Ohio | Public Utilities Commission

LARGE FILING SEPARATOR SHEET

CASE NUMBER: 14-1297-EL-SSO

FILE DATE: 12/6/17

SECTION: 3 of 3

FILED BY: THE NORTHWEST OHIO AGGREGATION COALITION

FILED ON BEHALF OF: THE NORTHWEST OHIO AGGREGATION COALITION

NUMBER OF PAGES: 159

DESCRIPTION OF DOCUMENT: THIRD NOTICE OF APPEAL

180 East Broad Street
Columbus, Ohio 43215-3793

(614) 466-3016
www.PUCO.ohio.gov

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

---

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 competeviness 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

Secretary

ATTACHMENT D

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

NINTH ENTRY ON REHEARING

Entered in the Journal on October 11, 2017

I. SUMMARY

{¶ 1} The Commission finds that the application for rehearing of the Eighth Entry on Rehearing should be denied.

II. DISCUSSION

{¶ 2} Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (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 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 establish an SSO to provide generation pricing for the period of June 1, 2016, through

May 31, 2019. The application is for an ESP, in accordance with R.C. 4928.143 (*FirstEnergy ESP IV*).

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

{¶ 6} 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 a distribution modernization rider (Rider DMR). The Commission also elected to make additional modifications to the stipulations approved in the Opinion and Order.

{¶ 7} Subsequently, on August 16, 2017, the Commission issued its Eighth Entry on Rehearing (Eighth Entry on Rehearing), granting, in part, and denying, in part, applications for rehearing submitted by numerous parties with respect to the Fifth Entry on Rehearing.

{¶ 8} 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.

{¶ 9} On September 15, 2017, FirstEnergy filed an application for rehearing of the Eighth Entry on Rehearing.

{¶ 10} The Ohio Consumers' Counsel and the Northwest Ohio Aggregation Coalition (OCC/NOAC) jointly filed a memorandum contra the application for rehearing on September 25, 2017. The Ohio Manufacturers' Association Energy Group (OMAEG) also filed a memorandum contra the application for rehearing on September 25, 2017.

{¶ 11} In its application for rehearing, FirstEnergy raises two assignments of error. In its first assignment of error, the Companies contend that the Eighth Entry on Rehearing is unreasonable and unlawful because it would require Staff to retain a monitor to ensure that funds collected under Rider DMR are expended appropriately.

{¶ 12} In support of this assignment of error, FirstEnergy claims that the directive to use a third-party monitor is wrong because, as the Commission had previously noted, the Commission and Staff are fully capable of making such an assessment. FirstEnergy also contends that Rider DMR revenues cannot be tracked in "real time." The Companies note that there is no way to "paint" Rider DMR dollars so that those dollars can be directly tracked to eventual use in support of grid modernization (Rehearing Tr. Vol. X at 1605-06). Instead, the Companies can report to Staff on payments in support of grid modernization, pension obligations, debt service obligations, and taxes, among other things. Further, FirstEnergy claims that the Commission has ample controls available to ensure no affiliate cross-subsidization will occur. FirstEnergy notes that the Companies are required to publically report dividends, loans and equity infusions and to report to the Commission on a quarterly basis on their participation in the FirstEnergy Corp. utility money pool arrangement. *In re Am. Transm. Sys. Inc., Ohio Edison Co., The Cleveland Elec. Illum. Co. and The Toledo Edison Co.*, Case Nos. 16-2050-EL-AIS et. al, Finding and Order (December 21, 2016) (*Money Pool Order*).

{¶ 13} The Companies also contend that quarterly reviews are impractical and unnecessary. The Companies claim that anticipated expenditures or use of funds in support of grid modernization will not occur regularly. Thus, the Companies argue that quarterly interim reports effectively would be "busy-work." Instead, the Companies propose to provide Staff annually with a list of what funds have been expended to further the purposes of Rider DMR, which the Staff could audit at its convenience.

{¶ 14} Finally, the Companies posit that "real-time" monitoring could restrict the use of Rider DMR funds. The Companies claim that the third-party monitor will have strong incentives to insert itself in the decision-making process or to seek opportunities to second-guess utility management. The Companies note that, since utilities are privately-owned and operated, regulators cannot and should not usurp the management role. *Elyria Tel. Co. v. Pub. Util. Comm.*, 158 Ohio St. 441, 447-448, 110 N.E.2d 59 (1953).

{¶ 15} In its memorandum contra, OMAEG contends that Staff's review of Rider DMR is necessary to protect customers and to ensure that funds collected under Rider DMR will be used to support grid modernization. OMAEG alleges that, other than claiming that Rider DMR dollars cannot be painted to allow tracking and that a monitor is not necessary, the Companies make no argument or showing how the use of a third-party monitor is inconsistent with the Commission's directive in the Fifth Entry on Rehearing mandating that Staff review the use of Rider DMR funds, which the Companies did not oppose. Further, OMAEG claims that the Companies fail to allege how the employment of a third-party monitor to assist Staff is unreasonable or unlawful as required by R.C. 4903.10(B). OMAEG notes that the Commission regularly uses third parties to assist Staff in reviewing and evaluating a public utility's financial records and business practices to ensure that customer funds are expended appropriately and prudently. OMAEG also argues that the Companies have failed to allege how the quarterly interim reports to Staff are unreasonable or unlawful; OMAEG claims that FirstEnergy merely asserts that the quarterly reports will serve no purpose and would be busy-work for the third-party monitors. Finally, OMAEG disputes the Companies' claim that a real time review of Rider DMR places restrictions on how the Companies use Rider DMR funds and interferes with their management role. OMAEG argues that, although neither the Fifth Entry on Rehearing nor the Eighth Entry on Rehearing limit or restrict how the Companies may use Rider DMR funds to support grid modernization, the Commission was clear that Rider DMR funds must be used to support grid modernization. Fifth Entry on Rehearing at 127-128. OMAEG argues that Staff's ongoing and real time review is necessary to protect customers and ensure that this directive is followed.

{¶ 16} OCC/NOAC, in their memorandum contra, claim that the plan for third-party monitors adopted by the Commission is intended to provide oversight on the use of Rider DMR funds. OCC/NOAC contend that the purpose of the using a third-party monitor is to ensure that Rider DMR revenues are being used to address credit quality and related goals accepted by the Commission. OCC/NOAC claim that existing financial and other self-reporting is useful but is not an adequate substitute for the third-party monitors contemplated by the Commission. OCC/NOAC also notes that existing regulatory mechanisms regarding affiliate transactions are not specifically directed to the objectives of Rider DMR. OCC/NOAC dismisses FirstEnergy's claims that the third-party monitors will usurp the Companies' management authority, noting that the third-party monitors will not have the authority to operate the utility, preempt utility management decisions or restrict financial flexibility. OCC/NOAC concludes that, if FirstEnergy finds the scrutiny and regulatory oversight of the third-party monitor so objectionable, the Companies can avoid such scrutiny and oversight by forgoing collection of funds under Rider DMR, a result which OCC/NOAC would support.

{¶ 17} The Commission finds that rehearing on this assignment of error should be denied. With respect to FirstEnergy's contention that Staff is fully capable of confirming whether the Companies (and FirstEnergy Corp.) have used funds collected to support grid modernization, we agree. Staff is fully capable of making this determination. However, in balancing the workload of Staff, the Commission frequently uses third parties to conduct audits or reviews on Staff's behalf. *See, In re Ohio Edison Co., The Cleveland Elec. Illum. Co. and The Toledo Edison Co.,* Case No. 17-974-EL-UNC (*Corporation Separation Audit Case*), Entry (July 5, 2017) (auditor selected for corporate separation audit). *See also, In re Ohio Edison Co., The Cleveland Elec. Illum. Co. and The Toledo Edison Co.,* Case No. 16-2041-EL-RDR, Entry (December 7, 2016) (auditor selected for 2016 review of delivery capital recovery rider); *In re Ohio Edison Co., The Cleveland Elec. Illum. Co. and The Toledo Edison Co.,* Case No. 15-1739-EL-RDR, Entry (December 9, 2015) (auditor selected for 2015 review of delivery capital recovery rider); *In re Ohio Edison Co., The Cleveland Elec. Illum. Co. and The*

Toledo Edison Co., Case No. 14-1929-EL-RDR, Entry (December 10, 2014) (auditor selected for 2014 review of delivery capital recovery rider). This case is no different. We have determined, in this case, that the periodic reviews would be better conducted by a third-party monitor on behalf of Staff. FirstEnergy has not presented any compelling arguments why this decision to use a third party on behalf of Staff is different than any other decision to use a third party on behalf of Staff or how the Companies are prejudiced by the use of a third party rather than Staff.

{¶ 18} We are also not persuaded by FirstEnergy's claims that existing controls ensure that there is no unlawful subsidy of the Companies affiliates in the use of Rider DMR funds. The audit in the *Corporate Separation Audit Case* has a different scope than the review of the use of Rider DMR revenues and, in any event, is due to be completed by February 28, 2018; *Corporate Separation Audit Case*, Entry (May 17, 2017), Request for Proposal No. RA17-CA-2 at 3. Thus, the auditor would not be able to review any transactions entered into in 2018 after February 28, 2018, or any transactions entered into in 2019. Likewise, the reporting requirements contained in Commission orders authorizing utilities to issue debt, while important in their own right, have a different scope than the review at issue here. *In re Am. Transm. Sys. Inc., Ohio Edison Co., The Cleveland Elec. Illum. Co. and The Toledo Edison Co.*, Case Nos. 16-2050-EL-AIS et al., Finding and Order (December 21, 2016).

{¶ 19} FirstEnergy also claims that quarterly reviews are impractical and unnecessary. We disagree. The Commission notes that, in the Fifth Entry on Rehearing, we directed the Staff to "periodically review" how the Companies (and FirstEnergy Corp.) use Rider DMR funds. The quarterly interim reports are simply part of the detailed instructions the Commission provided Staff for terms and conditions to include in the request for proposals (RFP) for the third-party monitor. As this is an ongoing review, we have determined that the third-party monitor should provide interim reports to the Staff on a quarterly basis so that Staff can remain informed on the progress of the ongoing review. Therefore, the Commission directed the Staff to include this provision as part of the RFP. This is also not an unusual provision. In the *Corporate Separation Audit Case*, the auditor is required to provide *monthly* status updates to Staff regarding the audit. *Corporate Separation Audit Case*, Entry (May 17, 2017), Request for Proposal No. RA17-CA-2 at 4. The requirement for quarterly interim reports in the Eighth Entry on Rehearing simply provides direction on the third-party monitor's obligations to Staff during the review, and the Companies have not shown any prejudice by this requirement.

{¶ 20} The Commission also rejects FirstEnergy's claim that real-time monitoring will somehow restrict the use of funds collected under Rider DMR. As OMAEG correctly observed, the Commission directed in the Fifth Entry on Rehearing that Rider DMR funds be used, directly or indirectly, in support of grid modernization. The Commission noted that the Companies may use Rider DMR funds directly in support of grid modernization, by using the funds for the large up-front cash investments necessary for grid modernization. The Commission also noted that the Companies may use Rider DMR funds indirectly in support of grid modernization by taking steps to lower the cost of borrowing the funds necessary to invest in grid modernization; these steps may include reducing outstanding pension obligations, reducing debt, or taking other steps to reduce long-term costs of accessing capital. Fifth Entry on Rehearing at 127-128. Nothing in the Eighth Entry on Rehearing explicitly changed these findings, and we are not persuaded by FirstEnergy that these findings were implicitly changed by our guidance that the review be done by a third party rather than Staff or that the review be ongoing, in real-time, rather than "periodically." Accordingly, rehearing on this assignment of error should be denied.

{¶ 21} In its second assignment of error, FirstEnergy alleges that the Eighth Entry on Rehearing is unlawful and unreasonable because the Commission failed to restore the 50 basis point adder to the return on equity calculation for the Advanced Metering Infrastructure/Modern Grid Rider (Rider AMI) previously approved by the Commission.

{¶ 22} OMAEG and OCC/NOAC reply that the Eighth Entry on Rehearing did not eliminate the 50 basis point adder. Instead, OMAEG and OCC/NOAC note that the

Fifth Entry on Rehearing eliminated the 50 basis point adder. OMAEG claims that the Companies raised the exact same arguments in their application for rehearing of the Fifth Entry on Rehearing and that the Commission rejected those arguments in the Eighth Entry on Rehearing. OCC/NOAC claim that the Companies seek a second bite at the apple. Both OMAEG and OCC/NOAC conclude that the arguments raised by FirstEnergy in the September 15, 2017 application for rehearing are untimely and that the Commission should reject this second request to reinstate the 50 basis point adder.

{¶ 23} The Commission finds that, with respect to its second assignment of error, FirstEnergy improperly seeks rehearing on rehearing. The Commission approved the 50 basis point adder as part of our approval of the stipulations originally filed in this proceeding. Opinion and Order at 22-23, 95, 111. In the Fifth Entry on Rehearing, the Commission reversed the decision to approve the 50 basis point adder. Fifth Entry on Rehearing at 106-108. In the Eighth Entry on Rehearing, the Commission affirmed the ruling in the Fifth Entry on Rehearing and denied rehearing on FirstEnergy's assignment of error related to the 50 basis point adder. Eighth Entry on Rehearing 67-68. Now, the Companies seek rehearing of that denial of rehearing. It is well established that it is improper to seek rehearing of a denial of rehearing on the same issue.

{¶ 24} In *Ormet Primary Aluminum Corp. v. South Central Power Co. and Ohio Power Co.*, the Commission squarely addressed this question, holding that R.C. 4903.10 does not allow persons who enter appearances to have "two bites at the apple" or to file rehearing upon rehearing of the same issue. *Ormet Primary Aluminum Corp. v. South Central Power Co. and Ohio Power Co.*, Case No. 05-1057-EL-CSS, Second Entry on Rehearing (September 13, 2006) at 3-4 (citing *In re The East Ohio Gas Co. and Columbia Gas Co.*, Case Nos. 05-1421-GA-PIP, et al., Second Entry on Rehearing (May 3, 2006) at 3). *See also In re Ohio Power Co. and Columbus Southern Power Co.*, Case No. 10-2929-EL-UNC, Entry on Rehearing (January 30, 2013) at 4-5. Accordingly, rehearing on this assignment of error should be denied.

III. ORDER

{¶ 25} It is, therefore,

{¶ 26} ORDERED, That the application for rehearing filed by FirstEnergy be denied. It is, further,

{¶ 27} ORDERED, That a copy of this Ninth 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/sc

Entered in the Journal
OCT 11 2017

Barcy F. McNeal

Barcy F. McNeal
Secretary

APPLICATIONS FOR REHEARING

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

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

BRUCE J. WESTON (0016973)
OHIO CONSUMERS' COUNSEL

Larry S. Sauer (0039223)
Counsel of Record
Maureen R. Willis (0020847)
William J. Michael (0070921)
Kevin F. Moore (0089228)
Ajay Kumar (0092208)
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
Telephone [Sauer]: (614) 466-1312
Telephone [Willis]: (614) 466-9567
Telephone [Michael]: (614) 466-1291
Telephone [Moore]: (614) 387-2965
Telephone [Kumar]: (614) 466-1292
Larry.sauer@occ.ohio.gov
Maureen.willis@occ.ohio.gov
William.michael@occ.ohio.gov
Kevin.moore@occ.ohio.gov
Ajay.kumar@occ.ohio.gov

Thomas R. Hays (0054062),
Counsel of Record
For NOAC and the Individual
Communities
8355 Island Lane
Maineville, Ohio 45039
Telephone: 419-410-7069
trhayslaw@gmail.com

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

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

The Office of the Ohio Consumers' Counsel ("OCC") and the Northwest Ohio Aggregation Coalition and the NOAC Communities Individually ("NOAC") file this application for rehearing[1] to protect 1.9 million consumers from, the PUCO plan for charging consumers hundreds of millions of dollars to support its financially challenged parent, FirstEnergy Corp., and/or its unregulated generation affiliate, FirstEnergy Solutions. This so-called credit support may ultimately be a bailout of affiliate-owned power plants akin to the proposal that was halted in April by Federal Energy Regulatory Commission ("FERC"). Consumers will pay a t least $612 million dollars (and perhaps up to more than $1 billion) but not for the electricity that they use. Instead the money they need for their families can be used to subsidize FirstEnergy's unregulated generation affiliate - FirstEnergy Solutions over three years through a Credit Support Rider (aka "Rider DMR" or "Credit Support Rider"). That plan was approved by the Public Utilities Commission of Ohio ("Commission" or "PUCO") in its Fifth Entry on Rehearing, issued October 12, 2016.

[1] This application for rehearing is authorized under R.C. 4903.10 and Ohio Adm. Code 4901-1-35.

In its Fifth Entry on Rehearing, the PUCO approved, with modifications, the Third Supplemental Stipulation establishing an eight year electric security plan ("ESP) for FirstEnergy. Under the PUCO modified ESP IV FirstEnergy will collect $204 million per year from customers for three years (plus potentially 2 more years) through the Credit Support Rider starting January 1, 2017. The PUCO's October 12, 2016, Entry on Rehearing was unreasonable and unlawful in the following respects:

ERRORS

ASSIGNMENT OF ERROR NO. 1: The PUCO erred by finding the stipulated ESP is more favorable in the aggregate than a Market Rate Offer ("MRO"). In particular the PUCO erred in evaluating the quantitative benefits of the ESP and concluding that those quantitative benefits outweigh those of an MRO.

A. The PUCO unreasonably and unlawfully failed to consider the delivery capital recovery rider revenues as quantifiable costs to customers under an ESP, causing the ESP costs to customers to be understated. The PUCO failed to base its finding on facts contained in the record in this proceeding, contrary to R.C. 4903.09.

B. The PUCO unreasonably and unlawfully failed to consider the distribution modernization rider as a quantifiable cost to customers under an ESP, causing the ESP costs to customers to be understated. The PUCO failed to base its finding on facts contained in the record in this proceeding, contrary to R.C. 4903.09.

ASSIGNMENT OF ERROR NO. 2: The PUCO erred by approving the Credit Support Rider in violation of Ohio law, including R.C. 4903.38 and 4928.143.

A. The PUCO approved an unlawful transition charge.

B. The Credit Support Rider does not meet the required standards for distribution infrastructure and modernization initiatives.

C. The Credit Support Rider does not meet the requirements of an economic development provision as required under R.C. 1928.143(B)(2)(i).

ASSIGNMENT OF ERROR NO. 3: The PUCO erred in approving the Credit Support Rider because the rider could result in unlawful cross-subsidization and affiliate abuse between FirstEnergy and its unregulated affiliates, leading to higher costs to customers.

ASSIGNMENT OF ERROR NO. 4: The PUCO erred by unlawfully and unreasonably ordering that Credit Support Rider revenues should be excluded from the Significantly Excessive Earnings Test. The PUCO's Order violated R.C. 4928.143(F), which requires the PUCO to consider if any "adjustments" related to the Utility's ESP caused significantly excessive earnings.

ASSIGNMENT OF ERROR NO. 5: The PUCO violated R.C. 4903.09 in making its decisions without findings of fact supported by the record, in the following respects.

A. The PUCO found that an incentive is needed for the utility to invest in grid modernization.

B. The PUCO found that sufficient protections are in place to ensure that effective and efficient use of funds provided to low-income customers, making competitive bidding procedures unnecessary at this time.

ASSIGNMENT OF ERROR NO. 6: The PUCO erred in finding that the "Modified Third Supplemental Stipulation" that includes the PUCO Staff's Credit Support Proposal passed the second prong of the settlement test because it does not benefit customers or the public interest.

A. The PUCO's reliance on R.C. 4928.143(B)(2)(h) to authorize the Credit Support Rider harms customers and is not in the public interest.

B. The Credit Support Rider harms customers and is not in the public interest because it is an expensive solution to an over-stated risk.

C. The PUCO authorized the Credit Support Rider with too many open issues such that it will harm consumers and not be in the public interest.

D. Exclusion of the Credit Support Rider revenues from SEET harms consumers and is not in the public interest.

ASSIGNMENT OF ERROR NO. 7: The PUCO erred in finding that the Modified Third Supplemental Stipulation with the PUCO Staff's Credit Support Proposal passed the third prong of the settlement test because the Settlement violates important regulatory principles and practices.

A. The Credit Support Rider does not comply with R. C. 4928.02.

B. The Credit Support Rider is an unlawful subsidy.

C. The Credit Support Rider is an unlawful transition charge.

ASSIGNMENT OF ERROR NO. 8: The PUCO erred when it found that charges authorized by R.C. 4928.143(B)(2)(h) cannot be construed to violate R.C. 4905.22.

ASSIGNMENT OF ERROR NO. 9: The PUCO erred by approving Rider GDR because it harms consumers, and is not in the public interest.

ASSIGNMENT OF ERROR NO. 10: The PUCO erred in ordering that the cost of the Economic Load Response Program Rider credits should be collected from all customers instead of a portion ($5 per credit) being collected solely from GS and GP customers.

ASSIGNMENT OF ERROR NO. 11: The PUCO erred in determining that FirstEnergy may withdraw its ESP long after it has been approved and after hundreds of millions of dollars have been collected from customers.

The reasons in support of this application for rehearing are set forth in the accompanying Memorandum in Support. The PUCO should grant rehearing and abrogate or modify its Entry on Rehearing as requested by OCC/NOAC.

Respectfully submitted,

BRUCE WESTON (0016973)
OHIO CONSUMERS' COUNSEL

/s/ Larry S. Sauer
Larry S. Sauer (0039223)
Counsel of Record
Deputy Consumers' Counsel
Maureen R. Willis (0020847)
William J. Michael (0070921)
Kevin F. Moore (0089228)
Ajay Kumar (0092208)
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
Telephone [Sauer]: (614) 466-1312
Telephone [Willis]: (614) 466-9567
Telephone [Michael]: (614) 466-1291
Telephone [Moore]: (614) 387-2965

Telephone [Kumar]: (614) 466-1292
Larry.sauer@occ.ohio.gov
Maureen.willis@occ.ohio.gov
William.michael@occ.ohio.gov
Kevin.moore@occ.ohio.gov
Ajay.kumar@occ.ohio.gov

/s/ Thomas R. Hays

Thomas R. Hays (0054062),
Counsel of Record
For NOAC and the Individual
Communities
8355 Island Lane
Maineville, Ohio 45039
Telephone: 419-410-7069
trhayslaw@gmail.com

TABLE OF CONTENTS

PAGE

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

APPLICATION FOR REHEARING
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL AND THE

I. INTRODUCTION

The Public Utilities Commission of Ohio ("PUCO") still has the ability in this proceeding to protect 1.9 million Ohioans from paying massive subsidies to FirstEnergy ("FirstEnergy" or "Utilities")[2] in the name of credit support. The credit support will require FirstEnergy consumers to pay $612 million over the next three years or more than $1 billion over five years. It is not for the electricity that they use. Instead it can be used to subsidize FirstEnergy Corp or its unregulated generation affiliate in any way they see fit.

This is simply another unnecessary bailout for FirstEnergy which is in its present state due to its poor business decisions regarding its generation fleet. But customers should no longer be subsidizing the power plants of Ohio's electric utilities. Both the Ohio Revised Code and recent Supreme Court decisions show that such a subsidy is clearly unlawful.

[2] FirstEnergy refers to Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company.

In 1999, the Ohio General Assembly approved Senate Bill 3 ("S.B. 3") that replaced cost-based regulation for generation with competitive markets. The fundamental premise behind S.B. 3 is that retail customers should not now be asked to protect Ohio electric utilities from competitive generation market risks or losses. FirstEnergy is now wholly responsible for whether it is in a competitive position in the generation market. FirstEnergy's generation should not now be subsidized by consumers. Subsidies are harmful to a competitive market. Instead, consumers should receive the benefits of historically low competitive market pricing as the Ohio General Assembly intended in 1999.

The Office of the Ohio Consumers' Counsel ("OCC") and the Northwest Ohio Aggregation Coalition and the Individual Communities ("NOAC"), on behalf of Ohio's residential energy consumers, submits this application for rehearing on the PUCO's Fifth Entry on Rehearing. Because the PUCO's decision violated Ohio law and the policy underlying the law, we seek this rehearing.

II. STANDARD OF REVIEW

Applications for rehearing are governed by R.C. 4903.10. The statute permits "any party who has entered an appearance in person or by counsel in the proceeding" to apply for rehearing in respect to "any matters determined in the proceeding." Applications for rehearing must be filed within thirty days of the PUCO's orders.

Both OCC and NOAC filed motions to intervene in this proceeding, 2014, which were granted by Entry dated December 1, 2014. OCC and OCC/NOAC also filed testimony regarding FirstEnergy's electric security plan ("ESP"). OCC and NOAC actively participated in the evidentiary hearing and rehearing process.

R.C. 4903.10 requires that an application for rehearing must be "in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful." Additionally, Ohio Adm. Code 4901-1-35(A) states: "An application for rehearing must be accompanied by a memorandum in support, which shall be filed no later than the application for rehearing."

In considering an application for rehearing, R.C. 4903.10 provides that "the commission may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefor is made to appear." The statute also provides: "[i]f, after such rehearing, the commission is of the opinion that the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may abrogate or modify the same; otherwise such order shall be affirmed." The statutory standard for abrogating some portions of the Opinion and Order and modifying other portions are met here. The PUCO should grant and hold rehearing on the matters specified in this Application for Rehearing, and subsequently abrogate or modify its Fifth Entry on Rehearing.

ASSIGNMENT OF ERROR NO. 1: The PUCO erred by finding the stipulated ESP is more favorable in the aggregate than a Market Rate Offer ("MRO"). In particular the PUCO erred in evaluating the quantitative benefits of the ESP and concluding that those quantitative benefits outweigh those of an MRO.

The PUCO found that the modified ESP IV "considering the entire record of this proceeding" is more favorable in the aggregate than a market rate offer.[3] On its quantitative evaluation, the PUCO concluded that the modified ESP IV was more favorable in the aggregate than an MRO by $51.1 million.[4] The PUCO ruled that two

[3] Fifth Entry on Rehearing at 160.

[4] Id. at 163.

costly charges (Credit Support Rider -$600 million, Rider DCR $915 million) should be excluded from its analysis because the charges "are likely to be recovered under a hypothetical MRO application." The PUCO was wrong. Rehearing should be granted.

A. The PUCO unreasonably and unlawfully failed to consider the delivery capital recovery rider revenues as quantifiable costs to customers under an ESP, causing the ESP costs to customers to be understated. The PUCO failed to base its finding on facts contained in the record in this proceeding, contrary to R.C. 4903.09.

In conducting the ESP v. MRO analysis, the PUCO considered quantitative factors. The PUCO (in the earlier phase of this proceeding) concluded that the costs of the distribution capital recovery rider (Rider DCR)[5] and the costs of a distribution rate case should be considered substantially equal and removed from the ESP v. MRO analysis.[6] The PUCO relied solely upon its previous findings in the FirstEnergy ESP III cases.[7] The PUCO erred by relying upon general conclusions and facts outside the record in this proceeding, contrary to R.C. 4903.09. The PUCO also unreasonably and unlawfully ignored specific record evidence in this proceeding, particularly with respect to OCC Witness Effron's analysis of FirstEnergy's over-earnings on the distribution portion of the Utility's business.

OCC Witness Kahal calculated that Rider DCR (for distribution cost recovery) would cost customers approximately $915 million over and above the current Rider DCR over the eight-year term of FirstEnergy's ESP.[8] And yet, the PUCO disregarded these

[5] Rider DCR is intended to compensate the Utilities for the costs of additions to plant in service over and above the plant included in their base rates, at consumer expense.

[6] Opinion and Order at 119.

[7] Id. at 119, citing FirstEnergy ESP III Case, Opinion and Order (July 18, 2013) (sic) at 55-56; Entry on Rehearing (Jan. 30, 2013) at 22-23.

[8] OCC/NOPEC Ex. 11 at 23-24 and 11A (Kahal Second Supplemental Direct and Kahal Errata).

charges to customers -- calling it a "wash"-- when it conducted the MRO v. ESP test, relying on its prior ruling in a previous FirstEnergy ESP case.

OCC/NOPEC Witness Kahal testified that a general assumption that the DCR is a wash, does not hold true in this case for two key reasons. First, all three utilities are potentially substantially over-earning for distribution utility service, as shown in OCC Witness Effron's analysis.[9] In the Utilities' base rate cases, in which utility earnings are comprehensively reviewed, any excess earnings would serve as an offset for the new distribution costs that FirstEnergy would collect through increases to Rider DCR.[10]

Second, Rider DCR includes a stale 10.5 percent return on equity (and percent overall return) that was set in a 2007 rate case. The cost of capital has declined substantially since 2007, when these returns were set.[11] A new base rate case would set the current cost of capital based on financial market conditions at that time. So the out of date and overstated rate of return associated with Rider DCR would likely be adjusted downward, saving customers money and providing at least a partial offset to new distribution investment costs. Rider DCR increases would only serve to perpetuate, or even increase, the excess return on the investment that customers would be unnecessarily required to fund.

Instead of relying upon the evidence placed in the record in this proceeding, the PUCO went back to FirstEnergy's 2012 ESP case. But that case did not contain evidence of massive overearning on distribution service, like the evidence in this case. And, the

[9] OCC Ex. 18 at 17 (Effron Direct).

[10] OCC/NOPEC Ex. 8 at 30 (Kahal Supplemental).

[11] OCC/NOPEC Ex. 11 at 22-23 and 11A (Kahal Second Supplemental and Kahal Errata); OCC/NOPEC Ex. 8 at 31 (Kahal Supplemental).

authorized rate of return ("ROR") in the DCR is now far more outdated. Capital costs and rate of return awards (in Ohio) have been declining since 2012. Thus, while the staleness of the ROR embedded in Rider DCR may not have been perceived in 2012 as a serious problem, it clearly is today with the passage of time and persistence of low market capital costs.

The PUCO, however, failed to address this concern. The PUCO also did not consider facts and the additional evidence presented in this proceeding, contrary to the requirements of R.C. 4903.09. It was unreasonable and unlawful for the PUCO to treat Rider DCR as a wash in the quantitative portion of the ESP v. MRO test. This understated the cost of the ESP in the ESP v. MRO test. The PUCO erred. Rehearing should be granted.

B. The PUCO unreasonably and unlawfully failed to consider the distribution modernization rider as a quantifiable cost to customers under an ESP, causing the ESP costs to customers to be understated. The PUCO failed to base its finding on facts contained in the record in this proceeding, contrary to R.C. 4903.09.

The PUCO found that for purposes of the MRO v. ESP test it "must construe this section [R.C. 4928.1432(D)] as if a hypothetical application for an MRO had been submitted *based upon the same facts as are in the record in this case.*"[12] The PUCO did construe the law but not in a good way. It determined that the revenues collected from customers under the Credit Support Rider ($204 per year, for a minimum of three years) "are likely to be recovered under a hypothetical MRO application pursuant to R.C. 4928.142(D)." On that basis, the PUCO excluded the $612 million in revenues from the

[12] Fifth Entry on Rehearing at 162.

quantitative analysis. Had these revenues not been excluded under the analysis, the ESP would have been decidedly *less* favorable in the aggregate than an MRO. By a lot.

Although R.C. 4928.142(D)(4) permits the PUCO to adjust the electric distribution utility's most recent standard service offer price to address "any emergency that threatens its financial integrity," FirstEnergy presented no case that "any emergency" exists. And no Staff Witness - Ms. Turkenton, Mr. Buckley, or Dr. Choueiki - testified that there is a "financial emergency" that threatens FirstEnergy's (the distribution utilities) financial integrity. "*The facts as are in the record in this case*" do not support a finding that there is a financial emergency for FirstEnergy that would allow it (in a hypothetical MRO application) to get emergency relief.

Instead of relying on evidence, which it must under R.C. 4903.09, the PUCO fashioned a legal argument justifying its decision to exclude the Credit Support Rider revenues from the statutory test. The PUCO concluded that that a potential downgrade to below investment grade is a "financial emergency" under R.C. 4928.142(D)(4). Its conclusion stems from comparing the emergency provisions of R.C. 4909.16 to the emergency provision of R.C. 4928.142(D)(4). It clings to a single case – a 1988 PUCO Opinion and Order (in an emergency rate case) that addressed utilities' requests for rate relief.[13] But the PUCO's argument is flawed for a number of reasons.

R.C. 4909.16 and R.C. 4928.142(D) are significantly different with regard to the relief permitted, making any comparison faulty. R.C. 4909.16 imbues the PUCO with the authority to "temporarily alter or amend existing rates or orders." In contrast, R.C. 4928.142(D) permits a permanent, not temporary, adjustment--the PUCO can adjust the

[13] *In re: Cleveland Elec. Illumin. Co.*, Case No. 88-170-EL-AIR, Opinion and Order (Aug. 23, 1988).

electric distribution utility's standard service offer price. That price remains in effect until a subsequent standard service offer is established through a competitive bidding process. Two different statutes, addressing different needs.

And even if the PUCO were correct (it is not) in relying upon precedent under R.C. 4909.16 to construe R.C. 4928.142(D), the PUCO has erred in construing that precedent. The facts at issue in the 1988 emergency rate application (made by Cleveland Electric Illuminating Company and the Toledo Edison Company) were vastly different from the facts in evidence in this proceeding.

In that 1988 proceeding the utilities' financial condition involved more than being on the verge of a downgrade in investment ratings. There the PUCO measured a comprehensive set of factors before concluding an emergency existed: "Applicants' present bond ratings, rated BBB- by Standard and Poor's are at the 'ragged' edge of investment grade; the companies have a negative cash flow, and, as a result are unable to pay their bills with current revenue receipts; the coverage ratios of the utilities are imperiled; and, finally, applicants are not receiving the carrying charges on the equity component of their investment not yet included in rate base. *In view of all of these serious and fundamental financial indicators,* the evidence in the record supports the view that CEI and Toledo Edison are in an emergency as contemplated by Section 4909.16 Revised Code."[14] According to the PUCO, "[t]he ultimate question for the Commission is

[14] *In re: Cleveland Elec. Illumin. Co.,* Case No. 88-170-EL-AIR, Opinion and Order at 24 (Aug. 23, 1988)(citations omitted, emphasis added). Notably, in that proceeding, the PUCO, though finding an emergency existed, rejected the notion that customers should be asked to provide additional cash to CEI and TE, through increased rates. The PUCO instead instructed the companies that they "absolutely must take very aggressive steps to enhance their revenues and minimize their expenses." The PUCO also noted that they were "puzzled" by the utilities lack of aggressiveness in pursing revenue enhancement and "troubled" by the utilities attitude that: they had done enough and "that now is the time for the Commission to subject the ratepayers to higher rates." The PUCO there had it right.

whether, absent emergency relief, the utility will be financially imperiled or its ability to render service will be impaired."

In stark contrast, in this proceeding the PUCO never concluded that absent the additional revenues provided through the Credit Support Rider the Utilities will be financially imperiled or their ability to render service impaired. The nearest the PUCO could get was that if the financial rating dropped below investment grade, it would cost the utility (and eventually customers) more to borrow money. Yet OCC Witness Kahal testified that increased borrowing costs would amount to about $2 million per year, while under the Credit Support Rider customers would pay hundreds of millions of dollars.[15]

And the PUCO should consider claims of financial peril with great skepticism. For this is the same utility that claimed it could pay consumers hundreds of millions of dollars under original Rider RRS in later years, under the revenues collected under the electric security plan.

And there are more reasons the PUCO is wrong and rehearing should be granted. The PUCO applied the wrong test. The test is not "whether the utility could potentially offer" a Credit Support Rider (or other non-SSO provision) along with a filing for a MRO. That interpretation, favored by Ms. Mikkelsen,[16] would render the ESP v. MRO comparison useless. Any non-SSO provision of an ESP could accompany a filing for a MRO. Surely the General Assembly did not intend for the statutory test that provides some protection for customers to be meaningless. Instead the test should be whether the statute permits the utility, "*based upon the same facts as are in the record in this proceeding*" to seek and obtain the charge. Here that answer is no.

---

[15] OCC Ex. 46 at 8 (Kahal Rehearing Rebuttal).

[16] R. Tr. X at 1741.

And when the costs of the Credit Support Rider are included as part of the statutory test, massive ESP costs develop (approximately $612 million over a three-year period) that have no counterpart on the MRO side. Quantitatively, the modified ESP with the Credit Support Rider is not more favorable in the aggregate than the MRO. The modified ESP, by law, must be disapproved.

ASSIGNMENT OF ERROR NO. 2: The PUCO erred by approving the Credit Support Rider in violation of Ohio law, including R.C. 4903.38 and 4928.143,

In approving the Credit Support Rider, the PUCO has allowed FirstEnergy to charge customers an unlawful transition charge. And the PUCO has permitted FirstEnergy to include as a provision of its ESP a charge that is not authorized under R.C. 4928.143. The PUCO should grant rehearing on the Credit Support Rider and reject it because it violates Ohio law.

A. The PUCO approved an unlawful transition charge.

Ohio law prevents the PUCO from authorizing the collection of transition revenues by an electric utility.[17] While the PUCO attempts to classify the credit Support Rider as a "distribution" charge,[18] it does not change the practical effect of the charge. That is the charge collects unlawful transition revenue. The Credit Support Rider is an unlawful transition charge that requires consumers to improperly subsidize the competitive generation of FirstEnergy Corp. Under the charge, money will be funneled to FirstEnergy Corp. to cover financial losses associated with its unregulated business.[19]

---

[17] R.C. 4928.38.

[18] Fifth Entry on Rehearing at 130, ¶287.

[19] OCC Ex. 46 at 5 (Kahal Rehearing Rebuttal).

Yet Ohio law bars the PUCO from authorizing "the receipt of transition revenues or ***any equivalent revenues*** by an electric utility after the market development period has ended."[20] The Ohio Supreme Court ("Court") has determined that even though the money was not explicitly labeled as transition revenue, it can still be considered "transition revenue."[21] As part of that case, the Court determined that AEP's Retail Stability Rider ("RSR") collected unlawful transition revenue. The Court overturned the PUCO's approval of that charge.[22] The Court noted that Rider RSR was approved to "provide AEP-Ohio with sufficient revenue to ensure it maintains its financial integrity as well as its ability to attract capital."[23] The Court's decision was subsequently reinforced when the Court later summarily rejected DP&L's Service stability charge as an unlawful transition charge.[24] The PUCO's approval of the Credit Support Rider in this proceeding is likewise an unlawful transition charge.

The PUCO approved Credit Support Rider is a transition charge that will support the financial integrity of FirstEnergy's parent company. It is intended to keep FirstEnergy Corp. at an investment grade rating.[25]

---

[20] R.C. 4928.38 (emphasis added) (the statute does create an exception for R.C. 4928.21 and R.C. 4928.40, however, neither are applicable in this context).

[21] "But the fact that AEP did not explicitly seek transition revenues does not foreclose a finding that the Company is receiving the equivalent of transition revenue under the guise of the RSR." *In Re Application of Columbus Southern Power Co.*, No. 2013-0521, 2016-Ohio-1608, slip op. at ¶21 (Ohio 2016) ("AEP Transition Revenue Case").

[22] AEP Transition Revenue Case at ¶38.

[23] AEP Transition Revenue Case at ¶36.

[24] *In Re Application of Dayton Power and Light Company to Establish a Standard Service Offer in the Form of an Electric Security Plan*, No. 2014-1505, 2016-Ohio-3490, slip op. at ¶1 (Ohio 2016) ("DP&L Transition Revenue Case").

[25] PUCO Staff Ex. 13 at 2 (Buckley Direct).

From the documents that are attached to Staff Witness Buckley's testimony[26] it becomes evident why FirstEnergy Corp.'s credit is dropping. In its rationale for changing FirstEnergy Corp.'s outlook to negative, Standard & Poor's describes "weak commodity prices" and "[t]he higher-risk competitive business greatly increases the company's [FirstEnergy Corporation] exposure to lower generation volumes and commodity prices."[27] Low commodity prices have resulted in the outlook weakening for FirstEnergy Corp.'s competitive affiliates, like FirstEnergy Solutions, which in turn has caused the negative outlook for the corporate parent.

There is no problem with the Ohio electric distribution utilities, who are collecting their costs and have a strong financial outlook.[28] The Credit Support Rider is an anti-competitive subsidy that is propping up FirstEnergy Corp. for financial problems arising from its unregulated subsidiaries. The PUCO acknowledges that it will provide the parent company with revenue to ensure it is able to maintain its credit and as a result, attract capital.[29] This sort of financial integrity/transition charge is exactly what the Court put a stop to in its decision in the AEP Transition Revenue Case[30] and the corresponding DP&L Transition Revenue case.[31]

---

[26] While these documents were originally filed as confidential, these confidentially claims were waived by FirstEnergy. R Tr. I at 31.

[27] PUCO Staff Ex. 13 at Attachment 3, pg 2-3 (Buckley Direct).

[28] The FirstEnergy Companies all have higher ratings than FirstEnergy Corp. (BBB+ compared to BBB-), PUCO Staff Ex. 13 at Attachment 3, pg 6-7 (Buckley Direct).

[29] "We intend for Rider DMR to provide the minimum amount necessary to provide credit support for the Companies to facilitate access to credit markets." Fifth Entry on Rehearing at 93, ¶197.

[30] AEP Transition Revenue Case at ¶38.

[31] DP&L Transition Revenue Case at ¶1.

Drawing a distinction between a "generation" charge and a "distribution" charge as the PUCO did in the order does not resolve the concern that it is a transition charge.[32], The money is still flowing to the parent company and from there could still be used to subsidize the generation costs. The PUCO specifically declined to place any restrictions on the use of the DMR funds.[33] The Credit Support Rider is an illegal financial integrity/transition charge, therefore the PUCO should grant rehearing and reject this charge to consumers.

B. The Credit Support Rider does not meet the required standards for distribution infrastructure and modernization initiatives.

The PUCO claims that the credit support charge is a distribution infrastructure and modernization rider that fits under 4928.143(B)(2)(h).[34] However, the credit support proposal meets none of the requirements of that provision. And as the Ohio Supreme Court has ruled, a utility may not include a provision in its ESP that is not contained in the delineated sections of R.C. 4928.143(B)(2).[35]

R.C. 4928.143 sets out the standard for distribution modernization charges that may be included in an ESP. An ESP may include, "provisions regarding distribution infrastructure and modernization incentives for the electric distribution utility"[36] that "include a long-term energy delivery infrastructure modernization plan for that utility or any plan providing for the utility's recovery of costs, including lost revenue, shared savings, and avoided costs, and a just and reasonable rate of return on such infrastructure

[32] Fifth Entry on Rehearing at 130, ¶287.

[33] Fifth Entry on Rehearing at 127, ¶281.

[34] Fifth Entry on Rehearing at 90, ¶191.

[35] *In Re Columbus S. Power Co.*, 128 Ohio St.3d 512, 519-520 (2011).

[36] R.C. 4928.143(h).

modernization."[37] When approving one of these provisions, the PUCO must "ensure that customers' and the electric distribution utility's expectations are aligned" with regards to reliability.[38] But the approved Credit Support Rider fails all these requirements.

Under the statute, the charge must be used for "distribution infrastructure and modernization incentives."[39] Despite its name, the so-called "Distribution Modernization Rider" has nothing to do with distribution infrastructure and modernization. PUCO Staff Witness Buckley testified that the main purpose of the rider is to provide a cash infusion to ensure FirstEnergy Corp. can maintain its credit rating at the expense of consumers.[40] The PUCO relies on the PUCO Staff claims that this credit support will help FirstEnergy receive "more favorable terms when accessing the capital market"[41] and thus "enable the Companies to procure funds to jumpstart their distribution grid modernization initiatives."[42]

However, there is no requirement that FirstEnergy spend any of these monies on grid modernization.[43] This is not regulated recovery for necessary investments, nor is it even a scheme that allows for accelerated recovery of investment (like many riders). It is simply providing money (and a lot of it) for FirstEnergy Corp. to strengthen its balance sheet. Whether the Utilities actually spend money to modernize the grid is very much up

---

[37] Id.

[38] Id.

[39] Id.

[40] PUCO Staff Ex. 13 at (Buckley Direct) ("[t]he rider would be established to allow the Ohio Regulated Distribution Utilities to provide the appropriately allocated support for First Energy Corporation to maintain investment grade by the Major credit rating agencies.").

[41] Fifth Entry on Rehearing at 91, ¶192.

[42] Fifth Entry on Rehearing at 91, ¶192.

[43] "Therefore, placing restrictions on the use of Rider DMR funds would defeat the purpose of Rider DMR." Fifth Entry on Rehearing at 127, ¶281.

in the air. So the linkage between dollars collected and distribution modernization is missing. The credit support provision does not fulfill the statute.

In addition, FirstEnergy already has the Delivery Capital Rider ("DCR"), which the PUCO Staff acknowledged provides the Utilities the ability to fund improvements to the distribution infrastructure.[44] A properly structured DCR could be included (and was, at significant cost to consumers)[45] in the Utilities' ESP. But providing money so the parent company can maintain its credit rating does not meet the definition of incenting or promoting distribution modernization consistent with Ohio law.

Furthermore, even if this proposal did require distribution modernization, it would still fall short of meeting the statutory requirements. Under R.C. 4928.143(B)(2)(h), the PUCO must determine, *before approving the provision*, that customers' and the distribution utility's expectations are aligned.[46] And, OCC Witness Williams testified in the first phase of this case, customers and FirstEnergy's expectations are not aligned.[47] The PUCO Staff never presented any new evidence beyond what was originally presented at the hearing to show that these expectations are in alignment.[48] The PUCO should grant rehearing and reject the Credit Support Rider because it fails to meet the statute.

---

[44] PUCO Staff Ex. 4 at 6 (Nicodemus Direct) (describing the Delivery Capital Rider as a distribution infrastructure incentive).

[45] Fifth Entry on Rehearing at 148. ¶328.

[46] R.C. 4928.143(h).

[47] OCC Ex. 27 at 19-21 (Williams Direct Public) ("To the extent that the FirstEnergy customer perception survey indicates that the Utility's customers are unwilling to pay more to avoid non-major outages, customers and FirstEnergy expectations concerning reliability are not aligned.").

[48] R. Tr. II at 469 (Turkenton Cross) (stating that the alignment of expectations was addressed by a staff Witness in the original 41 days of hearing).

C. The Credit Support Rider does not meet the requirements of an economic development provision as required under R.C. 4928.143(B)(2)(i).

FirstEnergy claims that the Credit Support Rider is permitted under Ohio law as a valid program for economic development and job retention.[49] The PUCO does not explicitly rule on whether the Credit Support Rider is permitted in R.C. 4928.143(B)(2)(i), but implicitly accepts the premise that keeping FirstEnergy's headquarters in Ohio is economic development.[50] These benefits include the salaries and economic benefits of having service corporation employees located in Ohio.[51]

While an OCC witness conceded that there may be economic benefits from having the headquarters in Ohio,[52] these benefits are already paid for by Ohioans in base distribution rates. The EDUs are charged a service corporation bill that is collected from customers through base distribution rates.[53] Any further attempt to subsidize these costs is simply a double collection of these costs.

Additionally, the economic development provision of the statute is for economic development that has yet to be implemented.[54] Keeping the headquarters of FirstEnergy Corp. in Akron is not a new economic development plan. The headquarters have been located in Akron for a long time now. Furthermore, the provision only applies to economic development that occurs related to a distribution utility, not the parent

[49] FE Brief at 25.

[50] Fifth Entry on Rehearing at 112, ¶241 (Oct. 12, 2016).

[51] FE Ex. 205 at 5 (Murley Rehearing Rebuttal).

[52] Fifth Entry on Rehearing at 112, ¶241.

[53] R. Tr. X at 1750 (Mikkelsen)(FE Witness Mikkelsen testified that she "would expect to recover [from Ohio utility customers] service company costs allocated to the companies in a base rate proceeding.").

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

company.[55] Finally, as the PUCO Staff noted in its brief, "the Staff believes that the companies are already recompensed adequately for the presence of the headquarters [.....]"[56] Therefore, the PUCO should grant rehearing and reject the assumption that the Credit Support Rider is a permissible under R.C. 4928.143(B)(2)(i) as an economic development or job retention program.

ASSIGNMENT OF ERROR NO. 3: The PUCO erred in approving the Credit Support Rider because the rider could result in unlawful cross-subsidization and affiliate abuse, between FirstEnergy and its unregulated affiliates, leading to higher costs to customers.

The Credit Support Rider violates FERC rules that prevent an energy company (FirstEnergy) from using captive customers' to subsidize the parent corporation's shareholders and merchant affiliates. The PUCO erred in approving it.

On April 27, 2016, the FERC issued an order, which rescinded FirstEnergy's affiliate transaction waiver for purposes of the initial Rider RRS and its related power purchase agreement ("PPA").[57] In rescinding FirstEnergy's affiliate waiver, FERC repeatedly expressed concerns that FirstEnergy's Rider RRS raises cross-subsidization and affiliate abuse concerns because captive customers could be inappropriately forced to subsidize FirstEnergy Corp.'s shareholders and unregulated merchant affiliates.[58] The Credit Support Rider is no better. It suffers from the same problems as the Rider RRS did.

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

[56] Staff states this point is "arguable", OCC does not believe this point is arguable, the service bill is a clear part of the record in the last rate case, and if those costs have changed, it should be determined in a subsequent rate case. However, OCC was prevented from presenting evidence on this topic, See OCC/NOAC Initial Brief at 72-74.

[57] *EPSA, et al. v. FirstEnergy Solutions, et al.*, 155 FERC ¶ 61,101 (April 27, 2016) ("Waiver Order").

[58] Waiver Order at ¶¶ 55, 64.

Under the approved Credit Support Rider, consumers will be forced to pay FirstEnergy approximately $204 million per year for at least three years. The primary objective of the Credit Support Rider is to provide credit support for FirstEnergy Corp. to maintain investment grade credit rating[59] and allow FirstEnergy Corp. adequate time to implement a long-term financial solution.[60] Specifically, Dr. Choueiki states that the credit support from customers will assist the Companies in receiving more favorable terms in the capital market, thereby "enabl[ing] the Companies to procure funds to jumpstart their distribution grid modernization initiatives."[61]

However, the record is clear that the Credit Support Rider includes no firm commitment or requirement that FirstEnergy actually use the Rider DMR revenues to invest in distribution grid modernization.[62] Indeed, the PUCO explicitly refused to place restrictions on the use of the Credit Support Rider funds.[63] So there is no assurance that these revenues will be spent on distribution modernization or other initiatives within FirstEnergy. There is also no assurance that these revenues will not be passed to FirstEnergy Corp. as dividends. Without restrictions to ensure that the Credit Support Rider revenues do not leave the Utilities, the Credit Support Rider could easily lead to the same result FERC sought to avoid: captive customers subsidizing FirstEnergy Corp., its shareholders, and/or its unregulated generation affiliate, FirstEnergy Solutions.

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

[60] Staff Ex. 13 at 6 (Buckley Rehearing).

[61] Staff Ex. 15 at 15 (Choueiki Rehearing).

[62] See e.g., Tr. Vol. II at 433; Tr. Vol. III at 584; Tr. Vol. III at 702-703; Tr. Vol. III at 957-958; Tr. Vol. IV at 1001.

[63] Fifth Entry on Rehearing at ¶ 281.

The PUCO states that the Credit Support Rider does not constitute an unlawful subsidy[64] because the PUCO "direct[ed] Staff to periodically review how the Companies, and FirstEnergy Corp., use the Credit Support Rider funds to ensure that such funds are used, directly or **indirectly**, in support of grid modernization."[65] However, a periodic review of how the funds are used will not cure the problem explained above. It is still possible for the Credit Support Rider funds collected from customers to subsidize FirstEnergy's affiliates in violation of FERC's rules and regulations. Rehearing should be granted.

ASSIGNMENT OF ERROR NO. 4: The PUCO erred by unlawfully and unreasonably ordering that Credit Support Rider revenues should be excluded from the Significantly Excessive Earnings Test. The PUCO's Order violated R.C. 4928.143(F), which requires the PUCO to consider if any "adjustments" related to the Utility's ESP caused significantly excessive earnings.

The PUCO determined that Rider DMR revenues should be excluded from the Significantly Excessive Earnings Test ("SEET") calculation.[66] The PUCO found that including the revenue in SEET would "introduce an unnecessary element of risk to the Companies and undermine the purpose of providing credit support for the Companies." And while the risk to the companies and the undermining of the Credit Support Rider may be a concern to the PUCO, it cannot be the basis for excluding ESP revenues from the SEET test. The law precludes it.

That law is R.C. 4928.143(F). That provision applies to all ESPs, regardless of the length. It requires the PUCO to conduct an annual review of the utility's total earnings

[64] Fifth Entry on Rehearing at ¶ 282 ("The Commission finds that this Staff review will ensure that there is no unlawful subsidy of the Companies' affiliates.").

[65] Fifth Entry on Rehearing at ¶ 282 (emphasis added).

[66] Fifth Entry on Rehearing at ¶212.

under its ESP. In its annual review, the PUCO is required ("shall") to consider "if any such adjustments resulted in excessive earnings." If the PUCO finds that "such adjustments" did result in significantly excessive earnings, compared to similar companies, the utility must return the excess to customers.

The Court has construed this particular SEET statute. The Court held that "such adjustments" refers to "the provisions that are included in an ESP" that "resulted in excessive earnings."[67] In other words, the earnings caused by the plan (adjustments) must be considered as part of the earnings reviewed in the SEET. So excluding the DMR revenues from SEET is contrary to R.C. 4928.143.

Additionally it is notable that in that case, the Court upheld the PUCO decision to exclude from the earnings review "off-system sales." The basis of that exclusion was that the sales were not derived from the ESP.[68] Yet, here the revenues in question are derived from the ESP. They are an "adjustment" under the ESP that contributes to the earnings of the Utility. The earnings from Rider DMR must be included in the SEET review under R.C. 4928.143(F).

The SEET test is an important consumer protection. It is meant to ensure the public that the ESPs are not setting prices that are too high. But here the PUCO's ruling thwarts a complete review of the utility's earnings under its ESP. It does this by segregating out one portion of the Utility's ESP (the DMR) and treating it differently from all other revenues created under the Utility's ESP.

Not only is this unlawful, but it is also unreasonable. The PUCO's ruling could deprive customers of refunds they may be otherwise entitled to under the law. If the

[67] *In re: Columbus S. Power Co.*, 134 Ohio St. 3d 392, 2012-Ohio-5960, 983 N.E.2d 685, ¶40.
[68] Id.

Utilities have significantly excessive earnings, as a result of Rider DMR and all other riders and rates, then they must return those excessive earnings to customers. The PUCO has not afforded special treatment to other utilities' ESP riders.[69] There is no reason to depart from that sound practice now for FirstEnergy's Rider DMR.

Rehearing should be granted. The PUCO should reverse its ruling and comply with the law.

ASSIGNMENT OF ERROR NO. 5: The PUCO violated R.C. 4903.09 in making its decisions without findings of fact supported by the record, in the following respects.

A. The PUCO found that an incentive is needed for the utility to invest in grid modernization.

The PUCO erred in approving the Credit Support Rider because it approved the program without stating the specific facts and reasons for its decision. Under R.C. 4903.09, the PUCO must make findings of fact supported by record evidence. If the PUCO does not do it fails to comply with the requirements of R.C. 4903.09 and its Order is unlawful.[70]

Here, the PUCO determined that an incentive is *needed* for FirstEnergy to focus their efforts on grid modernization.[71] Yet while the PUCO Fifth Entry on Rehearing does discuss the Credit Support Rider, it does not state the reasons why this incentive is necessary. The Entry discusses the alleged benefits of grid modernization,[72] how grid modernization would be accomplished,[73] and even when grid modernization would be

[69] OCC Ex. 43 at 9-10 (Rehearing Direct Testimony of Dr. Duann).

[70] R.C. 4903.09; See also *Motor Service Co. v. Public Util. Comm.*, 39 Ohio St. 2d 5 (1974); *Ideal Transportation Co. v. Public Util. Comm.*, 42 Ohio St. 2d 195 (1975).

[71] Fifth Entry on Rehearing at PP 186-188.

[72] Fifth Entry on Rehearing at PP 186-187.

[73] Fifth Entry on Rehearing at PP 186-187.

accomplished.[74] But the Entry does not explicitly state why a Credit Support Rider is necessary in order for FirstEnergy to invest in grid modernization. Indeed, FirstEnergy is investing in grid modernization without such an "incentive."[75] So, the PUCO erred in approving the Rider DMR and rehearing should be approved.

B. The PUCO found that sufficient protections are in place to ensure that effective and efficient use of funds provided to low-income customers, making competitive bidding procedures unnecessary at this time.

R.C. 4903.09 requires a PUCO opinion and order to state specific findings of fact, supported by the record. The Fifth Entry on Rehearing fails to state the specific reasons upon which the conclusions in the PUCO's opinion and order were based. This order fails to comply with the requirements of R.C. 4903.09 as explained below, and is, unlawful.[76]

Here, OCC/NOAC recommended modifying the Settlement to require competitive bidding of low-income programs. This recommendation was made to ensure the cost-effective and efficient use of funds for consumers.[77] The PUCO denied OCC's application. The PUCO stated that "significant benefits through the low-income programs exist, as illustrated in our Order, and sufficient protections are in place to ensure the cost-effective and efficient use of funds provided to low-income customers, making competitive bidding procedures unnecessary at this time."[78] But the PUCO failed to support its findings with record evidence. In particular, the PUCO did not explain what protections are in place that ensure cost effective and efficient use of the low-income

[74] Fifth Entry on Rehearing at PP 188.

[75] P3 and EPSA Joint Initial Rehearing Brief, at 57-60 (August 15, 2016).

[76] R.C. 4903.09; See also *Motor Service Co. v. Public Util. Comm.*, 39 Ohio St. 2d 5 (1974); *Ideal Transportation Co. v. Public Util. Comm.*, 42 Ohio St. 2d 195 (1975).

[77] Fifth Entry on Rehearing at ¶ 254-255.

[78] Fifth Entry on Rehearing at ¶ 255.

program funding. The PUCO did not comply with R.C. 4903.09. Rehearing should be granted.

ASSIGNMENT OF ERROR NO. 6: The PUCO erred in finding that the "Modified Third Supplemental Stipulation" that includes the PUCO Staff's Credit Support Proposal passed the second prong of the settlement test because it does not benefit customers or the public interest.

The PUCO concluded that in consideration of the entire record of this proceeding, the "PUCO Modified Third Supplemental Stipulations" benefit customers and is in the public interest under the second prong of the PUCO's three-prong test for the consideration of settlements.[79] The PUCO's conclusion in this regard is unjust and unreasonable as explained below.

A. The PUCO's reliance on R.C. 4928.143(B)(2)(h) to authorize the Credit Support Rider harms customers and is not in the public interest.

The PUCO found that Credit Support Rider is authorized under R.C. 4928.143(B)(2)(h). The PUCO stated that the record demonstrates that the Credit Support Rider is intended to stimulate the Utilities to focus their innovation and resources on modernizing their distribution systems. And for that reason, the Credit Support Rider was determined by the PUCO to be a distribution modernization incentive authorized by R.C. 4928.143(B)(2)(h).[80] However, for the reasons argued in Assignment of Error 2 (B) this finding is unreasonable.

Additionally, the PUCO in its decision noted that, in this proceeding, the PUCO Staff completed an examination of the reliability of the Utilities' distribution system and

[79] Fifth Entry on Rehearing at 121.

[80] Fifth Entry on Rehearing at 130.

ensured that the customers' and the Utilities' expectations are aligned.[81] The problem with PUCO's decision is that the evidence that the PUCO relies upon predates the Credit Support Rider proposal. It is unreasonable for the PUCO to find that the Utilities' and customers' expectations are aligned without taking into consideration the $612 million (and possibly more) that customers will be asked to pay over the next three to five years for this alleged grid modernization program.

For these reasons, it was unreasonable for the PUCO to find that the Credit Support Rider complies with R.C. 4928.143(B)(2)(h). And it was unreasonable for the PUCO to find that the Utilities' and customers' expectations are aligned. Therefore, the PUCO's approval of the Credit Support Rider harms customers and the public interest, and rehearing should be granted.

B. The Credit Support Rider harms customers and is not in the public interest because it is an expensive solution to an over-stated risk.

Under Ohio law, the PUCO is required to ensure that "reasonably priced retail electric service" is available to consumers.[82] When the PUCO approved the Credit Support Rider it failed to consider any evidence that it would impose higher costs on customers—much higher than the costs customers would pay in financing costs if a downgrade in credit ratings happened. The PUCO should grant rehearing and reject the Credit Support Rider.

The PUCO determined that there is ample evidence in the record establishing that a downgrade of the Utilities credit rating is a serious risk.[83] In this regard, the PUCO

[81] Staff Ex. 4 at 6-10; Tr. XXVIII at 5840-41.

[82] R.C. 4928.02.

[83] Fifth Entry on Rehearing at 91.

relies on rehearing testimony that shows that a downgrade would have adverse consequences for the Utilities. The PUCO stated that the downgrade may result in limited access to the credit markets. In addition, a downgrade may result in more restrictive terms and conditions. A downgrade may trigger requirements that the Utilities or FirstEnergy Corp. post cash as collateral. Finally, the PUCO found that a downgrade may result in higher borrowing costs, increasing the Utilities' long-term cost of debt.[84]

Incredibly the PUCO did not quantify the extent of the perceived "serious risk." As OCC Witness Kahal testified,, FirstEnergy and the PUCO Staff have failed to provide evidence that FirstEnergy will be completely unable to access the capital they need to make investments.[85] And while the PUCO relied on OCC Witness Kahal to support its finding that a downgrade may result in higher borrowing costs, the PUCO neglected to discuss Mr. Kahal's analysis of the potential increased borrowing costs arising from a downgrade. Mr. Kahal agrees that the Credit Support Rider could save FirstEnergy Corp. money by preventing a downgrade. But Mr. Kahal opined that Ohio consumers would be providing a bailout that may cost customers vastly more than any benefit from decreased borrowing costs.[86]

Mr. Kahal testified that the benefits of improving credit ratings for FirstEnergy would be modest and only a small percentage of the $204 million per year cost to

---

[84] Fifth Entry on Rehearing at 92.

[85] OCC Ex. 46 at 9 (Kahal Rehearing Rebuttal).

[86] OCC Ex. 46 at 8 (Kahal Rehearing Rebuttal)("When the full $1 billion is issued (which likely would be over a period of several years), this is an interest rate expense savings of $2 million per year—a tiny fraction of the $131 million (or more) ratepayer cost. While those savings would continue beyond the first three to five years, they would remain a small portion of the $400 million to $650 million cost customers are expected to pay under Staff's proposal.").

customers.[87] Mr. Kahal testified that on a $1 billion issuance of debt, the interest rate savings would be merely $2 million dollars.[88]

So the PUCO is asking customers to pay $612 million for a potential $2 million in savings in the future. This is unreasonable, especially in light of Chairman Haque's concurrence in this case: "The [PUCO] is an economic regulator. It is not a bank. It is not a trust fund. We authorize rates and charges that come directly from the pockets of consumers and businesses in this state."[89] With this decision the PUCO is charging customers well beyond the benefits that are necessary to achieve its goals. This is a burden that the consumers of this state should not be forced to bear.

For these reasons it was unjust and unreasonable for the PUCO to determine that the Credit Support Rider is a benefit to consumers and the public interest. The PUCO should grant rehearing.

C. The PUCO authorized the Credit Support Rider with too many open issues such that it will harm consumers and not be in the public interest.

The PUCO has approved the implementation of the Credit Support Rider, but in doing so, has left certain issues impacting consumers unanswered. In light of the significance of the issues that are open-ended it was unjust and unreasonable for the PUCO to find that the "PUCO Modified Third Supplemental Stipulation" (including the Credit Support Rider) benefitted consumers and the public interest. The issues that remain unanswered in the PUCO's Fifth Entry on Rehearing are identified below.

---

[87] OCC Ex. 46 at 6.

[88] Id. at 9.

[89] Fifth Entry on Rehearing, Concurring Opinion of Chairman Asim Z. Haque at 3, ¶7.

i. The total cost of grid modernization is unknown and thus the harm to consumers is unquantified.

The stated intent of the Credit Support Rider is to jump start grid modernization. However, the scope of the grid modernization program and the extent of the investment consumers will be asked to pay is unknown. The PUCO stated:

> The Commission notes the Stipulations modified and approved by the Commission in this proceeding provide that the Companies file a grid modernization business plan. Pursuant to this provision, the [Utilities] filed an application on February 29, 2016, in the FirstEnergy Grid Modernization Case. However, Staff witness Choueiki testified that the Companies grid modernization efforts should extend beyond this application (Staff Ex. 15 at 15-16; Rehearing Tr. Vol. IV at 1007-08,1021-22; Rehearing Tr. Vol. IV at 1015; Rehearing Tr. Vol. V at 1221-23).[90]

The PUCO Staff is recommending (and the PUCO appears supportive of) that the grid modernization must be above and beyond that which FirstEnergy beyond has proposed in its grid modernization business plan filed with the PUCO. However, such additional grid modernization efforts will only come at a higher cost for consumers. Yet that higher cost is not quantified. Without knowing how much customers will have to pay for grid modernization, the PUCO cannot determine that it is in the public interest to have them do so. The PUCO's order is unreasonable and unjust. Rehearing should be granted.

ii. The PUCO has failed to protect customers by identifying sufficiently developed conditions under which FirstEnergy may collect Credit Support Rider revenues from customers.

The PUCO placed the following conditions on FirstEnergy's collection of Credit support Rider revenues:

> The Commission finds that recovery of revenue under the [Credit Support Rider] *should be conditioned upon: (1) continued retention of the* corporate headquarters and nexus of operations of FirstEnergy Corp. in

[90] Fifth Entry on Rehearing at 89.

> Akron, Ohio; (2) no change in "control" of the [Utilities] as that term is defined in R.C 4905.402(A)(1); and (3) **a demonstration of sufficient progress in the implementation and deployment of grid modernization programs approved by the Commission.**[91]

However, these conditions are so vague that they do not provide any protection for customers.

The PUCO established a condition that FirstEnergy retain its corporate headquarters and nexus of operations in Akron, Ohio in order to collect Credit Support revenues from customers. Unfortunately, this PUCO condition fails to adequately protect consumers. The PUCO stated:

> However, the Commission will not adopt the Staff's recommendation that Rider DMR be subject to refund, to be refunded if FirstEnergy Corp. moves its headquarters or nexus of operations during the collection of Rider DMR (Staff Ex. 13 at 7). Making Rider DMR subject to refund would be counterproductive and impose additional risks on the [Utilities].[92]

The PUCO should have followed the advice of their Staff. Making Rider DMR subject to refund would provide some needed protection from customers.

Additionally, the PUCO included a condition that FirstEnergy demonstrate "sufficient progress" in the implementation and deployment of grid modernization programs. This condition also fails to protect consumers. That is because on November 3, 2016, FirstEnergy filed tariffs with the PUCO that included the Credit Support Rider with an effective date of January 1, 2017. As discussed above, the scope of the grid modernization programs is currently undefined, and would seem to be virtually impossible for FirstEnergy to demonstrate sufficient progress in the implementation and deployment of grid modernization programs between now and January 1, 2017. Despite

---

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

[92] Fifth Entry on Rehearing at 11.

this fact, FirstEnergy fully intends to begin collecting Credit Support Rider revenues from customers prior to meeting the PUCO's condition.[93]

The conditions put in place by the PUCO before Credit Support revenues can be collected from customers fail to benefit consumers or the public interest.

D. Exclusion of the Credit Support Rider revenues from SEET harms consumers and is not in the public interest.

The PUCO decided that the Credit Support Rider revenues should be excluded from SEET calculations.[94] The PUCO concluded that in consideration of the entire record of this proceeding, the "PUCO Modified Third Supplemental Stipulation" benefits customers and are in the public interest in accordance with the second prong of the PUCO's three-prong test for the consideration of settlements.[95] The PUCO's conclusion in this regard is unjust and unreasonable as previously explained in Assignment of Error 4.

The PUCO's decision to exclude Credit Support revenues from the annual SEET calculation harms consumers and was not in the public interest. Therefore, the PUCO should grant rehearing on this issue.

ASSIGNMENT OF ERROR NO. 7: The PUCO erred in finding that the Modified Third Supplemental Stipulation with the PUCO Staff's Credit Support Proposal passed the third prong of the settlement test because the Settlement violates important regulatory principles and practices.

The PUCO concluded that in consideration of the entire record of this proceeding, the Modified Third Supplemental Stipulation does not violate any regulatory principle or

[93] FirstEnergy Tariff Filing Ohio Edison at Sheet 132; Cleveland Electric Illuminating Company at Sheet 132; Toledo Edison at Sheet 132 (November 3, 2016).

[94] Fifth Entry on Rehearing at 98.

[95] Fifth Entry on Rehearing at 121.

practices.[96] The PUCO's conclusion in this regard is unjust and unreasonable as explained below.

A. The Credit Support Rider does not comply with R. C. 4928.02.

The PUCO states that PUCO Staff provided evidence that the Credit Support Rider supported and furthers the policies of the state of Ohio, as illustrated in R.C. 4928.02. Specifically, the PUCO Staff argues that the Credit Support Rider will "enable" the Utilities to procure funds to invest in modernizing the distribution grid, increase the diversity of supplies and suppliers, and encourage the offerings of innovative services.[97] However, enabling the Utilities to invest in grid modernization does not further that state policy if there is no requirement that the Credit Support Rider funds ($204 million per year for three years or more) be used for that stated purpose. And the PUCO makes no such requirement of the Utilities.[98]

The PUCO also relied upon the testimony of RESA witness Crockett-McNew regarding the benefits from grid modernization that 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.[99]

---

[96] Fifth Entry on Rehearing at 150.

[97] Fifth Entry on Rehearing at 122, citing Staff Ex. No. 15 at 14-15; R.C. 4928.02 (C) and (D).

[98] Fifth Entry on Rehearing at 127.

[99] Fifth Entry on Rehearing at 123; R.C. 4928.02(A) and (B).

However, under the PUCO Fifth Entry on Rehearing, customers would pay at approximately $612 million to incentivize (but not require) smart grid investment.[100] For at least three years -- and possibly for two additional years.[101] But there are fundamental problems with the PUCO's finding that the Credit Support Rider satisfies Ohio policy under R.C. 4928.02 as discussed above. First, it cannot be over-looked that use of these funds for grid modernization is not required.[102] Second, is the unproven assumption that FirstEnergy needs to jumpstart its smart grid investment. It goes unmentioned by the PUCO that part of the Third Supplemental Stipulation, approved by the PUCO, FirstEnergy had already committed to making a smart grid filing.[103] It fulfilled that commitment when it filed its business plan in Case No. 16- 0481-EL-UNC.

As part of the settled ESP, FirstEnergy will be afforded very favorable rate treatment funded by its 2 million customers. Specifically, under Rider AMI, the Utilities will collect smart grid costs from customers beginning three months after the PUCO authorizes the grid modernization project.[104] This means that even before FirstEnergy spends its first dollar for smart grid, it could collect money from customers. And Rider AMI is in addition to the Credit Support Rider, approved by the PUCO, that customers will be paying for.[105]

---

[100] Fifth Entry on Rehearing Concurring Opinion of Chairman Haque at 4 (The PUCO approved $132.5 million per year to be grossed up for taxes, approximately $204 million for three years = approximately $612 million).

[101] Fifth Entry on Rehearing at 97.

[102] Fifth Entry on Rehearing at 127 ("Therefore, placing restrictions on the use of the [Credit Support Rider] would defeat the purpose of the [Credit Support Rider]. The [Credit Support Rider] is intended to provide credit support to the [Utilities] in order to avoid a down grade in credit ratings.").

[103] FE Ex. 154 at 9-10.

[104] Id.

[105] Fifth Entry on Rehearing at 54.

Rider AMI, as provided for under the settled ESP and approved by the PUCO, permits FirstEnergy to collect money from customers based on a forward looking formula rate concept, reconciled for actual costs incurred and revenues received.[106] This is essentially a fully projected test year concept --something the General Assembly prohibits. [107] And yet, the PUCO decided, that despite these enhancements to Rider AMI, more money is needed to be collected from customers for smart grid to go forward. Despite the fact that there has been no showing that a jump start is needed to incentivize this investment.

The record is void of evidence supporting the amount of credit support that is needed to incent FirstEnergy's grid modernization effort. Rather the PUCO focused on credit metrics FirstEnergy needed to maintain investment grade ratings for its parent FirstEnergy, Corp. This crystalizes what the Credit Support Rider is about. It's not about grid modernization. It's about credit support. And consumers are being asked to write a check for that support when there is already sufficient funding for grid modernization. Therefore, the Credit Support Rider cannot be found to further state policy as the PUCO concluded in its Fifth Entry on Rehearing. The PUCO should grant rehearing as OCC/NOAC requests.

B. The Credit Support Rider is an unlawful subsidy.

The PUCO unreasonably concluded that the Credit Support Rider is not an unlawful subsidy. The basis for this conclusion is that the Credit Support Rider constitutes the necessary credit support to allow the Utilities to access credit markets with

[106] Id.

[107] R.C. 4909.15(C) limiting the test year to no more than six month prior to the Utility's application and ending not more than nine months after the application.

reasonable rates, terms, conditions so as to raise the significant amounts of money needed to implement its grid modernization initiative. The problem for the PUCO is that saying the Credit Support Rider is for grid modernization, without requiring it to be used in that manner, makes it impossible for the PUCO to find that the rider is not an unlawful subsidy.

It is clear that the PUCO does not require the Credit Support Rider funds collected from customers to be used for grid modernization. The PUCO stated: "Therefore, placing restrictions on the use of the [Credit Support Rider] would defeat the purpose of the [Credit Support Rider]. The [Credit Support Rider] is intended to provide credit support to the [Utilities] in order to avoid a down grade in credit ratings."[108] Absent requirements by the PUCO that FirstEnergy must use the Credit Support Rider funds for grid modernization, the Utilities are free to pay revenues collected from the Credit Support Rider as dividends up to FirstEnergy Corp. FirstEnergy Corp. may then use the funds as it sees fit. That could mean providing a cash infusion to the financially struggling unregulated generation affiliate, FirstEnergy Solutions. The Credit Support Rider under those circumstances is an unlawful subsidy.

Specifically, the Credit Support Rider violates the policy provisions that preclude utilities from charging customers to subsidize their unregulated generation operations. While the PUCO cites to a number of the policy guidelines laid down by the General Assembly as discussed above,[109] the PUCO in its Entry on Rehearing ignores R.C. 4928.02(H), which directly addresses the type of subsidy that PUCO has approved:

[108] Fifth Entry on Rehearing at 127.

[109] PUCO Staff Brief at 5-6.

> Ensure effective competition in the provision of retail electric service by ***avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service*** or to a product or service other than retail electric service, and vice versa, including by prohibiting the recovery of any generation-related costs through distribution or transmission rates[.][110]

By using captive customer funds to bailout FirstEnergy Corp. for decisions made in the unregulated side of the business, PUCO is creating an anticompetitive subsidy. That subsidy allows money to flow from captive customers' distribution rates to the unregulated competitive generation affiliate, FirstEnergy Solutions.[111] The PUCO's Fifth Entry on Rehearing provides no protection against such subsidy. Therefore, the PUCO should grant OCC/NOAC's rehearing request on this issue.

C. The Credit Support Rider is an unlawful transition charge.

The PUCO determined that the Credit Support Rider did not constitute transition revenues. The PUCO stated: "First there is no "transition" involved in this case. The [Utilities] transferred their generation assets to FES many years ago and the Utilities have provisioned the SSO through a competitive bidding process since their first ESP in 2009. Moreover, [the Credit Support Rider] is authorized by R.C. 4928.143(B)(2)(h) rather than R.C. 4928.143(B)(2)(d), the statute which authorized the AEP stability charge which was overturned by the Supreme Court. As such, [the Credit Support Rider] is clearly a "distribution" charger rather than a "generation" charge. In fact, [the Credit Support Rider] is entirely unrelated to generation because the [Utilities] have no generation assets."[112]

---

[110] R.C. 4928.02(H) (Emphasis added).

[111] OCC Ex. 46 at 13 (Kahal Rehearing Rebuttal)("Staff's proposal to protect FE Corp's credit ratings with ratepayer funds also benefits merchant plant operations through reduced collateral requirements").

[112] Fifth Entry on Rehearing 130.

The PUCO relies heavily on the fact that FirstEnergy has previously transitioned its generating assets to its unregulated affiliate FirstEnergy Solutions.[113] And while it cannot be disputed that FirstEnergy was able to charge customers $6.9 billion in transition costs, it has not stopped FirstEnergy from trying to collect even more. R.C. 4928.38 bars the PUCO from authorizing the receipt of transition revenues or any equivalent revenues.[114] Under the Credit Support Rider since funds collected from customers need not be used for grid modernization, these funds are the equivalent of transition revenues. And the PUCO cannot by law allow FirstEnergy to collect such revenues.

Under R.C. 4928.38, FirstEnergy's transition to competitive generation is over. FirstEnergy is to be "fully on its own in the competitive market." Under the credit support rider it is not fully on its own because it is able to subsidize its generation operations. The PUCO erred by ignoring this fact.

The PUCO further erred by relying on the argument that the Credit Support Rider was authorized under R.C. 4928.143(B)(2)(h) because it is intended to incent grid modernization.[115] However, as noted above, the Credit Support Rider funds are not required to be used for that purpose.[116] As such, the PUCO further errs by relying on the Credit Support Rider being a "distribution charge.[117] The funds collected from captive distribution customers could be used to bailout FirstEnergy Corp of the unregulated

---

[113] Fifth Entry on Rehearing at 130.

[114] R.C. 4928.38; see also *In re Application of Columbus Southern Power Company and Ohio Power Company For Authority to Establish a Standard Service Offer Under R.C. 4928.143 In the Form of an Electric Security Plan;* S. Ct. Case No. 2016-Ohio-1608 Slip Opinion at Para. 18 (April 21, 2016).

[115] Fifth Entry on Rehearing at 130.

[116] Fifth Entry on Rehearing at 127.

[117] Fifth Entry on Rehearing at 130.

generation affiliate FirstEnergy Solutions. In those circumstances, the funds cannot be found so clearly to be a distribution charge.

ASSIGNMENT OF ERROR NO. 8: The PUCO erred when it found that charges authorized by R.C. 4928.143(B)(2)(h) cannot be construed to violate R.C. 4905.22.

In the PUCO's Fifth Entry on Rehearing, the PUCO rejected claims that the Credit Support Rider violates R.C. 4905.22.[118] The PUCO noted that the credit rider is authorized by R.C. 4928.143(b)(2)(h) which is modified by the prefatory language "notwithstanding any provision of Title XLIX of the Revised Code to the contrary***."[119] The PUCO interprets this prefatory language as giving the PUCO flexibility in approving ESP provisions. The PUCO reasons that the language means that the "strict requirements of R.C. Chapters 4905 and 4909 do not necessarily apply." The PUCO concludes that "based on the plain language of R.C. 4928.143(B)(2)(h), unjust and unreasonable charges authorized by the PUCO under R.C. 4928.143(B)(2)(h) cannot be construed to violate R.C. 4905.22."

The PUCO's statutory construction here is misguided. Although the "notwithstanding" language does permit the PUCO some flexibility in approving ESP provisions, it does not mean that the provisions of R.C. 4905.22 "do not necessarily apply." Rather, R.C. 4905.22 applies unless there is a conflict between it and the provisions that following the "notwithstanding" language. The Court has interpreted the phrase "notwithstanding" when used in statutory enactments to mean that if there is a recognized inconsistency between two or more statutory enactments the enactment that provides "notwithstanding" the other enactments would prevail. *State ex rel. Carmean v.*

[118] Fifth Entry on Rehearing at 131.

[119] Id.

Board of Education, 170 Ohio St. 415; 11 Ohio Op.2d 162 (1960). And the Court recently refused to rule that the "notwithstanding" provision of R.C. 4928.143 trumps other statutes, including R.C. 4928.39. [120]

But here there is no inconsistency. R.C. 4905.22 provides reasonable limits to the charges contained in R.C. 4928.143. There can be distribution infrastructure and modernization incentives so long as they do not result in unjust and unreasonable rates for customers. To accept the PUCO's interpretation would mean that the PUCO could authorize provisions in an ESP that could result in virtually unlimited charges to customers.

This is not a reasonable interpretation and conflicts with state policies. Included in the state policies is the requirement that the PUCO ensure customers access to adequate, safe, reliable, and reasonably priced electric service. R.C. 4928.02(A). The PUCO has found that it must be guided by these state policies when reviewing applications under Chapter 4928.[121] The PUCO has an affirmative duty to implement the policies under R.C. 4928.06.

The PUCO erred in concluding that distribution and modernization incentives cannot violate R.C. 4905.22. Rehearing should be granted.

[120] DP&L Transition Revenue Case , 2016-Ohio-3490, slip op (Ohio 2016) .

[121] *In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of a Market Rate Offer to Conduct a Competitive Bidding Process for a Standard Service Offer Electric Generation Supply, Accounting Modifications, and Tariffs for Generation service,* Case No. 10-2586-EL-SSO, Opinion and Order at 10-11 (Feb. 23, 2011).

ASSIGNMENT OF ERROR NO. 9: The PUCO erred by approving Rider GDR because it harms consumers, and is not in the public interest.

In the Fifth Entry on Rehearing, the PUCO denied rehearing on Rider GDR because all arguments concerning the PUCO's approval of Rider GDR were addressed and denied in the ESP IV Opinion and Order.[122] The PUCO is mistaken.

The Opinion and Order does not fully address the concerns raised by the parties regarding why Rider GDR is unjust and unreasonable. Indeed, as the Fifth Entry on Rehearing notes, the Opinion and Order only provides two modest clarifications or modifications in its attempt to address intervenor concerns with the Rider GDR.[123] However, neither of these clarifications nor modifications remedies the myriad of problems in approving Rider GDR.[124]

For example, the Opinion and Order did not address the fact that Rider GDR is an asymmetric, single-issue ratemaking request when substantial excess earnings are already being earned by FirstEnergy. In addition, the Opinion and Order did not address the fact that Rider GDR provides no incentive or requirement for FirstEnergy to file for rate reductions resulting from changes in governmental regulations. The Opinion and Order also failed to address whether approval of Rider GDR would erode any alleged benefits for consumers associated with a distribution rate freeze. Last, the Opinion and Order failed to directly address whether it is in the public's best interest to approve a rider that

[122] Fifth Entry on Rehearing at ¶ 253.

[123] "FirstEnergy may file an application in a separate proceeding to recover any costs which it currently contemplates recovering through Rider GDR, and the Companies will bear the burden of demonstrating that such costs are just and reasonable. The Commission will clarify that Rider GDR should be limited to Federal and state government mandates enacted after the filing date of the application in this proceeding and that no generation or transmission related expenses will be eligible for recovery under Rider GDR." Opinion and Order at 93 (citations omitted).

[124] Opinion and Order at 66-67.

could potentially be used to charge consumers for an endless amount of federal and state government mandates.

Instead, the Opinion and Order generally dismisses these concerns by stating that any costs FirstEnergy wishes to charge consumers will be reviewed by the PUCO at a later time.[125] Approving Rider GDR at an initial rate of zero and an undertaking a review of future charges does not address the concerns raised by intervenors. For example, it does not address whether it is just and reasonable for Rider GDR to be approved without a requirement that FirstEnergy file for rate reductions resulting from changes in governmental regulations. The concerns with Rider GDR are valid and demonstrate that it inappropriately harms consumers and is not in the public interest. Therefore, the PUCO should grant rehearing on this issue.

ASSIGNMENT OF ERROR NO. 10: The PUCO erred in ordering that the cost of the Economic Load Response Program Rider credits should be collected from all customers instead of a portion ($5 per credit) being collected solely from GS and GP customers.

The PUCO erred when it modified the Settlement and directed FirstEnergy to file tariffs which state that the recovery of Economic Load Response Program Rider ("Rider ELR") credits through Rider EDR(e) should be collected from all customers.

Currently there are two components to demand reduction rates:

(1) Rider ELR (Economic Load Response) gives a $5 per kW per month credit for curtailable load. This credit is recovered through the DSE1 component of the Demand Side Management and Energy Efficiency Rider. It is allocated and charged on an energy (per kWh) basis to all customers, net of any revenues received from PJM. The per kWh rate is the same for all customers. But, the DSE1 charges are avoidable for customers taking service under

[125] Opinion and Order at 93, 110.

Rider ELR. In other words, if a customer gets the $5 ELR credit, it doesn't pay the DSE1 charge.[126]

(2) The Rider EDR (b) credit is also $5 per kW per month for curtailable load. Those costs are recovered through Rider EDR(e) by all General Service Secondary and General Service Primary (non-residential classes) customers. The costs are allocated and charged on a kWh basis.[127]

The May 28, 2015 Settlement in this case allowed for an increase to the number of customers and load that can receive the credits but maintained the same method of recovery as under currently approved tariffs.

In the Fifth Entry on Rehearing, the PUCO then held that, in the interests of gradualism and because Rider ELR is an economic development program, the recovery of the cost of the incremental increase in available credits under the Settlements should be collected from all customers, who all benefit from economic development spurred by the ELR programs rather than through Rider EDR(e).[128]

The approved Rider ELR cost allocation is unjust and unreasonable. Rider ELR does not produce economic development benefits that will benefit all customers. There is no evidence in the record that the discount provided to large industrial customers will allow them to compete better in the global marketplace. In addition, the new rate design merely shifts the allocation of costs to different classes of customers without providing an actual benefit. In particular, the cost allocation results in residential

[126] Fifth Entry on Rehearing at ¶ P 245.

[127] Fifth Entry on Rehearing at ¶ P 245.

[128] Fifth Entry on Rehearing at ¶P 245.

customers paying an unreasonably large share of these costs,[129] without any added benefit. While, OCC agrees that FirstEnergy has made use of Rider ELR since 2009, there has been no showing that such a drastic change in cost allocation is just and reasonable at this juncture. Therefore, the PUCO should grant rehearing on this issue.

ASSIGNMENT OF ERROR NO. 11: The PUCO erred in determining that FirstEnergy may withdraw its ESP long after it has been approved and after hundreds of millions of dollars have been collected from customers.

The PUCO granted rehearing to clarify that FirstEnergy's right to withdraw from the modified ESP IV does not lapse during the application and appeals process.[130] The PUCO opined that 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 acceptance of modified ESP IV.

But the PUCO's ruling is unreasonable and unlawful. Under the PUCO's interpretation FirstEnergy could withdraw its plan many months and even years down the road, after it has reaped the benefits of increased revenues collected from its customers. This is because a final non-appealable order may take years to surface after it emerges from the lengthy appellate process. And the appellate process is prolonged greatly by the PUCO's habit of deferring a substantive ruling on parties' applications for rehearing. In the meantime, the utility continues to charge consumers hundreds of millions of dollars. That is unjust and unreasonable.

---

[129] The financial impact to residential customers of the modification to the Rider ELR cost allocation is as follows: approximately 135,000 (incremental kW) X $5 = $675,000 per month $675,000 X 12 months = $8,100,000 per year $8,100,000 X 56% (which is the approximate percent of residential base distribution revenue to the whole) = $4,536,000 per year $4,536,000 / 1,900,000 (approximate # of FE-Ohio residential customers) = $2.39 per customer per year $2.39 / 12 = $.20 which would be the rate impact per month for a residential customer due to the change in the allocation of the incremental kW credits.

[130] Fifth Entry on Rehearing a ¶333.

A utility's right to withdraw an ESP application is not unlimited. The PUCO itself has recognized this when in the past it has determined that the filing of tariffs consistent with its Opinion and Order (modifying the ESP) is to be deemed as acceptance of the Order (thereby precluding later withdrawal).[131] The PUCO's ruling here contradicts its earlier order, with no justification for departing from its precedent. But the Court has required the PUCO to provide such justification when it departs from precedent.[132]

And under the PUCO's ruling a utility could withdraw its plan in response to a modification of the plan made by the Court. This is because the PUCO's ruling allows FirstEnergy to withdraw after a final non-appealable order is issued. That would include an order being issued by the Court. Yet that is unlawful and contrary to Ohio law. Under R.C 4928.143(C)(2)(a) a utility may withdraw but only in response to commission action, not court action: "[i]f the commission modifies and approves an application under Division (C)(1) of this section, the electric distribution utility may withdraw the application, thereby terminating it, and may file a new standard service offer under this section of a standard service offer under section 4928.142 of the Revised Code."

There is no right to terminate and withdraw an ESP application that has been changed due to a modification by the Court. The words aren't there. The PUCO cannot

---

[131] See *In the Matter of the Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider,* Case No. 14-1693-EL-RDR, Opinion and Order at 106 (Mar. 31, 2016); *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan,* Case No. 14-1297-EL-SSO, Opinion and Order at 86 (Mar. 31, 2016).

[132] Office of Consumers' Counsel v. Pub. Util. Comm., 10 Ohio St.3d 19, 461 N.E.2d 303, 305 (1984).

rewrite the law.[133] The PUCO is a creature of statute. *Columbus S. Power Co. v. Pub. Util. Comm.* (1993), 67 Ohio St. 3d 535, 620 N.E.2d 835; *Pike Natural Gas Co. v. Pub. Util. Comm.* (1981), 68 Ohio St. 2d 181, 22 Ohio Op. 3d 410, 429 N.E.2d 444 *Consumers' Counsel v. Pub. Util. Comm.* (1981), 67 Ohio St. 2d 153, 21 Ohio Op. 3d 96, 423 N.E.2d 820; and *Dayton Communications Corp. v. Pub. Util. Comm.* (1980), 64 Ohio St. 2d 302, 18 Ohio Op. 3d 478, 414 N.E.2d 1051. It may only exercise the authority conferred on it by the General Assembly. The PUCO must follow the law.

That the Utility has only a limited opportunity to withdraw its ESP is evident by the accompanying subsection of the law. R.C. 4928.143(C)(2)(b) requires the utility to return to prior rates. If the utility is permitted to withdraw years after rates are implemented (once a final non-appealable order is issued) it will be difficult, if not impossible for the utility to return fully and completely to its prior rates. If the PUCO is right (it is not) that a utility can withdraw at any time, after accepting the benefits of the ESP, then one would have to assume that the General Assembly enacted laws that are not feasible of being executed. This is contrary to the Ohio rules of statutory construction.[134]

The only way the most recent standard service rates can continue is if the right to withdraw is exercised within a relatively short period of time after implementing its ESP plan. That would allow the provisions of R.C. 4928.143(C)(2)(b) to be implemented as written and intended by the General Assembly. The PUCO's extending the utility's right to withdraw was unreasonable and unlawful. The PUCO should grant rehearing and reverse.

---

[133] *In re: Application of Columbus S. Power Co.*, Slip Opinion No. 2-016-Ohio-1608, par 49 ("[i}n construing a statute, we may not add or delete words."), citing *State ex rel. Cincinnati Bell Tel. Co. v. Publ. Util. Comm.*, 105 Ohio St.3d 177, 2005-Ohio-1150, 824 N. E.2d 68, ¶32.

[134] R.C. 1.47(D) stating that in enacting a statute, *inter alia*, a result feasible of execution is intended.

III. CONCLUSION

The PUCO should grant rehearing on these claims of error and modify or abrogate its October 12, 2016 Fifth Entry on Rehearing. Granting rehearing is necessary to ensure that FirstEnergy customers are not subject to unreasonable and unlawful charges. Otherwise Ohio consumers could end up paying for a whole host of unreasonable and unlawful charges. These unlawful charges render FirstEnergy's ESP plan less favorable in the aggregate than an MRO. That means the PUCO cannot by law approve the ESP.

The Fifth Entry on Rehearing includes a Credit Support Rider that will collect approximately $612 million from customers for three years (with a potential two-year extension). But that charge is destined to not fulfill its stated purpose. The Credit Support Rider funds are supposed to "jump start" FirstEnergy's investment in grid modernization. But FirstEnergy is not required to use the funds this way. So the funds may actually be used to bailout FirstEnergy's parent, FirstEnergy Corp. or its unregulated generation affiliate, FirstEnergy Solutions. Under the PUCO's Order captive local distribution customers will be paying an unlawful subsidy to FirstEnergy that is unrelated to any electric service being provided. The Credit Support rider is an unlawful transition charge. To protect Ohioans, the OCC/NOAC requests that the PUCO rehear its Fifth Entry on Rehearing, consistent with this application for rehearing.

Respectfully submitted,

BRUCE WESTON (0016973)
OHIO CONSUMERS' COUNSEL

/s/ Larry S. Sauer
Larry S. Sauer (0039223)
Counsel of Record
Deputy Consumers' Counsel
Maureen R. Willis (0020847)
William J. Michael (0070921)
Kevin F. Moore (0089228)
Ajay Kumar (0092208)
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
Telephone [Sauer]: (614) 466-1312
Telephone [Willis]: (614) 466-9567
Telephone [Michael]: (614) 466-1291
Telephone [Moore]: (614) 387-2965
Telephone [Kumar]: (614) 466-1292
Larry.sauer@occ.ohio.gov
Maureen.willis@occ.ohio.gov
William.michael@occ.ohio.gov
Kevin.moore@occ.ohio.gov
Ajay.kumar@occ.ohio.gov
(All will accept service vial email)

/s/ Thomas R. Hays
Thomas R. Hays (0054062),
Counsel of Record
For NOAC and the Individual
Communities
8355 Island Lane
Maineville, Ohio 45039
Telephone: 419-410-7069
trhayslaw@gmail.com

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Application for Rehearing by the Office of the Ohio Consumers' Counsel and the Northwest Ohio Aggregation Coalition and the NOAC Communities Individually was served via electronic transmission, to the persons listed below, on this 14th day of November 2016.

/s/ Larry S. Sauer
Larry S. Sauer
Deputy Consumers' Counsel

SERVICE LIST

mkurtz@BKLlawfirm.com
kboehm@BKLlawfirm.com
jkylercohn@BKLlawfirm.com
stnourse@aep.com
mjsatterwhite@aep.com
yalami@aep.com
czdebski@eckertseamans.com
dparram@taftlaw.com
Schmidt@sppgrp.com
ricks@ohanet.org
mkl@smxblaw.com
gas@smxblaw.com
wttpmlc@aol.com
lhawrot@spilmanlaw.com
dwilliamson@spilmanlaw.com
blanghenry@city.cleveland.oh.us
hmadorsky@city.cleveland.oh.us
mdortch@kravitzllc.com
rparsons@kravitzllc.com
gkrassen@bricker.com
dstinson@bricker.com
dborchers@bricker.com
DFolk@akronohio.gov
sechler@carpenterlipps.com
gpoulos@enernoc.com
dwolff@crowell.com
rlehfeldt@crowell.com
rkelter@elpc.org

cdunn@firstenergycorp.com
jlang@calfee.com
talexander@calfee.com
dakutik@jonesday.com
sam@mwncmh.com
fdarr@mwncmh.com
mpritchard@mwncmh.com
cmooney@ohiopartners.org
callwein@keglerbrown.com
joliker@igsenergy.com
mswhite@igsenergy.com
Bojko@carpenterlipps.com
ghiloni@carpenterlipps.com
barthroyer@aol.com
athompson@taftlaw.com
Christopher.miller@icemiller.com
Gregory.dunn@icemiller.com
Jeremy.grayem@icemiller.com
tdougherty@theOEC.org
Marilyn@wflawfirm.com
todonnell@dickinsonwright.com
mfleisher@elpc.org
drinebolt@ohiopartners.org
meissnerjoseph@yahoo.com
LeslieKovacik@toledo.oh.gov
trhayslaw@gmail.com
Jeffrey.mayes@monitoringanalytics.com
msoules@earthjustice.org

evelyn.robinson@pjm.com
mjsettineri@vorys.com
glpetrucci@vorys.com
mwarnock@bricker.com

sfisk@earthjustice.org
Thomas.mcnamee@ohioattorneygeneral.gov
Thomas.lindgren@ohioattorneygeneral.gov
Steven.beeler@ohioattorneygeneral.gov

Attorney Examiners:

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

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

NORTHEAST OHIO PUBLIC ENERGY COUNCIL'S APPLICATION FOR REHEARING

Glenn S. Krassen (Reg. No. 0007610)
Counsel of Record
BRICKER & ECKLER LLP
1001 Lakeside Avenue, Suite 1350
Cleveland, OH 44114
Telephone: (216) 523-5405
Facsimile: (216) 523-7071
gkrassen@bricker.com

Dane Stinson (Reg. No. 0019101)
Dylan F. Borchers (Reg. No. 0090690)
BRICKER & ECKLER, LLP
100 South Third Street
Columbus, OH 43215-4291
Telephone: (614) 227-2300
Facsimile: (614) 227-2390
dstinson@bricker.com
dborchers@bricker.com

COUNSEL FOR NORTHEAST OHIO PUBLIC ENERGY COUNCIL

May 2, 2016

TABLE OF CONTENTS

Page

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

NORTHEAST OHIO PUBLIC ENERGY COUNCIL'S APPLICATION FOR REHEARING

The Northeast Ohio Public Energy Council ("NOPEC"), through counsel and pursuant to R.C. 4903.10, and O.A.C. 4901-1-35, hereby requests rehearing of the Opinion and Order issued by the Public Utilities Commission of Ohio ("Commission") in this proceeding on March 31, 2016 ("Order"). NOPEC submits that the Commission's Order is unlawful and unreasonable based on the following grounds:

A. The Commission's Order is Unlawful Because it Failed to Consider the Effect of the Nonbypassable Rider RRS on Large-Scale Government Aggregation as Required by R.C. 4928.20(K).

B. The Commission Erred in Approving the Severability Provision of the Third Stipulation and Recommendation by Not Modifying it to Permit Payments Made under Rider RRS to be Refunded in the Event a Court of Competent Jurisdiction Invalidates the Rider, like the Commission did in the Ohio Power Company PPA Opinion and Order.

C. The Commission Erred in Not Rejecting the Third Stipulation and Recommendation's Transition Provision.

D. The Commission Erred in Applying the Test for Approving Partial Stipulations to the Third Stipulation and Recommendation.

    1. The First Prong: The Commission erred in finding that the settlement is the product of serious bargaining among capable, knowledgeable parties with a diversity of interests.

2. The Second Prong: The settlement is unlawful because it violates numerous statutes, regulatory principles and practices.

   a. Rider RRS is unlawful because it does not fall under any of the provisions of R.C. 4928.143(B). In Re Application of Columbus Southern Power Co., et al., 128 Ohio St. 3d 512, 2011-Ohio-1788 [¶¶ 31-35], 945 N.E.2d 655.

      i. It is unlawful to include a provision related to "a financial limitation on customers shopping" in an ESP. R.C. 4928.143(B)(2)(d); CSP II.

         (a) Common usage of the term "customer shopping" is synonymous with the term "customer switching" and reveals the General Assembly's intent under R.C. 4928.143(B)(2)(d) only to permit provisions in an ESP that would limit customer switching. R.C. 1.42.

         (b) The Commission's finding that Rider RRS provides stability and certainty is unreasonable and against the manifest weight of the evidence.

      ii. The Commission erred by finding that Rider RRS, as a part of the "Economic Stability Program," meets the requirements of an economic development program under R.C. 4928.143(B)(2)(i).

   b. Rider RRS is Unlawful Because It Requires Customers to Fund an Unlawful, Anti-competitive Subsidy Under R.C. 4928.02(H).

      i. The subsidy customers are being asked to pay is anti-competitive.

   c. Rider RRS is unlawful because it permits the recovery of unlawful transition charges prohibited by R.C. 4928.38.

   d. The settlement is unlawful because it includes Rider GDR and a new unbundled distribution rate rider in the ESP contrary to the Ohio Supreme Court's ruling in CSP II.

   e. The settlement is unlawful because the Commission erred in applying the ESP v. MRO test set forth in R.C. 4928.143(C)(1).

      i. The Legislative History of SB 221

ii. The Ohio Supreme Court's Precedent

iii. The Rules of Statutory Construction Require that R.C. 4928.143(C)(1) Be Construed Consistent with Legislative Intent. R.C. 1.49.

iv. Appropriate application of the ESP v. MRO Test

(a) The Commission erred in its quantitative analysis because it failed to remove Rider RRS and shareholder funding from the ESP v. MRO test, and failed to quantify the costs of Riders GDR, DCR, and Unbundled Distribution Rate Rider.

(b) It is Unlawful to Value the Placeholder GDR and Unbundled Distribution Rate Rider at Zero.

(c) It is unlawful not to quantify Rider DCR as a cost of the ESP.

(d) The Commission erred by not excluding the economic development, job retention and low income funding from the quantitative analysis.

(e) Even if the Commission could consider qualitative factors in determining whether an ESP is more favorable than an MRO, it is unlawful to consider qualitative factors that fall outside of the provisions of R.C. 4928.143(B).

3. The Third Prong: It is unlawful to bootstrap approval of an ESP, which fails the ESP v. MRO test, by considering alleged qualitative benefits that fall outside of R.C. 4928.143(B).

E. The Commission erred in granting the Companies' motion to strike arguments regarding the Legislative History of S.B. 221.

1. The draft legislation and bill analyses of SB 221 constitute its legislative history, which the Commission is permitted to consider pursuant to R.C. 1.49.

2. Ohio Supreme Court precedent permits the Commission to consider the draft legislation and LSC bill analyses as authority to support its interpretation of legislative intent.

MEMORANDUM IN SUPPORT

I. INTRODUCTION

In its initial brief, the Northeast Ohio Public Energy Council ("NOPEC") explained that it is a regional council of governments established under R.C. Chapter 167, and is the largest governmental retail energy aggregator in the State of Ohio. It is comprised of approximately 200 member communities in the thirteen (13) northern Ohio counties of Ashtabula, Lake, Geauga, Cuyahoga, Summit, Lorain, Medina, Trumbull, Portage, Huron, Columbiana, Mahoning, and Seneca. NOPEC provides electric aggregation service to approximately 500,000 retail electric customers – or nearly one-third of the retail electric customers located in the service territories of two FirstEnergy Corp. operating companies: The Cleveland Electric Illuminating Company ("CEI") and Ohio Edison Company ("OE").[1]

Since the enactment of SB 3 in 1999, NOPEC has been an active participant in Ohio's deregulated electric generation market,[2] arranging electric supply contracts for its customers that will result in savings of more than $300 million through 2019, when its current contract expires. Significantly, NOPEC's current contract is with FirstEnergy Solutions Corp. ("FES"), an affiliate of CEI and OE. Under this contract, FES provides NOPEC customers with full-requirements retail electric service for a nine-year period, from January 1, 2011 through December 31, 2019. The publicly available terms of this competitively bargained-for contract show that NOPEC's

[1] IGS Exhibit 13 (White Supplemental) at 6.

[2] See R.C. 4905.03.

residential customers pay a fixed 6% off their EDU's price to compare, and its small commercial customers pay a fixed 4% off the price to compare during the contracts' nine-year term.[3]

The most controversial provision of the Companies'[4] electric security plan ("ESP IV") is the proposed nonbypassable rider under which all distribution customers must pay a return of, and on, FES's investment in the Sammis and Davis Besse generating facilities, as well as FES's share of power from the Ohio Valley Electric Corporation ("OVEC Entitlement") (collectively "PPA Units"). Specifically, the Companies propose to enter into a purchase power agreement with FES under which they would purchase the power of the PPA Units and sell these resources' capacity, energy and ancillary services into PJM Interconnection, LLC ("PJM"). The full costs of these resources plus a return on invested capital, net of associated market revenues, would be recovered from all distribution customers through the nonbypassable Retail Rate Stability Rider ("Rider RRS).[5]

The record in this proceeding shows that during the remainder of the NOPEC/FES supply contract (through 2019), NOPEC's customers will be required to pay an additional, nonbypassable charge for FES' generation through Rider RRS.[6] NOPEC customers would be harmed by being required to give up their bargained-for FES discount and pay FES twice for generation. As explained below, Rider RRS is unlawful because, among other reasons, it violates R.C. 4928.20(K), which protects large-scale governmental aggregations from the harmful effect of nonbypassable charges.

---

[3] Tr. XXII at 4591 (Wilson Re-Cross). The Companies did not contest these terms at hearing, but only argued that they were confidential. Tr. XXII at 4592-4594. These terms are publicly available as reported by FirstEnergy Corp.'s own news release. http://www.prnewswire.com/news-releases/firstenergy-solutions-and-nopec-enter-into-nine-year-agreement-78317142.html.

[4] The "Companies" refer to FirstEnergy Corp.'s operating companies: CEI, OE and The Toledo Edison Company ("TE").

[5] OCC/NOPEC Ex. 4 (Wilson Direct) at 5

[6] OCC/NOPEC Ex. 9 (Wilson Second Supplemental) at 8; Companies Ex. 33 (Ruberto Direct) at Ex. JAR-1.

NOPEC's immediate concern is that its customers not pay twice for FES' generation. NOPEC's broader concern is with the interference Rider RRS would have on Ohio's ability to ensure effective competition in the provision of retail electric service, as required by statute.[7]

II. GROUNDS FOR REHEARING

A. The Commission's Order is Unlawful Because it Failed to Consider the Effect of the Nonbypassable Rider RRS on Large-Scale Government Aggregation as Required by R.C. 4928.20(K).

R.C. 4928.20(K) was enacted as a part of SB 221. It provides:

> The commission shall adopt rules to ***encourage and promote large-scale governmental aggregation in this state***. For that purpose, the commission shall conduct an immediate review of any rules it has adopted for the purpose of this section that are in effect on the effective date of the amendment of this section by S.B. 221 of the 127th general assembly, July 31, 2008. ***Further, within the context of an electric security plan under section 4928.143 of the Revised Code, the commission shall consider the effect on large-scale governmental aggregation of any nonbypassable generation charges, however collected***, that would be established under that plan, except any nonbypassable generation charges that relate to any cost incurred by the electric distribution utility, the deferral of which has been authorized by the commission prior to the effective date of the amendment of this section by S.B. 221 of the 127th general assembly, July 31, 2008. [Emphasis supplied.]

On brief, NOPEC asked the Commission to consider the effect of Rider RRS on large-scale government aggregations.[8] Although the Commission recognized that NOPEC raised this issue,[9] the Order nevertheless fails to consider it as required by R.C. 4928.20(K) and in violation of R.C. 4903.09.

---

[7] See R.C. 4928.02(H) (ensuring effective competition in the provision of retail electric service is a policy of this state).

[8] NOPEC Initial Br. at 3-5, 26-29.

[9] Order, at 102.

As explained on brief, in assessing the effect of the nonbypassable Rider RRS on large-scale governmental aggregation, the Companies did no more than assume governmental aggregation customers would be subject to the same risks and alleged delayed benefits as all other customers.[10] Indeed, Companies' witness Ruberto testified that the Companies performed no studies on the effect of Rider RRS on large-scale governmental aggregations such as NOPEC.[11] The Companies' analysis merely restates the obvious: the effect of a nonbypassable charge is that it is applied to all customers. The legislature clearly understood as much and intended more by creating this special statutory provision.

In historical context, large-scale governmental aggregation has been an important part of Ohio's retail electric market design since SB 3 became effective in 2001, and has provided an important choice to residential and small commercial customers. The Commission's market monitoring reports show that approximately 66%, 65% and 72% of residential sales in Ohio Edison ("OE"), Toledo Edison ("TE"), and Cleveland Electric Illuminating ("CEI") companies services territories, respectively, are from a CRES provider. Moreover, the NOPEC aggregation supplies approximately 500,000 customers, or nearly one-third of the residential and commercial customers in the CEI and OE service territories.[12] To date, NOPEC's electric aggregation program has saved NOPEC residential and small commercial customers hundreds of millions of dollars.

It is against this backdrop that the legislature enacted special provisions and protections in SB 221 to encourage and promote governmental aggregation in this state, including protecting large-scale governmental aggregation from an ESP's interference with the generation rates

---

[10] Application, Companies Ex. 1 at 21; Companies Ex. 7 (Mikkelsen Direct) at 31.

[11] Tr. XXIII at 2871-2872 (Ruberto Direct).

[12] See footnote 1.

agreed upon between the governmental aggregator and its chosen supplier. Significant here, NOPEC contracted with the Companies' affiliate, FES, to supply full-requirements electric service to its aggregation for a *nine* year period, from January 1, 2011 through December 31, 2019 – a period longer than the eight-year term of the proposed ESP and Rider RRS in this case. The publicly available terms of the contract show that residential customers pay a fixed 6% off their EDU's price to compare, and small commercial customers pay a fixed 4% off the price to compare during the contracts' nine year term.[13] The NOPEC contract demonstrates that the proposed Rider RRS is unlawful and unreasonable for the following reasons.

As the legislature intended, NOPEC has successfully arranged, on its own, to hedge against potential volatile price increases by (1) basing its contract upon the SSO price of service and (2) reducing that price by a fixed 6% for residential customers and a fixed 4% for small commercial customers. By basing the NOPEC price on the SSO's price to compare, NOPEC has taken advantage of the laddered SSO auctions that will provide price stability for its customers. NOPEC has further provided for price stability by arranging a fixed percent off the price to compare. Unlike Rider RRS, this percent off the price to compare will apply whether market prices for electricity increase or decrease in the future. And, unlike under Rider RRS, when market prices are low, NOPEC customers are not subject to a surcharge and, indeed, receive the benefit of the same fixed percent off the PTC for an even lower rate.

As the legislature intended, NOPEC (and FES) embraced the competitive marketplace to provide consumers with an innovative nine-year contract that resulted in guaranteed savings in their electric rates. However, this PPA proposal now attempts to change the bargain the parties struck. NOPEC customers currently are paying FES for full-requirements generation service

---

[13] See footnote 3.

through 2019. It is uncontroverted that, once Rider RRS becomes effective, NOPEC's customers will pay an additional amount for this same generation service in the form of the nonbypassable Rider RRS – effectively paying twice – until their contract through NOPEC expires on December 31, 2019.[14] In considering the effect of the nonbypassable Rider RRS on large-scale governmental aggregation customers, the Commission should conclude that NOPEC customers will be harmed by paying this unbargained-for surcharge, that Rider RRS does not encourage or promote large-scale governmental aggregation, and that it is unlawful to make NOPEC customers subject to Rider RRS.

B. The Commission Erred in Approving the Severability Provision of the Third Stipulation and Recommendation by Not Modifying it to Require Payments Made under Rider RRS to be Refunded in the Event a Court of Competent Jurisdiction Invalidates the Rider, like the Commission did in the Ohio Power Company PPA Opinion and Order.

Although the Commission had instructed the Companies to include in their ESP a severability provision that would continue the other benefits of the ESP in the event Rider RRS were invalidated, the Third Stipulation and Recommendation contained a provision that would permit the parties to negotiate in good faith to restore Rider RRS to its equivalent value. The provision also provided that amounts collected under Rider RRS would not be refunded to customers in the event Rider RRS were invalidated.[15] In its Order, the Commission modified the severability provision such that the Commission reserved the right to modify the Stipulation if there is a change to PJM's tariffs or rules which prohibits the PPA Units from being bid into PJM

---

[14] OCC/NOPEC Ex. 9 (Wilson Second Supplemental) at 13; Companies Ex. 33 (Ruberto Direct) at Att. JAR-1. See discussion below which explains that NOPEC residential customers' current 6% guaranteed savings will be reduced by Rider RRS during at least its first three years. FirstEnergy's own projections would not provide customers a 6% credit to their bill until 2029 – which is five years after the ESP ends.

[15] Companies Ex. 154 at 8-9.

auctions.[16] The Commission erred in not modifying the Stipulation to remove the prohibition against refunds if Rider RRS was invalidated.

Importantly, in Ohio Power Company's PPA case, also decided March 31, 2016, the Commission correctly found that the similar severability provision in Ohio Power's Stipulation should be modified such that the prohibition against providing customer refunds should be removed in the event its similar PPA Rider were invalidated.[17] There is no factual difference between the Companies and Ohio Power's refund provisions in the severability language of each utility's Stipulation and no basis for the Commission to treat the severability provisions differently in its two PPA Opinions and Orders issued the same day. NOPEC seeks rehearing to permit a refund of customer funds paid under Rider RRS in the event it is invalidated by a court of competent jurisdiction.

C. The Commission Erred in Not Rejecting the Third Stipulation and Recommendation's Transition Provision.

In its initial brief, NOPEC explained that the Third Stipulation and Recommendation's Transition Provision should be rejected.[18] However, the Commission's Order fails to address this issue. Because the proposed ESP IV is for a term of eight years, the Commission is required to review it in year four to determine (1) whether it is still meeting the ESP v. MRO test and will continue to do so throughout ESP IV's term, and (2) whether the prospective effect of continuing the ESP is substantially likely to provide the Companies with excessive returns on equity.[19] Under this provision, if the Commission were to determine that the ESP IV should be terminated

[16] Order at 92.

[17] See *In Re Ohio Power Company*, Case No. 14-1693 (Opinion and Order, March 31, 2016) at 87.

[18] NOPEC Initial Br. at 76-77.

[19] R.C. 4928.143(E).

under these tests, Rider RRS and Rider DCR revenues would continue to be collected for the initially approved eight year term.[20]

The legislature clearly provided for the "four-year check-up" in R.C. 4928.143(E) to protect consumers against future uncertainties, including future electricity prices and equity returns. The Transition Provision eliminates this statutory protection, is unlawful and must be rejected.

In addition, the Transition Provision improperly inserts language into R.C. 4928.143(E). Specifically, it requires the Commission to consider quantitative and qualitative factors[21] in conducting the ESP v. MRO test and, among the qualitative factors, consider the "financial health of the utilities."[22] Consideration of the "financial health of the utilities" is not one of the items specifically set for in R.C. 4928.143(B), therefore it may not lawfully be considered as a part of the ESP v. MRO under the Ohio Supreme Court's decision in *CSP II* (discussed below).

Finally, the Transition Provision provides that the ESP may be terminated only if the Commission finds that ***each*** utility has significantly excessive earnings. In other words if two of the three utilities involved in this proceeding are deemed to have significantly excessive earnings, the stipulation would permit them to continue to do so for four more years. This provision clearly is unreasonable, and is also unlawful: R.C. 4928.143(E) requires the Commission to consider the earnings of the individual electric distribution company. The remedy provided if the individual company's earnings are excessive is to terminate the ESP as to that company. Permitting the company to continue to receive substantially excessive earning is unlawful. The Stipulation's Transition Provision should be summarily rejected

[20] Companies Ex. 154 (Third Stipulation, Section V.K.) at 18; Tr. XXXVI at 7564-7565.

[21] As explained below, it is unlawful to consider qualitative factors in the ESP v. MRO test.

[22] Companies Ex. 154 (Third Stipulation, Section V.K.) at 18.

D. The Commission Erred in Applying the Test for Approving Partial Stipulations to the Third Stipulation and Recommendation.

In approving partial stipulations offered to resolve proceedings before it, the Commission traditionally considers a three-prong analysis, which was endorsed by the Ohio Supreme Court in *Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, 592 N.E.2d 1370 (1992):

1. Is the settlement a product of serious bargaining among capable, knowledgeable parties, where there is a diversity of interests among the stipulating parties?
2. Does the settlement package violate any important regulatory principle or practice?
3. Does the settlement, as a package, benefit ratepayers and the public interest?

NOPEC asserts below that it is error to adopt the partial stipulation test in ESP proceedings. NOPEC also submits that the Commission erred in applying this test to the facts of this case for the following reasons.

1. The First Prong: The Commission erred in finding that the settlement is the product of serious bargaining among capable, knowledgeable parties with a diversity of interests.

The Commission found that the signatory parties to the Partial Stipulation represent a diversity of interests.[23] To the contrary, a large number of parties with considerable experience before the Commission in ESP proceedings and with diverse interests have refused to sign the stipulation. These include millions of residential customers (OCC, NOPEC, NOAC), commercial customers (OMAEG), environmental interests (Sierra Club, Environmental Defense Fund, Environmental Law and Policy Center) and CRES suppliers (PJM Power Providers, The Electric Supply Association, and Retail Energy Supply Association).[24] Accordingly, the Commission must give considerable weight to the diversity of interests opposing this partial

---

[23] Order at 43.

[24] OCC/NOPEC Ex. 11 (Kahal Second Supplemental) at 29.

stipulation. Considering the diversity of interests of the parties opposing the partial stipulation, the Commission erred by finding that the Partial Stipulation meets the first prong of the test.[25] Moreover, the Commission erred by not finding, as recognized by former Commissioner Cheryl Roberto, that bargaining cannot be said to be "serious" in the context of an ESP proceeding when the EDU, here the Companies, has the statutory ability to unilaterally reject any modification to the proposed electric security plan.[26]

2. **The Second Prong: The settlement is unlawful because it violates numerous statutes, regulatory principles and practices.**

As discussed previously, the Commission erred in approving the settlement because neither the settlement nor the Commission's Order considers the effect of Rider RRS on large-scale government aggregations required by R.C. 4928.20(K).[27] Moreover, the settlement violates several other statutes, practices and principles.

a. **Rider RRS is unlawful because it does not fall under any of the provisions of R.C. 4928.143(B). *In Re Application of Columbus Southern Power Co., et al.,* 128 Ohio St. 3d 512, 2011-Ohio-1788 [¶¶ 31-35], 945 N.E.2d 655.**

The most controversial provision of ESP IV is the Companies' request for approval of the nonbypassable Rider RRS under which all distribution customers must pay a return of and on FES' investment in the PPA Units. The threshold question presented is whether the Companies' proposed Rider RRS is lawful under Ohio law. Significantly, the Ohio Supreme Court has held that only the nine items enumerated in R.C. 4928.143(B)(2) may be included in an ESP. *In Re Application of Columbus Southern Power Co., et al.*, 128 Ohio St. 3d 512, 2011-Ohio-1788 [¶¶

---

[25] OCC/NOPEC Ex. 11 (Kahal Second Supplemental) at 28-30.

[26] OCC/NOPEC Ex. 11 (Kahal Second Supplemental) at 6-7, citing to the Companies' 2008 ESP case, *In Re FirstEnergy*, Case No. 08-935-EL-SSO, Second Finding and Order (March 25, 2009), Roberto concurring in part and dissenting in part.

[27] NOPEC Initial Br. at 3-5, 26-29.

31-35], 945 N.E.2d 655 (hereinafter, "*CSP II*"). Lacking confidence that its proposed Rider RRS fits any of the criteria of R.C. 4928.143(B)(2), the Companies provided various alternative approaches for the Commission's consideration.[28] Their first three alternatives are based on the language of R.C. 4928.143(B)(2)(d), which provides that an ESP may include:

> Terms, conditions, or charges relating to limitations on customer shopping for retail electric generation service, bypassability, standby, back-up, or supplemental power service, default service, carrying costs, amortization periods, and accounting or deferrals, including future recovery of such deferrals, as would have the effect of stabilizing or providing certainty regarding retail electric service...

The Commission rejected the Companies' argument that Rider RRS could be included in an ESP because it was a nonbypassable charge, and thus was related to "bypassability."[29] The Commission also declined to rule on whether Rider RRS was related to "default service."[30] Instead, it found that Rider RRS could be included in the ESP as a "financial limitation on customer shopping" under R.C. 4928.143(B)(2)(D); and also that Rider RRS is part of an "economic development plan" under R.C. 4928.143(B)(2)(i).

i. It is unlawful to include a provision related to "a financial limitation on customers shopping" in an ESP. R.C. 4928.143(B)(2)(d); CSP II.

In finding that Rider RRS is a "financial limitation on customer shopping," the Commission's Order acknowledges that the rider does not impose a "physical" limitation on shopping. Rather, the Order reasons that the "Rider RRS would function as a financial restraint on complete reliance on the retail market for the pricing of retail electric generation service."[31]

---

[28] Companies Ex. 155 (Mikkelsen Fifth Supplemental) at 9.

[29] Order at 108-109.

[30] Order at 109.

[31] Order at 109.

However, the Commission erred because R.C. 4928.143(B(2)(2)(d) provides only for a "physical" limitation on customer shopping.

(a) Common usage of the term "customer shopping" is synonymous with the term "customer switching" and reveals the General Assembly's intent under R.C. 4928.143(B)(2)(d) only to permit provisions in an ESP that would limit customer switching. R.C. 1.42.

Key to the determination whether Rider RRS constitutes a "limitation on customer shopping" is the interpretation of this phrase and, specifically, whether the phrase contemplates a "physical" or a "financial" limitation on customer shopping. Resolution requires a determination of legislative intent. In this regard, R.C. 1.42 provides:

> Words and phrases shall be read in context and construed according to the rules of grammar and common usage. Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly.

The Ohio Revised Code,[32] as well as Commission and Ohio Supreme Court precedent, are replete with references that use the term "shopping" synonymously with the word "switching."[33] Common usage dictates that the term "customer shopping" refers to customers who physically "switch" to CRES providers.

To accept that R.C. 4928.143(B)(2)(d) contemplates a "financial" limitation on shopping, the word "financially" must be read into the statute. Recently addressing the rules of statutory construction in Commission proceedings, the Ohio Supreme Court stated:

---

[32] See, *e.g.*, R.C. 4928.40(A)(1) ("...such ***shopping incentives*** by customer class as are considered necessary to induce, at the minimum, a twenty per cent load ***switching rate by customer class*** halfway through the utility's market development period but not later than December 31, 2003." [Emphasis added.])

[33] *In Re Ohio Consumers' Counsel*, 109 Ohio St.3d, 206-Ohio-2110, 847 N.E.2d 1184, ¶ 21; *In Re Elyria Foundry*, 114 Ohio St.3d 305, 2007-Ohio-4146, 871 N.E.2d 970, at ¶ 72.

> When interpreting a statute, a court must first examine the plain language of the statute to determine legislative intent. *Cleveland Mobile Radio Sales, Inc. v. Verizon Wireless*, 113 Ohio St.3d 394, 2007-Ohio-2203, 865 N.E.2d 1275, ¶ 12. The court must give effect to the words used, ***making neither additions nor deletions from the words chosen by the General Assembly***. *Id. See, also, Columbia Gas Transm. Corp. v. Levin*, 117 Ohio St.3d 122, 2008-Ohio-511, 882 N.E.2d 400, ¶ 19. Certainly, had the General Assembly intended to require that electric distribution utilities prove that carrying costs were "necessary" before they could be recovered, it would have chosen words to that effect.[34] [Emphasis added.]

The Commission's addition of the word "financial" to the statute contravenes its plain meaning and the intent of the General Assembly to provide the Commission only with the authority to limit customer switching to CRES providers. Thus, the proper interpretation of the phrase at issue is that an ESP may include a provision relating to limitations on customers physically switching to a CRES provider.

The Commission's determination that R.C. 4928.143(B)(2)(d) permits a "financial" limitation on customer shopping contravenes legislative intent, as determined by R.C. 1.42, and is unlawful. Moreover, without its express inclusion in the items listed in R.C. 4928.143(B)(2)(a)-(i), such a financial limitation on customer shopping is forbidden by *CSPII*.

(b) The Commission's finding that Rider RRS provides stability and certainty is unreasonable and against the manifest weight of the evidence.

The Commission's finding that Rider RRS will have the effect of providing retail rate stability and certainty "in theory" offers little comfort to Ohio's consumers. The Commission found that when wholesale prices rise, Rider RRS will mitigate the increase in market prices.[35]

However, as OCC/NOPEC witness Wilson explained, proposed Rider RRS would be updated annually and the net Rider RRS amounts incurred in one year would not appear on a

[34] *In Re Columbus S. Power*, 138 Ohio St.3d 448, 2014-Ohio-462, 9 N.E.3d 1064, ¶ 26.

[35] Order at 109.

customer's bill until the next year as a credit or charge. Dr. Wilson testified that, due to this lag, it is likely that the annual Rider RRS updates could move in the same direction as forward market rates. Thus, there is no assurance that Rider RRS would move in the opposite direction as the market and, further, it cannot be assumed that the Rider RRS will tend to hedge or stabilize customers' rates.[36] Indeed, the likelihood that the rider will move in the same direction of market prices will only exacerbate price volatility for consumers, rather than produce rate stability.

Dr. Wilson also testified that SSO customers would be served under staggered supply contracts established through periodic competitive auctions. These blended SSO rates would reflect forward prices at the time of the auction and, forward prices for delivery periods a few years out tend to be stable, resulting in fairly stable rates over time. Dr. Wilson also explained that customers taking service under contracts with CRES suppliers could choose offerings (including fixed price contacts) that control how their electric supply would be priced as market prices rise and fall, balancing cost, risk and other considerations.[37]

The Commission offers no citations or analysis to support its finding, in violation of R.C. 4903.09. NOPEC presumes the Commission's finding is based upon the testimony of the Companies' witness Strah. Mr. Strah dismissed Dr. Wilson's legitimate methods to mitigate market fluctuation by stating that the SSO and CRES contracts are not long-term solutions. He reasoned that the SSO was limited to the three-year term of an ESP, that CRES contracts are typically offered for a period of one year and that no CRES contracts were offered for a period greater than three years.[38] Mr. Strah's testimony, offered before the Third Stipulation and

---

[36] OCC/NOPEC Ex. 4 (Wilson Direct) at 13, 50.

[37] Id.

[38] Companies' Ex. 4 (Strah Direct) at 11, 13.

Recommendation was filed, ignores that the proposed ESP term is now eight years. Moreover, Mr. Strah failed to consider the effect of Rider RRS on large-scale governmental aggregation.[39] Had he done so, he would have learned that NOPEC, which serves approximately a third of the customers in the CEI and OE service territories, has an existing contract with FES to serve its aggregation members for a period of *nine* years – longer than the three year CRES contracts on which Mr. Strah relies, and even longer than the ESP IV's proposed eight year term.[40] The publicly available terms of this competitively bargained-for contract show that NOPEC's residential customers pay a fixed 6% off their EDU's price to compare. This is significant because Mr. Strah testified that the Companies' residential customers would pay a charge under Rider RRS during the first three years of the ESP (2019), but they would not receive a 6% credit on their bill until 2029 (which now is 5 years after ESP IV would end).[41]

Under their existing FES contract, NOPEC residential customers *already* are receiving a 6% discount and will enjoy their 6% discount whether market prices increase or decrease, unlike under Rider RRS. Mr. Strah's testimony confirms that Rider RRS does not benefit NOPEC's customers, who have successfully mitigated the effect of prices increases in the competitive market, as the legislature intended. Rider RRS provides only costs and no benefits to NOPEC's customers.

ii. The Commission erred by finding that Rider RRS, as a part of the "Economic Stability Program," meets the requirements of an economic development program under R.C. 4928.143(B)(2)(i).

The Commission's Order finds that Rider RRS may be included in an ESP under R.C. 4928.1343(B)(2)(i), because it is part of an economic development plan. Without analysis, the

---

[39] Such consideration is required by R.C. 4928.20(K).

[40] Tr. XXII at 4591 (Wilson Re-Cross Examination).

[41] Companies Ex. 13 (Strah Direct) at 12.

Commission found that the PPA Units have a significant economic impact upon the regions in which they are located.[42] The Commission's order is fundamentally flawed because no evidence of record demonstrates, and the Commission did not find, that the PPA Units will close if Rider RRS is not approved. Indeed, Companies' witness Rose's wholesale price projections provide a healthy return of and on legacy capital, as well as an additional surplus of $2 billion over the initial 15 year term of Rider RRS.[43] OCC/NOPEC witness Wilson's testimony makes clear that prices must be substantially lower than witness Rose's projections to warrant retirement.[44] According to the Companies' own projections, market revenues will be sufficient to keep the plants economical without the need for Rider RRS.[45]

To support its finding that Rider RRS is an economic development program, the Commission unreasonably relies on the testimony of Companies' Witness Murley, who conducted a study on the economic impact of the Sammis and Davis-Besse plants. The study examines plant level data supplied by FES, along with "multipliers" derived from a regional economic impact model. Using this approach, the study identifies the economic impact of the plants in terms of total jobs and economic output.

Witness Murley's study has aspects that are not accurate. First, the economic "output" of the plants cited by Witness Murley is mostly a measure of the value of generation supply from selling power into the PJM at the two plants.[46] This is not a useful measure of economic impact, and removal of these values dramatically lowers the asserted adverse economic impact of the

[42] Order at 109-110.

[43] OCC/NOPEC Ex. 7 (Kahal Direct) at 38.

[44] Id.

[45] Id. at 39.

[46] OCC/NOPEC Ex. 7 (Kahal Direct) at 45 ("For Sammis, this is $502 million out of a total of $586 million.").

plants' retirement.[47] Witness Murley's study also assumes that if Davis-Besse shuts down, then all employees and contractors are laid off immediately, with no additional considerations.[48] Witness Murley entirely fails to consider that if Davis-Besse were to close, there would first be a decommissioning process that would be an enormous undertaking, requiring significant economic resources, including a large on-site staff and contractors.[49] As a result, Davis-Besse would remain a considerable source of economic activity even if it were to close.[50]

In addition, Ms. Murley's study is fundamentally flawed because it gives no consideration to the far reaching adverse impacts of Rider RRS if FES and the Companies elect *continued* operation of uneconomic plants. In a scenario with very low wholesale market prices, Rider RRS allows the plants to survive, albeit with significant ratepayer subsidization reflected in increased retail electric rates—while the Companies earn guaranteed profits.[51]

Importantly, Ms. Murley's study ignores the fact that retail electric rate increases have a significant detrimental impact on the service area economics of the Companies. Large electric rate increases can adversely affect the local economy. Residential customers have less disposable income, thereby having less to spend in the local economy.[52] For residential customers, Rider RRS is analogous to experiencing a tax increase with no corresponding benefit in the form of more public services. Commercial customers may respond to retail rate increases

---

[47] Id. (asserting that "[a] far more valid measure is the modeled impact on personal income, which totals about $170 million for both plants combined (inclusive of multiplier effects)"—a much lower figure than the asserted adverse impact of $1 billion).

[48] Id.

[49] Id.

[50] Id.

[51] OCC/NOPEC Ex. 7 (Kahal Direct) at 39.

[52] Id. at 42.

due to Rider RRS by raising prices to cover the added cost of doing business.[53] As noted by OCC/NOPEC witness Kahal, "[t]his effect further reduces the net disposable income of the households in the [Companies'] service area, furthering reducing employment through multiplier impacts."[54]

Ohio's critical manufacturing sector also will be adversely affected by Rider RRS.[55] Ohio's manufacturers must compete with other manufacturers regionally, in the U.S., and globally. Retail rate increases impair their competitiveness, thereby further reducing local employment.[56] Witness Murley's study gives no consideration to the adverse ripple impacts of Rider RRS on the northern Ohio economy if the Companies continue operations of uneconomic plants and Ohio consumers are faced with large electric increases.

b. Rider RRS is Unlawful Because It Requires Customers to Fund an Unlawful, Anti-competitive Subsidy Under R.C. 4928.02(H).

The Commission's Order finds that Rider RRS does not provide an anti-competitive subsidy. Although numerous parties' arguments are based on the plain language of R.C. 4928.02(H), the Commission does not address that statutory provision or its prior case construing it. Instead, the Commission found that Rider RRS does not provide an anti-competitive subsidy because all customers will be charged the Rider RRS rate.[57] The Order misses the point. The rider provides FES with an anti-competitive subsidy by ensuring a return of, and on, its investment in the PPA Units, a subsidy that no other Ohio competitive retail electric service provider has.

---

[53] Id.

[54] Id.

[55] *See* OMAEG Ex. 17 at 5 (noting that in 2010, Ohio had the highest level of manufacturing activity among the Midwestern states).

[56] OCC/NOPEC Ex. 7 (Kahal Direct) at 42.

[57] Order at 110.

R.C. 4928.02(H) provides that it is the policy of this state to:

> Ensure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa, ***including by prohibiting the recovery of <u>any generation-related costs through distribution or transmission rates.</u>*** [Emphasis supplied.]

Rider RRS is a distribution rate under the authority of *In Re Ohio Power Company*, Case No. 10-1454-EL-RDR Finding and Order (January 11, 2012) (the "*Sporn Case*"). In the *Sporn Case*, AEP Ohio sought to recover the closing costs associated with its Sporn Unit 5 generating facility through a stand-alone rider, the Plant Closure Cost Recovery Rider ("PCCRR"). The costs included the unamortized balance plant balance that remained on AEP Ohio's books (approximately $56.1 million). The PCCRR rider clearly was a rate to recover the costs of generation-related service, but AEP Ohio sought to recover the charge from all distribution customers as a nonbypassable charge, and called the rider a "distribution" charge in its application.

In the *Sporn Case*, the Commission recognized that whether a charge is to be classified as a distribution rate is dependent upon the class of customers to which it is applied. If a charge is applied to all distribution customers, it is considered a distribution rate. In *Sporn*, the Commission disallowed the PCCRR, finding:

> Additionally, the Commission notes that [AEP Ohio's] recovery of the closure costs would be contrary to the state policy found in Section 4928.02, Revised Code. That policy requires the Commission to avoid subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service. ***[AEP Ohio] seeks to establish a nonbypassable charge that would be collected from all distribution customers by way of the PCCRR.***[58] [Emphasis added.]

[58] *See Ohio Power*, Order (February 25, 2015) at 19.

In this case, under the *Sporn Case* precedent, the nonbypassable Rider RRS also would be charged to all distribution customers and, thus, be considered a distribution charge. The plain language of R.C. 4928.02(H) prevents the Commission from allowing recovery of ***any*** generation-related costs through distribution rates. Because Rider RRS charges all distribution customers for the cost of the PPA Units' generation, it is considered to be a distribution rate and is prohibited by R.C. 4928.02(H).[59] Indeed, in *Electric Power Supply Assoc., et al. v. FirstEnergy Solutions, et al.*, 155 FERC ¶ 61,101 (2016) ("FERC Order"), FERC prohibited the Companies from making any transactions under the PPA, until further review, because the PPA could force the Companies' captive distribution customers to cross-subsidize their unregulated generation affiliates.[60]

The Commission's Order also is unlawful because it fails to explain its departure from its precedent in *Sporn*.

i. The subsidy customers are being asked to pay is anti-competitive.

Rider RRS creates an anti-competitive subsidy by requiring all of the Companies' customers to underwrite the generation costs of the PPA Units. Rider RRS requires ratepayers to guarantee that the PPA Units' generation earn a profit by covering the difference in the revenues from the sale of the power and the cost of generation. This guarantee is a benefit to FES, which owns Sammis and Davis Besse, and an interest in OVEC. It is a subsidy to FES regardless of whether it produces a credit for retail customers in any particular year and an anti-competitive benefit that other competitive retail or wholesale providers do not enjoy.

---

[59] See *In Re Elyria Foundry Company*, 114 Ohio St.3d 305, 2007-Ohio-4164, 871 N.E.2d 1176,
[60] EPSA, at P 65.

Moreover, OCC/NOPEC witness Sioshansi recognizes other anti-competitive consequences of the Rider RRS. He explains that the rider could incentivize the Companies to cause lower-cost power from the PPA Units to be withheld from the market to the benefit of the Companies' affiliated unregulated generation in PJM.[61]

Rider RRS is unlawful under Ohio law because it provides an anti-competitive subsidy to FES.

c. Rider RRS is unlawful because it permits the recovery of unlawful transition charges prohibited by R.C. 4928.38.

Rider RRS guarantees that the Companies will recover from their customers a return of, and on, their investment in the PPA Units. This guarantee, which is meant to subsidize the Companies and FES from what otherwise will occur in the wholesale electric markets, constitutes an unlawful transition charge under R.C. 4928.38. The subsidy provided by Rider RRS contravenes Ohio law which explicitly requires the Companies (and FES) to be "on [their] own in the competitive market."[62]

In its Order, the Commission found that Rider RRS did not constitute a transition charge. It reasons that transition costs are costs that are "unrecoverable in a competitive market," and that under its analysis, Rider RRS will result in a net credit to customers over the 8-year term of the ESP.[63] However, the Ohio Supreme Court recently clarified that transition costs are those that are "not recoverable through market-based rates." *In Re Application of Columbus S. Power Co.*, Slip Opinion 2016-Ohio-1608 (April 21, 2016), at 6 ("*Columbus S. Po*wer"). The revenues that the Companies will collect under Rider RRS are not from "market-based rates." Rather,

---

[61] OCC/NOPEC Ex. 1 (Sioshansi Direct) at 16-17 .

[62] R.C. 4928.38.

[63] Order at 112.

they are collected from customers based upon the legacy costs of the PPA Plants, which were to be collected before the market development period ended in December 2010. Id.

Further, the Order ignores that it is undisputed that in the first three years the ESP, Rider RRS will result in a net charge to customers. Rider RRS violates the explicit language of R.C. 4928.38 that, after the market development period, the Companies are to be "on [their] own in the competitive market." By approving Rider RRS as a "form of rate insurance,"[64] the Companies and FES are not on their own during the first three years of the ESP, or even during its entire 8-year term. During times of low energy prices, customers will pay the Rider RRS charge.[65]

Even the Commission acknowledges that its projections of net credits are "simply predictions" that "may be proven wrong in the future, particularly over an eight-year time frame."[66] Indeed, R.C. 4928.143(E) recognizes as much by requiring a utility with an ESP term longer than three years, to make a filing in the fourth year to assure that it still is more favorable in the aggregate than and MRO. Rider RRS provides the Companies and FES with a crutch in the marketplace for the entire eight year period.

When SB 3 was enacted in 1999, it permitted Ohio's electric utilities the opportunity to collect "transition revenues"[67] to "assist it in making the transition to a fully competitive retail electric generation market."[68] However, the recovery of transition charges was permitted for only a limited period of time.[69] Utilities could collect certain transition costs until the end of the

---

[64] Order at 80.

[65] Id.

[66] Order at 86.

[67] "Transition revenues" are defined under R.C. 4928.39.

[68] R.C. 4928.37.

[69] R.C. 4928.38.

market development period, which ended December 31, 2005.[70] The collection period for transition costs identified as regulatory assets expired on December 31, 2010.[71] The Companies recovered past, sunk investments through transition charges from 2001 through 2010 in the amount of nearly $7 billion ($6,911,427,628).[72]

The General Assembly expressly provided that the Ohio electric utility was "wholly responsible for whether it is in a competitive position after the market development period,"[73] In fact, R.C. 4928.38 prohibits the PUCO from authorizing transition revenues or "any equivalent revenues" except as provided by statute. And if this authority is not clear enough, R. C. 4928.141 also explicitly provides that a standard service offer, "shall exclude any previously authorized allowances for transition costs."

The dollars the Companies are to collect under the first three years of Rider RRS are transition revenues (or the equivalent of transition revenues) that the PUCO cannot impose on customers after the end of the statutory market development period. The market development period ended on December 31, 2010. On January 1, 2011, at the latest, the Ohio General Assembly proclaimed that Ohioans are protected from paying make-whole charges and revenue guarantees to their electric utilities for generation service.

d. The settlement is unlawful because it includes Rider GDR and a new unbundled distribution rate rider in the ESP contrary to the Ohio Supreme Court's ruling in *CSP II*.

As stated previously, the Ohio Supreme Court recently held that only the nine items enumerated in R.C. 4928.143(B)(2) may be included in an ESP. *CSP II,* 128 Ohio St. 3d 512, 2011-Ohio-1788 [¶¶ 31-35]. The Commission's Order goes to great lengths to attempt to justify

70 R.C. 4928.38.

71 R.C. 4928.39.

72 OCC Ex. 25 (Rose Direct) at 18.

73 R.C. 4928.38.

including Rider RRS in the ESP, consistent with *CSP II*; however, the Commission gave no analysis to whether the new Government Directives Rider ("Rider GDR") also falls within the nine items listed in R.C. 4928.143(B)(2), as well as the zero-amount placeholder rider the Commission approved to capture unbundled distribution costs, as proposed by Interstate Gas Supply ("Unbundled Distribution Rate Rider").[74] Rider GDR will recover costs related to future government directives. The proposed Rider GDR and the Unbundled Distribution Rate Rider do not meet any of the nine elements of R.C. 4928.143(B)(2). Because the riders do not fall within any of the nine items listed, the Commission's inclusions of the rider in the ESP was unlawful.

e. The settlement is unlawful because the Commission erred in applying the ESP v. MRO test set forth in R.C. 4928.143(C)(1).

R.C. 4928.141 provides that an electric distribution utility may seek approval of a market rate offer ("MRO") or ESP as its SSO. R.C. 4928.142 and 4928.143 specify the standards for MROs and ESPs, respectively. 4928.143(C)(1) sets forth the standard that the Commission must follow when approving an electric distribution utility's proposed ESP:

> ...the commission by order shall approve or modify and approve an application filed under division (A) of this section if it finds that the electric security plan so approved, including its *pricing and all other terms and conditions*, including any deferrals and any future recovery of deferrals, *is more favorable in the aggregate* as compared to *the expected results that would otherwise apply under [an MRO derived under] section 4928.142 of the Revised Code.* (Emphasis supplied.)

In applying the test, the Commission considered: (1) the SSO price of generation to customers (R.C. 4928.143(B)(1)); (2) other quantifiable provisions (R.C. 4928.143(B)(2)), and (3) qualitative provisions (for which there is no statutory authority). Under the Commission's analysis, these three elements are combined (in the "aggregate") and compared to the results that would be obtained under R.C. 4928.142, if the SSO were proposed in the form of an MRO. From

[74] Order at 98.

this comparison, the Commission found that the proposed ESP, in the aggregate, is more favorable than an SSO in the form of an MRO.[75]

NOPEC currently is challenging such analysis in the Ohio Supreme Court.[76] The appeal specifically concerns whether the language "in the aggregate" permits the Commission to consider the qualitative (or non-quantifiable) benefits of a proposed ESP, in addition to its quantifiable costs. The legislative history of 2007 Am.Sub.S.B. 221, Effective July 31, 2008 ("SB 221"),[77] and the Court's precedent show that the Commission is limited to considering quantifiable costs only.

i. The Legislative History of SB 221[78]

R.C. 4928.143(C)(1) was enacted as a part of SB 221, which underwent significant changes in the Ohio Senate and House after being introduced in the Senate on October 4, 2007. This history shows that the legislature has consistently intended the SSO as an MRO to be a market-based price developed through a competitive bidding process, and that the SSO as an ESP be a cost-based price. The ESP price evolved over the various versions of SB 221 from a traditional rate base/cost of service analysis based upon the valuation of its facilities and costs to provide service, to one that permits a utility to propose a pricing methodology, which price could be adjusted through the additional cost items provide in R.C. 4928.13(B)(2).

---

[75] Order at 120.

[76] Ohio Supreme Court Case No. 13-513.

[77] The Order, at 37, strikes NOPEC's reliance on statute's legislative history. NOPEC also seeks rehearing of this aspect of the Order below.

[78] NOPEC is aware that this Ohio Supreme Court has stated in the past that "no legislative history of statutes is maintained in Ohio." See *State v. Dickinson*, 28 Ohio St.2d 65, 67, 275 N.E.2d 599 (1971) ("*Dickinson*"). However, R.C. 1.49 specifically sanctions the examination of "legislative history," and the Court has done so before and after *Dickinson*. See *Caldwell v. State*, 115 Ohio St. 458, 154 N.E. 792 (1926), and *Griffith v. Cleveland*, 128 Ohio St.3d 35, 2010-Ohio-4905, 941 N.E.2d 1157 (2010) (examining the documents maintained on the Ohio General Assembly's web site). Copies of the Senate and House versions of SB 221, and related bill analyses of the Legislative Service Commission are all linked on the Ohio General Assembly's website at http://www.legislature.state.oh.us/analyses.cfm?ID=127_SB_221&ACT=As%20Enrolled, and are contained in the Appendix to the Initial Brief.

As introduced, the legislation was structured such that the either an MRO or ESP could be approved if the Commission deemed them just and reasonable, and they complied with the state policies contained in R.C. 428.02.[79] However, in the legislation, as passed by the Senate, the standard for approving an MRO changed significantly and required not only a finding that the offer and price were just and reasonable and compliant with R.C. 4928.02, but also that the price determined for each customer class under the MRO was to be "more favorable than, *or at least comparable to*," the price for each customer class under an ESP. (Emphasis supplied.)[80] However, in the version of the legislation as reported by the House, the legislature significantly expanded the costs that could be recovered through the ESP under R.C. 4928.143(B)(2). Accordingly, it placed a check on the costs to be recovered under an ESP, as a consumer protection provision, such that the ESP's costs could not be greater than the price resulting from an MRO. Moreover, the legislature removed the state policy considerations from the criteria the Commission may consider under the ESP v. MRO test.[81] The processes for developing the MRO and ESP remained essentially the same in the version of SB 221 as Passed by the General Assembly, except that the standard of review importantly required that the ESP be "more favorable" than an MRO.[82]

[79] See Appendix A to NOPEC's Initial Brief. SB 221 as Introduced, Section 4928.14(B)(1), Legislative Service Commission Bill Analysis, 127th General Assembly, SB 221: As Introduced. SB 221 as Passed in the Senate, Section 4928.14(D)(1).

[80] See Appendix B to NOPEC's Initial Brief. SB 221 as Passed in the Senate, Section 4928.14(D)(1); Legislative Service Commission Bill Analysis, 127th General Assembly, SB 221: As Passed by the Senate.

[81] See Appendix C to NOPEC's Initial Brief. SB 221 as Reported in the H. Public Utilities, Section 4928.143(B)(1); Legislative Service Commission Bill Analysis, 127th General Assembly, SB 221: As Reported by the H. Public Utilities.

[82] See Appendix D to NOPEC's Initial Brief. SB 221 as Passed by the General Assembly, Section 4928.143(C)(1); Legislative Service Commission Bill Analysis, 127th General Assembly, SB 221: As Passed by the General Assembly.

ii. The Ohio Supreme Court's Precedent

The Ohio Supreme Court has had two opportunities to interpret the scope of items that could be considered in reviewing an ESP. First, it recognized that the nine provisions listed in R.C. 4928.143(B)(2)(a)-(i) require the Commission to make a quantitative determination. It recognized that eight of the items "implicitly require" the Commission to consider "certain costs." *In Re Application of Columbus Southern Power Co., et al.*, 128 Ohio St. 3d 402, 2011-Ohio-958 [¶26], 945 N.E.2d 501 (hereinafter, "*CSP I*"). The ninth item (R.C. 4928.143(B)(2)(e) (App. Appx. at 214.) also requires a quantitative analysis because it permits an automatic increase in any component of the "price" of an ESP.[83]

In a later decided case, the Commission recognized that all nine of the R.C. 4928.143(B)(2) factors provided for "cost recovery" and limited the items to be considered by the Commission in approving an ESP only to those cost provisions specifically enumerated. *In Re Application of Columbus Southern Power Co., et al.*, 128 Ohio St. 3d 512, 2011-Ohio-1788 [¶¶ 31-35], 945 N.E.2d 655 (hereinafter, "*CSP II*").

Considered together, the cases show that the Commission can modify the "price" in R.C. 4928.143 (B)(1) by considering cost of service factors, if it so chooses. *CSP I.* The Commission also can modify the "costs" to be recovered in the ESP under R.C. 4928.143(B)(2)(a)-(i). What

---

[83] To be clear, the Court in *CSP I*, at ¶ 27, stated:

Moreover, while it is true that the commission must approve an electric security plan if it is 'more favorable in the aggregate' than an expected market-rate offer...that fact does not bind the commission to a strict price comparison. On the contrary, in evaluating the favorability of a plan, the statute instructs the commission to consider 'pricing and all other terms and conditions.' Thus, the commission must consider more than price in determining whether an electric security plan should be modified.

This language cannot be construed to mean that the Commission may look at an unlimited number of factors in addition to "price." Rather, as construed by *CSP II*, infra, it becomes clear that the Commission is limited in its analysis to consider the items listed in R.C. 4928.143(B)(1) and (2), e.g., the price contained in R.C. 4928.143(B)(1) and the cost factors listed in R.C. 4928.143(B)(2), as discussed subsequently.

the Commission cannot do is add additional items to be considered in this quantitative analysis, including qualitative items. *CSP II.*

iii. The Rules of Statutory Construction Require that R.C. 4928.143(C)(1) Be Construed Consistent with Legislative Intent. R.C. 1.49.

The Legislature intended, and the Ohio Supreme Court confirmed, that the Commission is limited, in reviewing an ESP, to considering the quantitative factors listed in R.C. 4928.143(B) (the "price" in R.C. 4928.143(B)(1) and the "costs" in R.C. 4928.143(B)(2)). Accordingly, R.C. 4928.143(C)(1) must be construed consistent with that intent. R.C. 1.49. R.C. 4928.143(C)(1) provides in part:

> ...the commission by order shall approve or modify and approve an application filed under division (A) of this section if it finds that the electric security plan so approved, including its *pricing and all other terms and conditions*, including any deferrals and any future recovery of deferrals, *is more favorable in the aggregate* as compared to *the expected results that would otherwise apply under [an MRO derived under] section 4928.142 of the Revised Code.* (Emphasis supplied.) [App. Appx. at 215.]

A review of this provision makes clear that the term "pricing" is a reference to the price to be proposed in R.C. 4928.143(B)(1), while the reference to "all other terms and conditions" refers to the specifically enumerated items for which cost recovery can be had under R.C. 4928.143(B)(2)(a)-(i), because no other items may be considered in reviewing an ESP. *CSP II.* The Commission's charge is then to consider whether the ESP price and costs, combined (i.e., "in the aggregate") are "more favorable" than the price developed through a competitive bidding process under the MRO provisions contained in R.C. 4928.142.

iv. Appropriate application of the ESP v. MRO Test

The Commission performed the traditional analysis of the ESP v. MRO test,[84] which considers three elements: (1) the SSO price of generation to customers,[85] (2) other quantifiable provisions,[86] and (3) qualitative provisions. In addressing the test's first element, the Commission found that the SSO price of generation to customers would be established through the competitive bid process under R.C. 4928.143(B)(1) and would be equivalent to the results that would be obtained under the MRO provided in R.C. 4928.142.[87] NOPEC does not disagree with that analysis as to the first element.

As stated above, the legislative history and statutory construction of R.C. 4928.143 do not permit the Commission to consider "qualitative" benefits in performing the ESP v. MRO test. As explained below, the "qualitative" benefits alleged by the Companies have been confused with the "public benefit" analysis the Commission performs when considering partial stipulations. Specifically, the legislative history of R.C. 4928.143 demonstrates that the state policy provisions of R.C. 4928.02, which form the bases for the public benefit analysis, are not to be included in the ESP v. MRO test.[88]

Accordingly, whether the Companies' proposed ESP is more favorable in the aggregate than an MRO rests on a determination of whether the identifiable costs, or quantifiable benefits, of the ESP are greater than the cost of an MRO.

---

[84] R.C. 4928.143(C)(1).

[85] R.C. 4928.143(B)(1).

[86] R.C. 4928.143(B)(2).

[87] Order at 118.

[88] See Appendix C to NOPEC's initial brief. SB 221 as Reported in the H. Public Utilities, Section 4928.143(B)(1); Legislative Service Commission Bill Analysis, 127th General Assembly, SB 221: As Reported by the H. Public Utilities. Also note that the factors listed in R.C. 4928.02 are not included in the nine items listed in R.C. 4928.143(B), and cannot be considered in the ES v. MRO test per *CSP II*.

(a) The Commission erred in its quantitative analysis because it failed to remove Rider RRS and shareholder funding from the ESP v. MRO test, and failed to quantify the costs of Riders GDR, DCR, and Unbundled Distribution Rate Rider.

In performing the quantitative analysis, the Commission considered the alleged benefits to consumers from Rider RRS ($256 million), economic development funding ($24 million), low income funding ($19.1 million), and consumer advisor agency funding ($8 million), for a total alleged benefit of $307.1 million. The Commission erred in its quantification of each of these provisions and also erred by not quantify the costs to customers of Riders GDR, DCR, and the Unbundled Distribution Rate Rider.

As explained above, because Rider RRS is not one of the nine factors that can be included in an ESP per *CSP II*, it should be excluded from the ESP v. MRO test and its value should be reduced to zero. Moreover, if the PPA is never filed and approved by FERC, as required by the FERC Order, there will never be any of the "benefit" identify by the Commission to include in the ESP v. MRO test. In addition, because the low income funding and customer advisory agency funding is not provided in the nine items included in RC. 4928.143(B)(2), they also should be excluded from the ESP v. MRO test. The exclusion of these items effectively reduces the alleged benefit of the ESP to $24 million over the ESP's eight year term, or only $3 million per year.[89] The Commission also erred by not quantifying the costs to consumers of Riders GDR, DCR, and the Unbundled Distribution Rate Rider which likely offset the claimed $3 million per year alleged benefit.

---

[89] The Commission confuses the state policy in R.C. 4928.02 with the limited items that can be included in an ESP under R.C. 4928.143(B). Low income funding and customer advisory agency funding falls within state policy considerations (R.C. 4928.02(L) (protect at-risk populations)), but do not fall within the limited categories contained in R.C. 4928.143(B).

(b) It is Unlawful to Value the Placeholder GDR and Unbundled Distribution Rate Rider at Zero.

As stated previously, only those items that are expressly listed in R.C. 4928.143(B) may be included in an ESP. The Commission approved a new Government Directives Rider ("Rider GDR") to recover costs related to future government directives. Rider GDR does not meet any of the nine elements of R.C. 4928.143(B)(2), and should be disallowed.

Nevertheless, the Commission approved the rider as a placeholder, with an initial rate of zero, which will be populated with costs during the eight-year ESP as governmental directives are issued. Because the rider currently would be set at zero and unidentified cost recovery would occur in future ESP years, Ohio's consumers currently cannot determine from the rider's costs. Without presently knowing how the rider may be quantified in the future, the Commission cannot consider and consumers cannot reasonably contest, under R.C. 4928.143(C)(1), whether the ESP is more favorable than an MRO. The Commission's finding unreasonably and unlawfully precludes review of Rider GDR's costs to be collected during the ESP's term for purposes of the statutory test. The Commission's approval of the placeholder rider also prevents the Companies from sustaining their burden of proof that the ESP is more favorable than an MRO under R.C. 4928.143(C)(1). Accordingly, the placeholder Rider GDR must be disallowed or, alternatively, absent the ability to quantify Rider GDR, the entirety of the Companies' ESP rejected. This same analysis is applicable to zero-based rider the Order approves for the Unbundled Distribution Rate Rider, as proposed by Interstate Gas Supply ("IGS").[90]

The Commission should reject this premature Rider GDR placeholder rider for several reasons, consistent with the Commission's denial of similar premature placeholder riders in other

---

[90] Order at 98.

recent ESP cases.[91] First, the Companies do not provide a list of the costs or accounts they would seek to recover through Rider GDR, thereby creating an open-ended recovery vehicle for any costs that the Companies may incur. If the Companies believe that programs required by legislative or governmental directives would increase costs and cause a revenue deficiency, then the Companies should file a rate case to recover the costs related to the directives.[92] The Companies should not be able to recover the costs associated with the legislative or governmental directives absent a showing that any such costs actually cause revenue deficiencies.[93]

Rider GDR is also asymmetric, which compounds the excessive earnings concerns of single-issue ratemaking.[94] Under Rider GDR, the Companies have no obligation to file for rate reductions resulting from changes in governmental regulations. Additionally, because the Companies have far more information about their operations than the Commission, it would be difficult for the Commission to ensure that the utilities are fully compliant with their obligation to flow through cost reductions to customers.[95]

(c) It is unlawful not to quantify Rider DCR as a cost of the ESP.

The Commission's order authorized the Companies to continue the Delivery Capital Recovery Rider ("Rider DCR") during the period of ESP IV, with a modification to increase the

[91] *See In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143, in the Form of an Electric Security Plan*, Case No. 13-2385-EL-SSO, Opinion and Order (Feb. 25, 2015), p. 63, where the Commission rejected AEP's proposed placeholder for potential NERC compliance and cybersecurity costs as premature.

[92] OCC Ex. 18 (Effron Direct) at 23.

[93] Id.

[94] OCC/NOPEC (Kahal Direct) Ex. 7 at 34.

[95] Id.

revenue caps for Rider DCR.[96] Specifically, the revenue caps for Rider DCR will increase annually by: $30 million for the period June 1, 2016 through May 31, 2019; $20 million for the period June 1, 2019 through May 31, 2022, and $15 million for the period June 1, 2022 through May 31, 2024. To be clear, these increases pertain only to annual increases to the allowable caps. Thus, with the increases, the annual caps would increase from $210 million in the 2016-2017 PJM planning year to $ $390 million in the 2023-2024 PJM planning year – and total $2.595 billion during the eight year term of ESP IV.[97]

OCC/NOPEC witness Kahal demonstrated that revenues associated with Rider DCR were a quantifiable cost of the ESP.[98] However, the Commission refused to quantify these costs as a part of the ESP v. MRO test, on the basis that the revenue requirements associated with the recovery of incremental distribution investments should be considered to be the "substantially equal," "over the long term," whether recovered through the ESP or through a distribution rate case, if an MRO were implemented.[99] NOPEC notes that the Companies' burden of proof is to show that the ESP is "more favorable" than an MRO, not "substantially equal." The Companies cannot sustain their burden of proof under the Commission's analysis. Further, the Commission did not identify the period of the "long term" mentioned in its order, in violation of R.C. 4903.09. If the "long term" extends beyond the eight year term of the ESP (which is likely due to the Commission's approval of the distribution rate freeze), the DCR costs must be quantified, because the ESP v. MRO analysis pertains only to costs and benefits incurred during the term of the ESP. R.C. 4928.143(B)(1) and (E).

---

[96] Application, Company Ex. 1 at 13.

[97] Tr. XXXVI at 7573-7575 (Mikkelsen Cross).

[98] OCC/NOPEC Ex. 7 (Kahal Direct) at 23-24.

[99] Order at 119.

Moreover, the Commission's findings misstate the statutory test found in R.C. 4928.143(C)(1), which requires the Commission to compare "the electric security plan so approved...to the expected ***results that would otherwise apply under section 4928.142 of the Revised Code***." (Emphasis added.) The plain meaning of the statute clearly limits the Commission's analysis to the "expected results" of R.C. 4928.142, and does not contemplate consideration of the results of a distribution rate case.[100]

In addition, the Commission's analysis requires one to read into the statute words to the effect that the approved ESP should be compared to the expected results under R.C. 4928.142 **and a distribution rate case**. In considering the rules of statutory construction, the Ohio Supreme Court has found:

> When interpreting a statute, a court must first examine the plain language of the statute to determine legislative intent. *Cleveland Mobile Radio Sales, Inc. v. Verizon Wireless*, 113 Ohio St.3d 394, 2007-Ohio-2203, 865 N.E.2d 1275, ¶ 12. The court must give effect to the words used, ***making neither additions nor deletions from the words chosen by the General Assembly***. *Id. See, also, Columbia Gas Transm. Corp. v. Levin*, 117 Ohio St.3d 122, 2008-Ohio-511, 882 N.E.2d 400, ¶ 19. Certainly, had the General Assembly intended to require that electric distribution utilities prove that carrying costs were "necessary" before they could be recovered, it would have chosen words to that effect.[101] [Emphasis added.]

The Commission's interpretation of the statute unlawfully adds to the words chosen by the General Assembly. Had the General Assembly intended to include the expected results of a distribution rate case in the statutory test, it would have so stated.

---

[100] R.C. 1.42.

[101] *In Re Columbus S. Power*, 138 Ohio St.3d 448, 2014-Ohio-462, 9 N.E.3d 1064, ¶ 26.

(d) The Commission erred by not excluding the economic development, job retention and low income funding from the quantitative analysis.

As explained above, the Commission found that Rider DCR costs included in an ESP are "substantially equal" because the same distribution costs could be recovered through a rate distribution case over the "long term" if an MRO were implemented. The Commission found the stipulated economic development, low income funding, and customer advisory agency funding costs are benefits of an ESP because they cannot be obtained in an MRO.[102] However, the Commission ignores the analysis it made in support of cost recovery under Rider DCR – that if an MRO is implemented, the Commission may also consider the potential quantitative benefits that customers would receive through a distribution rate case. As such, if an MRO were implemented with a companion distribution rate case, the Companies and the parties could stipulate, as in this ESP proceeding, to provide economic development, low income funding, and customer advisory agency funding. Indeed, the Companies witness Mikkelsen admitted the ability to include these funds in a distribution rate proceeding.[103]

(e) Even if the Commission could consider qualitative factors in determining whether an ESP is more favorable than an MRO, it is unlawful to consider qualitative factors that fall outside of the provisions of R.C. 4928.143(B).

As stated above, qualitative benefits are not properly considered a part of the ESP v. MRO test. The Ohio Supreme Court has limited the items that can be included in an ESP to those expressly listed in R.C. 4928.143(B),[104] and the Court subsequently found that each of

[102] Order at 113, 119.

[103] Tr. XIII at 596.

[104] *In Re Application of Columbus Southern Power Co., et al.*, 128 Ohio St. 3d 402, 2011-Ohio-958, 945 N.E.2d 501 (hereinafter, "*CSP I*").

those items were "categories of cost recovery."[105] The statutory test, as confirmed by judicial interpretation, is meant to serve as a consumer protection provision, by limiting the rates that consumers pay under an ESP to less than those they would otherwise pay at market under an MRO. It is improper, and unlawful, to permit qualitative benefits to override the quantitative analysis that R.C. 4928.143(C)(1) expressly requires.

Nevertheless, in this proceeding, the Commission included "qualitative benefits" in the ESP. The Commission erred by including each of the following "benefits" in the ESP because they are not included in the nine items listed in R.C. 4928.143(B): (1) continuation of the distribution rate freeze, (2) continuation of multiple rate options and programs, (3) establishment of a "goal" to reduce CO_2 emissions, and (4) programs for resource diversity.[106]

Further, another four "qualitative benefits" identified by the Commission are so speculative that they cannot be considered benefits of this ESP at all, including (1) the "goal," but no obligation, to save 800,000 MWh of energy annually (by 2045) through reactivated energy efficiency programs, (2) the obligation to file future applications, with no obligation for approval, for smart grid deployment, utility battery technology, and to transition to straight-fixed variable rate design.[107]

Moreover, the alleged "qualitative" benefits to provide energy efficiency programs to small businesses, and deploy smart grid infrastructure, are based upon R.C. 4928.02(M) and (D), respectively,[108] and not R.C. 4928.143(B), in violation of *CSP II*.

---

[105] *In Re Application of Columbus Southern Power Co., et al.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 945 N.E.2d 655 (hereinafter, "*CSP II*").

[106] Order at 119.

[107] Order at 119-120.

[108] Order at 119.

3. The Third Prong: It is unlawful to bootstrap approval of an ESP, which fails the ESP v. MRO test, by considering alleged qualitative benefits that fall outside of R.C. 4928.143(B).

By creating "qualitative benefits" as a part of the statutory ESP v. MRO test, without statutory authority and in violation of Ohio Supreme Court precedent, the Commission has muddled the ESP v. MRO test and the traditional test for approving partial stipulations -- particularly the traditional test's third prong that considers whether, as a package, the partial stipulation benefits ratepayers and the public interest.

According to the Court's decision in *CSP II*, if the Commission is to consider "qualitative benefits" (which it cannot), the source of those benefits must come from R.C. 4928.143(B)(2). A construction of R.C. 4928.143(C)(1) that permits consideration of any alleged benefits beyond those nine items, renders R.C. 4928.143(B) and the ESP v. MRO test a nullity.

The Order's confusion of the partial stipulation test with the ESP v. MRO test is apparent. The Commission relies on many of the state policies in R.C. 4928.02 as independent authority to consider qualitative benefits under the ESP v. MRO test, and also items outside of R.C. 4928.143(B). While the Commission must review an ESP to ensure that its provisions do not violate the state policies contained in R.C. 4928.02,[109] the state policies are not contained in R.C. 4928.143(B) and, cannot be considered a part of the ESP for purposes of the test performed under R.C. 4928.143(C)(1).

To add to the confusion, the Order in this proceeding considers another set of "benefits" under the partial stipulation test, that were not considered as "qualitative benefits" under the ESP v. MRO test. If the ESP fails the ESP v. MRO test, it violates an important, indeed statutory, regulatory principle and must be denied regardless of additional benefits that may be

[109] *In Re Elyria Foundry*, 114 Ohio St.3d 305, 2007-Ohio-4146, 871 N.E.2d 970.

alleged. The Commission cannot use the alleged benefits identified in the third prong of the partial stipulation test to approve the settlement. Approval of the ESP simply cannot be bootstrapped through the partial stipulation standard.

Moreover, the additional benefits identified by the Order beginning at page 87 are not benefits of the ESP at all. The Order identifies each of the *AEP Ohio ESP III* factors as a benefit of the ESP. For the reasons listed in NOPEC's initial brief, they are not, because each of the factors was meant to ensure the reasonableness of Rider RRS. Because Rider RRS was approved based upon these factors, they cannot be considered an additional benefit of the ESP.

Finally, the Order lists several other benefits of the ESP beginning on page 92. The Order finds that these benefits are derived from R.C. 4928.02.[110] For the reasons stated above, and in NOPEC's initial brief, the Commission should reject these benefits under the ESP v. MRO test.

E. The Commission erred in granting the Companies' motion to strike arguments regarding the Legislative History of S.B. 221.

The Commission's Order found that arguments related to the legislative history of SB 221 should be stricken from NOPEC's initial brief because they reference information outside the record.[111] The Commission's finding is unlawful under R.C. 1.49 and Ohio Supreme Court precedent.

1. The draft legislation and bill analyses of SB 221 constitute its legislative history, which the Commission is permitted to consider pursuant to R.C. 1.49.

R.C. 1.49 provides in part:

> If a statute is ambiguous, the court, in determining the intention of the legislature, may consider among other matters:

---

[110] Order at 92.

[111] Order at 37.

***

(C) The legislative history.

It is beyond question that the draft legislation and bill analyses conducted thereon by the Legislative Service Commission ("LSC") constitute the legislative history of a statute. *Griffith v. Cleveland*, 128 Ohio St.3d 35, 2010-Ohio-4905 ("*Griffith*"). In addition, it is clear that record in this proceeding shows that R.C. 4928.143 is "ambiguous."

NOPEC's position on brief is clear: although the Ohio Supreme Court has held that ***only*** the ***cost*** factors contained R.C. 4928.143(B) may be included in an ESP, the Commission has found that it also can consider the "qualitative" benefits of an ESP under R.C. 4928.143(C)(1).[112] With such divergent views between the Court and the Commission, R.C. 4928.143 necessarily is ambiguous.

2. **Ohio Supreme Court precedent permits the Commission to consider the draft legislation and LSC bill analyses as authority to support its interpretation of legislative intent.**

The Commission found that it cannot consider the draft legislation and LSC bill analyses because they were not introduced at hearing also is without merit. The Commission cites no supporting case law for its determination; however, FirstEnergy in making its motion, relied on the unreported decision of *State v. Conyers*, 6th Dist. Lucas No. L-97-1327, 1998 Ohio App. LEXIS 3274 (July 17, 1998) to support its position that LSC analyses must be introduced at hearing and made a part of the record. However, the Ohio Supreme Court's subsequent decision in *Griffith* is controlling. *Griffith* came before the Ohio Supreme Court as an appeal from a procedural order of the Ohio Court of Claims, which dismissed a claim for lack of jurisdiction.

---

[112] See, *In Re Application of Columbus Southern Power Co., et al.*, 128 Ohio St. 3d 402, 2011-Ohio-958 [¶26], 945 N.E.2d 501, in which the Ohio Supreme Court recognized that the items listed in R.C. 4928.143(B) "implicitly require" the Commission to consider "certain costs." See, also, *In Re Application of Columbus Southern Power Co., et al.*, 128 Ohio St. 3d 512, 2011-Ohio-1788 [¶¶ 31-35], 945 N.E.2d 6551, in which the Court recognized that all nine of the R.C. 4928.143(B)(2) factors provided for "cost recovery" and limited the items to be considered by the Commission in approving an ESP only to those cost provisions specifically enumerated.

No evidentiary record was made in the trial court, and yet the Ohio Supreme Court relied on draft bills and LSC bill analyses as authority to support its interpretation of legislative intent.

III. CONCLUSION

For the above reasons, NOPEC respectfully requests that the Commission grant rehearing consistent with the grounds NOPEC raises; that the Third Stipulation and Recommendation be rejected; and that the Companies' proposed ESP IV be denied because it fails to satisfy the ESP v. MRO test.

Respectfully submitted,

Glenn S. Krassen (Reg. No. 0007610)
Counsel of Record
BRICKER & ECKLER LLP
1001 Lakeside Avenue, Suite 1350
Cleveland, OH 44114
Telephone: (216) 523-5405
Facsimile: (216) 523-7071
gkrassen@bricker.com

Dane Stinson (Reg. No. 0019101)
Dylan F. Borchers (Reg. No. 0090690)
BRICKER & ECKLER, LLP
100 South Third Street
Columbus, OH 43215-4291
Telephone: (614) 227-2300
Facsimile: (614) 227-2390
dstinson@bricker.com
dborchers@bricker.com

COUNSEL FOR NORTHEAST OHIO PUBLIC ENERGY COUNCIL

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Application for Rehearing was served *via electronic mail* upon the parties of record this 2nd day of May, 2016.

Glenn S. Krassen

burkj@firstenergycorp.com
cdunn@firstenergycorp.com
dakutik@jonesday.com
jlang@calfee.com
talexander@calfee.com
mkurtz@BKLlawfirm.com
kboehm@BKLlawfirm.com
jkylercohn@BKLlawfirm.com
stnourse@aep.com
mjsatterwhite@aep.com
yalami@aep.com
Jennifer.spinosi@directenergy.com
ghull@eckertseamans.com
myurick@taftlaw.com
dparram@taftlaw.com
Schmidt@sppgrp.com
ricks@ohanet.org
tobrien@bricker.com
mkl@bbrslaw.com
gas@smxblaw.com
wttpmlc@aol.com
lhawrot@spilmanlaw.com
dwilliamson@spilmanlaw.com
blanghenry@city.cleveland.oh.us
hmadorsky@city.cleveland.oh.us
kryan@city.cleveland.oh.us
mdortch@kravitzllc.com
rparsons@kravitzllc.com
mitch.dutton@fpl.com
DFolk@akronohio.gov
mkimbrough@keglerbrown.com
sechler@carpenterlipps.com
gpoulos@enernoc.com
twilliams@snhslaw.com
larry.sauer@occ.ohio.gov
maureen.willis@occ.ohio.gov
sam@mwncmh.com
fdarr@mwncmh.com
mpritchard@mwncmh.com
cmooney@ohiopartners.org
callwein@keglerbrown.com
joliker@igsenergy.com
mswhite@igsenergy.com
Bojko@carpenterlipps.com
barthroyer@aol.com
athompson@taftlaw.com
Christopher.miller@icemiller.com
Gregory.dunn@icemiller.com
Jeremy.grayem@icemiller.com
blanghenry@city.cleveland.oh.us
hmadorsky@city.cleveland.oh.us
kryan@city.cleveland.oh.us
tdougherty@theOEC.org
jfinnigan@edf.org
Marilyn@wflawfirm.com
todonnell@dickinsonwright.com
matt@matthewcoxlaw.com
mfleisher@elpc.org
rkelter@elpc.org
drinebolt@ohiopartners.org
meissnerjoseph@yahoo.com
LeslieKovacik@toledo.oh.gov
trhayslaw@gmail.com
Jeffrey.mayes@monitoringanalytics.com
mhpetricoff@vorys.com
mjsettineri@vorys.com
glpetrucci@vorys.com
msoules@earthjustice.org
sfisk@earthjustice.org
Thomas.mcnamee@puc.state.oh.us
Thomas.lindgren@puc.state.oh.us
Steven.beeler@puc.state.oh.us
dwolff@crowell.com
rlehfeldt@crowell.com