this assignment of error should be denied.

4. **THE STIPULATIONS, AS MODIFIED BY THE COMMISSION, VIOLATE NO IMPORTANT REGULATORY PRINCIPLES OR PRACTICES**

{¶ 104} The Commission concluded in its Fifth Entry on Rehearing that the Stipulations, and as modified by the Commission, do not violate any important regulatory principles or practices and, thus, satisfy the third prong of three-prong test (Fifth Entry on Rehearing at 121-150).

a. The Commission's finding that Rider DMR complies with R.C. 4928.02.

{¶ 105} OMAEG and OCC/NOAC contend that Rider DMR does not advance state policy under R.C. 4928.02. Specifically, these parties continue to argue that Rider DMR will limit competitive retail generation, other generating companies may view Rider DMR as simply providing FirstEnergy Corp. a large cash infusion, thereby deterring new entry into the supply market. OMAEG and OCC/NOAC also raise the fact that Rider DMR contains no firm commitment or requirement that the Companies use the revenues collected under the rider to fund its distribution grid modernization. As such, OMAEG contends that Rider DMR is a way to provide credit support to the Companies and FirstEnergy Corp., not to modernize the grid. Further, OCC/NOAC contend the fact that the Companies need to jumpstart their grid modernization investments is also an unsupported fallacy, explaining that the Companies had already committed to filing a grid modernization business plan (Co. Ex. 154 at 9-10). OCC/NOAC also note that, due to the enhancements of Rider AMI, including the ability to collect money from customers based on a forward looking formula rate concept, there is no need for an additional jumpstart. Rather than promote diversity of supplies or suppliers in Ohio, OMAEG contends that Rider DMR will actually diminish the diversity of supplies and limit competitive retail generation choices for customers, in violation of R.C. 4928.02(C). Thus, OMAEG and OCC/NOAC maintain that Rider DMR fails to promote or advance the policies set forth in R.C. 4928.02.

{¶ 106} FirstEnergy argues that these points have previously been considered and rejected by the Commission. Specifically, FirstEnergy notes that the Commission found Rider DMR promotes state policy to "[e]nsure diversity of electricity supplies and suppliers, by giving consumers effective choices over the selection of those supplies and suppliers and by encouraging the development of distributed and small generation facilities" and to "[e]ncourage innovation and market access for cost-effective supply- and demand-side retail electric service including, but not limited to, demand-side management, time-differentiated pricing, waste energy recovery systems, smart grid programs, and implementation of advanced metering infrastructure" (Fifth Entry on Rehearing at 122-23). Furthermore, FirstEnergy argues that the Commission also found that "Rider DMR, by incentivizing and supporting grid modernization, promotes additional provisions of state policy to: ensure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service; and ensure the availability of unbundled and comparable retail electric service that provides consumers with the supplier, price, terms, conditions, and quality options they elect to meet their respective needs. R.C. 4928.02(A); R.C. 4928.02(B)," adding that "the retention of FirstEnergy Corp.'s headquarters and nexus of operations in Akron, Ohio serves to facilitate the state's effectiveness in the global economy. R.C. 4928.02(N)." (Fifth Entry on Rehearing at 123).

{¶ 107} The Commission agrees with FirstEnergy and finds that these arguments were fully addressed in the Fifth Entry on Rehearing (Fifth Entry on Rehearing at 122-23). As such, these assignments of error will be denied.

b. The Commission's finding that Rider DMR is authorized under R.C. 4928.143(B)(2)(h).

{¶ 108} In their respective applications for rehearing, Sierra Club, OCC/NOAC, P3/EPSA, NOPEC, Environmental Advocates, and OMAEG assert that the Commission erred when it determined that Rider DMR is authorized under R.C. 4928.143(B)(2)(h). Additionally, these parties contend that Rider DMR should not be considered related to distribution service because there is no requirement that the Companies spend Rider DMR revenues on distribution modernization; rather, they argue that the revenues will be used to benefit FirstEnergy Corp. by providing it credit support. NOPEC claims that Staff witness Buckley even acknowledged that Rider DMR was related to credit support instead of distribution service. As additional evidence that Rider DMR is neither necessary nor related to the distribution system, OCC/NOAC, OMAEG, and NOPEC also argue the Companies already have the Advanced Metering Infrastructure (Rider AMI) and the Delivery Capital Recovery Rider (Rider DCR) to recover capital expenditures made on grid modernization and other distribution infrastructure investments. Given the plain language of R.C. 4928.143(B)(2)(h), NOPEC further contends that incentives are only appropriate when a utility is actually incurring costs for investment in infrastructure modernization, which is not the case here. OMAEG, OCC/NOAC and Sierra Club also argue the "sufficient progress" condition created in the Fifth Entry on Rehearing is vague and "essentially meaningless," given the fact that the scope of the grid modernization programs remain completely undefined. P3/EPSA go even further to state that this condition is the sole connection between Rider DMR and the promise of grid modernization, falling short of the statutory requirements, and adding that the conditions imposed by the Commission on Rider DMR are not sufficient to cure the fact that the rider is not related to distribution service.

{¶ 109} Many of the intervening parties also question whether Staff's review to ensure the Rider DMR revenues are used in support of grid modernization is meaningful and raise their concerns that the funds will be provided, instead, to FirstEnergy Corp. Sierra Club goes on to allege that there is some doubt as to whether the Commission can enforce its condition that Rider DMR funds be used in support of grid modernization. Further, Sierra Club, OMAEG, and P3/EPSA contend that Rider DMR cannot constitute "incentive ratemaking" as it is not connected to any costs incurred by the Companies to provide distribution service. CMSD similarly argues that Rider DMR cannot constitute "single-issue ratemaking" since it is not recovering specific costs or expenses. OCC/NOAC also claim that the Commission should have determined, at some time after the alternative proposal was submitted, that customers' and the Companies' expectations were aligned before approving Rider DMR, as required under R.C. 4928.143(B)(2)(h). As a separate assignment of error, OCC/NOAC argue that the Commission violated R.C. 4903.09 in finding that an incentive is needed for the Companies to invest in grid modernization, as the Commission failed to provide reasons as to why such an incentive is necessary. As a final note, Sierra Club and Environmental Advocates contend the Fifth Entry on Rehearing was unlawful because FirstEnergy failed to meet its burden that Rider DMR is related to distribution service and incentive ratemaking, and, consequently, the Commission's findings of such are against the manifest weight of the evidence. At the very least, Environmental Advocates argue the Commission should take this opportunity to grant rehearing in order to provide the framework of its detailed policy review of grid modernization and include certain provisions in the rider to ensure that the revenues are used solely for grid modernization, as well as ensure the revenues are spent prudently and subject to an annual true-up.

{¶ 110} FirstEnergy initially contends that the Commission thoroughly considered, and subsequently rejected, these arguments in its Fifth Entry on Rehearing, referencing the record on multiple occasions (Fifth Entry on Rehearing at 89-90). Moreover, FirstEnergy adds that Staff witnesses were clear that Rider DMR is meant to incentivize grid modernization by providing credit support to the Companies and enable them to access capital markets to secure financing at a reasonable cost for future distribution modernization projects (Rehearing Tr. Vol. II at 426, 429; Rehearing Tr. Vol. IV at 959, 1020-21, 1029). Additionally, although they also deal with distribution service, FirstEnergy notes that Rider AMI and Rider DCR serve different purposes than that of Rider DMR, which is to provide the Companies the ability to access the necessary capital for their grid modernization program at a reasonable cost. FirstEnergy also reiterates its earlier arguments that there is no record evidence indicating the Rider DMR funds will be provided to FirstEnergy Corp.; rather, these funds will be used for short-term obligations of the Companies and provide the necessary credit support to access capital markets and obtain lower financing costs for future grid modernization projects. Further, FirstEnergy states that the Commission is more than capable of enforcing the requirement that Rider DMR funds be used in support of grid modernization. In response to Sierra Club and CMSD's arguments that Rider DMR does not constitute "incentive ratemaking" or "single-issue ratemaking," the Companies assert that these parties wrongfully assume that cost-based ratemaking provisions apply to an ESP and that these arguments are irrelevant as the Commission determined that Rider DMR is a distribution modernization incentive (Fifth Entry on Rehearing at 90). Contrary to the assertions of many intervenors, FirstEnergy states that the Rider DMR charges are directly related to the Companies' ability to provide distribution service to customers. As a final point, FirstEnergy asserts that the Commission did determine that customers' and the Companies' expectations were aligned when examining the reliability of the Companies' distribution system (Fifth Entry on Rehearing at 90; Staff Ex. 4 at 6-10; Tr. Vol. XXVIII at 5840-41).

{¶ 111} However, in its application for rehearing, FirstEnergy agrees with Sierra Club and OMAEG that the "sufficient progress" condition is vague and introduces uncertainty, adding that while this provision is ultimately unnecessary, its inclusion or omission does not impact the Commission's conclusion that Rider DMR is authorized under R.C. 4928.143(B)(2)(h); rather, its inclusion threatens the effectiveness of the rider. The Companies note that this provision is not needed to create the required linkage between the rider and distribution service, as alleged by P3/EPSA, and add that the Commission will have the ability to govern the terms of the Companies' grid modernization programs in future, separate proceedings. As a final point, FirstEnergy argues that a simplified reading of this requirement may indicate that Rider DMR revenues be limited in the deployment of grid modernization programs, directly in contrast with the Commission's other findings in the Fifth Entry on Rehearing.

{¶ 112} While they agree with the Companies that the "sufficient progress" condition is vague and risks an arbitrary application, Environmental Advocates, OMAEG, and NOPEC argue that the Companies only desire to have this condition be removed because it would require them to invest in grid modernization, rather than use the money as a cash infusion to improve credit ratings and decrease debt. As such, these parties suggest that the Commission add more details and explicit timeframes as to what the expectations will be for the "sufficient progress" condition to be satisfied and ensure that such revenues are, in fact, used for grid modernization purposes. OCC/NOAC assert that FirstEnergy provides absolutely no evidentiary support for its assignment of error, adding that this provision provides the only link to using Rider DMR revenues for grid modernization efforts.

{¶ 113} The Commission agrees with FirstEnergy that we thoroughly addressed the arguments of Sierra Club, OCC/NOAC, P3/EPSA, Environmental Advocates, and OMAEG in the Fifth Entry on Rehearing, finding that Rider DMR is related to distribution service and acts as an incentive for the Companies to jumpstart their grid modernization initiatives to improve their distribution systems (Fifth Entry on Rehearing at 89-90). We would emphasize again that Rider DMR's purpose is to provide financial support to the Companies to allow them to access capital on more favorable terms, thereby jumpstarting grid modernization initiatives and reducing their future costs of providing distribution service. Moreover, we clearly indicated in the Fifth Entry on Rehearing that Staff will review Rider DMR to ensure that Rider DMR revenues are used, directly or indirectly, in support of grid modernization (Fifth Entry on Rehearing at 127-28). The Commission is fully capable of making such an assessment and such a review will provide further protection to FirstEnergy's customers and ensure that customers are indeed benefiting from these grid modernization initiatives. However, the Commission will clarify that we do not intend for this review to be conducted one time, at the end of the collection of Rider DMR. We intend for this review to be ongoing and conducted in real time. Accordingly, the Commission directs Staff to prepare a request for proposal (RFP) for a third party "monitor" to assist Staff and work with FirstEnergy and FirstEnergy Corp. to ensure that

Rider DMR funds are expended appropriately. This RFP should include quarterly interim updates on the use of Rider DMR to Staff, a mid-term report to be docketed in any proceeding in which the Companies seek an extension of Rider DMR, within 60 days after the filing of an application for extension, and a final report in a separate docket established for the review of Rider DMR, to be filed 90 days after the termination of Rider DMR or its extension. Further, we will extend the deadline for the filing of an application to extend Rider DMR to February 1, 2019, in order to allow the monitors sufficient time to review the use of Rider DMR funds prior to the extension proceeding, if any.

{¶ 114} Furthermore, in response to OCC/NOAC, we note that our decision was predicated on the fact that Rider DMR qualifies as a provision "regarding distribution infrastructure and modernization incentives" for the Companies. R.C. 4928.143(B)(2)(h). As discussed in the Fifth Entry on Rehearing, Rider DMR fits the plain language definition of an "incentive" and the evidence in the record demonstrated a need to focus FirstEnergy's efforts on areas that warrant improvement such as grid modernization (RESA Ex. 7 at 7; Staff Ex. 15 at 15; Co. Ex. 206 at 5-6; Rehearing Tr. Vol. IV at 956-57; 1015-16; Rehearing Tr. Vol. V at 1223, 1254-55; Fifth Entry on Rehearing at 88-90). Our discussion of need was directed more toward the need of the Companies to access reasonably priced capital in order to implement grid modernization projects, which we found to be a significant benefit to all customers in the Companies' distribution systems and will help foster state policy[6] (Fifth Entry on Rehearing at 88-90; see also Order at 22, 95-96). The Commission also recognizes that the signatory parties to Stipulated ESP IV agreed that incentivizing grid modernization in the Companies' service territories would be favorable (Order at 22). Additionally, as discussed in the Fifth Entry on Rehearing, Rider DMR essentially supplants the need for the 50 basis point adder to the return on equity for investment made for grid modernization, which was eliminated in response to OCC/NOAC's earlier application for rehearing (Fifth Entry on Rehearing at 108). As the

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6 The Commission attempted to review the language referred to in the Fifth Entry on Rehearing as specifically cited in OCC/NOAC's application for rehearing, but the page reference was erroneous.

intervening parties have failed to raise any new arguments from those already addressed, we find that these assignments of error should be denied.

{¶ 115} In response to FirstEnergy's application for rehearing, we will clarify that the "sufficient progress" language should not be interpreted to mean that Rider DMR revenues be limited in the deployment of grid modernization programs. We agree that Rider DMR may be used for other purposes related to improving the Companies' ability to access capital markets such as debt repayment and funding pension obligations (Rehearing Tr. Vol. X at 1607, 1610-11). Otherwise, rehearing on this assignment of error will be denied. As the parties are aware, the Commission has embarked on our PowerForward initiative to determine the future of grid modernization in this state. After PowerForward, FirstEnergy's grid modernization plan will be reviewed pursuant to the principles to be established in the PowerForward initiative. As such, it is impossible to further specify the milestones which FirstEnergy must achieve at this time.

c. The Commission's decision to refrain from addressing whether Rider DMR is authorized under R.C. 4928.143(B)(2)(i).

{¶ 116} As the Commission determined that Rider DMR is authorized by R.C. 4928.143)(B)(2)(i), it was unnecessary for the purposes of the Fifth Entry on Rehearing to determine whether the rider was also authorized by R.C. 4928.143(B)(2)(i). In their application for rehearing, OCC/NOAC argue that Rider DMR should not be considered an economic development and job retention program under R.C. 4928.143(B)(2)(i) because the Companies are compensated through distribution rates for FirstEnergy Corp. expenses allocated to the Companies. OCC/NOAC further contend that Rider DMR would not qualify as an economic development program since the headquarters are already located in Akron, Ohio, and the statute is limited to new economic development in Ohio. As a final argument, OCC/NOAC assert that Rider DMR does not satisfy the statute because it is not an electric distribution company program.

{¶ 117} FirstEnergy initially responds by stating that there will be no double recovery of costs as the economic development benefits from Rider DMR are entirely separate from the allocation of FES expenses to the Companies. Moreover, FirstEnergy notes that maintaining the headquarters in Akron for the duration of Rider DMR will not only sustain the existing positive economic impact in that area, but will also lead to additional jobs and improved distribution system reliability through the expected grid modernization initiatives. Moreover, FirstEnergy adds that the statute is not limited to new development and preserving the economic benefits associated with the headquarters being located in Akron would satisfy the statutory requirements. Finally, the Companies assert that the headquarters condition would be considered a program of the Companies, rather than FirstEnergy Corp., as the condition is tied to the Companies' authority to continue to collect revenues through Rider DMR. Additionally, given these significant economic development benefits, FirstEnergy argues in its own application for rehearing that the Commission erred when it failed to find that Rider DMR was authorized under R.C. 4928.143(B)(2)(i).

{¶ 118} In response to FirstEnergy's assignment of error, CMSD and Sierra Club first assert that, as FirstEnergy Corp.'s headquarters and nexus of operations are already located in Akron, maintaining the headquarters in the same location cannot be construed as implementing an economic development or job retention program. Further, OMAEG again contends that the economic impact analysis conducted by FirstEnergy witness Murley was flawed in several respects, including that it was limited to the Akron, Ohio area and failed to address any costs to customers associated with Rider DMR. CMSD and Sierra Club also note that FirstEnergy had no intent to move its headquarters for the duration of *ESP IV*, as evidenced by the fact it already renewed its lease of those facilities through 2025. Finally, Sierra Club and CMSD argue that Staff already stated that "the Companies are already recompensed adequately for the presence of the headquarters," as that cost is built into their distribution rates. CMSD adds that FirstEnergy's real purpose to introduce the economic impact analysis results was not to seek authorization to collect that amount; rather, it was to bolster the argument that *ESP IV* passed the ESP versus MRO test. Similarly, Environmental Advocates assert the Companies have provided no evidence of the alleged benefits other than FirstEnergy witness Mikkelsen's testimony; rather, Environmental Advocates contend the evidence only shows that Rider DMR is meant to act as a credit support rider with no commensurate benefits flowing to customers. While agreeing that Rider DMR is actually meant to provide credit support to FirstEnergy Corp., Sierra Club, NOPEC and OCC/NOAC also contend that Rider DMR does not satisfy the plain language of the statute as it is not implementing any economic development programs. OCC/NOAC add that because this commitment was made by FirstEnergy Corp. instead of a distribution utility, Rider DMR would also fail to satisfy the statutory language in that respect. Moreover, Sierra Club argues that if the Commission finds Rider DMR to satisfy this statutory language, such a finding would remove "any substantive limit to what an electric security plan may contain." *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 947 N.E.2d 655 (2011). Finally, Sierra Club asserts that R.C. 4928.143(B)(2)(i) only permits the rider to allocate "program costs" to customers. As the Companies would not be able to collect revenues based solely on the alleged benefits of Rider DMR, Sierra Club argues that the Companies would be limited to collecting only the costs of keeping the headquarters and nexus of operations in Akron, Ohio, minus any amounts for which they are already compensated, which were not introduced into the evidentiary record.

{¶ 119} The Commission finds that rehearing on these two assignments of error should be denied. Although OCC/NOAC are correct that the three FirstEnergy utilities operating in Ohio (Ohio Edison, Cleveland Electric Illuminating, and Toledo Edison) do recover certain shared service expenses allocated to the utilities, OCC/NOAC present no evidence of how much of the overall economic impact of the corporate headquarters is directly related to the expenses allocated to the utilities. Further, we are not persuaded by OCC/NOAC's claim R.C. 4928.143(B)(2)(i) only authorizes economic development programs that create new jobs rather than programs aimed at job retention; OCC/NOAC cite to no Commission or Supreme Court of Ohio precedent in support of this claim. With respect to FirstEnergy's assignment of error, we do agree that the record evidence supports FirstEnergy's claim of a $568 million annual economic impact through the retention of the FirstEnergy Corp. corporate headquarters, and we further agree that the facts demonstrate that retention of the FirstEnergy Corp. headquarters will retain a significant number of jobs vital to the region. We also agree that job retention programs are authorized economic development programs under 4928.143(B)(2)(i) and that nothing in 4928.143(B)(2)(i) precludes economic development programs authorized under that statute from assisting affiliates or parent companies of the utility. However, in the Fifth Entry on Rehearing, we adopted Staff's recommendation that R.C. 4928.143(B)(2)(h) provided the necessary and sufficient statutory authority for Rider DMR, and we affirm that decision now.

d. The Commission's finding that Rider DMR is not an unlawful subsidy.

{¶ 120} OMAEG, Environmental Advocates, OCC/NOAC, P3/EPSA, and NOPEC contend that Rider DMR will act as an anti-competitive subsidy for FirstEnergy Corp.'s generation services, in violation of R.C. 4928.02. As it alleges there is currently no requirement for grid modernization investment to occur or that revenues collected through Rider DMR be used for such initiatives, OMAEG argues Rider DMR functions as "an unlawful subsidy for FirstEnergy Corp. and increases costs for manufacturers who are forced to pay additional charges for their electric service, thereby impeding their ability to remain competitive in the global economy." These intervening parties also contend that, if the Companies issue a dividend to FirstEnergy Corp. of all, or any portion of, the revenues collected under Rider DMR, FirstEnergy Corp. would then have the ability to utilize those revenues for any purpose of its choosing, including transferring the money to FES. NOPEC and Environmental Advocates note that if the distribution customers of the Companies provide any financial benefit to FES or FirstEnergy Corp.'s other competitive subsidiaries, it would constitute an anti-competitive subsidy in violation of R.C. 4928.02(H). OCC/NOAC and P3/EPSA add that Rider DMR raises the same concerns that caused FERC to rescind the waiver of affiliate power sales restrictions underlying Rider RRS and does very little to protect customers relating to how the Rider DMR revenues will be used. As a final point, P3/EPSA contend that Staff's periodic review will not change the fact that this rider constitutes an illegal subsidy.

{¶ 121} Additionally, CMSD, NOPEC, OMAEG, and P3/EPSA argue that, according to information Staff witness Buckley relied upon in his testimony, the underlying reason for FirstEnergy Corp.'s current credit issues is the business risk associated with its unregulated generation subsidiaries. Thus, these parties argue that Rider DMR would do nothing to remedy the actual cause of FirstEnergy Corp.'s financial distress. OMAEG, OCC/NOAC, and P3/EPSA also contend that Staff's periodic review of how Rider DMR funds are utilized is inadequate to ensure the funds are properly used absent the implementation of further restrictions that such funds be used for distribution modernization. OMAEG and Environmental Advocates also reiterate their earlier arguments that there is no evidence that Rider DMR is necessary to support FirstEnergy Corp.'s credit rating or guarantee that Rider DMR would, in fact, prevent a downgrade of the Companies' credit ratings. As a final point, OMAEG and Environmental Advocates raise their earlier arguments, stating there is no record evidence to support a finding that FirstEnergy Corp. has taken steps to address its financial situation or that FirstEnergy Corp.'s other affiliates are adequately contributing, if at all, to the effort to provide credit support. In fact, OMAEG asserts the Commission's decision will only encourage FirstEnergy and FirstEnergy Corp. to continue making poor business decisions. Accordingly, OMAEG, OCC/NOAC, P3/EPSA, CMSD, and Environmental Advocates request the Commission grant rehearing on these assignments of error.

{¶ 122} FirstEnergy states that Dr. Choueiki made it clear that the purpose of Rider DMR is related to distribution service, specifically noting Staff's objective of modernizing the Companies' distribution grid. In fact, FirstEnergy contends that Dr. Choueiki stated numerous times during cross-examination that Staff's objective is to modernize the grid, which requires the Companies to have the financial capacity to implement such projects, and, thus, requires the ability to access capital on favorable terms. Notably, FirstEnergy witness Mikkelsen testified that the Companies intended to use the revenues collected under Rider DMR toward grid modernization improvement projects and, additionally, noted that the Commission would be able to review any information with respect to the Companies' operations and Rider DMR within their statutorily granted authority. Furthermore, FirstEnergy reiterates its claims that there is no mechanism in Rider DMR which would allow the transfer of revenues between the Companies and FES and that FirstEnergy Corp. has indicated that it will not be making any additional investments in FES in the future. The Companies also state that the Commission has directed FirstEnergy to modernize the distribution grid. Moreover, FirstEnergy argues that if the Commission were to accept the arguments of NOPEC, P3/EPSA, and Environmental Advocates, any source of revenue for the Companies would qualify as an unlawful subsidy to FES. FirstEnergy also asserts that because the annual shortfall amount required to meet Moody's CFO to debt ratio target range was allocated on a proportional basis to the Companies, there can be no subsidy. Thus, the Companies claim the amount of the shortfall of which they have been allocated reflects the appropriate portion they should be responsible for, further noting that several other constituents will be responsible for the remaining shortfall amount.

{¶ 123} The Commission notes that this issue was thoroughly addressed in the Fifth Entry on Rehearing and that the record clearly demonstrated that Rider DMR does not constitute an unlawful subsidy to FirstEnergy Corp (Fifth Entry on Rehearing at 126-29). As discussed in that decision, the record shows that the Companies require the ability to obtain capital for needed investments in their distribution systems in support of grid modernization and other necessary upgrades. Moreover, the Commission found that the Companies faced a serious risk of being downgraded to below investment grade, which would result in significant adverse effects upon the Companies' ability to access the capital markets, including, but not limited to, increases in future financing costs or more restrictive borrowing terms and conditions. This portion of the Fifth Entry on Rehearing is replete with references to the record from, not only Staff and FirstEnergy witnesses and exhibits, but also several intervenor witnesses and exhibits. The Commission further found that placing restrictions on the use of Rider DMR funds would defeat the purpose of the rider and, instead, directed Staff to periodically review how the Rider DMR funds are being utilized "to ensure that such funds are used, directly or indirectly, in support of grid modernization," further supporting the Commission's finding that Rider DMR will not act as an unlawful subsidy to the Companies' affiliates. A more thorough explanation of Staff's oversight and monitoring of FirstEnergy's use of Rider DMR revenues can be found in ¶113.

{¶ 124} As a final note, the Commission also found Rider DMR would recover a proportionate share of the CFO to debt ratio shortfall, which ensures that the Companies are not subsidizing affiliates. As we discussed in our Fifth Entry on Rehearing, testimony shows that additional actions have been undertaken by FirstEnergy Corp. and the Companies in order to improve their financial metrics and additional action will be required on their part to fully resolve their current financial dilemma (Fifth Entry on Rehearing at 95-96). Therefore, we find that the intervening parties have raised no new issues and these assignments of error should be denied.

e. The Commission's finding that the revenues collected under Rider DMR do not constitute unlawful transition revenues.

{¶ 125} Despite the Commission's finding that the Companies will use these funds to obtain more favorable terms when accessing the capital markets that will allow for necessary investment in grid modernization, NOPEC, OCC/NOAC, Environmental Advocates, OMAEG, and Sierra Club argue that there is no requirement in Rider DMR that the funds be used for these purposes. In fact, OCC/NOAC, OMAEG, Environmental Advocates, and NOPEC contend that the record shows the revenues collected under Rider DMR would be used to provide credit support to FirstEnergy Corp. and its unregulated affiliates, including FES, as a means to improve its credit rating. OCC/NOAC, OMAEG, and NOPEC also emphasize that R.C. 4928.38 prohibits the Commission from authorizing the receipt of transition revenues or "any equivalent revenues," noting that even though Rider DMR revenues would not be explicitly considered transition revenue, it would fall under the equivalency language of the statute due to the fact that these revenues need not be used for grid modernization. *In re Application of Columbus S. Power Co.*, 147 Ohio St.3d 439, 67 N.E.3d 734 (2016) (*AEP Ohio RSR Case*). Environmental Advocates add that the statute provides no exception for regulated utilities that have fully divested their generation. NOPEC and Sierra Club note, in the *AEP Ohio RSR Case*, the Supreme Court of Ohio held that riders that are designed to provide "sufficient revenue to maintain [a utility's] financial integrity and ability to attract capital during the ESP" constitute unlawful transition charges. NOPEC, OMAEG, and Environmental Advocates claim that the Commission attempts to adopt a much too narrow definition of transition revenues, as evidenced by recent Supreme Court of Ohio precedent rejecting the Commission's interpretation of R.C. 4928.38. *AEP Ohio RSR Case* at ¶21-22, ¶24, ¶36; *In re Application of Dayton Power and Light Co.*, 147 Ohio St.3d 166, 62 N.E.3d 179 (2016). These parties also state that it makes no difference that FirstEnergy has already transitioned their assets to FES. Therefore, NOPEC, OCC/NOAC, Environmental Advocates, OMAEG, and Sierra Club argue that the Commission should reject Rider DMR because it would collect unlawful transition revenues.

{¶ 126} In response, FirstEnergy notes that Rider DMR is proposed to help access capital to support distribution services rather than generation services. Additionally, FirstEnergy emphasizes the amount of revenue to be provided to the Companies is based on the Companies' proportional contribution to FirstEnergy Corp., and is completely unrelated to the operations of FES with respect to FirstEnergy Corp. FirstEnergy notes that the cases cited by the intervenors in support of their claims are completely inapposite to this proceeding as Rider DMR is not related to generation assets in any way. Moreover, the Companies emphasize there was nothing in the record to show a means by which the Companies would be able to directly transfer any funds to FES, explaining that the possibility of providing such a dividend is contrary to the facts of this proceeding.

{¶ 127} Consistent with our finding in our Fifth Entry on Rehearing, we disagree with claims that Rider DMR will collect transition revenue or its equivalent (Fifth Entry on Rehearing at 130). As we discussed in that decision, the Companies have already transferred their generation assets to FES and have utilized a competitive bidding process since their first ESP in 2009. Furthermore, the Commission noted that Rider DMR has been authorized under R.C. 4928.143(B)(2)(h) rather than R.C. 4928.143(B)(2)(d), the statute which authorized the AEP Ohio stability charge that was later overturned by the Supreme Court. *AEP Ohio RSR Case.* Moreover, Rider DMR is clearly a "distribution charge." Additionally, we again note Staff's oversight of the uses of Rider DMR revenues, pursuant to the process defined in ¶113, will ensure that these revenues will not be used to subsidize non-distribution functions of FirstEnergy Corp. subsidiaries. Thus, we find that these assignments of error should be denied, as they were thoroughly addressed in the Fifth Entry on Rehearing.

f. The Commission's finding that R.C. 4905.22 is not applicable to an ESP, and, even if this statute was applicable, Rider DMR would nonetheless comply with R.C. 4905.22.

{¶ 128} OMAEG and OCC/NOAC argue the Commission erred when it determined that R.C. 4905.22 does not apply to an ESP, stating that R.C. 4928.143(B)(2)(h) does not provide the Commission the ability to authorize provisions in an ESP that could result in virtually unlimited charges to customers or violate R.C. 4928.02. OCC/NOAC further assert that the Supreme Court has refused to apply the "notwithstanding" language in that statute to mean that it should take precedence over other provisions of R.C. Title 49; rather, the Court noted that if there is a recognized inconsistency between two or more statutes, the enactment that provides "notwithstanding" the other enactments prevails. *State ex rel. Carmean v. Bd. of Education*, 170 Ohio St. 415, 165 N.E.2d 918 (1960). As OCC/NOAC allege there is no inconsistency between R.C. 4905.22 and R.C. 4928.143, R.C. 4905.22 should be construed as providing a reasonable limit on the charges assessed under R.C. 4928.143, which is consistent with state policy. R.C. 4928.02(A). Additionally, OMAEG contends Rider DMR is an unreasonable charge because the Companies failed to consider any alternative tax gross-up factors to the 36 percent average tax rate for the Companies, there is no guarantee that Rider DMR revenues will be spent on distribution grid modernization efforts, the Companies failed to meet their burden to show that credit support for FirstEnergy Corp. is necessary, and there is no guarantee that Rider DMR will enable the Companies to access capital on more favorable terms.

{¶ 129} In response, FirstEnergy asserts that R.C. 4928.143 expressly provides that ESPs may include any of the provisions authorized in R.C. 4928.143(B)(2) "[n]otwithstanding any other provision of Title XLIX of the Revised Code to the contrary," further asserting that none of the exceptions would apply in this case. The Companies also contend that the case precedent cited by OCC/NOAC actually supports the proposition that this statute would take precedence over other R.C. Title 49 provisions. As a final point, the Companies claim that, although R.C. 4905.22 is inapplicable to this case, the Commission is still required to apply the ESP versus MRO test to determine whether the charges included in an ESP are reasonable.

{¶ 130} The Commission finds that these arguments have been thoroughly addressed in the Fifth Entry on Rehearing and, thus, require no additional explanation (Fifth Entry on Rehearing at 131-132). With the language used R.C. 4928.143(B)(2)(h), the General Assembly clearly intended that the Commission have flexibility in approving provisions related to distribution service contained in ESPs and that the strict requirements of R.C. Chapters 4905 and 4909 do not necessarily apply to such provisions. The Commission also stated in the Fifth Entry on Rehearing that, even if R.C. 4905.22 were to apply, Rider DMR would not be unreasonable under R.C. 4905.22. The Commission explained in detail that the Staff's calculation of Rider DMR was reasonable, as modified by the Commission (Fifth Entry on Rehearing at 93-96). Accordingly, claims that Rider DMR violated R.C. 4905.22 should be rejected and rehearing as to these assignments of error should be denied.

g. The Commission's finding that the record evidence does not support the Retail Competition Enhancement Rider (Rider RCE).

{¶ 131} As its sole assignment of error, IGS argues that the Commission unlawfully and unreasonably determined that the record evidence did not support the authorization and creation of a placeholder Retail Competition Enhancement Rider (Rider RCE), noting that the record evidence indicates that additional customer engagement is required to maximize the potential of SmartGrid deployment and incentivize shopping and is fully supported by the state policy set forth in R.C. 4928.02. IGS further states that any actual dollar amount to be included in Rider RCE and additional details regarding the operation of the rider would be determined in a separate case, in which interested parties would be able to fully participate. The Companies agree with the Commission's decision to grant rehearing and eliminate the unbundling proposal associated with Rider RCE in the Fifth Entry on Rehearing. However, the Companies contend that the Commission still needs to approve a zero placeholder rider that accurately reflects the retail competition incentive mechanism described in the Competitive Market Enhancement Agreement, noting Ms. Mikkelsen's testimony provides sufficient evidence for such a finding.

{¶ 132} In response, NOPEC and OCC/NOAC argue there is no evidentiary basis for the Commission to approve Rider RCE or its equivalent, noting this rider was not proposed as a part of Stipulated ESP IV, no witness supported this rider during the hearing, and IGS did not include this rider as a part of its written testimony. Rather, NOPEC asserts this rider only exists through a side agreement between IGS and FirstEnergy that was conceived during the latter part of the hearing process (OMAEG Ex. 24). NOPEC further contends that, while the Commission has approved zero placeholder riders in past proceedings, it has always done so after all parties had received adequate notice and opportunity for cross examination regarding the rider. As a bypassable rider, NOPEC asserts that SSO customers will be charged increased amounts in order to benefit the business interests of CRES providers. NOPEC urges the Commission to affirm its decision as to Rider RCE. OCC/NOAC further state that the

Commission already considered the testimony of FirstEnergy witness Mikkelsen and the remaining limited testimony of IGS witness White and concluded they were insufficient to substantiate Rider RCE.

{¶ 133} The Commission will affirm our decision that the limited testimony of FirstEnergy witness Mikkelsen, solicited on cross-examination, is insufficient to persuade the Commission to establish Rider RCE (Fifth Entry on Rehearing at 135-36; Tr. Vol. XXXVII at 7817-23, 7911-12, 7925-37). The record includes no information on whether it is necessary to incent shopping by the potentially affected customers in the Companies' service territories (Tr. Vol. XXXVII at 7928-31). In fact, the record demonstrates that, at the hearing, FirstEnergy did not endorse the establishment of Rider RCE. On cross examination, Ms. Mikkelsen was asked a direct question and gave a clear, unequivocal answer:

> Q. * * * Is the company requesting that the Commission approve the retail competitive incentive rider in its ESP in this proceeding?
>
> A. No.

Tr. XXXVII at 7819.

Accordingly, we find that rehearing on these assignments should be denied.

h. The Commission's findings regarding energy efficiency provisions and renewable resource requirements.

i. The Commission's finding to stay the effective date of the increase in the shared savings cap

{¶ 134} The Companies contend that the Commission had no basis for staying the effective date of the increase in the shared savings cap, noting that this is a completely independent concept from Rider DMR, the increase was a provision provided for by the bargaining parties as a part of the Stipulated ESP IV, and the Commission lacked any record evidence supporting its decision, risking violation of R.C. 4903.09.

{¶ 135} Environmental Advocates claim that FirstEnergy has failed to rebut the Commission's reasoning for implementing the stay, adding that, while the Companies are correct these are two independent concepts, both concepts are provisions of the Stipulated ESP IV that would substantially increase the amounts charged in customer bills. Environmental Advocates note that, in the event the Commission affirms its decision to increase the shared savings cap, it would be reasonable of the Commission to also stay the increase in order to moderate the combined effect of these provisions. OCC/NOAC and OMAEG agree that it is reasonable for the Commission to balance such provisions in order to protect customers from undue rate increases. Moreover, OCC/NOAC add that FirstEnergy first introduced energy efficiency shared savings into this proceeding through the Third Supplemental Stipulation, and should not be able to argue when the Commission modifies the recommendations therein. On the other hand, Sierra Club expresses its concerns that staying the increase in the shared savings cap may not be the best way to address customer bill impacts. As the Commission has previously found that increasing the shared savings is in the public interest, Sierra Club suggests that the Commission should grant rehearing on this ground and reinstate the increase in the shared savings cap effective immediately. Additionally, Sierra Club and OMAEG note that the Commission should also affirm its decision to limit allocating shared savings to programs upon which the Companies have a direct impact and, thus, disallow the Companies' recovery of shared savings for energy savings resulting from the Customer Action Program.

{¶ 136} The Commission will deny rehearing to reconsider our order to stay the effective date of the increase in the shared savings cap. The record is clear that Rider DMR will recover $132.5 million from ratepayers annually, adjusted for recovery of taxes at the prevailing Federal corporate income tax rate (Fifth Entry on Rehearing at 93-94, 95). The record is also clear that the after-tax annual shared saving cap would be increased from $10 million to $25 million (Co. Ex. 154 at 11-12). The Commission determined that recovery of Rider DMR and the recovery of, potentially, an additional $15 million in annual shared savings revenue, in addition to the other provisions of *ESP IV*, may place too great of a burden on ratepayers.

Therefore, in the interests of gradualism, the Commission stayed the increase in the shared savings cap until the Companies are no longer receiving revenue under Rider DMR (Fifth Entry on Rehearing at 147). The Commission has clearly set forth the reasons for our decision to stay the increase in the annual shared savings cap and the basis for this decision in the record. R.C. 4903.09. Additionally, we once again emphasize that parties to any stipulation are well aware that a stipulation is a recommendation only and that the stipulation is subject to modification by the Commission.[7] Therefore, we will affirm our decision to say the increase in the annual shared savings cap until the Companies are no longer receiving revenue under Rider DMR.

ii. The Commission's finding that the Companies should budget for the annual statutory energy efficiency mandate rather than the goal of 800,000 MWh of annual energy efficiency savings.

{¶ 137} In their application for rehearing, Environmental Advocates initially argue that the Commission erred by not requiring the Companies to comply with the provision in the Third Supplemental Stipulation to "strive to achieve 800,000 MWh of annual energy savings," rather than the annual statutory energy efficiency mandate. Environmental Advocates add that in order for this goal to be met, FirstEnergy must be able to establish sufficient program budgets, which are based on the projected incentive payments to implement energy efficiency measures, in order to produce the requisite level of energy savings. Otherwise, customers will likely lose this benefit entirely. The Companies agree with the position of Environmental Advocates, provided that the Commission also grants rehearing to authorize the increase in the shared savings cap to $25 million annually. In support of its request, the Companies argue the Commission should affirm its decision in the Order to approve the 800,000 MWh goal for purposes of the Companies' 2017-19 EE/PDR portfolio program, stating that exceeding the statutory benchmarks will benefit customers and that the Commission had no basis for

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7 We note that no signatory parties have indicated a desire to withdraw from the Stipulations based on the Commission's decision to stay the effective date of the increase in the shared savings cap and no signatory parties have raised this issue on rehearing, with the exception of the Companies.

requiring the Companies to budget to the energy efficiency benchmarks instead of the 800,000 MWh goal.

{¶ 138} OCC/NOAC initially argue that FirstEnergy has failed to meet the rehearing standard under R.C. 4903.10 by failing to provide evidence to show that the Commission's reduction in the shared savings cap or the reduction in the goal for the 2017-19 EE/PDR portfolio program was unlawful or unreasonable. OCC/NOAC also add that no environmental groups joined the Third Supplemental Stipulation and no party to that agreement has opposed the Commission's decision, other than FirstEnergy. Instead of utilizing the language as alleged by FirstEnergy, OCC/NOAC state the signatory parties elected to utilize more generalized language. Moreover, OCC/NOAC also request the Commission deny Environmental Advocates' arguments, as their arguments are not based on record evidence in this proceeding. Contrarily, Sierra Club argues that the Commission should grant FirstEnergy's assignment of error, noting that, if the Companies are required to budget based on the statutory mandate, there is no possible way that they will achieve the 800,000 MWh energy efficiency savings goal.

{¶ 139} The Commission will affirm our clarification provided in the Fifth Entry on Rehearing that the goal of 800,000 MWh of energy efficiency savings annually is simply a goal. FirstEnergy should strive to achieve this goal by efficiently administering its approved programs and by promoting the most cost effective programs possible rather than by simply increasing spending on the approved programs. As stated above, the Commission must be mindful of the rate impacts of all of the provisions of *ESP IV*. All other issues regarding achieving the annual goal of 800,000 MWh of energy efficiency savings should be addressed in the Companies' energy efficiency program portfolio plan proceedings. *See In re the Application of Ohio Edison Co., The Cleveland Elec. Illum. Co. and The Toledo Edison Co. for Approval of Their Energy Efficiency and Peak Demand Reduction Program Portfolio Plans for 2017 through 2019*, Case No. 16-743-EL-POR. Therefore, rehearing on this assignment of error should be denied.

iii. The Commission's finding that the Companies are authorized to collect lost distribution revenue to the extent that energy savings under the Customer Action Program are verifiable.

{¶ 140} Additionally, Environmental Advocates contend that the Commission unreasonably allowed FirstEnergy to recover lost distribution revenue based on energy savings resulting from the Customer Action Program without explaining its reasoning, in violation of R.C. 4903.09, and in deviation from Commission precedent. *In re Application of FirstEnergy*, Case No. 09-1820-EL-ATA, et al., Finding and Order (June 30, 2010) at 10; *FirstEnergy ESP II Case*, Opinion and Order (Aug. 25, 2010) at 14. Rather, Environmental Advocates note that, in the past, the Commission has typically limited the lost distribution revenue mechanism to contexts where measured savings are the result of actual utility programs. Without an adequate rationale for its contrary position in this case, Environmental Advocates request that the Commission grant rehearing to address these issues.

{¶ 141} In response, FirstEnergy argues that the Commission sufficiently addressed Environmental Advocates' argument regarding lost distribution revenues and the Commission should deny rehearing, as the ability to recover lost distribution revenues arising from savings from the Customer Action Program was an integral part of the Stipulated ESP IV and was supported by all of the signatory parties. Furthermore, the Companies assert that Environmental Advocates have failed to provide sufficient evidence for the Commission to treat this program differently from other similar programs, noting that the Customer Action Program is a Commission-approved energy efficiency program and should not be treated differently with respect to the recovery of lost distribution revenues, especially when it will be subject to the general measurement and verification protocols before any savings could be counted.

{¶ 142} We agree with FirstEnergy that this issue has been thoroughly addressed in the Fifth Entry on Rehearing (Fifth Entry on Rehearing at 143-44, 146-47.). Environmental

Advocates have raised no new arguments on rehearing. Thus, rehearing on this assignment of error will be denied.

iv. The Commission's finding that it was appropriate to remove the 50 basis point adder to the return on equity in the calculation for Rider AMI.

{¶ 143} Although the Companies acknowledge that Rider DMR, in part, and the 50 basis point adder in Rider AMI generally serve as incentives related to grid modernization, they argue that the Commission erred by concluding that Rider DMR supplanted the need for the adder. FirstEnergy adds that the adder will provide an incentive to use capital acquired with the assistance of Rider DMR on grid modernization projects over other types of investments, such as investments in the transmission system, or other short-term obligations of the Companies. Moreover, FirstEnergy asserts the Commission withdrew the 50 basis point adder without sufficient supporting evidence to do so.

{¶ 144} Contrary to the position of FirstEnergy, OCC/NOAC note that when the Commission authorized Rider DMR with an incentive for FirstEnergy to use the funds for grid modernization, it effectively displaced the need for the 50 basis point adder, consistent with the Commission's reasoning in its Fifth Entry on Rehearing.

{¶ 145} The Commission finds that rehearing on this assignment of error should be denied. As noted in the Fifth Entry on Rehearing, the 50 basis point adder was a provision of the Third Supplemental Stipulation, authorized by R.C. 4928.143(B)(2)(h), in order to provide the Companies with an incentive to invest in grid modernization. (Co. Ex. 154 at 10). In the Third Supplemental Stipulation, the smart grid modernization provisions were linked to Rider RRS, which the Companies forecasted would return an aggregate amount of $561 million (in nominal dollars) to ratepayers over the eight-year term of *ESP IV* (Co. Ex. 155 at 11-12); in fact, this linkage was explicit: "[i]n addition to promoting stable customer rates through Rider RRS, the Companies agree to empower customers through grid modernization initiatives . . . " (Co.

Ex. 154 at 9). On rehearing, the Commission eliminated Rider RRS and replaced it with Rider DMR, which will provide the Companies with annual revenue of $132.5 million, adjusted for recovery of taxes at the prevailing Federal corporate income tax rate (Fifth Entry on Rehearing at 95, 98). As discussed above, Rider DMR is authorized pursuant to R.C. 4928.143(B)(2)(h) and is an incentive to the Companies to invest in grid modernization (Fifth Entry on Rehearing at 88-90; Staff Ex. 15 at 15). Therefore, the 50 basis point adder and Rider DMR are authorized by the same statutory provision and are both intended to incent the Companies to take the same action: to invest in grid modernization. Accordingly, in determining whether the stipulations in this case, as a package, continued to benefit ratepayers and the public interest, the Commission found in the Fifth Entry on Rehearing that the purpose of the 50 basis point adder had been supplanted by Rider DMR. Because the 50 basis point adder was no longer necessary or appropriate, the Commission modified the Third Supplemental Stipulation to eliminate the 50 basis point adder (Fifth Entry on Rehearing at 106). Having thoroughly reviewed the record as it relates to the 50 basis point adder, we affirm our decision in the Fifth Entry on Rehearing.

v. The Commission's findings that customers who have opted out of EE and PDR programs may still participate in the Rider ELR program and receive credits thereunder and that the cost of the ELR program credits should be collected from all customers.

{¶ 146} Additionally, Environmental Advocates claim that the Commission unreasonably allowed the Companies' customers to opt out of paying for peak demand reduction programs while still receiving monetary credits for participation in the Rider ELR program, in violation of R.C. 4928.6613 and against Commission precedent. *AEP Ohio ESP III Case*, Entry on Rehearing (May 28, 2015) at 12; *In re Application of FirstEnergy*, Case No. 08-935-EL-SSO (*FirstEnergy ESP I Case)*, Second Opinion and Order (Mar. 25, 2009) at 10. In support of their argument, Environmental Advocates claim that, while a portion of the Rider ELR credit is funded through Rider EDR, the record and Commission's decision also shows that the Companies rely on Rider ELR to meet its PDR obligation under R.C. 4928.66 and funds a portion of the program through its EE/PDR rider, Rider DSE. In fact, Environmental Advocates claim that FirstEnergy included the ELR program in its current portfolio plan. OCC/NOAC note that the Commission's decision to order that the recovery of the ELR program credits should be collected through Rider EDR(e) from all customers was also unreasonable, noting that Rider ELR does not produce economic benefits that will benefit customers and the new rate design simply shifts the allocation of costs from one customer class to another.

{¶ 147} In response, FirstEnergy provides that, although the Commission was sufficiently clear in its Order and Fifth Entry on Rehearing in response to these arguments, Rider ELR customers may opt out of the Companies' EE/PDR portfolio plans and continue to receive Rider ELR credits because those credits do not arise from the Companies' EE/PDR portfolio plans, but rather from the Stipulated ESP IV itself, consistent with R.C. 4928.6613 (Order at 106-107; Fifth Entry on Rehearing at 146). The Companies and IEU-Ohio also contend that the Rider ELR credits approved in *FirstEnergy ESP I* came into existence prior to the Companies' first EE/PDR portfolio plan by approximately two years. Further, in its memorandum contra, IEU-Ohio contends that, because the ELR program predates the portfolio plan, its costs are recovered in part outside of the plan, and the program provides benefits that extend beyond compliance with EE/PDR requirements. Thus, a customer electing service under the ELR program should not be considered to take a benefit from the FirstEnergy portfolio plan. Moreover, IEU-Ohio emphasizes that the customer's right to opt out of the FirstEnergy portfolio plan is statutory. R.C. 4928.6611. IEU-Ohio also states that adopting Environmental Advocates' position would frustrate state energy policy and deter customers with demand response capabilities from taking service under the ELR program. R.C. 4928.02(D).

{¶ 148} The Commission finds that this issue was thoroughly addressed in the Fifth Entry on Rehearing and in that decision, we clarified that customers participating in the ELR program retain their statutory right to opt out of the energy efficiency programs, noting that the ELR programs existed long before the statutory energy efficiency and peak demand reduction mandates, as stated by the Companies. Additionally, the Commission explained that our long-standing precedent has held that ELR has an economic development component and ELR is funded, in part, through the economic development rider, which is paid by all customers, including those who opt out of the energy efficiency programs. Moreover, we agree, as noted by IEU-Ohio, that the decision cited by Environmental Advocates provides little guidance, as the Commission did not address whether a customer that participated in the AEP Ohio interruptible load program would be eligible to opt out of the utility's portfolio program costs and benefits. As such, these assignments of error will be denied.

i. The Commission's finding that the Companies' statutory right to withdraw does not end until at least the issuance of a non-appealable order.

{¶ 149} In their application for rehearing, OCC/NOAC request that the Commission grant rehearing to require the Companies invoke their right to withdraw from the ESP shortly after the Commission rules on rehearing and before any subsequent appeals are taken from that decision, noting this would be a reasonable limitation on the Companies' right to withdraw its ESP in order to bring finality and stability to the rates charged to customers, in accordance with R.C. 4928.143(C)(2). OCC/NOAC also argue that allowing a utility to withdraw from an ESP after a lengthy appellate process and Supreme Court decision would create logistical difficulties for the Commission.

{¶ 150} FirstEnergy argues that the statutory right to withdraw does not have an express time limit, adding that a utility will be unable to make an informed decision as to whether it should provide service under an ESP until the final terms of that ESP are determined. Moreover, FirstEnergy asserts the Commission is capable of handling the unusual circumstances where a utility withdraws from an ESP subsequent Supreme Court decision, as evidenced by the recent Dayton Power and Light ESP proceeding. R.C. 4928.143(C)(2)(b); *In re* *the Application of the Dayton Power and Light Co. to Establish a Standard Service Offer in the Form of an Elec. Security Plan*, Case No. 12-426-EL-SSO (*DP&L ESP II Case*), Finding and Order (Aug. 26, 2016).

{¶ 151} Consistent with our findings in the Fifth Entry on Rehearing, we agree with FirstEnergy that the Companies' filing of tariffs before the conclusion of the application for rehearing and appeals process will be subject to the rehearing and appeal process and that the Companies' right to withdraw from the *ESP IV* will not lapse until the conclusion of that process (Fifth Entry on Rehearing at 149-50). We again note, however, once a final, non-appealable order has been issued, FirstEnergy must exercise its right to withdraw within a reasonable period of time or the filing of tariffs will be considered to constitute acceptance of the modified *ESP IV*. As a final point, OCC/NOAC ignore the fact that Commission action is, at times, necessary to implement the decisions of the Supreme Court when those decisions are not self-executing. As the Supreme Court has held "[i]f the Commission makes a modification to a proposed ESP that the utility is unwilling to accept, R.C. 4928.143(C)(2)(a) allows a utility to withdraw the ESP application." *DP&L ESP II Case*, Seventh Entry on Rehearing (Dec. 14, 2016) at 4-5, 7-9, citing *In re Application of Ohio Power Co.*, 144 Ohio St.3d 1, 40 N.E.3d 1060 (2015). The Commission dismissed these exact same claims in the *DP&L ESP II Case* and, consistent with the reasoning set forth in the decisions of that proceeding and in our Fifth Entry on Rehearing, we find that rehearing as to OCC/NOAC's assignment of error should be denied.

*j. **Sierra Club and OMAEG's assertion that the Fifth Entry on Rehearing is unlawful and unreasonable because it failed to hold FirstEnergy to the burden of proof in the ESP IV proceeding as required by R.C. 4928.143(C)(1) and Ohio Adm.Code 4901:1-35-06(A).***

{¶ 152} In addition to its more specific assertions that the Companies failed to meet their burden under R.C. 4928.143(C)(1) and Ohio Adm.Code 4901:1-35-06(A) throughout this Eighth Entry on Rehearing, Sierra Club and OMAEG assert as separate assignments of error that the Companies failed to meet their burden of proof. Additionally, Sierra Club notes that the Companies' failure to meet their burden is partly due to the expedited hearing process that was set for the consideration of Rider DMR, which prevented a full and fair evaluation of the new proposal. OMAEG specifically notes the Companies failed to meet their burden on the following issues: to demonstrate a need for Rider DMR revenues, to show that Rider DMR will prevent a credit downgrade of FirstEnergy Corp., to determine the potential costs assessed to customers if the Companies and FirstEnergy Corp. are downgraded, to show that Rider DMR will incentivize grid modernization, and to demonstrate that the conditions imposed on Rider DMR are enforceable or beneficial to customers.

{¶ 153} The Commission agrees that R.C. 4928.143(C)(1) and Ohio Adm.Code 4901:1-35-06 impose the burden of showing that an application is just and reasonable on the electric distribution utility. However, there is no basis for asserting that FirstEnergy did not meet its burden in this case. We cannot fault the Companies for our decision to approve Rider DMR simply because Staff recommended it as an alternative to the Companies' Proposal. Additionally, this Commission has previously held on numerous occasions that the procedural schedule relating to the evaluation of Rider DMR was not prejudicial to any party and resulted in the fair and efficient consideration of the rider (Third Entry on Rehearing at 9-12; Fifth Entry on Rehearing at 12-14). Sierra Club has provided no evidence to indicate otherwise. Therefore, we will affirm our conclusion that the preponderance of evidence supports the establishment of Rider DMR (Fifth Entry on Rehearing at 87-97). Rehearing on these assignments of error should be denied.

k. Sierra Club's and OMAEG's assignments of error contending that the Fifth Entry on Rehearing is unlawful and unreasonable because the Commission failed to satisfy its duty under R.C. 4903.09 on multiple issues.

{¶ 154} Sierra Club and OMAEG also generally assert that the Fifth Entry on Rehearing fails to satisfy R.C. 4903.09, which requires that "[i]n all contested cases * * * the commission shall file * * * findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact." Specifically, OMAEG asserts that the Commission failed to provide sufficient rationale for its decisions when determining that Rider DMR is a grid modernization incentive, that, absent Rider DMR, the Companies will be unable to access the capital markets, and whether any of the cited adverse consequences of a credit downgrade will actually occur or could potentially occur in the Companies' and FirstEnergy Corp.'s current financial state.

{¶ 155} Sierra Club cites to *Tongren v. Pub. Util. Comm.*, 85 Ohio St.3d 87, 706 N.E.2d 1255 (1999) in support of its contention that the Commission failed to satisfy its burden under R.C. 4903.09; however, the Supreme Court held in that case that the Commission had failed to make a complete record, as required by R.C. 4903.09, where the record was completely devoid of evidence upon which Staff had relied in making the recommendation which was ultimately followed. This is not the case here. The entirety of the Fifth Entry on Rehearing is replete with references to the record and evidence upon which the Commission relied to make its decisions. Moreover, the Supreme Court has also held that strict compliance with the terms of R.C. 4903.09 is not required; rather the Supreme Court has indicated the purpose of R.C. 4903.09 is to enable the Court to review the decisions of the Commission in order to determine whether "the facts found by the commission lawfully and reasonably justified the conclusions reached by the commission in its order and whether the evidence presented to the commission as found in the record supported the essential findings of fact so made by the commission," without resorting to combing through countless volumes of transcripts and admitted exhibits. *Commercial Motor Freight, Inc. v. Pub. Util. Comm.*, 156 Ohio St. 360, 102 N.E.2d 842 (1951). Sierra Club's real contention seems to be with the conclusions of the Commission and not the bases for those conclusions. We thoroughly examined all evidence and arguments presented to us during the course of this proceeding, and the Fifth Entry on Rehearing is reflective of that thorough analysis. Thus, we find these general assignments of error should be denied.

C. *The Commission's finding that the ESP IV, as Modified by the Commission, Continues to be more favorable in the aggregate than the expected results of an MRO.*

1. THE COMMISSION'S FINDING THAT *ESP IV*, AS MODIFIED BY THE COMMISSION, IS QUANTITATIVELY MORE FAVORABLE THAN THE EXPECTED RESULTS OF AN MRO.

i. The Commission's finding that revenues collected under Rider DMR have no quantitative impact for purposes of the ESP versus MRO test.

{¶ 156} The Commission found that the approval of Rider DMR and the rejection of the Companies' Proposal would result in a plan which passes the MRO versus ESP test on a quantitative basis, as the modified Stipulated ESP IV would result in approximately $51.1 million in benefits that would not otherwise be available under an MRO. Additionally, the Commission held that the Rider DMR revenues used to support grid modernization would essentially be "a wash" for purposes of the ESP versus MRO test. In their applications for rehearing, OCC/NOAC and NOPEC contend that the Commission unreasonably found that the Companies could recover revenues equivalent to Rider DMR revenues through a base rate case, thus determining that Rider DMR had no impact for purposes of the ESP versus MRO test. Further, OCC/NOAC argue that endorsing such a position would render the test meaningless, as the same argument could be made for any rider. Sierra Club contends that Rider DMR is dissimilar to Rider AMI and that revenues collected under Rider DMR could not be recovered under such a rider. On a related note, Sierra Club adds that there is no evidence in the record to support that the proposed Rider DMR revenues could be collected through an alternative means, adding that, unlike a base rate case or Rider AMI, customers would not receive anything in return for their additional payments under Rider DMR. *Dayton Power & Light Co. v. Pub. Util. Comm.*, 4 Ohio St.3d 91, 103, 447 N.E.2d 733 (1983); *Office of Consumers' Counsel v. Pub. Util. Comm.*, 67 Ohio St.2d 153, 164, 167, 423 N.E.2d 820 (1981). Similarly, Sierra Club, Environmental Advocates, OCC/NOAC, OMAEG, NOPEC, and CMSD argue that the Commission's determination that revenues equivalent to those that would be generated by Rider DMR could be authorized in a MRO proceeding is based on an erroneous interpretation of the criteria for granting emergency rate relief, ignores the distinction between R.C. 4909.16 and the emergency provision of R.C. 4928.142(D)(4), and lacks any evidentiary support from the record in this case. Specifically, CMSD notes that treating FirstEnergy's current situation as an emergency that threatens its financial integrity is completely baseless, given the fact that they expected to pay a projected $256 million net credit to customers over the eight-year term of Rider RRS. Environmental Advocates further allege that the process set forth under R.C. 4909.16 is meant to provide temporary relief to the utility in order to prevent injury to the utility, which, in turn, could injure its customers. *In re Toledo Edison Co.*, Case No. 84-1286-EL-AEM, Supp. Opinion and Order (May 12, 1987). NOPEC argues that, even if the facts could support the Commission's finding of an emergency situation under a hypothetical MRO statute, it nonetheless would not be justified in awarding the Companies the Rider DMR revenues. In support of its argument, NOPEC cites to a prior case in which the Commission, having determined that an emergency existed, elected not to grant any additional rate relief and, instead, allow the utilities to make accounting adjustments and continue to monitor the situation during the pending rate case. *In re Cleveland Elec. Illum. Co.*, Case No. 88-170-EL-AIR, Opinion and Order (Jan. 31, 1989). Thus, OCC/NOAC, NOPEC, OMAEG, CMSD, and Sierra Club request the Commission grant rehearing as to these assignments of error.

{¶ 157} In its memorandum contra, FirstEnergy notes that the intended uses of the Rider DMR revenues would be considered distribution-related cash outflows and would be recoverable in a base rate case or the Companies' existing Rider AMI or comparable rider, adding that grid modernization related expenses are recoverable outside of ESPs. In response to arguments that Rider DMR would not be considered a "wash" for purposes of the ESP versus MRO test, FirstEnergy claims that such arguments were rejected by the Commission and the Supreme Court of Ohio. *FirstEnergy ESP III* Order at 50-52, 55-57; *FirstEnergy*, 146 Ohio St.3d 222, 2016-Ohio-3021, 54 N.E.3d 1218. In response to Sierra Club's arguments, the Companies assert that Sierra Club ignores the vast amount of evidence supporting the position that these revenues could be recovered outside of an ESP proceeding. Additionally, FirstEnergy notes that, as Rider DMR revenues will be used for credit support and access to reasonably priced capital in order to jumpstart the Companies' grid modernization initiatives, such charges could be recovered outside of the ESP, pursuant to the Energy Policy Act of 2005. Additionally, in their application for rehearing, the Companies assert the Commission should have specified the additional bases for concluding that Rider DMR has no quantitative effect on the ESP versus MRO test, including that the Companies could receive Rider DMR revenues outside of an ESP in a base distribution rate case or other rate mechanism and, even if Rider DMR's costs to customers were included only on the ESP portion of the test, such costs are more than offset by the $568 million economic impact attributed to Rider DMR's headquarters condition.

{¶ 158} In response to FirstEnergy's assignment of error, CMSD argues there is no provision in R.C. 4928.142 that authorizes the recovery of distribution-related costs in an MRO proceeding based on the notion that such costs might be recognized for purposes of establishing the revenue requirement in an R.C. 4909.18 distribution rate case and, thus, means that the Rider DMR revenues would not represent a "wash" for purposes of the ESP versus MRO test. CMSD and OMAEG also reiterate their earlier arguments that the real purpose for Rider DMR is to provide a cash infusion to the Companies, rather than fund grid modernization programs, while also pointing out several alleged inconsistencies with FirstEnergy's concerns regarding the cash outflows from debt refinancing and pension expense. As its final point, CMSD and Sierra Club contend that FirstEnergy is incorrect to state that the Commission could authorize the collection of Rider DMR revenues in a distribution rate case or the Companies could recover such revenues under Rider AMI, noting, once again, that Rider DMR merely represents a cash infusion with no associated benefits by way of grid modernization. CMSD, OMAEG, and Sierra Club also reiterate their earlier arguments against the authority of Rider DMR under R.C. 4928.143(B)(2)(i) to contradict FirstEnergy's assertion that the quantifiable benefits of Rider DMR should include the estimated $568 million economic impact of the headquarters, noting that FirstEnergy already had a commitment to maintain its headquarters in Akron, Ohio through its lease agreement and by the terms of the Third Supplemental Stipulation. Thus, it would be improper for the Commission to assign a quantitative value of that economic benefit for purposes of the ESP versus MRO test when FirstEnergy has showed no intention of moving its headquarters and has provided no information as to the quantifiable benefits or costs of maintaining its location. NOPEC and OCC/NOAC also disagree with the assertion that the Commission should find comparable revenues would be recoverable in a base distribution rate case, noting that R.C. 4905.15 provides no provisions that would allow an electric distribution utility, or its parent, to recover for credit support, R.C. 4928.143(C)(1) limits the comparison of an ESP to only that of an MRO, and to state otherwise would be in complete contradiction with the plain meaning of the statute and statutory interpretation directives. *In re Columbus S. Power Co.*, 138 Ohio St.3d 448, 9 N.E.3d 1064 (2014). Sierra Club adds that, because Rider DMR is not based on the recovery of any costs incurred by the Companies or attributable to any investments in distribution modernization initiatives, Rider DMR revenues could not be collected through a base rate case. *Consumers' Counsel v. Pub. Util. Comm.*, 67 Ohio St.2d 153, 423 N.E.2d 820 (1981).

{¶ 159} The Commission finds that the issues raised by OCC/NOAC, CMSD, and Sierra Club were thoroughly addressed in the Fifth Entry on Rehearing (Fifth Entry on Rehearing at 153-57, 160-63). We also add that there was ample evidence in the record to make such conclusions in that decisions, notably the testimony of FirstEnergy witness Mikkelsen and Staff witness Turkenton (Co. Ex. 206 at 19-20; Staff Ex. 14 at 3-4; Rehearing Tr. Vol. II at 482-83). The Commission, acknowledging that we have never approved an application under R.C. 4928.142(D), looked to other comparable statutes to consider the types of evaluative factors that we could utilize under that section and determined that R.C. 4909.16 provided guidance for our analysis under a hypothetical MRO application, even though the same standards applicable to R.C. 4909.16 would not necessarily apply to R.C. 4928.142(D).[8] With such criteria

[8] In ¶¶354 and 355 of the Fifth Entry on Rehearing, the Commission inadvertently referenced "R.C. 4928.143(D)" and "R.C. 4928.143" instead of R.C. 4928.142(D) and R.C. 4928.142, respectively.

in mind, we determined that the risk of the Companies' and FirstEnergy Corp.'s credit ratings dropping to below investment grade, along with the consequences resulting from such a decline, would be sufficient to constitute an emergency that threatens the utility's financial integrity, rather than simply only relying on the current credit ratings of the Companies, as alleged by CMSD. Further, CMSD ignores the fact that Rider DMR will provide the necessary financial support to the Companies in the short-term in order to access the capital markets for grid modernization purposes and cover short-term obligations. The fact that the modified Rider RRS was projected to provide a $256 million net credit to customers over eight years does not change the fact that the Companies require financial assistance now. The Commission also finds that the arguments of intervening parties that FirstEnergy failed to provide evidence of such a financial emergency are baseless, as there was an abundance of evidence presented by FirstEnergy, Staff, and even several of the intervening parties, upon which the Commission relied to make such a determination. We would also like to address Sierra Club's allegation that we "ignored" the arguments raised in its post-hearing brief and note that we thoroughly reviewed and considered all arguments presented by the parties and, based on that analysis, made our determinations. Furthermore, we find it very difficult for Sierra Club to make such an allegation when we summarized, and subsequently rejected, their arguments relating to the quantitative effect of Rider DMR on the ESP versus MRO test in our decision (Fifth Entry on Rehearing 153-55, 160-63). Again, it seems Sierra Club's main contention is that we disagreed with their recommendations, which is not an appropriate justification to grant rehearing. Accordingly, these assignments of error and, consequently, any assignments of error contending that the costs associated with Rider DMR should be considered in our quantitative analysis, should be denied.

{¶ 160} In response to FirstEnergy's application for rehearing, we are not persuaded by FirstEnergy's assertion that Rider DMR revenue could be recovered through a base distribution rate case. We do agree that certain costs of grid modernization, specifically the costs of any acquisition and deployment of advanced metering, including the costs of any meters prematurely retired as a result of the advanced metering implementation, may be recovered outside of an ESP, pursuant to our statutory authority under R.C. 4905.31. Moreover, we also agree that the $568 million annual economic impact of the retention of the FirstEnergy Corp. headquarters is an economic benefit under the ESP and should be included as a consideration in the ESP versus MRO test. Accordingly, rehearing on this assignment of error by the Companies should be granted in part and denied in part.

ii. The Commission's finding that Rider DCR has no quantitative impact for purposes of the ESP versus MRO test.

{**¶ 161**} In addition, OCC/NOAC argue in their application for rehearing that the Commission violated R.C. 4903.09 by solely relying on previous case law in support of its finding that the costs of Rider DCR would have no quantitative impact for purposes of the ESP versus MRO test. Further, OCC/NOAC assert that the Commission failed to address the testimony of OCC witnesses Effron and Kahal, which allegedly show that the Companies are over-earning on their distribution service. Similarly, because of the evidence of over-earning, OCC/NOAC add that prior cases finding that Rider DCR had no quantitative impact for purposes of the ESP versus MRO should not be applicable.

{**¶ 162**} In its memorandum contra, FirstEnergy contends that the Commission was correct to treat Rider DCR as a "wash" for purposes of the ESP versus MRO test, notably because these distribution-related capital costs would also be recoverable under an MRO through a base distribution rate case and there is no quantifiable cost associated with this provision in the Stipulated ESP IV (Order at 119). Further, the Companies assert that OCC/NOAC provide no supporting authority for its position and ignores the fact that the prior precedent relied upon by the Commission has also been upheld by the Supreme Court, making this matter a settled proposition. *FirstEnergy ESP III* Opinion and Order at 55-56. Additionally, the Companies contend that the Commission did thoroughly consider, and subsequently rejected, OCC/NOAC's arguments and testimony regarding the Companies' alleged over-earning on its distribution service in its Order and Fifth Entry on Rehearing (Order at 119; Fifth Entry on Rehearing at 116).

{¶ 163} We agree with FirstEnergy and find that these arguments have been thoroughly addressed in our Order and Fifth Entry on Rehearing, in addition to prior Commission decisions in other ESP proceedings (Order at 119; Fifth Entry on Rehearing at 116). *FirstEnergy ESP III* Opinion and Order at 55-56; *In re Columbus S. Power Co.*, Case No. 11-346-EL-SSO, Opinion and Order at 31. Thus, there is no reason for us to reiterate that reasoning again. Further, it is well-known that the Commission may refer to its past decisions in support of its findings in a case, much like the parties are entitled to reference past Commission decisions in their briefs and applications for rehearing without introducing those decisions into the evidentiary record first. This practice is particularly essential when dealing with riders and other mechanisms that have a long-standing presence before the Commission. OCC/NOAC's assignments of error as to this issue will be denied.

2. THE COMMISSION'S FINDING THAT *ESP IV*, AS MODIFIED BY THE COMMISSION, IS QUALITATIVELY MORE FAVORABLE THAN THE EXPECTED RESULTS OF AN MRO.

{¶ 164} In its application for rehearing, CMSD argues that the Commission erred in its application of the ESP versus MRO test by failing to balance the quantitative and qualitative benefits. CMSD notes that the Commission elected to find that *ESP IV* was more favorable than the MRO based on qualitative benefits alone, without regard to a correctly administered quantitative analysis. Additionally, CMSD contends that the additional costs that a customer would incur under an ESP should be proportional to the qualitative benefits the ESP would provide, and because the Commission failed to make such a determination, the ESP versus MRO test analysis is unreliable.

{¶ 165} In response, FirstEnergy first claims that CMSD's arguments misrepresent the findings in the Fifth Entry on Rehearing, in which the Commission posited a very thorough review of both the quantitative and qualitative benefits of *ESP IV*. The Companies add that the result of that analysis was that *ESP IV* is more beneficial than an MRO by at least $51.1 million of quantitative benefits from shareholder funded commitments, in addition to several significant qualitative benefits. Considering the Commission's finding that Rider DMR had no quantitative impact for purposes of the ESP versus MRO test, FirstEnergy asserts that CMSD's argument is meritless. Furthermore, the Companies assert that CMSD cites no supporting authority for its proportional test, noting that R.C. 4928.143(C)(1) has no such requirement. Finally, the Companies argue that the Commission evaluated the quantitative and qualitative benefits, both independently and taken together, and each case supported the Commission's finding that *ESP IV*, as modified by the Commission, was more favorable in the aggregate than the results of an MRO. Moreover, the Companies add that if the quantitative benefits had not outweighed the qualitative benefits, the analysis would have ultimately resulted in the same outcome. *In re the Application of Columbus S. Power Co. and Ohio Power Co.*, Case No. 11-346-EL-SSO, Opinion and Order (Aug. 8, 2012) at 75-77.

{¶ 166} The Commission is not persuaded by CMSD's arguments regarding the proportionality of quantitative costs relative to qualitative benefits, noting that R.C. 4928.143(C)(1) provides no such requirement. Furthermore, the Commission agrees with FirstEnergy that we conducted a thorough analysis of both quantitative and qualitative benefits to determine that *ESP IV*, as modified by our Order and Fifth Entry on Rehearing, is more favorable in the aggregate than the results of an MRO (Order at 112-20; Fifth Entry on Rehearing at 151-65). As such, we find CMSD's assignments of error should be denied.

i. The Commission's finding that Rider DMR will provide easier access to capital markets and allow the Companies to invest in grid modernization initiatives in their distribution systems.

{¶ 167} In their applications for rehearing, OMAEG, Sierra Club, and CMSD once again assert that there are no real commitments that the revenues received under Rider DMR are to be used for distribution grid modernization. Instead, these parties assert that Rider DMR was designed only to provide a cash infusion to the Companies to support FirstEnergy Corp.'s credit rating. OMAEG adds that Staff witness Choueiki even acknowledged that Rider DMR was created in order to provide necessary credit support to FirstEnergy Corp. and the Companies, instead of grid modernization. Sierra Club further argues that Rider DMR is unnecessary for grid modernization to occur and that the alleged grid modernization benefits of Rider DMR are illusory, as Rider DMR is intended to provide support to FirstEnergy Corp. and its subsidiaries. CMSD again raises the concern that there is no guarantee that Rider DMR will prevent a ratings downgrade, and as a result, contends that the Commission erred in finding that Rider DMR will encompass grid modernization benefits.

{¶ 168} In their memorandum contra, the Companies first assert that the Commission has already considered and rejected these arguments in the Fifth Entry on Rehearing (Fifth Entry on Rehearing at 160-64). Without unnecessarily duplicating its earlier arguments in response to intervenors claiming that there was no real commitment by the Companies to invest in grid modernization, FirstEnergy simply notes that the revenues received under Rider DMR will provide credit support to enable the Companies to maintain investment grade ratings and access the necessary capital required to engage in their grid modernization initiatives over the term of *ESP IV*. As such, the Companies assert that the ability to maintain their investment grade ratings is certainly a qualitative benefit of Rider DMR.

{¶ 169} We find that these arguments have been fully addressed and we will not duplicate the reasoning set forth in the Fifth Entry on Rehearing in this decision (Fifth Entry on Rehearing at 160-64). Accordingly, these assignments of error should be denied.

ii. The Commission's finding that Rider DMR will promote diversity of supplies and suppliers and promote Ohio's competitiveness in the global marketplace.

{¶ 170} OMAEG reiterates its earlier arguments that Rider DMR's purported qualitative benefit of diversity of suppliers and supplies is also largely overstated, noting that Rider DMR may actually deter other generation suppliers from entering the market upon seeing the competitive advantage provided to FirstEnergy Corp. and its subsidiaries. OMAEG adds that Rider DMR will actually have a detrimental effect on economic development in the state of Ohio.

{¶ 171} FirstEnergy notes that the Commission has previously considered and rejected these arguments and OMAEG has offered no additional information that would warrant changing the Commission's earlier finding (Fifth Entry on Rehearing at 158, 163). Additionally, the Companies reiterate there was a considerable amount of evidence in the record that showed encouraging the deployment of advanced technology throughout the distribution system will cause competitive suppliers to enter the market and to offer more innovative products to retail customers. The Companies also argue that the Commission similarly recognized the extensive economic benefits resulting from maintaining FirstEnergy Corp.'s headquarters in Akron, Ohio, as quantified in FirstEnergy witness Murley's economic impact analysis (Fifth Entry on Rehearing at 77).

{¶ 172} We agree that these arguments were thoroughly addressed in our Fifth Entry on Rehearing, in which we found that Rider DMR will promote diversity of supplies and suppliers and promote Ohio's competiveness in the global marketplace (Fifth Entry on Rehearing at 163-64). In support of our findings, we specifically referenced the rehearing testimony of RESA witness Crockett-McNew and Staff witnesses, in which they agreed that grid modernization will promote customer choice and promote the state's competitiveness in the global marketplace (Fifth Entry on Rehearing at 163-64; RESA Ex. 7 at 7; Staff Ex. 15 at 15-16; Staff Ex. 14 at 4). We also recognized the economic impact of maintaining FirstEnergy Corp.'s headquarters in Ohio, further noting that no other witness was able to produce evidence contradicting Ms. Murley's estimated economic impact of $568 million on Ohio's economy (Fifth Entry on Rehearing at 77). Thus, OMAEG's assignments of error as to these issues should be denied.

iii. The Commission's finding that the five qualitative benefits previously relied upon by the Commission in its original Order will continue to exist under *ESP IV*, as modified by the Fifth Entry on Rehearing.[9]

{¶ 173} In its application for rehearing, Sierra Club argues that the Commission unreasonably found certain qualitative benefits to exist under *ESP IV*. Specifically, Sierra Club takes issue with the Commission's recognition of the CO_2 reduction commitment and the 800,000 MWh reduction goal, contending such benefits are illusory and should not be considered qualitative benefits for purposes of the ESP versus MRO test because they are unenforceable. OMAEG also incorporates its arguments against these alleged benefits from its May 2, 2016 application for rehearing.

{¶ 174} In response, FirstEnergy argues that Sierra Club's assertions were rejected previously by the Commission (Order at 94-95). Furthermore, the Companies assert that they have filed their report with the Commission describing FirstEnergy Corp.'s carbon reduction efforts, and will continue to do so every five years through 2045. The Companies note further that they will strive to achieve this goal even if the Environmental Protection Agency's Clean Power Plan is overturned. Similarly, the Companies contend that, as they are committed to achieving substantial annual energy savings, they fully intend to uphold their commitment that they have presented to the Commission.

{¶ 175} Consistent with the *ESP IV* Opinion and Order and Fifth Entry on Rehearing issued in this case and based upon the testimony presented on rehearing, we find that these constitute tangible qualitative benefits will provide some value during *ESP IV* that would not

9 These qualitative benefits include: (1) modernizing distribution infrastructure through the filing of a business plan for the deployment of smart grid technology and advanced metering infrastructure in accordance with state policy set forth in R.C. 4928.02(D); (2) promoting resource diversity by investing in utility scale battery technology and by procuring or constructing new renewable energy resources; (3) encouraging energy efficiency; (4) continuing the distribution base rate freeze until June 1, 2024; and (5) providing multiple rate options and programs to preserve and enhance rate options for various customers (Fifth Entry on Rehearing at 163-64).

otherwise be available under an MRO (Order at 119; Fifth Entry on Rehearing at 163-64). As such, we find that Sierra Club's assignments of error as to these issues should be denied.

IV. PROCEDURAL MATTERS

A. *FirstEnergy's Motions to Strike*

{¶ 176} FirstEnergy filed motions to strike portions of the applications for rehearing filed by NOPEC and OMAEG on November 25, 2016 and December 2, 2016, respectively. OMAEG filed a memorandum contra FirstEnergy's motion to strike portions of its application for rehearing, to which FirstEnergy filed a reply.

{¶ 177} In its motion to strike portions of NOPEC's application for rehearing, FirstEnergy asserts that NOPEC improperly relied on material that is not in the evidentiary record and would be extremely prejudicial to the Companies. Moreover, FirstEnergy notes that NOPEC relies on news articles for this information, which the attorney examiners have already determined constitutes inadmissible hearsay. NOPEC did not file a memorandum contra asserting that the information should remain in its application for rehearing.

{¶ 178} In its motion to strike portions of OMAEG's memorandum contra applications for rehearing, FirstEnergy contends that OMAEG's argument that the Commission erred in extending the Companies' right to withdraw its ESP constitutes an untimely application for rehearing and its inclusion in a memorandum contra would be prejudicial to the Companies because they will have no opportunity to respond. As this section in OMAEG's memorandum contra fails to attempt to refute any argument raised in the applications for rehearing, FirstEnergy claims it is improper under both the Ohio Administrative Code and Commission precedent. Ohio Adm.Code 4901-1-35; *In re the Establishment of Carrier-to-Carrier Rules* , Case No. 06-1344-TP-ORD, Entry on Rehearing (Oct. 17, 2007) at 3; *In re the Regulation of the Elec. Fuel Component Contained within the Rate Schedules of Ohio Power Co.*, Case No. 98-101-EL-EFC, et al., Entry on Rehearing (July 15, 1999) at 8.

{¶ 179} In response, OMAEG asserts that its argument was proper, noting that the Companies' right to withdraw from the ESP is directly related to the assignments of error raised by the Companies in their application for rehearing. Specifically, OMAEG claims that each time FirstEnergy proposes an additional modification to Stipulated ESP IV, in addition to considering the modification, the Commission should also consider whether it is appropriate to allow the Companies to withdraw its ESP after collecting costs pursuant to their filed tariffs. Further, OMAEG asserts the Companies face no prejudice by OMAEG's argument, as they thoroughly addressed this issue in their own memorandum contra. Finally, while the Companies assert that Ohio Adm.Code 4901-1-35 contains no provisions allowing memoranda in support, OMAEG contends that there is also nothing in the rule prohibiting such supportive arguments. Thus, OMAEG requests that the Commission deny the motion to strike. Alternatively, OMAEG requests leave to file a memorandum in support of OCC/NOAC's application for rehearing.

{¶ 180} In its reply, FirstEnergy argues that OMAEG's position is clearly incorrect, noting that OMAEG fails to explain how the Companies' right to withdraw its ESP would be affected by the Commission's subsequent ruling on the Companies' application for rehearing since that statutory right is independent from the Commission's modifications to Stipulated ESP IV. Further, the Companies contend that its application for rehearing contained no assignment of error addressing their right to withdraw the ESP. Additionally, the Companies assert that OMAEG's argument vary from those raised by OCC/NOAC and, thus, the Companies are prejudiced with the inability to respond to those separate arguments. FirstEnergy requests that the Commission grant its motion to strike, given that OMAEG's argument was inconsistent with Ohio Adm.Code 4901-1-35 and prior Commission practice, and notes that any request for leave to file a memorandum in support of OCC/NOAC's application for rehearing would only unnecessarily delay these proceedings.

{¶ 181} Consistent with our prior decisions in this proceeding, we continue to find that new information should not be introduced after the closure of the record (*ESP IV* Opinion and Order at 37; Fifth Entry on Rehearing at 171). We note that the same analysis may be applied in this Eighth Entry on Rehearing, as FirstEnergy's motion to strike portions of NOPEC's application for rehearing deal with hearsay statements and other evidence not included in the record (*ESP IV* Opinion and Order at 35-37). We find it would be inappropriate to allow this information to be considered at this point in the proceeding, as the record is now closed and the Companies would not have the opportunity to prepare and respond to that information. We also find that FirstEnergy's motion to strike portions of OMAEG's memorandum contra should be granted for the reasons stated in FirstEnergy's motion. While OMAEG may be correct that Ohio Adm.Code 4901-1-35 contains no explicit prohibition against supportive arguments in memoranda contra, the Commission has previously interpreted this rule to limit arguments presented in memoranda contra to those directly adverse to the assignments of error raised in applications for rehearing. We also agree that the additional delay from allowing OMAEG to file a memorandum in support of OCC/NOAC's application for rehearing would be unnecessary and OMAEG has not shown good cause to remedy its procedural mistake.

{¶ 182} Accordingly, FirstEnergy's motions to strike portions of NOPEC's application for rehearing and OMAEG's memorandum contra applications for rehearing will be granted in their entirety. The stricken portions of these filings, as detailed above, have been disregarded by the Commission for purposes of its decision in this Eighth Entry on Rehearing. OMAEG's additional request for leave to file a memorandum in support of OCC/NOAC's application for rehearing should also be denied.

B. *OCC/NOAC's assignment of error alleging that FirstEnergy's application for rehearing does not satisfy the requirements of R.C. 4903.10.*

{¶ 183} In its application for rehearing, OCC/NOAC also allege that FirstEnergy's application for rehearing does not satisfy the requirements of R.C. 4903.10 because it failed to set forth specifically how the Commission's Fifth Entry on Rehearing was unlawful or unreasonable.

{¶ 184} The Commission finds no merit in OCC/NOAC's assignment of error. FirstEnergy clearly identified its assignments of error, in compliance with the statute, and the Commission was able to substantively address those assignments of error. Moreover, our decision is consistent with prior holdings in this proceeding (Third Entry on Rehearing at 9-12, 19; Fifth Entry on Rehearing at 14). Therefore, OCC/NOAC's assignment of error will be denied.

C. *Moot Assignments of Error*

{¶ 185} Upon reviewing several remaining assignments of error raised in the applications for rehearing filed on November 11, 2016, and November 14, 2016, this Commission finds the following assignments of error are moot as they pertain to the Rider RRS mechanism as originally approved by this Commission in the Order or were otherwise addressed in the Fifth Entry on Rehearing:

- The Commission's finding that Modified Rider RRS constitutes a "charge" and a "limitation on customer shopping" pursuant to R.C. 4928.143(B)(2)(d) is unreasonable and unlawful (P3/EPSA App. for Rehearing at 13-16).
- The Commission erred in upholding the attorney examiners' rulings that resulted in striking portions of testimony related to the Companies' Proposal that should have been considered by the Commission in rendering its decision on the lawfulness of Modified Rider RRS (OMAEG App. for Rehearing at 37-46).
- The Commission erred in determining that the Companies' Proposal is authorized under R.C. 4928.143(B)(2)(d) (OMAEG App. for Rehearing at 10-12).

{¶ 186} As we modified our Order in the Fifth Entry on Rehearing to approve Staff's alternative proposal, in the form of Rider DMR, we need not take time to address the merits of the assignments of error raised, or responsive arguments contained in memoranda contra, relating to the Rider RRS mechanism or reiterate our reasoning for the denial of the Companies'

Proposal provided in the Fifth Entry on Rehearing (Fifth Entry on Rehearing at 43-51). Accordingly, the assignments of error raised by P3/EPSA and OMAEG pertaining to Rider RRS and the Companies' Proposal are denied.

D. *General Denial of Assignments of Error Not Specifically Addressed in this Eighth Entry on Rehearing*

{¶ 187} As a final matter, any assignments of error raised by the Companies or the intervening parties in this proceeding that have not otherwise been addressed in this Eighth Entry on Rehearing are hereby denied.

V. ORDER

{¶ 188} It is, therefore,

{¶ 189} ORDERED, That the Companies' motions to strike portions of NOPEC's application for rehearing and OMAEG's memorandum contra the applications for rehearing are granted, as set forth herein. It is, further,

{¶ 190} ORDERED, That the applications for rehearing filed by FirstEnergy be denied in part and granted in part, as set forth herein. It is, further,

{¶ 191} ORDERED, That the applications for rehearing filed by Sierra Club, OCC/NOAC, CMSD, Nucor, NOEPC, OEG, IGS, Environmental Advocates, OMAEG, and P3/EPSA be denied. It is, further,

{¶ 192} ORDERED, That a copy of this Eighth Entry on Rehearing be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Asim Z. Haque, Chairman

M. Beth Trombold

Thomas W. Johnson

Lawrence K. Friedeman

Daniel R. Conway

GAP/MJA/sc

Entered in the Journal

AUG 1 6 2017

Barcy F. McNeal

Barcy F. McNeal
Secretary