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**

JOINT INITIAL REHEARING BRIEF OF THE PJM POWER PROVIDERS GROUP AND THE ELECTRIC POWER SUPPLY ASSOCIATION

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I. INTRODUCTION

While acknowledging the sheer tenacity of the FirstEnergy utilities in Ohio (The Cleveland Electric Illuminating Company, The Toledo Edison Company and Ohio Edison Company (the "Companies")), one has to wonder how many times in the span of one single proceeding can they ask the Public Utilities Commission of Ohio ("Commission") for money in so many different ways. The Commission first heard that the Companies' consumers need (1) to worry about reliability issues that do not exist, (2) to subsidize uneconomic plants in the name of fuel diversity and (3) to pay for a retail hedge based on projections that have been proven to be widely wrong. Now, on rehearing, the Companies still want consumers to pay for many of those things as well as dip into their savings to pay for the Companies' underfunded pension plan, provide credit support to a parent corporation and, as absurd as it sounds, pay over a half of billion dollars a year to be an Akron-based company. This case has evolved from a case focused on the bad public policy of a proposal not permitted under Ohio law to a case of a public utility asking the consumers of Ohio to pay over a billion dollars a year for nothing tangible.

From the beginning of this proceeding, the PJM Power Providers Group ("P3")[1] and the Electric Power Supply Association ("EPSA")[2] have warned this Commission that the Companies' Rider RRS proposal was a subsidy that would force ratepayers to pay hundreds of millions more than they would otherwise pay over the term of the ESP IV. P3/EPSA's warnings came true when the Federal Energy Regulatory Commission ("FERC") revoked FirstEnergy Solutions Corp.'s ("FES") and the Companies' affiliate waivers related to the Rider RRS power purchase agreement ("PPA"), and when it became clear that the Companies' 2014 Rider RRS projections were - as predicted by P3/EPSA and other parties - outdated and [redacted] with the actual prices for capacity and energy that are known today.

The Companies, though, have been relentless and shameless in their pursuit for a ratepayer-funded subsidy to FirstEnergy Corp. and its competitive business unit. While the FERC stood tall on behalf of Ohio consumers and demanded protections to save consumers from affiliate self-dealing, the Companies tried to repackage their proposal as a virtual PPA to try to circumvent FERC. The virtual PPA would rely upon the projected costs of the W.H. Sammis units, the Davis Besse unit and FES' entitlement from the Ohio Valley Electric Corporation ("OVEC") to be netted against revenues based on the units' projected generation output and actual capacity and day-ahead locational marginal prices at the AEP-Dayton Hub.[3]

[1] P3 is a non-profit organization whose members are energy providers in the PJM Interconnection LLC ("PJM") region, conduct business in the PJM balancing authority area, and are signatories to various PJM agreements. Altogether, P3 members own over 84,000 megawatts ("MWs") of generation assets, produce enough power to supply over 20 million homes, and employ over 40,000 people in the PJM region, representing 13 states and the District of Columbia. This brief does not necessarily reflect the specific views of any particular member of P3 with respect to any argument or issue, but collectively presents P3's positions.

[2] EPSA is a national trade association representing leading competitive power suppliers, including generators and marketers. Competitive suppliers, which collectively account for 40 percent of the installed generating capacity in the United States, provide reliable and competitively priced electricity from environmentally responsible facilities. EPSA seeks to bring the benefits of competition to all power customers. This brief does not necessarily reflect the specific views of any particular member of EPSA with respect to any argument or issue, but collectively presents EPSA's positions.

[3] Companies Ex. 197 at 8; Staff Ex. 15 at 11.

Setting aside the jurisdictional argument on whether the Commission can hear the new proposal on rehearing (which is fatal in its own right), the Companies' Modified Rider RRS proposal has the same flaws as the original Rider RRS proposal. The record evidence is undisputed that the Companies' Modified Rider RRS proposal will result in over one billion dollars in charges to ratepayers through 2018.[4] That is a hole from which the Companies will never escape, because even assuming the Companies' projections for 2019 through the end of the ESP IV term are true ($976 million in credits), the end result is still a net charge of $154 million ($342 million net present value). In other words, the Companies' own projections show that ratepayers will lose millions under Modified Rider RRS.

Even the Commission's Staff has finally realized that Modified Rider RRS has no upside for ratepayers. Although Staff was a signatory party to the original Rider RRS stipulation, Staff now wisely recommends rejecting the Modified Rider RRS for a number of reasons, including disagreeing with the Companies' projections [redacted].[5] With the new evidence collected in the record on actual capacity and energy forward pricing, the Commission should reject the Companies' Modified Rider RRS proposal, not only on legal grounds (as discussed below), but also because the Modified Rider RRS will be a sizable net charge to ratepayers.

The Commission should also refuse to provide "credit support" to FirstEnergy Corp. and its affiliates. Although the Companies never asked for "credit support," Staff has placed a new proposal before the Commission cloaked under the name of the "Distribution Modernization Rider" ("Rider DMR"). That rider's sole purpose is to provide the Companies' parent with cash that can be used to support the parent's investment-grade credit ratings. Staff's credit support

[4] P3/EPSA Ex. 20.
[5] Rehearing Tr. Vol. 5 at 1201-1202.

proposal would give the Companies $131 million a year to be used at the discretion of the Companies, including funding pensions, paying dividends to FirstEnergy Corp. shareholders or moving the money to other affiliates including FES.[6] In exchange, the parent's headquarters must remain in Akron for the ESP IV term (not much of a risk) and there cannot be a change of ownership of FirstEnergy Corp. or its subsidiaries.[7] Staff also recommends that the Commission issue a vague and undefined directive to the Companies to modernize the grid.[8]

Just like the Companies' original and modified Rider RRS proposals, Rider DMR is deeply flawed. For one, Rider DMR is proposed under R.C. 4928.143(B)(2)(h), which is intended for "[p]rovisions regarding the utility's distribution service." But Rider DMR is not related to distribution service, a point conceded by Staff witness Buckley, making it unlawful:[9]

> Q. The credit support is not for the provision of a distribution service by the distribution companies to the ratepayers, correct?
>
> A. Correct.

Another flaw is that Rider DMR will cost $393 million as proposed by Staff and cost up to $9 billion under the Companies' proposed modifications. Rider DMR also cannot satisfy the electric security plan ("ESP") versus market-rate offer ("MRO") test as required under R.C. 4928.143(C)(1).

Rider DMR is also flawed because if approved, it would be an unjust and unreasonable charge under R.C. 4905.22. First, there is no requirement that the Companies actually invest in grid modernization (only a "hope," as testified to by Staff witness Turkenton[10]). Second, nothing prohibits the Companies from investing in grid modernization today, especially as the

[6] Staff Ex. 13 at 4, Rehearing Tr. Vol 3 at 584, Vol. 10 at 1607-1608.
[7] Staff Ex. 13 at 7.
[8] Staff Ex. 15 at 15-16.
[9] Rehearing Tr. Vol. 3 at 611.
[10] Rehearing Tr. Vol. 2 at 426, 429.

Companies can seek cost recovery for any specific grid projects. Third, it is unjust and unreasonable to force Ohio ratepayers to make-up an alleged cash shortfall through a credit support rider – while ratepayers in other states do nothing more than provide FirstEnergy Corp.'s other regulated affiliates with a return on and of investment from traditional cost recovery projects.

The Commission has seen a continuous parade of poorly conceived and legally flawed proposals all with the common goal of transferring money from the pockets of consumers to the balance sheets of FirstEnergy Corp. and its affiliates. After over two years, thousands of pages of briefs, and 51 days of hearings, it is time for the Commission to tell the Companies that Ohio ratepayers are not responsible for providing a subsidy to FirstEnergy Corp. and its competitive business units. If the Companies truly believe that the consumers of Ohio will be better served if those consumers pay more, then the Companies are free to pursue those objectives through distribution rate cases and other legally available options. In the meantime, the Commission should reject Modified Rider RRS and Rider DMR.

II. THE PROPOSALS BEFORE THE COMMISSION

A. Modified Rider RRS

1. Modified Rider RRS is based on a different formula than original Rider RRS.

a. Original Rider RRS.

The Companies' original Rider RRS proposal was a scheme ostensibly offered as a mechanism to promote retail electric rate stability but in reality was little more than a means to subsidize the Companies' ailing affiliate FES. Through original Rider RRS, the Companies proposed entering into a PPA with FES by which the Companies would purchase all of the energy, capacity, and ancillaries from two of FES' generating plants—the Davis-Besse Nuclear

Power Station and the W.H. Sammis Plant—as well as FES' 4.85% entitlement to output from two generating units owned by the Ohio Valley Electric Corporation (collectively, the "Plants"), at prices sufficient to cover all of FES' costs for the Plants, including certain fuel costs, operations and maintenance, depreciation and tax, certain legacy costs, plus a 10.38% return on and of investment.[11] The Companies would then resell the power products purchased from FES into the wholesale power markets operated by PJM.[12]

The Companies would net the revenues they received from these sales against the costs paid to FES, and would credit or charge the difference to ratepayers on a non-bypassable basis through Rider RRS.[13] Thus, any losses that the Companies sustained as a result of selling FES' output into the wholesale markets would be paid by the Companies' captive ratepayers. Similarly, to the extent that the Companies realized gains through such sales, those gains would flow through to ratepayers under Rider RRS.

The Companies' chief claims concerning original Rider RRS were that: (i) it would promote stability in retail rates by charging ratepayers when market prices were low, and crediting customers when market prices were high;[14] and (ii) over the eight-year term of ESP IV, Rider RRS would produce a net credit for customers of $561 million ($260 million net present value ("NPV")).[15]

b. Modified Rider RRS.

On April 27, 2016, the FERC issued a decision precluding sales with respect to the Companies' PPA with FES "unless and until the [FERC] approves the Affiliate PPA under

[11] Companies Ex. 13 at 5; Companies Ex. 155 at 7.
[12] Companies Ex. 13 at 5; Companies Ex. 7 at 14.
[13] *Id.*
[14] Hearing Tr. Vol. 1 at 44.
[15] Companies Ex. 155 at 12; Sierra Club Ex. 89.

Edgar and *Allegheny*."[16] It concluded that the non-bypassable charges under Rider RRS present the "potential for the inappropriate transfer of benefits from [captive] customers to the shareholders of the franchised public utility."[17] In response to FERC's decision, the Companies developed a new proposal, Modified Rider RRS, which they claim no longer relies on an express PPA or other contractual arrangement with FES.

Like original Rider RRS, under Modified Rider RRS, ratepayers would receive a credit if revenues outweigh costs, and would pay a charge if costs outweigh revenues. But many of the variables that went into the formula for original Rider RRS have now been fixed based on projections that the Companies placed into the record back when this proceeding began in 2014.

Under Modified Rider RRS, the energy and capacity output for the Plants are no longer based on actual Plant operations; instead the Plants' energy and capacity output is fixed based on the projected energy and capacity output placed into the record by the Companies in 2014.[18] Similarly, the Plants' actual costs are replaced with the projected costs for the Plants (including a profit component) as placed into the record in 2014.[19] Modified Rider RRS will be projected annually based on forecasted forward energy prices and known capacity prices for the ATSI Zone, and then trued-up quarterly to reconcile projected energy revenues with actual energy revenues based on the actual monthly average on-peak and average off-peak day-ahead locational marginal price at the AEP-Dayton Hub,[20] and to reconcile actual sales and billing demands with projected amounts.[21]

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[16] *Electric Power Supply Association et al. v. FirstEnergy Solutions Corporation, et. al,* Docket No. EL16-34-000, Order Granting Complaint at ¶ 53 and fn. 91.
[17] *Id*. at ¶ 55.
[18] Companies Ex. 197 at 5.
[19] *Id*. at 6.
[20] This is another difference from original Rider RRS, where energy revenues were tied to the prices at the Sammis and Davis-Besse nodes, rather than the AEP-Dayton Hub. Companies Ex. 197 at 8.
[21] *Id.* at 7.

Credits or charges under Modified Rider RRS will be calculated by taking the difference between the Plants' projected revenues and projected costs plus a guaranteed profit, reconciled on a quarterly basis. When projected costs and the guaranteed profit exceed projected revenues, ratepayers will pay a charge, and when such revenues are greater than the projected costs and the guaranteed profit, any resulting gains will be flowed through to ratepayers.

2. Modified Rider RRS will result in net charges for ratepayers in the hundreds of millions of dollars.

The Companies insist that Modified Rider RRS offers the same or more benefits to ratepayers than original Rider RRS.[22] Among the Companies' claims is that, like original Rider RRS, customers would receive a credit projected to equal $561 million ($260 million net present value ("NPV")) over the eight-year term of the Companies' ESP IV.[23] But the claim relies on a forecast developed by Companies Witness Judah Rose when these proceedings began back in 2014. As the record now reflects, the intervening years have proven that Mr. Rose's projections are [redacted].

a. Mr. Rose's forecast is wrong.

The Companies' claim that ratepayers should expect to receive a net credit of $561 million under Modified Rider RRS relies on a forecast that Companies' Witness Judah Rose developed in August 2014. In his testimony, Mr. Rose boasts that "[m]y forecasts are as accurate as forecasts can be."[24] Alas, in the intervening two years, Mr. Rose's forecast has proven [redacted].

[22] Companies Ex.197 at 11.
[23] Companies Ex.197 at 4.
[24] Company Ex. 151 at 13.

Mr. Rose's conclusion that energy prices would rise in the future was based on wholesale forward prices, including wholesale forward prices for the AEP-Dayton Hub.[25] In his analysis, P3/EPSA witness Dr. Joseph Kalt reviewed updated forward prices for the AEP-Dayton Hub covering the first three years of Modified Rider RRS. As Dr. Kalt found, "Mr. Rose's outdated wholesale energy price forecast is [redacted] than currently reported AEP/Dayton futures market prices."[26] Mr. Rose' capacity price forecast was just as [redacted], having "[redacted]."[27]

b. The unrebutted evidence in this proceeding shows that ratepayers will pay a net charge in the hundreds of millions of dollars under Modified Rider RRS.

As the record evidence reflects, Mr. Rose's forecast has proven to be wrong, [redacted]. Therefore, the Companies simply have no credible basis to claim that Modified Rider RRS will produce a $561 million net credit. In fact, when Mr. Rose's forecast is reconciled with up-to-date energy forward and capacity prices for the first three years of the term of Modified Rider RRS, the revised forecast reveals that ratepayers can expect to pay at a minimum **a $154 million net charge ($342 million NVP),** a difference of approximately $715 million from the $561 million net credit projected by the Companies.[28] Moreover, Dr. Kalt's analysis only pertained to the first three years of Modified Rider RRS. But if the disparity between the Companies' forecast and current prices continues to widen, ratepayers face the prospect of paying billions in charges.

Dr. Kalt's analysis agrees with the [redacted]

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[25] Company Ex. 17 at 33-36.
[26] P3/EPSA Ex. 18C at 15 (emphasis added), and Attachment JPK-RH-1.
[27] *Id.*
[28] P3/EPSA Ex. 19.

[redacted].

Tellingly, the Companies have made no effort to rebut the findings of Dr. Kalt or Staff. Instead, the Companies continue to stick to their naked claim that ratepayers should expect to see a net benefit with Modified Rider RRS. But the evidence in this proceeding paints a wholly different picture. When the Companies' own forecast is reconciled with known price information, it reveals that the Companies' claimed net benefit of $561 million is a farce; instead ratepayers will pay the Companies hundreds of millions if not billions in charges over the term of Modified Rider RRS.

B. Rider DMR

1. Staff's DMR proposal.

On June 29, 2016, Staff presented an alternative proposal for the Commission's consideration on rehearing. Staff proposed the creation of a new, unique rider – Rider DMR – to provide support for FirstEnergy Corp. to maintain an investment grade rating by the major credit rating agencies.[30] Staff further clarified that as a result of this rider, the Companies will be able to access the capital market, which in turn will enable them to procure funds for distribution grid modernization initiatives.[31] Key aspects of the Staff's proposal are as follows:

- *Applicability and amount to be recovered*: All three Companies, combined, would recover $131 million annually for 36 consecutive months.[32] This amount was derived from (a) the percentage of the Companies' contribution in 2015 to FirstEnergy Corp.'s operating revenues (22%) and (b) the cash flow from operations ("CFO") to debt "shortfall" amount based on a 14.5% metric applied to a five-year average.[33]

[29] Rehearing Tr. Vol. 5 at 1201-1202.
[30] Staff Ex. 13 at 2.
[31] Staff Ex. 15 at 15.
[32] Rehearing Tr. Vol. 2 at 469; Rehearing Tr. Vol. 3 at 644; Rehearing Tr. Vol. 5 at 1209-1210.
[33] Staff Ex. 13 at 3-4.

- *Recovery*: The rider will not recover forecasted or actual costs.[34] The dollars collected will not be segregated or specially marked.[35]

- *Extension*: A one-time extension for a fixed 2-year period may be requested.[36] There is no requirement that the Companies demonstrate that they have invested in grid modernization in order to receive an extension.[37] The extension would be reviewed on a stand-alone basis at the time of extension request. There is no limit on the amount of money that the Companies could request in the extension period.[38]

- *Conditions*: Two conditions are proposed – (a) FirstEnergy Corp. must keep its headquarters and nexus of operations in Akron, Ohio, for the entire term of the ESP IV or the entire rider amount will be subject to refund; and (b) upon the announcement of an impending change of ownership for FirstEnergy Corp. or its subsidiaries, the rider will end immediately.[39] Staff also recommended that the Commission direct the Companies to invest to modernize the distribution grid.[40]

- *Relationship with ESP IV*: Staff proposes to institute Rider DMR and to remove the approved Rider RRS from the Companies ESP IV.[41] Rider DMR would become part of the ESP IV, but would "drop off" at the end of 36 months or the end of the extension period.[42]

2. The Companies' proposed modifications to Rider DMR.

The Companies proposed several modifications to Staff's Rider DMR proposal. Their modifications can be summarized as follows:

- *Applicability and amount to be recovered*: The annual amount collected under Rider DMR should be increased to $558 million annually for the entire ESP IV, based on the use of (a) a greater percentage (40%) of the Companies' contribution to FirstEnergy Corp.'s pre-tax revenues, instead of operating revenues; and (b) the cash flow from operations ("CFO") to debt "shortfall" amount based on a higher 15% metric applied to only a three-year average.[43]

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[34] Rehearing Tr. Vol. 4 at 1017-1018.
[35] Rehearing Tr. Vol. 3 at 580, 584.
[36] Rehearing Tr. Vol. 3 at 646-647; Rehearing Tr. Vol. 4 at 974.
[37] Rehearing Tr. Vol. 4 at 975.
[38] Rehearing Tr. Vol. 4 at 977.
[39] Staff Ex. 13 at 7.
[40] Staff Ex. 15 at 15.
[41] Rehearing Tr. Vol. 2 at 456.
[42] Rehearing Tr. Vol. 4 at 99-991, 1012.
[43] Companies Ex. 206 at 9-13.

- *Adder*: An amount not to exceed the alleged economic impact of the headquarters in Akron, Ohio (calculated to be $568 million) should be added to the annual amount collected.[44] Altogether, the Companies propose that Rider DMR collect up to $1.126 billion annually.

- *Time Period*: The rider should be in place for the term of the ESP IV (concluding in May 2024) and should be implemented upon Commission approval without a requirement to commence grid modernization.[45]

- *SEET*: Rider DMR revenues should be excluded from the annual significantly excessive earnings test evaluation.[46]

Compared to the Companies' claimed projections for Rider RRS, both Staff's and the Companies' proposed Rider DMR reflect ever-growing subsidies to FirstEnergy Corp., all at the expense of ratepayers.

Proposal Comparison – Bad to Worse

Original Rider RRS Proposal	**Modified Rider RRS**	**Staff DMR**	**Companies DMR**
A $*256* million net credit over the eight-year term of ESP IV as determined in the March 31, 2016 Decision.[47]	A minimum $*154* million in charges as determined using actual energy forward and capacity auction results for 2016 through 2018 and then the Companies' projections for 2019-2014.	A charge of $*393* million over three years, with the possibility of an additional $*262* million extension.[48]	A minimum charge of $*4.464* billion over eight years with up to $*568* million more a year if approved by the Commission.[49]

III. THE COMMISSION LACKS JURISDICTION TO CONSIDER MODIFIED RIDER RRS AND RIDER DMR

The Commission lacks jurisdiction to consider Modified Rider RRS and Rider DMR because neither proposal was properly preserved for consideration on rehearing. The Commission "is a creation of the General Assembly under the police power of the state, and it has only such jurisdiction and authority to act as is vested in it by statute." *Ohio Bus Line, Inc. v.*

[44] Companies Ex. 205 at 4; Companies Ex. 206 at 13-14.
[45] Companies Ex. 206 at 15-16.
[46] Companies Ex. 206 at 22.
[47] March 31, 2016 Decision at 85. P3/EPSA disagree with the Commission's conclusion on the amount of the charge under the original Rider RRS.
[48] Staff Ex. 13 at 3.
[49] Companies Ex. 205 at 4; Companies Ex. 206 at 13-14.

Pub. Util., 29 Ohio St.2d 222 (1972), paragraph one of the syllabus. The Commission's jurisdiction to consider matters on rehearing is fixed by R.C. 4903.10 and the rule promulgated thereunder, Ohio Adm.Code 4901-1-35. As neither the Modified Rider RRS nor Rider DMR comply with the statutory requirements governing applications for rehearing, the Commission is without jurisdiction to consider either proposal.

A. The Commission Lacks Jurisdiction To Consider Modified Rider RRS

As repeatedly stated by P3/EPSA, the Companies failed to include Modified Rider RRS as a specifically-stated assignment of error in their Application for Rehearing in this proceeding, depriving the Commission of jurisdiction to consider it pursuant to R.C. 4903.10.[50]

1. Modified Rider RRS was proposed in the Companies' Memorandum in Support, not in the Application for Rehearing itself.

By way of background, in their Application for Rehearing filed May 2, 2016, the Companies alleged eight assignments of error arising from the March 31, 2016 Opinion and Order in this proceeding (the "March 31, 2016 Decision"), including the following:[51]

> 6. The Order is unreasonable because it requires the Companies to bear the burden for any capacity performance penalties.
>
> 7. The Order is unreasonable because the Commission prohibited cost recovery for Plant outages greater than 90 days.
>
> 8. The Order is unreasonable because it does not reflect the ruling by the Federal Energy Regulatory Commission Order issued on April 27, 2016 in Docket Number EL16-34-000.

(collectively "Assignments of Error Nos. 6-8"). In an accompanying Memorandum in Support, under the common heading relating to Assignments of Error No. 6-8, the Companies noted their opposition to the Commission's determination that the Companies bear the burden of capacity

[50] P3/EPSA filed an application for rehearing on August 5, 2016, seeking reconsideration by the Commission of its determination on July 6, 2016, that it has jurisdiction to consider the Modified Rider RRS proposal. A ruling on P3/EPSA's August 5 application for rehearing has not been issued yet. This argument has been included in the P3/EPSA Initial Rehearing Brief to preserve P3/ESPA's argument.

[51] Companies' Application for Rehearing at 2.

performance penalties under Rider RRS.[52] The Companies also challenged the Commission's modification to the Stipulation in this proceeding to prohibit cost recovery under Rider RRS for plant outages greater than 90 days.[53] But the Memorandum in Support went on to note that both of these errors would be moot if the "Commission approves the Companies' modified proposal discussed below."[54]

The Memorandum in Support then went on to state that the April 27, 2016 decision by FERC "has complicated the Companies' and Commission's efforts to provide customers with stability and other retail rate benefits provided by Stipulated ESP IV" and "which now render [*sic*] the Commission's March 31, 2016 Order unreasonable" because it would necessitate a review of the PPA underpinning Rider RRS by FERC—"a process that would likely require a much more lengthy time period to come to a conclusion."[55]

To address this impediment, the Memorandum in Support went on to say, the Companies "developed a modified Rider RRS proposal that is designed to be solely within the Commission's jurisdiction and that will rely on retail ratemaking mechanisms that do not utilize or refer to a PPA or any other contractual arrangement or other involvement of FES."[56] In support of Modified Rider RRS, the Companies separately filed on the same day as their Application for Rehearing the Prefiled Rehearing Testimony of Eileen M. Mikkelsen. <u>**Significantly, as explained below, the Companies' Application for Rehearing itself contains no specific assignment of error relating to Modified Rider RRS,**</u> and as a result, the Commission has no authority to consider it.

[52] Memorandum in Support of Companies' Application for Rehearing at 13.
[53] *Id.*
[54] *Id.*
[55] *Id.* at 13.
[56] *Id.* at 15.

2. The Companies' Application for Rehearing fails to specifically set forth Modified Rider RRS as an assignment of error.

In order for the Commission to have jurisdiction over Modified Rider RRS, it should have been included specifically as an assignment of error in the Companies' Application for Rehearing. It was not, depriving the Commission of jurisdiction to consider it.

R.C. 4903.10 states that an application for rehearing "shall be in writing and **shall set forth specifically** the ground or grounds on which the applicant considers the order to be unreasonable or unlawful." (Emphasis added.) Ohio Adm.Code 4901-1-35(A) similarly requires that the application for rehearing itself "set forth, in numbered or lettered paragraphs, the specific ground or grounds upon which the applicant considers the commission order to be unreasonable or unlawful."

The Supreme Court of Ohio has repeatedly emphasized that specificity in assignments of error is a jurisdictional requirement. *See, e.g., Disc. Cellular, Inc. v. Pub. Util. Comm.,* 112 Ohio St. 3d 360, 374 (2007) ("**[W]e have strictly construed the specificity test set forth in R.C. 4903.10**") (Emphasis added); *Specialized Transport, Inc. v. Pub. Util. Comm.,* 170 Ohio St. 539, 540 (1960) ("[I]t is not within the court's power to provide variable or different qualifying standards for rehearing applications, much less to deliberately sanction a disregard for those specifically named by statute.").

None of the assignments of error in the Companies' Application for Rehearing specifically allege that the Commission's Opinion and Order is unlawful and unreasonable in failing to adopt Modified Rider RRS. In fact, without the benefit of the Companies' Memorandum in Support or the related pre-filed testimony, it would have been ***impossible*** for the Commission to discern that it erred in failing to address an alternative rider proposal calculated at avoiding the reach of the FERC's jurisdiction.

The closest that the Application for Rehearing comes to implicating Modified Rider RRS is the Companies' vague assertion in the Application for Rehearing itself that the Commission's Order is "unreasonable because it does not reflect the ruling by the Federal Energy Regulatory Commission Order issued on April 27, 2016. . . ." But Modified Rider RRS is intended to *circumvent* the FERC's jurisdiction by removing the PPA between the Companies and its generation affiliate. Stated otherwise, an order from this Commission that "reflected" the FERC's April 27, 2016 Order would not, in any sense, give rise to Modified Rider RRS. The amorphous reference to the FERC in Assignment of Error No. 8 falls far short of the specificity required by Ohio law.

In sum, because the Modified Rider RRS proposal was not raised or mentioned in the Companies' Application for Rehearing, the Commission lacks jurisdiction to consider it.

3. The Commission cannot look outside of an application for rehearing to consider an assignment of error not raised in the application for rehearing itself.

Because the Companies' Application for Rehearing did not itself include Modified Rider RRS as an assignment of error, the Commission has no authority to look to the Companies' Memorandum in Support or pre-filed testimony in order to consider it on rehearing.

Plain statutory language requires that the application for rehearing itself—and not another pleading—set forth the assignments of error relied on by an applicant for rehearing. R.C. 4903.10 provides that an application for rehearing "shall be in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful" and that "*[n]o party shall* in any court *urge or rely on any ground for reversal, vacation, or modification not so set forth in the application."* (Emphasis added).

Moreover, Ohio Adm. Code 4901-1-35(A) makes it clear that it is not sufficient for a ground for rehearing to be included only in the memorandum in support; rather, the memorandum in support may only explain the basis for the ground for rehearing already contained in the application itself:

> An application for rehearing must be accompanied by a memorandum in support, which sets forth an explanation of the basis for each ground for rehearing identified in the application for rehearing and which shall be filed no later than the application for rehearing.

Here, because nothing in the Companies' Application for Rehearing, including Assignments of Error Nos. 6-8, specifically urges the adoption of Modified Rider RRS, that proposal was not properly preserved for rehearing and the Commission lacks jurisdiction to consider it.

4. The Commission has previously ruled that assignments of error cannot be raised in a memorandum in support.

The Commission's own prior interpretation of its limited statutory jurisdiction confirms that the Commission may not look to a memorandum in support or other document in determining whether an applicant perfected an assignment of error.

In Case No. 11-776-AU-ORD, the Commission undertook a review of its administrative rules, as required by R.C. 119.032. During that proceeding, Staff proposed changes to the Commission's rules in Ohio Adm.Code Chapter 4901-1.[57] Among the changes under consideration was a revision to the rule governing applications for rehearing, Ohio Adm.Code 4901-1-35. Specifically, Staff had proposed language clarifying that applications for rehearing must set forth in numbered or lettered paragraphs the ground or grounds upon which the applicant considers the Commission order to be unreasonable or unlawful.[58]

[57] *In the Matter of the Commission's Review of Chapters 4901-1, Rules of Practice and Procedure; 4901-3, Commission Meetings; 4901-9, Complaint Proceedings; and 4901:1-1, Utility Tariffs and Underground Protection, of the Ohio Administrative Code*, Case No. 11-776-AU-ORD, 2014 Ohio PUC LEXIS 12, Findings and Order at ¶ 3 (Jan. 22, 2014).
[58] *Id.* at ¶ 60.

Certain commentators objected to Staff's proposed change, submitting it was not clear "why this change is necessary rather than the current practice of filing a brief application for rehearing accompanied by a separate and much longer memorandum in support."[59] The Commission disagreed with these commentators and adopted Staff's language, ruling that:[60]

> **[T]he General Assembly has very clearly delineated the rehearing process.** Rather than introduce confusion, we find that the Staff-proposed modification adds clarity to the rehearing process. An applicant seeking rehearing must file an application and must set forth with specificity in the application the ground or grounds on which the applicant believes the Commission order is unreasonable or unlawful. **While rehearing applicant's** [*sic*] **are free to expound upon their assignments of error in a memorandum, the Commission legally can not consider any grounds for rehearing not contained within the application itself.** Staff's proposed revisions to Rule 35 will be adopted.

Thus, the Commission has already recognized that as a legal matter, it cannot consider any grounds for rehearing contained in anything other than the application for rehearing itself.[61] Here, the Commission's consideration of whether the Companies perfected rehearing over Modified Rider RRS is therefore limited to the Companies' application for rehearing, and not a memorandum in support or pre-filed testimony. To allow parties to raise assignments of error in a supporting memorandum or in separately filed documents is not only contrary to law, but also will lead to untold confusion in years to come—both at the Commission and the Supreme Court of Ohio. That is not what the General Assembly intended when it enacted R.C. 4903.10.

[59] *Id.*

[60] *Id.* (Emphasis added).

[61] Case No. 11-776-AU-ORD is not the first time the Commission had made this determination. *See, e.g., In Re Settlement Agreement in Case No. 07-564-WW-AIR and the Standards for Waterworks Companies and Sewage Disposal System Companies*, Case No. 08-1125-WW-UNC, 2009 Ohio PUC LEXIS 854, *8-9 (October 14, 2009) (finding that an application that requests a rehearing but then merely refers to the memorandum in support for specific grounds does not substantially comply with statutory requirements).

5. Modified Rider RRS is not an "explanation" of Assignments of Error Nos. 6-8.

As noted above, Ohio Adm.Code 4901-1-35(A) permits a memorandum in support of an application for rehearing to "set[] forth an explanation of the basis for each ground for rehearing identified in the application for rehearing." In the Companies' Memorandum in Support, Modified Rider RRS is presented under the captions concerning Assignments of Error Nos. 6-8. But Modified Rider RRS is not an "explanation" of those assignments of error. Rather, it is an entirely new proposal not referenced anywhere in the Companies' application for rehearing.

Assignment of Error No. 6 provides that "[t]he Order is unreasonable because it requires the Companies to bear the burden for any capacity performance penalties." The Memorandum in Support notes that Assignment of Error No. 6 would be mooted if Modified Rider RRS is adopted. But Modified Rider RRS does not "explain" Assignment of Error No. 6. That is, Modified Rider RRS offers no clarification on why the Commission was unjust and unreasonable in requiring the Companies to bear the burden of capacity performance penalties.

Assignment of Error No. 7 states: "[t]he Order is unreasonable because the Commission prohibited cost recovery for Plant outages greater than 90 days." The Memorandum in Support notes that Assignment of Error No. 7 would also be mooted if the Commission was to adopt Modified Rider RRS. But here too, Modified Rider RRS is not an "explanation" for why the Commission was unjust and unreasonable in prohibiting cost recovery for Plant outages greater than 90 days.

Finally, Assignment of Error No. 8 provides that "[t]he Order is unreasonable because it does not reflect the ruling by the Federal Energy Regulatory Commission Order issued on April 27, 2016 in Docket Number EL16-34-000. But Modified Rider RRS does not offer an "explanation" for why the Commission's March 31, 2016 decision in this proceeding is unreasonable and unlawful due to the after-the-fact FERC Order. And if adopted by the Commission, Modified Rider RRS would not "reflect" the FERC's ruling. Rather, Modified Rider RRS is an attempt to *circumvent* FERC's Order by proposing a new rider based on a construct specifically calculated to avoid the reach of FERC's jurisdiction.

To permit the Companies to bootstrap Modified Rider RRS onto assignments of error lacking any discernible nexus to the Companies' proposal contravenes the plain language of R.C. 4903.10 and Ohio Adm. Code 4901-1-35(A).

6. The *CG&E Case* does not support the Commission's jurisdiction to consider Modified Rider RRS on rehearing.

Inasmuch as the Companies may contend that the Supreme Court of Ohio's decision in *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St. 3d 300 (2006) (the "*CG&E Case*") supports the Commission's jurisdiction over Modified Rider RRS, that case dealt with a very different application for rehearing and offers no help to the Companies in this proceeding. In the *CG&E Case*, the Court upheld the Commission's granting of rehearing on an alternative proposal by The Cincinnati Gas & Electric Company ("CG&E") that was included in the company's application for rehearing.[62] The Court found that the Commission properly "treated CG&E's alternative proposal as an assignment of error on rehearing."[63]

The *CG&E Case* correctly decided the issue before it, but is completely distinguishable from the facts in this proceeding. Chiefly, CG&E's Application for Rehearing itself (and not an accompanying pleading) specifically urged the Commission to adopt the alternative proposal, devoting almost a full page to the topic under the heading "the Alternative Proposal" before

[62] The *CG&E Case* at 302.
[63] *Id.* at 304.

describing the proposal more fully in a memorandum for support.[64] Conversely, here the Companies' Application for Rehearing is completely silent regarding Modified Rider RRS.

Therefore, because CG&E's application for rehearing took pains to specifically describe their proposal in the application for rehearing itself, the Court's ruling that the Commission properly "treated CG&E's alternative proposal as an assignment of error on rehearing"[65] was entirely consistent with R.C. 4903.10. Whereas in this proceeding, nothing in the Companies' Application for Rehearing references the Companies' Modified Rider RRS proposal—a crucial distinction that makes the *CG&E Case* entirely inapplicable.

In sum, the *CG&E Case* involves an application for rehearing that specifically described the company's alternative proposal. That application for rehearing bears no resemblance to the Companies' Application for Rehearing, and therefore, the *CG&E Case* has no bearing on the question of the Commission's jurisdiction in this case.

B. The Commission Lacks Jurisdiction To Consider Rider DMR

The Commission is also without jurisdiction to consider Rider DMR. The Commission should find that Ohio law deprives the Commission of the authority to consider Rider DMR in the context of this rehearing proceeding.

R.C. 4903.10 contains two significant limitations on the Commission's jurisdiction to hear matters on rehearing: (1) the application for rehearing must be "**<u>in respect to any matters determined in the proceeding</u>**"[66] and (2) a hearing must be held "**<u>on the matter specified in such application</u>**."[67]

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[64] *See In the Matter of the Application of The Cincinnati Gas & Electric Company to Modify Its Nonresidential Generation Rates to Provide for Market-Based Standard Service Offer Pricing and to Establish an Alternative Competitive-Bid Service Rate Option Sub-Ssequent to the Market Development Period*, Case Nos. 03-93-EL-ATA, et al., CG&E Application for Rehearing at 2, 4-5 (Oct. 29, 2004).
[65] The *CG&E Case* at 304.
[66] R.C. 4903.10 (Emphasis added).
[67] *Id.* (Emphasis added).

Rider DMR does not satisfy either limitation. First, as the record shows, Rider DMR is a completely distinct proposal from Rider RRS, asserted under a separate provision of the ESP statute, with an unrelated goal, different metrics, and (at least if one accepts the Companies' projections of Modified Rider RRS) a very different financial outcome for ratepayers. Therefore, it in no way relates to any matters that were previously "determined in this proceeding" (i.e., to original Rider RRS). Second, Rider DMR was not proposed through an application for rehearing, and therefore, is not a proper subject for a hearing that, by statute, must be held "on the matter specified in [an application for rehearing]." Therefore, the Commission lacks jurisdiction to consider Rider DMR.

1. Rider DMR is not a matter "determined in this proceeding."

For the Commission to have jurisdiction over Rider DMR on rehearing, Rider DMR must concern a matter "determined in the proceeding."[68] Given the wholly different policy objectives, mechanics, and claimed impact to ratepayers between the two riders, Rider DMR has no relation whatsoever to the Commission's prior determination regarding Rider RRS. As a result, Rider DMR does not speak to a matter "determined in [this] proceeding" and the Commission is without jurisdiction to consider it in this case.

The record is clear that Rider DMR has no relation to any part of the prior proceedings. Staff has proposed Rider DMR as a *new* rider to serve as an alternative to Rider RRS.[69] Rider RRS (as approved by the Commission) and Rider DMR, however, are **completely different proposals,** entirely distinct in their policy objectives, mechanics, and (if one accepts the Companies' projections), their impacts on ratepayers. Among the key differences:

[68] R.C. 4903.10.

[69] Staff Ex. 15 (Choueiki Rehearing Testimony) at 14-15.

	Original Rider RRS	Rider DMR
Alleged objective:	To safeguard customers against volatility in retail rates.[70]	To provide the Companies with credit support to jump start grid modernization.[71]
Mechanics	The Companies would acquire the generation output of specified generation plants through a power purchase agreement, which generation would be sold into the PJM markets, with customers receiving a charge or credit based on the netting of the costs and revenues from such sales.[72]	Ratepayers would pay a fixed annual charge, representing a portion of revenues necessary for FirstEnergy Corp. to obtain a cashflow from operations pre-working capital to debt ratio of at least 14-15%.[73]
Impact on Ratepayers	As determined in the March 31, 2016 Decision, a $256 million net credit over the eight year term of ESP IV.[74]	An annual charge of $131 million for three years, with the possibility of an extension for up to an additional two years.[75]

Companies' witness Mikkelsen confirmed that the Companies view Modified Rider RRS and Rider DMR as two distinct proposals with different purposes:[76]

> Q. You believe that the modified rider RRS has a different purpose than rider DMR, correct?
>
> A. Yes.
>
> Q. And the purpose of rider DMR is to provide credit support to the companies to allow them to jump-start distribution grid modernization, correct?
>
> A. Yes.
>
> Q. And you believe that modified rider RRS and rider DMR are two separate proposals, correct?
>
> * * *
>
> A. Yes.

[70] Company Ex. 7 (Mikkelson Direct Testimony) at 29.
[71] Staff Ex. 15 at 15.
[72] Company Ex. 1 at 9.
[73] Staff Ex. 13 at 2-4.
[74] March 31, 2016 Decision at 85. P3/EPSA disagree with the Commission's conclusion on the amount of the charge under Rider RRS.
[75] Staff Ex. 13 at 3.
[76] Rehearing Tr. Vol. 10 at 1761-1762.

Regardless of whether Staff is trying to fix the Companies' flawed modified Rider RRS proposal, the record is clear that Rider DMR has no relation to the prior proceeding and is a rider separate and apart from Rider RRS. The Commission cannot hear this new rider on rehearing and in this proceeding.

2. Rider DMR was not presented through an application for rehearing.

R.C. 4903.10 requires that a rehearing proceeding be held "on the matter specified in such application [for rehearing]." No party in this proceeding, including the Companies,[77] filed an application for rehearing seeking Rider DMR. Because Rider DMR was not included in application for rehearing, the Commission is without jurisdiction to consider Rider DMR within the scope of this rehearing proceeding.

3. The Commission's authority to abrogate or modify its original order on rehearing is subject to the limitations in R.C. 4903.10.

R.C. 4903.10 provides that:

> If, 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.

While the Commission has authority to abrogate or modify its original order on rehearing, the scope of the Commission's authority is constrained by the limitations of R.C. 4903.10; that is: (i) rehearing must still relate to "any matters determined in the proceeding" and (ii) rehearing must be held "on the matter specified in such application [for rehearing]." An interpretation of R.C. 4903.10 that gives the Commission unfettered authority to modify its order in ways entirely unrelated to the issues addressed in its original decision and not raised by any party to the proceedings through an application for rehearing defeats the plain purpose of R.C.

[77] *See, e.g.* Rehearing Tr. Vol. 10 at 1762.

4930.10—as a vehicle that allows parties to challenge the Commission's findings on the matters addressed in the original hearing.

4. The *CG&E Case* does not support the Commission's jurisdiction over Rider DMR.

The *CG&E Case* does not support a finding that the Commission has jurisdiction over Rider DMR in this rehearing proceeding. In the *CG&E Case*, discussed above in Section III.A.6, CG&E filed an application for rehearing urging the Commission to adopt an alternative proposal. CG&E's application for rehearing devoted almost a full page to the alternative proposal, with further detail provided in an attached memorandum in support, justifying the Court's finding that the Commission properly "treated CG&E's alternative proposal as an assignment of error on rehearing"[78]

Here, no party has submitted an application for rehearing proposing the adoption of Rider DMR. Because the *CG&E Case* is predicated on a timely-filed application for rehearing that specifically describes an alternative proposal, and these circumstances do not exist with respect to Rider DMR, the *CG&E Case* lends no support to the claim that the Commission has jurisdiction to consider Rider DMR.

In sum, in order for the Commission to have jurisdiction over Rider DMR under R.C. 4903.10, Rider DMR must relate to a matter "determined in [this] proceeding" and be the subject of an application for rehearing. Neither of those is true with respect to Rider DMR. Therefore, the Commission lacks authority to consider it in the context of this rehearing proceeding.

IV. THE COMMISSION SHOULD REJECT MODIFIED RIDER RRS

A. Standard Of Review

The Commission's standard of review of Modified Rider RRS is multifaceted.

[78] 111 Ohio St. 3d at 304.

First, the Companies claim that Modified Rider RRS is authorized by R.C. 4928.143(B)(2)(d). Therefore, the Companies must establish that Modified Rider RRS "must first be a term, condition, or charge; next, relate to one of the enumerated types of terms, conditions, and charges; and, finally, have the effect of stabilizing or providing certainty regarding retail electric service."[79]

Second, inasmuch as the Companies may claim that Modified Rider RRS is authorized by R.C. 4928.143(B)(2)(i), the Companies must show that Modified Rider RRS is a provision that implements an "economic development, job retention [or] energy efficiency program[]."[80]

Third, the Companies must establish that Modified Rider RRS is a "just and reasonable" charge under R.C. 4905.22.

Fourth, the Companies must comply with the Commission's directive in its February 25, 2015, *AEP ESP III* Opinion and Order, which required the applicant "to justify any requested cost recovery" and, "at a minimum," address certain factors, which the Commission would consider, but not be bound by:[81]

- The financial need of the generating plant;
- The necessity of the generating facility, in light of future reliability concerns, including supply diversity;
- A description of how the generating plant is compliant with all pertinent environmental regulations and its plan for compliance with pending environmental regulations; and
- The impact that a closure of the generating plant would have on electric prices and the resulting effect on economic development within the state.

[79] *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 Nos. 13-2385-EL-SSO et al., Opinion and Order (February 25, 2015) ("*AEP ESP III*") at 20.
[80] R.C. 4928.143(B)(2)(i).
[81] *AEP ESP III* at 25.

Fifth, R.C. 4928.143(C)(1) requires the Companies to demonstrate that pricing and all other terms and conditions of the ESP IV (including deferrals and future recovery of deferrals) are "more favorable in the aggregate" than the results that would be expected from an MRO.

Sixth, the Commission's findings on these issues must be based on evidence that is in the record.[82]

Finally, the Companies, as the applicants seeking approval of an ESP pursuant to R.C. 4928.143(C), bear the burden of proof.[83]

B. Modified Rider RRS Will Violate R.C. 4928.143(B)(2)(d)

The Companies claim that just like original Rider RRS, Modified Rider RRS serves as a rate-stabilizing mechanism authorized by R.C. 4928.143(B)(2)(d).[84] That statute provides that an ESP may include the following:

> (d) **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**. (Emphasis added).

Contrary to the Companies' claims, Modified Rider RRS is not authorized by R.C. 4928.143(B)(2)(d) because Modified Rider RRS is (i) does not constitute a "charge";[85] (ii) it is not a "financial limitation on customer shopping;" and (iii) does not provide retail rate stability or certainty.

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[82] *See AEP ESP III*, *supra*, at 24, citing *Tongren v. Pub. Util. Comm.*, 85 Ohio St.3d 87 (1999).
[83] R.C. 4928.143(C)(1).
[84] Companies Ex. 197 at 10.
[85] P3/EPSA recognize that several witnesses, including P3/EPSA Witness Kalt argue that Modified Rider RRS will impose charges to customers. This section of the brief, however, is addressing the structure of Modified Rider RRS, which envisions that it fluctuate between a charge and a credit. It, therefore, does not constitute a charge and does not fit language of the statute.

1. Modified Rider RRS does not constitute a "**charge**."

To be permissible under Section 4928.143(B)(2)(d), Modified Rider RRS must be a "term, condition, or <u>charge</u>" that relates to certain enumerated items.[86] The Companies project that Modified Rider RRS will result in charges for the first three years of ESP IV, with credits to ratepayers during the remainder of ESP IV's term, yielding an overall net <u>credit</u> to ratepayers of $561 million.[87]

While the Companies forecast Modified Rider RRS to be a net credit and theoretically the rider could be a credit during the term of ESP IV, the word "credit" does not appear anywhere in Section 4928.143(B)(2)(d). Selective compliance with the "charge" requirement of this statute at only certain times during the term of ESP IV is insufficient to satisfy R.C. 4928.143(B)(2)(d). In authorizing Modified Rider RRS under R.C. 4928.143(B)(2)(d) while recognizing that (at least in theory), Modified Rider RRS could produce a net credit, the Commission would effectively read the word "credit" into subsection (B)(2)(d). This would be impermissible. *See In re Columbus S. Power Co.,* 128 Ohio St.3d 512, ¶ 32 (2011) ("[I]f a given provision does not fit within one of the categories listed "following" (B)(2), it is not authorized by statute"); *In re Application of Columbus S. Power Co.,* Slip Opinion No. 2016-Ohio-1608, ¶ 49 ("[I]n construing a statute, we may not add or delete words.").

Because Modified Rider RRS can theoretically switch between a payment from the Companies to ratepayers, *or* a payment from the ratepayers to the Companies, it is not solely a "charge." Section 4928.143(B)(2)(d) does not authorize a "credit," only a "charge" whereby the utility charges the ratepayer a fee. The Commission would exceed its authority in allowing a

[86] R.C. 4928.143(B)(2)(d) (Emphasis added).
[87] Companies Ex. 197 at 4, Rehearing Tr. Vol. 1 at 79.

"credit," i.e., a payment *from* the utility *to* the ratepayer, under this provision. Therefore, the Commission cannot approve Modified Rider RRS as a "charge" under R.C. 4928.143(B)(2)(d).

2. Modified Rider RRS is not a limitation on customer shopping.

The Companies acknowledge that Modified Rider RRS will not restrict customer shopping for generation service in the Companies' service territory or change the price that a retail customer pays to its generation supplier.[88] Yet the Companies claim that Modified Rider RRS "operates as a financial limitation on the consequences of customer shopping."[89] The term "limitation" is understood in its plain sense to denote "the act of controlling the size or extent of something" or "control[ling] how much of something if possible or allowed."[90] The Companies do not claim that Modified Rider RRS controls the "size or extent" of the class of the Companies' ratepayers that shop for generation with a competitive retail electric service ("CRES") provider, or alternatively, prohibits the Companies' ratepayers from migrating to or from the Standard Service Offer. To the contrary, the Company maintains that Modified Rider RRS does not limit ratepayers from shopping for their generation supply.[91]

This point could not be any clearer than Ms. Mikkelsen's answer to a cross-examination question on rehearing:[92]

> Q. And the proposal does not place any restriction on the ability of retail customers to shop for their energy, correct.
>
> A. Yes.

The requirement relating to "limitations on customer shopping for retail electric generation service" is plain and unambiguous, and the Commission cannot ignore it. *See Doe v.*

[88] Rehearing Tr. Vol. 1 at 49-50.
[89] Companies Ex. 197 at 10.
[90] Merriam-Webster Online Dictionary, *http://www.merriam-webster.com* (accessed August 15, 2016).
[91] Rehearing Tr. Vol. 5 at 1065-1066.
[92] Rehearing Tr. Vol. 1 at 49.

Marlington Local Sch. Dist. Bd. of Educ., 122 Ohio St.3d 12, 2009-Ohio-1360, ¶ 29 ("It is our duty to apply the statute as the General Assembly had drafted it; it is not our duty to rewrite it."). Because Modified Rider RRS is nonbypassable and does not prohibit or restrict the Companies' ratepayers from shopping for generation through a CRES provider or migrating to or from the Companies' SSO load, under the plain meaning of R.C. 4928.143(B)(2)(d), Modified Rider RRS is *not* a "limitation" on shopping. Therefore, it is not authorized under R.C. 4928.143(B)(2)(d) on that basis.

3. Modified Rider RRS does not provide retail rate stability or certainty.

The Companies claim Modified Rider RRS provides a mechanism to stabilize volatility in retail rates over the term of the ESP IV.[93] But that is not the case. At best, Modified Rider RRS will have no discernible effect on stabilizing rates. But it could also lead to heightened *instability* in retail rates.

As an initial matter, volatility in short-term wholesale power markets does not translate to volatility in longer-term retail power markets.[94] Power prices for most retail customers are set by procurements carried out considerably in advance of consumption.[95] Moreover, retail prices based on forward market prices are much less volatile than day-to-day power prices.[96] With retail SSO rates, for example, the volatility of daily wholesale power prices is not transmitted to retail rates.[97] This is even true for notable events such as the spike in wholesale power prices during the "Polar Vortex" of January 2014.[98] SSO retail rates simply do not positively correlate with daily wholesale rates.[99] This is true for shopping customers as well. CRES providers

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[93] Companies Ex. 197 at 10; Rehearing Tr. Vol. 1 at 126.
[94] P3/EPSA Ex. 5 at 27.
[95] P3/EPSA Ex. 1 at 11.
[96] *Id.*
[97] P3/EPSA Ex. 5 at 27.
[98] *Id.* at 28.
[99] *Id.*

heavily emphasize price stability in their marketing materials, and provide discounts for customers to sign up for up to three-year fixed-rate contracts.[100] Like SSO customers, shopping customers already enjoy price stability. Under a best-case scenario, therefore, Modified Rider RRS will have no meaningful impact on retail rates.

But Modified Rider RRS could exacerbate rate instability. The Companies propose that Modified Rider RRS would be trued up quarterly to reconcile projected energy revenues with actual energy revenues based on the actual monthly average on-peak and average off-peak day-ahead locational marginal price at the AEP-Dayton Hub.[101] If energy prices are high are during a particular period and revenues for that period exceed the costs for the period, the next Modified Rider RRS reconciliation would be expected to take the form of a bill reduction. But it is possible that the "lag" in making billing adjustments under Modified Rider RRS and the random walk characteristics of electricity prices mean that this bill reduction would be applied in a post-spike period in which market prices have receded from their spike and are already relatively low.[102] Therefore, counter to the intended function of Modified Rider RRS, wholesale prices and Modified Rider RRS adjustments would *not* be counter-cyclical, but instead reinforce each other, resulting in customers incurring charges in periods of higher prices, and receiving credits in periods of lower prices, exacerbating the acuity of retail price instability.[103]

4. Modified Rider RRS is not authorized as relating to "bypassibility."

The Companies claim that Modified Rider RRS is authorized by R.C. 4928.143(B)(2)(d) as relating to "bypassibility."[104] The Commission has previously rejected this argument and it should do so again. In its March 31, 2016 Decision in this proceeding, the Commission found

[100] *Id.* at 27.
[101] Companies Ex. 197 at 7.
[102] P3/EPSA Ex. 5 at 28.
[103] *Id.* at 28-29.
[104] Companies Ex. 197 at 10.

that "since nearly any charge may be bypassable or non-bypassable, 'bypassability' alone is insufficient to fully meet the second criterion of R.C. 4928.143(B)(2)(d)."[105] For the same reason, the Commission should reject the Companies' claim that Modified Rider RRS is authorized by R.C. 4928.143(B)(2)(d) as relating to "bypassibility."

5. Modified Rider RRS is not authorized as relating to "default service."

Modified Rider RRS does not relate to "default service" under R.C. 4928.143(B)(2)(d), as claimed by the Companies.[106] "Default service," on the other hand, is the service that customers **must** receive if a competitive supplier is no longer able to provide service for any of the reasons set forth in R.C. 4928.14.

That statute states:

> The failure of a supplier to provide retail electric generation service to customers within the certified territory of an electric distribution utility **shall result in the supplier's customers**, after reasonable notice, **defaulting to the utility's standard service offer** under sections 4928.141, 4928.142, and 4928.143 of the Revised Code until the customer chooses an alternative supplier.[107]

In other words, "default service" applies *if, and only if,* a competitive supplier fails to provide service, pursuant to R.C. 4928.14. Conversely, Modified Rider RRS is intended to apply to all ratepayers, including those who are shopping with a competitive supplier and those customers that *choose* to take the SSO offer. Like the Companies' argument regarding "bypassibility," their interpretation of "default service" is so broad as to make that term meaningless. If "default service" is equated with a ratepayer's election to take the SSO offer, "default service" would authorize any conceivable charge or provision under R.C. 4928.143, thus eviscerating the other limitations in subsection (B)(2)(d). That interpretation is plainly unreasonable. Therefore, the

[105] March 31, 2016 Decision at 108.
[106] Companies Ex. 197 at 10.
[107] R.C. 4828.14.

Commission should reject the Companies' contention that Modified Rider RRS relates to "default service."

C. Modified Rider RRS Does Not Satisfy R.C. 4928.143(B)(2)(i)

Whatever the merits of the Companies' claim that original Rider RRS was part of an economic development program under R.C. 4928.143(B)(2)(i), Modified Rider RRS plainly fails to meet the requirements of that provision. R.C. 4928.143(B)(2)(i) states that an ESP may provide for or include:

> Provisions under which the electric distribution utility may implement economic development, job retention, and energy efficiency programs, which provisions may allocate program costs across all classes of customers of the utility and those of electric distribution utilities in the same holding company system.

In its March 31, 2016 Decision, the Commission determined that 'the plants to be included in the Economic Stability Program have a significant economic impact upon the regions in which the plants are located."[108] The Commission found, for example, that "Sammis and Davis-Bessee have a total economic impact of over $1.1 billion annually."[109] Noting its concern over the economic impact of plant closures and impact on local communities, the Commission found Original Rider RRS "will provide support" for these generation assets.[110] The avoidance of plant closures led the Commission to conclude that Rider RRS constituted an economic development program under R.C. 4928.143(B)(2)(i).[111]

The Commission cannot draw the same conclusion with respect to Modified Rider RRS. Companies Witness Mikkelsen acknowledged that Modified Rider RRS does not ensure the continued operation of any Ohio based generation.[112] In light of the Companies' position that

[108] March 31, 2016 Decision at 88.
[109] *Id.*
[110] *Id.*
[111] *Id.* at 109.
[112] Rehearing Tr. Vol. 1 at 51.

Modified Rider RRS will not support the viability of Sammis and Davis-Bessee, R.C. 4928.143(B)(2)(i) does not authorize Modified Rider RRS on economic development grounds.

D. Modified Rider RRS Violates the Prohibition Against the Recovery of "Transition Revenues or any Equivalent Revenues" In Violation Of R.C. 4928.38

Modified Rider RRS violates the prohibition against the recovery of "transition revenues or any equivalent revenues" under R.C. 4928.38.

1. Ohio law prohibits the recovery of "transition revenues or any equivalent revenues."

Pursuant to S.B. 3, each electric utility was allowed an opportunity "to receive transition revenues that may assist it in making the transition to a fully competitive retail electric generation market."[113] This opportunity was limited to the end of the "market development period,"[114] which ended on December 31, 2010.[115] Afterwards, the utility was required to be "fully on its own in the competitive market."[116] Following the end of the market development period, the Commission is prohibited from "authoriz[ing] the receipt of transition revenues or any equivalent revenues."[117]

"Transition revenues" (also referred to as "transition costs"[118]) are "costs incurred by the utility before retail competition began that will not be recoverable through market-based rates."[119] As for "equivalent revenues," the Supreme Court of Ohio recently explained that "[b]y inserting the phrase 'any equivalent revenues,' the General Assembly has demonstrated its intention to bar not only transition revenue associated with costs that were stranded during the

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[113] R.C. 4928.37.
[114] *Id.*
[115] R.C. 4928.40(A).
[116] R.C. 4928.38
[117] *Id.*
[118] *See, e.g.,* R.C. 4928.39.
[119] *Id.*

transition to market following S.B. 3 but also any revenue that amounts to transition revenue by another name."[120]

2. Modified Rider RRS will recover "transition revenues or any equivalent revenues."

Modified Rider RRS will recover the "transition revenues or any equivalent revenues" in contravention of R.C. 4928.38. The calculation of a credit or charge under Modified Rider RRS is based on projected costs and generation output for the FES plants that were already of record during the original Rider RRS phase of this proceeding.[121] Crucially, while Modified Rider RRS no longer relies on an explicit PPA with FES, ratepayers will still pay charges predicated on the **same generation** involved in original Rider RRS. This point was repeatedly made by Staff witness Dr. Chouieki.[122]

Original Rider RRS would have recovered from ratepayers the difference between the costs of 3,244 MWs generation output owned by the Companies' affiliate, FES, together with a guaranteed return on and of equity equal to 10.38 percent and the revenues from the sale of that output into the PJM markets pursuant to a PPA between the Companies and FES. Layered into the costs recoverable through original Rider RRS were certain "legacy costs," which included "all costs that arise from decisions or commitments made and contracts entered into prior to December 31, 2014, including any costs arising from provisions under such historic contracts that may be employed in the future."[123]

Although the Companies claim Modified Rider RRS is not tied to any particular generation, its mechanism relies on the specific cost and volume projections for FES' plants, including FES' guaranteed return on and of equity equal to 10.38 percent and FES' legacy

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[120] *In re Application of Columbus Southern Power Co.*, 2016-Ohio-1608 at ¶ 21.
[121] Companies Ex. 197 at 5.
[122] Rehearing Tr. Vol. 5 at 1249, 1251, 1252-1253.
[123] Company Ex. 7 at 14.

costs.[124] Because Modified Rider RRS will be calculated by netting out projected revenues from projected costs and generation volumes, Modified Rider RRS will charge customers the costs of generation to the extent those costs plus profits exceed simulated sales into the markets—e.g., generation costs above those costs recoverable "through market-based rates." That falls squarely into prohibition against recovery of "transition revenues or any equivalent revenues" under R.C. 4928.38. Tellingly, it was also Staff's regulatory opinion that Modified Rider RRS was "at its core a generation rider" that could potentially be construed as a transition charge.[125]

It is immaterial that Modified Rider RRS revenues would flow to the Companies, rather than FES, because nothing prevents the Companies from shifting those revenues to FES by routing the money through their common parent, FirstEnergy Corp. Specifically, Companies witness Mikkelsen acknowledged that:

- There is no restriction on the transfer of Modified Rider RSS revenues to FirstEnergy Corp. via dividends;[126]

- The Companies make no commitment that they will not use revenues collected under Modified Rider RRS to provide dividends to FirstEnergy Corp; and[127]

- Nothing prohibits FirstEnergy Corp. from using those dividends to invest in FES during the term of Modified Rider RRS.[128]

Therefore, nothing prevents Modified Rider RRS revenues from flowing to FES—an arrangement that contravenes R.C. 4928.38.

In sum, Modified Rider RRS violates the prohibition against the recovery of "transition revenues or any equivalent revenues" in R.C. 4928.38.

[124] Rehearing Tr. Vol. 1 at 146.
[125] Staff Ex. 15 at 14; Rehearing Tr. Vol. 4 at 980.
[126] Rehearing Tr. Vol. 1 at 73-74.
[127] *Id.* at 75.
[128] *Id.* at 228, 232.

E. The Companies Have Failed to Establish that Ratepayers Would Receive a Credit Over the Term of Modified Rider RRS and Instead, the Evidence Demonstrates That When Using Known Prices, Ratepayers Will Lose Hundreds of Millions of Dollars Under Modified Rider RRS

The Companies insist that Modified Rider RRS offers the same or more benefit to ratepayers than original Rider RRS, as approved by the Commission. Among the Companies' claims is that ratepayers will receive a credit projected to equal $561 million ($260 million NPV over the eight-year term of the Companies' ESP.[129] But when the Companies' forecast is reconciled with known energy and capacity prices for the first three years of ESP IV, it reflects that ratepayers will pay a minimum of an additional $715 million over the term of Modified Rider RRS, transforming the Companies' projected $561 million net credit into a $154 million net charge ($342 million NPV). The Companies' forecast assumes the Companies' projections are accurate for the remaining years of the term of ESP IV. If the Companies' projections continue to diverge from actual market prices, ratepayers' exposure to enormous charges will only continue to grow. In sum, the Companies' continued insistence that Modified Rider RRS will produce net credit to ratepayers is contradicted by the record in this proceeding. The Commission should not hesitate to reject the Companies' proposal.

1. The Companies' forecast is stale and inaccurate.

The Companies' forecast that ratepayers will receive a $561 million net credit relies in part on the assumption that wholesale energy and capacity prices will reflect the projections provided by the Companies' expert, Mr. Judah Rose, in 2014. But as P3/ESPA Witness Dr. Joseph P. Kalt explained, the intervening two years have proven that Mr. Rose's projections were [redacted] and failed to reflect the decline in energy prices during last several

[129] Companies Ex. 197 at 4.

years—undercutting any claims that Modified Rider RRS will produce net benefits for ratepayers:[130]

> The Companies' power price forecast, prepared by Mr. Rose in 2014, [redacted] In particular, [redacted] to reflect the declines in power market prices over the past couple years. Attachment JPK-RH-1, for example, provides a comparison of the electric price forecast developed by Mr. Rose in his August 2014 analysis (as applied by Mr. Lisowski in his generation dispatch analysis and still relied upon in the Companies' latest NPV calculations) against current wholesale electricity market futures prices for the AEP/Dayton trading hub. Attachment JPK-RH-1 shows that Mr. Rose's outdated wholesale energy price forecast is [redacted] than currently reported AEP/Dayton futures market prices. The Companies' Proposal sets Rider RRS based on current AEP/Dayton futures prices; Mr. Rose's energy price forecast is clearly now irrelevant.[131] Consequently, the Companies' estimated early period ratepayer impacts, which rely centrally on Mr. Rose's power price forecasts, are clearly wrong – and wrong in claiming net ratepayer benefits.
>
> Similarly, the Companies' PJM RPM capacity price forecast is now approximately two years old. Over that period, it [redacted] upon which Rider RRS revenue would now be based. Attachment JPK-RH-2 examines the evolution of PJM's RPM capacity prices for the Companies' PJM capacity zone (ATSI) compared to those forecasted by Mr. Rose. As Attachment JPK-RH-2 shows, Mr. Rose's 2018/2019 and 2019/2020 capacity price projections were [redacted] actual PJM capacity prices of \$164.77/MW-Day and \$100.00/MW-Day, respectively. [redacted]

[redacted][132]

[130] P3/EPSA Ex. 18C at 15-16.
[131] Mikkelsen Rehearing Testimony at 8:6-13.
[132] P3/EPSA Ex. 18C, Attachments JPK-RH-1 and JPK-RH-2.

[redacted]

[redacted]

The evidence in the record reflects that the Companies' forecasts [redacted]

2. **Using known energy forward and capacity auction results, the Companies' forecast reflects ratepayers would incur at least a $154 million net charge ($342 million NPV) over the term of Modified Rider RRS.**

Dr. Kalt projected the first three years of Rider RRS compared to the Companies' projection[133] to reflect wholesale energy prices, based on the average AEP Dayton Hub March 2016 forward prices, and known capacity prices in the ATSI zone for 2016/2017, 2017/2018 and

[133] See Sierra Club. Ex. 89.

2018/2019.[134] As shown on the table below (which reflects Dr. Kalt's findings) after accounting for updated wholesale prices during the first three years of the term of Modified Rider RRS, ratepayers can expect to pay at a minimum a $154 million net charge ($342 million NVP), a difference of approximately $715 million from the $561 million net credit projected by the Companies.

Table - Modified Rider RRS Impacts Based on March 2016 Known Prices (in Millions)

	2016	**2017**	**2018**	**2019**	**2020**	**2021**	**2022**	**2023**	**2024**	**Total**
Projected Market Revenue	519	920	909	1,507	1,657	1,693	1,738	1,771	748	11,462
Projected Costs	762	1,330	1,386	1,381	1,450	1,477	1,561	1,581	688	11,616
Under (Over) Recovery	243	410	477	(126)	(207)	(216)	(177)	(190)	(60)	**154**
NPV Under (Over) Recovery	226	355	384	(94)	(144)	(140)	(107)	(107)	(31)	**342**

If the disparity between the Companies' forecast and current prices continues to widen, the charges that ratepayers can expect to pay under Modified Rider RRS will only grow more exorbitant.

3. Staff [redacted] that ratepayers will [redacted].

Staff also [redacted]

[134] See P3/EPSA Ex. 18C at 15-16; Rehearing Tr. Vol. 5 at 1185.
[135] Rehearing Tr. Vol. 5 at 1201-1202.

[redacted]

4. The Companies have failed to rebut the evidence that Modified Rider RRS will lead to net charges, not credits, over the term of ESP IV.

The Companies have failed to rebut the evidence in this proceeding that the Companies' own forecast of Modified Rider RRS, when reconciled with known market prices, projects that Modified Rider RRS will impose a net charge of hundreds of millions on ratepayers over the term of ESP IV. Instead, the Companies continue to stick to their naked claim that ratepayers will see receive a net credit under their proposal.[136] In light of the undisputed evidence to the contrary, the Commission should safeguard the interests of ratepayers and reject Modified Rider RRS.

F. Modified Rider RRS Will Violate R.C. 4905.22 as an Unreasonable Charge.

R.C. 4905.22 provides that "[a]ll charges made or demanded for any service rendered, or to be rendered, shall be just, reasonable. . . and no unjust or unreasonable charge shall be made or demanded for, or in connection with, any service . . . ."

As shown above, the Companies' own forecast for Modified Rider RRS, when adjusted for known energy forward and capacity prices during the first three years of ESP IV, projects that Modified Rider RRS will impose a net charge of hundreds millions of dollars on ratepayers over the term of ESP IV. And the risk of even greater charges will only grow if power prices continue to diverge from the Companies' stale forecast. That alone makes Modified Rider RRS a patently unreasonable charge that violates R.C. 4928.22.

Moreover, the alleged "hedge" that Ohio ratepayers will receive in exchange for the exorbitant charges paid to the Companies is ill-conceived, runs contrary to sound regulatory

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[136] Rehearing Tr. Vol. 10 at 1699.

principles, and can lead to nonsensical results that undercut its stated aim of tempering rate instability.

Dr. Kalt testified that because Modified Rider RRS is predicated on—and would shift the risks of—unregulated generation to captive ratepayers, it runs contrary to established ratemaking principles:[137]

> The Rider RRS would be unrelated to the Companies' actual costs incurred to meet ratepayers' service requirements. Instead, we have a fictional cost construct that would simply provide a tracking mechanism by which the Companies could charge or credit ratepayers and guarantee revenues to the overall FirstEnergy family sufficient to provide cost-plus-profit recovery for affiliated generation plants.
>
> In short, the Companies' revised proposal is based not on the costs the Companies as regulated utilities would incur to serve ratepayers, but instead on the difference between cost and revenue streams of unregulated generation. **<u>The Companies' Proposal has no foundation in a cost-of-service regulation framework, or under any principles of utility regulation that I have studied in my career</u>.**

Moreover, because Modified Rider RRS marries simulated costs and generation quantities with actual market prices, it can produce bizarre results that artificially increase costs for ratepayers, undermining the rider's claimed rate-stabilizing feature. As OCC/NOAC Witness James F. Wilson observed, under original Rider RRS, "the amounts to be collected through the rider would depend upon actual operation and dispatch of the FES plants, and their actual energy market earnings."[138] But Modified Rider RRS fixes the generation quantities based on projections contained in the record of these proceedings, and that can produce outcomes that are "strange and nonsensical."[139]

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[137] P3/EPSA Ex. 18C at 11 (Emphasis added).
[138] OCC/NOAC Ex. 1 at 17.
[139] *Id.* at 18.

Specifically, Mr. Wilson noted, market conditions during the term of Modified Rider RRS could diverge from the Companies' 2014 projections.[140] As such, coal, natural gas, and energy price relationships would continue to change, causing some plants being retired and others to be built. These developments, among other factors, would influence the dispatch of these plants, "likely resulting in energy and fuel prices, and generation amounts, very different from what was projected back in 2014."[141] As a result, "the fixed generation quantities will, from time to time, turn out to be very inconsistent with the actual market prices that will be used in the calculations."[142]

For example, the Companies' projections could forecast relatively low generation quantities when actual market prices are high, resulting in lower revenues offsets than what would have occurred had actual generation quantities been used as was proposed with original Rider RRS.[143] Likewise, when projecting generation quantities, the Companies' forecast assumed energy prices would be higher than they are today. When actual energy prices are low, "using generation quantities from the 2014 simulation could lead to substantial losses, when in fact the plants would likely have run very little and had small losses."[144] As a consequence "artificial, calculated losses" would be charged to ratepayers under Modified Rider RRS.[145] Summarizing his findings, Mr. Wilson concluded that Modified Rider RRS "essentially results in assuming inefficient plant operation, which will tend to raise the cost of Rider RRS to customers compared to the earlier approach to Rider RRS."[146]

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[140] *Id.*
[141] *Id.*
[142] *Id.*
[143] *Id.* at 20.
[144] *Id.*
[145] *Id.*
[146] *Id.* at 21.

Lastly, and as discussed earlier, due to the lag inherent in Modified Rider RRS' reconciliation process, wholesale prices and Rider RRS adjustments may not end being counter-cyclical as intended, but instead could reinforce each other, resulting in customers incurring charges in periods of higher prices, and receiving credits in periods of lower prices, thereby increasing—not decreasing—retail rate instability.[147]

In sum, R.C. 4905.22 requires a public utility's charges to be "just and reasonable." It is manifestly unjust and unreasonable to ask ratepayers to pay hundreds of millions of dollars or more for an ill-conceived "hedge" that may result in anomalous outcomes and whose price-stabilizing benefits are questionable.

G. Modified Rider RRS Does not Satisfy the *AEP ESP III* PPA Rider Factors

In the *AEP ESP III* decision, the Commission approved a PPA Rider, which it set at an initial rate of zero.[148] The Commission required AEP Ohio to address the following factors, which the Commission would balance, but not be bound by, in deciding whether to approve cost recovery under the PPA Rider:[149]

- The financial need of the generating plant;
- The necessity of the generating facility, in light of future reliability concerns, including supply diversity;
- A description of how the generating plant is compliant with all pertinent environmental regulations and its plan for compliance with pending environmental regulations; and
- The impact that a closure of the generating plant would have on electric prices and the resulting effect on economic development within the state.

[147] P3/EPSA Ex. 5 at 28-29.
[148] *AEP ESP III* at 25
[149] *Id.* at *25*.

With respect to Modified Rider RRS, the Companies have taken the position that these factors are inapplicable because "those factors applies only to a PPA-type construct, which modified Rider RRS is not."[150]

But by including these factors in its consideration of whether to approve cost recovery under a PPA rider, the Commission sent a clear message that a PPA Rider must offer more than the mere possibility of retail rate stability; instead a properly conceived PPA rider would also be designed to ensure the viability of Ohio based generation, thereby protecting local economies against plant closure, maintaining resource diversity in the state, and avoiding costly transmission-upgrades.

The Companies propose that the Commission should simply substitute original Rider RRS with Modified Rider RRS. But because Modified Rider RRS is no longer tied to a PPA with FES, it is no longer designed to protect against the closure of any particular plants, thus eschewing the aforementioned benefits that result from maintaining the viability of Ohio-based generation.[151] The absence of these benefits from Modified Rider RRS was not lost on Commission Staff, who recommended the Commission deny Modified Rider RRS, in part, because:

> The purpose of granting Rider RRS, according to the Commission, was not simply to provide a financial hedge to all the Companies' distribution customers but also to preserve resource diversity in the state and to protect the local economies from the negative impacts of power station closures. **The Modified Rider RRS is no longer comprised of a PPA that is tied to specific power stations in the state, and accordingly, eliminates two important benefits that the Commission highlighted in its Opinion and Order referenced above.**[152]

[150] Companies Ex. 197 at 19.
[151] *See* Rehearing Tr. Vol. 1 at 51, 179, Staff Ex. 15 at 13.
[152] Staff Ex. 15 at 13.

While the Companies may claim that Modified Rider RRS "provides all the benefits of the Rider RRS that was originally approve by the Commission,"[153] in reality, Modified Rider RRS strips out many of the benefits that the Commission believed to be key to a properly conceived rate stability hedge. For this reason alone, the Commission should not approve Modified Rider RRS.

H. The Companies Have Not Demonstrated That ESP IV, With Modified Rider RRS, is More Favorable in the Aggregate Than an MRO

R.C. 4928.143(C)(1) requires the Commission to approve, or modify and approve, the ESP, if the ESP (including its pricing and all other terms and conditions, including deferrals and future recovery of deferrals) is more favorable in the aggregate as compared to the expected results that would otherwise apply under R.C. 4928.142. In this proceeding, the Companies have the burden of showing that the ESP IV, with Modified Rider RRS, is more favorable in the aggregate as compared to an MRO.

The Companies claim that Modified Rider RRS is "designed to produce the same or very similar results for customers" and thus, Modified Rider RRS has no impact on the Commission's previous finding in this proceeding that the Companies' ESP IV was more favorable than an MRO.[154] But the record reflects that any quantitative benefit found by the Commission to have existed with original Rider RRS is now eviscerated in light of known energy forward and capacity prices, and instead, ratepayers will be exposed to the near-certain risk of paying hundreds of millions in charges over the term of Modified Rider RRS. The risk of enormous charges under Modified Rider RRS alone outweighs any qualitative benefits included in ESP IV.

In its March 31, 2016 Decision, the Commission found that "on a quantitative basis the proposed ESP IV is more favorable than an MRO by $307.1 million," which consists of "the predicted $256 million in net revenue predicted for Rider RRS and $51.1 million in committed

[153] Companies Ex. 197 at 10.
[154] Companies Ex. 197 at 18.

shareholder funding over the eight years of ESP IV."[155] But as addressed above, the prediction that customers will receive a net revenue benefit under Modified Rider RRS is completely unrealistic in light of known energy and capacity prices.

Rather, the evidence in the record reflects that Modified Rider RRS will at a minimum cost ratepayers hundreds of millions of dollars or more over the term of ESP IV. Specifically, Dr. Kalt calculated the first three years of Modified Rider RRS using known energy prices, based on the average AEP Dayton Hub March 2016 forward prices, and actual capacity prices in the ATSI zone for 2016/2017, 2017/2018, and 2018/2019. His findings indicate that during the first three years of ESP IV, ratepayers would pay an additional $715 million dollars in charges.[156] When the Companies' projections are revised to reflect these known prices, they show that Modified Rider RRS will produce a net charge of $154 million ($342 million NPV).[157] [redacted][158]

Thus, using the Companies' own projections for 2019 through the end of the ESP IV term, the uncontroverted evidence in this proceeding reflects that ratepayers would pay hundreds of millions in charges under Modified Rider RRS, negating the Commission's finding of a $307.1 million benefit under an ESP and resulting in ESP IV, in the aggregate, being less favorable than an MRO on a quantitative basis.

The risk of enormous charges also outweighs any qualitative benefits of ESP IV. In fact, the qualitative benefits identified by the Commission with respect to original Rider RRS

[155] March 31, 2016 Decision at 119.
[156] *See* discussion above in Section III.E.
[157] *Id.*
[158] Rehearing Tr. Vol. 5 at 1201-1202.

consisted largely of the "continuation" of various existing options and programs, a "goal" to reduce CO_2 emissions, and programs to "promote" energy efficiency.[159] The value of these benefits are modest when compared to the near-certainty ratepayers would face hundreds of millions (if not billions) in charges under Modified Rider RRS. Moreover, for reasons discussed above, the efficacy of Modified Rider RRS as a hedge against rate volatility is, at best, questionable, and certainly does not justify exposing ratepayers to the risk of massive charges.

Finally, while the Commission did not expressly rely on the alleged benefits of original Rider RRS as a means of preserving resource diversity in the state, protecting local economies from the impacts of plant closure, and avoiding costly transmission upgrades in its discussion of the ESP v. MRO test in its March 31, 2016 Decision, it is worth noting that Modified Rider RRS does not purport to provide any of these benefits, further detracting from its qualitative value (if any).[160]

The Companies bear the burden of showing that ESP IV, with Modified Rider RRS, is more favorable in the aggregate as compared to an MRO. The Companies have failed to meet that burden. Quantitatively, the evidence reflects Modified Rider RRS will almost certainly cost ratepayers hundreds of millions of dollars, negating any other quantitative benefits that would be included with ESP IV. Further, any qualitative benefits that flow from ESP IV are decidedly modest when weighed against the risk of exorbitant charges under Modified Rider RRS. Based on the record before it, the Commission must find that ESP IV, with Modified Rider RRS, is not more favorable, in the aggregate, than an MRO.

[159] March 31, 2016 Decision at 119.
[160] *See* Rehearing Tr. Vol. 1 at 51, 179; Staff Ex. 15 at 13.

V. THE COMMISSION SHOULD REJECT RIDER DMR, AS PROPOSED BY STAFF AND THE COMPANIES

Even if the Commission could decide Rider DMR on rehearing (which it cannot), the Commission should reject Rider DMR, as proposed by the Staff and as proposed to be modified by the Companies. Providing credit support to a public utility for the benefit of its parent corporation and related affiliates is not authorized under the Commission's governing statutes, especially when: (1) the Commission's own staff acknowledges that the credit support is "not for the provision of a distribution service …[;]" (2) Rider DMR, when considered with the Companies' ESP IV, is not more favorable in the aggregate than an MRO, and (3) Rider DMR, if approved, would violate R.C. 4905.22 as an unjust and unreasonable charge.

A. Standard of Review

The Commission's review of the Rider DMR proposal, like its review of the Modified Rider RRS proposal is multifaceted.

First, the Commission must find that Rider DMR is authorized under R.C. 4928.143(B)(2)(h), as Staff contends.

Second, the Commission must find, pursuant to R.C. 4928.143(C)(1), that the ESP IV with the Rider DMR is more favorable in the aggregate as compared to the expected results from an MRO.

Third, the Commission must find, as required by R.C. 4905.22, that Rider DMR charges will be just and reasonable.

Fourth, as the proponents of the Rider DMR proposals, Staff and the Companies carry the burden of proof for their respective Rider DMR proposals.[161]

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[161] *See, e.g.*, *In the Matter of the Application of The East Ohio Gas Company d/b/a Dominion East Ohio to Adjust its Pipeline Infrastructure Replacement Program Cost Recovery Charge and Related Matters*, Case No. 09-458-GA-RDR, Opinion and Order at 9 (December 16, 2008); and *In the Matter of the Conjunctive Electric Service*

Finally, the Commission's findings on these issues must be based on evidence that is in the record.[162]

B. Rider DMR is not Authorized by R.C. 4928.143(B)(2)(h)

Staff witnesses Turkenton and Choueiki suggested in their testimony that Rider DMR could be permissible under R.C. 4928.143(B)(2)(h).[163] That statute states that an ESP may provide for or include:

> **Provisions regarding the utility's distribution service, including, without limitation** and notwithstanding any provision of Title XLIX of the Revised Code to the contrary, **provisions regarding single issue ratemaking,** a revenue decoupling mechanism or any other incentive ratemaking, and provisions **regarding distribution infrastructure and modernization incentives for the electric distribution utility**. (Emphasis added.)

While Staff may have euphemistically used the term "distribution" in naming their rider, Rider DMR is a not, in fact, a "provision[] regarding the utility's distribution service" and therefore does not satisfy the requirements of R.C. 4928.143(B)(2)(h). Rather, the sole function of Rider DMR is credit support—specifically, to provide a cash infusion to the Companies for the purpose of shoring up FirstEnergy Corp.'s credit rating. The testimony of Staff and Company witnesses confirms that Rider DMR is *not* a provision regarding the Companies' distribution service: [164]

Witness	Testimony	Citation
Staff witness Buckley	"Q. The credit support is not for the provision of a distribution service by the distribution companies to the ratepayers, correct? "A. Correct."	Rehearing Tr. Vol. 3 at 611
Staff witness	"…based on Dr. Choueiki's testimony and Mr. Buckley's	Rehearing Tr.

Guidelines Proposed by Participants of the Commission Roundtable on Competition in the Electric Industry, Case No. 96-406-EL-COI, Entry at 3 (December 30, 1997).

[162] *See, In re Ohio Power Company*, Case Nos. 13-3285-EL-SSO et al., Opinion and Order at 24 (February 25, 2015), citing *Tongren v. Pub. Util. Comm.*, 85 Ohio St.3d 87 (1999).

[163] Staff Ex. 14 at 3-4; Staff Ex. 15 at 15.

[164] Additionally, Staff witness Choueiki testified that proposed Rider DMR is not a generation-related change. (Rehearing Tr. Vol. 4 at 1010).

Witness	Testimony	Citation
Turkenton	testimony that this is credit support to the company [sic] for them to be able to access the capital markets. And then, in turn, by accessing the capital markets, we hope that they modernize the grid." "Q. Okay. And does the fact that this is a distribution rider under the distribution portion of the ESP statute influence your thinking at all? "A. I don't believe this is -- it is named "distribution modernization rider," but I believe Staff Witnesses Buckley and Dr. Choueiki and myself believe that this is a form of credit support for the company [sic] to be able to access -- access the capital markets and hopefully they will, in turn, modernize the grid. So there is a distribution component to it, but I don't know that staff believes that it is a distribution rider, per se. That late recovery will happen when they apply for this in the SmartGrid rider."	Vol. 2 at 426. See also, Tr. Vol. 2 at 472 Rehearing Tr. Vol. 2 at 429
FirstEnergy witness Mikkelsen	"Q. And, by contrast, rider DMR would not be for recovery of any specific expenses, if any, incurred by the companies, correct? "A. Yes."	Rehearing Tr. Vol. 10 at 1645

Unlike previous distribution-service riders approved by this Commission in this proceeding, such as the Delivery Capital Recovery Rider,[165] Rider DMR is being provided solely for credit support[166] and is not related to any cost recovery of distribution services, making it unauthorized under R.C. 4928.143(B)(2)(h).

Moreover, Staff's mere "hope" that the Companies would use the millions they receive from Ohio ratepayers to invest in grid modernization is not enough to convert a credit support rider to a provision "regarding the utility's distribution service." Nor is it sufficient that Staff proposes that the Commission "direct the Companies to begin investing in distribution assets,"[167]

[165] *See* March 31, 2016 Decision at 119.
[166] Rehearing Tr. Vol. 10 at 1687.
[167] Staff Ex. 15 at 16.

given the glaring absence in the Staff's proposal of any terms requiring the Companies to actually use the money collected under Rider DMR for grid modernization.

Regardless of whether the Commission may believe there are legitimate policy objectives to be served with providing credit support to FirstEnergy Corp., Rider DMR must be sustained, if at all, under R.C. 4928.143(B)(2)(h). A rider intended solely for credit support and offered with the "hope" that the Companies would deign to use the hundreds of millions collected thereunder for grid modernization and a vague request for a Commission directive is far too attenuated from the statutory requirement that Rider DMR be a "provision[] regarding the utility's distribution service" and thus, fails to satisfy R.C. 4928.143(B)(2)(h).

C. Staff and the Companies Have not Demonstrated That ESP IV, with Rider DMR, is More Favorable, in the Aggregate, than an MRO

R.C. 4928.143(C)(1) requires the Commission to approve, or modify and approve, the ESP, if the ESP (including its pricing and all other terms and conditions, including deferrals and future recovery of deferrals) is more favorable in the aggregate as compared to the expected results that would otherwise apply under R.C. 4928.142. Here, neither Staff nor the Companies have demonstrated that ESP IV, with Rider DMR, is more favorable in the aggregate as compared to an MRO.

Staff witness Turkenton testified that with Rider DMR added to the ESP IV "the ESP application is more favorable in the aggregate than an MRO application would be."[168] In her opinion, Rider DMR will have "no impact" on the ESP versus MRO test because credit support could be recovered both under an MRO application per R.C. 4928.142(D)(4) and under an ESP application per R.C. 4928.143(B)(2)(h).[169] In other words, Ms. Turkenton concluded that the addition of Rider DMR would be neutral for purposes of the MRO versus ESP test, and the

[168] Staff Ex. 14 at 2-3.
[169] Staff Ex. 14 at 3-4.

Commission's previously found quantitative and qualitative benefits of the ESP IV as approved would result in the ESP being more favorable in the aggregate than an MRO application.

Ms. Mikkelsen concurred that the addition of Rider DMR would be neutral for purposes of the MRO versus ESP test, but reached that conclusion on the theory that the DMR revenues could be recovered in a base rate proceeding, in Rider AMI or another mechanism.[170] Ms. Mikkelsen added that the benefit associated with the requirement to keep the FirstEnergy Corp. headquarters in Akron, Ohio, also should be factored into the ESP versus MRO test.[171] Upon including the headquarters benefit amount, Ms. Mikkelsen stated that at worst the Rider DMR is neutral, or the rider will be quantitatively beneficial under the test.[172]

Ms. Turkenton stated that the same qualitative benefits of the ESP previously considered by the Commission[173] would also have to be taken into consideration and when that is done, the ESP IV is more favorable than an MRO.[174] Ms. Mikkelsen likewise testified that the qualitative benefits of the ESP IV render the ESP IV more favorable than an MRO.[175] Taken together, both witnesses contend that the ESP versus MRO test is satisfied.

[170] Companies Ex. 206 at 19.
[171] Companies Ex. 206 at 19-20.
[172] Companies Ex. 206 at 20.
[173] Those qualitative benefits are: (a) continuation of the distribution rate increase freeze until June of 2024; continuation of multiple rate options and programs to preserve and enhance rate options for various customers provided in previous ESPs; the establishment of a goal to reduce CO-2 emissions by FirstEnergy Corp. with periodic reporting requirements; reactivation and expansion of energy efficiency programs; and programs to promote the use of energy efficiency programs by small businesses pursuant to state policy. (Tr. Vol. 2 at 449, 487-488) *See, also*, March 31, 2016 Decision at 119-120.
[174] Staff Ex. 14 at 4; Tr. Vol. 2 at 479, 485.
[175] Companies Ex. 206 at 20.

Taking Ms. Turkenton and Ms. Mikkelsen's numbers, the ESP IV versus MRO quantitative results, excluding Rider DMR (which they both claim is neutral), would be as follows:

Witness	**Quantitative Benefits of the ESP IV**	
Turkenton	($ in millions)	
	Economic Development Funding	$ 24.0
	Low Income Funding	$ 19.1
	Customer Advisory Agency Funding	$ 8.0
	Total Quantitative Benefits	$ 51.1
Mikkelsen	($ in millions)	
	Economic Development Funding	$ 24.0
	Low Income Funding	$ 19.1
	Customer Advisory Agency Funding	$ 8.0
	Headquarters	up to $ 568.0
	Total Quantitative Benefits	$ 51.1 to 619.1

The numbers in the above table are not correct though because the quantitative analysis of the ESP versus MRO test presented by Ms. Turkenton and Ms. Mikkelsen is flawed. The first flaw is that revenues from Rider DMR would not be included on the MRO side of the equation. Credit support costs cannot be recovered in an MRO under R.C. 4928.142(D)(1) – (3). Those subsections allow an MRO to include fuel, purchased power and supply and demand portfolio costs and, as Ms. Turkenton admitted, Rider DMR's purpose of "credit support is different from generation."[176] Also, credit support costs would not be included in an MRO under provision (D)(4) as they are not:

- Incurred to comply with environmental laws and regulations – credit support is wholly unrelated.
- To address any emergency that threatens the utility's financial integrity – there is no claim by the Companies in this case that *they* have *any emergency* that threatens *their* financial integrity.

[176] Rehearing Tr. Vol. 2 at 429.

Similarly, no Staff witness claimed that any of the Companies have an emergency that threatens their financial integrity.[177]

- To ensure the adequacy of the revenue to the utility to avoid a constitution "taking" of property – there has been no claim that credit support revenues involve a taking.

Thus, the MRO statute does not support inclusion of the Rider DMR costs in the MRO side of the equation.

Second, it is error to attribute the retention of the FirstEnergy Corp. headquarters in Akron, Ohio, to the DMR for purposes of this test. There was no intention to move the headquarters before Rider DMR was presented. Ms. Mikkelsen has not been informed that the headquarters will be moved out of Akron.[178] More specifically, FirstEnergy Corp. stated its intent in May 2015 to remain in its headquarters for 8.5 years – the company signed a lease, separate and apart from the Rider DMR proposal.[179] Additionally, the Companies agreed in the Stipulation that FirstEnergy would maintain the corporate headquarters for the duration of Rider RRS.[180] Tellingly, the Commission did not identify the retention of the corporate headquarters as a benefit of the ESP IV when the analysis was done in March 2016. As a result, this condition of Rider DMR should not, for purposes of the test, be considered either a quantitative or a qualitative benefit of the ESP IV with the inclusion of Rider DMR.

[177] The record indicates the opposite situation for the Companies. For example, their credit ratings are and have been for years at investment grade levels. Rehearing Tr. Vol. 10 at 1780. Moreover, with Moody's "delinking" the competitive segment from FirstEnergy Corp., there is less of a concern of the Companies' competitive affiliates impacting them financially. (P3/EPSA Ex. 21 at 1, 2)

[178] Rehearing Tr. Vol. 10 at 1603-1604.

[179] Dynegy Ex. 1 at 11; Rehearing Tr. Vol. 10 at 1604.

[180] Companies Ex. 154 at 17 (¶ I.3).

Accounting for the above errors by Turkenton and Mikkelsen, the actual quantitative weighing of the ESP IV versus an MRO is:

Witness	Quantitative Benefits of the ESP IV	
Turkenton	($ in millions)	
	Economic Development Funding	$ 24.0
	Low Income Funding	$ 19.1
	Customer Advisory Agency Funding	$ 8.0
	Rider DMR	$(393.0)
	Total Quantitative Benefits	$(341.9)
Mikkelsen	($ in millions)	
	Economic Development Funding	$ 24.0
	Low Income Funding	$ 19.1
	Customer Advisory Agency Funding	$ 8.0
	Rider DMR	$(558.0)
	Total Quantitative Benefits	$(506.9)

The previously identified qualitative benefits of the ESP IV do not outweigh the $393 million, the $558 million, or up to $1.126 billion that would be imposed on customers from Rider DMR. The evidence does not establish that, with Rider DMR, the Companies' ESP IV will be more favorable than an MRO. Rather, the evidence demonstrates the opposite. The Commission should reject the Rider DMR proposal because it fails the ESP versus MRO test.

D. Rider DMR, If Approved, Will Violate R.C. 4905.22 as an Unjust and Unreasonable Charge

R.C. 4905.22 provides that "[a]ll charges made or demanded for any service rendered, or to be rendered, shall be just, reasonable. . . and no unjust or unreasonable charge shall be made or demanded for, or in connection with, any service . . . ."

There is no just and reasonable basis on which to approve Rider DMR, either as proposed by Staff or as modified by the Companies. First, under either Staff's or the Companies' formulation, the proposed rider offers ratepayers no guarantees whatsoever that the Companies will spend any of the revenues collected thereunder on tangible grid modernization efforts. Second, while the Companies will surely not object to receiving no-string-attached revenues from Ohio ratepayers, the Companies do not *need* Rider DMR. That is, the evidence has not borne out any concrete impediment that prevents the Companies from undertaking grid modernization today, particularly when the costs of doing so are ultimately recoverable through a different rider.

Third, the Companies already have other means of generation cash flow from operations that can support FirstEnergy Corp.'s credit ratings. Ohio ratepayers should not be placed in a position of paying money to the Companies (and to FirstEnergy Corp.) without any commitment that Rider DMR dollars would result in tangible investments in the Companies' grid. Fourth, while Rider DMR, as proposed by Staff is woefully unjust and unreasonable, the Companies' proposed modifications make that rider even more unpalatable for Ohio's ratepayers, and should be rejected.

1. Rider DMR will not guarantee grid modernization in the Companies' service territory.

Under either Staff's or the Companies' formulations of Rider DMR, the rider contains no requirement for actual grid modernization or any of the specific initiatives listed in Dr. Choueiki's testimony.[181]

Staff is only generally recommending that the Commission direct the Companies to initiate and start investing in modernizing the grid.[182] Moreover, Staff does not agree with an additional recommendation that the Companies make a certain level of investment in grid modernization.[183]

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[181] Rehearing Tr. Vol. 2 at 433; Rehearing Tr. Vol. 4 at 956-957.
[182] Staff Ex. 15 at 15; Rehearing Tr. Vol. 4 at 956, 958, 959, 968, 1001; Rehearing Tr. Vol. 5 at 1210.
[183] Rehearing Tr. Vol. 3 at 647-648.

As for the Companies, they have made it abundantly clear that they are not committing to grid modernization,[184] a fact that the Staff also acknowledges.[185] Staff acknowledged as well that, if FirstEnergy Corp. moved to a "more regulated operation," there would not necessarily be more distribution investment in Ohio; rather, investment could be made outside of Ohio and investment could be in the transmission side of the business.[186]

As a result, the only grid modernization commitment that exists is what the Companies agreed to previously in this proceeding – a statement that "the Companies agree to empower consumers through grid modernization initiatives that promote customer choice in Ohio" and the filing of a grid modernization business plan.[187] That plan was filed on February 29, 2016.[188] The filing contains different modernization scenarios, but lacks key details such as costs, a recommended scenario, detailed deployment schedule and other specific details.[189] Instead, the Companies included more generalities, such as:[190]

- "[T]he anticipated timeline assumes that 2016 and 2017 would be dedicated to the vetting of the Plan through a collaborative process and discussions with interested parties on a grid modernization strategy and ideas from parties that produces a solution that best benefits the Companies' customers."

- "It is the Companies' desire to use this Plan as a catalyst to spur discussions with interested parties -- many of whom have knowledge, experience and expertise in smart grid technologies and can provide valuable insight into effective deployment of these

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[184] Rehearing Tr. Vol. 10 at 1607, 1609 In addition, in presenting the Modified Rider RRS proposal, the Companies made no commitment to modernizing the grid. (Rehearing Tr. Vol. 1 at 58-59, 63-64, 69-70)
[185] Rehearing Tr. Vol. 2 at 472-473.
[186] Rehearing Tr. Vol. 3 at 587.
[187] Company Ex. 154 at 9-10.
[188] Administrative notice was taken of the business plan filing. (Rehearing Tr. Vol. 4 at 965-966) *See*, *In the Matter of the Filing by Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company of a Grid Modernization Business Plan*, Case No. 16-481-EL-UNC, Business Plan Filing (February 29, 2016).
[189] The timeline attached to the grid modernization business plan filing is wholly unrelated to grid modernization; it is a proposed timeline for the revenue decoupling requirement in the ESP IV Stipulation.
[190] Business Plan Filing, Attachment A at 13, 31.

> technologies. * * * The Companies look forward to working with all interested parties in moving this Plan forward."

Other than the filing of several motions to intervene, no further action on the part of the Companies or the Commission has occurred in that docket in the five months that the business plan has been pending. In Staff's view, that docket is for having a stakeholder process and forum to determine what the Companies should be doing with regard to grid modernization.[191] Plus, there are other initiatives, such as battery technology, that are to be explored, perhaps in other proceedings, in accordance with the Stipulation in this proceeding.[192]

Ratepayers should not be asked to spend hundreds of millions of dollars on the mere "hope" that the Companies would elect to use the money collected from Rider DMR to undertake grid modernization. In the absence of a requirement in the proposal mandating that Rider DMR dollars to be spent on concrete investments in grid modernization, ratepayers cannot be assured they will receive any benefit whatsoever from Rider DMR. A bare subsidy to FirstEnergy Corp. with no tangible requirement for grid modernization is patently unjust and unreasonable under R.C. 4905.22.

2. The Companies can achieve grid modernization without Rider DMR.

Neither Staff nor the Companies have established that the Companies require Rider DMR in order to proceed with grid modernization. To the contrary, the Companies already have means in place to undertake grid modernization and recover any costs (and a return on equity) incurred in doing so. That is what other Ohio utilities have done, and there are simply no just and reasonable grounds for treating the Companies differently.

[191] Rehearing Tr. Vol. 4 at 1021.
[192] Rehearing Tr. Vol. 4 at 1022; Company Ex. 154 at 11 (¶ E.2).

Staff believes that Rider DMR is an effort to "prime the [Companies'] capital pump"[193] with the hope that by doing so, the Companies would invest in grid modernization. But Staff was careful to avoid claiming that Rider DMR was necessary for the Companies to undertake grid modernization:[194]

> Q. Dr. Choueiki, does staff believe that this credit support is necessary in order to enable the companies to invest in modernizing the distribution grid?
>
> A. According to Mr. Buckley's testimony, it's necessary to provide credit support to the companies and to FirstEnergy Corp., not to modernizing the grid. The modernization of the grid is an objective and a -- and a policy of the State of Ohio that I cited in my testimony.

As discussed above, the Companies have already begun to proceed with a grid modernization business plan – something the Companies voluntarily agreed to do as part of the Stipulation in this case, which occurred many months before Rider DMR was first proposed by the Staff.

And once the Companies do invest in grid modernization, the Commission has already given them a means of recovering their investment costs through the Companies' Advanced Metering Infrastructure/Modern Grid Rider ("Rider AMI").[195] Rider AMI is an existing, nonbypassable rider applicable to all customers (except the GT customers). Rider AMI specifically identifies what costs it recovers:[196]

> The charges set forth in this Rider recover costs associated with the Ohio Site Deployment of the Smart Grid Modernization Initiative in Case No. 09-1820-EL-ATA. Any additional costs associated with expansion of the Ohio Site Deployment or the implementation of any additional advanced metering or grid modernization infrastructure in Ohio including, but not limited to, Commission directed, legislatively mandated or Company initiated and Commission approved infrastructure expansion will be collected through this Rider.

[193] Rehearing Tr. Vol. 5 at 1254-55.
[194] Rehearing Tr. Vol. 4 at 960.
[195] Rehearing Tr. Vol. 2 at 429, 460, 473-474; Rehearing Tr. Vol. 4 at 1015.
[196] *See, e.g.*, Ohio Edison Company Tariff, P.U.C.O. No. 11 at Sheet 106.

Moreover, the Commission decided as part of its March 2016 decision in this proceeding that, for any specifically approved parts of the Companies' newly proposed grid modernization business plan (a separately required filing which was made in February 2016), the cost-recovery will occur as follows:[197]

> The Companies' recovery shall be through a rider, which would commence within three months of the issuance of a Commission order authorizing the implementation of a Grid Modernization project, and shall be based on a forward looking formula rate concept that would be subsequently reconciled for actual costs compared to forecasted costs and for actual revenue received compared to revenue forecasted to be recovered. **The return on equity shall initially be set at 10.38%** (following the ATSI ROE as that may be adjusted in the future), **with an additional 50 basis point adder,** the cost of debt will be set at the embedded long term costs of debt in existence at the time the rider is updated, and the capital structure will be based on the actual capital structure in existence at the time the rider is updated. **All costs incurred will be recovered in Rider AMI, which will be updated and reconciled on a quarterly basis, and will remain in effect until such costs are fully recovered.** Any operational savings that are produced by the investment and accrue to the Companies, such as reduced meter reading expense, will be credited against the costs during the quarterly update and reconciliation process.

In addition to enabling the Companies to recover their costs expended in grid modernization, Rider AMI will itself provide the Companies with cash from operations that can support credit ratings.[198]

In fact, Rider AMI-like riders have been the means through which other Ohio utilities have deployed smart grid equipment. These other utilities have not needed a special credit support rider in order to undertake such grid modernization—and there is no reason to treat the Companies more favorably.

[197] Company Ex. 154 at 10 (footnote omitted).
[198] Rehearing Tr. Vol. 10 at 1643-1644; Company Ex. 154 at 10, 12-13.

For example, Duke Energy Ohio, Inc. ("Duke") has deployed smart grid equipment and it has recovered its costs through two riders, as the roll-out took place.[199] Duke did not receive credit support first, with a promise of then also recovering the deployment costs through AMI-like riders. Similarly, Ohio Power Company ("AEP Ohio") has deployed smart grid equipment throughout a portion of its service territory.[200] It recovered its costs through an AMI-like rider as that roll-out took place.[201]

Commission precedent establishes that there has been no credit support first, with subsequent additional recovery afterward. Neither Staff nor the Companies have articulated a persuasive reason for why the Companies should be treated more favorably than the other Ohio utilities.

3. Other means of generating additional cash flow are available to the Companies.

Lest the Commission worry that without Rider DMR, the Companies would be starved from vital cash flow, the record reflects that the Companies already have other means of generating cash that may support maintaining investment-grade credit ratings. Specifically, Ms. Mikkelsen testified that credit support is provided to FirstEnergy Corp. via other corporate initiatives, including from the returns on equity from storm cost recovery, base rates, capital recovery filings, and a vegetation management rider.[202] She added that the equivalent applies in Ohio, stating "[i]f the Ohio Commission were to approve capital recovery for investment in the

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[199] Duke's riders are titled Distribution Reliability-Infrastructure Modernization Rider (Rider DR-IM) and Advanced Utility Rider (Rider AU). *In the Matter of the Application of Duke Energy Ohio, Inc., for Approval of an Electric Security Plan*, Case Nos. 08-920-EL-SSO et al., Opinion and Order (December 17, 2008); *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in Rates*, Case Nos. 07-589-GA-AIR et al., Opinion and Order (May 28, 2008).

[200] *In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets,* Case Nos. 08-917-EL-SSO et al., Opinion and Order (March 18, 2009).

[201] *Id.* at 38. That rider was titled the GridSMART Rider. *Id.*

[202] Rehearing Tr. Vol. 10 at 1634, 1641, 1642, 1649, 1650, 1662, 1664, 1667; Companies Ex. 206 at 17-18.

distribution system, that would -- and it included a return on investment, that would provide credit support to the companies."[203] She agreed that the recovery for any approved grid modernization business plan under Rider AMI would also provide credit support for the Companies because it too will include a return on equity.[204] It is unjust and unreasonable to ask the Companies' captive ratepayers to provide the Companies with millions in unrestricted dollars without any commitment that their Rider DMR dollars would translate into tangible investments in the Companies' grid.

4. The Companies' proposed modification to Rider DMR would make an already-unjust and unreasonable proposal even more unpalatable for the Companies' ratepayers.

For the reasons outlined above, Rider DMR is patently unjust and unreasonable. But the Companies' proposed modification to Rider DMR makes an already-unlawful rider even more unpalatable for the Companies' ratepayers.

Apparently believing that Staff's proposal was too stingy, Ms. Mikkelsen testified that the amount to recover under Rider DMR should be $558 million per year, based on an allocation to Ohio ratepayers of 40% of net income.[205] She and FirstEnergy witness Murley testified that an additional amount should be added on top of the $558 million per year as indicative of the value of the FirstEnergy Corp. headquarters being retained in Akron, Ohio, as required by one of the Staff's conditions in the DMR proposal. Ms. Murley estimated that additional amount could be as high as $568 million per year.[206] Taken together, the Companies' proposal for DMR could

[203] Rehearing Tr. Vol. 10 at 1643.
[204] Rehearing Tr. Vol. 10 at 1643-1644; Companies Ex. 154 at 10, 12-13.
[205] Companies Ex. 206 at 12-14.
[206] Companies Ex. 206 at 14; Companies Ex. 205 at 6; Rehearing Tr. Vol. 10 at 1602-1603.

reach a charge of $1.126 billion a year. This amount far exceeds the average remaining shortfall identified by the Companies as illustrated below:[207]

12/31/2012 Shortfall	12/31/2013 Shortfall	12/31/2014 Shortfall	Average
$590 million	$799 million	$1,290 million	$893 million 60% of 893 = $536 million

Thus, under the Companies' proposed modifications to Rider DMR, their customers would pay a minimum of 40% of the cash shortfall each year, as well as an amount up to 100% of the remaining average cash shortfall each year ($536 million). Given that the Companies' proposed modifications also include a longer period of time for the rider – nearly eight years – ratepayers will be covering not a "fair share," but all of the average cash shortfall that the Companies claim is needed based on the recent past.[208] Not only is it unfair for Ohioans to take on that responsibility, it is directly contrary to the Staff's determination that Ohio ratepayers not be responsible for the entire shortfall.[209] Thus, the Companies are proposing that they recover between $4.185 billion and $8.445 billion over the ESP IV.[210] This is plainly unjust and unreasonable.

In sum, for all of the foregoing reasons, Rider DMR, whether under Staff's or the Companies' formulations, does not meet the statutory requirements that a public utility's charges be "just and reasonable." At the end of the day, Rider DMR would transfer hundreds of millions of captive ratepayer dollars to the Companies with no guarantee that ratepayers would see any of

[207] Companies Ex. 206 at 13; Rehearing Tr. Vol. 10 at 1787-1788.
[208] Companies Ex. 206 at 14; Rehearing Tr. Vol. 10 at 1603.
[209] Staff Ex. 13 at 5.
[210] This calculation assumes that Commission authorization is granted and that collections under the Rider DMR occur for 7.5 years. That amount of time would vary depending upon when any Commission authorization occurs.

their money be spent on grid modernization. That kind of arrangement falls far short of satisfying R.C. 4905.22.

VI. THE EXAMINERS ERRONEOUSLY STRUCK TESTIMONY ON THE IMPACTS OF MODIFIED RIDER RRS

Compounding the error of holding a hearing "regarding the provisions of the Modified RRS proposal,"[211] the Attorney Examiners erred in striking Dr. Kalt's testimony showing that the Modified RRS proposal is unreasonable, unreliable and contrary to the public interest. The Commission should reverse the unlawful rulings striking that evidence.

A. Relevant Issues in the Hearing Included Calculations of Costs and Revenues and Forecasted Impacts of the Modified RRS Proposal

At hearing, the Companies introduced testimony that they "have modified how Rider RRS charges and credits will be calculated," including changes to both the cost calculation (by fixing the Companies' estimated costs plus profit) and the revenue calculation (by changing revenue projections from plant-based forecasts to hub-based futures, by providing a quarterly reconciliation of actual revenues, and by relying upon revenue assumptions made in 2014 that are demonstrably false given new evidence of market prices and forecasts).[212] The Companies also were allowed to offer testimony that the revised calculation under the Modified RRS proposal would not change the forecasted impacts on ratepayers and will provide alleged "rate stabilization benefits" to Ohio's captive ratepayers.[213]

B. P3/EPSA's Evidence Shows That the Modified RRS Proposal is Unjust, Unreasonable and Will Harm Ratepayers Every Year

P3/EPSA responded by introducing evidence showing that the calculations and assumptions supporting the Modified RRS proposal are unreliable, unreasonable and will not

[211] Entry ¶ 15 (June 3, 2016).
[212] Rehearing Tr. Vol. 1, Companies Ex. 197 at 4:14-22 & 5:8-6:14.
[213] Rehearing Tr. Vol. 1 at 52:20- 57:22.

benefit affected captive ratepayers. P3/EPSA offered testimony from emeritus economist Dr. Joseph Kalt. Dr. Kalt demonstrated that the Modified RRS proposal is unjust and unreasonable, as "customers will immediately start off 'in the hole,'" and the Modified Rider RRS proposal could well produce greater retail rate volatility."[214] Dr. Kalt further attempted to demonstrate that customers will not get out of that "hole" over the entire ESP IV period. Dr. Kalt's testimony was directly responsive to the entire Modified RRS proposal and the Companies' testimony, but was improperly stricken.

C. Dr. Kalt's Testimony Should Not Have Been Stricken

Dr. Kalt's testimony was improperly stricken as cumulative and outside the scope of the proceeding.[215] It is neither.

Dr. Kalt's testimony was not cumulative. Dr. Kalt's testimony showing that the Modified RRS proposal provisions for quarterly adjustments will actually increase rate volatility provides a sound rebuttal of the Companies' claim that retail rate stability will be supported by the Modified RRS proposal.[216] Although Dr. Kalt's testimony was directed to a new feature of the Modified RRS proposal, it was stricken as cumulative because it cited his earlier testimony for context and support.[217] The mere fact that Dr. Kalt's analysis of the Companies' new proposal was supported by and consistent with his earlier analysis does not render his relevant testimony and analysis cumulative. Indeed, his testimony addressed a brand new aspect of the Modified RRS proposal that did not even exist until May 2, 2016. It is not cumulative.

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[214] P3/EPSA Ex. 17 at 8:6-7, 10:1-1; P3/EPSA Ex. 19.

[215] Rehearing Tr. Vol. 5 at 1127-1130 (striking as cumulative P3/EPSA Ex. 17 at 6:8-7:11, 8:23-9:2, 9:9-19, 10:7-12, 20:5-12, 21:15-22:17 and included footnotes) and 1149-1155 (striking as outside the scope P3/EPSA Ex. 17 at 7:17-8:5, 8:9-23, 9:2-7, 13:13-15:7, 16:16-19:16 and included footnotes and referenced exhibits, in part). Similarly relevant testimony of witnesses Tyler Comings and James Wilson was offered but excluded as cumulative or beyond the scope of the proceeding.

[216] Rehearing Tr. Vol. 5, P3/EPSA Ex. 17 at 9:9-19, 10:7-12, 21:15-22:17.

[217] Rehearing Tr. Vol. 5 at 1115:22-1116:7 & 1127:10-14.

Neither was Dr. Kalt's testimony outside the scope of the proceeding. On rehearing, the Companies offered new calculations using new variables and claimed they supported a net credit for Modified Rider RRS.[218] Dr. Kalt's stricken testimony demonstrated that, up to and beyond 2018, the changed calculations are unsupported by reliable evidence and make unreasonable assumptions given factual information relevant to the Companies' new formula. For example, given the Companies' claim that Modified Rider RRS would still provide a net credit, and given new evidence of known market prices, Dr. Kalt's testimony shows that the Modified RRS proposal is unjust and unreasonable,[219] This analysis was directly responsive to the Companies' claims, calculations and forecasts offered on May 2, 2016 and should not have been stricken.

D. The Commission Should Reverse the Ruling Striking Dr. Kalt's Testimony

Dr. Kalt's testimony was unreasonably and unlawfully stricken. Without Dr. Kalt's testimony, the Commission will have to rule on an incomplete record that includes "the companies' number on the new proposal" as well as "staff's number on the alternative proposal" but is lacking "an intervenor's number about the modified rider RRS."[220] The Commission cannot reach a fair or just conclusion without the benefit of a record providing P3/EPSA's relevant evidence of the impacts of the Modified RRS proposal.

As well, it is patently unfair and prejudicial to strike P3/EPSA's evidence as well as other aligned intervenors – and only that evidence – regarding the calculations and forecasts under the Modified RRS proposal. The Commission has held already that intervenors' have a right to be heard in the proceedings.[221] Intervenors will be unlawfully stripped of that right if their relevant evidence regarding the unreasonableness of the Modified RRS proposal is stricken.

[218] Rehearing Tr. Vol. 5 at 52:13-57:22.
[219] *Compare* Sierra Club Ex. 89, P3/EPSA Ex. 19 and 20C.
[220] Rehearing Tr. Vol. 5 at 1147:20-24.
[221] Entry at ¶ 5, 7-8 (Dec. 1, 2014).

VII. CONCLUSION

The Companies' Modified Rider RRS proposal is another scheme presented by the Companies to garner funds for the benefit of their parent corporation and competitive affiliate. While the Companies seek to sidestep federal review of the underlying agreement associated with the original Rider RRS, the modified Rider RRS proposal nonetheless fails to pass statutory muster and will harm ratepayers by charging them, at a minimum, hundreds of millions of dollars over the ESP IV term. Staff's proposed Rider DMR fares no better, either as Staff proposed it or as the Companies modified it. This credit support rider does not comply with the statute purportedly authorizing its creation and fails the ESP vs. MRO test. It will also be an unjust and unreasonable charge to customers as it fails to guarantee any investment in grid modernization over the term of the ESP IV. It also is not necessary to jump start grid modernization and forces Ohio ratepayers to bear the brunt of providing cash to improve operational cash flow for FirstEnergy Corp. Two years of trying to make flawed proposals fit under the law and facts is two years too long. The Commission should end this proceeding and reject both Modified Rider RRS as well as Rider DMR.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The Public Utilities Commission of Ohio's e-filing system will electronically serve notice of the filing of this document on the parties referenced on the service list of the docket card who have electronically subscribed to the case. In addition, the undersigned certifies that a courtesy copy of the foregoing document is also being served (via electronic mail) on the 15th day of August, 2016 upon all persons/entities listed below:

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