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

REHEARING POST-HEARING BRIEF OF THE OHIO HOSPITAL ASSOCIATION

I. INTRODUCTION

This case is no longer about the electric security plan filed by Ohio Edison Company, the Cleveland Illuminating Company, and the Toledo Edison Company (collectively, "FirstEnergy" or "Companies") in August 2014 (the "ESP IV"). Instead, the Public Utilities Commission of Ohio ("Commission" or "PUCO") is being asked to approve a multi-billion dollar bailout of a public utility paid for by captive ratepayers—the hospitals, small businesses, manufacturers, and residential customers who make this state thrive.

When asked in 2008 about the proposed auto bailout, not-yet Ohio Governor John Kasich stated, "If they're (the auto industry) not going to be viable, we shouldn't throw good money after bad."[1] To be fair, at least the auto bailouts required the participating companies to make reforms that would secure their long-term viability and allow the companies to eventually return to profitability. And at least the auto companies had to pay some of the money back. Here, for the first time in Ohio history, captive ratepayers are being asked to bailout a public utility and its

[1] Bertram de Souza, *Did Kasich Oppose Auto Bailout?*, Vindy.com, Sept. 16, 2012, http://www.vindy.com/news/2012/sep/16/did-kasich-oppose-auto-bailout/.

unregulated affiliates without any corporate or structural reforms, without any possibility of repayment, and without any benefit to ratepayers.

A. The History of this Proceeding.

The overwhelming majority of the ESP IV proceeding centered on the proposed Retail Rate Stability Rider ("Rider RRS"), a nonbypassable rider designed to support the Companies' proposal to enter into an unbid, non-competitive multi-year Power Purchase Agreement ("PPA") with its affiliate, First Energy Solutions ("FES"). Under the PPA, the Companies would purchase the output of FES's Sammis and Davis Besse generating facilities, as well as FES's share from the Ohio Valley Electric Corporation, at full cost, plus a return on invested capital. The Companies would then offer the energy, ancillary services, and capacity into the PJM markets. The net costs of the assets under the PPA would then be charged to FirstEnergy's ratepayers via Rider RRS.

On March 31, 2016, the Commission modified and then approved ESP IV which included the proposed Rider RRS. On April 27, 2016, however, the Federal Energy Regulatory Commission ("FERC") issued an Order rescinding the FES affiliate transaction waiver, effectively blocking the PPA from taking effect. As a result, FirstEnergy filed an application for rehearing to replace Rider RRS with an entirely new proposal disguised as a "modified" Rider RRS ("New Rider RRS"), which replaces the affiliate PPA rejected by FERC with a "virtual" PPA no longer tied to specific generating units.[2] Rather, the virtual PPA will be entirely based on FirstEnergy's projected generation costs and projected sales into the PJM markets, as claimed by FirstEnergy in the record of the original proceeding.[3]

The Commission Staff rightfully and justifiably recommends the rejection of New Rider RRS as eliminating the basis of the Commission's approval of the original Rider RRS and as an

[2] Companies Ex. 197 (Mikkelsen Rehearing Testimony) at 5-6.
[3] *Id.*

illegal generation transition charge.[4] However, two additional proposals—also raised for the first time on rehearing—followed Staff's recommended rejection of New Rider RRS. These two proposals are each significantly different than the proposal contemplated in the underlying proceeding:

1) Staff's proposal to provide FirstEnergy with $131 million of credit support revenue per year for three years plus a potential two year extension; and

2) FirstEnergy's counter-proposal requesting $558 million of credit support revenue per year for eight years—a total eerily similar to the amount requested in the original Rider RRS/affiliate PPA proposal.

The Commission should immediately reject these proposals for the legal and policy reasons more thoroughly discussed below.

B. The OHA

The OHA is a private, nonprofit trade association with 220 hospitals, 68 of which are served by FirstEnergy.[5] OHA members have more than 700 electricity accounts statewide. In total, OHA members served by FirstEnergy consumed more than 1,500 GWh of electricity in 2015. Residents in the area served by FirstEnergy rely on OHA-member hospitals more than 13.8 million times each year for health care services on a combined in-patient and out-patient basis, according to 2014 data.

Nearly all of OHA member hospitals are non-profit entities, and those "hospital" members also include the full spectrum of medical care services ranging from the stereotypical hospital to physician office buildings, urgent care centers, free-standing emergency rooms, ambulatory surgery centers, skilled nursing facilities (nursing homes), renal dialysis centers, etc. More than 350,000 Ohioans work for or at those hospitals and healthcare systems. OHA's mission is to be a membership-driven organization that provides proactive leadership to create an environment in

[4] Staff Ex. 15 (Choueiki Rehearing Testimony) at 13-14.

[5] All OHA member hospitals are listed at http://www.ohanet.org/Members, and every hospital, or virtually every hospital, in FirstEnergy's service area is a member of OHA.

which Ohio hospitals are successful in serving their communities. The hospitals receiving electricity from FirstEnergy are OHA members that consume significant amounts of electrical energy, and rely on their host electric distribution utility of FirstEnergy to deliver the electric power necessary to provide patient care. Virtually every hospital in FirstEnergy service area is a member of OHA.

Environmental stewardship is important to OHA's members. The OHA works closely with its members to implement cost-effective energy efficiency measures and reduce the carbon footprint of hospitals across Ohio. By making OHA member hospitals more efficient consumers of electricity, those OHA members not only reduce the cost of the essential services that they provide, but also further contribute to the environmental and public health of the communities they serve.

II. LEGAL ARGUMENT

A. FirstEnergy's New Rider RRS and the "Virtual PPA" should be rejected because it is void of any benefit to ratepayers and because it is improperly before the Commission.

1. *FirstEnergy's New Rider RRS lacks any of the purported benefits of the original Rider RRS.*

In an attempt to again avoid running afoul of FERC, FirstEnergy's New Rider RRS is no longer dependent on a PPA with FES. However, this maneuver by FirstEnergy utterly eliminates many of the purported benefits of Rider RRS that were the basis of the Commission's approval of the original Rider RRS in the first place, namely that it would: (i) "encourage resource diversity in the state" by supporting specific coal and nuclear plants;[6] and (ii) support plants with "a significant

[6] *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and the Toledo Edison Company Application for Authority to Provide for a Standard Service Offer Pursuant to Ohio Revised Code 4928.143 in the Form of an Electric Security Plan,* Case No. 14-1297-EL-SSO (Opinion and Order dated March 31, 2016) at 87-88.

economic impact upon the regions in which the plants are located."[7] Because New Rider RRS is no longer comprised of a PPA supporting specific power plants in the state of Ohio, neither of these justifications for the rider remains. For this reason alone, the Commission should reject FirstEnergy's New Rider RRS.

The Companies suggest that cash collected from New Rider RRS could be used for an array of capital expenditures.[8] These include distribution grid modernization "through advanced metering infrastructure, distribution automation, and Volt/Var controls," as well as "battery resources and/or to invest in new Ohio renewable resources."[9] However, the Companies admit that they are unwilling to commit to spending a portion of the revenue collected on any of these so-called benefits.[10]

2. *The Commission should have fully addressed other intervening parties' memoranda contra before denying intervening parties' applications for rehearing in its July 6, 2016 Entry.*

While it is clear that even a cursory substantive review of New Rider RRS reveals that it lacks any claimed benefit to ratepayers that would justify its approval by the Commission, it is also OHA's position that the Commission does not have jurisdiction to consider New Rider RRS in the context of this rehearing proceeding. At the very least, OHA expresses concern that threshold procedural and jurisdictional questions were only given partial consideration by the Commission.

On May 2, 2016, FirstEnergy filed its application for rehearing, in which it proposed the New Rider RRS. On May 11, 2016, one day prior to the date upon which intervening parties were to file memoranda contra, the Commission issued an Entry granting the Companies' application for

[7] *Id.*; *see also*, Rehearing Tr. Vol. I at 264 (Companies' Witness Mikkelsen testifying that the proposal is "independent of any actions with respect to any plants at FES").

[8] Companies' Ex. 197 (Mikkelsen Rehearing Testimony) at 12.

[9] *Id.*

[10] Rehearing Tr. Vol. I, at 63 (Mikkelsen cross).

rehearing ("First Entry on Rehearing"). The Commission stated that "(w)e believe that sufficient reasons have been set forth by the parties to warrant further consideration of the matters specified in the applications for rehearing."[11]

By doing so, however, the Commission failed to consider the numerous memoranda contra *filed the next day* which directly challenged the reasoning set forth in the Companies' application for rehearing. A number of these memoranda raised threshold procedural and jurisdictional issues that—if fully considered by the Commission—could have eliminated the basis for rehearing or significantly narrowed the scope of this rehearing. Specifically, the Commission failed to address two arguments: (i) that the Companies failed to submit a new SSO application before proposing new Rider RRS; and (ii) the Companies failed to properly raise New Rider RRS as part of their application for rehearing.

For the purposes of efficiency and economy, the OHA endorses and briefly summarizes, rather than repeat in detail, the compelling legal arguments set forth in the memoranda contra to the Companies' application for rehearing on these issues.

(a) <u>The Companies must first submit a new SSO application before proposing New Rider RRS.</u>

First, under Ohio Revised Code Section ("R.C.") 4928.143(C)(2)(a), it is unlawful for the Companies to replace Rider RRS with New Rider RRS in an application for rehearing.[12] After the Commission approved, with minor modifications, the Companies' ESP IV application, the Companies were limited to two choices under Ohio law: (i) accept the ESP as modified by the Commission (which FirstEnergy did not do); or, (ii) reject the Commission's modifications and file

[11] Entry on Rehearing (May 11, 2016) at 3.

[12] *See Northeast Ohio Public Energy Council's Memorandum Contra FirstEnergy's Application for Rehearing*, Case No. 14-1297-EL-SSO (May 12, 2016).

a new Standard Service Offer ("SSO") application.[13] By proposing that the Commission replace the Rider RRS with New Rider RRS, the Companies effectively rejected Rider RRS as modified and approved by the Commission. As a result, the Companies' only option to replace Rider RRS with New Rider RRS was through a new SSO application. And, it is undisputed that such an application has not been filed.

Notwithstanding the foregoing, OHA acknowledges that OCC/NOAC's application for rehearing in this case raised the jurisdictional issue that FirstEnergy is required under R.C. 4928.143(C)(2)(a) the file a new SSO application if it wishes to propose New Rider RRS.[14] Although the Commission purported to reject this argument, its reasoning fails as a matter of law. [15] Specifically, the Commission stated:

> In an analogous situation, the Supreme Court of Ohio found no error where the electric utility filed tariffs implementing an ESP and also filed for rehearing and appealed a Commission decision modifying and approving an ESP without either withdrawing or formally accepting the modified ESP. *In re Columbus S. Power Co.*, 128 Ohio St.3d 512, 947 N.E.2d 655, 2011-Ohio-1788 at ¶¶ 45-47. OCC/NOAC make no effort to distinguish this precedent[16]

In reality, this "analogous" case relied upon the by the Commission is not analogous at all. In that case, the utility filed tariffs implementing an ESP, while also appealing the modifications to the ESP *made by the Commission*. The utility's application for rehearing made no new proposals or modifications to the ESP.[17] In contrast, here FirstEnergy is appealing the Commission's modifications to the ESP and *proposing its own additional modifications* to the ESP. As argued in more detail by the May 12, 2016 memoranda contra, FirstEnergy does not seek merely to overturn

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[13] R.C. 4928.143(C)(2)(a).

[14] *Application for Rehearing by the Office of Ohio Consumers' Counsel and the Northwest Ohio Aggregation Coalition,* Case No. 14-1297-EL-SSO (June 10, 2016) at 2, 14.

[15] Third Entry on Rehearing (July 6, 2016) at ¶ 44.

[16] *Id.* at ¶ 39.

[17] *Columbus Southern Power Company's and Ohio Power Company's Application for Rehearing,* Case Nos. 08-917-EL-SSO, 08-918-EL-SSO (April 17, 2019).

the slight modifications to its ESP by the Commission.[18] Instead, FirstEnergy asks the Commission to reject the Commission-approved Rider RRS and replace it with New Rider RRS. However, FirstEnergy may only do so by first filing a new SSO application.[19]

(b) The Commission does not have jurisdiction to consider New Rider RRS as part of this rehearing proceeding because the Companies failed to raise it in their application for rehearing.

Second, the Companies' attempt to propose New Rider RRS as part of its application for rehearing is jurisdictionally defective because FirstEnergy failed to include the proposal in its application for rehearing.[20] There is no question that a party must specifically raise an issue in its application for rehearing.[21] However, FirstEnergy made no reference to New Rider RRS in its application for rehearing. It is not sufficient for the Companies to merely discuss New Rider RRS in its memorandum in support.[22] The rejection of this argument would require this Commission to reject its own precedent and the holdings of the Ohio Supreme Court. Consequently, the Commission lacks jurisdiction to consider New Rider RRS on rehearing, and it must be rejected.

(c) The Commission acknowledges that it has yet to fully consider threshold jurisdictional and procedural issues in this proceeding.

On July 6, 2016, the Commission issued its Third Entry on Rehearing, rejecting multiple interlocutory appeals[23] and applications for rehearing.[24] In general, these applications for rehearing

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[18] *See* Northeast Ohio Public Energy Council's Memorandum Contra FirstEnergy's Application for Rehearing, at 2.

[19] *Id.*

[20] Joint Memorandum Contra of the PJM Providers, Inc. and Electric Power Supply Association, Case No. 14-1297-EL-SSO (May 12, 2016) at 4-6.

[21] *Id.*, citing R.C. 4903.10 and *Disc. Cellular , Inc. v. Pub. Util. Comm.*, 112 Ohio St. 360, 374=375, 2007-Ohio-53.

[22] *Id.*, citing *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 (Oct. 14, 2009) (finding that an application that merely requests a rehearing and refers to the memorandum in support for specific grounds did not substantially comply with the statutory requirements of specificity); and *In Re Columbus Southern Power Company and Ohio Power Company*, Case No. 04-169-EL-UNC, 2005 Ohio PUC LEXIS 704, *30-31 (finding that arguments in an introductory section were not identified as assignments of error or specific grounds for rehearing, as required by R.C. 4903.10).

[23] The Third Entry on Rehearing denied interlocutory appeals filed by P3/EPSA, OCC/EG, and OMAEG.

challenged the First Entry on Rehearing. The interlocutory appeals challenged a subsequent Entry issued by the attorney examiner setting an evidentiary hearing regarding the provisions of FirstEnergy's New Rider RRS.[25]

Most notably, the Commission noted in its Third Entry on Rehearing that the arguments presented in the May 12, 2016 memoranda contra FirstEnergy's application for rehearing had not yet been thoroughly considered. Cognizant of the important threshold jurisdictional and procedural arguments raised in the May 12, 2016 memoranda contra, OCC/NOAC argued that the Commission should have considered the memoranda contra before granting rehearing. The Commission acknowledged that it still needed to consider the arguments presented in the memoranda contra:

> Finally, rehearing on OCC/NOAC third assignment of error should be denied. OCC/NOAC contend that the Commission should not have granted rehearing without first considering the intervening parties' memoranda contra. ***However, the Commission merely granted rehearing for further consideration of the matters specified in the applications for rehearing.*** Since FirstEnergy has requested an additional hearing on its [New Rider RRS] as part of its application for rehearing, the Commission granted rehearing prior to the filing of memoranda contra in order to provide parties as much time as possible for discovery regarding [New Rider RRS]. Nonetheless, ***we will thoroughly consider all arguments raised in the memoranda contra in the ultimate disposition of the applications of rehearing***.[26]

(Emphasis added).

FirstEnergy also acknowledges that the Commission has yet to consider the issues raised in the memoranda contra. In responding to OCC/NOAC's June 10, 2016 application for rehearing, FirstEnergy noted:

> The [First Entry on Rehearing] simply reopened the record so that the parties could be afforded additional process regarding the proposal, and OCC/NOAC have been provided notice and a reasonable opportunity to be heard and has engaged in additional discovery as part of the rehearing process. ***The***

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[24] The Third Entry on Rehearing denied applications for rehearing filed by OCC/NOAC and OMAEG.

[25] Attorney Examiner Entry (June 3, 2016) at ¶ 17.

[26] Third Entry on Rehearing at ¶ 46.

Commission remains free to consider the arguments raised in OCC/NOAC's Memorandum Contra Application for Rehearing filed on May 12, 2016.[27]

(Emphasis added).

Fundamental procedural and jurisdictional arguments as argued in the May 12, 2016 memoranda contra must still be addressed. It is OHA's position that the Commission only partially considered these issues before dismissing them in its Third Entry for Rehearing. Given the importance of these issues, and the Commission's acknowledgment of the need to "thoroughly consider all arguments raised in the memoranda contra," it is OHA's position that these threshold issues are alive in this proceeding and deserve full consideration by the Commission.

B. Forcing captive ratepayers to bailout the Companies for nothing in return is outside the scope of this rehearing proceeding and must be rejected.

On June 29, 2016, Staff recommended that the Commission reject New Rider RRS. However, Staff also proposed a new "Distribution Modernization" Rider ("Rider DMR") as part of ESP IV. The purpose of this rider is not related to distribution improvement or modernization. Instead, it is solely designed to protect the credit ratings of FirstEnergy Corp. ("FE Corp")—the parent of the Companies and their unregulated affiliates.[28] Specifically, Staff recommends collecting $131 million per year from captive ratepayers through this rider for a period of at least three years, with the potential for two additional years.[29]

On July 25, 2016, the Companies submitted testimony addressing Rider DMR. Unsurprisingly, the Companies embraced the concept of a direct bailout through payments from

[27] *The Companies' Memorandum Contra Application for Rehearing of OCC/NOAC*, Case No. 14-1297-EL-SSO (June 20, 2016) at 7.

[28] Staff Ex. 13 (Buckley Rehearing Testimony) at ¶ 5 ("The rider would be established to allow the Ohio Regulated Distribution Utilities to provide the appropriately allocated support for First Energy Corporation (FE) to maintain investment grade by the major credit rating agencies.").

[29] *Id.* at 12.

ratepayers that would support its parent corporation and unregulated affiliates.[30] Also unsurprisingly, the Companies determined that the Staff's credit support proposal was not sufficient to achieve its intended purpose.[31] Instead, the Companies proposed that the annual amount of Rider DMR should be increased to $558 million, over the entire eight (8) year term of ESP IV—a total of more than $4 billion.[32]

Thus, in the final weeks of two years of litigation, ratepayers are suddenly presented with completely new credit support proposals involving a multi- billion dollar bailout with no benefits for ratepayers, including hospitals.

1. *This rehearing process is not the proper forum for the Commission to determine if it will set precedent that Ohio's captive ratepayers are responsible for providing financial bailouts to support an incumbent utility and its unregulated affiliates.*

The Commission should not consider either bailout as part of this rehearing proceeding. Rehearing in this case was granted "merely . . . for further consideration of the ***matters specified in the applications for rehearing***."[33] (Emphasis added). The Companies' original ESP IV application, its subsequent amended applications and stipulations, and its application for rehearing never contemplated direct credit support payments. The credit support proposals are certainly not matters "specified in the applications for rehearing." In terms of establishing the proper scope of a rehearing proceeding, if the Commission cannot draw the line here by rejecting these new proposals, where can it draw the line?

If the Commission is going to set precedent that Ohio's captive ratepayers are financially responsible to bailout an incumbent utility and its affiliates, then this rehearing process is not the

[30] Companies' Ex. 206 (Mikkelsen Rehearing Rebuttal and Surrebuttal Testimony).

[31] *Id.* at 9.

[32] *Id.* at 12-14.

[33] Third Entry on Rehearing, at ¶ 46.

proper forum to do so. A decision to declare an incumbent utility and its affiliates as effectively "too big to fail," and requiring captive ratepayers to pay direct credit support payments, without first exhausting all other potential remedies, will have widespread, immediate and long-term precedential implications. It is a decision that requires rigorous debate before even being considered. It should not be a decision stemming from new proposals introduced in the final weeks of multi-year litigation.[34]

2. *The credit support proposals should be rejected because they lack merit and force captive ratepayers to fund a corporate bailout.*

If the Commission decides that this rehearing proceeding is the appropriate forum to consider the credit support bailout, it should reject the proposals as lacking merit.

The Commission should not hold FirstEnergy's captive ratepayers accountable for past corporate decisions made by FirstEnergy with nothing to do with Ohio regulation. As indicated by OCC Witness Kahal, "[t]he weak FE Corp. credit ratings are due to a combination of a weak corporate balance sheet and extensive but risky unregulated operations."[35] For instance, FE Corp. "expanded its [unregulated merchant generation] business and invested considerable capital with management's decision to acquire Allegheny Energy and its extensive coal generation."[36] It is the responsibility of FE Corp.'s management and its shareholders to deal with these poor business decisions, not the responsibility of captive ratepayers.

In return for bailouts of FE Corp. and the Companies' unregulated affiliates, Ohio ratepayers would receive nothing in return except higher bills and a dangerous precedent.[37] Staff's proposal

[34] Only a limited evidentiary record has been developed as to the merits of the various credit support proposals. Only three intervening parties submitted rebuttal testimony addressing Staff's proposal. FirstEnergy made its own credit support proposal through rebuttal and surrebuttal testimony filed on July 25, 2016, and intervening parties did not have the opportunity to file additional testimony addressing FirstEnergy's proposal.

[35] OCC Ex. 44 (Kahal Rehearing Testimony) at 5.

[36] *Id.* at 10.

[37] *See* OMAEG Ex. 37 (Lause Rehearing Testimony) for discussion on impact to manufacturers.

does recommend that Rider DMR be contingent on FE Corp.'s headquarters remaining in Akron, Ohio,[38] but the Companies do not support this requirement.[39] Both Staff and the Companies suggest that Rider DMR *could* enable additional investment in grid modernization.[40] However, there is no requirement that Rider DMR revenue be used for distribution improvements, grid modernization,[41] or for any other purpose beneficial to the Companies' ratepayers.[42] Unfathomably, Staff and the Companies nonetheless insist on using these hypothetical benefits in the "ESP v. MRO" test.[43] The Commission should be not so credulous.

III. CONCLUSION

At its core, the ESP IV litigation over the past two years has always been about the lack of economic viability of the aging generation assets owned by the Companies' unregulated affiliates in an energy landscape undergoing fundamental changes. Two years ago, the Companies proposed a PPA with its affiliate, clothed in promises of enhanced reliability and economic development. Today, the Commission is confronted with proposals that are naked subsidies to support bad bets made by FE Corp.'s management. The adoption of these proposals would force captive ratepayers to pay for these decisions and subsidize shareholders and FE Corp.'s unregulated operations, while gaining nothing in return. Adopting the words of Governor Kasich, the Commission should not

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[38] Staff Ex. 13 (Buckley Rehearing Testimony) at ¶ 13.

[39] Companies' Ex. 206 (Mikkelsen Rehearing Rebuttal and Surrebuttal Testimony) at 14.

[40] *Id.* at 8 "The Companies *could* use Rider DMR cash to invest in distribution grid modernization, redeem debt, to fund the pension or to fund other grid modernization initiatives." Emphasis added.

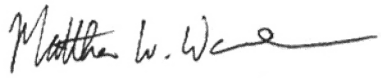
[41] *See* Rehearing Tr. Vol. IV at 956, Staff Witness Choueiki indicating that the Companies would not be required to undertake any specific grid modernization efforts.

[42] OCC Ex. 44 at 12 (Witness Kahal stating "[e]ven if Rider DMR does not achieve the credit rating improvement objective, the Staff proposal would have the effect of increasing FE Corp. profits, making more cash available to pay increased dividends to shareholders").

[43] Staff Ex. 14 (Turkenton Rehearing Testimony) at 2-3; Companies' Ex. 206 (Mikkelsen Rehearing Rebuttal and Surrebuttal Testimony) at 18-20.

throw good ratepayer money after bad. The New Rider RRS and two bailout proposals must be rejected.

Respectfully submitted on behalf of
THE OHIO HOSPITAL ASSOCIATION



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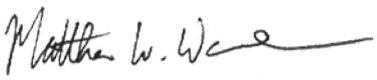
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Rehearing Post-Hearing Brief was served *via electronic mail* upon the parties of record this 15th day of August 2016.



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