

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**INITIAL REHEARING BRIEF
BY
THE OFFICE OF THE OHIO CONSUMERS' OFFICE
AND
NORTHWEST OHIO AGGREGATION COALITION (AND ITS INDIVIDUAL
COMMUNITIES),
VILLAGE OF HOLLAND
LAKE TOWNSHIP BOARD OF TRUSTEES
LUCAS COUNTY BOARD OF COMMISSIONERS
CITY OF MAUMEE
CITY OF NORTHWOOD
VILLAGE OF OTTAWA HILLS
CITY OF PERRYSBURG
CITY OF SYLVANIA
CITY OF TOLEDO
VILLAGE OF WATERVILLE**

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I. INTRODUCTION AND BACKGROUND

The Public Utilities Commission of Ohio (“PUCO”) should protect 1.9 million Ohioans from paying massive subsidies to FirstEnergy, potentially up to \$8.9 billion, above the market price of electricity.¹ FirstEnergy’s alternative proposal (to the Staff’s credit support proposal) has the potential (up to \$8.9 billion in total) for much greater cost per customer than FirstEnergy’s modified Rider RRS proposal.² The Office of the Ohio Consumers’ Counsel (“OCC”) and the Northwest Ohio Aggregation Coalition

¹ FirstEnergy refers to the Cleveland Electric Illuminating Company, The Ohio Edison Company, and The Toledo Edison Company (“FirstEnergy” or “Utilities”).

² There are no customer impact numbers in the record for FirstEnergy’s alternative to Staff’s proposal. OCC/NOAC Ex. 1 at 10, 13, 16 (Wilson Rehearing Testimony) Proffer: estimated cost to consumers for FirstEnergy’s modified Rider RRS proposal \$3.6 billion in total and up to \$800.00 per customer over the eight-year term of FirstEnergy’s electric security plan.

(“NOAC”)³ recommend that consumers be given, in their monthly electric bills, the benefit of historically low market prices for energy. Further, the PUCO should end the electric utilities’ use of Ohio’s 2008 energy law to bankroll their long overdue transition to competition. The PUCO should be wary of allowing FirstEnergy to collect more money from customers for charges that fund utilities’ “financial integrity.” The Ohio Supreme court recently struck such charges down.⁴ At the very least, the PUCO should be protecting consumers by ordering charges of such nature to be collected subject to refund.

On August 4, 2014, FirstEnergy filed its Electric Security Plan (“ESP”) IV application in this case. The application included a power purchase agreement (“PPA”) between FirstEnergy and its unregulated affiliate FirstEnergy Solutions (“FES”). The PPA was intended to subsidize uneconomic generation owned by FES.⁵ OCC estimated the PPA would cost consumers between \$3.6 and \$5.15 billion over its eight-year term. After numerous days of hearing, three stipulations, and multiple rounds of briefs opposing the Utilities’ application, the PUCO approved the stipulated electric security plan, including the PPA, on March 31, 2016.

On April 27, 2016, the Federal Energy Regulatory Commission (“FERC”) granted a complaint brought by the PJM Power Producers (“P3”), the Electric Power Supply Association (“EPSA”), and others. OCC and NOAC joined that FERC proceeding to

³ NOAC and its Individual Communities consists of the Village of Holland, Lake Township Board of Trustees, Lucas County Board of Commissioners, City of Maumee, City of Northwood, Village of Ottawa Hills, City of Perrysburg, City of Sylvania, City of Toledo and the Village of Waterville.

⁴ *In re: the Application of Columbus Southern Power Co.*, 206-Ohio-1608; *In re: Dayton Power & Light Co.*, 2016-Ohio-3490.

⁵ The PPA covered the following generating units: Sammis, Davis-Besse and FirstEnergy’s OVEC entitlement in Kyger Creek and Clifty Creek.

support the complainants. FERC's rulings protected several million Ohioans by rescinding the Utilities' affiliate waiver, requiring FirstEnergy to present the PPA for FERC review. As a result, FirstEnergy has decided to pursue other options, although it has advised that it retains the option of submitting the PPA to FERC for approval.⁶

Instead, on May 2, 2016, FirstEnergy filed an Application for Rehearing to the PUCO's March 31, 2016 Opinion and Order. That Application for Rehearing presented a virtual PPA that included a modified Rider RRS proposal ("Proposal"). The Proposal was supported by rehearing testimony filed by Eileen Mikkelsen⁷ and correspondence stating, "[t]he Signatory Parties fully support the filing and the proposed schedule for review."⁸ Furthermore, the correspondence stated: "Staff of the Public Utilities Commission is still reviewing the Application For Rehearing and Rehearing Testimony of Eileen M. Mikkelsen. Also, The Kroger Company does not oppose the Companies' filing or proposed procedural schedule."⁹

On June 29, 2016, the Staff filed three pieces of testimony. One opposed the Proposal,¹⁰ a second presented an alternative proposal ("Staff's Proposal"),¹¹ and the third analyzed Staff's Proposal under the more favorable in the aggregate test.¹² Staff's Proposal would charge captive Ohio distribution customers money in order to provide credit support for the financially ailing FirstEnergy Corp. Staff called its proposal a "distribution modernization" Rider ("DMR"). But the Staff's Proposal includes no

⁶ FirstEnergy Memorandum Contra OCC Application for Rehearing at 3-4 (June 20, 2016).

⁷ FE Ex. 197 (Rehearing Direct Testimony of Eileen Mikkelsen) (May 2, 2016).

⁸ FE Ex. 198 at 1 (Correspondence) (May 4, 2016).

⁹ FE Ex. 198 at footnote 1 (Correspondence) (May 4, 2016).

¹⁰ PUCO Staff Ex. 15 at 13-14 (Rehearing Testimony of Hisham Choueiki) (June 29, 2016).

¹¹ PUCO Staff Ex. 13 (Rehearing Testimony of Joseph Buckley) (June 29, 2016).

¹² PUCO Staff Ex. 14 at 3-4 (Rehearing Testimony of Tamara Turkenton) (June 29, 2016).

enforceable requirement that the money FirstEnergy would collect through the DMR actually be used for distribution modernization. OCC refers to Staff's Proposal for what it really is -- the Credit Support Rider ("Credit Support Rider" or "CSR"). The CSR would require Ohio consumers to pay FirstEnergy Utilities \$131 million annually¹³ for a minimum of three years. Staff Witness Buckley testified that if FirstEnergy Corp. "has not improved its credit position after three years, [FirstEnergy] could request an extension for an additional two years."¹⁴

Finally, on July 25, 2016, FirstEnergy presented a modification to Staff's Proposal through the rebuttal/surrebuttal testimony of Eileen Mikkelsen. Plainly stated, FirstEnergy's modifications would require its customers to pay huge sums of money for a very long time -- for the remaining term of the eight-year ESP (through May 31, 2024). Specifically, FirstEnergy seeks "[an] annual amount [that] would equal the \$558 million associated with the credit support to jump start grid modernization and an additional amount not [to] exceed the economic development value outlined by Company Witness Sarah Murley [\$568 million] arising from having the FirstEnergy Corp. headquarters and nexus of operations in Akron, Ohio."¹⁵ Together, the two components of FirstEnergy's modifications to Staff's Proposal total a staggering \$1.126 billion per year -- more than eight times the value of Staff's Proposal -- over a much longer period of time (nearly eight years). When all is said and done, consumers could be charged up to nearly \$8.9 billion to support the financial integrity of FirstEnergy Corp.

¹³ The \$131 million per year could be increased see Tr. III at 739 (Buckley) (July 13, 2016).

¹⁴ PUCO Staff Ex. 13 at Q&A 12 (Rehearing Testimony of Joseph Buckley) (June 29, 2016).

¹⁵ FE Ex. 206 at 14-15 (Rehearing Rebuttal/Surrebuttal Testimony of Eileen Mikkelsen) (July 25, 2016).

A chart summarizing the various proposal and issues surrounding each proposal is attached.

II. RECOMMENDATIONS

In the first phase of this proceeding, OCC/NOPEC Witness Kahal testified that the concept of an ESP has outlived any purpose it may have served for customer protection (if it ever did protect customers) under Senate Bill 221 (“S.B. 221”).¹⁶ The PUCO is not required to approve FirstEnergy's modified Rider RRS. Nor is the PUCO required to approve the Staff's proposed Credit Support Rider or FirstEnergy's modifications to the Staff's rider. These provisions circumvent both the market pricing intended in 1999 under Senate Bill 3 (“S.B. 3”) and the regulation of monopoly distribution service that otherwise would occur under R.C. Chapter 4909.

Under Ohio law, the standard service offer (based upon wholesale auctions) can be accomplished through the market-rate offer. Generation and distribution service for FirstEnergy have been corporately separated. And 100% of the SSO load has been, and will be, supplied through a wholesale auction. The use of and structure of the wholesale auctions are not in dispute in this case. Now is the time to utilize a market-rate offer, and reject the harmful and unnecessary features of an ESP for Ohioans. Those harmful and unnecessary features include the newly proposed provisions to the ESP that only serve to take more money from customers for little in return.

The PUCO can and should say no to the proposals before them. The PUCO should modify the Utilities’ proposed plan, changing it into a market-rate offer instead of an ESP, under R.C. 4928.143(C)(1). Modifications to the Utilities’ plan should include

¹⁶ OCC/NOPEC Ex. 7 at 13 (Kahal Direct).

restructuring the plan so that the SSO is provided to Ohioans through a market-rate offer with all features of the proposed ESP rejected (other than the wholesale auctions).

III. THE PUCO SHOULD NOT APPROVE ANY OF THE PENDING PROPOSALS BEFORE IT, BECAUSE NONE OF THEM PASS THE ESP V. MRO TEST.

Ohio statutes require that electric distribution utilities provide a generation standard offer either through an ESP or a market-rate offer.. The Utilities chose to file an ESP. If an electric utility chooses to provide a standard offer through an ESP, the PUCO may approve an ESP only if it finds that it is more favorable in the aggregate for customers than a MRO. (R.C. 4928.143(C)(1). This provision is referred to as the statutory test for electric security plans. Under the law the expected price of the SSO generation under an electric security plan is compared to the expected price derived under a market-rate offer. The utility bears the burden of proof in this matter. Additionally, R.C. 4928.143(C)(1) requires the comparison to be made on an “aggregate” basis. That means that the comparison must consider “all other terms and conditions” of the ESP plan. The PUCO has determined that such provisions may include quantifiable non-price benefits and qualitative benefits.

A. Like FirstEnergy’s original Rider RRS, its Proposal is not more favorable in the aggregate for customers than a market rate offer.

OCC submitted the pre-filed written testimony of Matthew I. Kahal on June 22, 2016. In that testimony Mr. Kahal addressed the Proposal, including his conclusions on whether the Proposal (along with other stipulation provisions) is more favorable in the aggregate for customers than a market rate offer (“MRO v ESP test”).¹⁷ When Mr. Kahal

¹⁷ Proffer at 20-21.

appeared to testify on July 15, 2016, the Company moved to strike portions of Mr. Kahal's testimony that addressed the MRO v. ESP test.¹⁸ Mr. Kahal's testimony on this issue was struck over the objections of OCC.¹⁹ OCC proffered Mr. Kahal's testimony, and that proffer was accepted by the bench.²⁰ Notwithstanding OCC's inability to base its brief on Mr. Kahal's expert testimony (due to the unjust and unreasonable ruling striking Mr. Kahal's testimony), the PUCO should find the Proposal, taken together with the provisions in the Third Supplemental Stipulation, does not pass the statutory test.

According to FirstEnergy Witness Mikkelsen, the Proposal did not change any of the provisions relied upon by the PUCO when it made its determination on the statutory ESP v. MRO test.²¹ Ms. Mikkelsen testified that the Proposal maintains the quantitative benefits of the Stipulated ESP IV recognized by the Commission and enhances the qualitative benefits of Rider RRS discussed in the Order.²² And because the PUCO found the Stipulated ESP (with the Rider RRS in lieu of the Proposal) passed the statutory test, Ms. Mikkelsen concludes that Stipulated ESP IV is still more favorable in the aggregate than the expected results of the MRO.

But this testimony assumes the PUCO was correct in its analysis the first time around (in its March 31, 2016 Order). It was not. The PUCO erred in a number of respects.

First, the PUCO erred because it unreasonably relied on FirstEnergy's Rider RRS cost projections. The PUCO determined that Rider RRS will generate \$256 million in net

¹⁸ R. Tr. V at 1078-1084.

¹⁹ R. Tr. V at 1091.

²⁰ R. Tr. V at 1167-1168.

²¹ FE Ex. 197 at 2.

²² FE Ex. 197 at 21.

revenue over the eight-year term of ESP IV. It got there by accepting the Utility's stale projections and disregarding all but one projection presented by OCC/NOAC Witness Wilson. Staff Witness Dr. Choueiki advised that Rider RRS is going to be a charge²³ and that he does not agree with the Utilities' projections of modified Rider RRS as a credit.²⁴ The PUCO's decision in this regard was unreasonable and against the manifest weight of the evidence.

The PUCO also erred by unreasonably and unlawfully failing to consider the delivery capital recovery rider revenues as quantifiable costs to customers under an ESP. This caused the ESP costs to customers to be understated. In doing so the PUCO failed to base its finding on facts contained in the record, contrary to R.C. 4903.09.

OCC/NOAC applied for rehearing on these (and other) issues on May 2, 2016. That application for rehearing was initially granted on May 11, 2016, by Attorney Examiner Entry so that the PUCO could further consider that matter (and others) raised on rehearing. On June 3, 2016, another Attorney Examiner Entry granted rehearing solely related to the Utility's Proposal. Under the Entry, no further testimony was to be allowed regarding other assignments of error raised by parties.²⁵ There have been no additional Entries on Rehearing either granting or denying OCC's/NOAC's May 2, 2016 Application for Rehearing.

Because there has been no substantive ruling on the rehearing application of OCC/NOAC and others, reliance on the prior holdings of the PUCO on the statutory test is misplaced. There is no final order that confirms the PUCO's conclusions will not

²³ R. Tr. X at 1250 (Choueiki).

²⁴ R. Tr. IV at 986 (Choueiki).

²⁵ Entry at ¶15 (June 3, 2016).

change in response to the rehearing applications. FirstEnergy, which relies solely on the PUCO conclusions, has not met its burden of proof otherwise on this issue. The PUCO should find that the record produced by FirstEnergy lacks sufficient evidence to make a determination that the Proposal and the provisions of the Third Supplemental Stipulation meet the statutory test. The PUCO should thus reject the Stipulated ESP (with the Proposal) in favor of an MRO.

B. Neither the Credit Support Rider proposed by the PUCO Staff nor the Credit Support Rider modified by FirstEnergy, when added to the Third Supplemental Stipulation, are more favorable in the aggregate for customers than a market rate offer.

One of the alternatives presented for the PUCO's consideration is the PUCO Staff's proposed Credit Support Rider. Under that Credit Support Rider, in addition to paying the costs associated with the provisions of the Third Supplemental Stipulation, customers would pay an extra \$131 million per year, for a minimum of three years.²⁶ FirstEnergy proposed modifications to the PUCO Staff proposal that would significantly increase the yearly charges collected from customers under the Credit Support Rider. FirstEnergy proposes modifications to the credit rider where customers would pay at least \$558 million, over an extended eight-year time frame.²⁷ The maximum charge under the FirstEnergy modifications to the Credit Rider would allow FirstEnergy to collect a staggering \$1.13 billion per year from customers.²⁸

²⁶ PUCO Staff Ex. 13 at 2 (Buckley).

²⁷ FE Ex. 206 at 12-13 (Mikkelsen Rehearing, Rebuttal and Surrebuttal).

²⁸ The \$1.2 billion charge comes from \$558 million credit rider plus a maximum value (\$568 million) for the "economic development" commitment, identified by Ms. Murley.

But the problem is that the massive subsidy requested under the Credit Support Rider causes the plan to be less favorable in the aggregate than an MRO. As such, the PUCO has no choice but to reject the Credit Support Rider.

Staff Witness Turkenton testified that with the Credit Support Rider (as proposed by Staff), the ESP IV is more favorable in the aggregate to customers than an ESP.²⁹ She testifies that while the revenues from the Credit Support Rider are costs to customers, they “would have no impact on the ESP verses MRO test since equivalent revenues could potentially be recovered through an MRO application under R.C. 4928.142(D)(4).”³⁰ Ms. Turkenton is wrong.

R.C. 4928.142(D)(4) is a provision that permits the PUCO to adjust the electric distribution utility's most recent standard service offer price to address “any emergency that threatens its financial integrity.” But FirstEnergy has presented no case that an emergency exists that threatens the Utilities’ financial integrity. And no Staff Witness—Ms. Turkenton, Mr. Buckley, or Dr. Choueiki –testified that there is a financial emergency that threatens FirstEnergy’s financial integrity.

FirstEnergy Witness Mikkelsen tried to help the Staff out by “augmenting” the Staff’s more favorable in the aggregate comparison.³¹ Ms. Mikkelsen testified that the Credit Support Rider would have no impact on the statutory test because equivalent revenues “could potentially be recovered in a base rate case proceeding, in the [Utilities’] existing Rider AMI, or in another mechanism similar to the Credit Support Rider while

²⁹ PUCO Staff Ex. 14 at 3.

³⁰ PUCO Staff Ex. 14 at 4.

³¹ FE Ex. 197 at 18. OCC moved to strike this testimony on the basis that it was not rebuttal testimony. R. Tr. X at 1586-1591. That motion was erroneously denied.

the Utilities are providing SSO service under an MRO.”³² But like Ms. Turkenton, Ms. Mikkelsen is wrong as well.

First, the Utilities have agreed to freeze base rates through the end of the ESP term,³³ so the Companies could not collect “equivalent revenues” through a base rate proceeding that might accompany an MRO filing. Second, existing Rider AMI is not fashioned as a credit support rider, and Rider AMI is not a provision that by law is included as market rate offer.

A MRO sets the SSO costs for generation. No more, no less. The MRO by law does not include non-SSO costs --all the trimmings (under R.C. 4928.143(B)(2)) that cost customers money under an electric security plan. To suggest that the Credit Support Rider could be a provision of a market rate offer reads words into the law (R.C. 4928.142) that are just not there. Neither the utility nor the PUCO can do that.

Moreover, the statutory test is not whether the utility could potentially offer a credit support rider (or other non-SSO provision) along with a filing for a MRO. That interpretation, favored by Ms. Mikkelsen,³⁴ would render the ESP v. MRO comparison useless. Any non-SSO provision of an ESP could accompany a filing for a MRO. Surely the General Assembly did not intend for the statutory test that provides some protection for customers to be meaningless.

³² FE Ex. 197 at 19.

³³ FE Ex. 3 at 13.

³⁴ R. Tr. X at 1741.

Rather the test is whether under the law non-SSO components would be included as part of a MRO.³⁵ The answer is no. The MRO does not include non-SSO costs. Ms. Mikkelsen's testimony that the Credit Support Rider is quantitatively neutral under the statutory test is mistaken.

And when the costs of the Credit Support Rider under the Staff proposal and FirstEnergy's modifications are included as part of the statutory test, massive ESP costs develop (\$331 million to 1.13 billion per year) that have no counterpart on the MRO side. Quantitatively, the ESP with the Credit Support Rider (Staff proposal or FirstEnergy modifications to the Credit Support Rider) is not more favorable in the aggregate than the MRO.

Staff Witness Turkenton touts the qualitative benefits of the Credit Support Rider claiming that it will promote modernization of the grid.³⁶ But the fact that the Utilities are not willing to commit to grid investment³⁷ undermines this claim. Because there is no commitment from the Utilities to invest in the grid modernization, it should not be considered either a qualitative or a quantitative benefit in the statutory test.

Ms. Mikkelsen's claims that the condition of keeping the headquarters in Akron for the term of the ESP is a quantitative benefit that is equal to or greater than the maximum annual charge for its value (\$568 million added to the \$558 million Credit Support Rider charge).³⁸ This claim ignores the fact that under FirstEnergy's proposal

³⁵ See for example, *In the Matter of the Columbus Southern Power Co.*, Case No. 11-346-EL-SSO, Opinion and Order at 75-76 (Aug. 8, 2012), excluding from the MRO side of the equation the retail stability rider costs because they "would not occur under an MRO." and including the costs of GridSmart, the Distribution Rider, and Rider ESRR on the ESP side only.

³⁶ PUCO Staff Ex. 14 at 4.

³⁷ R. Tr. X at 1606.

³⁸ FE Ex. 197 at 19-20.

the benefits of the commitment can then be charged to customers dollar for dollar under its proposal. The quantitative benefit goes to zero when the PUCO approves FirstEnergy's \$568 million adder to the Credit Support Rider.

The PUCO should find that neither the Staff's proposed Credit Rider nor FirstEnergy's modifications to the Credit Support Rider (along with the remaining provisions of ESP IV) pass the statutory test. FirstEnergy has failed to prove that the ESP (as modified by the Proposal) is more favorable in the aggregate for customers than a market rate offer. And FirstEnergy and the PUCO Staff have failed to prove that the Credit Support Rider (along with the Third Supplemental Stipulation provisions) will be more favorable in the aggregate for customers than a market rate offer. The plans by law must be disapproved.

IV. EVALUATION OF FOUR PROPOSALS

A. Original Rider RRS Proposal cannot be implemented unless and until FirstEnergy submits and FERC approves Rider RRS's affiliate power purchase agreement.

As FirstEnergy's ESP IV proceeding was being litigated, the Electric Power Supply Association ("EPSA") and others³⁹ ("Complainants") filed a complaint at FERC.⁴⁰ The Complaint requested that FERC rescind the affiliate power sales waiver⁴¹ that it had previously granted to FirstEnergy Corp.'s market-regulated affiliates.⁴² The waiver originally allowed FirstEnergy to enter into affiliate wholesale power supply

³⁹ The other Complainants included: Retail Energy Supply Association ("RESA"), Dynegy, Inc., Eastern Generation LLC, NRG Power Marketing LLC, and GenOn Energy Management LLC.

⁴⁰ *EPSA, at al. v. FirstEnergy*, Complaint, Docket No. EL16-34-000 (January 27, 2016) ("Complaint").

⁴¹ See *FirstEnergy Solutions Corp.*, 125 FERC ¶ 61,356 (2008); reh'g denied, 128 FERC 61,119 (2009) (accepting FE Solutions' request to waive application of the affiliate restriction regulations over OCC's protest) (hereafter "Waiver Order").

⁴² See Complaint at 1-2.

contracts without submitting the contract for FERC review and approval.⁴³ Complainants requested that FERC rescind the waiver, solely with respect to the PPA, given the fundamental change in circumstances since that waiver was granted.⁴⁴ The cited fundamental change was that the non-bypassable charges associated with the PPA between FirstEnergy Solutions and FirstEnergy would force captive Ohio consumers to subsidize FirstEnergy's uneconomic generation.⁴⁵ Therefore, as the Complaint was premised on the fact that the waiver was initially granted because FirstEnergy had no captive customers, but that premise no longer exists with respect to the Rider RRS PPA.⁴⁶

On April 27, 2016, FERC granted the Complaint and rescinded FirstEnergy's affiliate power sales waiver as it applies to the Rider RRS PPA.⁴⁷ FERC agreed that the circumstances surrounding FirstEnergy's affiliate power sales waiver had changed. It found that the "non-bypassable charges present the 'potential for the inappropriate transfer of benefits from [captive] customers to the shareholders of the franchised public utility,'⁴⁸ and, thus, could undermine the goal of the Commission's affiliate restrictions."⁴⁹ Accordingly, FERC ordered FirstEnergy, prior to collecting any costs under its Rider RRS, to submit the Rider RRS PPA for FERC's review⁵⁰ under FERC's

⁴³ See Waiver Order.

⁴⁴ See Complaint at 33.

⁴⁵ See Complaint at 3.

⁴⁶ See Complaint at 3, 16, n. 49.

⁴⁷ *EPSA, at al. v. FirstEnergy*, Order Granting Complaint, Docket No. EL16-34-000 (April 27, 2016) ("FERC Order").

⁴⁸ FERC Order at P 55 citing Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 198; see also *Cross-Subsidization Restrictions on Affiliate Transactions*, Order No. 707, FERC Stats. & Regs. ¶ 31,264 at P 42, order on reh'g, Order No. 707-A, FERC Stats. & Regs. ¶ 31,272 (2008).

⁴⁹ FERC Order at ¶ 55.

⁵⁰ See FERC Order at P 53.

affiliate PPA standards in *Boston Edison Co. Re: Edgar Elec. Energy Co*⁵¹ and *Allegheny Energy Supply Co., LLC*.⁵² Thus, the Rider RRS as originally proposed and approved by the PUCO cannot be effectuated unless and until FirstEnergy submits and FERC approves the Rider RRS PPA. To OCC's/NOAC's knowledge, FirstEnergy has yet to submit the Rider RRS PPA to FERC for its review and approval.

B. The Modified Rider RRS Proposal should be denied because it fails the three-prong settlement test.

This proceeding contains a settlement. The standard of review for considering a settlement has been discussed in a number of PUCO cases and by the Ohio Supreme Court ("Court"). As the Ohio Supreme Court stated in *Duff v. Pub. Util. Comm.*⁵³ a stipulation is merely a recommendation that is not legally binding upon the PUCO. The PUCO "may take the stipulation into consideration, but must determine what is just and reasonable from the evidence presented at the hearing."⁵⁴

The Court in *Consumers' Counsel v. Pub. Util. Com.*⁵⁵ considered whether a just and reasonable result was achieved with reference to criteria adopted by the PUCO in evaluating settlements:

1. Is the settlement a product of serious bargaining among capable, knowledgeable parties, where there is diversity of interests among the stipulating parties?
2. Does the settlement, as a package, benefit customers and the public interest?

⁵¹ 55 FERC ¶ 61,132 (1991) ("Edgar").

⁵² 108 FERC ¶ 61,082 (2004) ("Allegheny").

⁵³ *Duff v. Pub. Util. Comm.* (1978), 56 Ohio St.2d 367; see also Ohio Adm. Code 4901-1-30.

⁵⁴ *Id.*

⁵⁵ *Consumers' Counsel v. Pub. Util. Comm.* (1992), 64 Ohio St.3d 123, 126.

3. Does the settlement package violate any important regulatory principle or practice?

The Modified Rider RRS proposal as a provision of the overall Stipulation package fails the settlement test for the following reasons.

- 1. The Modified Rider RRS Proposal fails the first prong of the settlement test because it is not the result of serious bargaining among capable knowledgeable parties representing a diverse interest of parties.**

The first prong of the settlement test asks whether the PUCO can determine that the negotiations over the settlement took place in an environment of sufficient conflict (i.e., “serious bargaining”) between knowledgeable signatories representing a diverse interest of parties is somewhat in doubt.⁵⁶ While the PUCO Order held that the Third Supplemental Stipulation (“Stipulation”) satisfied this prong,⁵⁷ the Stipulation package containing the new Modified Rider RRS Proposal does not.

First, to OCC’s/NOAC’s knowledge there were no settlement discussions scheduled and held at the PUCO for all intervenors to attend and discuss the proposed modifications to the Stipulation. A Stipulation must be considered as a package and in its entirety.⁵⁸ FirstEnergy filed correspondence alleging who continued to support their Proposal, but there was not a new Stipulation filed in this case. That FirstEnergy alleges that the Modified Rider RRS Proposal and the Stipulation taken as a “package” were the product of serious bargaining among capable knowledgeable parties. That is a fiction, because negotiations among the various parties never took place regarding the revised

⁵⁶ *In re Restatement of Accounts and Records of CG&E, DP&L, and CSOE*, Case No. 84-1187-EL-UNC, Order at 7 (Nov. 26, 1985).

⁵⁷ See FirstEnergy ESP IV Order at 43-45. The OCC is not implying its support for this decision.

⁵⁸ See *Consumers’ Counsel v. Pub. Util. Comm.* (1992), 64 Ohio St.3d 123, 126.

proposal intended to circumvent FERC review, and a new Stipulation never emerged from such negotiations.

In addition, the Stipulation no longer represents a diverse group of interests who have conducted serious bargaining or negotiations. In its defense, FirstEnergy represents that a portion of the signatory parties “support the filing and the proposed schedule for review.”⁵⁹ However, very notably, this group of supporters no longer includes the PUCO Staff.⁶⁰ The Kroger Company is also no longer a firm signatory to the settlement by distinguishing itself as a party that merely “does not oppose” the Modified Rider RRS Proposal.⁶¹ In addition, in compliance with the PUCO’s decision in the March 31, 2016, Opinion and Order, in order to avoid even the possibility of prejudice to the non-signatory parties the Consumer Protection Association should, again, be disregarded as a signatory party to the Stipulations.⁶² Accordingly, in a field of 54 intervening parties in this proceeding, only 14⁶³ are left supporting the Modified Rider RRS Proposal. And, of those 14, two are made up of FirstEnergy, the applicant in this proceeding, and Ohio Power Co. (“AEP Ohio”), who has a vested interest in seeing the Stipulation approved due its own current PPA Rider.⁶⁴ Moreover, the majority of the remaining signatories have ostensibly agreed to be a signatory in exchange for specific favorable terms or

⁵⁹ FE Ex. 198; See FirstEnergy Ex. 197 at 9 (Rehearing Testimony of Eileen Mikkelsen).

⁶⁰ FE Ex. 198 at n.1 (Correspondence from C. Dunn to Secretary McNeal, dated May 4, 2016).

⁶¹ Id.

⁶² See FirstEnergy ESP IV Order at 45.

⁶³ The signatory parties are: The FirstEnergy Companies, Council for Economic Opportunities in Greater Cleveland, Ohio Power Company, Ohio Energy Group, City of Akron, Cleveland Housing Network, Citizen Coalition, Nucor Steel Marion, Inc., Material Sciences Corporation, International Brotherhood of Electric Workers Local 245, Council of Smaller Enterprises, Association of Independent Colleges and Universities, EnerNOC, Inc., Ohio Partners for Affordable Energy.

⁶⁴ See AEP Ohio ESP III, Application (October 3, 2014).

provisions in the Stipulation.⁶⁵ This cannot be held as a group of diverse parties that is sufficient to approve such an important proposal to the State of Ohio and its consumers.

Therefore, the Modifications to the Stipulation do not satisfy the first prong of the three-prong test.

2. The Modified Rider RRS Proposal fails the second prong of the settlement test because it does not benefit customers or the public interest.

The Modified Rider RRS Proposal does not benefit ratepayers and the public interest, and therefore should be denied, for a multitude of reasons. First, it cuts the crucial link between the physical attributes and operation of the Sammis and Davis-Besse power plants and the Modified Rider RRS Proposal.⁶⁶ FirstEnergy's original Rider RRS proposal and eventual Stipulation was designed to ensure the continued operation of Sammis and Davis-Besse.⁶⁷ In addition, FirstEnergy claimed that there were a vast array of qualitative and quantitative public interest benefits that would be derived or facilitated by the continued operation of Sammis and Davis-Besse.⁶⁸

The majority of those benefits do not exist under the Modified Rider RRS Proposal. Indeed, FirstEnergy Witness Mikkelsen has admitted that the Modified Rider RRS Proposal does not ensure the continued operation of any Ohio-based generation.⁶⁹ Accordingly, the Modified Rider RRS Proposal would not include public interest benefits, which were directly tied to the continued operation of Sammis and Davis-Besse. These benefits included: (a) reliability of generation supply; (b) fuel/power supply

⁶⁵ OCC/NOAC Initial Brief at 25, Case No. 14-1297-EL-SSO (February 16, 2016).

⁶⁶ See OCC Ex. 44 at 7 (Kahal Rehearing Direct).

⁶⁷ See FE Ex. 13 (Testimony of Steven E. Strah).

⁶⁸ See OCC Ex. 44 at 7:6-10 (Rehearing Direct Testimony of Kahal).

⁶⁹ See R. Tr. I at 51:1-4 (Mikkelsen).

diversity;⁷⁰ (c) thousands of power plant and “linked” jobs, with associated income and tax revenue for the state; and (d) avoidance of costly additional transmission expenditures.⁷¹ That is, if the Proposal is approved and the original Rider RRS is withdrawn, the PUCO-approved Stipulation would no longer deliver the qualitative and quantitative benefits that it promised.

Second, the Modified Rider RRS Proposal is unjust and unreasonable because it would be financially unstable and unpredictable for FirstEnergy and its consumers.⁷² The original Rider RRS was designed to be essentially revenue and earnings neutral for FirstEnergy.⁷³ That is, FirstEnergy was supposed to pay FirstEnergy Solutions its cost of service (per the terms of the PPA) and sell the actual generation from Sammis, Davis-Besse and the OVEC entitlement into the wholesale market.⁷⁴ That resulting revenue stream would either “finance” the ratepayer credit, or ratepayers would “finance” FirstEnergy’s revenue shortfall.⁷⁵ In either case, FirstEnergy’s financial position was protected.⁷⁶ Under the Modified Rider RRS Proposal, FirstEnergy Solutions is not explicitly proposed⁷⁷ to receive any revenues If market prices remain lower than FirstEnergy’s sponsored projections (and with no SEET protection for consumers) the

⁷⁰ See R.C. 4928.02(C). (Such an occurrence would be a violation of R.C. 4928.02(C) because it would not ensure the diversity of electric supplies or suppliers.)

⁷¹ See OCC Ex. 44 at 7, 12 (Rehearing Direct Testimony of Matthew I. Kahal); OEC/EDF Ex. 3 at 7:10-20 (Rehearing Testimony of John Finnigan); PUCO Staff Ex. 15 at 13 (Rehearing Testimony of Choueiki).

⁷² See OCC Ex. 44 at 7:15-8:15, 12-13 (Rehearing Direct Testimony of Kahal).

⁷³ See FE Ex. 198 at 18:7-9 (Rehearing Direct Testimony of Mikkelsen); OCC Ex. 44 at 7:16-18 (Rehearing Direct Testimony of Kahal).

⁷⁴ See OCC Ex. 44 at 7:18-20 (Rehearing Direct Testimony of Kahal).

⁷⁵ See OCC Ex. 44 at 7-8 (Rehearing Direct Testimony of Kahal).

⁷⁶ See OCC Ex. 44 at 8 (Rehearing Direct Testimony of Kahal).

⁷⁷ There has been no persuasive evidence that Modified Rider RRS revenues could not eventually be received by FirstEnergy Solutions.

Modified Rider RRS Proposal will enrich FirstEnergy with potentially hundreds of millions of dollars per year at consumers' expense.⁷⁸ However, if FirstEnergy's market outlook is correct, then their pre-tax earnings will be impaired by \$561 million.⁷⁹ Such a financial loss could have adverse implications for the utilities' financial integrity and ability to meet utility service obligations for consumers.⁸⁰ Therefore, the Modified Rider RRS Proposal is unjust and unreasonable because it is too financially unstable and unpredictable.⁸¹

It is notable that FirstEnergy has provided no explanation as to how FirstEnergy would fund the payment of any credits to consumers. FirstEnergy's claim that the Proposal would be financially beneficial to consumers relies heavily on their projection that consumers' charges in the early years of the rider would be more than offset by credits in the latter years.⁸² Although these projections are based on unreasonable and outdated market forecasts,⁸³ FirstEnergy has still not explained how they would fund the payment of such credits if they did materialize and whether such unlikely payments would be funded ultimately by customers. FirstEnergy's Modified Rider RRS proposal, while still a generation rider at its core,⁸⁴ is no longer directly linked to the Sammis and

⁷⁸ See R.C. 4928.02(A) (Such charges to consumers would be a violation of R.C. 4928.02(A) because they would not ensure the availability of reasonably priced retail electric service.)

⁷⁹ See OCC Ex. 44 at 8 (Rehearing Direct Testimony of Kahal).

⁸⁰ Id.

⁸¹ Id.

⁸² Sierra Club Ex. 89 (Mikkelsen Workpaper 11/30/15).

⁸³ Proffer R. Tr. IV at 876:2-14 (July 14, 2016) (Proffer of OCC/NOAC Witness James Wilson's updated projections of the costs of Modified Rider RRS).

⁸⁴ See PUCO Staff Ex. 15 at 14:1-4 (Rehearing Testimony of Hisham Choueiki).

Davis-Besse power plants.⁸⁵ Therefore, there is no generation to produce revenues should the Modified Rider RRS defy logic and expectations and produce massive credits to consumers. Such a rider proposal is unjust and unreasonable and should be denied.

Last, in her rehearing testimony, FirstEnergy Witness Mikkelsen does not provide any updated projection of charges or credits under the Modified Rider RRS proposal.⁸⁶ Instead, FirstEnergy continues to rely on its projection of costs and revenues under Rider RRS, based on market forecasts developed in mid-2014, to contend that customers would receive a projected \$561 million nominal credit over the eight-year rider term.⁸⁷ As Ms. Mikkelsen further notes, the PUCO in its Order approving Rider RRS averaged FirstEnergy's projection with one of three scenarios projected by OCC Witness Wilson to identify a projected credit to customers of \$256 million nominal.⁸⁸ But neither projection is reliable or up-to-date.⁸⁹ Reliance on these projections is therefore arbitrary and unreasonable.

3. The Modified Rider RRS fails the third prong of the settlement test because it violates important regulatory principles and practices.

a. The Modified Rider RRS Proposal should be denied because it is unlawful under FERC's affiliate restrictions and regulations.

The Modified Rider RRS Proposal should be denied because it is in breach of FERC's Orders and regulations. On April 27, 2016, FERC issued the FERC Order on the

⁸⁵ See FE Ex. 198 at 4 (Rehearing Testimony of Mikkelsen); PUCO Staff Ex. 15 at 13:15-17 (Rehearing Testimony of Hisham Choueiki).

⁸⁶ See FE Ex. 198 (Rehearing Testimony of Mikkelsen).

⁸⁷ See FE Ex. 198 at 3-4 (Rehearing Testimony of Mikkelsen).

⁸⁸ See FE Ex. 198 at 3-4 (Rehearing Testimony of Mikkelsen) (citing FirstEnergy ESP IV Order at 85).

⁸⁹ Proffer R. Tr. IV at 876:2-14 (July 14, 2016) (Proffer of OCC/NOAC Witness James Wilson's updated projections of the costs of Modified Rider RRS).

EPSA Complaint.⁹⁰ In issuing its decision, FERC repeatedly expressed concerns that captive customers could be forced to subsidize FirstEnergy Solutions' generation.⁹¹

FERC noted that “the Affiliate PPA raises the potential for cross-subsidization from [the Companies'] retail customers—who are captive in the sense that they cannot avoid the non-bypassable charge—to FirstEnergy Ohio Market Affiliates.”⁹² FERC also noted that “there exists the potential for a franchised public utility with captive customers to interact with a market-regulated power sales affiliate in ways that transfer benefits to the affiliates and its stockholders to the detriment of the captive customers,” and stressed that the Rider RRS charges could be used to effectuate precisely the type of affiliate abuse that FERC identified in Order No. 697-A.⁹³ FERC therefore exercised its independent role to ensure that wholesale sales of electric energy and capacity are just and reasonable and to protect against affiliate abuse.⁹⁴

Instead of submitting its PPA for FERC's review, FirstEnergy has submitted its Modified Rider RRS Proposal in what is an obvious attempt to circumvent the FERC Order and FERC's authority. If approved, the Modified Rider RRS Proposal would permit cross-subsidization between FirstEnergy and its affiliates at the expense of Ohio consumers. As FERC has recognized, an extreme example of affiliate abuse would be a situation where a holding company, such as FirstEnergy Corp., siphons funds from a franchised public utility to support its failing market-regulated power sales affiliate

⁹⁰ *EPSA, at al. v. FirstEnergy*, Order Granting Complaint, Docket No. EL16-34-000 (April 27, 2016) (“FERC Order”).

⁹¹ See, e.g., FERC Order at ¶ 59, 60.

⁹² FERC Order at ¶ 65.

⁹³ FERC Order ¶ 60 (citing *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, 123 FERC ¶ 61,055, FERC Stats. & Regs. ¶ 31,268, Order No. 697-A ¶ 188- 89 (Apr. 21, 2008)).

⁹⁴ FERC Order ¶ 65.

company.⁹⁵ The Modified Rider RRS Proposal has created the possibility of just such abuse. There is no restriction in the Modified Rider RRS Proposal that would prevent FirstEnergy from directing the Modified Rider RRS monies to its affiliates.⁹⁶ Indeed, FirstEnergy admitted that Modified Rider RRS revenues could move from FirstEnergy to FirstEnergy Corp.⁹⁷

FirstEnergy also admitted that there is no prohibition in the Modified Rider RRS Proposal on FirstEnergy Corp.'s ability to move monies from FirstEnergy Corp. to FirstEnergy Solutions.⁹⁸ To put it simply, if approved, Modified Rider RRS would enable FirstEnergy to siphon funds from its ratepayers to FirstEnergy Solutions via the parent company.⁹⁹ It is also important to remember that one of the main motivations for the original Rider RRS was to subsidize the economically-challenged FirstEnergy Solutions' power plants.¹⁰⁰ The evidence now suggests that FirstEnergy could provide that same subsidy indirectly via FirstEnergy Corp. – the parent company of both

⁹⁵ FERC Order ¶ 60 n.101; Order 697-A ¶ 198 n.280.

⁹⁶ See R. Tr. I at 58-75 (Mikkelsen) (FirstEnergy Witness Mikkelsen testifying that: (1) FirstEnergy will not commit to using the Modified Rider RRS revenues on only FirstEnergy operations; (2) FirstEnergy could move monies to FirstEnergy Corp. through dividends; (3) the Modified Rider RRS Proposal does not prohibit FirstEnergy Corp. from giving rider revenues to FirstEnergy Solutions; and (4) FirstEnergy is not proposing that the PUCO will be able to review how the Modified Rider RRS revenues are spent).

⁹⁷ See R. Tr. I at 73:5-75:1 (Mikkelsen).

⁹⁸ See R. Tr. I at 75:16-25 (Mikkelsen).

⁹⁹ Modified Rider RRS may also breach the no-conduit provision of 18 C.F.R. § 35.39(g), which prohibits efforts to circumvent the affiliate restrictions in §§ 35.39(a) through (g).

¹⁰⁰ See generally FirstEnergy Br. at 125-128; FirstEnergy Reply at 196-200.

FirstEnergy Solutions and FirstEnergy.¹⁰¹ Such action would be in breach of FERC's regulations.

In addition, the rider could still facilitate unlawful affiliate abuse even if the revenues from Modified Rider RRS do not ultimately end up with FirstEnergy Solutions. FERC's affiliate restrictions are designed, in part, to protect against the inappropriate transfer of revenues from such customers to the shareholders of the franchised public utility or its holding company.¹⁰² Consequently, if revenues from the Modified Rider RRS end up at FirstEnergy Corp., strengthening its financial position and allowing it to support other non-utility affiliates, that would also be in violation of FERC's affiliate restrictions. Given FirstEnergy's admission that Modified Rider RRS revenues could be received by FirstEnergy Corp.,¹⁰³ the evidence demonstrates that a breach of FERC's affiliate restrictions could occur if the Modified Rider RRS were approved. Therefore, the PUCO should deny FirstEnergy's Proposal.

¹⁰¹ See R. Tr. I at 58-75 (Mikkelsen) (FirstEnergy Witness Mikkelsen testifying that: (1) FirstEnergy will not commit to using the Modified Rider RRS revenues on only FirstEnergy operations; (2) FirstEnergy could move monies to FirstEnergy Corp. through dividends; (3) the Modified Rider RRS Proposal does not prohibit FirstEnergy Corp. from giving rider revenues to FirstEnergy Solutions; and (4) FirstEnergy is not proposing that the PUCO will be able to review how the Modified Rider RRS revenues are spent.); See also FirstEnergy Ex. 198 at 11:17-23 (Rehearing Direct Testimony of Eileen Mikkelsen) ("The implementation of Rider RRS will be solely the responsibility of the Companies. There are no contracts or any other form of an agreement between the Companies and FES that would require the Companies to share the revenues or expenses of modified Rider RRS with FES. This proposal was not designed to transfer regulated revenues to the competitive operations (including FES).").

¹⁰² Order 697-A ¶ 198.

¹⁰³ See R. Tr. I at 58-75 (Mikkelsen) (FirstEnergy Witness Mikkelsen testifying that: (1) FirstEnergy will not commit to using the Modified Rider RRS revenues on only FirstEnergy operations; (2) FirstEnergy could move monies to FirstEnergy Corp. through dividends; (3) the Modified Rider RRS Proposal does not prohibit FirstEnergy Corp. from giving rider revenues to FirstEnergy Solutions; and (4) FirstEnergy is not proposing that the PUCO will be able to review how the Modified Rider RRS revenues are spent).

b. The Modified Rider RRS Proposal is in violation of R.C. 4928.38 and Supreme Court of Ohio precedent because it is a transition or financial stability charge.

OCC Witness Rose opined that FirstEnergy's Proposal is not consistent with Ohio Law.¹⁰⁴ Under R.C. 4928.38 an electric utility may receive transition revenues from the starting date of competitive retail electric service through the end of the market development period; however, that time period expired on December 31, 2005.¹⁰⁵ R.C. 4928.38 provides that once the utility's market development period ends, it "shall be fully on its own in the competitive market."¹⁰⁶ Section 4928.39 of the Revised Code defines transition costs as costs unrecoverable in a competitive environment, and should no longer be collected from consumers now. As OCC Witness Rose opined: "[c]ustomers are no longer obligated to cover the operating generating costs and guarantee a return on generating assets owned by the Utilities' unregulated affiliate. The Utilities are now "wholly responsible" for whether they are in a competitive position in the generation market.¹⁰⁷ The law is very clear that "[w]ith the termination of that approved revenue source, the utility shall be fully on its own in the competitive market"¹⁰⁸ and that the PUCO "shall not authorize the receipt of transition revenues or any equivalent revenues"

¹⁰⁴ OCC Ex. 45 at 7 (Rose Rehearing Direct).

¹⁰⁵ It should be noted that the "Generation Transition Charge" (GTC) ended at the end of 2005, but, for "regulatory transition charges" (RTC), the end dates were extended, per the PUCO-approved stipulation. Specifically, the stipulation indicates that the RTC recovery periods will not extend beyond December 31, 2006 for Ohio Edison, June 30, 2007 for Toledo Edison, and December 31, 2008 for CEI except in some limited circumstances. See *In the Matter of the Application of FirstEnergy Corp. on Behalf of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of Their Transition Plans and for Authorization to Collect Transition Revenues*, PUCO Case Nos. 99-1212-EL-ETP, 99-1213-EL-ATA, and 99-1214-EL-AAM, Opinion and Order (July 19, 2000). p. 11."

¹⁰⁶ See OCC Ex. 45 at 7 (Rose Rehearing Direct).

¹⁰⁷ OCC Ex. 45 at 7 (Rose Rehearing Direct).

¹⁰⁸ R.C. 4928.38.

after the termination of the market development period.¹⁰⁹ Therefore, from December 31, 2005 forward, prices were supposed to be determined based on competitive market forces. That is, neither the utility nor its affiliate can charge captive customers of regulated services for revenues to support deregulated power plants.

In direct relation to the Modified Rider RRS proposal, comparable transition, financial integrity, or stability-type charges were recently deemed unlawful by the Ohio Supreme Court.¹¹⁰ Specifically, AEP Ohio's¹¹¹ Retail Rate Stability ("RSR") Rider and The Dayton Power and Light Company's ("DP&L") Service Stability Rider ("SSR") were both deemed by the Ohio Supreme Court to be unlawful. The Court held that AEP Ohio's RSR was an unlawful transition charge, in relevant part, because it was proposed "as a means to ensure that the company was not financially harmed during its transition to a fully competitive generation market over the three-year ESP period."¹¹² The Court further stated that the RSR's intended effect of "provid[ing] AEP-Ohio with sufficient revenue to ensure it maintains its financial integrity as well as its ability to attract capital" did not justify its approval by the PUCO.¹¹³

The Modified Rider RRS Proposal is legally indistinguishable from the recent Ohio Supreme Court precedent. It is uncontroverted that the original Rider RRS would directly support FirstEnergy's economically-challenged, non-competitive, generation-

¹⁰⁹ Id.

¹¹⁰ See *In re Application of Columbus S. Power Co.*, No. 2016-Ohio-1608, and *In re Application of Dayton Power and Light Co.*, Case No. 2016-Ohio-3490 (in these cases the Ohio Supreme Court denied similar charges on the basis that they were transition, financial integrity or stability-type charges).

¹¹¹ Ohio Power Co. and Columbus Southern Power Co.

¹¹² *In re Application of Columbus S. Power Co.*, No. 2016-Ohio-1608, Para. 23.

¹¹³ See *In re Application of Columbus S. Power Co.*, No. 2016-Ohio-1608, Para 35-36.

owning affiliate FirstEnergy Solutions' Sammis and Davis-Besse power plants.¹¹⁴ While FirstEnergy has modified its Rider RRS proposal, it has not modified the potential ultimate destination of its revenues to save its failing unregulated competitive enterprise at captive customers' expense.¹¹⁵ Indeed, FirstEnergy admits that it cannot guarantee that the revenues from the Modified Rider RRS do not, once again, end up in the hands of FirstEnergy Solutions.¹¹⁶ Further, the Modified Rider RRS will ensure the financial integrity, and prevent the further financial harm of, FirstEnergy, FirstEnergy Solutions and/or FirstEnergy Corp.¹¹⁷ In fact, FirstEnergy admitted that the Modified Rider RRS revenues would improve its credit ratings.¹¹⁸ As has been stated in this rehearing proceeding an improved credit rating would ensure FirstEnergy receives more favorable terms when accessing the capital market.¹¹⁹ Therefore, the Modified Rider RRS Proposal has the same intended effect as AEP's Rider RSR and is, similarly, an unlawful charge.

¹¹⁴ See FE Ex. 37 at 2-3 (Direct Testimony of Donald Moul) (FirstEnergy direct testimony explaining that the economic viability of Sammis and Davis-Besse are in doubt and the Rider RRS would permit the plants to stay in operation).

¹¹⁵ See R. Tr. I at 58-75 (Mikkelsen) (FirstEnergy Witness Mikkelsen testifying that: (1) FirstEnergy will not commit to using the Modified Rider RRS revenues on only FirstEnergy operations; (2) FirstEnergy could move monies to FirstEnergy Corp. through dividends; (3) the Modified Rider RRS Proposal does not prohibit FirstEnergy Corp. from giving rider revenues to FirstEnergy Solutions; and (4) FirstEnergy is not proposing that the PUCO will be able to review how the Modified Rider RRS revenues are spent.); See also FE Ex. 198 at 11:17-23 (Rehearing Direct Testimony of Eileen Mikkelsen) ("The implementation of Rider RRS will be solely the responsibility of the Companies. There are no contracts or any other form of an agreement between the Companies and FES that would require the Companies to share the revenues or expenses of modified Rider RRS with FES. This proposal was not designed to transfer regulated revenues to the competitive operations (including FES).").

¹¹⁶ Id.

¹¹⁷ Id.

¹¹⁸ See R. Tr. I at 76:1-5 (Mikkelsen) ("Q. The collection of revenues under the proposal would improve some of the credit metrics for the companies that credit rating agencies look at in rating a company, correct? A. Yes.")

¹¹⁹ PUCO Staff Ex. 15 at 15 (Rehearing Testimony of Choueiki) (testifying that revenues through Staff's proposed Credit Support Rider will assist FirstEnergy in receiving more favorable terms when accessing the capital markets).

c. The Modified Rider RRS Proposal should be denied because it cannot be authorized by the PUCO under R.C. 4928.143(B)(2)(d).

Under R.C. 4928.143(B)(2)(d), an ESP may provide for or include terms, conditions, or charges relating to, among other things, “limitations on customer shopping for retail electric generation service...as would have the effect of stabilizing or providing certainty regarding retail electric service.”¹²⁰ FirstEnergy alleges that its Modified Rider RRS Proposal satisfies this standard, as the PUCO held the Rider RRS did, because it is a “financial limitation on the consequences of customer shopping.”¹²¹ This is a tortured reading and interpretation of the statute, which is incorrect for several reasons.

First, FirstEnergy is wrong because the plain reading of the statute does not state that an ESP may include charges related to “financial” or “physical” limitations on shopping. It is well-established canon of construction that when the language of a statute is plain and unambiguous it must be given that effect.¹²² Here, the statute plainly allows for an ESP to include “terms, conditions, or charges relating to limitations on customer shopping for retail electric generation service....”¹²³ The statute is not ambiguous in its language or construction and, therefore, the plain meaning of its terms must be given effect. Such an effect would not allow for the Modified Rider RRS’s due to its alleged financial limitation on customer shopping. The proposal should be denied.

¹²⁰ R.C. 4928.143(B)(2)(d).

¹²¹ FE Ex. 197 at 10-17 (Mikkelsen Rehearing Testimony).

¹²² See *Caminetti v. United States*, 242 U.S. 470, 485 (1917).

¹²³ R.C. 4928.143(B)(2)(d).

Second, the Modified Rider RRS Proposal will not limit customer shopping because it is a non-bypassable rider.¹²⁴ That is, all of FirstEnergy's distribution customers, shopping and non-shopping alike, will be charged or credited for the Modified Rider RRS.¹²⁵ If the charge cannot be avoided then it will not impact a customer's decision to shop or not shop. Indeed, consumers will continue to obtain generation service either through the SSO or through contracts with a CRES provider or aggregation. The Modified Rider RRS will not change any part of the shopping process and will not restrict or otherwise limit customer shopping in any way.¹²⁶ Therefore, the Modified Rider RRS does not relate to limiting customer shopping.

Third, even if FirstEnergy's tortured interpretation of the statute was used, the Modified Rider RRS would still be inconsistent with R.C. 4928.143(B)(2)(d) because the Modified Rider RRS does not "financially limit customer shopping."¹²⁷ In FirstEnergy ESP IV Order, the PUCO seems to hold that if consumer bills under a rider reflect a generation price that is partly cost-based and partly market-based, then that will result in a financial limitation on customer shopping for retail electric generation service.¹²⁸ This is not true. Such a rider does not financially limit a shopping customer unless the charge is only allocated to shopping customers. The fact that the Modified Rider RRS is non-bypassable¹²⁹ means that the charge is not a limit on shopping customers, but on all

¹²⁴ R. Tr. I at 50:12-17 (Mikkelsen) (FirstEnergy Witness Mikkelsen stating that the modified Rider RRS applies to both shopping and non-shopping customers); FE Ex. 13 at 5 (Testimony of Steven E. Stah).

¹²⁵ Id.

¹²⁶ R. Tr. I at 49:21-24 (Mikkelsen) ("Q: And the proposal does not place any restriction on the ability of retail customers to shop for their energy correct? A: Yes."); FE Ex. 13 at 6-7 (Testimony of Steven E. Stah).

¹²⁷ See R.C. 4928.143(B)(2)(d).

¹²⁸ FirstEnergy ESP IV Order at 109 (March 31, 2016).

¹²⁹ See R. Tr. I at 50:12-17 (Mikkelsen) (FirstEnergy Witness Mikkelsen stating that the modified Rider RRS applies to both shopping and non-shopping customers); FE Ex. 13 at 5 (Testimony of Steven E. Stah).

customers. Therefore, the charge, if the PUCO's interpretation is followed, would be a financial limitation on all customer bills, not just shopping customers' bills.

Last, it is important to note that following such an interpretation of R.C. 4928.143(B)(2)(d) could be dangerous legal precedent for consumers. This statutory interpretation would enable a utility to claim that any generation-related rider that is not completely based on market pricing is compliant with the Revised Code and has received the PUCO's "stamp of approval." The possibility of riders that could harm consumers would be endless.

d. The Modified Rider RRS Proposal should be denied because it violates regulatory principles and practices regarding the SEET test.

The Modified Rider RRS Proposal violates important regulatory principles and practices because the proposed exclusion of Rider RRS revenues and expenses (if any) in the annual SEET review¹³⁰ of FirstEnergy is inconsistent with Ohio law¹³¹ and prior PUCO orders.¹³² While certain exclusions to net earnings used to calculate return on equity for SEET purposes are allowed,¹³³ exclusions of revenues and expenses for SEET purposes should generally be limited to those associated with non-recurring, special, and

¹³⁰ FE Ex. 198 at 18 (Rehearing Testimony of Mikkelsen).

¹³¹ See R.C. 4928.143(F).

¹³² See *In the Matter of the Investigation into the Development of the Significantly Excessive Earnings Test Pursuant to Amended Substitute Senate Bill 221 for Electric Utilities*, Case No. 09-786-EL-UNC, Finding and Order (June 30, 2010).

¹³³ For example, the earnings from off-system sales can be excluded on a case-by case basis and an exclusion to a utility's net income as a result of SEET refund can be made in the year when the adjustment is made. See *In the Matter of the Investigation into the Development of the Significantly Excessive Earnings Test Pursuant to Amended Substitute Senate Bill 221 for Electric Utilities*, Case No. 09-786-EL-UNC, Finding and Order at 9, 15 (June 30, 2010).

extraordinary items.¹³⁴ As OCC Witness Dr. Duann states, adjustments to the revenues and expenses for SEET calculation are generally limited to extraordinary, special, one-time-only events such as gains and write-offs associated with asset disposition or regulatory events or earnings from affiliated companies.¹³⁵ In contrast, the Modified Rider RRS is a recurring mechanism that will collect charges (or allegedly render credits) over an extended period of time.¹³⁶ That is, the Modified Rider RRS will deliver a regular and continuous stream of charges (or credits) to FirstEnergy or customers. It is not a special item or one-time event and thus should not be excluded from SEET.¹³⁷

To allow Modified Rider RRS charges to be excluded from SEET would also be non-compliant with PUCO precedent. Several similar riders, that have recently been approved, were not excluded from SEET calculations. Specifically, The Dayton Power & Light Company's Service Stability Rider ("SSR")¹³⁸ and the Ohio Power Company's Retail Rate Stability Rider ("RSR")¹³⁹ are both stability-type riders that are not excluded from SEET calculations. The Modified Rider RRS, Rider SSR, and Rider RSR are all permanent and regularly collected by their respective electric distribution utility. Rider SSR and Rider RSR were not treated as special items and were not excluded from SEET calculations. It would be inconsistent to allowed the Modified Rider RRS to now be excluded from SEET.

¹³⁴ See *In the Matter of the Investigation into the Development of the Significantly Excessive Earnings Test Pursuant to Amended Substitute Senate Bill 221 for Electric Utilities*, Case No. 09-786-EL-UNC, Finding and Order at 18 (June 30, 2010) ("Accordingly, for the SEET calculation, the earned return will equal the electric utility's profits after deduction of all expenses, including taxes, minority interest, and preferred dividends, paid or accumulated and excluding any non-recurring, special, and extraordinary items.").

¹³⁵ OCC Ex. 43 at 8 (Rehearing Direct Testimony of Dr. Daniel J. Duann, Ph.D.).

¹³⁶ OCC Ex. 43 at 8 (Rehearing Direct Testimony of Dr. Daniel J. Duann, Ph.D.).

¹³⁷ OCC Ex. 43 at 8 (Rehearing Direct Testimony of Dr. Daniel J. Duann, Ph.D.).

¹³⁸ See Case No. 12-426-EL-SSO.

¹³⁹ Case No. 11-0346-EL-SSO.

e. The Modified Rider RRS Proposal is in violation of R.C. 4928.02(H).

Under R.C. 4928.02(H) it is the policy of the State of Ohio to:

[e]nsure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa, including by prohibiting the recovery of any generation-related costs through distribution or transmission rates.¹⁴⁰

Here, the Modified Rider RRS Proposal is a non-bypassable charge to distribution customers assessed by FirstEnergy that could potentially end up in the hands of FirstEnergy's noncompetitive affiliate, FirstEnergy Solutions.¹⁴¹ In addition, the non-bypassable charge collected through Modified Rider RRS could only benefit one generation supplier, FirstEnergy Solutions, because the revenues would be kept within the FirstEnergy family of companies.¹⁴² These would amount to benefits from additional revenues that other competitive suppliers in the market do not receive.¹⁴³ Accordingly, an

¹⁴⁰ R.C. 4928.02(H); See also *Indus. Energy Users-Ohio v. Pub. Util. Comm.*, 2008-Ohio-990, 117 Ohio St. 3d 486, 487-88, 885 N.E. 2d 195, 198 (In *Indus. Energy Users-Ohio*, the Supreme Court of Ohio reversed a PUCO finding authorizing the use of distribution revenues to subsidize the cost of a generation facility. The Supreme Court's references in the case to R.C. 4928.02(G) are to the same language now in R.C. 4928.02(H) due to the 2008 addition, in Senate Bill 221, of R.C. 4928.02(F)); *Elyria Foundry Co. v. Pub. Util. Comm.* 2007-Ohio-4164, 114 Ohio St. 3d 305, 315, 871 N.E. 2d 1176, 1188 (in *Elyria Foundry*, fuel costs in a standard service offer were not permitted to be deferred for later recovery through a non-bypassable distribution charge, i.e., a charge applicable to all customers).

¹⁴¹ See R. Tr. I at 58-75 (Mikkelsen) (FirstEnergy Witness Mikkelsen testifying that: (1) FirstEnergy will not commit to using the Modified Rider RRS revenues on only FirstEnergy operations; (2) FirstEnergy could move monies to FirstEnergy Corp. through dividends; (3) the Modified Rider RRS Proposal does not prohibit FirstEnergy Corp. from giving rider revenues to FirstEnergy Solutions; and (4) FirstEnergy is not proposing that the PUCO will be able to review how the Modified Rider RRS revenues are spent.); See also FirstEnergy Ex. 198 at 11:17-23 (Rehearing Direct Testimony of Eileen Mikkelsen).

¹⁴² See R.C. 4928.02(C) (Such an occurrence would be a violation of R.C. 4928.02(C) because it would not ensure the diversity of electric supplies or suppliers.)

¹⁴³ *Id.*

approval of the Modified Rider RRS is a violation of state policy and applicable legal precedent.

C. The PUCO Staff's Credit Support Rider violates the law, harms consumers, and sets a precedent of dangerous public policy.

The staff of the PUCO has opposed FirstEnergy's Proposal by stating that FirstEnergy's new proposal eliminates important benefits that the PUCO had relied on in its March 31 Opinion and Order.¹⁴⁴ Under the false guise of grid modernization, the Staff of the PUCO has proposed a rider (inaptly titled the "Distribution Modernization Rider"), which would provide credit support for FirstEnergy that will require consumers to "assist the Companies in receiving more favorable terms when accessing the capital market."¹⁴⁵ Only tangentially related to grid modernization, this proposal would provide an annual \$131 million consumer funded cash infusion¹⁴⁶ for three years with an option for two more years.¹⁴⁷ The PUCO staff predicted that this proposal would allow FirstEnergy to borrow money at lower interest rates to fund grid modernization programs.¹⁴⁸ However, there are no requirements that FirstEnergy spend money on grid modernization after receiving these funds.¹⁴⁹

The PUCO staff has determined this credit support proposal is necessary because FirstEnergy Corp. (the parent company of the electric distribution companies) is likely to

¹⁴⁴ PUCO Staff Ex. 15 at 13 (Choueiki Direct).

¹⁴⁵ PUCO Staff Ex. 15 at 13 (Choueiki Direct).

¹⁴⁶ PUCO Staff Ex. 13 at 3 (Buckley Direct).

¹⁴⁷ PUCO Staff Ex. 13 at 7 (Buckley Direct).

¹⁴⁸ PUCO Staff Ex. 15 at 15 (Choueiki Direct).

¹⁴⁹ R. Tr. IV at 957 (Choueiki Cross)(stating that there is no mandate that cash collected through the Credit Support Rider would go to grid modernization initiatives).

be downgraded by credit ratings agencies.¹⁵⁰ Upon closer inspection, it becomes clear that this downgrade is due to the FirstEnergy Corp.'s mismanagement of its own competitive generation affiliates.¹⁵¹ In a manner, Ohio consumers would be footing the bill for a credit support proposal that is necessary due to management's decisions regarding FirstEnergy's competitive affiliates.¹⁵²

Furthermore, as will be detailed below, the credit support proposal violates Ohio law, sets a dangerous public policy precedent, and harms consumers. Ohio consumers should not bear the burden of bailing out the management of FirstEnergy for their decisions in the deregulated competitive marketplace. Therefore, the OCC/NOAC recommend that the PUCO act to protect consumers and deny Staff's proposal.

1. PUCO Staff's credit support proposal violates Ohio law.

The PUCO Staff's credit support proposal cannot be approved by the PUCO because it is not a provision permitted under an ESP (it does not qualify as a valid distribution modernization charge). It is also an unlawful transition charge. Staff's credit support proposal is unprecedented and unwarranted, and it would be unreasonable for the PUCO to order customers to fund.

a. Staff credit support proposal does not meet the required standards for distribution infrastructure and modernization incentives.

The PUCO Staff claims that this is a distribution infrastructure and modernization rider that fits under 4928.143(h). However, staff's credit support proposal meets neither of these requirements. R.C. 4928.143 sets out the standard for distribution modernization

¹⁵⁰ See PUCO Staff Ex. 13 at 2 (Buckley Direct).

¹⁵¹ See OCC Ex. 46 at 4 (Kahal Rehearing Rebuttal).

¹⁵² OCC Ex. 46 at 4 (Kahal Rehearing Rebuttal).

charges that may be included in an ESP. An ESP may include, “provisions regarding distribution infrastructure and modernization incentives for the electric distribution utility”¹⁵³ that “include a long-term energy delivery infrastructure modernization plan for that utility or any plan providing for the utility's recovery of costs, including lost revenue, shared savings, and avoided costs, and a just and reasonable rate of return on such infrastructure modernization.”¹⁵⁴ When approving one of these provisions, the PUCO must “ensure that customers' and the electric distribution utility's expectations are aligned” with regards to reliability.¹⁵⁵ Staff’s credit support proposal fails all these requirements.

Under the statute, the provision must be used for “distribution infrastructure and modernization incentives.”¹⁵⁶ Despite its name, the Staff’s so called “Distribution Modernization Rider” is not structured as a distribution infrastructure and modernization incentive. Staff Witness Buckley specifically testified that, “[t]he rider would be established to allow the Ohio Regulated Distribution Utilities to provide the appropriately allocated support for First Energy Corporation to maintain investment grade by the major credit rating agencies.”¹⁵⁷ Staff Witness Buckley clearly states that the main purpose of the rider is to provide a cash infusion to ensure FirstEnergy Corp. can maintain its credit rating at the expense of consumers.

¹⁵³ R.C. 4928.143(h).

¹⁵⁴ Id.

¹⁵⁵ Id.

¹⁵⁶ Id.

¹⁵⁷ PUCO Staff Ex. 13 at 2 (Buckley Direct).

PUCO Staff claims that this credit support will help FirstEnergy receive “more favorable terms when accessing the capital market”¹⁵⁸ and thus “enable the Companies to procure funds to jumpstart their distribution grid modernization initiatives.”¹⁵⁹ However, there is no requirement that FirstEnergy spend any of these monies on grid modernization.¹⁶⁰ This is not regulated recovery for necessary investments, nor is it even a scheme that allows for accelerated recovery of investment (like many riders). It is simply providing money for FirstEnergy Corp. to strengthen its balance sheet. Whether the utility actually spends money to modernize the grid is very much up in the air.

In addition, FirstEnergy already has the Delivery Capital Rider “DCR,” which Staff acknowledged provides the utilities the ability to fund improvements to the distribution infrastructure.¹⁶¹ A properly structured DCR could be included in the Utilities’ ESP as a distribution infrastructure and modernization charge. But providing money so the parent company can maintain its credit rating does not meet the definition of incenting or promoting distribution modernization consistent with Ohio law.

Furthermore, even if this proposal did require distribution modernization, it would still fall short of meeting the statutory requirements. Under R.C. 4928.143(h), the PUCO must determine, before approving the provision, that customers’ and the distribution utility’s expectations are aligned.¹⁶² However, as OCC testified in the first phase of this

¹⁵⁸ PUCO Staff Ex. 15 at 15 (Choueiki Direct).

¹⁵⁹ PUCO Staff Ex 15 at 15 (Choueiki Direct).

¹⁶⁰ See R Tr. IV at 957 (Choueiki Cross).

¹⁶¹ PUCO Staff Ex. 4 at 6 (Nicodemus Direct) (describing the Delivery Capital Rider as a distribution infrastructure incentive).

¹⁶² See R.C. 4928.143(h).

case, customers and FirstEnergy's expectations are not aligned.¹⁶³ Additionally, Staff has not presented any new evidence beyond what was originally presented at the hearing to show that these expectations are in alignment.¹⁶⁴ The PUCO should reject the DMR because it fails to meet the statute.

b. Staff's credit support proposal is an unlawful transition charge.

Staff's credit support proposal is an unlawful transition charge that requires consumers to improperly subsidize competitive generation efforts of FirstEnergy Corp. Staff's credit support proposal seeks to funnel money to FirstEnergy Corp. to cover financial losses associated with its competitive generation business. Ohio law bars the PUCO from authorizing "the receipt of transition revenues or *any equivalent revenues* by an electric utility[.]" after the market development period has ended (2005)"¹⁶⁵ The Ohio Supreme Court ("Court") has determined that even though something was not explicitly labeled as transition revenue, it can still be considered "transition revenue".¹⁶⁶ As part of that case, the Court determined that AEP's Retail Stability Rider ("RSR") included the recovery of unlawful transition revenue. The Court overturned the PUCO's approval of that rider.¹⁶⁷ When looking at AEP's transition revenues the Court noted that Rider RSR

¹⁶³ See OCC Ex. 27 at 19-21 (Williams Direct Public) ("To the extent that the FirstEnergy customer perception survey indicates that the Utility's customers are unwilling to pay more to avoid non-major outages, customers and FirstEnergy expectations concerning reliability are not aligned.").

¹⁶⁴ R. Tr. II at 469 (Turkenton Cross) (stating that the alignment of expectations was addressed by a staff Witness in the original 41 days of hearing).

¹⁶⁵ R.C. 4928.38 (emphasis added) (the statute does create an exception for R.C. 4928.21 and R.C. 4928.40, however, neither are applicable in this context).

¹⁶⁶ "But the fact that AEP did not explicitly seek transition revenues does not foreclose a finding that the Company is receiving the equivalent of transition revenue under the guise of the RSR." *In Re Application of Columbus Southern Power Co.*, No. 2013-0521, 2016-Ohio-1608, slip op. at ¶21 (Ohio 2016) ("AEP Transition Revenue Case").

¹⁶⁷ AEP Transition Revenue Case at ¶38.

was approved to “provide AEP-Ohio with sufficient revenue to ensure it maintains its financial integrity as well as its ability to attract capital.”¹⁶⁸ The Court’s decision was subsequently reinforced when the Court recently and summarily rejected DP&L’s Service stability charge as an unlawful transition charge.¹⁶⁹

Staff’s credit support proposal is a transition charge that is meant to support the financial integrity of its parent company. As stated above, it is abundantly clear that Staff’s proposed credit support rider is maintained for the benefit of keeping FirstEnergy Corp. at an investment grade rating.¹⁷⁰ From the documents that are attached to Staff Witness Buckley’s testimony¹⁷¹ it becomes evident why FirstEnergy Corp.’s credit is dropping.

In its rationale for changing FirstEnergy Corp.’s outlook to negative, Standard & Poor’s describes “weak commodity prices” and “[t]he higher-risk competitive business greatly increases the company’s [FirstEnergy Corporation] exposure to lower generation volumes and commodity prices.”¹⁷² Low commodity prices have resulted in the outlook weakening for FirstEnergy Corp.’s competitive affiliates, like FirstEnergy Solutions, which in turn has caused the negative outlook for the corporate parent. There is no problem with the Ohio electric distribution utilities, who are recovering their costs and

¹⁶⁸ AEP Transition Revenue Case at ¶36.

¹⁶⁹ *In Re Application of Dayton Power and Light Company to Establish a Standard Service Offer in the Form of an Electric Security Plan*, No. 2014-1505, 2016-Ohio-3490, slip op. at ¶1 (Ohio 2016) (“DP&L Transition Revenue Case”).

¹⁷⁰ See PUCO Staff Ex. 13 at 2 (Buckley Direct).

¹⁷¹ While these documents were originally filed as confidential, these confidentially claims were waived by FirstEnergy. R Tr. I at 31.

¹⁷² PUCO Staff Ex. 13 at Attachment 3, pg 2-3 (Buckley Direct).

have a strong financial outlook.¹⁷³ Staff's credit support proposal is an anti-competitive subsidy that is propping up FirstEnergy Corp. for issues with its unregulated subsidiaries. Staff acknowledges that it will provide the parent company with revenue to ensure it is able to maintain its credit and as a result, attract capital.¹⁷⁴ This sort of financial integrity/transition charge is exactly what the Court is put a stop to in its decision in the AEP Transition Revenue Case¹⁷⁵ and the corresponding DP&L Transition Revenue case¹⁷⁶. There is a bit of irony in the fact that FirstEnergy Solutions fought against Dayton Power & Light's anticompetitive financial integrity/transition charge, and yet its affiliate EDU's are now seeking a similar charge to subsidize its competitive business.¹⁷⁷ Staff's credit support proposal is a blatantly illegal financial integrity/transition charge that should be rejected by the PUCO.

2. Staff's credit support proposal is bad public policy and harms consumers.

In addition to being illegal, Staff's credit support proposal sets bad precedent and directly harms consumers. The PUCO should not allow the regulatory process to be undermined by FirstEnergy seeking to bail-out its parent or its unregulated affiliates. Such a bail-out would be borne on the shoulders of FirstEnergy's customers. To place the additional uneconomic monetary burden of such a bail-out on the shoulders of the economically depressed regions¹⁷⁸ that FirstEnergy serves violates the basic policy

¹⁷³ The FirstEnergy Companies all have higher ratings than FirstEnergy Corp. (BBB+ compared to BBB-), PUCO Staff Ex. 13 at Attachment 3, pg 6-7 (Buckley Direct).

¹⁷⁴ PUCO Staff Ex. 13 at 2 (Buckley Direct).

¹⁷⁵ AEP Transition Revenue Case at ¶38.

¹⁷⁶ DP&L Transition Revenue Case at ¶1.

¹⁷⁷ *In the Matter of the Application of The Dayton Power and Light Company for Approval of its Electric Security Plan*, Case No. 12-426-EL-SSO, Opinion and Order at 19 (Sep. 4, 2013).

¹⁷⁸ See OCC Ex. 27 at 6-8 (Williams Public Direct).

rationale that is articulated in Ohio law.¹⁷⁹ Therefore, the PUCO should reject Staff's credit support proposal and take action to prevent FirstEnergy from harming consumers.

a. Neither the Staff nor the Companies have proven the need for emergency rate relief. In any event, emergency rate relief is not a provision available to utilities under an electric security plan

The proposal circumvents the emergency rate relief statutes and would set a bad precedent of the PUCO bailing out unregulated companies. Regulation of Ohio's electric distribution utilities does not occur solely through the venue of an ESP case. When a distribution utility is in dire need of cash or solvency, it can rely on the emergency rate relief statute.¹⁸⁰ The PUCO has already set out the standards required for a utility to meet the requirements of the rate relief statute.¹⁸¹ The ultimate question in that analysis is "whether, absent emergency relief, the utility will be financially imperiled or its ability to render service will be impaired."¹⁸²

FirstEnergy's present predicament does not currently meet the requirements of the rate relief statute. As stated above, the fundamental issue is in the financial weakness of FirstEnergy's unregulated affiliates and its parent. Furthermore, there is no provision in the ESP statute to allow for recovery for emergency rate relief or financial integrity

¹⁷⁹ See R.C. 4928.02 (H) ("Ensure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa, including by prohibiting the recovery of any generation-related costs through distribution or transmission rates"); R.C. 4928.02 (A) ("Ensure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service").

¹⁸⁰ See R.C. 4909.16.

¹⁸¹ *In the Matter of the Application of Akron Thermal, LP, for an Emergency Increase in its Steam and Hot Water Rates and Charges*, Case No. 00-2260-HT-AEM, Opinion and Order at 6 (Jan. 25, 2001).

¹⁸² *Id.*

charges.¹⁸³ Financial distress in the unregulated companies is not the concern of the PUCO, and the PUCO can only take action that is permitted by law to directly protect the FirstEnergy EDUs from adverse consequences. Additionally, there has been no showing by the utility that absent emergency relief, the EDUs will be financially or imperiled or their ability to render service will be impaired.

There are important policy goals involved in preventing consumers from bailing out FirstEnergy's corporate parent. One of these policies is that in doing so, the PUCO could be incenting risky behavior on the part of the corporate parents of distribution utilities. This is exemplified in the economic concept of "moral hazard." Moral hazard is the notion that, "there is a distorted incentive structure in place that motivates investors to make suboptimal choices because they do not bear the adverse consequences of these choices."¹⁸⁴ By bailing out FirstEnergy's parent corporation, the PUCO would be promoting additional risky behavior. Furthermore there would be no incentive not to engage in risky behavior for the corporate parent because they know the PUCO will insulate them from any bad consequences at captive consumers' expense. Such a policy precedent would in the end harm consumers because they would bear the burden of bailing out these parent corporations.

¹⁸³ See R.C. 4928.143 (This statute specifically omits any mention of financial integrity, which is included in the Market Rate Offer statute, R.C. 4928.142).

¹⁸⁴ Lois R. Lupica, *Transition Losses in the Electric Power Market: A Challenge to the Premises Underlying the Arguments for Compensation*, 52 RUTGERS L. REV. 649, 677 (2000).

b. Staff's credit support proposal directly harms consumers.

Under Staff's credit support proposal, Ohio consumers are being made to atone for the past corporate decisions made by FirstEnergy's own management.¹⁸⁵ Such an outcome forces consumers to pay a premium to protect the shareholders of FirstEnergy. The PUCO should act to ensure that consumers will not be bailing-out FirstEnergy Corp.

As OCC Witness Kahal points out:

The weak credit ratings cited by Witness Buckley are, in fact, the direct result of FE Corp management's own past corporate decisions (and its unregulated operations), and not by Ohio regulation. It is unfair to hold utility customers accountable for those FE Corp policy decisions and force them to subsidize shareholders and FE Corp's unregulated operations.¹⁸⁶

The end result of Staff's credit support proposal is bail-out and subsidization of FirstEnergy Corporation and its unregulated operations in the rates that captive consumers pay for electricity. Such a result is unjust and unreasonable and would result in Ohio consumers paying \$400 to \$650 million in charges over the course of three to five years.¹⁸⁷

Staff Witness Buckley suggests to collect these funds subject to refund if FirstEnergy Corporation does not agree to keep its headquarters in Ohio.¹⁸⁸ This is an appropriate provision, but does not take into account the sheer illegality of Staff's proposal, and its likelihood of being overturned by the Ohio Supreme Court. Therefore, OCC/NOAC would recommend that if the PUCO were to take the extreme action of

¹⁸⁵ OCC Witness Kahal describes weak financials that have resulted in an undercapitalized FirstEnergy Corporation. See OCC Ex. 46 at 11 (Kahal Rehearing Rebuttal).

¹⁸⁶ OCC Ex. 46 at 4 (Kahal Rehearing Rebuttal).

¹⁸⁷ OCC Ex. 46 at 3 (Kahal Rehearing Rebuttal).

¹⁸⁸ PUCO Staff Ex. 13 at 7 (Buckley Rehearing Direct).

approving an additional \$400 to \$650 million in charges to consumers (which it should not), they should be collected subject to refund.

It also appears that the PUCO staff is unique in their zeal to solve FirstEnergy's corporate woes. As OCC Witness Kahal states, "[t]here is no evidence that any rate or earnings enhancement initiative in other jurisdictions will be forthcoming."¹⁸⁹ If Ohio chooses to bail-out FirstEnergy it will be alone in providing direct credit support to FirstEnergy Corp.

This is especially true when FirstEnergy could strengthen its balance sheet through other actions, including equity share sales.¹⁹⁰ FirstEnergy corporation shares currently sell for a healthy premium over their book value.¹⁹¹ FirstEnergy should be engaging in actions like this,¹⁹² and their cash flow improvement program¹⁹³ to support their balance sheet instead of relying on Ohio consumers to bail them out.

Finally, the PUCO should investigate the appropriateness of taking action to prevent the Ohio EDU's from suffering any consequences of a ratings downgrade. OCC Witness Kahal suggests that low cost "ring-fencing" be investigated by FirstEnergy as a possible action to be taken.¹⁹⁴ As OCC Witness Kahal describes it:

Credit-rating agencies are concerned with the potential for bond holder losses due to default and bankruptcy. It is for this reason that S&P and Moody's are concerned with affiliate risk issues

¹⁸⁹ OCC Ex. 46 at 8 (Kahal Rehearing Rebuttal).

¹⁹⁰ OCC Ex. 46 at 12 (Kahal Rehearing Rebuttal).

¹⁹¹ *Id.*

¹⁹² FirstEnergy Witness Mikkelsen has stated that FirstEnergy Corporation is issuing \$500 million in equity and this would provide credit support for the Companies. R. Tr. X at 1678 (Mikkelsen Rebuttal Cross). These actions are the proper means to provide credit support and should be continued.

¹⁹³ FE Witness Moul describes the Cash Flow Improvement Program that could result of savings of \$155 million in 2016 and \$240 million in 2017. Tr. XXXII at 6576-6577 (Moul Rebuttal Cross).

¹⁹⁴ OCC Ex. 46 at 13 (Kahal Rehearing Rebuttal).

when assigning ratings to the FE Ohio Utilities, and this is why they employ a consolidation criterion. It is possible to address this problem by putting in place structural separation measures that can help protect the FE Ohio Utilities from such affiliate and parent financial and bankruptcy risk. Such measures (if needed) would be far less expensive than the \$400 million to \$650 million customer cost recommended by Witness Buckley.¹⁹⁵

While OCC/NOAC do not recommend ring-fencing at this time, it should be investigated as a possible solution that could protect the FirstEnergy EDUs from the risks associated with a ratings downgrade of the parent corporation. Not surprisingly, the New Jersey Board of Public Utilities has already suggested that FirstEnergy's New Jersey affiliate be required to have such a study in its most recent rate case.¹⁹⁶ The PUCO should reject Staff's credit support proposal and require that the management of FirstEnergy explore ring-fencing to protect the utilities.

3. Even if the PUCO adopts Staff's Credit Support Rider, it should reject OEG's proposed rate design.

Staff's credit support proposal directly harms consumers, but OEG's proposed rate design would go even further by allocating a disproportionate amount of the Rider DMR costs to FirstEnergy's residential customers. In its rebuttal testimony to Staff's proposal, OEG proposes that Staff's credit support proposal (Rider DMR) should be allocated based 50 percent on distribution revenues and 50 percent based on demand (4 Coincident Peak).¹⁹⁷ This allocation is inappropriate because it would disproportionately allocate costs to residential consumers to the benefit of high usage industrial and commercial customers. OEG Witness Baron testified that his proposal would allocate up

¹⁹⁵ OCC Ex. 46 at 14 (Kahal Rehearing Rebuttal).

¹⁹⁶ Id.

¹⁹⁷ OEG Ex. 7 at 3 (Baron Rehearing Rebuttal).

to \$57 million dollars of the credit support rider to residential customers.¹⁹⁸ OCC/NOAC propose that if the PUCO approves Rider DMR (they should not), then the PUCO should allocate costs to all customers on the basis of 50 percent kwh allocation and 50 percent Demand (4 Coincident peak). This would result in a more equitable distribution between a pure demand or pure energy allocation. OCC/NOAC take no position on the intra class allocation methodology to be used for other customer classes.

D. FirstEnergy's modifications to the Staff Proposal are harmful to consumers and should not be considered for approval by the PUCO.

The PUCO should not consider approving the PUCO Staff Proposal, as argued above. However, if the PUCO does find merit in the concepts contained in the PUCO Staff Proposal, then OCC/NOAC recommend not adopting the more extreme modifications to the Credit Support Rider advocated by FirstEnergy.

FirstEnergy modified the Staff proposal in two distinct ways. Simply, FirstEnergy wants to collect much more money over a much longer period of time. First, the Utilities propose the remaining term of the ESP (i.e., eight years)¹⁹⁹ as a period of time over which the Credit Support Rider would be in effect to collect money from customers instead of three years with the potential option to extend for an additional two years, as proposed by Staff. Second, FirstEnergy's proposal would significantly increase the charges to consumers allowing it to charge customers up to \$1.13 billion per year. This is a big jump up from Staff's proposal which would allow FirstEnergy to collect \$131 million per year from consumers. FirstEnergy's proposed modifications would cause great harm to customers and should not be approved by the PUCO.

¹⁹⁸ R. Tr. VI at 1304 (Baron Rebuttal Cross).

¹⁹⁹ R. Tr. X at 1732 (Mikkelsen).

1. FirstEnergy's proposal that customers pay the credit support rider for eight years is arbitrary and harmful to consumers.

FirstEnergy's alternative proposals, in this proceeding including Rider RRS and the Proposal were both for a term of eight years, the length of ESP IV. The Utilities' proposed modifications to the Staff Proposal for the remaining time of the ESP²⁰⁰ is more by coincidence than necessity. However, that remaining term of the ESP bears no relationship to the purpose of the Credit Support Rider and the duration by which it should be used to collect money from the Utilities' customers.

Staff thought three years was an adequate period of time for FirstEnergy Corp. to improve its credit ratings.²⁰¹ Staff suggested that a two year extension could be requested if FirstEnergy Corp.'s credit position had not improved after three years.²⁰² Nevertheless, the two year extension was not guaranteed, but merely suggested by Staff that FirstEnergy could request it if needed. It is expected that FirstEnergy would need to demonstrate the request, for the two year extension, to be just and reasonable before being approved by the PUCO.

OCC/NOAC contends that FirstEnergy's requested term is arbitrary. Importantly, FirstEnergy does not know how much time is needed to improve credit ratings.²⁰³ It is noteworthy that Staff viewed the credit support to be a "bridge" to allow time for FirstEnergy Corp. to implement a long-term solution.²⁰⁴ In FirstEnergy's modifications

²⁰⁰ FirstEnergy's ESP IV that commenced on June 1, 2016 and will conclude May 31, 2024, See R. Tr. Vol. 10 at 1732-1733.

²⁰¹ PUCO Staff Ex. No. 13 at Q&A 12 (Rehearing Testimony of Joseph Buckley).

²⁰² Id.

²⁰³ R. Tr. Vol. X at 1731-1732 (Mikkelsen).

²⁰⁴ PUCO Staff Ex. No. 13 at Q&A 11 (Rehearing Testimony of Joseph Buckley).

to Staff Proposal, there exists no provision to turn off the spigot if credit ratings improve during the period of credit support collections.

The PUCO should not approve the Utilities' proposed modifications to the authorized term for collecting the Credit Support Rider. Because, if it turns out, as Staff proposes, that a three-year term was adequate time to improve FirstEnergy Corp.'s credit ratings, then all collections through that Rider beyond the three-year term would be unjust and unreasonable. That could harm consumers by up to 1.13 billion dollars for every year that the Utilities rely on the Credit Support Rider for these unjust and unreasonable collections.

For these reasons, FirstEnergy's proposed modifications to the authorized term for the collection of the Credit Support Rider from consumers should not be adopted by the PUCO.

2. FirstEnergy's modifications to Staff Proposal pertaining to the calculation of credit support collections from customers is grossly overstated and places too much responsibility on Ohioans to fund this unlawful bailout.

FirstEnergy has recommended certain modifications to the Staff Proposal that result in a significant increase to the potential Credit Support Rider collections from customers. Staff's proposal calls for the collection of \$131 million per year be collected from customers.²⁰⁵ FirstEnergy's modification would increase the annual collections for credit support to an amount up to a staggering \$1.13 billion per year. That number includes an amount to be collected of \$558 million per year that represents adjustments to Staff Witness Buckley's calculations. In addition, the up to \$1.13 billion number

²⁰⁵ PUCO Staff Ex. 13 at Q&A 6 (Rehearing Testimony of Joseph Buckley).

includes an “additional amount not to exceed the economic development value outline by Company Witness Sarah Murley arising from having the FirstEnergy Corp. headquarters and nexus of operation in Akron, Ohio.”²⁰⁶ Ms. Murley found the “total economic impact associated with the HQ is \$568 million each year ...”²⁰⁷ Therefore, it appears²⁰⁸ that FirstEnergy’s recommendation for credit support could result in an annual collection of up to \$1.13 billion (\$558 million + up to \$568 million = \$1.126 billion) per year from FirstEnergy consumers. Such an astronomical request -- 8.6 times larger than the Staff’s recommendation -- should not be entertained by the PUCO.

a. FirstEnergy’s modifications to the credit support calculation result in a significant increase in collections from customers for credit support.

FirstEnergy Witness Mikkelsen includes a chart on page 13 of her rehearing rebuttal surrebuttal testimony that identifies the allocated average annual cash flow from its multistate operations (“CFO”) shortfall to be \$357 million. This number is comparable to Mr. Buckley’s \$131 million annual CFO shortfall number. The FirstEnergy recommendation increases Mr. Buckley’s assessment of financial support need by \$226 million due to making three adjustments to Mr., Buckley’s calculation methodology. The three adjustments are:

- 1) The target goal for CFO to Debt should be 15 percent rather than 14.5 percent used by Mr. Buckley;

²⁰⁶ FE 206 at 14-15 (Rehearing Rebuttal and Surrebuttal Testimony of Eileen Mikkelsen).

²⁰⁷ FE Ex. 205 at 6 (Rebuttal Rehearing Testimony of Sarah Murley).

²⁰⁸ Various efforts to get FirstEnergy Witness Mikkelsen to do this math on the Witness stand were unsuccessful. See R. Tr. Vol. X at 1602, 1806, 1807 (Mikkelsen).

- 2) The calculation of the [Credit Support Rider] should use a three year average from 2012 - 2014 rather than a five year average; and
- 3) An allocation of 40 percent should be used.²⁰⁹

FirstEnergy's rationale for changing Mr. Buckley's calculations is self-serving and merely proposed to increase the annual credit support collections from Ohio's captive consumers. The CFO to Debt guidance that Mr. Buckley chose was not unreasonable. He had the availability of both the guidance from January 2016 that he used in his calculation and the April 28, 2016 guidance referenced by Ms. Mikkelsen²¹⁰ when he prepared his testimony. He chose the more conservative guidance, and that was not unreasonable. The PUCO should disregard FirstEnergy's recommended change to the CFO to Debt guidance.

Regarding the five-year history that Mr. Buckley relied upon (2011 through 2015), FirstEnergy recommends instead a three year history should have been used. Not the last three years, but rather the middle three years 2012 through 2014. This demonstrates that FirstEnergy is not recommending a specific length of time that the PUCO should use in its analysis, but rather which years in particular should be included in the review. That is merely a self-serving attempt to cherry-pick the worst three-years from Mr. Buckley's five-year review. FirstEnergy's recommendation has nothing to do with Mr. Buckley's methodology and everything to do with how to get more money from customers. The PUCO should not approve this approach.

²⁰⁹ FE Ex. 206 at 9 (Rehearing Rebuttal and Surrebuttal Testimony of Eileen Mikkelsen) .

²¹⁰ FE Ex. 206 at 10 (Rehearing Rebuttal and Surrebuttal Testimony of Eileen Mikkelsen).

b. FirstEnergy's recommendation for credit support subsidy is too much for Ohioans to bear.

FirstEnergy would like to place a significantly greater burden on Ohioans for the responsibility of paying the Credit Support Rider. Mr. Buckley had recommended a 22 percent responsibility for FirstEnergy's Ohio customers based on 2015 revenues. FirstEnergy recommends a 40 percent responsibility based on 2015 net income. FirstEnergy's recommendation should not be adopted.

If Staff's Proposal (or some variation) were adopted (which it should not be) the allocation of the credit support bail-out for FirstEnergy Corp. becomes a very important consideration for the PUCO. Mr. Buckley included in his testimony:

Staff believes the long-term financial health of FE will have benefits for the Ohio Regulated Distribution Utilities, as well as the State of Ohio in general. **However, Staff believes that the customers of the Ohio Regulated Distribution Utilities should not be the only constituents providing credit support for the entire FE Corporation.**²¹¹

However, the record evidence would indicate that FirstEnergy is not sufficiently pursuing credit support from other constituents. On cross-examination Ms. Mikkelsen agreed to the notion that other constituents have a role,²¹² yet there does not appear to be a commitment to pursue contributions from other constituents to help achieve the 15 percent CFO to Debt credit metric rating.²¹³ Indeed, Ms. Mikkelsen testified that the FirstEnergy Utilities did not intend to seek contributions from others within the FirstEnergy corporate family.²¹⁴

²¹¹ PUCO Staff Ex. 13 at Q&A 10 (Rehearing Testimony of Joseph Buckley) (emphasis added).

²¹² R. Tr. Vol. X at 1790 (Mikkelsen).

²¹³ R. Tr. Vol. X at 1738-1739 (Mikkelsen).

²¹⁴ R. Tr. X at 1739.

Staff did not intend for the bail-out of FirstEnergy Corp. to be laid at Ohioans doorstep alone. Yet absent a commitment to the contrary, that is exactly what will happen. And if the Credit Support Rider fails to improve the credit metrics for FirstEnergy Corp., then the money paid by Ohioans through the Credit Support Rider would be for naught. Therefore, if the PUCO approves the Staff's Proposal (or some variation), which it should not, then the PUCO should allocate no more than 22 percent responsibility for the credit support subsidy to Ohioans.

3. FirstEnergy's recommendations for a gross-up for taxes unreasonably increases the credit support provided by FirstEnergy customers.

FirstEnergy recommended an additional adjustment to Mr. Buckley's calculation. Ms. Mikkelsen stated that the Credit Support Rider annual revenue calculated under Mr. Buckley's methodology should be grossed-up for income taxes.²¹⁵ The FirstEnergy recommended gross-up for income taxes adjustment would result in an additional collection for credit support of \$211 million per year.²¹⁶

FirstEnergy assumed approximately a 36 percent average tax rate for the Utilities in making its recommended adjustment to Mr. Buckley's calculation.²¹⁷ However, on cross-examination, Mr. Buckley recommended another approach to the gross-up adjustment. Mr. Buckley recommended using the actual tax rate that the Utilities are paying because the Staff had used cash flow statements.²¹⁸ According to Mr. Buckley, if the PUCO was to consider grossing-up the revenue to be collected from consumers for

²¹⁵ FE Ex. 206 at 11 (Rehearing Rebuttal and Surrebuttal Testimony of Eileen Mikkelsen).

²¹⁶ FE Ex. 206 at 13 (Rehearing Rebuttal and Surrebuttal Testimony of Eileen Mikkelsen). See chart on page 13 (558 million - \$357 million = \$211 million).

²¹⁷ FE Ex. 206 at 11 (Rehearing Rebuttal and Surrebuttal Testimony of Eileen Mikkelsen).

²¹⁸ R. Tr. Vol. 3 at 739 (Buckley).

income taxes, then the PUCO should look at what the Utilities actually paid in income taxes, not the standard corporate tax rate of 36 percent recommended by FirstEnergy. And if the Utilities did not actually pay income taxes, then there should be no need for a gross-up adjustment for income taxes.

4. FirstEnergy’s modifications to Staff’s Proposal to maintain its headquarters and nexus of operations in Akron, Ohio would cost Ohioans up to an additional \$568 million.

Mr. Buckley has conditioned the continued receipt of credit support collections from customers on FirstEnergy maintaining its headquarters and nexus of operation in Akron, Ohio.²¹⁹ Mr. Buckley even opined that if FirstEnergy did not maintain its headquarters and nexus of operations in Akron Ohio during the entire term of ESP IV, then the entire amount of the credit should be subject to refund.²²⁰ Mr. Buckley was taking a pro-consumer position with regards to this particular recommendation.

However, FirstEnergy has seized upon Mr. Buckley’s attempt to protect consumers and turned his recommendation into an opportunity to seek additional money from consumers. Ms. Mikkelsen stated: “The value to the state of Ohio should be reflected in in a higher [Credit Support Rider] value.”²²¹ That value, according to Ms. Mikkelsen could be up to \$568 million per year.²²²

The record reflects no evidence that FirstEnergy plans to relocate its headquarters away from Akron, Ohio.²²³ In fact the very same requirement to maintain its

²¹⁹ PUCO Staff Ex. No. 13 at Q&A 13 (Rehearing Testimony of Joseph Buckley) (emphasis added).

²²⁰ PUCO Ex. No. 13 at Q&A 13 (Rehearing Testimony of Joseph Buckley)(emphasis added).

²²¹ FE Ex. No. 206 at 14 (Rehearing Rebuttal and Surrebuttal Testimony of Eileen Mikkelsen).

²²² FE Ex. No. 206 at 14-15 (Rehearing Rebuttal and Surrebuttal Testimony of Eileen Mikkelsen).

²²³ R. Tr. X at 1603-1604 (Mikkelsen).

headquarters and nexus of operations in Akron, Ohio predates Staff's Proposal, because it was a provision included in the Third Supplemental Stipulation.²²⁴ And in that Third Supplemental Stipulation that was adopted by the PUCO, and is the basis for rates customers pay today (since June 1, 2016), there was no added charge to customers for the commitment. Indeed one would think that the commitment has already been paid for because it was part of the package deal that resulted in rates customers are paying right now.

Nonetheless, FirstEnergy seeks to squeeze more money out of Ohioans by making them pay to keep headquarters in Ohio. Ms. Mikkelsen believes as the financial condition of a company deteriorates, the risk increases that the company would face a change in control, which would result in the loss of the headquarters and nexus of operations in Akron, Ohio.²²⁵ That however, is the purpose of the Credit Support Rider to prop-up the parent corporation to prevent deterioration of its financial condition by helping FirstEnergy Corp. maintain investment grade credit ratings.²²⁶ Therefore, the PUCO should not provide additional subsidies to incent FirstEnergy to retain its headquarters and nexus of operations in Akron, Ohio. That same commitment was included in the Third Supplemental Stipulation, and did not require consumers to pay any additional subsidies. FirstEnergy's modifications to the Staff Proposal are unjust and unreasonable, and should not be approved by the PUCO.

²²⁴ FE Ex. No. 154 at 17 (Third Supplemental Stipulation) (December 1, 2015). ("FirstEnergy will maintain its corporate headquarters and its nexus of operations in Akron, Ohio for the duration of rider RRS.")

²²⁵ R. Tr. X at 1744 (Mikkelsen).

²²⁶ PUCO Staff Ex. 13 (Rehearing Testimony of Joseph Buckley) (June 29, 2016).

5. FirstEnergy’s recommendation that revenues collected pursuant to a Credit Support rider should be excluded from the significantly excessive earnings test (“SEET”) calculation, is unlawful and would deprive customers of refunds they may be otherwise entitled to under the law.

FirstEnergy Witness Mikkelsen has recommended that revenues associated with the Credit Support Rider should be excluded from the Utilities’ annual SEET calculation.²²⁷

However, there is no basis in the law for the PUCO to adopt this recommendation. R.C. 4928.143 (E) states:

The commission shall also determine the prospective effect of the electric security plan to determine if that effect is substantially likely to provide the electric distribution utility with a return on common equity that is significantly in excess of the return on common equity that is likely to be earned by publicly traded companies, including utilities, that face comparable business and financial risk, with such adjustments for capital structure as may be appropriate. The burden of proof for demonstrating that significantly excessive earnings will not occur shall be on the electric distribution utility.

FirstEnergy’s arguments in this regard are baseless and unreasonable. First of all, the SEET calculation is to be applied to the overall earnings of a utility resulting from all of the “adjustments” included in an approved ESP, not the revenues associated with one particular rider incorporated in an ESP. So even if the revenues of the Credit Support Rider are included in the SEET calculation and a SEET refund is ordered, there is no demonstration that the SEET refund money is from that Rider. The SEET refund is from the revenues collected by the Utilities from all rates and riders included in the ESP.

Second, the purpose of the Credit Support Rider, if it is determined to be legal and

²²⁷ FE Ex. 206 at 22 (Rehearing Rebuttal and Surrebuttal Testimony of Eileen Mikkelsen). (“A SEET refund associated with the Credit Support Rider would defeat the purpose of the rider. If the Credit Support Rider dollars are refunded, they would not improve the Companies’ credit metrics.”)

reasonable, is to provide necessary (but not significantly excessively) funds to support FirstEnergy Corp.'s investment grade credit ratings. The Credit Support Rider is not a license for FirstEnergy Corp. or its Ohio EDUs to make significantly excessive earnings. If the Utilities have significantly excessive earnings, as a result of Rider DMR and all other riders and rates, then they should be treated the same as other Ohio EDUs. The Utilities should be required to refund the excessive earnings to their customers who are paying the excessive rates in the first place.

Ms. Mikkelsen states that the extraordinary nature of FirstEnergy's commitments (the goal of developing the nations' most intelligent grid and retaining its corporate headquarters in Akron, Ohio) make exclusion from the SEET calculation necessary.²²⁸ The Credit Support Rider is extraordinary bad regulatory policy for Ohioans if it is approved by the PUCO. In exchange for collecting the revenues through the Credit Support Rider, FirstEnergy Corp. and the Utilities make no commitments and are not required to make any capital investments in grid modernization or in keeping its headquarters in Akron. There is nothing extraordinary about the purpose, regularity, and permanency of revenues collected through the Credit Support Rider. Other Ohio EDUs such as Ohio Power have riders with similar purpose of distribution grid modernization (i.e. Rider DIR) and the revenues collected under such riders are not excluded from the SEET calculation.

Therefore, the PUCO should not adopt this recommendation by FirstEnergy.

²²⁸ FE Ex. 206 at 22-23 (Rehearing Rebuttal and Surrebuttal Testimony of Eileen Mikkelsen) .

V. There is no information in the record which would permit the PUCO to evaluate the rate impacts on customers of the rehearing alternatives; nor is there data to evaluate the financial impact of the alternatives on FirstEnergy. It would be unreasonable and inconsistent with provisions in the Ohio Administrative Code for the PUCO to set rates for customers this way.

Under the Ohio Administrative Code there are rules setting out the information electric utilities must submit when filing applications to establish a standard service offer.

²²⁹ The rules require the filing of information that will assist the PUCO and other parties in evaluating the effects of the plan – whether it is a market rate offer or an electric security plan.

The rules for an ESP require, inter alia, 1) financial projections of the effect of the ESP on the electric utility throughout the term of the ESP (Ohio Admin. Code 4901:1-35-03(C)(2)); 2) projected rate impacts by customer class/rate schedule for the duration of the ESP (Ohio Admin. Code 4901:1-35-03 (C)) (2); and 3) detailed information on distribution modernization programs (Ohio Admin. Code 4901:1-35-03 (C) (a) and (g)).

The PUCO has in the past commented upon the importance of these rules:

An ESP is quite complex, with many aspects to be decided, and these decisions should be made in the context of all available information. The Commission, throughout history, has been charged with consideration and balancing of the competing interests of various stakeholders, a process which requires knowledge and understanding of the possible effects of decisions on various parties. AEP Ohio's argument²³⁰ would have the Commission, and the public flying blind in this regard, and could jeopardize the sense of fairness and legitimacy of the process.²³¹

²²⁹ Ohio Admin. Code 4901:1-35.

²³⁰ AEP argued that the rules should not include the filing of pro forma financial projections.

²³¹ *In the Matter of the Adoption of Rules for Standard Service Offer, Corporate Separation, Reasonable Arrangements, and Transmission Riders for Electric Utilities Pursuant to Sections 4928.14, 4928.17, and 4905.31, Revised Code, as amended by Amended Substitute Senate Bill No. 221, Case No. 08-777-EL-ORD, Finding and Order at 4-5 (Sept. 17, 2008).*

There are before the PUCO at least three new proposals that vary from the ESP approved by the PUCO in its March 31, 2016 Opinion and Order. These proposals are the basis for a new ESP, or at the very least a modified ESP. Under these plans, FirstEnergy will be collecting hundreds of millions (if not billions) of dollars from the hard working people of this State.

And yet, FirstEnergy would have the Commission and the public flying blind—all because they have produced no evidence on the possible effects of the proposals on various parties. Indeed, Dr. Choueiki testified that the PUCO Staff had not analyzed the alternatives to determine what proposal would result in reasonable rates for customers.²³² Such a process lacks fairness and legitimacy.

The PUCO cannot fulfill its statutory duty to consider and balance the competing interests of various stakeholders without basic information about the effect of the proposals on the citizens of Ohio. The burden of proof lies solely with those seeking to amend or modify the existing ESP. In this instance, that burden lies with the PUCO Staff and FirstEnergy. Both the PUCO Staff and the Utilities were given ample opportunity to present such evidence in the ten days of rehearing on this matter. They chose not to.

The PUCO cannot, nor should it, make its decision on these issues of monumental importance without evidence on the impacts of the proposals on the parties to this case. The PUCO, should on that basis alone, reject the alternatives presented.

²³² R. Tr. at 1224 (Choueiki).

VI. DURING THE REHEARING THERE WERE PROCEDURAL ERRORS THAT HARMED THE ABILITY OF CONSUMER PARTIES (AND OTHERS OPPOSING FIRSTENERGY) TO PRESENT EVIDENCE ON THE RECORD. THE RULINGS SHOULD BE REVERSED UNDER OHIO ADM. CODE 4901-1-15(F).

- A. The PUCO should reverse the Attorney Examiner's rulings which excluded evidence relevant to the MRO v. ESP test – they prevent the PUCO from having a robust record and harm consumers.**

Ohio Adm. Code 4901-1-15(F) allows a party to seek reversal of Attorney Examiner's ruling by "discussing the matter as a distinct issue in its initial brief" OCC/NOAC seeks reversal of the rulings described herein.

In this proceeding, the Attorney Examiner granted a motion to strike significant portions of OCC/NOAC Witness Wilson that included updated energy forecast data and customer cost impacts of FirstEnergy's modified Rider RRS proposal.²³³ In addition, the Attorney Examiner struck significant portions of OCC Witness Kahal who performed the statutorily-mandated ESP v. MRO test based on OCC/NOAC Witness Wilson's analysis.²³⁴

The Attorney Examiner's rulings were in error because relevant, material evidence was kept out of the record during the evidentiary hearing on rehearing.²³⁵ Intervenor testimony regarding the cost of FirstEnergy's Proposal was stricken. So was testimony regarding OCC's expert's analysis of whether the Proposal (along with the

²³³ The Attorney Examiner's July 14, 2016 rulings struck portions of OCC/NOAC Witness James F. Wilson's (RRS proposal's costs). See R. Tr. IV, at 851-876 (Wilson).

²³⁴ The Attorney Examiner's July 15, 2016 rulings struck portions of OCC Witness Matthew I. Kahal's (impact of the RRS proposal's cost on the statutorily required MRO v. ESP test) testimony. R. Tr. X, at 1082-1091 (Kahal).

²³⁵ The Attorney Examiner's July 14, 2016 and July 15, 2016 rulings struck portions of OCC/NOAC Witness James F. Wilson's (RRS proposal's costs) and OCC Witness Matthew I. Kahal's (impact of the RRS proposal's cost on the statutorily required MRO v. ESP test) testimony. See R. Tr. IV, at 851-876 (Wilson); id. R. Tr. X, at 1082-1091 (Kahal).

provisions of the stipulated ESP) is more favorable in the aggregate to consumers than an electric security plan (MRO v. ESP test).²³⁶ Under R.C. 4928.143(C)(1) the RRS proposal, including all other elements of the proposed ESP, must be shown by FirstEnergy to be more favorable in the aggregate to customers than the alternative – a MRO. Because the Proposal is part of FirstEnergy’s pending ESP, the testimony about the Proposal’s cost, and the cost’s impact on the MRO v. ESP test, should not have been stricken. It should have been admitted into the record so that the PUCO can decide this matter based on a robust record. Without that record, it is impossible for the PUCO to meaningfully apply the MRO v. ESP test. Consumers will be harmed.

The Attorney Examiner’s ruling should be reversed and the testimony of OCC/NOAC Witness Wilson and OCC Witness Kahal should be admitted, as more fully explained below.

1. The Attorney Examiner’s rulings are in error because they excluded material, relevant evidence on whether the new and different Proposal passes the MRO v. ESP test.

The Attorney Examiner’s rulings prohibited OCC/NOAC from offering relevant evidence on whether the Proposal passes the MRO v. ESP test.²³⁷ These rulings are serious errors that harm consumers because the Proposal is new and different from the RRS proposed in the original phase of these proceedings.

²³⁶ R.C. 4928.143(C)(1).

²³⁷ The Attorney Examiner’s July 14, 2016 and July 15, 2016 rulings struck portions of OCC Witnesses James F. Wilson’s (RRS proposal’s costs) and Matthew I. Kahal’s (impact of the RRS proposal’s cost on the statutorily required MRO v. ESP test) testimony. See R. Tr. IV, at 851-876 (Wilson); id. R. Tr. X, at 1082-1091 (Kahal).

On March 31, 2016, the PUCO issued its Opinion and Order in this case. That Order approved a series of stipulations that resulted in a standard service offer containing, inter alia, a RRS. Under the terms of the PUCO-approved RRS, FirstEnergy was to enter into a purchase power agreement with its affiliate, FirstEnergy Solutions (“Affiliate PPA”). All customers of FirstEnergy were required to pay the RRS over the next eight years. The PUCO ruled that RRS was the primary basis that made the ESP more favorable in the aggregate to customers than a MRO.²³⁸ This was because the PUCO found (over numerous parties’ objections) that over the eight-year term customers would receive a \$256 million benefit (credit) from Rider RRS.

But on April 27, 2016, FERC issued an Order that rescinded an earlier waiver given to FirstEnergy Corporation.²³⁹ FERC found that, before being allowed to transact under the Affiliate PPA, FirstEnergy Solutions (or any other FirstEnergy Corporation Ohio Market affiliate) would have to submit the Affiliate PPA for review and approval by FERC.²⁴⁰

FirstEnergy recognized that its ESP had to change as a result of FERC’s Order to move forward with its customer-funded subsidy proposal. So it presented the Proposal in conjunction with its Application for Rehearing, filed May 2, 2016.

²³⁸ The PUCO found FirstEnergy’s ESP more favorable to customers in the aggregate than a MRO on a quantitative basis by \$307 million, with \$256 million directly attributable to RRS. Opinion and Order at 119. The PUCO also found that Rider RRS was in the public interest because it would avoid transmission investment in the range of \$400 million to \$1.1 billion and will encourage resource diversity by supporting 2,220 MW in existing coal fired plants and 908 MW of nuclear generation. Opinion and Order at 87-88. The PUCO also described the significant economic impact upon the regions in which the plants are located, noting the “economic impact of plant closures and the impact on local communities” is of concern to it. Opinion and Order at 88. With FirstEnergy’s modified Rider RRS proposal, which changes the costs and revenues that flow through Rider RRS, (see Mikkelsen Rehearing Testimony at 3), all of the PUCO’s findings are no longer valid.

²³⁹ *EPSA v. FirstEnergy Solutions*, FERC Docket No. EL16-345-000, Order Granting Complaint (Apr. 27, 2016).

²⁴⁰ *EPSA v. FirstEnergy Solutions*, FERC Docket No. EL16-345-000 at 22 (April 27, 2016).

The Proposal is very different than the PUCO-approved RRS. The Rehearing Testimony of FirstEnergy Witness Eileen Mikkelsen explains that under the RRS proposal, there are no *actual* revenues to be booked as part of any *actual* wholesale capacity or energy transactions. There are no *actual* costs attributable to operating *actual* generation facilities. The Proposal is based on a comparison of costs that FirstEnergy will not incur versus PJM market revenue that FirstEnergy will not receive.

Further, under the original RRS, projected and actual revenues would be based on nodal pricing from the Sammis and Davis-Besse plants. By contrast, the calculation of the RRS Proposal is based on AEP Dayton Hub prices.²⁴¹ FirstEnergy has now abandoned its argument that RRS is necessary to fund the plants. And it admits the four factors established by the PUCO in Case No. 13-2385-EL-SSO are no longer relevant.²⁴²

OCC Witness Wilson was able to confirm the vast differences between the original RRS and the Proposal.. He explained that “the modified calculations as proposed, would use generation amounts from the 2014 simulations for the revenue calculations and the cost calculations; as opposed to the original rider RRS, where the calculations would use future prices and generation amounts, actual generation amounts that are consistent with those future prices.”²⁴³ That leads to “inefficient dispatch and the nonsensical assumptions” underlying the RRS proposal discussed by OCC Witness Wilson in his testimony.²⁴⁴ He therefore, “concluded that overall the *changes* to use

²⁴¹ See R. Tr. IV, at 873:14-874:4.

²⁴² Compare Opinion and Order (considering FirstEnergy's defense of original PPA, including under four factors) *with* Rehearing Testimony of Eileen Mikkelsen (modified RRS would not be used to fund Sammis or Davis-Besse).

²⁴³ See R. Tr. IV, at 895:20-896:1.

²⁴⁴ See *id.* at 896:2-9.

fixed generation amounts and fixed cost amounts, et cetera, would raise the cost of rider RRS to customers *relative to* the original proposal.”²⁴⁵

FirstEnergy's Proposal is a fundamentally different proposal than the RRS approved by the PUCO on March 31, 2016. The PUCO-approved RRS was the basis for a purported \$256 million credit to consumers that enabled the PUCO to find that FirstEnergy's initial ESP is more favorable in the aggregate to customers than a MRO. With FirstEnergy's new Proposal, that finding is no longer applicable. The PUCO must conduct a new analysis of FirstEnergy's ESP, inclusive of the Proposal, under the MRO v. ESP test. The Attorney Examiner's rulings prohibited OCC/ from offering relevant evidence on whether the Proposal passed the MRO v. ESP test. That would have assisted the PUCO in fulfilling its statutory duty to evaluate the Proposal under the statutory test. The Attorney Examiner's ruling was arbitrary and capricious. It should be reversed.²⁴⁶

²⁴⁵ See *id.* at 895:11-14 (*italics added*).

²⁴⁶ The Attorney Examiner attempted to justify the rulings by asserting that OCC could rely on Rider RRS costs and their impact on the MRO v. ESP test from the evidence presented on the original Rider RRS. See, e.g., R. Tr. V at 1085:4-1086:20. That rationale is without foundation given that this is a *pending* ESP case and, as described herein, the Rider RRS proposal is very different from the original proposal. FirstEnergy itself changed its projections from the original proceeding, as pointed out by counsel during the rehearing, shifting from nodal pricing to AEP Dayton Hub pricing. See R. Tr. IV, at 873:14-874:4; see also *id.* R. Tr. X at 1197:16-1198:7. Staff changed its projections, too. See *id.* at 982:8-986:25. Further, the Attorney Examiner allowed parties to update projects based on what he described as “actual new prices or actual new facts[.]” See, e.g., R. Tr. X at 1087:14-19. There is no principled reason to allow updates to parties' forecasts in one instance, but not another, as the Attorney Examiner did.

2. **The Attorney Examiner's rulings should be reversed in order for the PUCO to consider relevant evidence on the harm of FirstEnergy's Proposal to consumers.**
 - a. **The PUCO is deprived of a robust record to evaluate FirstEnergy's ESP, inclusive of the RRS proposal, under the MRO v. ESP test.**

The Attorney Examiner's rulings prohibited OCC/NOAC from offering relevant evidence on whether the Proposal passes the MRO v. ESP test.²⁴⁷ R.C. 4928.143 (C)(1) states:

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

The Attorney Examiner's ruling deprived OCC/NOAC of presenting evidence relevant to this statutory test. OCC/NOAC's testimony regarding the Proposal's cost, and the cost's impact on the MRO v. ESP test, should have been admitted into evidence. This would allow the PUCO to fully evaluate if FirstEnergy's ESP, which is pending, passes the MRO v. ESP test. Upon such evaluation, the ESP, inclusive of the Proposal, does not pass the MRO v. ESP test.

²⁴⁷ The Attorney Examiner's July 14, 2016 and July 15, 2016 rulings struck portions of OCC Witnesses James F. Wilson's (Rider RRS proposal's costs) and Matthew I. Kahal's (impact of the Rider RRS proposal's cost on the statutorily required MRO v. ESP test) testimony. See R. Tr. IV, at 851-876 (Wilson); id. R. Tr. X, at 1082-1091 (Kahal).

FirstEnergy's Proposal is presented as a modification to its ESP, a plan that was initially approved by the PUCO with the original RRS.²⁴⁸ The requirement in R.C. 4928.143(C)(1) – that the proposed ESP cannot be approved unless FirstEnergy proves that it is more favorable in the aggregate than an MRO – must be met before the PUCO can consider adopting the electric security plan.. Accordingly, FirstEnergy must prove that its ESP, with the RRS Proposal, is more favorable in the aggregate to customers than an MRO. By the same token, intervenors, including OCC and NOAC, must be able to challenge whether the ESP, with the RRS proposal, complies with R.C. 4928.143(C)(1).

FirstEnergy Witness Mikkelsen testified that FirstEnergy's ESP with the RRS Proposal is more favorable in the aggregate to customers than a MRO. She testified that the RRS proposal produces the same quantifiable benefits as its earlier PUCO approved proposal.²⁴⁹

But relevant portions of the testimony of OCC/NOAC Witness Wilson and OCC Witness Kahal disputing FirstEnergy's analysis and presenting an alternative analysis under the ESP v. MRO test was stricken from the record.²⁵⁰ OCC/NOAC Witness Wilson provided his estimate of the cost for the RRS proposal – \$1.3 billion under one scenario, \$3.6 billion under another – and contrasted his estimated costs with FirstEnergy Witness Mikkelsen's estimate.²⁵¹ To assist the PUCO in determining what costs to use in

²⁴⁸ This distinguishes this docket from others, such as PUCO Case No. 13-2385-EL-SSO, where the PUCO approved a utility's ESP with a placeholder rider set at zero that would be further analyzed and populated, if at all, in a later, different proceeding.

²⁴⁹ See FE Ex. 197 at 2 (Mikkelsen Rehearing).

²⁵⁰ See OCC/NOAC Ex. 1 (Wilson); OCC Ex. 44 (Kahal).

²⁵¹ See OCC/NOAC Ex. 1 at 9:14-10:7; 11:1-17:4 (proffered at R. Tr. IV, at 875-76).

its MRO v. ESP analysis, OCC/NOAC Witness Wilson explained why his estimates are more reliable than FirstEnergy's.²⁵²

Relying on OCC/NOAC Witness Wilson's costs, OCC Witness Kahal analyzed the ESP, inclusive of the RRS proposal, under the MRO v. ESP test. He concluded that the ESP was not more favorable in the aggregate to customers than a MRO.²⁵³

The Attorney Examiner struck OCC/NOAC Witness Wilson's and OCC Witness Kahal's testimony.²⁵⁴ These rulings deprived OCC/NOAC of its opportunity to present evidence of the cost to customers of the RRS Proposal and FirstEnergy's ESP. They have deprived the PUCO of a robust record on which to analyze the MRO v. ESP test. Also, FirstEnergy's ESP, inclusive of the Proposal, is *pending*.²⁵⁵ FirstEnergy bears the burden of proving that it is more favorable in the aggregate than a MRO.²⁵⁶ Intervenors, including OCC/NOAC, should be able to challenge FirstEnergy's analysis. Parties should not be deprived of offering competent evidence on an ESP's cost, or the cost's impact on consumers under the statutorily mandated MRO v. ESP test, under circumstances similar to those here.

The Attorney Examiner's rulings should be reversed.

²⁵² See OCC/NOAC Ex. 1 at 21:7-21; 22:8-17; 28:1-4; 19-21.

²⁵³ See OCC Ex. 44 at 8:20-9:16; 10:7-12; 14:13; 17:13-18:20; 20:4-8; 21:5-21.

²⁵⁴ See R. Tr. IV at 851-876 (Wilson); *id.* R. Tr. X at 1082-1091 (Kahal). Importantly, FirstEnergy did not question OCC Witness Wilson's or OCC Witness Kahal's competency to testify. See *id.*

²⁵⁵ Staff Witness Choueiki acknowledged as much. See R. Tr. IV at 1012:13-17.

²⁵⁶ R.C. 4928.143(C)(1).

- b. The Attorney Examiner's rulings should be reversed because they are inconsistent with precedent and prevent the presentation of relevant evidence on the harm of FirstEnergy's Proposal to consumers.**

The Attorney Examiner's rulings *struck* portions of OCC/NOAC Witness Wilson's and OCC Witness Kahal's testimony. The testimony is not part of the record. The PUCO cannot even consider it or, in its judgment, accord it proper weight. Depriving the PUCO of the opportunity to do so, particularly in light of the analysis it must conduct under R.C. 4928.143(C)(1), is inconsistent with precedent. The evidence should be admitted and accorded whatever weight is appropriate rather than stricken.²⁵⁷ As the PUCO has stated elsewhere, "evidence and testimony presented by [OCC/NOAC Witness Wilson and OCC Witness Kahal] must be admitted into evidence so as to provide the AE and the Commission a reasonable opportunity to weigh that evidence, and to establish the merit and relevancy of that evidence."²⁵⁸

²⁵⁷ See, e.g., *In the Matter of the Application of Ohio Power Company and Columbus Southern Power Company for Authority to Merge and Related Approvals*, Opinion and Order, 2011 Ohio PUC Lexis 1325, *28-30 (Dec. 14, 2011) (rejecting OCC's motion to strike since the PUCO can determine what is the proper weight to give testimony and concerns with hearsay "inapplicable to administrative proceedings"); *In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of an Electric Security Plan*, Opinion and Order, 2008 Ohio PUCO Lexis 762, *80-81 (Dec. 17, 2008) (denying motions to strike and noting that PUCO would decide what weight to give the testimony); *In the Matter of the Application of the Ohio Bell Telephone Company*, Opinion and Order, 1976 Ohio PUC Lexis 4, *82-83 (July 8, 1976)) (denying motion to strike, recognizing that grounds for motion went to weight to be given to testimony); *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Establish a Standard Service Offer*, Opinion and Order, 2010 Ohio PUC Lexis 862, *34-35 (Aug. 25, 2010).

²⁵⁸ See *In the Matter of the Regulation of the Electric Fuel Component Contained within the Rate Schedules of The Dayton Power & Light Company and Related Matters*, Opinion and Order, 1987 Ohio PUC Lexis 107, *36-37 (Feb. 18, 1987). Permitting parties to update their forecasts based on more recent information is not a concept foreign to the PUCO, either. See, e.g., *In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan*, Case No. 08-917-EL-SSO, Entry on Rehearing (Roberto Concurrence) (July 23, 2009).

In light of past precedent, the Attorney Examiner should have admitted OCC/NOAC Witness Wilson's and OCC Witness Kahal's testimony in its entirety. The PUCO could have then given all the evidence the weight it deserves.

c. The Attorney Examiner's rulings should be reversed because parties will otherwise suffer undue prejudice.

OCC/NOAC, the utility consumers that they represent, and other parties in this action will suffer undue prejudice if the Attorney Examiner's rulings are not reversed. This is because the PUCO will not be able to meaningfully determine if FirstEnergy's pending ESP, with the Proposal, passes the MRO v. ESP test. FirstEnergy's ESP, with modified RRS, does *not* pass the test if the evidence stricken is considered. Implementing the RRS Proposal would harm consumers by imposing huge rate increases on them. But the PUCO will never know how much harm because the Attorney Examiner erroneously barred the evidence from being presented. Additionally, the harm will be compounded if the PUCO authorizes the Proposal without rates being subject to refund (which the PUCO has declined to order) and without conducting the statutorily required MRO v. ESP test based on evidence that goes to the heart of the proposed ESP's costs, customers may be unable to obtain refunds for charges later determined to be unlawful.²⁵⁹

²⁵⁹ See, e.g., *Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254, 257 (1957).

B. The PUCO should reverse the Attorney Examiner's rulings which denied motions to strike the Companies' rebuttal testimony. The rebuttal testimony should have been stricken under R.C. 4903.10.

Ohio Adm. Code 4901-1-15(F) allows a party to seek reversal of Attorney Examiner's ruling by "discussing the matter as a distinct issue in its initial brief" OCC/NOAC seeks reversal of the rulings described herein.

In this proceeding, the Attorney Examiner denied motions to strike FirstEnergy Witness Mikkelsen's Rehearing Testimony.²⁶⁰

The Attorney Examiner's ruling was in error because FirstEnergy, exercising minimal diligence, let alone reasonable diligence, should have offered Witness Mikkelsen's Rehearing Testimony during the original proceeding. Because it did not, the testimony is prohibited under R.C. 4903.10.

The Attorney Examiner's ruling should be reversed and the Rehearing Testimony of FirstEnergy Witness Mikkelsen should be stricken, as more fully explained below.

1. FirstEnergy Witness Eileen Mikkelsen's rehearing testimony should have been stricken because it is prohibited under R.C. 4903.10.

R.C. 4903.10 limits rehearing by prohibiting the PUCO from, "tak[ing] any evidence [on rehearing] that, with reasonable diligence, could have been offered upon the original hearing." FirstEnergy's evidence should not have been admitted into the record under this law. OCC/NOAC, and other intervenors, pointed out the conflict between FirstEnergy's original Rider RRS proposal and FERC rules during the original hearings

²⁶⁰ See, e.g., R. Tr. I at 32-43; id. at R. Tr. X at 1592-1598.

in this matter.²⁶¹ FirstEnergy on rehearing offered an alternative Rider RRS plan. It was based on additional evidence that should have been offered upon the original hearings in response to the testimony provided by OCC/NOAC and other intervenors.²⁶² The Rehearing Testimony was inappropriate under R.C. 4903.10's plain language.²⁶³ OCC therefore moved to strike it.²⁶⁴ FirstEnergy, exercising *minimal* diligence, let alone *reasonable* diligence, should have offered the Rehearing Testimony upon the original hearing. It did not.²⁶⁵ It should not have been permitted to do so on rehearing. In error,

²⁶¹ See, e.g., Direct Testimony of Ramteen Sioshansi (OCC Exs. 1 and 25) filed December 22, 2014 and May 11, 2015; Direct Testimony of Joseph E. Bowring on behalf of the Independent Market Monitor for PJM (December 22, 2015) at 3; Direct Testimony of Lael Campbell on behalf of Intervenors Constellation Newenergy, Inc. and Exelon Generation Company, LLC (December 22, 2014) at 18:17-19:7. It is important to note that FirstEnergy had right around eight months between when this testimony was filed and the start of the hearings. As a result of legal action taken by OCC and others, FERC issued orders providing Ohioans the benefits of competitive markets and lower electric rates. *Electric Power Supply Association et al. v. FirstEnergy Solutions Corporation*, FERC Docket No. EL16-34-000, Order Granting Complaint (April 27, 2016). Although portions of OCC Witness Sioshansi's testimony were withdrawn at the original hearing, such testimony still provided notice of the conflict between FirstEnergy's proposal and FERC rules.

²⁶² The alternative plan should be rejected. The additional evidence is the Rehearing Testimony of Eileen M. Mikkelsen ("Rehearing Testimony").

²⁶³ R.C. 4903.10 ("The commission . . . shall not upon such rehearing take any evidence that, with reasonable diligence, could have been offered upon the original hearing.")

²⁶⁴ See R. Tr. I at 32-43.

²⁶⁵ Instead, FirstEnergy asserted simply that FERC's rules were not "relevant" here. See Post-Hearing Reply Brief of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company at 296.

the Attorney Examiner denied OCC's motion to strike.²⁶⁶ The Attorney Examiner's ruling should be reversed and the Rehearing Testimony stricken.²⁶⁷

2. Rehearing evidence on the purported economic benefits of retaining the FirstEnergy Corp. headquarters and a nexus of operations in Ohio should have been stricken under R.C. 4903.10 because, with reasonable diligence, the Companies had ample opportunity to present the same evidence at hearing (not rehearing).

R.C. 4903.10 provides that, “[t]he commission shall also specify the scope of the additional evidence, if any, that will be taken, *but it shall not upon such rehearing take any evidence that, with reasonable diligence, could have been offered upon the original hearing.*”²⁶⁸ Rehearing is limited to evidence already taken unless additional evidence could not, with reasonable diligence, have been offered in the original hearing. By exercising minimal (let alone reasonable) diligence, the companies could have – and should have – offered Ms. Murley's rehearing testimony on the economic impacts of retaining FirstEnergy's headquarters and nexus of operations in Akron, Ohio at numerous points during this proceeding.

For example, in the Third Stipulation, FirstEnergy proposed that it would, “maintain its corporate headquarters and its nexus of operations in Akron, Ohio for the

²⁶⁶ See id. at 43:10-19.

²⁶⁷ See, e.g., R.C. 4903.10; Ohio Admin.Code 4901-1-27 (PUCO and Attorney Examiner may take such actions to prevent the presentation of inadmissible evidence; *In the Matter of the Review of Chapters 4901-1, 4901-3, and 4901-9 of the Ohio Administrative Code*, Case No. 06-685-AU-ORD, 2006 Ohio PUC Lexis 746, *88 (PUCO 2006) (“By their very nature, the Commission's attorney examiners are authorized to exclude evidence that is deemed inadmissible in a commission proceeding.”); *In the Matter of the Regulation of the Electrical Fuel Component Contained Within the Rate Schedules of the Ohio Edison Company and Related Matters*, Case No. 83-34-EL-EEC, 1984 PUC Lexis 60, *15 (PUCO 1984) (appropriate for inadmissible argument and evidence to be stricken from the record); *In the Matter of the Review of Chapters 4901-1, 4901-3, and 4901-9 of the Ohio Administrative Code*, Case No. 06-685-AU-ORD, 2006 Ohio PUC Lexis at *88 (same).

²⁶⁸ R.C.4903.10 (emphasis added).

duration of Rider RRS.”²⁶⁹ Notably, this proposed commitment falls under a heading of “*Economic Development, Reliability and Low Income.*”²⁷⁰ Thus, the commitment to maintain FirstEnergy’s headquarters and nexus of its operations in Akron, Ohio was presented as a form of economic development just as it is packaged this way under the Credit Support Rider. The fact that the commitment is attached to a different proposal is of no consequence – it is the same commitment. FirstEnergy was free to present evidence on any purported benefits of such commitment in December 2015. FirstEnergy chose not to do so. R.C. 4903.10 prevents the PUCO from giving FirstEnergy another chance now. Accordingly, the PUCO should strike Ms. Murley’s testimony in its entirety.

C. The Utilities’ proposed modifications to Staff’s plan should be rejected because they are illegal and will harm consumers.

Ohio Adm. Code 4901-1-15(F) allows a party to seek reversal of Attorney Examiner’s ruling by “discussing the matter as a distinct issue in its initial brief” OCC/NOAC seeks reversal of the rulings described herein.

In this proceeding, the Attorney Examiner denied interested Parties the opportunity to cross examine FirstEnergy’s Witnesses Mikkelsen and Murley on the potential for customer harm arising from the Utilities’ proposed modifications to the Staff Credit Support Proposal.²⁷¹ The Attorney Examiner excluded material, relevant evidence

²⁶⁹ FE Ex. at 17 (Third Supplemental Stipulation). Importantly, the “duration of Rider RRS” and the duration of the Credit Support Rider as proposed to be modified by the Companies, is the same.

²⁷⁰ Id. (emphasis added).

²⁷¹ See, e.g., R. Tr. IX at 1508:10 – 1512:9. FirstEnergy did note that the Opinion and Order in Case No. 07-0551-EL-AIR could be used on brief. See Id. at 1510:5-6.

from the record that would help the PUCO decide whether to allow the Companies to double charge customers.

The Attorney Examiner's ruling was in error because the Utilities have taken Staff's Credit Support Rider and have increased the potential harm to consumers, by wanting to add up to nearly \$570 million more in subsidies. The subsidies are based on the purported economic benefits of FirstEnergy keeping its headquarters in Akron, but the subsidies will involve charging customers twice for the same thing. They are not legal under the ESP statute. The ESP statute does not permit charges for "economic benefits" of FirstEnergy Corp., a parent holding company. Nor does it permit charging customers for purported "economic benefits."

The Attorney Examiner's ruling should be reversed for the reasons more fully explained below.

- 1. The Attorney Examiner's ruling refusing to take administrative notice of the relevant documents from FirstEnergy's base rate case because they deprive the PUCO of information necessary to determine if the proposed Credit Support Rider would harm Ohio consumers by requiring them to pay twice for the same services.**

FirstEnergy seeks to charge Ohioans twice for the same service. Ms. Murley and Ms. Mikkelsen advocate for including in the proposed Credit Support Rider purported economic benefits that are based on the cost and value of services provided by Shared Services employees. But Ohioans are already charged for these same costs and services in FirstEnergy's base rates. It is up to the PUCO to determine if it wishes to allow consumers to be charged twice for the cost and value of services provided by Shared Services employees. The PUCO should make this decision with all relevant information.

Due to rulings by the Attorney Examiner excluding relevant, material evidence, it will not be able to do so.

At rehearing, OCC requested that the Attorney Examiner take administrative notice of the Application and Staff Report in Case No. 07-551-EL-AIR.²⁷² These documents, along with the Opinion and Order in the case, would present the PUCO with a robust record. The PUCO would have the opportunity to decide whether customers would be charged twice for the cost and value of services provided by Shared Services employees – once in their base rates and again in the Credit Support Rider . Without these documents, the PUCO would have no way of making such a determination. Ms. Murley testified that she does not “know if the utilities recover the cost of Shared Services through their base rates.”²⁷³ Ms. Mikkelsen testified affirmatively that she “would expect to recover [from Ohio utility customers] service company costs allocated to the companies in a base rate proceeding.”²⁷⁴ Further questioning on this issue was prohibited because the Attorney Examiner incorrectly determined that he did not “see the double charges at all.”²⁷⁵

Taking administrative notice of the requested documents would help the PUCO “see” that there would, in fact, be double-charging of the costs of shared services if they were included in the Credit Support Rider. For example, the Staff Reports from Case No. 07-551-EL-AIR clearly state that:

The Applicant[FirstEnergy] annualized test year labor expense to reflect estimated employee and wage levels expected for the end of

²⁷² See R. Tr. IX at 1508:10 – 1512:9. FirstEnergy did not that the Opinion and Order in Case No. 07-0551-EL-AIR could be used on brief. See id. at 1510:5-6.

²⁷³ R. Tr. IX at 1506:19 – 1508:8.

²⁷⁴ R. Tr. X at 1750:7-15.

²⁷⁵ R. Tr. X at 1752:9-10.

the test year. The applicant included in its labor expense estimate payroll costs including straight time labor, overtime labor, and incentive compensation. *Also included are allocated costs for shared services provided by FirstEnergy Service Co. employees.*²⁷⁶

Such portions of the Staff Report and FirstEnergy's application clearly support OCC's/NOAC's argument that there are serious double-charging issues. But the Attorney Examiner has shielded these documents from the light of day in this case. The PUCO is precluded from considering these documents or, in its judgment, according them the proper weight when determining whether Ohio consumers should be charged twice for the same services. The PUCO should take administrative notice of these materials and afford them the due weight they deserve. Otherwise, the PUCO's analysis will be flawed and consumers will be harmed.

2. The PUCO should not approve FirstEnergy's attempt to charge consumers for the "economic benefits" of keeping FirstEnergy Corp.'s headquarters in Ohio because such charges are unlawful under the ESP statute and will harm Ohio consumers.

The PUCO cannot, as a matter of law, include in the Credit Support Rider the purported "economic benefits" of FirstEnergy retaining its headquarters in Ohio.²⁷⁷ Ms. Mikkelsen notes that the PUCO "Staff's alternative to the Companies' Proposal contains a condition that represents an economic and job development provision as part of Stipulated ESP

²⁷⁶ A report by the Staff of the Public Utilities Commission of Ohio, FirstEnergy Toledo Edison Company, Case No. 07-551-EL-AIR at 10 (Dec. 4, 2007)(emphasis added); A report by the Staff of the Public Utilities Commission of Ohio, FirstEnergy Cleveland Electric Illuminating Company, Case No. 07-551-EL-AIR at 10 (Dec. 4, 2007)(emphasis added); A report by the Staff of the Public Utilities Commission of Ohio, FirstEnergy Ohio Edison Company, Case No. 07-551-EL-AIR at 10 (Dec. 4, 2007)(emphasis added).

²⁷⁷ At the rehearing, OCC made a motion to strike Ms. Murley's testimony on relevancy grounds citing to the standard in R.C. 4928.143(B)(2)(i). See R. Tr. Vol. IX at 1458:7 - 1460:16. The Attorney Examiners denied OCC's motion. The PUCO should give Ms. Murley's testimony the due weight it deserves – none.

IV.”²⁷⁸ The ESP statute speaks directly on this point. It provides that, “[p]rovisions 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.”²⁷⁹ Ms. Murley’s testimony relates to FirstEnergy Corp., a parent company, and provides no information on any economic development or job retention program that any of the FirstEnergy electric distribution utilities seek to “implement.” Further, her “economic impact analysis” lacks any information on the costs of such programs. It focuses on purported benefits, not costs. The ESP statute does not allow an electric distribution utility, much less a parent company, to charge consumers for the purported benefits of economic development programs.²⁸⁰

a. The ESP statute does not allow charges for “economic benefits” of FirstEnergy Corp., a parent holding company.

The ESP statute only permits recovery of costs for economic development or job retention programs carried out by the electric distribution utility. Here, FirstEnergy asks to charge customers for the purported benefits of retaining the FirstEnergy Corp.

²⁷⁸ *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 Rebuttal and Surrebuttal Testimony of Eileen M. Mikkelsen at 14:13-14. (July 25, 2016).

²⁷⁹ R.C. 4928.143(B)(2)(i) (emphasis added). See also R.C. 4905.31(E) (statute on special contracts and economic development that allows a utility to “recover *costs* incurred in conjunction with any economic development and job retention program of the utility within its certified territory”); R.C. 4929.164 (statute allowing gas utility economic development programs that requires information on various costs associated with such projects).

²⁸⁰ Perhaps, in part, because doing so would be nonsensical. Were customers charged dollar-for-dollar for purported economic benefits, the charge would cancel out the benefit and it would be a wash.

headquarters in Ohio.²⁸¹ The statute clearly and unambiguously prohibits this because FirstEnergy Corp. is not an electric distribution utility, it is the parent corporation. Permitting a non-electric distribution utility to charge captive customers of the electric distribution utility dollar for dollar for the purported benefits of keeping its headquarters in Ohio would flip the ESP statute on its head. The request to charge customers up to the value of the “economic development” is unlawful. That request should be denied.

b. The Utilities, by their own admission, have submitted no evidence of costs associated with retaining the FirstEnergy Corp. headquarters in Ohio.

The focus of R.C. 4928.143(B)(2)(i) is costs and costs alone. Astonishingly, the Utilities submitted *no* evidence of the costs underlying the purported economic development and job retention benefits that would result from keeping FirstEnergy Corp.’s headquarters in Ohio.²⁸² Ms. Murley freely admits that her analysis “does not address costs of the [Credit Support Rider] in any way.”²⁸³ Indeed, her testimony

²⁸¹ *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, Rebuttal Rehearing Testimony of Sarah Murley at 2:1-4 (“My testimony addresses the economic and revenue impacts of the FirstEnergy Corp. headquarters (the “HQ”) on the state of Ohio.”) (July 22, 2016) (hereinafter “Murley Testimony”).

²⁸² Including costs of economic development and job retention programs is not foreign to FirstEnergy. For example, in the Third Supplemental Stipulation at 17 – under “Economic Development and Job Retention” – the company provides the costs of implementing the proposed programs. *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, Third Supplemental Stipulation and Recommendation at 17 (Dec. 1, 2015) (hereinafter “Third Supplemental Stipulation”). Notably, they are silent on any purported benefits from such programs.

²⁸³ R. Tr. IX at 1487:23 - 1488:1.

includes the word “cost” merely once.²⁸⁴ No logical leap comes close to suggesting that such a dearth of analysis even approaches meeting the Utilities’ burden laid out in R.C. 4928.143(B)(2)(i).

Additionally, Ms. Murley did not show that there would be any benefits to consumers whatsoever as a result of retaining the FirstEnergy headquarters in Ohio. Her testimony purports to show that keeping the FirstEnergy headquarters in Ohio would result in a “total economic impact” of “\$568.0 million each year.”²⁸⁵ Yet, out of the other side of her mouth, she recommends that the PUCO make Ohio consumers pay for the entirety of these benefits.²⁸⁶ Paying \$568 million for a purported \$568 million economic benefit is no benefit at all.²⁸⁷

Ms. Murley’s testimony should have been stricken in its entirety. R.C. 4928.143(B)(2)(i) permits recovery of costs of economic development, and costs alone. Ms. Murley, by her own admission, did not account for costs – only purported benefits. Because the ESP statute does not allow for charging customers for the purported economic benefits of economic development, the PUCO cannot, as a matter of law, include them in the Credit Support Rider. Ms. Murley’s testimony is therefore wholly irrelevant.

²⁸⁴ See Murley Testimony Attachment SM-R-1 at 5. Indeed, the one instance in which Ms. Murley mentions costs relates to the “cost of labor and other inputs” associated with the “direct impacts from the FirstEnergy Corp.’s headquarters operations.” *Id.* Ms. Murley testified that these direct impacts are equivalent to the payroll of shared services employees at the FirstEnergy headquarters. R. Tr. IX at 1524:3 – 1528:10. As noted, including such costs in Rider DMR would result in harm to Ohio consumers by charging them twice for the same services.

²⁸⁵ Murley Testimony at 6:7-8.

²⁸⁶ R. Tr. IX at 1501:23 -1502:1.

²⁸⁷ The companies have not provided any evidence that customers would actually benefit from including the purported “economic impacts” in the Credit Support Rider. See, e.g., R. Tr. IX at 1502:14 – 20 (Ms. Murley admitting that she could not answer such a question because “I didn’t do that analysis.”).

VII. CONCLUSION

On March 31, 2016, the PUCO approved FirstEnergy's ESP IV and the included PPA (Rider RRS). Subsequently (April 27, 2016), FERC though a complaint proceeding asked to see FirstEnergy's PPA. Instead, FirstEnergy chose a different path, and Rider RRS is currently not a viable option for PUCO approval. Now before the PUCO sit three options to bailout FirstEnergy Corp. through above-market subsidies paid by consumers. None of these proposals should have been entertained through the PUCO's rehearing process, much less approved. Based on the arguments above, FirstEnergy's Proposal (modified Rider RRS), the Staff's Proposal and FirstEnergy's modifications to the Staff's Proposal should all be rejected by the PUCO. FirstEnergy should be required to file a new MRO application, in order for consumers to be given the benefit of the historically low prices available in the market.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Initial Rehearing Brief was served via electronic service upon the parties this 15th day of August 2016.

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	Rider RRS	Modified Rider RRS (The Proposal)	Staff Proposal Rider DMR	FE's Modification to Rider DMR ¹
Term	8 Years	8 Years	3 Years with potential for two more	8 Years
Cost to Customers	\$3.6 billion over term of ESP, approximately \$800 per residential customer (1,000 KWh/month) ²	\$3.6 billion over term of ESP, approximately \$800 per residential customer (1,000 KWh/month) ³	\$131 million/year for first three years, total of \$393 million, with potential for more in years four and five ⁴	Up to \$1,126 billion/year, ⁵ total of \$8.9 billion over the term of the ESP
Legal and Policy Impediments	<p>-- Collects transition revenues violating R.C. 4928.38</p> <p>--No authority for PUCO to approve as limit on shopping under R.C. 4928.143(B)(2)(d)</p> <p>-- Fails to meet policy objectives of R.C. 4928.02, including:</p> <ul style="list-style-type: none"> ensure availability of reasonably priced retail electric service ensure the diversity of electricity supplies and suppliers avoid anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail service <p>-- FERC approval of underlying purchase power agreement (PPA) needed</p> <p>-- Contrary to SB3 and SB 221</p> <ul style="list-style-type: none"> Contrary to competitive whole sale markets Bails FES generation assets out; incents risky behavior <p>--Not more favorable in the aggregate for customers than a market rate offer</p>	<p>-- Collects transition revenues violating R.C. 4928.38</p> <p>-- -- Not authorized by the PUCO under R.C. 4928.143(B)(2)(d).</p> <p>Fails to meet policy objectives of R.C. 4928.02, including:</p> <ul style="list-style-type: none"> ensure availability of reasonably priced retail electric service ensure the diversity of electricity supplies and suppliers avoid anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail service <p>-- Virtual PPA, likely will need FERC approval</p> <p>-- Contrary to SB 3 and SB 221</p> <ul style="list-style-type: none"> Contrary to competitive whole sale markets Bails FE Utilities out <p>-- Based on outdated projections</p> <p>-- Does not support the continued operation of the Sammis and Davis-Besse</p> <p>--Not more favorable in the aggregate for customers than a market rate offer</p> <p>-- Consideration of alternative should require FE to withdraw ESP with prior rates in place</p>	<p>-- Collects transition revenues violating R.C. 4928.38</p> <p>---- No legal basis for credit support under R.C. 4928.143; no commitment to spend on distribution modernization</p> <p>Fails to meet policy objectives of R.C. 4928.02, including:</p> <ul style="list-style-type: none"> ensure availability of reasonably priced retail electric service ensure the diversity of electricity supplies and suppliers avoid anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail service <p>-- Bailing out FirstEnergy Corp. by keeping credit ratings at investment grade</p> <p>--Not more favorable in the aggregate for customers than a market rate offer</p> <p>-- Consideration of alternative should require FE to withdraw ESP with prior rates in place</p>	<p>-- Collects transition revenues violating R.C. 4928.38</p> <p>-- No legal basis for credit support under R.C. 4928.143; no commitment to spend on distribution modernization</p> <p>-- Fails to meet policy objectives of R.C. 4928.02, including:</p> <ul style="list-style-type: none"> ensure availability of reasonably priced retail electric service ensure the diversity of electricity supplies and suppliers avoid anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail service <p>-- Bailing out FirstEnergy Corp. by keeping credit ratings at investment grade</p> <p>-- Adder for economic development value of keeping headquarters in Akron could double charge customers</p> <p>--Not more favorable in the aggregate for customers than a market rate offer</p> <p>-- Consideration of alternative should require FE to withdraw ESP with prior rates in place</p>

¹ Includes purported economic benefits (\$558 million) from FirstEnergy keeping its headquarters in Akron.

² Based on OCC/NOPEC Witness Wilson's Testimony at 12 (Dec. 30, 2015) (OCC/NOPEC Ex. 5).

³ Id. OCC/NOAC Witness Wilson updated the cost projections for the Proposal but those updates were stricken from the record.

⁴ Staff Ex. 13.

⁵ FirstEnergy Ex. 206 at 14.

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Summary: Brief Initial Rehearing Brief by the Office of the Ohio Consumers' Counsel and the Northwest Ohio Aggregation Coalition electronically filed by Ms. Deb J. Bingham on behalf of Sauer, Larry S.