BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

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

POST-REHEARING REPLY BRIEF OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY

PUBLIC VERSION

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I. INTRODUCTION

As the Commission has previously held, Powering Ohio's Progress – the fourth Electric Security Plan ("ESP IV") presented by Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company (collectively, "the Companies") – provides customers an array of benefits over the eight year term of the program. ESP IV offers, among other things, a distribution base rate freeze, numerous rate options offering savings, enhancements to the competitive market, support for low income customers and more opportunities for customers to access energy efficiency programs. As approved, the Retail Rate Stability Rider ("Rider RRS"), one of the prominent features of ESP IV, offers customers rate stability to protect against market risks over the eight-year ESP IV term. Unfortunately, modifications made by the Commission to the Third Supplemental Stipulation, along with an intervening decision by the Federal Energy Regulatory Commission ("FERC"), made timely implementation of the rider impossible. These issues were timely raised in the Companies' Application for Rehearing. Given the extraordinary amount of time and resources that the Companies, the parties and the Commission have spent in getting ESP IV approved, going back to "square one" was the least acceptable option. Accordingly, the Companies proposed a modification to Rider RRS (the "Proposal") eliminating the need for any purchase power agreement between the Companies and FirstEnergy Solutions Corp. ("FES"). The Proposal changes how charges or credits are calculated under the rider in order to provide the hedging mechanism and rate stability that the Commission initially found so appropriate for customers. The Proposal also eliminates possible risks for customers by fixing costs, plant output and cleared capacity.

The Commission appropriately granted rehearing and set an evidentiary hearing on the Proposal and alternatives thereto. As the Companies demonstrated in their Post-Rehearing Brief, the Proposal should be adopted. If not, Staff's proposed Rider DMR should be approved with modifications. Given all of the benefits of ESP IV, it would be an unwarranted and unfortunate step backward if one of these two outcomes did not occur.

Throughout this rehearing, those opposing the Proposal[1] labor under a series of misapprehensions. For example, parties claim that the Commission could not even have evidentiary hearings on rehearing because the Companies were required either to have predicted unprecedented FERC action or to include the Companies' prescriptions for errors or unreasonable provisions in the March 31 Order in this case as part of the Companies' Application for Rehearing. There are no such requirements. In their Application for Rehearing, the Companies appropriately noted the error and unreasonableness of Rider RRS as approved. As noted, the Commission appropriately set for evidentiary rehearing the Proposal that would address the problems identified in the Companies' Application.

Even after the Commission expressly set forth the limited scope of the evidentiary hearing on rehearing – i.e., the consideration of the Proposal or any alternatives thereto – certain parties believe that the rehearing was an opportunity to relitigate the wisdom of the

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[1] These parties are: Cleveland Metropolitan School District ("CMSD"); Direct Energy Services, LLC and Direct Energy Business, LLC ("Direct"); the Independent Market Monitor for PJM, Inc. ("IMM"); Northeast Ohio Public Energy Council ("NOPEC"); Office of the Ohio Consumers' Counsel ("OCC") and Northwest Ohio Aggregation Coalition and various communities ("NOAC") (collectively, "OCC/NOAC"); Ohio Environmental Council and Environmental Defense Fund ("OEC/EDF"); Ohio Hospital Association ("OHA"); Ohio Manufacturers Association Energy Group ("OMAEG"); PJM Power Providers Group and Electric Power Supply Association ("P3/EPSA"); Retail Electric Supply Association ("RESA"); Sierra Club; and the Staff of the Commission.

Commission's approval of Rider RRS. In addition to providing testimony on this issue (which was properly stricken), the parties opposing ESP IV, Rider RRS and the Proposal unearth already rejected arguments. For example, these parties reargue whether Rider RRS is authorized under R.C. 4928.143(B)(2) or whether Rider RRS passes muster under R.C. 4905.22. These are no longer issues in this case. The Commission already has decided that Rider RRS easily falls within its authority under R.C. 4928.143(B)(2). In the March 31 Order, the Commission did not adopt any analyses under or even mention R.C. 4905.22; that statute does not apply to ESPs.

Even when the parties address the proper issues presented at the evidentiary rehearing, they take positions that improperly slant or simply ignore the evidence. For example, regarding the Proposal, they claim that now that the Companies will be providing the hedge through Rider RRS, the rider is "no longer revenue neutral" to the Companies. Thus, they claim, the rider poses a financial risk to the Companies. There was no evidence to support either proposition. Rider RRS, as approved, would never have been "revenue neutral" to the Companies. The opposing parties focused solely on the "financial burden" of projected Rider RRS credits in the later years of ESP IV, overlooking that the Companies are also expected to receive $400 million in Rider RRS charges, along with additional revenues from other provisions of ESP IV, such as Riders DCR and AMI, and lost distribution revenue.

Or these parties contend, without any evidentiary support, that the Proposal is just a backdoor way of subsidizing FES. There is no subsidy. There is no mechanism for the Companies to transfer funds to FES. The management of FirstEnergy Corp., the Companies' corporate parent, has stated in no uncertain terms that it will not provide additional financial support to FES. The best that the opposing parties can do is point to testimony that it is "possible" that funds from Rider RRS could be part of a dividend to FirstEnergy Corp. Given the rest of the evidence, this argument is baseless. The Companies have also stated in no uncertain terms that they intend to use the funds that are projected to come to them for a variety of capital needs. It is undisputed that the Companies have considerable capital needs for the term of ESP IV, totaling over $1 billion, and at least two of the Companies haven't issued a dividend in years. Consequently, the notion of Rider RRS as a subsidy is at odds with the facts.

Similarly, these parties, seeking to take advantage of recent Ohio Supreme Court decisions relating to other electric distribution utilities ("EDUs"), now claim that Rider RRS is a transition charge. Given that Rider RRS is expected to provide a net credit to customers during ESP IV and does not actually contemplate direct payments for generation outputs from the Companies to FES, the case for transforming the rider into a transition charge is dubious. Plus, unlike the other EDUs in the recent Court decisions, the Companies transitioned to competitive generation and divested such assets well over a decade ago. There are no transition costs to recover.

Nor do these parties fare any better when they attempt to argue that ESP IV with the Proposal fails to meet the ESP v. MRO test. They contend that many of the benefits of Rider RRS (those associated with the continued operation of the Plants[2]) would be missing under the Proposal. The Commission's ESP v. MRO analysis, however, depended on none of those now "missing" benefits. Some of these parties also claim that updated forwards energy prices show that Rider RRS will be more costly. But these forwards prices are the same types of prices that

[2] The "Plants" refers to the Davis-Besse and Sammis generation facilities.

the Commission previously properly rejected as a reliable basis for projecting the effect of Rider RRS. These prices are still volatile and heavily weather dependent. Recent forwards prices reflect record warm temperatures. They are hardly reflective of what the market will be over the next eight years. Simply put, there is nothing in the Proposal that changes the ESP v. MRO analysis as set forth in the March 31 Order.

While the Companies dispute the Staff's criticisms and recommendation relating to the Proposal and Rider RRS, the Companies acknowledge the potential merit of a properly designed Distribution Modernization Rider ("Rider DMR"). Those parties opposing this rider offer similar erroneous arguments levied against Rider RRS and the Proposal. For example, they echo the unsupported claim that Rider DMR is really a subsidy for FES. They question the need for the rider – i.e., to provide credit support to the Companies for the purpose of accessing funds for capital projects such as grid modernization – despite the undisputed evidence that: (1) the Companies and FirstEnergy Corp. have credit ratings that are at or towards the bottom of the investment grade range; (2) ratings agencies have put FirstEnergy Corp. on a watch for a possible downgrade; (3) per the ratings agencies, a downgrade is likely without some positive action to support the Companies in this case; (4) the downgrade of FirstEnergy Corp.'s credit rating would directly adversely affect the Companies' credit ratings; and (5) falling below investment grade credit ratings would make it more costly for the Companies to do business because, among other things, it would make access to needed capital more difficult and expensive.

These parties similarly resort to a kind of gamesmanship, claiming that Rider DMR will not benefit customers because there is no "guarantee" that the Companies' credit rating will not deteriorate or because there is no "requirement" or "commitment" that the Companies spend these funds on grid modernization (despite the name of the rider). This is more fantasy. Rider DMR is not proposed to be (and never could be) a mechanism to "guarantee" maintained or better credit ratings. As the evidence shows, Rider DMR will be one of several mechanisms that will help the Companies and FirstEnergy Corp. maintain their investment grade ratings. Similarly, as with Rider RRS, the Companies have plainly stated that their intent is to use the money to maximize their capital needs including needs arising from a grid modernization plan. Further, these parties overlook that, as required by the March 31 Order, the Companies have submitted a grid modernization plan. The notion that, once a plan is approved, the Companies would somehow not proceed to implement it defies logic.

These parties also try to downplay the significant benefit provided by the Staff's proposal to tie Rider DMR to FirstEnergy Corp.'s continued presence in Akron. These parties argue that FirstEnergy Corp. already had committed to stay in Akron. This ignores that the requirement to stay in Akron coexisted with Rider RRS. If Rider RRS is rejected, there is no headquarters commitment. The parties argue that the economic benefit of having FirstEnergy Corp. in Akron is overblown. Yet the testimony regarding the economic impact of the headquarters requirement is undisputed.

These parties also fail to present any meritorious arguments regarding the ESP v. MRO test for ESP IV with Rider DMR. They claim that Rider DMR would be a cost of the ESP. This overlooks that Rider DMR, like Riders DCR and AMI, is a distribution related rider that would recover costs that would otherwise be recovered in a base rate case or some other rate mechanism outside of an ESP. Accordingly, for quantitative purposes, Rider DMR would be, at worst, a "wash" in an ESP v. MRO analysis. Considering the economic impact of Rider DMR's proposed requirement to maintain FirstEnergy Corp.'s headquarters and nexus of business in Akron, Rider DMR adds $568 million to ESP IV's quantitative benefits. Further, given that Rider DMR provides economic benefits through the headquarters requirement, credit support, and assistance to achieve grid modernization, Rider DMR makes ESP IV, when compared to ESP IV as approved, even more qualitatively beneficial than an MRO.

II. THE COMMISSION PROPERLY GRANTED REHEARING AND HAS JURISDICTION TO CONSIDER THE COMPANIES' PROPOSAL AND THE STAFF'S PROPOSAL.

As a preliminary matter, the Commission has jurisdiction to consider modifying its March 31 Order on rehearing to incorporate either the Companies' Proposal or Rider DMR (with the Companies' recommended improvements). OCC/NOAC and P3/EPSA have been at the forefront arguing that rehearing is contrary to R.C. 4903.10 or R.C. 4928.143(C). Asserting a meritless argument over and over, however, does not advance its chances of success. The Commission has addressed most of these jurisdictional arguments and found them lacking in legal support.[3] As shown below, Rider RRS opponents offer nothing new to justify reversing course.

A. The Commission's Consideration of the Proposal or Rider DMR Is Not Barred by R.C. 4903.10.

NOPEC and OCC/NOAC make the same faulty argument made by OCC/NOAC in their June 10, 2016 Application for Rehearing: that R.C. 4903.10 forbids the Commission from

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[3] *See* Third Entry on Rehearing (July 6, 2016) ("Third Entry on Rehearing"). In the Third Entry on Rehearing the Commission reserved for determination by the Attorney Examiners objections to evidence on the basis that the evidence could have been offered upon the original hearing. *Id.*, ¶ 45.

considering the Proposal on rehearing because the Proposal could have been offered during the original hearing.[4] As the Companies explained in their Memorandum Contra OCC/NOAC's Application for Rehearing,[5] this argument is contrary to fact and logic for three reasons:

- The Proposal relies on data included in the record and already relied upon by the Commission in its Order;[6]
- The Companies had no lawful basis for introducing evidence in support of the Proposal prior to the Companies' May 2, 2016 Application for Rehearing; and
- The Companies lacked a reason to propose modifications to the Rider RRS calculation until after the Commission's Order and the FERC Order, which was unprecedented and resulted from the FERC expanding its definition of "captive customers."[7]

NOPEC's reliance on a "statutory proscription against introducing new proposals on rehearing"[8] confuses argument with evidence. The statutory proscription is against taking on rehearing "***any evidence*** that, with reasonable diligence, could have been offered upon the original hearing."[9] NOPEC and OCC/NOAC complain about the Proposal, which is based on existing evidence in the record, but fail to identify any new facts that could have been offered with reasonable diligence in the original hearing. And, as the Attorney Examiner concluded in denying OCC's motion to strike Ms. Mikkelsen's testimony based on this same argument, the "Companies are not required to anticipate unprecedented actions by the FERC. . . . Certainly

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[4] NOPEC Rehearing Brief, pp. 5-7; OCC/NOAC Rehearing Brief, pp. 68-70. *See* OCC/NOAC Application for Rehearing, pp. 6-7 (June 10, 2016).

[5] Companies' Memo. Contra OCC/NOAC AFR, pp. 4-6 (June 20, 2016).

[6] *See*, *e.g.*, Rehearing Testimony of Eileen M. Mikkelsen, pp. 5-6 ("Mikkelsen Rehearing Test.").

[7] *See* Rehearing Tr. Vol. I, p. 43.

[8] NOPEC Rehearing Brief, p. 5.

[9] R.C. 4903.10 (emphasis added).

something that is unprecedented is unforeseeable with reasonable diligence."[10] Neither NOPEC nor OCC/NOAC provide any response to the Bench's observation. Neither cites to precedent for FERC's action. The Commission's consideration of the Proposal does not violate R.C. 4903.10.

Likewise, OCC/NOAC are incorrect that Company witness Murley's rebuttal rehearing testimony could have been offered, with reasonable diligence, during the original hearing.[11] Her testimony was offered as rebuttal to the failure of Staff witness Buckley to quantify in his rehearing testimony the value of the corporate headquarters condition in proposed Rider DMR.[12] Mr. Buckley's testimony recommending the amount of Rider DMR and the corporate headquarters condition did not exist until he filed his rehearing testimony on June 29, 2016.[13]

OCC/NOAC point to a separate headquarters commitment made by the Companies in the Third Supplemental Stipulation,[14] a *commitment unrelated to Rider DMR*. What Mr. Buckley has proposed is that the Companies recover a certain level of revenues through Rider DMR and that FirstEnergy Corp.'s corporate headquarters and nexus of operations remain in Akron, Ohio, throughout ESP IV "or the entire amount of the [Rider DMR] credit should be subject to refund."[15] The tie to Rider DMR and the refund condition are entirely new; they could not have

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[10] Rehearing Tr. Vol. I, p. 43.

[11] OCC/NOAC Rehearing Brief, pp. 70-71.

[12] *See* Rebuttal Rehearing Testimony of Sarah Murley, p. 2 ("Murley Rehearing Rebuttal Test.") (purpose of testimony is rebutting Staff witness Buckley's failure to identify economic and revenue impacts of the corporate headquarters condition); Rehearing Testimony of Joseph P. Buckley, p. 7 ("Buckley Rehearing Test."). *See generally* Rehearing Tr. Vol. IX, pp. 1425-26, 1432-34 (argument on motion to strike, and Attorney Examiner denying the motion).

[13] *See* Staff Ex. 13.

[14] OCC/NOAC Rehearing Brief, pp. 70-71.

[15] Buckley Rehearing Test., p. 7.

been rebutted in the original hearing by Ms. Murley. Thus, the Companies could not have offered Ms. Murley's rehearing rebuttal testimony, even with extraordinary diligence, in the original hearing.

Sierra Club similarly argues that Staff could have offered in the original proceeding, with reasonable diligence, testimony regarding Rider DMR and the Companies' credit ratings and metrics.[16] But Sierra Club fails to explain how Staff could have foreseen the unforeseeable events leading up to the multiple applications for rehearing filed on May 2, 2016, and the Commission's decision to grant rehearing to consider the Companies' Proposal and alternative proposals. The question is not whether certain facts ***could*** have been offered in the original hearing, since any facts whatsoever could have been offered (and potentially stricken as irrelevant or outside the scope of that hearing). The question is whether, given the posture of the original hearing and the relevant issues thereto, parties ***should*** have diligently offered evidence in support of or against those relevant issues. Sierra Club has not shown that Staff was obligated to provide testimony in support of Rider DMR during the original hearing.

B. The Commission's Consideration of the Proposal and Staff's Proposed Alternative Is Not Barred by R.C. 4928.143(C)(1).

NOPEC, OCC/NOAC and OHA also complain that the Companies' only option is to accept or reject the Commission-approved ESP IV.[17] Specifically, these parties believe that R.C. 4928.143(C)(1) wrote out of Ohio utility law the entire rehearing process for ESPs. The

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[16] Sierra Club Rehearing Brief, pp. 41-43.

[17] NOPEC Rehearing Brief, pp. 5-7; OHA Rehearing Brief, pp. 6-8. *See* OCC/NOAC Application for Rehearing, pp. 4-5 (June 10, 2016) (making same argument); OCC/NOAC Application for Rehearing, pp. 9-10 (May 31, 2016) (same); OCC/NOAC Request for Certification of Interlocutory Appeal (June 8, 2016) (same).

Commission rejected this argument in its Third Entry on Rehearing, and should do so again here.[18] R.C. 4928.143(C)(2) did not render inapplicable to all electric utilities the rehearing and appeal process in R.C. Chapter 4903 for ESPs. While electric utilities "may withdraw the application, thereby terminating it," as provided in R.C. 4928.143(C)(2)(a), they also may seek rehearing of, and take an appeal from, any Commission modifications to an ESP. The Companies' right to seek rehearing of a Commission order, and the Commission's authority to grant rehearing, are expressly provided by statute.

C. The Companies' Application for Rehearing Properly Asserted Assignments of Error and, on Rehearing, the Commission May Consider the Companies' Proposal and Staff's Proposed Alternative As Solutions to Those Assignments of Error.

P3/EPSA argue once again that the Commission lacks jurisdiction to consider the Proposal because the Companies did not include the Proposal in their Application for Rehearing.[19] The Commission correctly denied P3/EPSA's argument in its Third Entry on Rehearing.[20] The Commission should do so again here. The Companies' have fully rebutted P3/EPSA's argument on two occasions.[21] For the sake of efficiency, the Companies incorporate those responses here.

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[18] Third Entry on Rehearing, ¶¶ 39, 44.

[19] P3/EPSA Rehearing Brief, pp. 12-21. *See also* OHA Rehearing Brief, p. 8.

[20] Third Entry on Rehearing, ¶¶ 26-31.

[21] Companies' Memo. Contra Joint AFR of P3/EPSA, pp. 2-11 (Aug. 15, 2016); Companies' Memorandum Contra The Joint Motion For A Stay Of Discovery And For An Expedited Ruling Filed By P3/EPSA, pp. 3-8 (May 26, 2016).

OHA, Sierra Club and P3/EPSA also contend that Rider DMR is outside the scope of rehearing.[22] The Commission, however, may consider Rider DMR on rehearing for the same reasons it may consider the Companies' Proposal. Pursuant to R.C. 4903.10, the Commission properly limited the scope of its rehearing review to specific issues being reheard: the remedies to address the problems with timely implementation of Rider RRS, and specifically, the Companies' Proposal and any alternatives to the Proposal (such as Rider DMR).[23] In their Application for Rehearing, the Companies suggested the need to revisit Rider RRS due to an intervening ruling by FERC and certain modifications to the Third Supplemental Stipulation made by the Commission. The Commission accordingly granted rehearing on the matter specified.[24] As such, the Commission is not conducting a *de novo* review of the Companies' ESP IV. Instead, the Commission is examining whether, in light of the issues raised in the Companies' Application for Rehearing, ESP IV should be changed to include the Companies' Proposal or Staff's alternative to Rider RRS.[25] "Following a rehearing, the Commission need only be of the opinion that the original order should be changed for it to modify the same."[26]

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[22] OHA Rehearing Brief, pp. 10-12; Sierra Club Rehearing Brief, pp. 41-42; P3/EPSA Rehearing Brief, pp. 21-25.

[23] *See* Entry, ¶ 15 (June 3, 2016) (setting hearing regarding provisions of the Proposal and limiting the scope of the hearing to "provisions of, and alternatives to, the Modified RRS Proposal."); Third Entry on Rehearing, ¶ 25 (affirming attorney examiner's June 3 Entry setting matter for hearing and establishing scope of rehearing); *id*. ¶ 30 (noting that no party is prejudiced because each party may participate in hearing considering the Proposal and to present any relevant evidence in opposition to the Proposal or to provide an alternative).

[24] *See* R.C. 4903.10

[25] R.C. 4903.10 ("If, after such rehearing, the commission is of the opinion that the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may abrogate or modify the same").

[26] *Columbus & S. Ohio Elec. Co. v. Pub. Utilities Com.*, 10 Ohio St.3d 12, 15, 460 N.E.2d 1108 (1984).

Thus, having granted rehearing, the Commission has broad discretion to decide whether its March 31 Order should be modified to include the Proposal or Rider DMR.

III. APPLICABLE LEGAL STANDARDS ON REHEARING

The statutory standard applicable to the Commission's approval of an ESP is stated in R.C. 4928.143(C)(1):

> 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. . . . Otherwise, the commission by order shall disapprove the application.

This statutory standard traditionally is referred to as the ESP v. MRO test. In its March 31 Order, the Commission found that the Companies' Stipulated ESP IV satisfied the ESP v. MRO test.[27] Because the Commission granted rehearing to consider whether the March 31 Order should be changed, the Commission's task on rehearing is to determine whether it is reasonable to incorporate the Proposal or Rider DMR into the Commission-approved ESP IV and, if so, whether ESP IV, as modified, continues to satisfy the ESP v. MRO test.

The Commission should also make sure that each provision of an ESP is authorized under R.C. 4928.143.[28] For the ESP, as modified by the Proposal, the Commission should also consider the traditional three-pronged test for approval of stipulations.

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[27] Opinion and Order, pp. 118-20 (Mar. 31, 2016) ("March 31 Order").

[28] Given the plain language of R.C. 4928.143(B)(2), the Commission was correct in Case No. 08-917-EL-SSO when it determined that the wording of R.C. 4928.143(B)(2) does not limit the provisions that may be included in an ESP to the specific provisions included in R.C. 4928.143(B)(2)(a)-(i). *See In the Matter of the Application of Columbus*

The Commission should reject intervenors' attempts to layer on additional statutory tests that are inapplicable to an ESP.[29] For example, certain parties suggest that riders in an ESP must not violate R.C. 4905.22.[30] Other parties cite R.C. 4928.38 as relevant for ESP review.[31] But those statutes have no application to an ESP. R.C. 4905.22 is generally applicable to traditional base rate cases. R.C. 4928.38 is a pre-S.B. 221 provision. An ESP is governed only by R.C. 4928.141 and 4928.143. The former statute directs electric distribution utilities to apply to the Commission to establish a Standard Service Offer in accordance with R.C. 4921.142 or 4928.143. Then R.C. 4928.143 specifies the components that an ESP may include ***notwithstanding*** any other provision of Title 49, including R.C. 4905.22 and R.C. 4928.38.[32] Thus, there is no legal basis for intervenors' reliance on any arguments based on R.C. 4905.22 or R.C. 4928.38 in this ESP proceeding.

Similarly, the Commission should reject intervenors' reliance on non-statutory guidelines that have no applicability to the issues presented on rehearing. P3/EPSA and OEC/EDF criticize the Proposal for not satisfying the four non-binding factors set out by the Commission in the

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Southern Power Company for Approval of an Electric Security Plan, Case No. 08-917-EL-SSO, Opinion & Order, pp. 27-28 (Mar. 18, 2009). Although the Ohio Supreme Court found to the contrary in an appeal from that case, a future Court could decide that "without limitation" modifies the plan itself and not the listed items. *See Columbus Southern Power Co.,* 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶33.

[29] *See* P3/EPSA Rehearing Brief, pp. 42-45 (citing R.C. 4905.22); OMAEG Rehearing Brief, p. 9 (same); P3/EPSA Rehearing Brief, pp. 34-36 (citing R.C. 4928.38); NOPEC Rehearing Brief, p. 12 (same); OCC/NOAC Rehearing Brief, pp. 25-27 (same); OMAEG Rehearing Brief, p. 19 (same); OEC/EDF Rehearing Brief, p. 16 (same).

[30] *See* P3/EPSA Rehearing Brief, pp. 42-45, 57-58; OMAEG Rehearing Brief, p. 9.

[31] *See* P3/EPSA Rehearing Brief, pp. 34-36; NOPEC Rehearing Brief, p. 12; OCC/NOAC Rehearing Brief, pp. 25-27; OMAEG Rehearing Brief, p. 19; OEC/EDF Rehearing Brief, p. 16.

[32] R.C. 4928.143(B). The only exceptions are R.C. 4928.143(D), R.C. 4928.20(I), (J), and (K), R.C. 4928.64(E), and R.C. 4928.69. *Id.*

AEP ESP3 Order[33] for reviewing a rate stabilization mechanism supported by a PPA.[34] These four factors focus on the generating plants proposed to support such a mechanism.[35] The March 31 Order generally touched on these factors, but noted that its decision did not turn on these factors.[36] Instead, the Commission's decision turned on the retail rate stability benefits of Rider RRS and its retail authority under state law.[37] In any event, here, there is no PPA. Therefore, there is no need to consider whether and how the four factors apply. Further, as the Commission decided in the *AEP ESP3* Order and in the March 31 Order in this case, the rate stability benefits of the rider in question (here, Rider RRS) are well established and the Commission has authority to approve such a rider.

IV. THE ESP IV, AS MODIFIED BY THE PROPOSAL, PASSES THE ESP V. MRO TEST AND MEETS THE THREE-PRONG TEST FOR STIPULATIONS.

A. Rider RRS Is Authorized Under R.C. 4928.143(B).

Rider RRS, as modified by the Proposal, may be authorized by the Commission as part of an ESP under various provisions of R.C. 4928.143(B)(2).[38] Direct argues that Rider RRS cannot be included in an ESP because the rider neither recovers a "cost" nor provides a

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[33] *In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143, in the Form of an Electric Security Plan*, Case No. 13-2385-EL-SSO, Opinion and Order, pp. 19-26 (Feb. 25, 2015) ("*AEP ESP3* Order").

[34] P3/EPSA Rehearing Brief, pp. 45-47; OEC/EDF Rehearing Brief, pp. 13-15.

[35] *AEP ESP3* Order, p. 25.

[36] March 31 Order, p. 87.

[37] March 31 Order, pp. 86-87.

[38] *See* March 31 Order, pp. 108-109 (finding that Rider RRS met the requirements set forth at R.C. 4928.143(B)). *But see* n. 28, *supra.*

"service."[39] Further, Direct argues that Ohio Supreme Court precedent "put to rest" the notion that ESP "revenue mechanisms must be tied to 'costs.'"[40] These arguments are wrong for several reasons.

First, arguments about the nature of Rider RRS are beyond the scope of the rehearing. The Commission already has determined the benefits of Rider RRS. In its March 31 Order, the Commission observed, "Rider RRS will operate as a form of rate insurance."[41] Second, following from this Commission finding, Direct is flat wrong in its characterization that Rider RRS does not provide a service. Third, there is no Supreme Court precedent that requires all riders falling under R.C. 4928(B)(2) be cost-based. To be sure, the Court rejected a charge for provider of last resort ("POLR" service) included in an AEP ESP, holding that the rider was not cost-based.[42] Given that the Commission had justified the POLR charge as cost-based, the absence of such a rationale for that charge was a valid reason for reversal. Similarly, in AEP's more recent case, the Court's rejection of a portion of AEP's Rate Stability Rider ("Rider RSR") was that it lacked evidentiary support *and* that it was justified to assist AEP transition to market-based generation procurement and the restructuring of AEP's generation business.[43] Notably,

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[39] Direct Rehearing Brief, pp. 8-10.

[40] Direct Rehearing Brief, p. 10.

[41] March 31 Order, p. 80.

[42] *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 25.

[43] *In re Application of Columbus S. Power Co.*, 2016-Ohio-1608, ¶¶ 25, 37, 2016 WL 1592905, at *5, *8 (April 21, 2016) ("*AEP RSR* Decision").

the Court has expressly reserved for future consideration the question of whether rates must be cost-based.[44]

In any event, as further demonstrated below, the criticisms made by intervenors fail to carry the day. As the Commission has previously found, Rider RRS falls squarely within several authorizations under R.C. 4928.143(B)(2).

1. The criteria under R.C. 4928.143(B)(2)(d) are not subject to review on rehearing.

Several intervenors repeat old arguments that Rider RRS is not authorized by R.C. 4928.143(B)(2)(d).[45] However, the Commission already has determined that Rider RRS is authorized under R.C. 4928.143(B)(2)(d).[46] The Proposal does not alter that determination. The Proposal consists only of a few modifications to the methodology for calculating the charges and credits included in Rider RRS. These modifications do not change – or have any impact on – the fact that Rider RRS is a charge that relates to limitations on customer shopping for retail electric generation service, bypassability and default service, as would have the effect of stabilizing or providing certainty regarding retail electric service.[47]

The Commission granted rehearing not to revisit the legal underpinnings of Rider RRS but, instead, to consider the modifications to the calculation of Rider RRS. No intervenor has

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[44] *In re Columbus S. Power Co.*, 128 Ohio St.3d 402, 2011-Ohio-958, ¶ 26 ("Whether the commission generally must consider cost of service we need not and do not decide. We simply hold that nothing in the statute generally forbids such consideration.").

[45] P3/EPSA Rehearing Brief, pp. 27-33; Sierra Club Rehearing Brief, pp. 8-14; OCC/NOAC Rehearing Brief, pp. 28-30; OMAEG Rehearing Brief, pp. 20-22; NOPEC Rehearing Brief, p. 9.

[46] March 31 Order, pp. 108-09.

[47] *See* March 31 Order, pp. 108-09; Mikkelsen Rehearing Test., p. 10.

justified revisiting on rehearing the same R.C. 4928.143(B)(2)(d) arguments that were made in the initial phase of this proceeding. Specifically, none of those parties made any showing that the Proposal should change the Commission's determination that Rider RRS is lawful under R.C. 4928.143(B)(2)(d). Thus, because the R.C. 4928.143(B)(2)(d) criteria are not properly before the Commission on rehearing, the Commission need not again consider arguments regarding this statute.

2. Rider RRS is authorized under R.C. 4928.143(B)(2)(d).

Even if the criteria under R.C. 4928.143(B)(2)(d) were before the Commission again now on rehearing (they are not), intervenors' arguments have been fully briefed and were properly rejected by the Commission in the March 31 Order. The Companies explained in their Post-Hearing Brief that Rider RRS is authorized by R.C. 4928.143(B)(2)(d).[48] The Commission found in its March 31 Order that Rider RRS is: (1) a charge; (2) that relates to limitations on customer shopping for retail electric generation service; (3) as would have the effect of stabilizing or providing certainty regarding retail electric service.[49] Intervenors offer nothing new in this latest round of briefing to justify modifying those findings.

a. Rider RRS is a term, condition or charge.

No party disputed in post-hearing and reply briefs filed in February 2016 that Rider RRS is a charge. In fact, Sierra Club and CMSD agreed in their initial post-hearing briefs that Rider

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[48] Companies' Post-Hearing Brief, pp. 113-24 (Feb. 16, 2016) ("Companies' Initial Brief").

[49] March 31 Order, pp. 108-09.

RRS is a charge.[50] P3/EPSA argue now on rehearing that Rider RRS is not a charge within the meaning of R.C. 4928.143(B)(2)(d) because it could be a credit.[51] Yet, a credit is simply a negative charge appearing on customer bills. Of course, this has always been true with Rider RRS, and the Commission found that Rider RRS qualifies as a charge even though it would be a credit in some years.[52] P3/EPSA have offered no basis for altering that finding on rehearing.

b. Rider RRS relates to limitations on customer shopping for retail electric generation service.

Opponents of Rider RRS argue once again that Rider RRS does not function as a financial limitation on shopping for retail electric generation service – despite the Commission's finding that it does.[53] The Companies fully addressed these arguments in their Post-Hearing Reply Brief filed on February 26, 2016, and they incorporate that discussion here.[54]

In addition, Ohio Energy Group ("OEG") witness Baron quantified in his rehearing testimony the extent to which Rider RRS operates as a financial limitation on shopping. The Commission explained in the March 31 Order that:

> the consequence of Rider RRS is that the bills of all customers would reflect a price for retail electric generation service that is based in part on the retail market and in part on the cost of service of Sammis, Davis-Besse, and the OVEC plants. . . . Effectively, then, Rider RRS would function as a financial restraint on

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[50] Sierra Club Initial Post-Hearing Brief, p. 7 (Feb. 16, 2016) ("Sierra Club Initial Brief"); Initial Brief of CMSD, p. 9 (Feb. 16, 2016) ("CMSD Initial Brief").

[51] P3/EPSA Rehearing Brief, pp. 28-29.

[52] March 31 Order, p. 108.

[53] P3/EPSA Rehearing Brief, pp. 29-30; Sierra Club Rehearing Brief, pp. 9-12; OCC/NOAC Rehearing Brief, pp. 28-30. *See* March 31 Order, p. 109.

[54] *See* Companies' Post-Hearing Reply Brief, pp. 269-71 (Feb. 26, 2016) ("Companies' Initial Reply Brief").

> complete reliance on the retail market for the pricing of retail electric generation service.[55]

With the Proposal's change to proxy costs that are fixed and known for the eight-year term of Rider RRS, Mr. Baron was able to calculate that the financial result of Rider RRS to customers is that they will have generation rates comprised of approximately forty percent guaranteed cost-based pricing and sixty percent market-based pricing.[56] This is the quantification of the financial restraint on shopping for retail electric generation service previously found by the Commission.

The fact that Ms. Mikkelsen confirmed that the "Proposal does not place any restriction on the ability of retail customers to shop for their energy"[57] does not alter the analysis. The ability of customers to shop is not impacted by the Proposal. As the Commission observed in the March 31 Order, the Companies' customers "have the ability to choose a competitive supplier pursuant to R.C. 4928.03 and will continue to benefit from a robust choice in competitive suppliers."[58] Indeed, the Signatory Parties agree that Rider RRS does not in any way limit a customer's ability to shop, and does not negatively impact retail competition or SSO auctions.[59] Nevertheless, because Rider RRS provides rate stability through its financial hedge design (as quantified by Mr. Baron), the Commission did not err in finding that it relates to a financial limitation on customer shopping for retail electric generation service.

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[55] March 31 Order, p. 109.

[56] Rehearing Testimony of Stephen J. Baron, p. 8 ("Baron Rehearing Test.").

[57] P3/EPSA Rehearing Brief, p. 29, citing Rehearing Tr. Vol. I, p. 49.

[58] March 31 Order, p. 109.

[59] Third Supp. Stip., Section V.L.2.

c. Rider RRS relates to bypassability.

The Companies explained in their Post-Hearing Brief and Reply Brief how Rider RRS relates to bypassability.[60] P3/EPSA and Sierra Club argue on rehearing that the Commission found Rider RRS did not relate to bypassability.[61] This is untrue. The Commission found that the nonbypassable character of Rider RRS alone was "insufficient to ***fully*** meet the second criterion of R.C. 4928.143(B)(2)(d)."[62] The Commission apparently believed that Rider RRS met the bypassability criterion partly, but not fully. Yet the Commission determined in an earlier proceeding that a charge relates to bypassability when both shopping and non-shopping customers will benefit.[63] Rider RRS relates to bypassability not simply because it is nonbypassable, but because both shopping and non-shopping customers will benefit from its retail rate stabilization. Thus, based on the plain language of R.C. 4928.143(B)(2)(d) and the Commission's *DP&L ESP2* Order, Rider RRS relates to bypassability.

d. Rider RRS relates to default service.

Sierra Club and P3/EPSA also argue that Rider RRS does not relate to default service, narrowly construing the term "default service" to mean only the involuntary service provided under R.C. 4928.14.[64] Yet, these narrow readings of "default service" in R.C. 4928.143(B)(2)(d) are not the Commission's reading, or for that matter a common reading, of the term. As

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[60] Companies' Initial Brief, p. 118; Companies' Initial Reply Brief, pp. 271-72.

[61] P3/EPSA Rehearing Brief, pp. 31-32; Sierra Club Rehearing Brief, p. 12.

[62] March 31 Order, p. 109 (emphasis added).

[63] *See 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, pp. 20-21 (Sept. 4, 2013) ("*DP&L ESP2* Order").

[64] Sierra Club Rehearing Brief, p. 13; P3/EPSA Rehearing Brief, pp. 32-33.

discussed in the Companies' Post-Hearing Brief, the Commission previously has found that "default service" as used in R.C. 4928.143(B)(2)(d) means SSO service.[65] Customers default to the Companies' SSO service, so default service is synonymous with SSO service.[66] Rider RRS relates to the Companies' proposed default service because the rider is designed to mitigate the long-term risk of wholesale market price increases that will be incorporated directly into the SSO via the competitive procurement process. Sierra Club's assertion that Rider RRS has no relationship to the price paid by SSO customers for SSO service[67] is simply wrong.

e. Rider RRS would have the effect of stabilizing or providing certainty regarding retail electric service.

A few intervenors argue that Rider RRS cannot be authorized under R.C. 4928.143(B)(2)(d) because they believe it would not have the effect of stabilizing or providing certainty regarding retail electric service.[68] The Companies fully addressed these criticisms in their Post-Hearing Brief and Reply Brief.[69] After considering intervenors' arguments, the Commission found that Rider RRS, as a hedging mechanism, will have the effect of stabilizing or providing certainty regarding retail electric service in that it will act as a form of rate insurance.[70] Opponents of Rider RRS offer no basis on rehearing for altering the Commission's finding.

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[65] Companies' Initial Brief, pp. 119.

[66] *See* R.C. 4928.14.

[67] Sierra Club Rehearing Brief, p. 13.

[68] Sierra Club Rehearing Brief, p. 14; P3/EPSA Rehearing Brief, pp. 30-31; OMAEG Rehearing Brief, pp. 20-22; Staff Rehearing Brief, p. 3.

[69] Companies' Initial Brief, pp. 120-22; Companies' Initial Reply Brief, pp. 273-75.

[70] March 31 Order, p. 109.

Sierra Club again makes the erroneous claim that "retail electric service" as used in R.C. 4928.143(B)(2)(d) is limited to electricity purchased by retail customers.[71] To the contrary, "retail electric service" means the beginning-to-end supply of electricity to retail customers, including generation, transmission and distribution service and all related services.[72] As the Commission found, Rider RRS provides stability and certainty regarding retail electric service by mitigating the increase in market prices over time.[73]

The record is ample that the Companies' customers face market risks over the next eight years, and that Rider RRS is designed to mitigate that risk.[74] As Company witness Mikkelsen explained, "if power prices rise, customers will begin to see credits to offset the increasing power prices. As a result, the modified Rider RRS would still have the effect of stabilizing or providing certainty regarding retail electric service."[75] Although the Proposal modifies the mechanics of the Rider RRS calculation, it does not reduce the stability value of the hedge. Thus, the Proposal does not impact the Commission's earlier finding that Rider RRS would have the effect of stabilizing or providing certainty regarding retail electric service.

3. Rider RRS Is Authorized By R.C. 4928.143(B)(2)(i).

Sierra Club and P3/EPSA argue that Rider RRS no longer qualifies as an economic development and job retention program because, as modified by the Proposal, Rider RRS does

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[71] Sierra Club Rehearing Brief, p. 14. *See* Sierra Club Initial Brief, pp. 8-9 (making same argument).

[72] R.C. 4928.01(A)(27).

[73] March 31 Order, p. 109.

[74] *See*, *e.g.*, Companies' Initial Reply Brief, pp. 124-31. *See also* Baron Rehearing Test., pp. 5-8 (quantifying extent to which Rider RRS will help stabilize retail electric service).

[75] Mikkelsen Rehearing Test., p. 10.

not ensure the operation of specific generating plants.[76] Although Rider RRS no longer provides this specific benefit, it nevertheless continues to offer economic development and job retention benefits. Rider RRS, as modified, offers rate stability to customers that, in turn, has economic development benefits "which will contribute to the overall vibrancy of our service territory."[77] As Company witness Mikkelsen explained at hearing, the Companies "have always been very, very vested, very interested in the economic vitality of their service territories, . . . and that very much was an underpinning and continues to be an underpinning of the Companies' proposal."[78] As a result, Rider RRS is an economic development and job retention program.

Rider RRS promotes economic development by mitigating future price increases and volatility.[79] "Price stability is an important consideration in site location and expansion as well as large capital investments and employment decisions."[80] As Ms. Mikkelsen explained, this predictability and certainty "may provide more certainty that customers would remain situated in our service territory or perhaps grow their load in our service territory. And to the extent that happens, I think that that may help to ensure the generation assets in the area continue to

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[76] Sierra Club Rehearing Brief, p. 15; P3/EPSA Rehearing Brief, pp. 33-34; *see also* OCC/NOAC Rehearing Brief, pp. 18-19.

[77] Rehearing Tr. Vol. X, p. 1699 (Mikkelsen Rebuttal Cross).

[78] Rehearing Tr. Vol. I, pp. 255-56 (Mikkelson Cross). *See* Mikkelsen Rehearing Test., p. 12.

[79] Mikkelsen Rehearing Test., p. 12.

[80] Mikkelsen Rehearing Test., p. 12. *See also* Direct Testimony of Steven E. Strah, p. 11 (Aug. 4, 2014) ("By tempering future rate increases and volatility, Rider RRS will promote economic development. Price stability is an important consideration in site location analysis. When major companies consider locating or staying in Ohio, or existing companies consider expansion, they are making long term, multi-million dollar investments, and require pricing stability in their budget projections. The greater the degree of certainty about energy costs that we can provide these companies, the greater our odds of landing new capital investment and employment in the State of Ohio.").

operate."[81] Thus, Rider RRS promotes economic development both on the supply side (generation assets) and the demand side (retail customers).

Sierra Club argues that it is "legally wrong" to consider Rider RRS as being authorized under R.C. 4928.143(B)(2)(i) because the statute allows EDUs only to "implement economic development, job retention, and energy efficiency programs."[82] There are at least two things wrong with this argument. First, this argument addresses the wisdom of Rider RRS generally and thus could (and should) have been raised previously.

Second, Sierra Club would have the Commission adopt a definition of "program" that is not only overly narrow, but also inconsistent with Commission precedent. The fact is *Rider RRS is the program.* Like Rider ELR, the automaker credit or rate provisions providing beneficial treatment to The Cleveland Clinic in prior ESPs, the Commission approved rates and charges that provided benefits by retaining and potentially attracting industrial and commercial customers.[83] As noted, by its design, Rider RRS will similarly provide rate characteristics that,

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[81] Rehearing Tr. Vol. I, p. 51 (Mikkelsen Cross).

[82] Sierra Club Rehearing Brief, p. 15

[83] *In the Matter 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 Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 12-1230-EL-SSO, Opinion and Order, pp. 42-44, 55-57 (July 18, 2012) ("ESP III Order"); *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 Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 10-388-EL-SSO, Opinion and Order, pp. 39-42, 44-45 (Aug. 25, 2010) ("ESP II Order"); *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 Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan,* Case No. 08-935-EL-SSO, Second Opinion and Order, pp. 10, 14 (Mar. 25, 2009) ("ESP I Order").

at minimum, will keep businesses in the Companies' service territory.[84] Accordingly, Rider RRS falls within R.C. 4928.143(B)(2)(i).

B. Stipulated ESP IV, Modified To Include The Proposal, Continues To Satisfy The Commission's Three-Part Stipulation Test.

1. Stipulated ESP IV is and has been the subject of serious bargaining.

In its March 31 Order, the Commission discussed at length its finding that Stipulated ESP IV was the product of serious bargaining among capable, knowledgeable parties.[85] The Commission emphasized, among other things, the long history of bargaining between the parties that resulted in a stipulated version of the ESP quite different from the one the Companies initially proposed.[86] Yet, OCC/NOAC, NOPEC and OEC/EDF now contend that the Proposal, which modifies the calculation of only one part of Stipulated ESP IV, has somehow undone these many months of bargaining.[87] The intervenors argue that: (1) there is no evidence of serious bargaining with respect to the Proposal;[88] (2) no serious bargaining occurred because non-signatories were not approached to gauge their support for the Proposal;[89] (3) the Signatory Parties did not have time to consider the Companies' purportedly unilateral Proposal;[90] and (4)

[84] Rehearing Tr. Vol. I, p. 51 (Mikkelsen Cross); Mikkelsen Rehearing Test., p. 12.

[85] March 31 Order, pp. 43-45.

[86] March 31 Order, p. 44.

[87] OCC/NOAC Rehearing Brief, pp. 16-17; NOPEC Rehearing Brief, p. 9; OEC/EDF Rehearing Brief, pp. 7-8.

[88] OCC/NOAC Rehearing Brief, pp. 16-17; NOPEC Rehearing Brief, p. 9; OEC/EDF Rehearing Brief, pp. 7-8.

[89] OCC/NOAC Rehearing Brief, pp. 16-17; NOPEC Rehearing Brief, p. 9.

[90] OEC/EDF Rehearing Brief, pp. 7-8; NOPEC Rehearing Brief, p. 9.

the Signatory Parties no longer represent a diverse group of interests.[91] As shown below, none of the intervenors' arguments find any basis in the record or Commission precedent.

The intervenors' assertions that no serious bargaining took place with respect to the Proposal are premised upon the flawed proposition that the Proposal requires the Commission to revisit its findings in the March 31 Order. It does not. The Proposal modifies only the Rider RRS calculation. It does not amend the stipulations, and there is therefore no impact to the Commission's conclusion that Stipulated ESP IV, as a package, is the product of serious bargaining.[92] Indeed, as OEC/EDF witness Finnigan admitted at rehearing, the Commission's three-prong test applies to a stipulation as a whole, not to any specific provision of the stipulation.[93] Accordingly, the intervenors' arguments on this front are irrelevant and unfounded. In any event, all but two Signatory Parties support the Proposal, with one party not opposing. Thus, there is agreement on supporting ESP IV as modified by the Proposal.

NOPEC and OEC/EDF argue that the Signatory Parties did not have sufficient time to evaluate the supposedly unilateral Proposal.[94] This argument is also baseless. The unrebutted evidence shows that the Companies engaged the Signatory Parties in discussions regarding modifying the Rider RRS calculation prior to filing the Proposal.[95] The support of nearly all of

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[91] OCC/NOAC Rehearing Brief, pp. 17-18.

[92] Mikkelsen Rehearing Test., p. 10; March 31 Order, pp. 43-45.

[93] Rehearing Tr. Vol. V, pp. 1161-62 (Finnigan Cross).

[94] *See* NOPEC Rehearing Brief, p. 9; OEC/EDF Rehearing Brief, pp. 7-8.

[95] Mikkelsen Rehearing Test., p. 9.

the Signatory Parties was expressed in a letter docketed by the Companies on May 4, 2016.[96] After more than three months and many days of rehearing since the Companies filed that letter, the support of these parties – all of whom are represented by experienced counsel – has not wavered. If these parties felt that they had not been afforded sufficient time to consider or comment upon the Proposal, they would have stated as much. Neither NOPEC nor OEC/EDF are in a position to speak for them. Further, the fact that Kroger decided not to oppose and Staff provided an alternative proposal[97] is clear evidence that the Companies' actions were not "unilateral."

OCC/NOAC assert that the positions of Kroger and Staff, as well as the fact that Stipulated ESP IV is supported by less than half of the intervening parties, demonstrate that the Signatory Parties no longer represent a diverse group of interests.[98] This argument is wrong. There are at least four reasons why.

First, Kroger's decision not to oppose the Proposal does not somehow subtract from the diversity of interests of the signatories supporting Stipulated ESP IV as a package. The

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[96] Company Ex. 198. The letter shows that the Proposal is supported by: Ohio Power Company; Ohio Energy Group; City of Akron; Council of Smaller Enterprises; Cleveland Housing Network; Consumer Protection Association; Council for Economic Opportunities in Greater Cleveland; Citizens Coalition; Nucor Steel Marion Inc.; Material Sciences Corporation; The Association of Independent Colleges and Universities of Ohio; the International Brotherhood of Electrical Workers – Local 245; Ohio Partners for Affordable Energy; EnerNOC; and Interstate Gas Supply, Inc.

[97] Rehearing Testimony of Hisham M. Choueiki, pp. 13-15 ("Choueiki Rehearing Test.").

[98] OCC/NOAC Rehearing Brief, p. 17.

Commission has looked to signatory parties and parties not in opposition to a stipulation when considering support for serious bargaining underlying a stipulation.[99]

Second, while Staff may not support the Proposal, it continues otherwise to support Stipulated ESP IV. At no time has Staff withdrawn its support. Indeed, the Companies' questioning of Staff witness Turkenton on this point was deemed so obvious as to be "friendly" cross.[100]

Third, the Commission emphasized in the March 31 Order that "[t]he signatory parties represent diverse interests including the Companies, a municipality, competitive suppliers, commercial customers, industrial consumers, labor unions, small businesses, [and] advocates for low and moderate income residential customers[.]"[101] Those facts have not changed.

Fourth, it is by now well-settled that the Commission "will not require any single party . . . to agree to a stipulation in order to meet the first prong of the three-prong test."[102] And the Commission's March 31 Order further noted that "it is not unusual in Commission proceedings for non-signatory parties to a stipulation to represent a diverse group of interests, especially in a

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[99] *See In re Duke Energy Ohio, Inc.*, Case No. 05-724-EL-UNC, *et al.*, Opinion and Order, p. 27 (Nov. 20, 2007) (concluding, over OCC's objections, that a stipulation was the product of serious bargaining among knowledgeable parties and noting that "the stipulation was either supported <u>or not opposed</u> by representatives of each stakeholder group.") (emphasis added).

[100] Rehearing Tr. Vol. II, pp. 476-77 (Turkenton Cross).

[101] March 31 Order, p. 43.

[102] *Id.* (citing *Dominion Retail v. Dayton Power & Light Co.*, Case No. 03-2405-EL-CSS, Opinion and Order, p. 18 (Feb. 2, 2005); Entry on Rehearing, p. 7 (Mar. 23, 2005)).

case which has over 40 intervening parties."[103] Thus, the Commission has already considered and rejected OCC/NOAC's arguments and need not revisit them.

Attempting to resurrect yet another argument the Commission squarely rejected in March, OCC/NOAC assert: "[T]he majority of the remaining signatories have ostensibly agreed to be a signatory in exchange for specific favorable terms or provisions in the Stipulation."[104] This is, of course, a rehash of OCC/NOAC's unsuccessful contention that Stipulated ESP IV represents mere "favor trading."[105] As the Commission has already observed in this case:

> We expect that parties to a stipulation will bargain in support of their own interests in deciding whether to support a stipulation. Further, we believe that parties themselves are best positioned to determine their own best interests and whether any potential benefits outweigh any potential costs. The claim that benefits for low-income customers and for small businesses reflect mere "favor trading" and a lack of serious bargaining flies directly in the face of Ohio policy, which calls upon the Commission to protect at-risk populations and to encourage the education of small business owners regarding the use of, and to encourage the use of, energy efficiency programs. R.C. 4928.02(L), (M).[106]

In short, Stipulated ESP IV is and has been the subject of serious bargaining. The Proposal does not require the Commission to revisit its prior ruling, and the intervenors' hollow arguments should be rejected.

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[103] *Id.*

[104] OCC/NOAC Rehearing Brief, pp. 17-18.

[105] March 31 Order, pp. 41-42; Initial Brief of OCC/NOAC, p. 35 (Feb. 16, 2016) ("OCC/NOAC Initial Brief").

[106] March 31 Order, p. 44.

2. Stipulated ESP IV, modified to include the Proposal, benefits customers.

a. The rate stabilizing effects and projected $256 million credit of Rider RRS remain unchanged.

The record evidence demonstrates that the rate stabilizing effects and projected $256 million credit under Rider RRS as approved by the Commission remain under the Proposal. In reviewing the rehearing record, it is instructive to keep in mind what the Commission has already found. As the Commission observed in the March 31 Order, "The Commission must choose from the most reliable of . . . projections and forecasts."[107] Noting that Company witness Rose was "a recognized leader in the field" and that Company witnesses Rose and Lisowski produced the "only full projection of energy prices, as well as net revenues to be recovered or credited under Rider RRS," the Commission held that the Companies' projection was "reliable."[108] In so doing, the Commission rejected parties' criticisms that the Companies projections were not updated.[109] The Commission found that although recent price trends were declining, long term trends showed prices would likely increase.[110] The Commission further rejected most of the same types of analyses presented by the same witnesses who testified on rehearing in opposition to the Proposal. For example, regarding forward market prices (specifically, for natural gas), the Commission stated, "the evidence in the record demonstrates that forward markets beyond three years are thinly traded and that forward market prices beyond three years do not necessarily

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[107] March 31 Order, p. 80.

[108] March 31 Order, pp. 80-81.

[109] March 31 Order, p. 81.

[110] March 31 Order, p. 81.

reflect actual transactions."[111] The Commission further said, "the current market data Mr. Wilson relies upon [i.e., forward prices] are very short term prices which were heavily influenced by warm weather conditions."[112] The Commission also rejected the intervenor witnesses' contention that lower prices seen in early 2016 will remain over the longer term:

> The Commission does not believe that the evidence supports OCC and NOPEC's prediction that we have entered a period of energy price utopia where the price of natural gas, electricity and oil remains flat for a period of 15 years nor do we believe that it would be responsible for the Commission to base its decision on such a prediction. The evidence in the record demonstrates that the predicted prices for natural gas are significantly below recent history dating to 2005 (Co. Ex. 166 at 6, Figure 6). In fact, the evidence of record demonstrates that the oil and gas drilling rig count has dropped sharply, which may reduce future production of natural gas (Co. Ex. 151 at 31-33). In fact, the most current information from the EIA available at hearing indicates that the rig count is at its lowest level since 1999 (Co. E. 173 at 1; Co. Ex. 174 at 1).[113]

Many of the same observations that the Commission made in its March 31 Order apply to the evidence admitted on rehearing. In particular, P3/EPSA and Sierra Club make much of an admitted "back-of-the-envelope" calculation by Staff witness Choueiki and an analysis by P3/EPSA witness Kalt that both rely on recent energy forward prices. As demonstrated below, Dr. Choueiki's calculation and Dr. Kalt's forward price analysis are methodologically flawed due to their complete dependence on recent forward prices. As the Commission previously noted, forward price-based projections are unreliable because forward prices have been – and in

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[111] March 31 Order, p. 84.

[112] March 31 Order, p. 84.

[113] March 31 Order, p. 83.

the early to middle part of this year continued to be – skewed downward by the warmest fall and winter on record for the lower 48 states and by record high natural gas inventories. Further, similar to the natural gas future market previously found to be unreliable as a basis for projections, the energy forwards market that these witnesses rely on is highly illiquid in the term used by Dr. Choueiki and Dr. Kalt. Dr. Kalt's analysis is particularly suspect due to its clear results-oriented bias. For many of these same reasons, intervenors' attacks on Company witness Rose's forecasts are groundless. Indeed, the Companies' projections remain the only methodologically sound forecasts of record in this proceeding.

(i) Dr. Choueiki's "back-of-the-envelope" calculation based upon forward energy prices is flawed.

P3/EPSA and Sierra Club make much of Dr. Choueiki's self-described "back-of-the-envelope" calculation regarding the alleged cost to customers of Rider RRS during the first three years of Stipulated ESP IV.[114] During cross-examination at hearing, Dr. Choueiki testified that Staff "did some 'back of the envelope' calculations" relying on "energy prices at the AD Hub on-peak and off-peak," which were trading at approximately **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** than the Companies forecasted.[115] He then multiplied this figure by **[BEGIN CONFIDENTIAL]** "[redacted] **[END CONFIDENTIAL]** megawatt-hours a year"[116] to arrive at an allegedly **[BEGIN CONFIDENTIAL]** [redacted]" **[END**

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[114] *See* P3/EPSA Rehearing Brief, pp. 9-10, 41-41, 48; Sierra Club Rehearing Brief, p. 24.

[115] Rehearing Tr. Vol. V-C, p. 1201 (Choueiki Cross).

[116] Rehearing Tr. Vol. V-C, p. 1201 (Choueiki Cross).

CONFIDENTIAL] each year for the first three years of Stipulated ESP IV.[117] As Dr. Choueiki testified, the **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** per megawatt-hour reduction that drives Staff's back-of the-envelope calculation is entirely "based on the [energy] forwards from ICE."[118]

During his cross-examination by counsel from the Companies, however, Dr. Choueiki made several admissions that cast doubt on the size and nature of this alleged additional charge. Dr. Choueiki agreed that forwards change from day-to-day[119] and that energy prices are influenced by natural gas prices.[120] Dr. Choueiki further admitted that in March 2016 natural gas inventories were at record highs[121] and that natural gas prices could be influenced by the weather.[122] Dr. Choueiki also agreed that the National Oceanic Atmospheric Administration

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[117] Rehearing Tr. Vol. V-C, p. 1202 (Choueiki Cross).

[118] Rehearing Tr. Vol. V-C, p. 1202 (Choueiki Cross). Sierra Club takes Company witness Mikkelsen's testimony out of context, i.e., "With regards to energy prices, Ms. Mikkelsen acknowledged during the rehearing that energy prices resulting from their competitive bidding process are 'over $15 a megawatt-hour lower in [20]16-[20]17 than they were in [20]15-[20]16'." Sierra Club Rehearing Brief, p. 22 (citing Rehearing Tr. Vol. X, p. 1802). As Ms. Mikkelsen further explained, "The companies' modified rider RRS proposal did not include an estimate for the clearing price from the competitive bid process." Rehearing Tr. Vol. X, p. 1803 (Mikkelsen Rebuttal Cross). Thus, Sierra Club misses the mark here.

[119] Rehearing Tr. Vol. V, p. 1232 (Choueiki Cross).

[120] Rehearing Tr. Vol. V, p. 1233 (Choueiki Cross).

[121] Rehearing Tr. Vol. V, p. 1236 (Choueiki Cross).

[122] Rehearing Tr. Vol. V, p. 1233 (Choueiki Cross). Contrary to Sierra Club's claims, Dr. Choueiki's testimony here cuts both ways. It is not the case that natural gas prices may only increase due to "unseasonable weather, such as the polar vortex." Sierra Club Rehearing Brief, p. 25. By the same token, unseasonably sustained warm weather, as was just experienced, would put downward pressure on gas prices. OCC/NOAC witness Wilson admitted this was the case at the January 2016 hearing. *See* Hearing Tr. Vol. XXXVIII, p. 8119 (Wilson Cross). The Commission concurred in its March 31 Order when it dismissed a projection by OCC witness Wilson: "[T]he current market data Mr. Wilson relies upon are very short term prices which were heavily influenced by warm weather conditions." March 31 Order, p. 84.

("NOAA") "are experts in weather-analysis reports"[123] and, based upon the NOAA National Overview – February 2016, he further agreed that the recent fall and winter were "relatively warm."[124] Indeed, according to the February 2016 NOAA report, the "September-February average temperature for the contiguous U.S. was 46.8º F, 3.9º F above the 20th century average. This was the warmest such six-month period on record and consisted of the warmest autumn and the warmest winter on record for the Lower 48."[125]

Dr. Choueiki further admitted, as the Commission has previously found, that forward markets, whether for natural gas or energy, become quite illiquid in a fairly short period of time.[126] Specifically, Dr. Choueiki agreed that Company Exhibit 199 (CME Group Henry Hub Natural Gas Futures Settlements dated Thursday, June 30, 2016), and Company Exhibit 200 (CME Group PJM Dayton Hub 5 MW Volume energy forwards dated June 30, 2016)[127] drive this point home. In the case of Henry Hub natural gas settlements, Dr. Choueiki admitted that there was a significant drop-off in the volume of trades after the end of 2017.[128] Regarding AD-Hub energy forwards, Dr. Choueiki further agreed that they also drop off substantially after

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[123] Rehearing Tr. Vol. V, p. 1234 (Choueiki Cross).

[124] Rehearing Tr. Vol. V, pp. 1234-36 (Choueiki Cross).

[125] NOAA National Overview – February 2016, State of the Climate, page 5 of 15 (accessed July 11, 2016) (administratively noticed at Rehearing Tr. Vol. V, p. 1234) ("February 2016 NOAA Report").

[126] Rehearing Tr. Vol. V, p. 1237 (Choueiki Cross).

[127] Company Ex. 200 in total is CME Group PJM AEP Dayton Hub Day-Ahead Off-Peak Calendar Month 5 MW Volume; CME Group PJM AEP Dayton Hub Day-Ahead Peak Calendar Month 5 MW Volume; CME Group PJM AEP Dayton Hub Real-Time Off-Peak Calendar Month 5 MW Volume; and CME Group PJM AEP Dayton Hub Peak Calendar Month Real-Time LMP Volume, all of which are dated Thursday, June 30, 2016.

[128] Rehearing Tr. Vol. V, pp. 1246-47 (Choueiki Cross).

2017: "They go below a thousand, although there are folks that trade. You see there is some trading, but a lot less."[129]

Indeed, Company Exhibits 199 and 200 dramatically illustrate how illiquid natural gas and energy forwards markets become within a year. Company Exhibit 199 shows a decrease in Estimated Volume of Henry Hub Natural Gas Futures from 160,700 trades for August 2016 to 457 trades for August 2017 – a decrease of more than 99% in one year.[130] The total Estimated Volume of trades for the time period from August 2016 to December 2020 is 379,127.[131] Of that number, 338,328 trades, or approximately 89% of all trades for that four-year time period, occur in the six months from August 2016 to January 2017.[132] By October 2017, Estimated Volume drops into the hundreds.[133] Likewise, Company Exhibit 200 shows that the volume of trades of energy price forwards decreases dramatically within a very short time as well. For example, the open interest volume for the PJM AEP Dayton Hub Real-Time Off-Peak Calendar Month 5 MW Volume deceases from 16,820 for August 2016 to 2,040 for January 2017 – an approximate 88% drop-off in six months.[134]

The record evidence catalogued above undermines the validity of Dr. Choueiki's "back-of-the-envelope" calculation, based as it is entirely upon recent AD Hub energy price forwards,

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[129] Rehearing Tr. Vol. V, p. 1248 (Choueiki Cross). *Contra* Sierra Club, counsel for the Companies here was seeking to have Dr. Choueiki admit that forwards markets quickly become illiquid and the volume of trades shrinks dramatically in a relatively short period of time, a proposition with which Dr. Choueiki agreed. *See* Sierra Club Rehearing Brief, p. 25.

[130] *See* Company Ex. 199.

[131] *See* Company Ex. 199.

[132] *See* Company Ex. 199.

[133] *See* Company Ex. 199.

[134] *See* Company Ex. 200.

for a number of reasons. First, as the Commission has found previously, energy prices are correlated with natural gas prices[135] such that lower natural gas prices translates into lower energy prices. Second, the warmest six month fall and winter (from September 2015 to March 2016) on record had just occurred in the lower 48 states, which would skew natural gas prices, and hence forward energy prices, downward.[136] Third, and following naturally from the weather data, natural gas inventories were at record highs in March 2016, thereby further depressing both natural gas spot and futures prices.[137] Fourth, energy price and natural gas forwards are remarkably illiquid after a short period of time, i.e., approximately six months to a year (depending on the market), such that very few transactions easily could skew prices upwards or downwards in fairly dramatic fashion. Taken together, these facts illustrate, once again and as the Commission found in the March 31 Order, the methodological flaws inherent in using forward prices beyond the immediate near-term.[138] Hence, the claims by P3/EPSA and Sierra Club that Dr. Choueiki's calculation shows the Proposal resulting in significantly increased charges during Stipulated ESP IV fall flat.

(ii) Dr. Kalt's analysis based upon forward energy prices is flawed.

P3/EPSA and Sierra Club tout Dr. Kalt's exclusively forwards-based analysis when claiming that the Proposal, based on recent forward energy prices, would result in a charge to

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[135] *See* March 31 Order, p. 85.

[136] March 31 Order, p. 84.

[137] Rehearing Tr. Vol. V, p. 1236 (Choueiki Cross).

[138] March 31 Order, p. 85 (dismissing OCC/NOAC witness Wilson Scenario 3 as flawed as it is entirely based on NYMEX forwards).

customers over the term of Stipulated ESP IV. Specifically, both P3/EPSA and Sierra Club place heavy emphasis on Dr. Kalt's putative conclusion that over the term of Stipulated ESP IV, the Proposal allegedly would lead to a net charge of $154 million.[139] The basis for this claim is illustrated in a table on page 41 of P3/EPSA's Rehearing Brief. For the row "Projected Market Revenue" for the years 2016, 2017 and 2018, P3/EPSA has plugged in the values for those years from a similarly-named row taken from a table in Dr. Kalt's Attachment JPK-RH-3-Revised.[140] These three years of alleged projected market revenue were derived from recent AD Hub forward energy prices.[141] The remaining values for the table in P3/EPSA's brief were derived from Sierra Club Exhibit 89, the November 30, 2015 workpaper of Company witness Mikkelsen. These alleged projected revenues apparently are then netted against the numbers contained in the row "Projected Costs" to produce an over- or under-recovery for each year of the term of Stipulated ESP IV to arrive at a supposed $154 million charge.[142]

Given its wholesale reliance on AD Hub forward energy prices, Dr. Kalt's analysis is flawed for the same reasons that Dr. Choueiki's was: (1) the heavy downward pressure placed on natural gas spot and futures prices due to a record warm fall of 2015 and winter of 2015-2016; (2) the downward pressure on such prices due to record high natual gas inventories in March 2016; (3) the influence of natural gas prices on energy prices; and (4) the illiquidity of the energy

[139] *See* Sierra Club Rehearing Brief, pp. 22, 23-24; P3/EPSA Rehearing Brief, pp. 9-10, 37, 39-41, 48.

[140] *See* P3/EPSA Rehearing Brief, p. 41; Attachment JPK-RH-3-Revised.

[141] *See* Attachment JPK-RH-3-Revised; Rehearing Tr. Vol. V, pp. 1186-87 (Kalt Cross).

[142] *See* P3/EPSA Rehearing Brief, p. 41.

futures market, particularly at the AD Hub, which evidenced a 90% decrease in trading in a six month period ending in January 2017.[143]

Moreover, it became readily apparent that Dr. Kalt cherry-picked his data resulting in unrepresentative prices. Specifically, at hearing, Dr. Kalt admitted that he used AD Hub forwards from March 4, 2016[144] – which, conveniently enough, was the very same day that Henry Hub natural gas spot prices hit a low of $1.49 per MMBTU – the lowest spot prices since December 7, 1998:[145]

> Q. You do look at Henry Hub prices, do you not?
>
> A. Occasionally, yes.[146]
>
> *****
>
> Q. And you are aware that the EIA publishes information on what these spot prices were for EIA --or for the Henry Hub?
>
> A. I believe so, yes.[147]
>
> Q. (By Mr. Kutik) And would it be correct to say, sir, that on March 4, 2016, the Henry Hub natural gas spot price was a $1.49?
>
> A. It looks to be, yes.[148]

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[143] *See* Company Ex. 200. At the January 2016 hearing, Dr. Kalt, in the context of natural gas price futures, admitted that a *single transaction* only three years out could significantly change the price for that furtures period. *See* Hearing Tr. Vol. XLI, p. 8681 (Kalt Cross).

[144] Rehearing Tr. Vol. V, p. 1187 (Kalt Cross).

[145] *See* EIA Henry Hub Natural Gas Spot Price (Dollars per Million BTU), page 16 of 16 for Friday, March 4, 2016 (accessed July 12, 2016) (administratively noticed at Rehearing Tr. Vol. V, p. 1190) ("EIA Henry Hub Natural Gas Spot Price").

[146] Rehearing Tr. Vol. V, p. 1188 (Kalt Cross).

[147] Rehearing Tr. Vol. V, p. 1188 (Kalt Cross).

[148] Rehearing Tr. Vol. V, p. 1190 (Kalt Cross).

> Q. Okay. Would it be fair to say that that Henry Hub natural gas spot price was not that low, as published by EIA, since December of 1998?
>
> *****
>
> A. And your question was something about 1998?
>
> Q. Yes. We don't have a price as low as the price we see on March 4, 2016, since December of 1998. December 7 to be exact.
>
> A. That appears to be right.[149]

Dr. Kalt agreed that his choice to pull AD Hub forwards from March 4, 2016 was not a "coincidence."[150] It thus is apparent that Dr. Kalt cherry-picked March 4, 2016 as the trading day from which to pull his AD Hub forwards so that he could use the lowest prices that he could find.

Notably, Dr. Kalt's claim on redirect examination that he did not rely upon Henry Hub "natural gas prices" to develop his analysis in Attachment JPK-RH-3-Revised is, like much of his testimony, disingenuous.[151] The forward energy prices Dr. Kalt used are correlated with natural gas prices. As the Commission found in the March 31 Order when dismissing Dr. Kalt's previous analysis, "The evidence in the record is that the prices of natural gas, electricity, coal, oil and other energy-related products are strongly correlated."[152] This is hardly disputed. Both

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[149] Rehearing Tr. Vol. V, pp. 1189, 1191 (Kalt Cross).

[150] Rehearing Tr. Vol. V, p. 1188 (Kalt Cross)

[151] Rehearing Tr. Vol. V, p. 1192 (Kalt Redirect). After all, this is the same witness who proclaimed that the Sammis units were profitable and would keep running without a PPA underlying Rider RRS. *See* Second Supplemental Testimony of Joseph P. Kalt, pp. 19-20 (Dec. 30, 2015) ("Kalt Second Supp. Test."). Of course, we know now that without the PPA support through Rider RRS, four of the Sammis units are slated to be deactivated. *See* Rehearing Tr. Vol. X, p. 702 (Mikkelsen Cross).

[152] March 31 Order, p. 85.

Mr. Wilson and Mr. Comings have sought to make much of the fact that natural gas prices and wholesale energy prices are closely correlated and move in tandem.[153]

In fact, ***Dr. Kalt himself has recognized the direct correlation between natural gas prices and power prices.*** His prior analysis and projection in this proceeding was based almost entirely upon natural gas futures prices and alleged costs to customers due to the correlation of natural gas prices with electricity prices.[154] As Dr. Kalt claimed in that context, "The Companies' own NPV calculations employ *projected natural gas and, hence, electricity prices….*"[155] Thus, it simply is not credible that Dr. Kalt would develop an analysis solely based upon actual wholesale energy prices without in any way relying upon or reviewing Henry Hub natural gas spot prices. This is particularly the case given that Dr. Kalt used energy price forwards from March 4, 2016 – the very same day Henry Hub natural gas spot prices hit an eighteen-year low.

Notably, since Dr. Kalt's cherry-picked date of March 4, 2016, when natural gas spot prices were trading at $1.49 MMBTU, spot prices increased to approximately $2.90 MMBTU in late June and early July 2016.[156] As such, between early March and early July 2016, natural gas spot prices increased approximately 97% from their March 2016 historic lows.

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[153] *See, e.g.*, Direct Testimony of James F. Wilson, p. 36 (Dec. 22, 2014) ("Wilson Direct Test.") (claiming that "energy price trends will closely follow natural gas price trends"); Supplemental Testimony of Tyler Comings, p. 5 (May 11, 2015) ("Comings Supp. Test.") (describing natural gas prices as "a key driver of wholesale energy prices"); Third Supplemental Testimony of Tyler Comings, p. 12 (Dec. 30, 2015) ("Comings Third Supp. Test.") (noting the correlation between natural gas prices and energy prices).

[154] *See* Kalt Second Supp. Test., p. 7.

[155] Kalt Second Supp. Test., p. 7 (emphasis added).

[156] *See* EIA Henry Hub Natural Gas Spot Price (Dollars per Million BTU), page 16 of 16 for late June/early July 2016 spot market data.

In light of his use of cherry-picked energy forwards, Dr. Kalt appears to have done little more than generate a results-oriented "analysis" that cannot be taken seriously. In turn, the assertions by Sierra Club and P3/EPSA that Dr. Kalt's analysis somehow demonstrates that the Proposal will result in several hundred million dollars in additional charges are baseless, dissolving as they do under critical scrutiny.

(iii) The forecasts by Company witness Rose are not "stale."

Sierra Club and P3/EPSA renew their attack on Company witness Rose's forecasts, claiming that they are "stale." Sierra Club recycles the same tired arguments it made in its Application for Rehearing.[157] P3/EPSA and OCC/NOAC follow suit.[158] As they were at the initial hearing and in their applications for rehearing, these intervenors are wrong again on rehearing. One need only ask: what has happened since March 31 to change the validity of Mr. Rose's forecasts? The answer is "nothing." That natural gas prices have remained low – in fact, historically low -- for another three months is not a basis to reject Mr. Rose's forecasts. Weather in the three month period since the last hearing produced record warm temperatures, driving natural gas inventories to record high levels. That natural gas prices have remained low is thus not surprising. But the market fundamentals that gave rise to an expectation of high long-term natural gas prices remain unchanged since the last round of hearings. Consequently, the valid assumptions and methodology of Mr. Rose's forecasts remain unchanged.

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[157] *See* Sierra Club Rehearing Brief, pp. 20-21, 23-26.

[158] *See* P3/EPSA Rehearing Brief, pp. 8-9, 38; OCC/NOAC Rehearing Brief, pp. 8, 20, 21.

The fact remains that the only methodologically sound forecasts in this proceeding have been produced by the Companies. In the March 31 Order, the Commission stated:

> The only full projection of energy prices, as well as the net revenues to he recovered or credited under Rider RRS, was produced by FirstEnergy witnesses Rose and Lisowski. Mr. Rose prepared the projection of energy prices, while Mr. Lisowski used such prices to determine the net annual revenues to be recovered or credited under Rider RRS using the Companies' dispatch modeling. The Commission notes that Mr. Rose forecasts higher energy prices in the future, based upon a number of factors, including higher forecast natural gas prices; greater reliance on natural gas as the price setting fuel; greater reliance on more costly units as demand grows and units retire; growth in demand for electricity; power plant retirements; new environmental regulations; new FERC policies; inflation; and carbon emission regulations (Co. Ex. 7 at 5-6. 19-20; Tr. Vol. VI at 1287-88). Likewise, Mr. Rose forecasts higher capacity prices in the future based upon: elimination of excess capacity due to plant retirements; demand growth; less capacity price suppression from demand response; less capacity imports from other regions; environmental regulations, rising financing and other capital costs; inflation; and greater natural gas infrastructure leading to higher costs as gas is shipped elsewhere (Co. Ex. 17 at 6-9, 41-43). According to the Companies' forecasts, the projected net revenues to be charged or credited to customers will result in an aggregate $561 million credit (in nominal dollars) over the eight-year term of ESP IV (Co. Ex. 155 at 11-12)…. Although we are mindful of the fact that FirstEnergy has the burden of proof in this proceeding, no other party has presented a full projection of energy prices and the net revenues under Rider RRS…. Accordingly, based upon the evidence in the record, the Commission finds that this projection by FirstEnergy witness Rose (Rose projection) is reliable, and we will include the Rose projection in our determination of an estimate of the net revenues under Rider RRS.[159]

The Commission further found that other intervenor witnesses' projections, especially those based exclusively on forwards pricing, were methodologically unsound. Specifically, they were

[159] March 31 Order, pp. 80-82.

"internally inconsistent," "arbitrarily chose[n]," devoid of "sufficient reliability and should be given no weight by the Commission," or of "little value as a projection."[160]

As it has in the past, Sierra Club once again seeks to attack Mr. Rose's natural gas price projections.[161] The principal bases for Sierra Club's criticism are that natural gas prices were lower than Mr. Rose had forecast and that futures prices were also lower.[162] Once again, Sierra Club ignores the extreme volatility of natural gas prices. As the undisputed record shows, as far as commodities go, the natural gas market is one of the most volatile. Mr. Rose testified to this fact extensively and it remains uncontroverted. In his rebuttal testimony, Mr. Rose specifically explained why he why lower short-term natural gas prices did not surprise him:

> Natural gas prices are especially volatile, and hence, neither periods with prices below the trend or above the trend are surprising. Indeed, of the most highly traded commodities on the NYMEX, including both energy and non-energy (including S&P 500, corn, coffee and gold), natural gas prices had the highest volatility on average from 2000 to 2015. The average natural gas price volatility was 57%, and the average of the eight other most highly traded commodities was 28.5%. The volatility of gas over the last ten years is 2.6 times the volatility of even the very volatile S&P 500 stock market index. Hence, deviations from average expected conditions are not uncommon ….Sometimes gas prices

[160] March 31 Order, pp. 82-85. Indeed, unlike various intervenors, only Mr. Rose employed very sophisticated computer modeling. To generate his forecasts, Mr. Rose employed widely recognized models as ICF's Integrated Planning Mode, General Electric's GE-MAPS, and ICF's Gas Market Model. These sophisticated computer models enabled Mr. Rose to engage in detailed modeling of the relevant power markets (*i.e.*, ATSI Zone and AEP Dayton, and selected nodal markets for electrical energy and the PJM RTO capacity price), and associated fuel industries. *See* Rebuttal Testimony of Judah L. Rose, pp. 3-10 (Oct. 20, 2015) ("J. Rose Rebuttal Test."). As such, Mr. Rose's sophisticated methodological approach provides the appropriate backdrop against which to evaluate Sierra Club's and P3/EPSA's recycled arguments that Mr. Rose's forecasts are stale and whether the Commission somehow erred (which it clearly did not) in relying on them.

[161] *See* Sierra Club Rehearing Brief, pp. 21, 23.

[162] *See* Sierra Club Rehearing Brief, pp. 22-23.

> are down (e.g., 2015) and sometimes they are up (e.g., 2013 and 2014).[163]

Indeed, as noted, the rehearing record shows that Henry Hub natural gas spot prices have increased 97% since their March 2016 18-year low.[164] Moreover, Dr. Kalt himself has previously admitted that natural gas prices are extremely volatile.[165] Also, as noted above, the warmest fall and winter on record in the contiguous states has impacted natural gas prices.[166] Hence, Sierra Club's myopic claim that Mr. Rose somehow "got it wrong" with regard to natural gas prices mirrors the short-term volatility of natural gas prices.[167]

In fact, Sierra Club's very criticism shows why short-term natural gas prices are difficult to predict and why Sierra Club and others are wrong to rely on forward prices as a reliable predictor of actual future prices. Recall that Mr. Rose's natural gas prices for at least the first two years where based on natural gas futures prices existing at the time of his forecast.[168] Thus, the fact that 2014 vintage forwards prices for 2015 or 2016 were "off" doesn't mean that Mr. Rose's long term forecasts are wrong. It just means, as Mr. Rose observed,[169] that forward prices are highly correlative to the spot market and move up and down just as quickly. Although

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[163] J. Rose Rebuttal Test., pp. 30-31. *See also* Hearing Tr. Vol. VI, p. 1168 (J. Rose Cross).

[164] *See* EIA Henry Hub Natural Gas Spot Price (Dollars per Million BTU), page 16 of 16 for late June/early July 2016 spot market data.

[165] Hearing Tr. Vol. XLI, p. 8671 (Kalt Cross).

[166] *See* February 2016 NOAA Report, p. 5 of 15.

[167] *See* Sierra Club Rehearing Brief, p. 23.

[168] Direct Testimony of Judah L. Rose, pp. 46-47 (Aug. 4, 2014).

[169] J. Rose Rebuttal Test., p. 51.

forward prices could be used in the short term (as Mr. Rose did), such prices are not necessarily good predictors of actual future prices, even in the short term.

Instead, given the extreme volatility of natural gas, the proper approach for projecting natural gas prices beyond a few years is to look at gas market supply and demand fundamentals. As the record demonstrates, these fundamentals show that natural gas supply is decreasing and natural gas demand is increasing.[170] As such, natural gas prices likely should increase over the longer term consistent with Mr. Rose's forecasts.[171] With regard to supply, various market indicators imply that the supply of natural gas is decreasing. Due to recent hydrocarbon price declines, the U.S. rig count has dropped by 55%.[172] Further, drilling directed at natural gas is at its lowest level in the United States since 1985[173] and, since 2011, it has decreased by approximately 75%.[174] Current natural gas prices likely are too low to meet future gas demand[175] as most recently reflected in the sharp increase in Henry Hub natural gas spot prices since March 2016.[176] With regard to demand:

> Between 2008 and 2015, natural gas demand in the U.S. increased by approximately 15% in spite of the Great Recession. Investments in export pipelines to Mexico, LNG export terminals, new petrochemical industry equipment, etc., are ongoing, and will

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[170] J. Rose Rebuttal Test., pp. 31-42.

[171] J. Rose Rebuttal Test., pp. 33, 36-37.

[172] J. Rose Rebuttal Test., p. 32.

[173] J. Rose Rebuttal Test., p. 32.

[174] J. Rose Rebuttal Test., p. 32.

[175] J. Rose Rebuttal Test., p. 32.

[176] Moreover, even if natural gas demand does not grow, these historically low prices simply cannot be sustained. This is so "because current low drilling levels mean that production will decline and exert upward pressure on prices." J. Rose Rebuttal Test., p. 32.

> increase U.S. gas consumption by one-third over the next ten years or approximately 9 TCF. This is as large as any ten year increase in gas demand in U.S. history.[177]

Thus, taken together, these supply and demand gas market fundamentals indicate that natural gas prices are bound to increase, most likely significantly, over the longer term. Sierra Club's argument to the contrary is meritless.

Regarding energy prices, Sierra Club and P3/EPSA rely exclusively on recent AD Hub forward energy prices to criticize Mr. Rose's long-term electrical energy price forecast.[178] As addressed above with Drs. Choueiki and Kalt, relying on near-term energy forwards to predict energy prices longer term is methodologically flawed. Hence, for the very reasons that Drs. Choueiki's and Kalt's exclusively forwards-based analyses does not withstand scrutiny, Sierra Club's and P3/EPSA's criticisms of Mr. Rose's long-term energy forecast based upon recent AD Hub energy price forwards falls flat.

Regarding capacity prices, Sierra Club's and P3/EPSA's criticisms of Mr. Rose's projections similarly are off base.[179] While near-term capacity prices have decreased, Mr. Rose's capacity price forecast remains methodologically sound. For example, capacity prices are nearing offer caps in certain zones within PJM:

> The COMED (a PJM sub-zone to the west of the RTO zone) BRA 2018/2019 CP capacity price was $215/MW-day (+79%); this was the first time the COMED price separated from the RTO price. This is the highest price ever recorded for this capacity zone [and]

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[177] J. Rose Rebuttal Test., p. 36.

[178] *See* Sierra Club Rehearing Brief, pp. 22-23, 26; P3/EPSA Rehearing Brief, pp. 9, 38.

[179] Sierra Club Rehearing Brief, pp. 21, 23-24.

> is evidence of the potential for PJM capacity prices in western PJM to exceed \$200/MW-day.[180]
>
> The East MAAC (a PJM sub-zone to the east of the RTO zone) BRA 2018/2019 CP capacity price increased to \$225/MW-day in the 2018/2019 BRA (+88%). This price was 99% of the bid cap, and hence, is evidence that PJM capacity prices can reach the offer price cap.[181]

Thus, as the PJM capacity market indicates, things are not so dire as Sierra Club and P3/EPSA contend. Indeed, at hearing, Mr. Rose testified to the similarities between the impacts of PJM's Capacity Performance ("CP") requirements and his forecasts:

> So, for example, the BRA, the base residual auction went from 120 to 165. The RTO price in the transition auction went from 60 to 134. We've seen increases in capacity prices around all markets with capacity, New England, New York, PJM, and MISO. That's what we forecast in 2014, that there would be significant increases, and they are afoot.[182]

Moreover, Sierra Club once again levels the recycled (and baseless) criticism that Mr. Rose allegedly overstated anticipated capacity prices for the 2018/2019 BRA auction, arguing that Mr. Rose projected capacity prices to be [**BEGIN CONFIDENTIAL]** [redacted] [**END CONFIDENTIAL]** for the 2018/2019 base residual auction, while the actual clearing price for capacity performance products in that auction was \$164.77/MW-day.[183] As the Companies demonstrated at length in their Reply Brief and yet again in their Memorandum

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[180] J. Rose Rebuttal Test., p. 22.

[181] J. Rose Rebuttal Test., p. 22.

[182] Hearing Tr. Vol. VI, p. 1196 (J. Rose Cross).

[183] Sierra Club Rehearing Brief, p. 24.

Contra Application for Rehearing, this putative criticism is belied by the record evidence.[184] The difference in these numbers is of scant significance and by no means impugns Mr. Rose's capacity price forecast over the longer term. It merely indicates that Mr. Rose was off by the timing of the CP requirements, but (significantly) not about the effects of those requirements. Specifically, in 2015, PJM published its "Scenario Analysis for the 2018/2019 BRA."[185] Scenario 13 of that report showed that if the 2018/2019 BRA results had had a 100 percent CP product requirement, instead of only 80 percent, the 2018/2019 BRA capacity price in the ATSI zone would have been \$236.67/MW-day – roughly \$70 higher per MW-day than what actually occurred.[186] As such, while Mr. Rose's capacity forecast regarding the *effect* of full CP requirements was **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]**. Indeed, PJM's forecast under Scenario No. 13 is **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** than Mr. Rose's with a full CP requirement. Thus, once again Sierra Club's criticism here falls flat.[187] Sierra Club's and P3/EPSA's criticisms of Mr. Rose's capacity forecasts are meritless.[188]

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[184] *See* Companies' Initial Reply Brief, pp. 55-56; Companies' Memorandum Contra Intervenor Applications for Rehearing, p. 26 (May 12, 2016) ("Companies' Memo. Contra Applications for Rehearing").

[185] Company Ex. 169 (authenticated by OCC/NOAC witness Wilson at Hearing Tr. Vol. XXII, p. 8123.)

[186] Hearing Tr. Vol. XXII, pp. 8123-28 (Wilson Cross); *see* Company Ex. 169, Scenario 13.

[187] The same arguments apply to Sierra Club's attempt to rely on the 2019/2020 BRA results for PJM. Sierra Club Rehearing Brief, p. 24. That auction too does not yet reflect the full implementation of the CP requirements.

[188] Sierra Club also seeks to resuscitate two other claims: (1) the Commission should have averaged the Companies' projected \$561 million Ride RRS credit with OCC/NOAC witness Wilson's Scenario 2 (the EIA AEO High Oil and Gas Case) as opposed Mr. Wilson's Scenario 1 (the EIA AEO Reference Case); and (2) the Commission should have relied on a net present value analysis as opposed to nominal dollars. *See* Sierra Club Rehearing Brief, pp. 20-21. The Companies have addressed these claims extensively in their Memorandum Contra Applications for Rehearing, the relevant arguments from which the Companies incorporate by reference here. *See* Companies' Memo. Contra Applications for Rehearing, pp. 37-41.

b. Rider RRS continues to provide economic development benefits.

Intervenors fail to grasp that Rider RRS will continue to provide economic development benefits. Several Intervenors argue that because the Plants are no longer part of the Proposal, any economic benefits are nearly absent.[189] These arguments ignore two crucial points. First, as explained in the Companies' Post-Rehearing Brief, the Commission's decision to approve Rider RRS did not turn on such an issue.[190] Second, the Proposal continues to offer economic benefits to the region. The undisputed record demonstrates the rate stabilization effects of Rider RRS will promote economic development in the Companies' service territories. These economic development benefits flow to the Companies' customers, local communities, and the state of Ohio. Intervenors' arguments to the contrary are groundless.

As Company witness Mikkelsen explained:

> By mitigating future increases and volatility, Rider RRS will promote economic development. Rider RRS operates as a retail rate stabilization mechanism to provide retail price protection to customers from longer-term market trends. This stabilization mechanism provides retail price stability, certainty and predictability over the long term to all customers. Rate volatility and retail price predictability are significant issues for customers. The Companies' customers, including large industrial customers on whom Ohio's economy depends, want pricing that is stable and predictable. Price stability is an important consideration in site location and expansion as well as large capital investments and employment decisions. Rider RRS benefits the local, state and

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[189] *See, e.g.*, Staff Rehearing Brief, p. 2; OCC/NOAC Rehearing Brief, pp. 18-19; OHA Rehearing Brief, pp. 4-5; Sierra Club Rehearing Brief, pp. 38-39.

[190] Companies' Rehearing Brief, p. 17. *See* March 31 Order, p. 87 (stating that Commission's determination regarding whether Stipulated ESP IV benefits ratepayers and is in the public interest is not affected by Plant-focused economic factors).

> regional economies by retaining and growing the industrial base and will contribute to the economic vitality of the region.[191]

Ms. Mikkelsen further testified at hearing: "RRS will provide retail rate stability, predictability, for our customers, which is important to customers and should help them from an economic-development, job-retention perspective."[192] And additionally: "The companies have always been very, very vested, very interested in the economic vitality of their service territories and all of the attendant economic development tenants and that very much was an underpinning of and continues to be an underpinning of the company's proposal."[193] Thus, to claim, as Intervenors do, that Rider RRS does not continue to provide important economic development benefits, flies in the face of the undisputed record evidence.

c. The Companies' receipt of Rider RRS revenues is in the public interest.

OCC/NOAC lack support for their claim that Rider RRS is not in the public interest because it is no longer revenue neutral to the Companies.[194] According to OCC/NOAC, the Companies could be "enriched" if energy prices remain low or be financially threatened if they pay hundreds of millions of dollars in credits under Rider RRS.[195] But these parties overlook the

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[191] Mikkelsen Rehearing Test., p. 12.

[192] Rehearing Tr. Vol. I, p. 198 (Mikkelsen Cross).

[193] Rehearing Tr. Vol. I, pp. 255-56 (Mikkelsen Cross). And further:

> The rate -- the retail rate stability benefit to our customers will provide them economic development benefits which will contribute to the overall vibrancy of our service territory. And if our service territory and the customers in our service territory are strong, then the customers -- pardon me, then the companies are benefited as well.

Rehearing Tr. Vol. X, p. 1699 (Mikkelsen Rebuttal Cross).

[194] OCC/NOAC Rehearing Brief, pp. 18-20.

[195] *Id.*

stability provided by Rider RRS and the fact that the Companies can put Rider RRS revenues to use for grid modernization and other customer benefits. OCC/NOAC mistakenly describe the hedge as unpredictable, when it is *future energy prices* that are unpredictable. The design of the hedge makes Rider RRS a predictable bulwark against unpredictable energy prices.

As an initial matter, Rider RRS as approved by the Commission would not be revenue neutral to the Companies. In the March 31 Order, the Commission imposed a risk of disallowance if the Companies engaged in bidding behavior not designed to maximize revenue.[196] The Commission further ordered the Companies to absorb any penalties under PJM's recently approved capacity performance requirement rules.[197] Additionally, the Commission reserved the right to prohibit any recoveries by the Companies of costs arising from outages lasting longer than ninety days at the relevant generating facilities.[198] Still further, the Commission limited both the amount of potential bill increases and the Companies' recovery of costs excluded by the bill increase limits.[199] OCC witness Kahal admitted that Rider RRS, as approved, had elements that were not revenue neutral to the Companies.[200] Hence, the notion

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[196] March 31 Order, p. 91 ("Retail cost recovery may be disallowed as a result of a prudence review if the output from the units was not bid in a manner that is consistent with participation in a broader competitive marketplace comprised of the sellers attempting to maximize revenues.").

[197] March 31 Order, p. 92 ("FirstEnergy, rather than ratepayers, will bear the burden for any capacity performance penalties incurred by the generation units. Under no circumstances will capacity performance penalties be considered recoverable under Rider RRS. However, we will further modify the Stipulations to provide that all capacity performance bonuses will be retained by the Companies.").

[198] March 31 Order, p. 92 ("Additionally, the Commission reserves the right to prohibit recovery of any costs related to any unit for any period exceeding 90 days for any forced outage during the term of ESP IV…").

[199] March 31 Order, p. 86.

[200] Rehearing Tr. Vol. V, pp. 1096-97 (Kahal Cross).

that Rider RRS as approved by the Commission was revenue neutral is belied by the requirements for Rider RRS set forth in the March 31 Order.

OCC/NOAC's hypothetical impact on the Companies if energy prices remain low for the entire eight-year period of ESP IV assumes facts not in evidence. As discussed above, market fundamentals suggest that the hypothetical world suggested by OCC/NOAC and other intervenors will not come to pass. Indeed, the Commission already has found that OCC/NOAC's "prediction that we have entered a period of energy price utopia" is irresponsible.[201] Yet, if the Companies receive more Rider RRS revenues than forecast in any particular year, the public interest will be served by the Companies' investment of those revenues to "support important initiatives such as grid modernization and other new technologies."[202] Mr. Kahal admitted at hearing that he has no factual basis for his belief that the Companies really believe that Rider RRS will provide the Companies with "excess revenue":[203]

> Q. And you've seen or heard of no statement from any officer or employee of the companies that says [only plausible explanation for the companies' proposals that the companies must believe that it will translate into profits], correct?
>
> A. That's -- that's correct. That's not based on any statement from a company official that I have seen.
>
> Q. And when you wrote your testimony, would it be fair to say you had no idea of who within the FirstEnergy companies reviewed or approved the proposal?

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[201] March 31 Order, p. 83.

[202] Mikkelsen Rehearing Test., pp. 6-7.

[203] Rehearing Tr. Vol. V, pp. 1098-99 (Kahal Cross).

> A. Right. I don't know which individuals in FirstEnergy came up with the proposal.
>
> Q. Nor do you know what analysis they undertook?
>
> A. No, I don't.[204]

OCC/NOAC cannot cite to any evidence of record that supports their position; indeed, the record points decidedly in the opposite direction. Accordingly, complaints by OCC/NOAC that the Companies will be "enriched" at customers' expense are devoid of record support.

OCC/NOAC also incorrectly contend that the Companies "have provided no explanation as to how [the Companies] would fund the payment of any credits to consumers."[205] These parties ignore the extensive testimony Ms. Mikkelsen provided on this issue. In the later years of ESP IV, the Companies will have multiple revenue streams. Specifically, the Companies' investments into SmartGrid will generate dollars from revenue requirements arising from the SmartGrid investment (*i.e.*, return on and of those investments).[206] The Companies will receive additional revenue from Rider DCR, shared savings, lost distribution revenue, and other elements of ESP IV.[207] As Ms. Mikkelsen testified:

> The companies looked at the proposal in the context of the entire ESP. So recognizing that certainly with respect to the proposal there would be dollars that came into the company early that could be used, as we've discussed for things like funding the SmartGrid, once those investments are made, the ESP IV calls for a quarterly update and a forward-looking rate with respect to the investments in the SmartGrid. So there will be dollars coming back in

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[204] Rehearing Tr. Vol. V, pp. 1100-1101 (Kahal Cross).

[205] OCC/NOAC Rehearing Brief, p. 20; *see also* Sierra Club Rehearing Brief, p. 27.

[206] Rehearing Tr. Vol. I, pp. 80-81 (Mikkelsen Cross).

[207] Rehearing Tr. Vol. I, pp. 81, 85 (Mikkelsen Cross).

> associated with the revenue requirements arising from that SmartGrid investment. The ESP IV also includes dollars coming in associated with the distribution -- rider DCR as well as shared savings and other elements of the proposal. So when the company evaluated the proposal in the totality of the ESP IV, it concluded that it would be able to fund the credits that occurred in the out years without harm to the investments that it was likely to be directed to make under the SmartGrid proposal.[208]

Indeed, Mr. Kahal admitted that there were several riders approved in Stipulated ESP IV that permit the Companies to obtain revenues in excess of those approved in ESP III, such as Rider DCR, and potentially under any grid modernization rider.[209] Therefore, the Companies have provided a more than adequate explanation as to how any credits projected under the Proposal will be funded in a manner that supports the public interest.

Thus, there is no basis for adopting OEC/EDF's recommendation that the Companies should shift the risk of lost revenues – *i.e.*, credits paid to customers – to an independent third party by entering into a PPA or other financial hedge contract, presumably through a competitive bidding process.[210] OEC/EDF ignore that the Companies would not only be shifting away risk by entering into a PPA with a third party; they would also be shifting away revenues. Under the Proposal, the Companies are projected to collect approximately $400 million in revenues during the first few years of the rider's term.[211] These revenues will enable the Companies to pursue numerous beneficial initiatives, including modernizing the Companies' distribution grid, distribution automation, Volt/VAR controls, investing in battery resources and investing in new

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[208] Rehearing Tr. Vol. I, pp. 80-81 (Mikkelsen Cross).

[209] Rehearing Tr. Vol. V, pp. 1098-99 (Kahal Cross).

[210] OEC/EDF Rehearing Brief, p. 12.

[211] Sierra Club Ex. 89.

Ohio renewable resources.[212] Under OEC/EDF's argument, the Companies would lose a valuable revenue stream, and their ability to make these investments would be impaired. In any event, as Ms. Mikkelsen's testimony proves, OEC/EDF's concern about the financial risk to the Companies of providing credits to customers in the Proposal's later years is overstated.

Moreover, as the record demonstrates, no competitive bidding process was feasible or necessary. OEC/EDF also assume a fact that is not true; namely, that the Companies could, through a competitive bidding process, procure a product like Rider RRS. Simply put, the hedge offered to customers under Rider RRS is unique, and there is no comparable product on the market. Indeed, under cross-examination, Dynegy witness Ellis admitted that: (1) he was unaware of any long-term arrangement similar to Rider RRS being publicly traded on any index or trading floor; and (2) any third party alternatives would merely be "hypothetical possibilities."[213] Mr. Ellis further admitted that he had no personal knowledge of "any financial institution which has made such an offer in response to the companies' modified rider RRS proposal."[214] Mr. Kahal made similar admissions.[215] Moreover, in the March 31 Order, the Commission already considered and rejected a purported "indicative offer" from intervenor Exelon as not being comparable to the long-term, rate stabilizing hedge afforded under Rider RRS.[216] OEC/EDF's proposal is therefore baseless.

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[212] Mikkelsen Rehearing Test., p. 12.

[213] Rehearing Tr. Vol. IV, pp. 821-23 (Ellis Cross).

[214] Rehearing Tr. Vol. IV, pp. 822-23 (Ellis Cross).

[215] Rehearing Tr. Vol. V, pp. 1104-05 (Kahal Cross).

[216] March 31 Order, p. 99.

d. Calculating Rider RRS based upon the generation quantities of record does not lead to assumed periods of inefficient dispatch.

OCC/NOAC and P3/EPSA claim, based upon the rehearing testimony of OCC/NOAC witness Wilson, that calculating the costs of the Proposal by using various generation quantities already in the record will lead to assumed periods of inefficient dispatch.[217] Specifically, Mr. Wilson claims, "the fixed market quantities will, from time to time, turn out to be very inconsistent with the actual market prices that will be used in the calculations" which, allegedly, will lead to "nonsensical outcomes."[218] And further, "As one example this could result in using relatively low generation quantities during some periods of high prices," thereby allegedly "assuming inefficient plant operation" and subsequently increasing costs to customers.[219] As the rehearing record demonstrates, however, Mr. Wilson's conclusions – as they have been shown to be throughout this case – are well wide of the mark, and the related arguments by OCC/NOAC and P3/EPSA fail accordingly.

Under cross-examination, Mr. Wilson made a series of telling admissions that undermine his claims regarding supposed assumptions of "inefficient plant operation" under the Proposal. These admissions show that the Proposal has relatively small differences from Rider RRS regarding when the Plants would dispatch. To begin, Mr. Wilson admitted that nuclear units, such as Davis-Besse, do not usually follow dispatch because they run continuously when they

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[217] *See* OCC/NOAC Rehearing Brief, pp. 61-62; P3/EPSA Rehearing Brief, pp. 43-44.

[218] Rehearing Direct Testimony of James F. Wilson, pp. 17-18 ("Wilson Rehearing Test."); P3/EPSA Rehearing Brief, p. 44 (citing and quoting pp. 17-18 of Mr. Wilson's rehearing testimony).

[219] Wilson Rehearing Test., pp. 20, 21; P3/EPSA Rehearing Brief, p. 44; OCC/NOAC Rehearing Brief, p. 61.

are available.[220] Thus, there will be little difference between when that unit would dispatch under either version of Rider RRS (i.e., when Davis-Besse would actually run versus when the dispatch model assumes that it would run).

Moreover, for coal units, dispatch does not occur on a "one hour on and one hour off" basis. On this score, Mr. Wilson was impeached by his deposition where he admitted that the dispatch model employed by the Companies for Rider RRS as approved by the Commission did not assume that Sammis units 1 through 5 and the OVEC units would only run those hours when they were profitable.[221] Although Mr. Wilson feigned ignorance at hearing, in his deposition he agreed that an hourly profitability assumption was not included in the Companies' dispatch model.[222] Mr. Wilson further admitted that coal units cannot be expected to dispatch one hour, but not another depending upon whether it was profitable, because a coal unit has "got a ramping speed that prevents it from doing that."[223] Thus, the assumption underlying Mr. Wilson's criticism – that the Plants would "run" in the dispatch model under the Proposal at times of low prices when the Plants would not actually run – is simply false.

Mr. Wilson further admitted that calculations under the Proposal would not make any assumptions comparing hourly costs with hourly revenues, but would instead make such

[220] Rehearing Tr. Vol. IV, p. 886 (Wilson Cross).

[221] Rehearing Tr. Vol. IV, pp. 888-90 (Wilson Cross).

[222] Rehearing Tr. Vol. IV, pp. 888-90 (Wilson Cross).

[223] Rehearing Tr. Vol. IV, p. 890 (Wilson Cross).

calculations on a monthly basis.[224] Mr. Wilson was also forced to admit that the calculation of the Proposal would be more beneficial to customers than Rider RRS as approved when and if:

- actual incremental or variable costs were greater than forecasted;[225]
- fixed costs were greater than forecasted;[226]
- there were extended outages that were not assumed in the dispatch model for Rider RRS as approved;[227] and
- higher Locational Marginal Prices ("LMPs") in a given January or February would be reflected in the Proposal's calculations even if the Plants in the Companies' dispatch model did not run at the hours when those prices occurred (because those LMPs would be figured in the monthly average price used in the rider's calculation).[228]

Mr. Wilson also admitted that the Proposal eliminates certain risks inherent to Rider RRS as approved, such as the risks of costs increasing beyond the Companies' forecasts.[229] In light of these admissions, Mr. Wilson's conclusions on this issue do not carry any weight.[230]

As he did in his prior testimony on natural gas price projections, Mr. Wilson's testimony regarding "nonsensical" results purposely omits all of the facts. While the Plants may not in fact run at times when the dispatch model assumes, the opposite is also true.[231] When properly judged, the Proposal and its use of the dispatch model, while not providing a perfect match of

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[224] Rehearing Tr. Vol. IV, p. 891 (Wilson Cross).

[225] Rehearing Tr. Vol. IV, p. 891 (Wilson Cross).

[226] Rehearing Tr. Vol. IV, p. 891 (Wilson Cross).

[227] Rehearing Tr. Vol. IV, p. 892 (Wilson Cross).

[228] Rehearing Tr. Vol. IV, pp. 892-93 (Wilson Cross).

[229] Rehearing Tr. Vol. IV, p. 892 (Wilson Cross).

[230] Notably, neither OCC/NOAC nor P3/EPSA address these admissions in their rehearing briefs.

[231] Rehearing Tr. Vol. IV, p. 893 (Wilson Cross).

what will actually happen, nevertheless provides a reasonable basis to provide a hedge. As such, OCC/NOAC's and P3/EPSA's unsupported claims to the contrary are meritless.[232]

3. Stipulated ESP IV, modified to include the Proposal, does not violate any important regulatory principle or practice.

The Commission determined in the March 31 Order that Stipulated ESP IV does not violate any important regulatory principle or practice.[233] After finding that Rider RRS may be included in Stipulated ESP IV as a retail stabilization charge under R.C. 4928.143(B)(2)(d), the Commission proceeded to reject two of the same claims now asserted by a few opponents of Rider RRS, namely: (1) Rider RRS is anticompetitive (including with respect to governmental aggregation); and (2) Rider RRS collects unlawful transition revenues.[234] The modifications included in the Proposal only bolster the Commission's decision to reject these arguments, which were tied to the PPA-aspect of Rider RRS that no longer exists.

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[232] P3/EPSA also seeks to resuscitate their tired claim that "as discussed earlier, due to the lag inherent in Modified Rider RRS' reconciliation process, wholesale prices and Rider RRS adjustments may not end up being countercyclical as intended." P3/EPSA Rehearing Brief, p. 45. This claim originates in Dr. Kalt's Supplemental Testimony (pp. 28-29) dated May 11, 2015 and was previously raised by P3/EPSA in their initial brief in this proceeding. *See* Joint Initial Brief of P3/EPSA, p. 16 (Feb. 16, 2016) ("P3/EPSA Initial Brief"). The Commission, with good reason, simply ignored this baseless claim in its March 31 Order. Company witness Savage explained at hearing that she would not expect reconciliation components to have a material effect on the overall benefit that is expected over the term of Rider RRS. Specifically, "While reconciliation components are envisioned as part of the annual true-up of this rider, I would not expect them to have a material effect on the overall benefit that is expected over the [the term of Rider RRS]." Hearing Tr. Vol. XVIII, pp. 3505-06 (Savage Cross). P3/EPSA's attempt to argue this point again is meritless.

[233] March 31 Order, pp. 107-11.

[234] March 31 Order, pp. 110, 112.

a. Rider RRS does not violate R.C. 4928.02(H).

Approval of the Proposal will not cause Rider RRS to violate R.C. 4928.02(H),[235] which is an expression of the state's policy to:

> Ensure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa, including by prohibiting the recovery of any generation-related costs through distribution or transmission rates.[236]

In the March 31 Order, the Commission found that Rider RRS is consistent with Ohio policy because it is nonbypassable and will have the same effect on shopping customers as SSO customers.[237] The Commission addressed concerns related to the wholesale transactions to occur between the Companies and FES under the PPA by imposing appropriate safeguards that "are more than sufficient to protect against anticompetitive subsidies pursuant to R.C. 4928.02(H)."[238] Notably, those concerns were prompted solely by the fact that Rider RRS involved a bilateral contract with an affiliate.[239] Given that the Proposal eliminates that bilateral contract and does not depend upon any other contractual arrangement or other involvement with FES,[240] anticompetitive subsidies should no longer be an issue.

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[235] *See* OCC/NOAC Rehearing Brief, pp. 32-33; OMAEG Rehearing Brief, pp. 22-24; Direct Rehearing Brief, pp. 15-16; NOPEC Rehearing Brief, pp. 10-11; OEC/EDF Rehearing Brief, p. 15.

[236] R.C. 4928.02(H).

[237] March 31 Order, p. 110.

[238] March 31 Order, p. 110.

[239] March 31 Order, p. 110.

[240] *See* Mikkelsen Rehearing Test., p. 4.

Yet multiple intervenors are indisposed to let facts get in the way of their favored argument. Instead of accepting that Rider RRS no longer includes any avenue for Rider RRS revenues to flow from the Companies to FES, these intervenors would prefer to speculate as to the anticompetitive harms that could occur if revenues were to flow to FES. OCC/NOAC, for example, worry that Rider RRS revenues could "potentially end up in the hands" of FES.[241] OMAEG finds comfort in inventing a name for Rider RRS – calling it a "virtual PPA" – in hopes of distracting the Commission from the obvious fact that Rider RRS is not virtually, literally or actually dependent upon a PPA.[242] Incredibly, NOPEC repeats its R.C. 4928.02(H) argument from its Initial Post-Hearing Brief nearly word-for-word, including its now misleading description of Rider RRS as "charg[ing] all distribution customers for the cost of the PPA Units' generation."[243] Direct baldly terms Rider RRS a "bailout."[244] Calling a horse an orange does not make it an orange. Calling revenue to the Companies a subsidy to FES does not make it so without proof that those revenues will flow to FES. And intervenors have no such proof.

Rider RRS does not violate R.C. 4928.02(H). The focus of R.C. 4928.02(H) is on anticompetitive subsidies flowing in either direction between noncompetitive and competitive retail electric services or products. There is no evidence that revenues will flow between the Companies noncompetitive services and FES's competitive services. Any revenues Rider RRS generates will be received and used by the Companies. Under the Proposal, Rider RRS "will be

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[241] OCC/NOAC Rehearing Brief, p. 32.

[242] *See* OMAEG Rehearing Brief, pp. 22-23.

[243] NOPEC Rehearing Brief, pp. 10-11. *See* Initial Brief of NOPEC, pp 47-48 (Feb. 16, 2016) ("NOPEC Initial Brief").

[244] Direct Rehearing Brief, p. 1.

solely the responsibility of the Companies."[245] There is no mechanism within the Companies' organization that would allow them to share dollars with FES or transfer revenues or expenses to FES.[246] In addition, FirstEnergy Corp. has indicated that it is not going to make any more investments in FES going forward.[247] Thus, intervenors lack any factual basis for arguing that Rider RRS, as modified by the Proposal, violates R.C. 4928.02(H).

Company witness Mikkelsen explained at length in her Rehearing Testimony that Rider RRS revenues will flow to the Companies, not FES:

> 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).[248]

And, as Ms. Mikkelsen additionally explained at hearing, "I'm not aware of any mechanism within the companies' organization that would allow them to share dollars collected with FES."[249] Indeed, the Companies have no intention of transferring monies raised from their operations to FES. As Ms. Mikkelsen testified the hearing:

> It is the companies' intention to use the dollars collected in its operations whether it be for investments in advanced meter

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[245] Mikkelsen Rehearing Test., p. 11. *See* Rehearing Tr. Vol. I, p. 227 (Mikkelsen Cross).

[246] Mikkelsen Rehearing Test., p. 11; Rehearing Tr. Vol. I, pp. 226-27 (Mikkelsen Cross).

[247] Rehearing Tr. Vol. I, p. 158 (Mikkelsen Cross).

[248] Mikkelsen Rehearing Test., p. 11.

[249] Rehearing Tr. Vol. I, p. 226 (Mikkelsen Cross). *See also id.*, p. 227 ("The proposal is explicit insomuch as the implementation of rider RRS will be solely the responsibility of the companies. We are clear that there are no contracts or any other form of agreement between the companies and FES associated with rider RRS; and, beyond that, I am not aware of any means by which the companies could transfer revenues or expenses to FES.").

> infrastructure, distribution automation, Volt/VAR control, investment in battery resources, or investment in renewable resources, or other business purposes such as funding the pension or, I guess, any other operations.[250]

Intervenors have mustered no evidence to even suggest that Rider RRS revenues will flow to FES.

Intervenor complaints that the Companies could issue a dividend to their parent are a red herring. The Companies have issued dividends to FirstEnergy Corp. in the past, and never once has such a dividend been considered an anticompetitive subsidy solely because FirstEnergy Corp. has the ability to invest in a competitive subsidiary. If intervenors' theory that any monies coming to the Companies could be a subsidy to FES because those monies might "possibly" be a dividend was true, then any charge by the Companies – including base rates – could be considered a subsidy. The reason why this is not so is because R.C. 4928.17 expressly permits corporate separation of retail electric services, with the Companies providing noncompetitive retail electric service and an affiliate providing competitive retail electric service.[251] The Companies' corporate separation plan has been filed and approved by the Commission.[252] No party has questioned that the Companies' corporate separation plan "satisfies the public interest

[250] Rehearing Tr. Vol. I, p. 58 (Mikkelsen Cross).

[251] R.C. 4928.17(A)(1).

[252] The Companies' corporate separation plan is publicly available as filed in *In the Matter of the Application for Approval of a Corporate Separation Plan, Section 4928.17, Revised Code and 4901:1-37, Ohio Administrative Code,* Case No. 09-462-EL-UNC and was approved in Case No. 10-388-EL-SSO. *See* Case No. 14-1297-EL-SSO, Application, p. 19 (Aug. 4, 2014).

in preventing unfair competitive advantage and preventing the abuse of market power."[253] Intervenors' objections are fueled by rank speculation, not evidence.

Through Rider RRS, the Companies are offering a stability rider to all of their customers. The rider provides customers insurance against long-term price increases and volatility. This is not an anti-competitive subsidy to FES's competitive generation service, but a benefit to the Companies' customers consistent with the policy under R.C. 4928.02(A) to ensure the availability to consumers of reasonably priced retail electric service.[254]

b. Rider RRS is not unlawful under FERC affiliate restrictions.

OCC/NOAC claim that the Proposal is unlawful because it violates FERC orders and regulations.[255] OCC/NOAC base their claim on the FERC's April 27, 2016 Order that rescinded a waiver given to FES, specifically as to the PPA between the Companies and FES.[256] OCC/NOAC recognize that the Proposal eliminates any opportunity for the Companies to transfer Rider RRS revenues to FES without FERC approval of a PPA between the Companies and FES. Nevertheless, OCC/NOAC claim that FERC's affiliate restrictions would be violated if Rider RRS revenues (now completely independent of any PPA) were to flow from the Companies to FirstEnergy Corp. and then to FES.[257]

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[253] R.C. 4928.17(A)(2).

[254] *See AEP ESP3* Order, p. 26 (finding that AEP Ohio's PPA Rider was consistent with policy under R.C. 4928.02(A) to ensure the availability to consumers of reasonably priced retail electric service).

[255] OCC/NOAC Rehearing Brief, pp. 21-24. *See also* IMM Rehearing Brief, p. 2; Sierra Club Rehearing Brief, pp. 3-7.

[256] *EPSA v. FirstEnergy Solutions Corp.*, 155 FERC ¶61,101, FERC Docket No. EL-16-34-000, Order Granting Complaint ¶ 53 (April 27, 2016).

[257] OCC/NOAC Rehearing Brief, pp. 22-23.

Again, however, they have no proof that Rider RRS revenues will flow in such a circuitous path. Yet OCC/NOAC's unsubstantiated fears that sometime in the future there could be an unlawful transfer to FES under some unknown circumstance is not a basis today for the Commission to find that the Stipulated ESP IV violates an important regulatory principle or practice. Instead, the Commission can rest assured that the Companies will continue to comply with all state and federal laws regarding corporate separation.[258] Speculation regarding what may never happen is not sufficient grounds to reject the Proposal.

c. Rider RRS does not collect unlawful transition revenues.

Intervenors erroneously claim that revenues collected under Rider RRS would somehow amount to unlawful transition revenue.[259] Nothing could be further from the truth. Indeed, given that the Proposal likely will result in credits to customers over its eight-year term, the Proposal can hardly count as a "transition charge." Further, neither Rider RRS as approved nor Rider RRS as modified by the Proposal are designed to protect the Companies from financial harm as they "transition" to market-based pricing – the Companies accomplished this transition years ago. Thus, such claims are groundless.

As Company witness Mikkelsen explained in her rebuttal testimony, Rider RRS as approved by the Commission is a rate-stabilizing hedge to protect customers from volatile and

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[258] Indeed, if PJM Interconnection or the FERC design in the future a market construct that would permit the Companies to propose an alternative Rider RRS associated with physical generating assets within the period of the eight-year ESP IV, the Companies reserve the right to re-open ESP IV for the limited purpose of determining whether the approved construct should be incorporated into ESP IV.

[259] P3/EPSA Rehearing Brief, pp. 34-36; NOPEC Rehearing Brief, pp. 12-13; OCC/NOAC Rehearing Brief, pp. 25-27; OMAEG Rehearing Brief, p. 19; OEC/EDF Rehearing Brief, p. 16; OHA Rehearing Brief, pp. 2-3; Staff Rehearing Brief, pp. 3-4; Sierra Club Rehearing Brief, pp. 17-19.

unpredictable wholesale prices.[260] Nothing about the Companies' proposed modifications to the calculation of Rider RRS has changed this. The statute intervenors rely upon – R.C. 4928.38 – has nothing to do with hedges offered via an ESP to retail customers. That statute prohibits "the receipt of transition revenues or any equivalent revenues by an electric utility" except as authorized in transition plans in the early 2000s.[261] In turn, "transition revenues" recovered the difference between the book cost and market value of generating plants being separated from EDUs as the EDUs transitioned to market-based pricing.[262] Rider RRS, whether as approved or modified, is not a subsidy to help the Companies divest their generation and transition to market-based pricing.[263] Indeed, the Companies completed this transition years ago, with their first ESP in 2009.[264] Since 2009, the Companies have procured their SSO load through a competitive bid process.[265] Further, in 2005 the Companies transferred title to all of their generating facilities to various affiliated corporate entities.[266] There simply is no "transition" for which the Companies need to recover costs.[267]

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[260] Rehearing Rebuttal and Surrebuttal Testimony of Eileen M. Mikkelsen, p. 3 ("Mikkelsen Rehearing Rebuttal Test.").

[261] *See* R.C. 4928.31-.40.

[262] *See* R.C. 4928.34, .39, .40. This compensation was necessary to avoid any claim that corporate separation resulted in an unconstitutional taking of the EDU's property.

[263] Mikkelsen Rehearing Rebuttal Test., p. 3.

[264] Mikkelsen Rehearing Rebuttal Test., p. 3.

[265] Mikkelsen Rehearing Rebuttal Test., p. 3.

[266] Mikkelsen Rehearing Rebuttal Test., p. 3.

[267] Mikkelsen Rehearing Rebuttal Test., p. 4. Notably, Sierra Club contends that the fact that the Companies have already divested their generation and transitioned to a market-based generation pricing is irrelevant as long as the revenues are "equivalent" to transition revenues. Sierra Club Rehearing Brief, p. 18. But this argument begs the question: how can a charge be "equivalent" to transition revenues when there is no transition? Moreover, as demonstrated below, unlike rejected stability riders for AEP and DP&L, there is no justification being offered for

Moreover, because Rider RRS as approved by the Commission is projected to be a $256 million net credit over the term of ESP IV, Rider RRS hardly can be cast as a vehicle for collecting unlawful transition revenues.[268] Staff witness Choueiki admitted that Rider RRS could not count as a transition charge during those periods when a credit was issued.[269] Again, Rider RRS is a countercyclical hedge: when wholesale market prices are low it will amount to a charge and when wholesale prices are high it will amount to a credit.[270] To count as the type of cost-recovery vehicle conceived by intervenors, Rider RRS would have to be designed to collect revenues in order to assist the Companies to transition to market-based pricing. It does none of these things. Therefore, it simply does not provide the Companies with any sort of "transition revenue."

The two recent Ohio Supreme Court decisions striking down charges tied directly to market transitions lend no support to intervenors' position. The Court struck down AEP's RSR approved in AEP's second ESP proceeding because the rider violated R.C. 4928.38.[271] The Court then reversed the Commission's approval of DP&L's Service Stability Rider ("SSR") on

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Rider RRS based on the Companies' transition to market-based pricing or to divesting generation or anything that is even remotely "equivalent" to those things.

[268] Mikkelsen Rehearing Rebuttal Test., p. 4.

[269] Rehearing Tr. Vol. V, pp. 1250-51 (Choueiki Cross).

[270] As Ms. Mikkelsen explained at hearing:

> The retail rate stability provided underneath the proposal or pursuant to the proposal is such that when market prices are low, customers would see a charge which is what you see in the early years here. And as market prices increase, then that charge transitions to a credit to the customers during periods of high prices. And the combination of those really works to stabilize the retail ratepayer's charges throughout the term of the ESP.

Rehearing Tr. Vol. I, p. 126 (Mikkelsen Cross).

[271] *See AEP RSR* Decision, 2016-Ohio-1608.

the authority of the AEP RSR decision.[272] Neither decision has applicability to Rider RRS (either as approved by the Commission or as proposed on rehearing).

The record in the AEP RSR case easily supported the Court's conclusion that AEP's RSR was recovering revenue that was the equivalent of transition revenue. The purpose of the portion of the RSR at issue[273] was to "provide AEP with sufficient revenue to maintain its financial integrity and ability to attract capital during the ESP."[274] The Commission specifically approved the RSR as a means to ensure that AEP was not financially harmed during its three-year transition to market-based SSO rates.[275] Indeed, the amount of the RSR was directly tied to lost revenue resulting from discounted capacity prices and expected increases in customer shopping during that transition.[276] The RSR recovered "transition" revenues because it was a quid-pro-quo for AEP's agreement to transition to market-based SSO rates and revise its corporate structure by transitioning its generating assets out of the distribution utility as required by S.B. 3. Moreover, because the Commission had authorized AEP to recover its capacity costs fully in a separate proceeding, there was no evidentiary support for additional generation costs being recovered through the RSR.[277]

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[272] *In re Application of Dayton Power & Light Co*., 2016-Ohio-3490 (June 20, 2016) ("*DP&L SSR* Decision").

[273] A portion of the RSR that recovered deferred capacity costs was not at issue. *See AEP RSR* Decision, 2016-Ohio-1608, ¶ 7.

[274] *Id.* ¶ 8.

[275] *Id.* ¶ 23.

[276] *Id.* ¶¶ 23-24.

[277] *Id*. ¶¶ 35-37.

Similarly, in the DP&L case, the Commission supported DP&L's SSR on the basis that it was needed to protect DP&L's financial integrity and thereby ensure DP&L could provide safe and reliable electric service while it transitioned to 100% market-based service and reorganized its corporate structure.[278] Importantly, the Commission ordered DP&L to separate its generating assets by January 1, 2017, and the SSR was designed to shore up DP&L's earnings so that it eventually could separate its generation.[279] Thus, DP&L's SSR was equivalent to AEP's RSR in that it supported DP&L's earnings while DP&L finally transitioned to the distribution-only structure and market-based SSO pricing required by S.B. 3.

In short, both decisions stand for the proposition that R.C. 4928.38 bars a vertically integrated electric utility from receiving, after December 31, 2006, "financial integrity" revenues to protect it against financial harm as it transitions to market-based SSO rates while separating its generating assets. These two decisions have no relevance to the Companies' Rider RRS. Rider RRS is not a quid-pro-quo for a transition that occurred many years ago. The Companies have at

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[278] *DP&L ESP2* Order, p. 12 ("DP&L contends that it needs the five year ESP term to maintain its financial integrity and that a five year ESP term will mitigate DP&L's need for an increased SSR amount. . . . DP&L witness Jackson indicated that the five year ESP term is critical for DP&L to have the necessary cash flows needed to separate its generation assets by December 31, 2017. . . . DP&L argues that its ESP term should be authorized and that a more rapid move to market-based rates should be denied."); *id.*, p. 15 ("The Commission finds that this schedule for DP&L to implement full CBP procurement will move DP&L rates to market while granting DP&L sufficient time to refinance its long term debt to facilitate the divestment of the Company's generation assets."); *id.*, pp. 21-22 ("the Commission believes that the SSR would have the effect of stabilizing or providing certainty regarding retail electric service. We agree with DP&L that if its financial integrity becomes further compromised, it may not be able to provide stable or certain retail electric service. . . . DP&L is not a structurally separated utility; thus, the financial losses in the generation, transmission, or distribution business of DP&L are financial losses for the entire utility."); *id.*, p. 50 ("The modified ESP moves more quickly to market rate pricing than under the expected MRO. DP&L will be delivering and pricing energy at market prices by January 1, 2017, and if DP&L were to apply for an MRO, it is likely that DP&L would not deliver and price energy at full market prices until 2019.").

[279] *Id.*, p. 16; *id.*, p. 51 ("Moreover, although there is a quantifiable cost to the SSR, the SSR will ensure that DP&L can provide adequate, reliable and safe retail electric service until it divests its generation assets. Several witnesses have testified that this is essential to the implementation of a fully competitive retail market.").

no time in ESP IV asked to recover plant costs as a trade-off for transitioning SSO service to market-based pricing.

Nor is Rider RRS intended to protect the Companies' financial integrity,[280] and there is no "over-recovery" of capacity costs through Rider RRS. The Rider RRS approved by the Commission is a financial risk for the Companies (because of costs that could be trapped at the Companies), and modified Rider RRS is projected to have financial upside in the near-term but a financial cost in the long-term and overall. The RSR and SSR were subsidies to stabilize AEP and DP&L, not a hedge designed to stabilize retail electric service prices.[281]

d. Rider RRS does not harm large scale governmental aggregation.

NOPEC regurgitates the same flaccid argument it previously made: that R.C. 4928.20(K) renders Rider RRS unlawful by imposing a nonbypassable charge on governmental aggregation customers.[282] NOPEC was wrong then and is wrong again. Previously, the Companies soundly

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[280] Indeed, certain intervenors, while contending that Rider RRS is a transition charge also claim to be concerned about the Companies' financial ability to pay for credits projected in the later years of the ESP. *Compare* OEC/EDF Rehearing Brief, pp. 11-12 *with* p. 16; *Compare* OMAEG Rehearing Brief, p. 19 *with* pp. 28-29.

[281] Notably, the AEP RSR and DP&L SSR cases can be distinguished in another way: neither company argued to the Commission that their financial integrity riders could be approved under R.C. 4928.143(B)(2)(d) "notwithstanding" R.C. 4928.38. R.C. 4928.143(B) states that an ESP may include a stability rider notwithstanding any other provision of Title 49 to the contrary, which would include R.C. 4928.38. Indeed, while the majority opinion in the AEP RSR decision notes that the Commission and AEP waived this argument by not raising it, Justices O'Connor and Lanzinger recommended remanding the appeal specifically to consider whether "the word 'notwithstanding' could render R.C. 4928.38 inapplicable if the revenues are recoverable under one of the many provisions of R.C. 4928.143(B)(2)." *AEP RSR* Decision, 2016-Ohio-1608, ¶ 76. Here, as noted, the Companies have argued with regard to Rider RRS revenues that the "notwithstanding" provision in R.C. 4928.143(B) preempts any application of R.C. 4928.38. On rehearing, the Commission should find that R.C. 4928.143(B) controls and that R.C. 4928.38 has no applicability to an ESP.

[282] NOPEC Initial Brief, p. 26; NOPEC Rehearing Brief, p. 10.

refuted NOPEC's distortion of the statute.[283] NOPEC offers no new support related to this claim. The Commission found that nonbypassable charges have the same effect on all shopping customers, even those that are members of an aggregation.[284] Thus, nonbypassable charges are consistent with state policy. NOPEC's argument again must fail.

C. The Modest Modifications To Rider RRS Proposed By The Companies Do Not Impact The Outcome Of The ESP vs. MRO Test For Stipulated ESP IV.

In the March 31 Order, the Commission found that Stipulated ESP IV was both quantitatively and qualitatively more favorable than the expected results of an MRO:

> [W]e find that, on a quantitative basis, the proposed ESP IV is more favorable than an MRO by $307.1 million, representing the sum of the predicted $256 [million] in net revenue predicted for Rider RRS and $51.1 million in committed shareholder funding, over the eight years of ESP IV.[285]
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> Further, we find that the proposed ESP IV is more favorable qualitatively than an MRO. We find that the additional qualitative benefits of an ESP, which would not be provided for in an MRO, include: (1) continuation of the distribution rate freeze until June 1, 2024 to provide rate certainty, predictability, and stability for customers (Co. Ex. 154 at 13); (2) continuation of multiple rate options and programs to preserve and enhance rate options for various customers provided in previous ESPs (Co. Ex. 154 at 14-15); (3) establishment of a goal to reduce CO2 emissions by FirstEnergy Corp. with periodic reporting requirements (Co. Ex. 154 at 11; Co. Ex. 155 at 13); (4) reactivation and expansion of energy efficiency programs previously suspended by the Companies, with a goal of saving 800,000 MWh of energy annually (Co. Ex. 154 at 11-12); (5) programs to promote the use of energy efficiency programs by small businesses pursuant to state policy set forth in R.C. 4928.02(M) (Co. Ex. 155 at 5). In

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[283] Companies' Initial Reply Brief, pp. 284-86.

[284] March 31 Order, p. 110.

[285] March 31 Order, p. 119.

> addition, the Stipulations require the Companies to file applications to: (1) modernize distribution infrastructure through the filing of a business plan for the deployment of smart grid technology and advanced metering in accordance with Ohio policy set forth in R.C. 4828.02(D) (Co. Ex. 154 at 9-10); (2) promote resource diversity by investing in utility scale battery technology and, potentially, by procuring additional renewable energy resources (Co. Ex. 154 at 11-12; Co. Ex. 155 at 13); and (3) transition to a SFV rate design which balances the elimination of disincentives for the promotion of the principle of cost causation (Co. Ex. 154 at 12-13; Co. Ex. 155 at 13).[286]

The proposed modifications to Rider RRS have no impact on these findings regarding the ESP v. MRO test. As Company witness Mikkelsen testified:

> All of the qualitative and quantitative benefits relied upon by the Commission in reaching its determination about the ESP versus MRO test remain intact under the companies' proposal.[287]

After including the Proposal in ESP IV, there should be no change in the quantitative analysis. The Proposal does not modify the Companies' commitment of $51.1 million for energy efficiency, economic development and support for low income customers. The Proposal also does not modify the source of the revenues or costs used to develop the projections that the Commission relied upon to determine the $256 million net benefit that would be provided by Rider RRS.[288] In fact, the costs used in the projections will be the exact costs used for the Rider RRS charge.[289] Further, there is no reason to change the projection of revenues. In both Rider RRS as approved and the Proposal, revenues will be determined based on the energy and

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[286] March 31 Order, pp. 119-20.

[287] Rehearing Tr. Vol. X, p. 1682 (Mikklesen Rebuttal Cross).

[288] Mikkelsen Rehearing Test., pp. 5, 7.

[289] Mikkelsen Rehearing Test., p. 5.

capacity market.[290] Thus, having previously relied on the projections of those market revenues as calculated by Company witness Rose and by OCC witness Wilson's first scenario, the Proposal provides no reason for the Commission to revisit those projections.

Qualitatively, the Proposal also changes nothing in the ESP v. MRO analysis used by the Commission in the March 31 Order. Indeed, Staff witness Turkenton agreed at the hearing that "those qualitative benefits have not changed since the Opinion and Order."[291]

Those opposing ESP IV and the Proposal trot out many of the criticisms that the Commission already has rejected. OCC/NOAC argue, for example, that no ESP could ever pass the ESP v. MRO test because ESPs have "outlived any purpose."[292] They also argue again that the Commission should not treat revenues under Rider DCR as a "wash."[293] These arguments are beyond the scope of rehearing. Plus, there is no reason to litigate them again, especially given that neither of these arguments relates to the Proposal and how it effects the ESP v. MRO test.[294]

Relying solely on Drs. Choueiki's and Kalt's forwards-based analyses, P3/EPSA wrongly contend that "any quantitative benefit found by the Commission to have existed with original

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[290] Mikkelsen Rehearing Test., p. 7.

[291] Rehearing Tr. Vol. II, p. 479 (Turkenton Cross).

[292] OCC/NOAC Rehearing Brief, p. 5.

[293] OCC/NOAC Rehearing Brief, pp. 7-8.

[294] *See generally* March 31 Order, pp. 118-20 (finding that ESP IV is more favorable in the aggregate than the expected results of an MRO and specifically noting that "the costs of Rider DCR and the costs of a potential distribution rate case should be considered substantially equal and removed from the ESP v. MRO analysis."); Companies' Initial Brief, pp. 11-35; Companies' Initial Reply Brief, pp. 314-26.

Rider RRS is now eviscerated in light of known energy forward and capacity prices."[295] Other parties make similar arguments.[296] As addressed above,[297] given the serious problems with either analysis, neither reasonably can be relied upon.

As the record in this case shows, natural gas forwards prices are an unreliable predictor of future natural gas prices because forwards are highly correlative to highly volatile natural gas spot prices.[298] Such prices are heavily influenced by weather.[299] Given that the hearings in this case have taken place during record warm temperatures throughout the United States,[300] and that natural gas inventories were consequently at record high levels earlier this year,[301] it should be no surprise that natural gas prices hit an 18-year low in March.[302] Nevertheless, as the Companies previously showed and as the Commission previously found, this "energy price utopia" is highly unlikely to last; market fundamentals – including things like projected demand

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[295] P3/EPSA Rehearing Brief, p. 47. *See also id*., pp. 48-49.

[296] OMAEG Rehearing Brief, pp. 27-28; Sierra Club Rehearing Brief, p. 19; NOPEC Rehearing Brief, p. 17. Notably, NOPEC's entire argument along these lines improperly relies on portions of OCC/NOAC witness Wilson's testimony that has been stricken from the record. *See* Motion of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company to Strike Portions of the Brief on Rehearing of Northeast Ohio Public Energy Council, filed concurrently with this Reply Brief.

[297] *See,* pp. 31-42*, supra.*

[298] *See* J. Rose Rebuttal Test., p. 51.

[299] *See* March 31 Order, p. 84.

[300] *See* February 2016 NOAA Report, p. 5 of 16.

[301] *See* Rehearing Tr. Vol. V, p. 1236 (Choueiki Cross).

[302] *See* EIA Henry Hub Natural Gas Spot Price (Dollars per Million BTU), pp. 3, 16 of 16.

and rig counts – all point to higher prices going forward.[303] Indeed, by late June/early July 2016 natural gas spot prices increased 97% from their low point earlier this year.[304]

There is simply no reason for the Commission to reconsider its previous findings regarding the quantitative benefits of ESP IV. The only thing that has happened for energy prices is that record warm temperatures continued and, thus, natural gas – and energy – prices have stayed low. This is not a long term phenomenon. Indeed, there is no evidence to the contrary.

Another year's capacity prices also do not call for a reconsideration of the quantitative benefits of ESP IV versus an MRO. The results of the 2018/2019 BRA still do not reflect the full application and effect of the CP rules.[305] Indeed, PJM's projections for capacity prices with the full implementation of the CP rules are in line with Company witness Rose's projections.[306]

Nor do intervenors fare better in trying to show that the Commission's ESP v. MRO qualitative findings should be any different. Some parties attempt to resurrect prior, Commission-rejected arguments. For example, Sierra Club claims that Rider RRS will not provide price stability benefits or, even if it does, that such benefits are not needed.[307] The Commission already has addressed and rejected these arguments.[308] Sierra Club presents nothing new.

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[303] *See*, March 31 Order, p. 83; J. Rose Rebuttal Test., p. 32.

[304] *See* EIA Henry Hub Natural Gas Spot Price (Dollars per Million BTU), pp. 3, 16 of 16.

[305] *See* J. Rose Rebuttal Test., p. 23; *see also* Hearing Tr. Vol. XXXV, p. 7444 (J. Rose Rebuttal Redirect).

[306] *See* Companies' Initial Reply Brief, pp. 55-56.

[307] Sierra Club Rehearing Brief, pp. 33-35.

[308] March 31 Order, pp. 88, 109, 119.

Addressing issues *actually affected by the Proposal*, several parties point to the fact that the Proposal eliminates a PPA involving the Plants as a factor relating to Rider RRS. Specifically, these parties note that several benefits associated with the continued operation of the Plants – avoidance of additional transmission costs; maintained or improved grid reliability; maintenance of resource diversity; and economic development and job retention – would be "lost" under the Proposal.[309] Putting aside the irony of the same parties who so mightily previously proclaimed that there were no such benefits to Rider RRS[310] now decry that such benefits would now be "lost," these parties overlook that, as the passage from the March 31 Order quoted above shows, none of these benefits were relied upon by the Commission in its ESP v. MRO analysis.[311] The ESP v. MRO analysis conducted by the Commission does not even reference the benefits associated with the continued operation of the Plants.[312] Thus, these Plant-related issues have no relevance to the ESP v. MRO test.

As a matter of fact, Ms. Mikkelsen explained that Modified Rider RRS continues to provide significant economic development benefits given customer interest in stable, predictable

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[309] *See, e.g.*¸ CMSD Rehearing Brief, pp. 13-14; OEC/EDF Rehearing Brief, pp. 9-10; OHA Rehearing Brief, pp. 4-5; OMAEG Rehearing Brief, p. 27-28; P3/EPSA Rehearing Brief, p 47; Sierra Club Rehearing Brief, pp. 37-39.

[310] *See* ELPC/OEC/EDF Initial Brief, p. 13 (Feb. 16, 2016); OMAEG Initial Brief, pp. 63-66 (Feb. 16, 2016); P3/EPSA Initial Brief, pp. 25-27; Sierra Club Initial Brief, pp. 2-3, 80-114.

[311] *See* March 31 Order, pp. 118-20.

[312] March 31 Order, pp. 118-20. The Commission stated earlier in the March 31 Order that its decision does not turn on these Plant-related issues. March 31 Order, p. 87.

prices. By providing attractive rates, Rider RRS incentivizes customers to maintain or grow their business in the Companies' service territories.[313]

Other parties claim that the Proposal is more risky to customers.[314] In fact, the Proposal presents *less* risk to customers. Indeed, the Proposal actually eliminates several risks that were inherent in Rider RRS as approved by the Commission. As Ms. Mikkelsen testified at rehearing when questioned by the Attorney Examiner:

> EXAMINER PRICE: And, in fact, isn't it true that under the proposal, specific risks attributable to the plants under the old proposal, Davis-Besse and Sammis, such as whether or not they are actually operating or whether they are operating at full capacity are eliminated?
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> THE WITNESS: The proposal eliminates a number of risks, founded or unfounded in the companies' opinion, with respect to the original proposal as it relates to whether there are forced outages beyond those that were projected or whether there were capital expenditures required, whether it be for additional environmental work, emergent nuclear work, things of that nature, all of that is eliminated in the company's proposal.[315]

Moreover, "[t]he benefit of locking in the cost and generation assumptions eliminates concerns of certain parties related to extended outages, capital spending levels, operating costs exceeding projections, Plant retirements, whether or not costs are legacy costs, and environmental compliance risks and costs."[316] And further, "[b]y limiting the elements that are subject to

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[313] Mikkelsen Rehearing Test., p. 12; Rehearing Tr. Vol. I, pp. 198, 255-56 (Mikkelsen Cross); Rehearing Tr. Vol X, p. 1699 (Mikkelsen Rebuttal Cross).

[314] *See, e.g.*, P3/EPSA Rehearing Brief, pp. 8, 48-49; Sierra Club Rehearing Brief, p. 19; CMSD Rehearing Brief, p. 8.

[315] Rehearing Tr. Vol. I, pp. 126-27 (Mikkelsen Cross).

[316] Mikkelsen Rehearing Test., p. 6.

change to day-ahead energy prices and actual capacity prices, the modified Rider RRS provides customers the benefit of the hedge without bearing the risk of changes in Plant costs, operating levels or any other operational or market performance risk."[317] Hence, the Proposal provides a superior rate-stabilizing hedge for the Companies' customers as compared to Rider RRS as approved.[318]

Other parties claim that the Proposal is now riskier for the Companies, noting that the Companies will now be forced to absorb hundreds of millions of dollars in "losses" to pay for credits under Rider RRS that they allegedly have shown no ability to withstand.[319] To be sure, the Companies project that there will be credits coming to customers in the later years of the ESP. Under Rider RRS, these parties focus only on the cost to the Companies of these credits while overlooking other sources of funds that will be received by the Companies. For example, the Companies project that they will receive approximately $400 million in Rider RRS charges in the first few years of the ESP.[320] These revenues are in addition to increased funds coming to

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[317] Mikkelsen Rehearing Test., p. 6. Indeed, OCC/NOAC witness Wilson admitted that Modified Rider RRS would eliminate the risk that the cost of Rider RRS as approved would increase beyond the Companies' forecasts. Rehearing Tr. Vol. IV, p. 892 (Wilson Cross). As Ms. Mikkelsen further explained at hearing:

> That is the very nature of the hedge is that we have now removed all the variables from the hedge proposal, and it is really a more reliable hedge now insomuch is it focuses only on actual changes in energy prices and capacity prices. But the purpose of the hedge is to, again, protect the customers during periods of higher prices, with the understanding that if market prices are low, there will be a charge to the customers

Rehearing Tr. Vol. I, pp. 127-28 (Mikkelsen Cross).

[318] For the same reason, CMSD's claim that, "like its predecessor," Modified Rider RRS will make it more difficult for customers to manage their risks misses the mark. CMSD Rehearing Brief, p. 8. Although the Commission previously rejected this argument (*see* March 31 Order, pp. 91-92), to the extent that the Proposal changes anything for customers, as the record demonstrates, risks to customers under Modified Rider RRS are in fact reduced.

[319] OMAEG Rehearing Brief, pp. 28-29; Sierra Club Rehearing Brief, p. 27.

[320] Sierra Club Ex. 89.

the Companies under Rider DCR, Rider AMI, shared savings, lost distribution revenue, and other elements of ESP IV.[321] As Ms. Mikkelsen testified, these funds should improve the Companies' credit metrics such that the Companies should be in a sound position to borrow, if necessary, to sustain the impact of any Rider RRS credits.[322] No witness rebutted Ms. Mikkelsen's testimony.[323]

OMAEG complains that the Proposal will harm competition.[324] This claim is based on the notion that Rider RRS revenues will "really" or "possibly" end up with FES.[325] Yet, such a claim is belied by Company witness Mikkelsen's express testimony that the Companies intend to use revenues from Rider RRS for investment in "advanced meter infrastructure, distribution automation, Volt/VAR control, investment in battery resources, or . . . renewable resources."[326] She further debunked the notion that these funds would likely go to FES, noting:

- There was no mechanism for any funds to be transferred from the Companies to FES.[327]
- FirstEnergy Corp. management stated publicly that it was not going to provide further funds from FirstEnergy Corp. to support FES.[328]

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[321] Rehearing Tr. Vol. I, pp. 80-81, 85, 88 (Mikkelsen Cross).

[322] Rehearing Tr. Vol. I, pp. 76, 85, 91 (Mikkelsen Cross).

[323] OCC witness Kahal expressed concerns about the fact that Rider RRS would not be "revenue neutral." Rehearing Direct Testimony of Matthew I. Kahal, p. 13 ("Kahal Rehearing Test."). But he did not provide any financial analysis of Rider RRS's effect on the Companies. Nor was he familiar with any analysis that the Companies had done regarding their ability to deal with Rider RRS, especially in light of the other increased revenue sources provided under ESP IV. Rehearing Tr. Vol. V, pp. 1096-97 (Kahal Cross).

[324] OMAEG Rehearing Brief, p. 30.

[325] *See generally*, Rebuttal Testimony on Rehearing of Thomas N. Lause.

[326] Rehearing Tr. Vol. I, p. 58 (Mikkelsen Cross); Mikkelsen Rehearing Test., p. 12.

[327] Rehearing Tr. Vol. I, p. 226 (Mikkelsen Cross). *See also id.*, pp. 208, 227.

OMAEG also argues that there are no benefits relating to grid modernization because Rider RRS does not contain a commitment to modernize the grid or that there is no grid modernization plan.[329] Of course, this overlooks the fact that ESP IV already contains a commitment by the Companies to file a grid modernization plan, a plan that already has been filed and is under consideration by the Commission and other stakeholders.[330] Moreover, as noted, Ms. Mikkelsen expressly testified that grid modernization was, in fact, one of the things on which the Companies intend to spend revenues from Rider RRS.[331]

Nothing in the evidence presented on rehearing or in arguments by those opposing the Proposal now changes the Commission's analysis of ESP IV under the ESP v. MRO test. The Proposal does not change any quantitative or qualitative factor relied upon the Commission in its March 31 Order. For this reason, ESP IV, including the Proposal, is more beneficial in the aggregate than the results under an MRO.

D. Rider RRS Should Not Be Optional.

CMSD recommends that the Commission approve Rider RRS as an opt-in rider.[332] The Commission should reject CMSD's recommendation because it is impractical, devoid of detail

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[328] Rehearing Tr. Vol. I, p. 158 (Mikkelsen Cross). *See also id.*, p. 75; P3/EPSA Ex. 21, p. 2 ("In 2015, FirstEnergy's management . . . stated that it would not infuse any more capital into [FES].").

[329] OMAEG Rehearing Brief, p. 31.

[330] *See generally*, *In the Matter of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company Grid Modernization Business Plan*, Case No. 16-0481-EL-UNC, Docket.

[331] Rehearing Tr. Vol. I, p. 58 (Mikkelsen Cross).

[332] CMSD Rehearing Br., pp. 26-28.

and unsupported by analyses or evidence, and because it would frustrate the purposes of Rider RRS.

CMSD's recommendation is impractical because CMSD assumes that the level of annual costs and revenues used in the Rider RRS calculation would remain the same as under the Companies' Proposal. Thus, CMSD expects that an opt-in Rider RRS will preserve the $256 million quantitative benefit the Commission ascribed to Rider RRS.[333] However, CMSD cannot credibly contend that if only a handful of customers participated in Rider RRS, those few customers would receive the full benefits and pay the full charges of Rider RRS. While Company witness Mikkelsen agreed on cross-examination that the quantifiable benefits of Rider RRS are not dependent on the number of customers,[334] there are obvious practical limitations to this theoretical observation. CMSD cannot reasonably extrapolate from Ms. Mikkelsen's observation that Rider RRS could work as an opt-in program.[335]

CMSD's assumption that annual Rider RRS costs and revenues would remain the same if Rider RRS were an opt-in program also contradicts other CMSD arguments. For example, CMSD dismisses the possibility that fewer customers participating in Rider RRS "could leave the Companies on the hook for any unrecovered costs," contending that there are no actual PPA costs under the Proposal.[336] Similarly, CMSD argues that an opt-in program with fewer participating customers would reduce the Companies' exposure to a revenue shortfall created by

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[333] CMSD Rehearing Brief, p. 27.

[334] Rehearing Tr. Vol. I, p. 253 (cited in CMSD Rehearing Brief, p. 27).

[335] CMSD Rehearing Brief, p. 27.

[336] CMSD Rehearing Brief, p. 26.

Rider RRS in the later years of ESP IV.[337] CMSD cannot reasonably argue that Rider RRS costs and revenues can be ignored in an opt-in program, while also contending that the opt-in program will preserve the full $256 million in quantitative benefits recognized by the Commission.

The impracticality and internally contradictory nature of CMSD's recommendation, which was largely crafted at the briefing stage, is matched by its lack of important details. CMSD offered no evidence regarding participation rates or projected customer bill impacts under its recommendation. Consideration of CMSD's recommendation is impossible without such analyses.[338]

Further, CMSD's primary policy justification for its recommendation was previously raised and considered prior to the Commission's March 31 Order. CMSD explains that an opt-in program is appropriate because the ratepayer, not the Commission, should be making the decisions as to how to address the risk to the customer of volatility and future increases in wholesale prices (e.g., through staggered and laddered SSO auctions or a long-term fixed price contract with a CRES provider). CMSD contends that structuring Rider RRS as an opt-in program would provide additional rate stability only to those customers who want it. This is no reason to alter the structure of Rider RRS. Indeed, parties raised the same arguments in the earlier phase of this proceeding, and the Companies explained how Rider RRS provided different mitigation than SSO pricing or fixed-price CRES contracts.

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[337] CMSD Rehearing Brief, p. 26.

[338] CMSD Rehearing Brief, pp. 8-9, 27.

In addition, making Rider RRS an opt-in rider would defeat its purposes of providing rate stability and economic development benefits. For example, OEG witness Baron testified that the Proposal would provide retail rate stability to customers because under the Proposal, generation pricing would be approximately 30% cost-based and 70% market-based on a demand basis, and approximately 40% cost-based and 60% market-based on an energy basis.[339] These calculations would change dramatically if the number of participating customers were reduced by failure to opt-in, and if annual costs and revenues used in the modified Rider RRS calculation resulted in rates that could simply be ignored because, for example, the Companies were not recovering actual costs. With regard to economic development, Company witness Mikkelsen explained that the Proposal benefits the local, state and regional economies by retaining and growing the industrial base and will contribute to the economic vitality of the region.[340] Such broad benefits depend on widespread customer participation. Because CMSD's opt-in recommendation would frustrate these important purposes of the Proposal, it must be rejected.

E. Revenues Under Rider RRS Should Be Exempt From the SEET Calculation.

Intervenors erroneously claim that Rider RRS revenues should be included in the SEET calculation.[341] The Commission's Finding and Order in Case No. 09-786-EL-UNC (June 30, 2010) (the "Generic SEET Order"), determined that, for purposes of 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-*

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[339] Baron Rehearing Test., pp. 2, 5-8.

[340] Mikkelsen Rehearing Test., p. 12.

[341] OCC/NOAC Rehearing Brief, pp. 30-31; OEC/EDF Rehearing Brief, pp. 17-19.

recurring, special, and extraordinary items."[342] Even though Rider RRS is no longer revenue neutral to the Companies, charges or credits under Rider RRS warrant exclusion from the annual SEET calculation as a special item for three reasons.[343]

First, Rider RRS is, at most, only incidentally related to typical utility operations.[344] As such, and consistent with other items excluded in prior SEET cases such as mark-to-market accounting impacts, credits and charges under Rider RRS should be excluded from the SEET as well.[345]

Second, Rider RRS is symmetric by design, while the SEET calculation is "asymmetric with no lower range on the ROE."[346] As Ms. Mikkelsen explained:

> Including [Rider RRS revenues] in SEET contradicts the symmetric design of the rider by increasing the Companies' risk of a SEET refund, while not providing any downside protection in the event that the Proposal is a credit. A SEET refund due to the Proposal would defeat the purpose of the financial hedge because the full value would not be realized as customers would receive the full credit but would not have to pay the full charge.[347]

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[342] Generic SEET Order, p. 18 (emphasis added).

[343] Mikkelsen Rehearing Rebuttal Test., p. 21. OEC/EDF argue that Rider RRS revenues are not an extraordinary item (OEC/EDF Rehearing Brief, pp. 17-18), but the question presented is whether Rider RRS are a special item for purposes of the SEET.

[344] Mikkelsen Rehearing Rebuttal Test., p. 21.

[345] Mikkelsen Rehearing Rebuttal Test., p. 21.

[346] Mikkelsen Rehearing Rebuttal Test., p. 21.

[347] Mikkelsen Rehearing Rebuttal Test., p. 21.

Indeed, OEC/EDF witness Finnigan admitted that the "SEET test is asymmetric; that it only impacts the company if it has significantly excessively earnings; and that if it has under-earnings, then it would not apply."[348]

Third, in the case of the SEET calculation, the earned return on equity of the Companies must be compared to the earned return of comparable companies.[349] Because other companies do not have a hedge mechanism like Rider RRS,[350] revenues and credits from Rider RRS must be excluded for the purposes of the SEET calculation in order to have a valid comparison.[351]

OCC/NOAC's opposition to excluding Rider RRS revenues from the SEET calculation lacks a rational basis. Indeed, OCC witness Kahal admitted at hearing that, under certain circumstances, excluding Rider RRS credits and charges from the SEET calculation would in fact benefit customers.[352] Plus, OCC witness Duann's reading of the specific language from the Generic SEET Order – "non-recurring, special, and extraordinary items" – supports the exclusion of Rider RRS revenues and credits from the SEET calculation. At hearing, he agreed that any item deemed nonrecurring, special or extraordinary may be excluded from net income for purposes of the SEET.[353] He testified that each has a common, everyday meaning: (1) "non-recurring" means an item that does not happen regularly or happens one time; (2) "special"

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[348] Rehearing Tr. Vol. V, p. 1166 (Finnigan Cross).

[349] Mikkelsen Rehearing Rebuttal Test., p. 21.

[350] A proposition to which OEC/EDF witness Finnigan agreed. *See* Rehearing Tr. Vol. V, pp. 1164-65 (Finnigan Cross).

[351] Mikkelsen Rehearing Rebuttal Test., pp. 21-22.

[352] Rehearing Tr. Vol. V, pp. 1107-08. Mr. Kahal had not read the SEET statute or any Commission orders in SEET cases. *Id.*, pp. 1105-07 (Kahal Cross).

[353] Rehearing Tr. Vol. IV, pp. 919-21 (Duann Cross).

means one-of-a-kind or not ordinary; and (3) "extraordinary" means out-of-the-ordinary, not ordinary or unusual.[354] Using Dr. Duann's own words, the Commission can and should exclude Rider RRS revenues and costs from the SEET calculation under any of the three options, either because these items will not happen regularly, are not ordinary, or are unusual.

OCC/NOAC rely on Dr. Duann's testimony for the proposition that only one-time-only events may be excluded from the SEET calculation.[355] But Dr. Duann's testimony on this point lacks credibility. His self-created limit writes out of the Commission's test any special or extraordinary items. Under the Commission's test, any special or extraordinary items, even if they recur year after year, should be excluded from the SEET calculation.

Importantly, Dr. Duann has consistently opposed SEET exclusions the Commission has approved. He opposed exclusion of the margin from off-system sales in AEP's SEET proceedings, but the Commission authorized the exclusion.[356] He opposed the Companies' exclusion of deferred carrying charges, but the Commission authorized the exclusion.[357] He opposes exclusion of any recurring item as purportedly contrary to Commission precedent, yet is aware the Commission has authorized Duke Energy Ohio to exclude from the SEET calculation,

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[354] Rehearing Tr. Vol. IV, pp. 924-27 (Duann Cross).

[355] OCC/NOAC Rehearing Brief, p. 31.

[356] Rehearing Tr. Vol. IV, pp. 914-15 (Duann Cross); *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Administration of the Significantly Excessive Earnings Test under Section 4928.143(F), Revised Code, and Rule 4901:1-35-10, Ohio Administrative Code*, Case No. 10-1261-EL-UNC, Opinion and Order, pp. 28, 29-30 (Jan. 11, 2011).

[357] Rehearing Tr. Vol. IV, pp. 915-16 (Duann Cross); ESP III Order, pp. 47-48.

every year, mark-to-market adjustments.[358] Thus, OCC/NOAC's reliance on Dr. Duann's testimony is misplaced.

OCC/NOAC also argue that Rider RRS revenues should be included in the SEET calculation because the revenues from AEP's RSR and DP&L's SSR are included.[359] However, revenue from the AEP and DP&L riders in question were included in the SEET calculation by stipulation without consideration for whether those revenues are nonrecurring, special or extraordinary items. The RSR and SSR were also simple revenue collection mechanisms intended to boost the earnings of AEP and DP&L, respectively.[360] They did not function as a hedge, with the risk of substantial credits, as does Rider RRS.[361] Indeed, AEP and DP&L knew how much revenue they would receive from their riders during each year of their ESPs. In addition, the RSR and SSR were specifically designed to be symmetrical for purposes of the SEET – both had upper and lower ROE boundaries and a SEET cap that ensured AEP and DP&L would have an earned return between 7 percent and 11-12 percent.[362] RSR and SSR

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[358] Rehearing Direct Testimony of Daniel J. Duann, pp. 8-9 ("Duann Rehearing Test."); Rehearing Tr. Vol. IV, p. 917 (Duann Cross); *In the Matter of Application of Duke Energy Ohio, Inc. for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan, Accounting Modifications, and Tariffs for Generation Service*, Case No. 11-3549-EL-SSO, Opinion and Order, pp. 35, 48 (Nov. 22, 2011).

[359] OCC/NOAC Rehearing Brief, p. 31.

[360] *See* Rehearing Tr. Vol. IV, p. 932 (Dr. Duann agreeing that RSR and SSR are revenue collection mechanisms).

[361] Incredibly, Dr. Duann testified that the RSR and SSR were hedges. Rehearing Tr. Vol. IV, p. 934.

[362] *DP&L ESP2* Order, p. 26 (setting SSR so that DP&L will achieve an actual ROE in the 7-11% range, with a SEET cap of 12%); *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan,* Case No. 11-346-EL-SSO, Opinion and Order, p. 33 (Dec. 14, 2011) (setting RSR for AEP to establish a reasonable revenue target that would allow AEP the opportunity to earn within the range of 7-11%); *See* Rehearing Tr. Vol. IV, p. 941 (Dr. Duann agreeing that Commission set the revenue requirement for the RSR and SSR riders by targeting a reasonable range of equity for AEP and DP&L).

revenues were included in the SEET calculation specifically because they were intended to mitigate financial harm. As discussed above, application of the SEET to Rider RRS revenues would be unfairly and unreasonably asymmetrical.

Therefore, the Commission should change its March 31 Order on rehearing to incorporate the Proposal and thereby preserve all benefits of Stipulated ESP IV relied on by the Commission in its March 31 Order.

V. A PROPERLY DESIGNED RIDER DMR MAY BENEFIT CUSTOMERS.

The Proposal is the most beneficial modification to ESP IV to address the issues raised by the Companies' Application for Rehearing regarding Rider RRS. Staff's proposed Rider DMR would provide some different, yet important benefits by providing credit support for the Companies' numerous capital needs including, most prominently, modernizing the distribution grid. As demonstrated below, intervenors' attempts to argue that Rider DMR is not allowed under R.C. 4928.143(B)(2) go astray.[363] Being a single issue, incentive rate relating to distribution service, Rider DMR is authorized under R.C. 4928.143(B)(2)(h). Given Rider DMR's requirement that FirstEnergy Corp. maintain its headquarters and nexus of operations in Akron, Ohio, the rider provides economic benefits to the Companies' customers and thus is permissible under R.C. 4928.143(B)(2)(i). Further, there should be little question that additional revenues from Rider DMR will assist the Companies in maintaining investment grade credit ratings. The record shows that the Companies' ability to maintain such ratings is precarious, with ratings agencies specifically calling on regulatory authorities for support. Intervenors'

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[363] *See also* n. 28, *supra.*

arguments that Rider DMR should be rejected because there is no "guarantee" that Rider DMR would, in fact, assure investment grade credit ratings are impractical and illogical. The unrebutted evidence is that the Companies and FirstEnergy Corp. have been addressing and will continue to address the need to strengthen their credit ratings. The Commission should properly support a sound financial footing as the Companies face numerous capital-intensive needs, all for the ultimate benefit of customers.

Similarly, claims that Rider DMR would be a "bail out" or transition revenues rest on unsupported speculation, contrary to the evidence. As Company witness Mikkelsen stated on countless occasions, the Companies intend to use the revenues from Rider DMR for the Companies' capital and credit needs. These needs all relate to their distribution business.

Intervenors' contentions that Rider DMR's headquarters requirement is worthless also founder on the facts. The unrebutted evidence demonstrates having FirstEnergy Corp.'s headquarters and nexus of operations in Akron has an annual economic impact of $568 million. These parties also fail to acknowledge that the headquarters requirement is necessary if Rider DMR is adopted. The Companies' current headquarters commitment lasts only so long as Rider RRS is in effect.

Further, with Rider DMR, ESP IV is more favorable in the aggregate than an MRO. As a distribution-related rider, it is at worst quantitatively neutral for purposes of the ESP v. MRO test. Rider DMR changes none of the specific qualitative benefits relied upon by the Commission in its March 31 Order.

Attacks on the Companies' proposed modifications to Rider DMR also fail. Each of the proposed modifications better position Rider DMR to achieve the Staff's stated objective.

Accordingly, if the Commission does not accept the Proposal, Rider DMR as modified by the Companies, could be an appropriate addition to ESP IV as approved by the Commission.

A. Rider DMR Is Authorized Under R.C. 4928.143(B)(2).

1. Rider DMR is authorized under R.C. 4928.143(B)(2)(h).

The Companies' Post-Rehearing Brief demonstrated how Rider DMR is suitable for inclusion in ESP IV under R.C. 4928.143(B)(2)(h), which authorizes any provisions in an ESP "regarding the utility's distribution service." Those provisions may include, but are not limited to, provisions regarding single-issue ratemaking or any incentive ratemaking.[364]

The explanation of how Rider DMR meets these criteria is simple and straightforward. Rider DMR is a provision regarding distribution infrastructure and modernization. It is intended to jumpstart the Companies' modernization of their distribution grids, by facilitating the Companies' access to the capital required for distribution grid modernization on more favorable terms.[365] Also, access to the required capital on more favorable terms will reduce the Companies' future costs of providing distribution service.[366] In addition, Rider DMR provides single-issue or incentive ratemaking. It deals with a specific issue – credit support – and is intended to incentivize the Companies to be better able to obtain capital for purposes of grid modernization.[367] Indeed, OCC witness Mr. Williams agrees that provisions related to grid modernization are permissible in an ESP.[368]

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[364] R.C. 4928.143(B)(2)(h). *See* Companies' Rehearing Brief, p. 25. *But see* n. 28, *supra.*

[365] Mikkelsen Rehearing Rebuttal Test., pp. 5-6.

[366] Mikkelsen Rehearing Rebuttal Test., pp. 8-9.

[367] Mikkelsen Rehearing Rebuttal Test., p. 5. Rider DMR is similar to the Companies' Delivery Service Improvement Rider ("Rider DSI") which was approved by the Commission in the Companies' ESP I under R.C.

Notwithstanding the obvious relationships among Rider DMR, modernization of distribution infrastructure and distribution service, some intervenors maintain that Rider DMR has "nothing to do" with distribution service.[369] According to these parties, Rider DMR is provided solely for credit support.[370] Presumably recognizing the absurdity of these absolute positions, these parties qualify their arguments regarding how Rider DMR does not meet the requirements of R.C. 4928.143(B)(2)(h). For instance, P3/EPSA contend more narrowly that "Rider DMR . . . is not related to any *cost recovery* of distribution services."[371] Similarly, OCC/NOAC shift to arguing 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."[372] However, relating to "cost recovery of distribution services," or being the rider's "main purpose," is not the test for inclusion in an ESP under R.C. 4928.143(B)(2)(h). The ESP provision need only "regard[] the utility's distribution service." Rider DMR meets that definition.

To support their arguments that Rider DMR has nothing to do with distribution service, P3/EPSA and Sierra Club cite to the responses of Staff and Company witnesses on cross-

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4928.143(B)(2)(h). Rider DSI also provided annual revenue to support the delivery of distribution services without being tied to specific distribution investments. *See* Case No. 08-935-EL-SSO, Opinion and Order, pp. 11-12, 17 (Mar. 25, 2009). Rider DSI was also excluded from the SEET calculation. *Id.* at 12.

368 Direct Testimony of James D. Williams, p. 16 (Dec. 22, 2014).

369 Sierra Club Rehearing Brief, p. 44. *See also, e.g.,* P3/EPSA Rehearing Brief, p. 51; Direct Rehearing Brief, pp. 11-15; OCC/NOAC Rehearing Brief, pp. 34-36.

370 *See, e.g.,* P3/EPSA Rehearing Brief, p. 52; Sierra Club Rehearing Brief, p. 44. *See also* OCC/NOAC Rehearing Brief, pp. 34-36 (arguing that Rider DMR does not count as a "distribution infrastructure … rider" for the purposes of 4928.143 because its sole purpose it to provide credit support to the Companies.)

371 P3/EPSA Rehearing Brief, p. 52 (emphasis added).

372 OCC/NOAC Rehearing Brief, p. 35 (emphasis added).

examination recognizing that credit support is an element of Rider DMR.[373] However, these parties focus on the testimony of witnesses who were unfamiliar with the purpose of Rider DMR; these parties largely avoid discussing the testimony of Dr. Choueiki, the Staff witness who actually testified regarding the purpose of the Rider DMR. Thus, these parties focus on the testimony of Staff witness Buckley, who explained at the outset that "I don't actually propose the rider. I'm testifying to the amount."[374] Or they cite the testimony of Staff witness Turkenton, who explained that her understanding that Rider DMR is credit support for the Companies was "based on Dr. Choueiki's testimony and Mr. Buckley's testimony."[375]

Only Sierra Club makes any mention of Dr. Choueiki's testimony regarding the purpose of Rider DMR. Sierra Club, however, selectively and partially quotes Dr. Choueiki's response to questioning about whether Rider DMR's credit support is necessary to help the Companies and FirstEnergy Corp. maintain an investment grade rating.[376] In fact, when Sierra Club quotes Dr. Choueiki as saying Rider DMR is "necessary to provide credit support to the companies and to FirstEnergy Corp., not to modernizing the grid,"[377] Sierra Club conspicuously omits the first part of Dr. Choueiki's response, "[a]ccording to Mr. Buckley's testimony . . . ." Further, Sierra Club omits the context of the line of cross-examination, which explored the entity to which credit support would be provided. In response to those questions, Dr. Choueiki even cautioned that

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[373] P3/EPSA Rehearing Brief, pp. 51-52; OCC/NOAC Rehearing Brief, p. 35; Sierra Club Rehearing Brief, pp. 44-45.

[374] Rehearing Tr. Vol. II, p. 420 (Buckley Cross).

[375] Rehearing Tr. Vol. II, p. 426 (Buckley Cross).

[376] Sierra Club Rehearing Brief, p. 44 (citing Rehearing Tr. Vol. IV, p. 960).

[377] Sierra Club Rehearing Brief, p. 44.

"[t]hose would have been good questions, and I thought Mr. Buckley responded to all these yesterday. He is the expert on the financial matters."[378]

Dr. Choueiki was the witness who in fact made the Rider DMR recommendation, and therefore he was the appropriate witness to discuss whether the rider relates to distribution service. When asked to discuss the Rider DMR recommendation in his own testimony, Dr. Choueiki made clear that Rider DMR relates to distribution service:

> A. If you look at page 15, starting on line 14, it's not only recommending the new rider be formed and 131 be collected in it, but the Commission should direct -- I mean, you have got to take the two paragraphs together; you can't just take the first one and not the second one. So accordingly, the Commission should direct the companies to invest in modernization -- modernizing the distribution grid. Those are together, not separate.[379]

When pressed further, Dr. Choueiki maintained that distribution investment is part of Staff's Rider DMR recommendation:

> Q. Okay. So, in that respect, the recovery under the distribution modernization rider, is not tied to distribution investment, correct?

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[378] Rehearing Tr. Vol. IV, p. 960 (Choueiki Cross). Similarly, Direct omits part of Dr. Choueiki's response to questions regarding Rider DMR and Rider AMI. According to Direct's brief, Dr. Choueiki testified that "[t]hese riders 'would be for different purposes. One of them is for credit support and one of them for modernization…." Direct Rehearing Brief, p. 12 (citing Rehearing Tr. Vol. V, p. 1229). However, Direct Energy omitted the remainder of Dr. Choueiki's answer, "at a lower interest rate than otherwise with more favorable conditions." Rehearing Tr. Vol. V, p. 1229. Had Direct quoted the entirety of Dr. Choueiki's answer, the relationship between grid modernization and Rider DMR's credit support would be clear:

> A. You have to look at them together. According to Mr. Buckley, it may be more expensive not to get the credit support and then to have to pay a higher interest rate and have more unfavorable terms and conditions from creditors on the company. So, you know, you have to take them and understand what each one of them is for. One of them is so that the companies will get more favorable, according to Mr. Buckley, terms and conditions and a lower interest rate than otherwise.

Rehearing Tr. Vol. V, p. 1230 (Choueiki Cross). Thus, Rider DMR enables distribution grid modernization at a lower cost to customers.

[379] Rehearing Tr. Vol. IV, p. 959 (Choueiki Cross).

> A. That's not staff's position. That's your assumption. Staff's position is the Commission will -- we recommend the Commission authorize the collection of 131 and the Commission directs the company to initiate investment. So those are together. Not -- we've had that discussion already. They have to be together.[380]

Any lingering doubts that Rider DMR relates to distribution service should have been put to rest by Dr. Choueiki's explanation of the ambitious goal of Staff's recommendation:

> Q. So you don't know if there will be a specific level of funding mandated by the Commission in that proceeding; is that correct?
>
> A. Our recommendation is for the grid to be modernized and to become one of the most intelligent grids in the current industry. We would like Ohio, the entire state of Ohio, with all of its distribution electric utilities, to develop a modernization grid that is self-healing, that is open, that is available for retailers and consumers and third-party providers to, as I state in my testimony, interact and transact and offer all sorts of services to consumers and empower consumers in the state of Ohio.
>
> Q. Thank you.
>
> In -- Dr. Choueiki, you're referring to page 15 of your rehearing testimony, starting on line 14; is that correct?
>
> A. Yes.
>
> Q. And is it staff's official recommendation that the Commission direct the companies to invest in modernizing the distribution grid?
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> A. It is our -- in our recommendation, yes.[381]

P3/EPSA even attempt to include Company witness Mikkelsen among the witnesses who allegedly acknowledged that Rider DMR is not a provision regarding the Companies'

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[380] Rehearing Tr. Vol. IV, pp. 1020-21 (Choueiki Cross). When asked yet a third time, Dr. Choueiki stated, "The objective is to modernize the distribution grid in Ohio. That's our objective." Rehearing Tr. Vol. IV, p. 1029 (Choueiki Cross).

[381] Rehearing Tr. Vol. IV, pp. 967-68 (Choueiki Cross).

distribution service. However, P3/EPSA do not quote any of Ms. Mikkelsen's responses to questions regarding the objectives of Rider DMR. Rather, P3/EPSA quote Ms. Mikkelsen's response to a question regarding differences between Rider DMR and distribution rate cases filed by FirstEnergy Corp.'s utilities outside of Ohio.[382] Ms. Mikkelsen's responses to questions *regarding the purpose of Rider DMR* show a clear relationship between Rider DMR and distribution service:

> Q. Now, on page 5, lines 5 through 6, you state that "a properly designed Rider DMR would benefit the public." Do you see that?
>
> A. Yes.
>
> Q. And the basis of your statement is that rider DMR would provide credit support to the companies to put them in a position to jump-start grid modernization initiatives, correct?
>
> A. A properly-designed rider DMR would benefit the public by providing credit support, which would put the companies in a position to jump-start investment in the distribution grid modernization initiatives.[383]

Despite the clear nexus between Rider DMR and the Companies' distribution service, several parties argue that Rider DMR cannot be a provision regarding distribution service under R.C. 4928.143(B)(2)(h) absent some commitment or requirement that the dollars collected under Rider DMR will be spent on distribution.[384] While the Companies did not "commit" to use

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[382] P3/EPSA Rehearing Brief, p. 52 (quoting Rehearing Tr. Vol. X, p. 1645 (Mikkelsen Rebuttal Cross)).

[383] Rehearing Tr. Vol. X, pp. 1696-97 (Mikkelsen Rebuttal Cross).

[384] *See, e.g.*, OCC/NOAC Rehearing Brief, pp. 12, 36; OMAEG Rehearing Brief, pp. 33-35; NOPEC Rehearing Brief, p. 18; Sierra Club Rehearing Brief, pp. 50-51; *see also* CMSD Rehearing Brief, p. 12 (Rider DMR revenues will not actually be used to jumpstart the grid modernization program); P3/EPSA Rehearing Brief, p. 52 (The mere hope that monies collected under Rider DMR will be spent on distribution infrastructure is not enough to make Rider DMR a distribution charge); OEC/EDF Rehearing Brief, pp. 27-28 (Rider DMR is not suitable for inclusion in an ESP under R.C. 4928.143(B)(2)(h) because, among other reasons, there is no mandate that Rider DMR Revenues

Rider DMR revenues exclusively for distribution grid modernization initiatives, Company witness Mikkelsen explained that the Companies intend to use capital obtained through the credit support provided by Rider DMR revenues for distribution grid modernization, among other uses:

> Q. And the companies are not willing to commit to spend the revenues collected under rider DMR on distribution grid modernization initiatives, correct?
>
> A. It is the companies' intention to use the dollars collected in rider DMR for purposes within the companies' operations including grid modernization, as well as other things, such as other activities associated with modernizing the company's grid, perhaps for debt that is maturing over the term, potentially for funding of pensions, by way of example.[385]

As a result, the relationship between Rider DMR and grid modernization is undeniable.[386] The parties arguing that Rider DMR's purpose is solely to provide credit support refuse to acknowledge that credit support is a means to two distribution service ends: (1) jumpstarting grid modernization by facilitating the Companies' access to capital on more favorable terms; and (2) reducing the Companies' future costs of providing distribution service.

Some intervenors argue that Rider DMR cannot meet the requirements of R.C. 4928.143(B)(2)(h) because there has been no analysis of the reliability of the Companies' distribution system and no showing that customers' and the Companies' expectations are

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be invested in smart grid initiatives); RESA Rehearing Brief, pp. 4-5 (Neither Staff nor the Companies "guarantee" that any monies recovered under Rider DMR, regardless of how it is designed, will be spent on grid modernization).

[385] Rehearing Tr. Vol. X, p. 1607 (Mikkelsen Rebuttal Cross).

[386] Indeed, the other possible uses for capital obtained through credit support from Rider DMR revenues – refinancing debt or funding pensions – are also legitimate distribution related outlays.

aligned.[387] To the contrary, at the outset of this proceeding, Company witness Mikkelsen testified on this very topic.[388] Ms. Mikkelsen explained that the Companies' actual reliability performance has consistently outperformed their reliability standards from 2010 through 2013, and that the results of a 2013 customer perception survey demonstrated customers' perception that distribution reliability is improving and that they are being interrupted less frequently than in the past.[389] Staff witness Nicodemus agreed that the Companies have met the requirements of R.C. 4928.143(B)(2)(h) because "the Companies' reliability expectations are consistent with those of their customers."[390] Accordingly, the record already demonstrates the reliability of the Companies' distribution system and that customers' and the Companies' expectations are aligned. There is no requirement that these analyses have to be repeated for the specific purpose of approving Rider DMR. Certainly, no intervenor has pointed to any reason, let alone any authority, for requiring such a repetitious undertaking.

2. Rider DMR is authorized under R.C. 4928.143(B)(2)(i).

Rider DMR includes as an economic development and job retention component by including a condition that FirstEnergy Corp. must keep its corporate headquarters and nexus of operations in Akron, Ohio, for the entire term of ESP IV or else discontinue Rider DMR and possibly refund all Rider DMR revenues to customers (the "Headquarters Condition").[391] Staff

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[387] *See* OEC/EDF Rehearing Brief, p. 28; OCC/NOAC Rehearing Brief, pp. 36-37; Sierra Club Rehearing Brief, p. 50.

[388] Company Ex. 7 (Mikkelsen Direct Testimony), pp. 9-11.

[389] Company Ex. 7 (Mikkelsen Direct Testimony), pp. 9-11.

[390] Direct Testimony of Jacob Nicodemus, pp. 6-10 (Sept. 18, 2015).

[391] Buckley Rehearing Test., p. 7; Rehearing Tr. Vol. III, p. 580 (Buckley Cross).

also proposes that Rider DMR should cease if FirstEnergy Corp. or the Companies announce they are undergoing a change in ownership.[392] Company witness Mikkelsen recommended that the economic value to the state of Ohio of the Headquarters Condition should be reflected in a higher Rider DMR value.[393] To the extent the Commission includes the Headquarters Condition in Rider DMR, as proposed by Staff or as modified by the Companies, the rider would be authorized by R.C. 4928.143(B)(2)(i).

The Headquarters Condition is a job retention program because "it provides jobs. With a multiplier effect of … money being spent, it really helps invigorate the Akron area and the State of Ohio in general."[394] The Headquarters Condition also supports the state of Ohio through maintaining income and property taxes.[395] Company witness Murley testified that the Headquarters Condition has significant economic benefits for the region.[396] In fact, this incentive to maintain FirstEnergy Corp.'s corporate headquarters in Akron has an estimated annual economic impact of $568 million on Ohio's economy.[397]

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[392] Buckley Rehearing Test., p. 7. Mr. Buckley in his testimony refers to "FE or its subsidiaries," but he made clear at hearing that he means FirstEnergy Corp., Ohio Edison, CEI and Toledo Edison. Rehearing Tr. Vol. III, p. 582 (Buckley Cross).

[393] Mikkelsen Rehearing Rebuttal Test., p. 14.

[394] Rehearing Tr. Vol. III, p. 694 (Buckley Cross). *See* Rehearing Tr. Vol. V, p. 1256 (Staff witness Choueiki stating that the headquarters condition "is an economic positive").

[395] Rehearing Tr. Vol. III, p. 679 (Buckley Cross).

[396] Murley Rehearing Rebuttal Test, pp. 3-6; Mikkelsen Rehearing Rebuttal Test., p. 13.

[397] Murley Rehearing Rebuttal Test., pp. 3-4. Allegations that Rider DMR might have negative economic impact on the state of Ohio are unsupported by expert testimony. *See* OMAEG Rehearing Brief, pp. 41-42 (relying on anecdotal opinion of one business). They also are irrelevant: all economic development and job retention programs have costs, such as taxes paid to the State of Ohio.

Sierra Club argues that Rider DMR cannot be an economic development and job retention program because there is no reason to believe that the corporate headquarters and nexus of operations are at risk of leaving Akron.[398] In determining whether certain provisions of an ESP qualify under R.C. 4928.143(B)(2)(i), the Commission has never required proof a company will shut down or move out-of-state "but for" the economic development program. Rather, as long as a program maintains employment or retains industry, they are (and have been) properly considered to be economic development programs.

For example, the economic development programs in the Companies' ESP I included Rider ELR. [399] That rider was approved as an economic development program without any proof that all Rider ELR customers will cease operations without it.[400] Similarly, in that ESP, the Companies' $25 million economic development contributions to various projects did not require proof that businesses would cease operations without those contributions.[401] The same is true of the economic development programs approved for the first time in the Companies' ESP II.[402] The credits in Rider EDR to help domestic automakers and provide funding to the Cleveland Clinic could not have been approved if the Companies had to demonstrate affirmatively as a precondition of the Commission's approval of Rider EDR that the automakers and the Clinic would have left the state but for those credits.

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[398] Sierra Club Rehearing Brief, pp. 52-54.

[399] *See* ESP I Order, pp. 13-14.

[400] *See*ESP I Order, p. 10.

[401] *See* ESP I Order, p. 14.

[402] *See* ESP II Order, p. 27.

The Commission's treatment of economic development programs in these prior ESPs is consistent with R.C. 4928.143(B)(2)(i). There is no precondition to show a "but for" link that applies to economic development programs approved under that statute.

Sierra Club also ignores that the Headquarters Condition is not simply a ***commitment*** to maintain the corporate headquarters in Akron;[403] instead, it is a ***condition*** that uses the threat of the discontinuation of the rider – and possibly hundreds of millions of dollars in refunds issued by the Companies – to incentivize FirstEnergy Corp. to maintain most of its employees (i.e., the nexus of its operations) in the Akron area. Moreover, regardless of FirstEnergy Corp.'s present intent, the jobs at FirstEnergy Corp.'s headquarters are potentially at risk. Ms. Mikkelsen testified:

> What I know from experience is that as a corporation's financial condition deteriorates, they are at increased risk of a change of control. And when a change of control occurs, the headquarters would no longer and the nexus of operations would no longer remain in Akron, Ohio.[404]

The Headquarters Condition is an economic development and job retention program because it leverages the base Rider DMR revenue amount to the State's advantage. It constitutes a program of the Companies (as opposed to FirstEnergy Corp.) because the continuation of Rider

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[403] *See* Sierra Club Rehearing Brief, p. 54 (Companies' position is that they can collect money "simply because their parent company is based in Akron."). *See also* OMAEG Rehearing Brief, p. 42 (noting that Companies committed to maintain corporate headquarters and nexus of operations in Akron in Third Supplemental Stipulation).

[404] Rehearing Tr. Vol. X, p. 1715 (Mikkelsen Rebuttal Cross). The fact that FirstEnergy Corp. has a lease for its headquarters building in Akron is of little consequence, since the primary value at issue is FirstEnergy's people, not its offices. *See* Sierra Club Rehearing Brief, p. 52 (noting lease ending June 2025); OMAEG Rehearing Brief, p. 42 (same). A lease does not prevent the nexus of operations from being moved out of the Akron area.

DMR and possibly the refund condition is imposed directly on the Companies.[405] Indeed, an entity looking to acquire FirstEnergy Corp. and move its nexus of operations would assign independent value to the Headquarters Condition as an acquisition cost. All else equal, this makes it more likely that the headquarters and nexus of operations remain in Akron throughout the term of ESP IV.

OCC/NOAC insist that Rider DMR cannot be approved under R.C. 4928.143(B)(2)(i) because the costs of the economic development program have not been specified in the record.[406] According to OCC/NOAC, the "focus of R.C. 4928.143(B)(2)(i) is costs and costs alone."[407] R.C. 4928.143 authorizes "[p]rovisions under which the electric distribution utility *may* implement economic development, job retention, and energy efficiency programs."[408] It also provides that costs *may* be allocated across all customer classes.[409] The statute does not *mandate* that the program provisions be limited to cost recovery alone.[410] As the Ohio Supreme Court has noted, the "ESP statute permits numerous rate components, R.C. 4928.143(B)(2), but says very little about rate calculation."[411] EDUs have discretion to include in their ESPs – and the Commission has discretion to approve – provisions that implement economic development, job

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[405] *See* OCC/NOAC Rehearing Brief, pp. 75-76 (incorrectly arguing that the Headquarters Condition is an economic development program of FirstEnergy Corp. and not the Companies).

[406] OCC/NOAC Rehearing Brief, pp. 76-77.

[407] OCC/NOAC Rehearing Brief, p. 76.

[408] R.C. 4928.143(B)(2)(i) (emphasis added).

[409] *Id.*

[410] *See generally*, *In re Columbus Southern Power Co.*, 138 Ohio St.3d 448, 2014-Ohio-462, 8 N.E.3d 863, ¶ 38 (Court rejecting "invitation to read an economic-need policy into the language of" R.C. 4928.143(B)(2)(d) when it is not apparent in language used.).

[411] *In re Columbus Southern Power Co*., 138 Ohio St.3d 448, 2014-Ohio-462, 8 N.E.3d 863, ¶ 5.

retention and energy efficiency programs in the state based on the value of those programs to the state. If the Commission agrees that the Headquarters Condition offers economic development and job retention benefits, the Commission has the authority to approve an appropriate increase in the Rider DMR amount that reflects the value of that commitment.

Sierra Club complains that the Companies have not complied with Rule 4901:1-35-03(C)(9)(h) by describing Rider DMR as an economic development program in their ESP IV Application filed August 4, 2014.[412] Yet Rider DMR is Staff's proposal offered on rehearing as an alternative to Rider RRS. Because the Companies did not propose Rider DMR in their ESP IV Application, Rule 4901:1-35-03(C)(9)(h) is inapplicable.

B. A Properly Designed Rider DMR Will Provide Credit Support to the Companies to Jumpstart Grid Modernization Efforts (And Intervenors' Claims Otherwise Are Misplaced).

1. The Companies need the credit support that a properly designed Rider DMR would provide.

The purpose of Rider DMR is to jumpstart distribution grid modernization by enabling the Companies to access capital on better terms. The Companies discussed in their Post-Rehearing Brief that a properly designed Rider DMR can assist the Companies in doing so.[413] Grid modernization requires significant capital investments. The Companies' access to such capital and its cost are dependent on the Companies' credit ratings. The credit ratings are, in turn, dependent on, among other things, the Companies' financial health and particularly certain credit metrics which, broadly, reflect cash flows relative to debt. Thus, increased revenues

[412] Sierra Club Rehearing Brief, p. 55.

[413] Companies' Rehearing Brief, pp. 26-37.

through Rider DMR would serve, in turn, to: (1) improve the Companies' credit metrics; (2) strengthen the Companies' credit ratings; (3) preserve the Companies' ability to obtain capital at reasonable cost (among other benefits to an investment grade credit rating); and (4) allow the Companies' to implement capital-intensive programs, like grid modernization.

Yet, Intervenors wrongly claim that the Companies do not require credit support. These claims contradict the record evidence.

The evidence of record shows that the credit ratings of the Companies should be a cause for concern. Moody's Investor Services ("Moody's") has assigned both CEI and Toledo Edison a Baa3 rating, while Ohio Edison is rated Baa1.[414] As Ms. Mikkelsen testified at hearing:

> Two of the companies [CEI and Toledo Edison] are rated one notch above non-investment grade. One of the companies [Ohio Edison] is three notches above non-investment grade. Under S&P's, they have a negative outlook. And both, under a parent at Moody's, and again a parent at S&P, they are on negative outlook. That suggests to me that these companies are not financially stable or strong.[415]

Further, it is undisputed that the rating of FirstEnergy Corp. influences the Company's ratings. Under S&P's "family approach" to ratings, if FirstEnergy Corp. were downgraded, the Companies would also be downgraded.[416] Although Moody's rates each legal entity

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[414] Mikkelsen Rehearing Rebuttal Test., p. 6.

[415] Rehearing Tr. Vol. X, p. 1716 (Mikkelsen Rebuttal Cross). *See also id*., p. 1611; Mikkelsen Rehearing Rebuttal Test., pp. 6-7.

[416] Buckley Rehearing Test., p. 6; Rehearing Tr. Vol. I, pp. 133-134 (Mikkelsen Cross).

individually, an investment grade parent is credit positive to the subsidiaries, and a non-investment grade parent is credit negative to the subsidiaries.[417]

The ratings agencies have left little doubt that FirstEnergy Corp. is at risk of falling to a non-investment grade rating. Indeed, both Moody's and S&P have recently taken negative outlooks on FirstEnergy Corp. and expressed, in no uncertain terms, concern with its financial health going forward. On April 28, 2016, S&P revised its outlook on FirstEnergy to "negative" from "stable," noting that "FirstEnergy [Corp.] has minimal cushion at its present rating level" and that "[t]he negative outlook reflects the increased probability that we could downgrade FirstEnergy [Corp.] and its subsidiaries."[418] One factor leading to a possible downgrade pointed to by S&P was a failure by the Commission to approve Rider RRS. That same day, Moody's took similar action, revising its outlook on FirstEnergy Corp. to negative and expressing that its outlook reflected its expectation that FirstEnergy Corp.'s "financial profile will no longer meet our expectations for the Baa3 rating."[419] More recently, on July 29, 2016, Moody's reaffirmed its negative outlook on FirstEnergy Corp.[420] Moody's has expressly cautioned, "a negative

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[417] Mikkelsen Rehearing Rebuttal Test., p. 7 n.7. Only Direct, while acknowledging the impact of a FirstEnergy Corp. downgrade on the Companies under S&P's family approach, attempts to argue that "the… Companies may still remain investment grade" under Moody's approach. Direct Rehearing Brief, p. 6 (quoting Company witness Mikkelsen). However, Direct, misleadingly omits the remainder of Ms. Mikkelsen's answer: "but there would be sort of a credit-negative shadow overcast on the companies which could create the circumstance contained in bullet one [of the Companies' response to DR-35 (Sierra Club Ex. 99): 'Constrained, limited, and speculative access to the capital markets']" (Rehearing Tr. Vol. I, p. 102 (Mikkelsen Cross). Given its inability to engage in an honest discussion of this issue, Direct's other outrageous assertions, e.g., that "regulation has been very good to [the Companies]," Direct Rehearing Brief, p. 5, cannot be taken seriously.

[418] Buckley Rehearing Test., Att. 3, p. 2.

[419] Direct Ex. 1, p. 4.

[420] P3/EPSA Ex. 21, p. 1 ("The Baa3 Issuer rating and negative outlook for FirstEnergy Corp. . . . remain unchanged.").

rating action may result if the PUCO rejects or materially modifies the PPA and alternative measures do not enable [FirstEnergy Corp.] to achieve an appropriate credit profile in a timely manner."[421]

In turn, the consequences of additional credit downgrades, especially to a non-investment grade rating, could be severe. A non-investment grade rating signals significant credit risk to the capital markets.[422] If this were to happen to the Companies, their access to capital would be limited to more restrictive terms and conditions – potentially including a pledge of security and more rigid financial covenants.[423] As a result of being forced to access capital from a less liquid market, at higher borrowing costs, the Companies' long-term cost of debt will rise.[424] Over time, the Companies would be forced to recover these long-term debt increases from customers in a distribution rate case.[425] During periods of a distribution rate freeze, such as the term of Stipulated ESP IV, the Companies will have less funds available to make the investments necessary to ensure the delivery of safe and reliable electric service, such as through grid modernization.[426] OEC/EDF acknowledge the harms that accompany a downgrade: "We do not dispute that if FirstEnergy Corp. falls below investment grade that [the Companies] will have difficulty obtaining financing in the capital markets."[427]

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[421] Direct Ex. 1, p. 3.

[422] Mikkelsen Rehearing Rebuttal Test., p. 7.

[423] Mikkelsen Rehearing Rebuttal Test., p. 7.

[424] Mikkelsen Rehearing Rebuttal Test., p. 7.

[425] Mikkelsen Rehearing Rebuttal Test., pp. 7-8.

[426] Mikkelsen Rehearing Rebuttal Test., p. 8.

[427] OEC/EDF Rehearing Brief, p. 22.

In contrast, OCC/NOAC argues that there has been no showing that "emergency rate relief" is needed.[428] At hearing, however, OCC's own witness Kahal admitted that because the Companies have been placed on a negative outlook, the credit rating agencies may downgrade the Companies' credit ratings even further within the next year.[429] He also admitted that a downgrade could occur if the Commission rejected or materially modified Rider RRS or if alternative measures did not enable the Companies to rehabilitate their credit profile in a timely manner.[430] Mr. Kahal agreed that a downgrade from Moody's could occur if the Companies failed to maintain a cash flow from operations pre-working capital ("CFO") to debt ratio of 14%.[431] In addition, he agreed that a regulated utility with a credit rating of Baa3, such as CEI and Toledo Edison, was "subpar".[432] He further admitted that if the Companies' credit rating fell below investment grade, it could lead to "sharp increases" in the cost of borrowing.[433] Mr. Kahal also acknowledged that he had previously testified before the Maryland Commission that, in the case of two utilities "at or close to the lowest rung of investment grade, . . . Any credit quality slippage could result in reduced access to capital and sharp increases in the cost of capital."[434]

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[428] OCC/NOAC Rehearing Brief, pp. 40-41. *See also* OEC/EDF Rehearing Brief, pp. 39-43 (the Companies' proper recourse, if they are truly in financial trouble, was to seek temporary emergency relief under R.C. 4909.16, but even if they had, the Companies would not be entitled to the relief they are now seeking through Rider DMR.)

[429] Rehearing Tr. Vol. VIII, pp. 1384-85 (Kahal Rebuttal Cross).

[430] Rehearing Tr. Vol. VIII, p. 1385 (Kahal Rebuttal Cross).

[431] Rehearing Tr. Vol. VIII, pp. 1385-86 (Kahal Rebuttal Cross).

[432] Rehearing Tr. Vol. VIII, p. 1386 (Kahal Rebuttal Cross).

[433] Rehearing Tr. Vol. VIII, pp. 1387-1388 (Kahal Rebuttal Cross).

[434] Rehearing Tr. Vol. VIII, p. 1390 (Kahal Rebuttal Cross); Company Ex. 202, p. 21. In discussing the potential impacts of a credit rating downgrade of FirstEnergy Corp., Direct makes claims regarding the treatment of interest

Likewise, Dynegy witness Ellis admitted that the Companies' ability to fund their grid modernization efforts is at least partially dependent on their credit rating.[435] Given the weight of the evidence regarding the negative consequences of a downgrade to non-investment grade, Sierra Club's and OMAEG's insistence on exact quantification of the adverse effects of a downgrade[436] are unfounded and unnecessary, if not unrealistic.

Notwithstanding the parties' general acknowledgement that the Companies need credit support, Sierra Club maintains that this may not be the case because the Companies failed to provide any forward looking projections showing the need for such support.[437] This insistence

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expenses that are just plain wrong. Without any record support, Direct asserts, "A decision to secure debt through the parent at a higher cost (because of the parent's lower credit rating) would necessarily flag a ratemaking disallowance for the difference between the interest rate actually secured and the rate the utilities could have obtained on their own." Direct Rehearing Brief, pp. 13-14. Direct appears to argue the following: (1) FirstEnergy Corp. will issue debt on behalf of the Companies, in lieu of the Companies issuing their own debt; (2) this debt will result in incrementally higher interest costs for the Companies; and (3) the incremental interest expense resulting from this debt will necessarily be disallowed for recovery from the Companies' ratepayers. In addition to being counter to basic business logic, these arguments are misinformed and ignore the corporate structure of FirstEnergy Corp. The premise of Direct's argument is that even though the Companies have a need to issue debt, FirstEnergy Corp. would issue the debt at a knowingly higher cost on the Companies' behalf. This is an illogical hypothetical. Aside from not providing any reason why such a circumstance would even occur, Direct ignores the fact that FirstEnergy Corp. is a separate entity from the Companies. As such, any debt issued by FirstEnergy Corp. remains at FirstEnergy Corp. and would not be recorded as debt of the Companies. It follows that any interest expense associated with debt issued at FirstEnergy Corp. would remain at FirstEnergy Corp. and would not be recorded as interest expense of the Companies. The ratemaking treatment of such expense, if any, would be determined by the Commission. Therefore, Direct's unfounded hypothetical and blind contention that certain interest expense would be disallowed for recovery from the Companies' ratepayers have no merit and should be rejected.

[435] Rehearing Tr. Vol. IV, p. 819 (Ellis Cross).

[436] OMAEG Rehearing Brief, p. 24; Sierra Club Rehearing Brief, p. 72.

[437] Sierra Club Rehearing Brief, p. 60. Sierra Club makes additional arguments regarding the Securities Exchange Commission's ("SEC") Regulation Fair Disclosure ("Regulation FD"). First, Sierra Club argues that the fact that such information is material nonpublic information ("MNPI") does not justify the Companies' failure to provide this information. Sierra Club contends that Regulation FD does not prohibit disclosure of MNPI; rather, it merely requires that such disclosure be made promptly disclosure to the public. Sierra Club Rehearing Brief, p. 62. However, Sierra Club ignores the risks that the Companies would incur by making such a disclosure to the public, which constitutes a forward-looking statement. Indeed, additional explanation of the forward looking projections on cross-examination would require additional disclosures to the public, compounding the risks significantly. Second, Sierra Club also argues Regulation FD permits disclosure where there is a nondisclosure agreement ("NDA").

on credit metric projections is rich coming from an intervenor that, for the better part of two years, has insisted that the Commission's decisions be guided by actual results rather than the Companies' projections.[438] Nevertheless, Sierra Club overlooks the forward-looking evidence of record that the Companies and FirstEnergy Corp. are on negative outlook. And, as Staff witness Buckley recognized, it is easier to forestall a credit downgrade than reverse one.[439]

Sierra Club also claims that there is a conflict between the Companies' justifications for modifications to proposed Rider DMR and the Companies' justifications for Rider RRS. According to Sierra Club, the Companies cannot argue that an appropriately designed Rider

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Sierra Club Rehearing Brief, p. 63. However, Sierra Club does not demonstrate that the Protective Agreement in this proceeding addresses the regulation's concerns. The terms of the Protective Agreement are in the record of this proceeding. The Protective Agreement is attached as Exhibit A to the Companies' *Memorandum Contra The Northeast Ohio Public Energy Council And The Office Of The Ohio Consumers' Counsel's Joint Motion to Compel*, which the Companies filed on November 7, 2014. The Protective Agreement was adopted with modifications in the Attorney Examiners' December 1, 2014 Entry. The Protective Agreement does not even mention Regulation FD, much less prohibit receiving parties' misuse of information in violation of Regulation FD. It certainly provides the Companies no protection from liability resulting from receiving parties' misuse of the information. Third, Sierra Club further argues that the Commission has held that disclosure of MNPI in a Commission proceeding "does not appear" to trigger Regulation FD's requirements, citing a procedural entry in *In the Matter of the Application of The Cincinnati Gas & Elec. Co.*, Case No. 05-0059-EL-AIR (Apr. 20, 2005). That case is distinguishable, however, because it involved an applicant for a rate increase who, unlike the Companies, filed the sensitive information with the Commission, and then requested confidential treatment so that the information would not be provided to third parties. Further, the case is a source of no comfort to the Companies, because the Attorney Examiner denied confidential treatment. Thus, the authority cited by Sierra Club hardly supports that MNPI is protected under Commission-approved NDAs.

Sierra Club also contends that the Companies' alleged failure to provide forward-looking credit metric information runs afoul of the Companies' ESP filing requirements. Sierra Club Rehearing Brief, p. 64. Again, Sierra Club overlooks that Rider DMR was not the Companies' proposal. As such, the Companies had no duty to include information related to this rider in any filing required under the Commission's rules.

[438] *See, e.g.,* Sierra Club Initial Brief, pp. 20, 22-23 (relying on actual energy prices to argue Company witness Rose's forecast was unreasonably high); *id.*, pp. 24-29 (relying on actual natural gas prices to argue Company witness Rose's forecast was unreasonably high); *id.*, pp. 30-34 (relying on actual capacity prices to argue Company witness Rose's forecast was unreasonably high); *id.*, p. 72 (contending EDU Team improperly relied on written plant cost projections and did not obtain written historical cost information until after the Term Sheet was final).

[439] Rehearing Tr. Vol. III, p. 601 (Buckley Cross).

DMR must be set at a higher level of revenue for eight years, while also maintaining that the Companies would be able to pay $561 million in net credits under Rider RRS.[440]

There is no conflict. Sierra Club omits that the Companies are projected to pay the Rider RRS credits only in the later years of ESP IV. In the early years, cash received under Rider RRS – projected to be around $400 million in the first three years – would provide credit support.[441]

Another problem with Sierra Club's attempt to portray a conflict is that the Companies' recommended adjustments to Rider DMR have no relationship to Rider RRS. Rider DMR is Staff's proposal. The Companies identified adjustments that are necessary if Rider DMR is to achieve the results and benefits that Staff intended. These results include "for the grid to be modernized and to become one of the most intelligent grids in the current industry,"[442] as well as for FirstEnergy Corp.'s headquarters and nexus of operations to remain in Akron for the full term of ESP IV.[443] To say that the grid modernization Staff envisions will be capital-intensive is an understatement. This goal will not be completed after only three years. At hearing, Ms. Mikkelsen explained that the grid modernization effort will combine with other significant expenditures planned over the term of ESP IV:

> I do know there are significant cash requirements that the companies will have over the entire term of rider DMR. The grid modernization business plan, pending before the Commission, includes – the exact dollars I believe are confidential, but significant dollars that will be spent throughout the term of the

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[440] Sierra Club Rehearing Brief, pp. 57-60.

[441] Rehearing Tr. Vol. I, p. 91 (Mikkelsen Cross).

[442] Rehearing Tr. Vol. IV, pp. 967-68 (Choueiki Cross). P3/EPSA's contention that the Companies can achieve grid modernization without Rider DMR overlooks Staff's objective.

[443] Buckley Rehearing Test., p. 7.

> ESP period and beyond, as well as 1 point – the companies have $1.1 billion in debt maturing over the period of ESP IV. And there are significant pension funding obligations. Currently, that number is, if the companies were to fund the pension fully as of the start of ESP IV, those commitments would be $750 million to a billion dollars with ongoing funding commitments thereafter. So there's significant cash needs over the term of the ESP.[444]

Thus, although Rider RRS and Rider DMR are designed to provide different benefits, the revenues that the Companies are projected to receive in the early years of Rider RRS will provide a credit support benefit, albeit at a lesser amount, similar to the benefit provided by Rider DMR. This is because the Companies project to receive less revenues under Rider RRS then they would under Rider DMR as modified by the Companies. Consequently, although Rider RRS could provide credit support for grid modernization, Rider DMR provides a potentially more expeditious path towards achieving grid modernization.

Some parties argue that Rider DMR may not be enough to prevent FirstEnergy Corp. and the Companies from falling below investment grade.[445] Putting aside the fact that at least two of these parties – OMAEG and the Sierra Club – contradict themselves by arguing that Rider DMR is unnecessary for the Companies to *avoid falling below investment grade*,[446] this argument falsely attributes to the Companies a position the Companies never took. The Companies have

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[444] Rehearing Tr. Vol. X, pp. 1623-25 (Mikkelsen Rebuttal Cross). *See also id.*, p. 1761 (discussing $750 million to $1 billion pension obligation).

[445] CMSD Rehearing Brief, pp. 17-19; OMAEG Rehearing Brief, pp. 37-38; Sierra Club Rehearing Brief, pp. 71-74.

[446] *See, e.g.,* OMAEG Rehearing Brief, p. 37 ("[t]he Companies and Staff have failed to provide any evidence to show that an extraordinary measure, such as a subsidy in the form of Rider DMR is needed to address FirstEnergy Corp., or its subsidiaries', credit ratings."); Sierra Club Rehearing Brief, p. 39 ("a purported cash flow from operations ('CFO') to debt shortfall at FirstEnergy Corp."); *id.*, pp. 56-57 ("to address alleged credit metric and financial shortcomings about which no forward-looking data has been provided"); *id.*, p. 59 (suggesting "they are wildly inflating what they claim to need under the DMR").

explained, time and again, that a properly constructed Rider DMR, *along with actions taken by the Companies and by FirstEnergy Corp. as a whole*, should avert a credit rating downgrade, by collectively providing the improvement the rating agencies want. There is no dispute that more than Rider DMR is needed to avert a credit rating downgrade. That is why for the last several years FirstEnergy Corp. implemented numerous aggressive corporate-wide initiatives described by Company witness Mikkelsen.[447]

Sierra Club further complains that there is no assurance the Companies or FirstEnergy Corp. can stave off a downgrade given that there is "no plan or strategy" for how any of these entities intend to do that.[448] Sierra Club particularly relies on a mischaracterization of the record in which, by Sierra Club's telling, Ms. Mikkelsen testified that she "had not seen any written plan for FirstEnergy Corp. to achieve the target 15% CFO to debt level."[449] In fact, her testimony was as follows:

> Q. And you have not seen any written plan from FirstEnergy Corp. on how it would get to a 15-percent CFO to debt level, correct?
>
> A. While I haven't seen a written plan specifically designed to achieve 15 percent for CFO to debt, I am aware of a number of actions that have been taken and continue to be taken within the FirstEnergy Corporation in order to support the credit metrics of the companies as well as FirstEnergy Corp.[450]

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[447] Mikkelsen Rehearing Rebuttal Test., pp. 17-18. Given these corporate-wide initiatives have not succeeded in staving off a negative outlook, P3/EPSA's argument that they constitute "other means of generating cash that may support maintaining investment-grade credit ratings" and make Rider DMR unnecessary (P3/EPSA Rehearing Brief, p. 63) defies logic.

[448] Sierra Club Rehearing Brief, pp. 73-74.

[449] Sierra Club Rehearing Brief, p. 73 (citing Rehearing Tr. Vol. X, p. 1619).

[450] Rehearing Tr. Vol. X, pp. 1619-20 (Mikkelsen Rebuttal Cross).

She added that among the actions she referred to were those specifically referred in her Rebuttal and Surrebuttal Testimony.[451]

CMSD also questions the efficacy of Rider DMR, asserting that should Rider DMR revenues be used to fund grid modernization expenditures, such revenues would not be available to support the CFO pre-working capital to debt ratio.[452] CMSD's argument misunderstands what CFO is. Rider DMR is intended to allow the Companies better access to obtain capital for the purposes of grid modernization and to reduce the future costs of providing distribution service. Cash received by the Companies from Rider DMR revenues will increase the Companies' CFO and likewise improve their CFO to debt ratio. Cash spent on capital expenditures, such as grid modernization, would not be part of the CFO calculation because capital expenditures are considered investing activities rather than operating activities.[453] In fact, use of Rider DMR funds to invest in grid modernization should have a further positive impact on the Companies' CFO to debt metrics. As Dr. Choueiki testified, Rider DMR should allow the Companies to issue debt at a lower interest rate than otherwise would occur, with "more favorable conditions."[454] This lower interest expense will further increase the Companies' CFO, all else equal, thereby improving their CFO to debt. CMSD's claims regarding the impact of capital

[451] Rehearing Tr. Vol. X, p. 1620 (Mikkelsen Rebuttal Cross); Mikkelsen Rehearing Rebuttal Test., pp. 17-18.

[452] CMSD Rehearing Brief, p. 12.

[453] While not a replication of the CFO included in the CFO to debt calculation conducted by Moody's, the Statements of Cash Flow included in the Companies' FERC Form 1 filings in Direct Exhibits 2, 3, and 4 clearly show that capital expenditures, i.e., "Gross Additions to Plant", are recognized as investing activities and not operating activities.

[454] Rehearing Tr. Vol. V, p. 1229 (Choueiki Cross).

expenditures on the Companies' CFO to debt are thus misinformed and should not be given any weight by the Commission.

Relying on the testimony of OCC witness Kahal, OCC/NOAC and Sierra Club assert that the Commission should explore "ring-fencing" in order to protect the Companies from a downgrade of FirstEnergy Corp.'s credit rating.[455] OCC/NOAC and Sierra Club's proposals are, however, unnecessary. Indeed, the Companies are already subject to (and in compliance with) Ohio's corporate separation requirements. Thus, Mr. Kahal's suggestion to put in place "structural separation measures" is superfluous.[456] Indeed, Mr. Kahal wholly failed to consider the Companies' corporate separation plan. During rehearing, Mr. Kahal admitted that, while he was generally aware of the plan's existence, he had never reviewed the plan, never reviewed any statute regarding corporate separation in Ohio, and never reviewed any Ohio corporate separation regulations.[457] The arguments of OCC/NOAC and Sierra Club relying on Mr. Kahal's half-baked proposal should therefore be disregarded.

2. The "constituents" of FirstEnergy Corp., including the Companies, are properly "invested" in supporting the parent company's credit metrics.

Staff witness Buckley, in discussing what he believed to be the appropriate amount of credit support, asserted that the Companies' customers should not be the only constituents providing credit support. Mr. Buckley explained that a shared contribution is important to ensure

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[455] OCC/NOAC Rehearing Brief, pp. 43-44 (citing Rehearing Rebuttal Testimony of Matthew I. Kahal, pp. 13-14 ("Kahal Rehearing Rebuttal Test.")); Sierra Club Rehearing Brief, p. 66 (citing Kahal Rehearing Rebuttal Test., p. 14).

[456] Kahal Rehearing Rebuttal Test., p. 14.

[457] Rehearing Tr. Vol. VIII, pp. 1401-02 (Kahal Rebuttal Cross).

all parties – including employees, management, shareholders and others – are invested in supporting FirstEnergy Corp. as an investment grade entity.[458] To correct the misconception that other constituents are not invested in supporting FirstEnergy Corp. as an investment grade entity, Company witness Mikkelsen submitted rebuttal testimony identifying a variety of substantial ongoing contributions by employees, management, shareholders and customers of other FirstEnergy utilities in supporting FirstEnergy Corp. as an investment grade entity.[459]

Some intervenors utterly ignore this evidence of record and contend that a lack of measures taken by FirstEnergy Corp. employees, management, shareholders, and out-of-state affiliates to strengthen their balance sheets justifies rejection of Rider DMR.[460] To the contrary, several measures already have been taken. Specifically, FirstEnergy Corp. has changed medical and other benefits[461] and staff reductions have occurred.[462] Further, a Cash Flow Improvement Program ("CFIP") has been instituted.[463] The CFIP is expected to yield hundreds of millions of dollars in savings over the next several years.[464] OCC witness Kahal admitted that "the target [of the CFIP] I've seen, is 200 million; something along those lines."[465]

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[458] Buckley Rehearing Test., pp. 5-6.

[459] Mikkelsen Rehearing Rebuttal Test., pp. 17-18.

[460] CMSD Rehearing Brief, pp. 19-20, 25; OCC/NOAC Rehearing Brief, p. 43; OEC/EDF Rehearing Brief, pp. 30-31, 34-35; OMAEG Rehearing Brief, p. 38.

[461] Mikkelsen Rehearing Rebuttal Test., p. 17.

[462] Mikkelsen Rehearing Rebuttal Test., p. 17.

[463] Mikkelsen Rehearing Rebuttal Test., p. 17.

[464] Mikkelsen Rehearing Rebuttal Test., p. 17.

[465] Rehearing Tr. Vol. VIII, p. 1401 (Kahal Rebuttal Cross).

Shareholders have also contributed significantly. The annual dividend from FirstEnergy Corp. has been reduced from $2.20 to $1.44 per share – a reduction equaling over $300 million annually.[466] At hearing, Mr. Kahal acknowledged that FirstEnergy Corp.'s dividend had been reduced by "roughly a third" since 2014.[467] He further admitted that CEI has not paid a dividend to FirstEnergy Corp. since April 2015 and Toledo Edison had not done so since February 2014.[468] At hearing, the other intervenor rebuttal witness challenging that FirstEnergy Corp. needs to take measures to improve its balance sheet, OMAEG witness Lause, was unaware of these initiatives.[469] In addition, FirstEnergy Corp. has issued equity through stock investment and other employee benefits plans and further continues to assess the appropriateness and timing associated with issuing additional equity.[470]

Moreover, customers of FirstEnergy utilities outside of Ohio have contributed substantially to this effort. In New Jersey, the FirstEnergy utility will recover $736 million for storm costs incurred in 2011 and 2012.[471] That utility also has a pending rate case seeking an

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[466] Mikkelsen Rehearing Rebuttal Test., p. 17.

[467] Rehearing Tr. Vol. VIII, p. 1400 (Kahal Rebuttal Cross).

[468] Rehearing Tr. Vol. VIII, p. 1400 (Kahal Rebuttal Cross).

[469] *See* Rehearing Tr. Vol. VII, pp. 1345-47 (Lause Rebuttal Cross).

[470] Mikkelsen Rehearing Rebuttal Test., p. 17.

[471] Mikkelsen Rehearing Rebuttal Test., p. 18. Indeed, as Ms. Mikkelsen explained at hearing:

> Once the New Jersey board approved recovery of those dollars and they allowed for amortization and recovery of those dollars over a six-year period, that cash in annually, over the six years, would serve to improve JCP&L's credit metric, because it has cash coming in without a corresponding expense. So it would serve to improve the credit metric.

Rehearing Tr. Vol. X, p. 1646 (Mikkelsen Rebuttal Cross).

increase of $142 million annually.[472] In Pennsylvania, the four FirstEnergy utilities obtained approval in 2015 of rate increases totaling $293 million annually, and have additional rate cases pending that seek total increases of $439 million annually.[473] The Pennsylvania utilities also have capital recovery filings that will enable a $245 million rate increase over five years.[474] In West Virginia, a rate increase and vegetation management rider combined generate almost $100 million in additional revenue annually.[475]

Some intervenors downplay the significance of these contributions, contending that the contributions of these other constituents of FirstEnergy Corp. had nothing to do with credit support.[476] However, Ms. Mikkelsen explained at hearing how a rate increase for any FirstEnergy utility provides credit support:

> The applicants in each of the base rate cases listed here are the individual utility companies. The base rate applications in each of the states follows what I would characterize as the standard filing requirements for that state and the formulas laid out by those states for determining whether or not there should be a base rate increase.

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[472] Mikkelsen Rehearing Rebuttal Test., p. 18. *See also* Rehearing Tr. Vol. X, p. 1650 (Mikkelsen Rebuttal Cross) ("The purpose of the base rate case proceeding was to provide credit support, additional revenues for JCP&L, which, in turn, would provide credit support to FirstEnergy Corp.").

[473] Mikkelsen Rehearing Rebuttal Test., p. 18. *See also* Rehearing Tr. Vol. X, pp. 1654-58 (Mikkelsen Rebuttal Cross); Rehearing Tr. Vol. VIII, p. 1399 (Kahal Rebuttal Cross).

[474] Mikkelsen Rehearing Rebuttal Test., p. 18.

[475] Mikkelsen Rehearing Rebuttal Test., p. 18. At hearing, Ms. Mikkelsen explained how the vegetation management rider provides credit support:

> Once the vegetation management rider was approved, it created additional funds into the West Virginia companies which, in turn, provides credit support to the companies as well as to FirstEnergy Corp. . . . It is to recover costs associated with vegetation management that if those dollars weren't recovered, that would have a negative impact on the West Virginia utilities' credit metrics, and, in turn, the credit metrics of FirstEnergy Corp.

Rehearing Tr. Vol. X, p. 1667 (Mikkelsen Rebuttal Cross).

[476] *See, e.g.*, OEC/EDF Rehearing Brief, pp. 34-37.

> In all instances, I believe dollars collected associated with a base rate increase provide credit support not only to the applicant, but to FirstEnergy Corporation.[477]

At hearing, counsel for Sierra Club feigned confusion, at length, over how a base rate increase could possibly contribute to credit support without including a specific request for credit support.[478] Ultimately, Attorney Examiner Price explained that the Company's witness was testifying that base rate increases result in increased revenues, which in turn provide credit support to FirstEnergy Corp.: "The companies are increasing their profits; increased profits are providing credit support. You don't go in and ask the base rate case for credit support."[479] Intervenors' repeated assertions that the constituents of FirstEnergy Corp. (i.e., out-of-state customers, employees, management and shareholders) are not sufficiently "invested" in providing credit support to the parent company are no more legitimate than Sierra Club's feigned confusion.

P3/EPSA argue that Ohio ratepayers should not be responsible for all of the cash shortfall needed to provide credit support for the Companies or FirstEnergy Corp.[480] However, neither the Companies nor Staff ever suggested Rider DMR would cover the entire cash shortfall. At hearing, Company witness Mikkelsen repeatedly explained to P3/EPSA's counsel that a properly constructed Rider DMR, *along with actions taken by the Companies and by*

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[477] Rehearing Tr. Vol. X, p. 1664 (Mikkelsen Rebuttal Cross). See also Rehearing Tr. Vol. X, p. 1642 (Company witness Mikkelsen explaining that "I think that any time a utility company makes a filing that includes a return on investment, that return on investment serves to provide credit support to that company.").

[478] Rehearing Tr. Vol. X, pp. 1649-55 (Mikkelsen Rebuttal Cross).

[479] Rehearing Tr. Vol. X, p. 1656 (Mikkelsen Rebuttal Cross).

[480] P3/EPSA Rehearing Brief, p. 65.

FirstEnergy Corp. as a whole, should avert a credit rating downgrade by collectively providing the improvement the rating agencies want:

> Q. A goal of rider DMR is to keep the companies and FE Corp. at investment grade, correct?
>
> A. I don't think rider DMR is designed to keep the companies and FE Corp. at the 15-percent target level. *It would require other actions within the FirstEnergy Corporation in order to achieve that level.*
>
> Q. Understanding that rider DMR is, in your view, one piece of the puzzle, would you agree, though, that rider DMR's contribution is intended to keep the companies and FE Corp. at an investment grade credit rating?
>
> A. I think staff's testimony is *it should contribute to that goal*, but it is not designed to assure that outcome. *Other constituents have a role in that outcome.*
>
> Q. Okay. So maintaining the companies' and FE Corp.'s current ratings would be a successful outcome, correct?
>
> A. A successful outcome of what, sir?
>
> Q. Of rider DMR.
>
> A. Again, rider DMR, as proposed, is not designed to assure the maintenance of the existing credit ratings. *It needs to be taken in concert with other actions taken by FirstEnergy and its subsidiaries.*[481]

Given that it was never the position of Staff or the Companies, intervenors' arguments that the Companies, or Staff, seek to cover the entire cash shortfall through Rider DMR, must be rejected.

3. Rider DMR is not a "bailout."

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[481] Rehearing Tr. Vol. X, pp. 1790-91 (Mikkelsen Rebuttal Cross) (emphasis added).

As noted, Rider DMR has a dual purpose: (1) to jumpstart grid modernization by facilitating the Companies' access to capital on more favorable terms; and (2) to reduce the Companies' future costs of providing distribution service. In addition, Rider DMR has a stringent headquarters commitment. The Companies and FirstEnergy Corp. are required to undertake significant commitments, and bestow significant benefits on customers, in exchange for Rider DMR.

Some intervenors, however, ignore the grid modernization orientation and headquarters commitment. They focus instead on the credit support purpose, using it to mischaracterize Rider DMR as a "bailout" of FirstEnergy Corp.,[482] or even an anti-competitive subsidy to FES.[483] As demonstrated previously, the intervenors arguing that Rider DMR is merely for credit support improperly focus on the testimony of witnesses who were not supporting the purpose of Rider DMR; these parties largely avoid discussing the testimony of Dr. Choueiki, the Staff witness who actually made the Rider DMR recommendation. Dr. Choueiki made clear that Rider DMR relates to distribution service, and described an objective of modernizing the Companies' grid so that it becomes "one of the most intelligent grids in the current industry."[484] Rider DMR is a

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[482] *See, e.g.,* OCC/NOAC Rehearing Brief, p. 39; OEC/EDF Rehearing Brief, pp. 22-23, 26; OHA Rehearing Brief, pp. 10-13; OMAEG Rehearing Brief, pp. 35-36. OMAEG is most vocal in insisting that Rider DMR is a "corporate bailout." However, OMAEG witness Lause is not a compelling speaker on this subject. The record shows that Mr. Lause's company, Cooper Tire, has benefitted from several government incentive programs to keep its manufacturing plants open. Mr. Lause admitted at hearing that the City of Findlay, Ohio, approved a series of tax incentives, including job retention and payroll tax credits, for Cooper Tire to keep its local manufacturing plant open. Additionally, Mr. Lause admitted that the State of Mississippi had authorized a $25 million investment commitment for Cooper Tire to keep its Tupelo manufacturing facility in operation. In fact, Cooper announced that one of its four plants was going to close and invited the states where those plants were located to compete to keep their plants open. Rehearing Tr. Vol. VII, pp. 1349-56, 1359 (Lause Cross).

[483] Direct Rehearing Brief, pp. 15-16; NOPEC Rehearing Brief, p. 19.

[484] Rehearing Tr. Vol. IV, p. 967 (Choueiki Cross).

necessary tool to accomplish such a capital-intensive objective for the benefit of customers, and not a bailout.

Indeed, at hearing, Dr. Choueiki repeatedly corrected cross-examiners who tried to get him to agree that Rider DMR is intended to bail out FirstEnergy Corp. for past decisions. In response to a question regarding the economic concept of a "moral hazard," Dr. Choueiki explained:

> It wouldn't have been recommended if we felt it was a moral hazard. In the long term we think it is beneficial to the ratepayers of Ohio to have a health company -- to have healthy companies, so to have the healthy companies, you need the healthy parent, but the objective -- regardless what decisions were made in the past that have caused this issue to happen now, there is this issue that is a concern.
>
> A concern is our utilities continue to provide reliable service and to the extent -- and to the extent the Commission agrees with us on the policy matter that we would like to have a modernized grid that requires cash infusion at this point. So to have a modernized grid and have healthy companies, we don't see this at all as a moral hazard. The objective is to modernize the distribution grid in Ohio. That's our objective.[485]

Accordingly, the Companies' receipt of Rider DMR funds would be accompanied by high expectations that the Companies' grid would undergo significant modernization and that customers would see benefits.

Other intervenors advance the theory that Rider DMR funds would be an anticompetitive subsidy intended to support FES.[486] This completely ignores Staff's objectives for Rider DMR

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[485] Rehearing Tr. Vol. IV, p. 1029 (Choueiki Cross).
[486] Direct Rehearing Brief, p. 16; OEC/EDF Rehearing Brief, pp. 25-26; NOPEC Rehearing Brief, p. 19; OCC/NOAC Rehearing Brief, p. 39; OMAEG Rehearing Brief, pp. 35-36.

and the evidence of record. Staff's intent in proposing Rider DMR is to enable the Companies to access capital on favorable terms in order to modernize the Companies' distribution grid.[487]

Further, the Companies have no mechanism by which to transfer any monies recovered under either Rider RRS or Rider DMR to FES. Simply put, "[t]here are no contracts or any other form of an agreement between the Companies and FES" that would enable the Companies to share or transfer monies recovered under either rider with FES.[488] As Ms. Mikkelsen plainly explained at hearing, "I'm not aware of any mechanism within the companies' organization that would allow them to share dollars collected with FES."[489]Moreover, FirstEnergy Corp. has indicated that it is not going to make any more investments in FES going forward.[490]

Some intervenors contend Rider DMR is a bailout because there is no requirement or guarantee that the Companies will spend dollars collected under Rider DMR on modernizing the distribution grid.[491] As noted, however, Company witness Mikkelsen testified that it is the Companies' intention to use Rider DMR revenues to access capital for purposes within the Companies' operations, including for grid modernization and other distribution system improvements.[492]

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[487] Choueiki Rehearing Test., p. 15; Rehearing Tr. Vol. V, pp. 1015-1016 (Choueiki Cross).

[488] Mikkelsen Rehearing Test., p. 11.

[489] Rehearing Tr. Vol. I, p. 226 (Mikkelsen Cross). *See also id.,* pp. 208; 227.

[490] Rehearing Tr. Vol. I, p. 158 (Mikkelsen Cross).

[491] *See, e.g.,* P3/EPSA Rehearing Brief, pp. 58-60; NOPEC Rehearing Brief, p. 18; OMAEG Rehearing Brief, p. 40; Sierra Club Rehearing Brief, pp. 45-46, 47-48.

[492] Rehearing Tr. Vol. X, p. 1607 (Mikkelsen Rebuttal Cross). To be sure, Ms. Mikkelsen also mentioned other possible uses for these funds, e.g., refinancing soon to mature debt or payment towards pension liabilities. Rehearing Tr. Vol. X, p. 1607 (Mikkelsen Rebuttal Cross); Mikkelsen Rehearing Rebuttal Test., p. 9. Both types of outlays are legitimate distribution-related expenses.

While Sierra Club laments the lack of a requirement that money collected under Rider DMR be spent on modernizing the distribution grid,[493] such a requirement is unnecessary. Company witness Mikkelsen explained at hearing that the Commission has ample existing authority to review how the Company is using these funds:

> The companies are not including a provision [for Commission review] nor did the staff. Certainly, the Commission is free to review whatever they would like with respect to the companies' operations.[494]

Neither Staff nor the Companies have ever proposed that Rider DMR somehow be excluded from the Commission's existing authority over the Companies. Sierra Club's argument fails to recognize the degree of authority the Commission has to review the Companies' books.

Sierra Club also points to the Companies' lack of a "commitment" to use Rider DMR dollars solely for distribution grid modernization.[495] At hearing, Ms. Mikkelsen corrected this misapprehension that the specific dollars collected under Rider DMR could be earmarked for spending on grid modernization, i.e., "painted," as Sierra Club suggests:

> THE WITNESS: I'm struggling with the question with respect to the painting of dollars.
>
> EXAMINER PRICE: Could you explain what you mean?
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> THE WITNESS: Once dollars come into the company, then they are treated, you know, more -- they aren't specifically marked as they move throughout the companies', you know, income statement or balance sheet or how they are used. Once the dollars come in collectively, the dollars exist and the expectation is the

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[493] Sierra Club Rehearing Brief, pp. 45-48.
[494] Rehearing Tr. Vol. X, p. 1609 (Mikkelsen Rebuttal Cross).
[495] Sierra Club Rehearing Brief, pp. 48-49, 80-81, 83, 87-88.

> dollars collected from DMR would be used for credit support and to assist in jump-starting grid modernization.[496]

Notwithstanding the practical difficulty with "painting" Rider DMR dollars for grid modernization efforts, Ms. Mikkelsen at hearing noted that the Companies understand that Rider DMR revenues would be used to jump-start grid modernization:

> While it is true that the companies aren't making any guarantees, it is also true that the staff was very clear about what their expectation was with respect to the use of the rider DMR dollars in terms of jump-starting grid modernization.[497]

Similarly, OCC/NOAC complain that the Companies made no "commitment" to grid modernization.[498] OCC/NOAC cite to Ms. Mikkelsen's testimony quoted immediately above, i.e., that the Companies intend to use the dollars collected in Rider DMR to access capital for purposes within the Companies' operations that include grid modernization and potentially other things.[499] For all these reasons, Rider DMR cannot be accurately characterized as a bailout, and intervenors' arguments should be rejected.

4. Rider DMR revenues are not transition revenues.

NOPEC claims that Rider DMR would collect unlawful transition revenues because the Rider DMR revenues "arise from FES's uneconomic generating facilities."[500] OCC/NOAC have the same concern, suggesting that FirstEnergy Corp.'s credit issues arise from its competitive

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[496] Rehearing Tr. Vol. X, pp. 1605-06 (Mikkelsen Rebuttal Cross).
[497] Rehearing Tr. Vol. X, pp. 1609-10 (Mikkelsen Rebuttal Cross).
[498] OCC/NOAC Rehearing Brief, p. 12.
[499] Rehearing Tr. Vol. X, p. 1607 (Mikkelsen Rebuttal Cross).
[500] NOPEC Rehearing Brief, p. 20.

subsidiaries.[501] There are at least five reasons why these parties are wrong. To begin, Rider DMR would help access capital to support distribution services, not generation services.

Second, the evidence shows that the competitive affiliates have relatively high credit metrics compared to the Companies. As shown in P3/EPSA Exhibit 21, FES's pre-working capital (CFO pre-WC) coverage of debt is approximately 24% for 2016, while Allegheny Energy Supply Company, LLC's CFO pre-WC coverage of debt is approximately 31.5% for 2016.[502]

Third, the annual Rider DMR revenue amount is based on *the Companies' contribution* to FirstEnergy Corp.'s gross operating revenues (as proposed by Staff) or net income (as proposed by the Companies).[503] Thus, it is unrelated to FES's or FirstEnergyCorp.'s contribution, as NOPEC and OCC/NOAC appear to suggest.

Fourth, as shown above with regard to claims that Rider RRS is an alleged transition charge, Ohio law also does not support NOPEC's and OCC/NOAC's argument. OCC/NOAC's reliance on the recent AEP RSR decision overlooks that the Ohio Supreme Court focused on the fact that the revenues to be collected under AEP's rider were to assist AEP transition to a competitive market and divest its generation using a new corporate structure.[504] The Companies have already transitioned to such a market and corporate structure. Thus, Rider DMR does not

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[501] OCC/NOAC Rehearing Brief, pp. 37-39.

[502] P3/EPSA Ex. 21, p.3.

[503] Buckley Rehearing Test., p. 3; Mikkelsen Rehearing Rebuttal Test., p. 12.

[504] *See AEP RSR* Decision, 2016-Ohio-1608, ¶ 23 ("AEP proposed the RSR 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. . . . According to the company's witnesses, the RSR was designed to generate enough revenue for the company to achieve a certain rate of return on its generation assets *as it transitions* to full auction pricing for energy and capacity by June 2015." (emphasis added)).

involve "the receipt of transition revenues or any equivalent revenues by an electric utility."[505] Unlike transition charges, the Companies would not be recovering through Rider DMR the difference between the book cost and market value of generating plants they are divesting while transitioning to market-based pricing.[506] To the contrary, Rider DMR revenues received by the Companies would jumpstart the Companies' ability to fund grid modernization investments, either through capital support or through access to capital markets under more favorable terms.[507] These are *distribution-related* outlays. Rider DMR revenues cannot in any reasonable way be confused with transition revenues.

Fifth, as noted above regarding Rider RRS, the "notwithstanding" language in R.C. 4928.143(B) trumps R.C. 4928.38. The Commission can avoid any confusion created by NOPEC's and OCC/NOAC's arguments by finding that R.C. 4928.143(B) controls and that R.C. 4928.38 has no applicability to an ESP.

C. Keeping FirstEnergy Corp.'s Headquarters In Ohio Adds Significant Value Through Direct And Indirect Economic Impacts And This Should Be Reflected In A Higher Rider DMR Revenue Requirement.

1. Keeping the nexus of operations and headquarters in Akron provides $568 million per year in economic development and job retention benefits that Staff and Intervenors fail to recognize or quantify.

a. Ms. Murley's methodology is appropriate.

Intervenors' arguments that the Headquarters Condition does not provide significant economic development and job retention benefits fall well wide of the mark. Company witness

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[505] R.C. 4928.38.

[506] *See* R.C. 4928.34, .39, .40.

[507] Mikkelsen Rehearing Rebuttal Test., p. 5; Choueiki Rehearing Test., p. 15.

Murley's economic impact analysis is methodologically sound and well-founded. The IMPLAN model that Ms. Murley used to arrive at her conclusions regarding FirstEnergy Corp.'s headquarters and nexus of operations in Akron, Ohio ("FirstEnergy's Headquarters") was the same widely accepted and used model that she employed for her previous testimony.[508] In the March 31 Order, the Commission relied on the results of Ms. Murley's economic impact analysis contained in her prior testimony.[509] Here, the IMPLAN model enabled Ms. Murley to quantify the direct, indirect and induced economic impacts of keeping the FirstEnergy's Headquarters in Akron. Ms. Murley explained the difference between these types of impacts as follows:

> Direct economic impacts represent the direct production value generated by the company to the state's economy. These direct economic impacts include payroll and jobs required to create that level of production. Indirect economic, or "supply chain," impacts represent the vendor businesses and their employees that are supported by the company and are calculated using economic multipliers. These economic multipliers are a way of representing the larger economic impacts effect on the state's economy. Induced economic, or "household spending," impacts represent the effect of the payroll from the subject business and how that payroll results in additional spending by employees, and the effect of that spending on the region.[510]

In her analysis, Ms. Murley employed industry and state-specific multipliers from the IMPLAN model to calculate the value of the FirstEnergy's Headquarters to the Akron area and the State of Ohio.[511]

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[508] *See generally*, Supplemental Testimony of Sarah Murley (May 4, 2014).

[509] March 31 Order, p. 88.

[510] Murley Rehearing Rebuttal Test., pp. 2-3.

[511] Murley Rehearing Rebuttal Test., p. 3.

Importantly, as Ms. Murley testified at hearing, economic impact analyses, properly done, are location-specific:

> If I could use an example for manufacturing, I think it would be easier to understand. So let's say, for example, that there's a company that produces a manufactured product in Akron. And machine parts let's just say. And they sell those machine parts to customers all over the world, but they produce the parts in Akron. Their vendor purchases, they have a certain share of vendor purchases that are in Akron, their employees primarily live in that area and re-spend their payroll in that area. The economic impact is in the location where the product is produced. This is a service and so it's different than a manufactured product, but the concept and the foundation of how economic impact analysis is performed is exactly the same.[512]

To calculate the total economic impact of FirstEnergy's Headquarters, Ms. Murley relied primarily on total payroll and number of employees. Ms. Murley's analysis "quantifies the impacts on the state of Ohio."[513] Ms. Murley observed that FirstEnergy Corp. (through FirstEnergy Services Company) directly employs 1,360 people with an annual payroll of $151.3 million in the Akron, Ohio area.[514] Further, the FirstEnergy's Headquarters supports an additional 2,047 jobs (i.e., 756 supply chain jobs plus 1,291 jobs related to employee spending) and $93.3 million annually by other Ohio businesses.[515]

Based on this data and using the IMPLAN model, Ms. Murley calculated the total economic impact of the FirstEnergy's Headquarters as follows:

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[512] Rehearing Tr. Vol. IX, p. 1560 (Murley Redirect).

[513] Murley Rehearing Rebuttal Test., p. 3.

[514] Murley Rehearing Rebuttal Test., p. 3.

[515] Murley Rehearing Rebuttal Test., p. 3.

> The HQ has an estimated annual economic impact of $568.0 million on Ohio's economy, and directly and indirectly supports approximately 3,407 jobs and $244.6 million in annual payroll throughout the state. While it is not possible to isolate the taxes exclusively paid by the HQ, the local and state tax revenues from FirstEnergy Corp. HQ employees and other supported jobs are estimated at $20.0 million per year.[516]

And further:

> The output multiplier for FirstEnergy Corp.'s headquarters operations in Ohio is 1.92. This means that for every $1 million of goods and services created by FirstEnergy Corp., an additional $920,000 in economic activity is generated within the state's economy. Also, for every direct job retained at FirstEnergy Corp.'s headquarters, an additional 1.5 jobs are supported at other businesses in the state.[517]

Thus, Ms. Murley's IMPLAN analysis properly quantifies the value of FirstEnergy's Headquarters and demonstrates its importance to the Akron region and the state as a whole.

b. The criticisms of Ms. Murley's analysis lack merit.

OEC/EDF and OMAEG claim that Ms. Murley should not have relied on the IMPLAN multipliers but should have personally collected specific information on, e.g., actual vendor purchases generate a certain number of jobs or a certain amount of personal income. [518] As Ms. Murley explained at hearing, however, such an analysis was not possible:

> So in the case of the indirect or vendor purchase impacts, it would require me to interview each one of FirstEnergy's vendors to verify how much they had spent with those vendors. And in the case of the indirect impacts, also to talk to each one of their employees about how much they spent. So assuming that part is possible,

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[516] Murley Rehearing Rebuttal Test., pp. 3-4.

[517] Murley Rehearing Rebuttal Test., p. 5.

[518] EDC/OEC Rehearing Brief, p. 37; OMAEG Rehearing Brief, p. 53.

> from there, I would have to also ask each vendor how many people they employed and what percent of their workforce was devoted to servicing FirstEnergy's needs, and also who their suppliers were and what portion of their suppliers they would attribute or would their supply purchases they would attribute to FirstEnergy's purchases. And for the employees, I would not only have to ask them how much they spent, but where they spent it. And then I would need to talk to all of those retailers and personal service providers and ask them how many people they employed and what percent of their workforce could be attributed to the sales to FirstEnergy employees, and the same for the employees of the supplier businesses. So it becomes a fairly untenable task.[519]

Thus, these intervenors are requesting something which is not part of an economic impact analysis and would be impossible to complete. That is likely why they have cited no authority suggesting this type of review is typical or required. As such, Intervenors' criticisms on this count are meritless.

OCC/NOAC argue the commitment in the Third Supplemental Stipulation regarding FirstEnergy's Headquarters and the Headquarters Condition in Rider DMR are the same.[520] As noted, this is wrong. The commitment in the Third Supplemental Stipulation "was an element agreed to, again, among a number of provisions by a number of signatory parties."[521] That commitment also related to the continuation of Rider RRS.[522] On the other hand, the Headquarters Condition is tied to Rider DMR and has nothing to do with the Third Supplemental

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[519] Rehearing Tr. Vol. IX, pp. 1558-59 (Murley Redirect).

[520] OCC/NOAC Rehearing Brief, pp. 52-53.

[521] Rehearing Tr. Vol. X, pp. 1683-84 (Mikkelsen Rebuttal Cross).

[522] Third Supp. Stip., p. 17 ("FirstEnergy will maintain its corporate headquarters and its nexus of operation in Akron, Ohio for the duration of Rider RRS.").

Stipulation.[523] Further, the Headquarters Condition contains the consequence of discontinuation of Rider DMR and possibly a refund, both of which are absent from the relevant Third Supplemental Stipulation provision.[524] As the Attorney Examiner observed at hearing: "But this is a -- although it might be a similar commitment; it is a new commitment based upon a totally different rider. The plain language of the stipulation says that it's -- the commitment was contingent upon rider RRS being in place."[525] Hence, intervenors' claims here fail.

NOPEC, CMSD and OMAEG also offer the related argument that the Companies' commitment to keep FirstEnergy's Headquarters in Akron has no benefit because FirstEnergy's Headquarters is already obligated to remain in Akron as a result of the Third Supplemental Stipulation.[526] This argument fails to recognize that this Third Supplemental Stipulation restriction is limited to only the period in which Rider RRS is in place.[527] If Rider RRS is not in place, then FirstEnergy Corp. is not obligated to keep its headquarters in Ohio, let alone bound to an "absolute requirement" that FirstEnergy's Headquarters stay in Ohio.[528] Accordingly, Headquarters Condition of Rider DMR provides a significant economic benefit to Ohio.

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[523] *See* Buckley Rehearing Test., p. 7. *See also* Rehearing Tr. Vol. X, p. 1744 (Mikkelsen Rebuttal Cross) ("Th[e headquarters provision] was a provision of the third supplemental stipulation, among many provisions included in the third supplemental stipulation. There was not a particular incentive tied to that provision.").

[524] *Compare* Buckley Rehearing Test., p. 8 *with* Third Supp. Stip., p. 17.

[525] Rehearing Tr. Vol. X, pp. 1597-98 (Mikkelson Rebuttal Direct). And further: "It's a different commitment. It might be similar, but it's a commitment related to a different rider." *Id.*, p. 1596.

[526] NOPEC Rehearing Brief, pp. 23-24; OMAEG Rehearing Brief, pp. 53-54.

[527] OMAEG Rehearing Brief, p. 54 (citing Company Ex. 154, p. 17 (Third Supplemental Stipulation) ("FirstEnergy will maintain its corporate headquarters and its nexus of operations in Akron, Ohio for the duration of Rider RRS."); OCC/NOAC Rehearing Brief, p. 53 (same); CMSD Rehearing Brief, p. 16.

[528] CMSD Rehearing Brief, p. 16 (claiming the refund provision is improper because there is currently an "absolute requirement" the FE Headquarters remain in Akron.)

Intervenors further argue that FirstEnergy Corp. has no intention of moving its Akron headquarters and nexus of operations and, therefore, the results of Ms. Murley's economic impact analysis are beside the point. For example, OMAEG argues that the Headquarters Condition provides no benefit to customers because FirstEnergy Corp. is already obligated to maintain its headquarters in Akron since its lease extends through 2025.[529] This argument goes nowhere. Intervenors ignore the fact that even though FirstEnergy Corp. is committed to maintaining its headquarters and nexus of operations in Akron, should the parent company's financial condition continue to deteriorate, a change of control is a distinct possibility. Were a change of control to occur, all bets regarding the location of the headquarters and nexus of operations would be off. As noted, Ms. Mikkelsen testified from her personal experience that a company with a weakened condition could experience a change in control and with such a change could come a change in the location of a headquarters.[530] Thus, intervenors' arguments are misplaced.

Intervenors also criticize Ms. Murley for analyzing only the economic impact of FirstEnergy's Headquarters, rather than conducting a "cost/benefit" analysis which takes into

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[529] OMAEG Rehearing Brief, p. 54.

[530] Rehearing Tr. Vol. X, p. 1715 (Mikkelsen Rebuttal Cross). *See also id.*, p. 1744 ("I think FirstEnergy is committed to maintaining its headquarters and nexus of operations in Akron, Ohio. As we discussed earlier, 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."). As a corollary to this point, at hearing, OCC witness Kahal admitted that keeping a utility's headquarters in-state likely makes that utility more responsive to state regulators and the State's public policy directives. *See* Rehearing Tr. Vol. VIII, pp. 1402-04 (Kahal Rebuttal Cross).

account the costs of Rider DMR to customers.[531] Ms. Murley explained at hearing why a "cost/benefit" analysis would not have been feasible to conduct:

> Looking at the impact -- I think I've covered what's involved in the economic impact of the company being in Ohio. To look at the economic impact of an increase in utility rates would -- from a cost/benefit perspective, would require me to understand how the utility rates would impact different classes of customers, and what their price elasticity is to increases in utility prices, and what their propensity is to substitute other fuels for electricity, and how they might respond given the magnitude and expected link of the increase in utility prices, how much of those prices might be passed on from commercial and industrial customers to residential customers, what other ancillary issues might be created in general by higher utility prices such as economic-development-related issues relative to attracting other companies to Ohio. The scope of that analysis would be so broad as to not be meaningful specifically to the question at hand.[532]

2. The allocated average annual rider DMR revenue amount of $558 million plus an additional amount to be determined by the Commission for keeping FirstEnergy Corp.'s headquarters and nexus of operations in Akron is correct.

Given that FirstEnergy's Headquarters generates $568 million in economic and job retention benefits, some value for this economic benefit needs to be reflected in a properly designed Rider DMR, in addition to the $558 million annual revenue requirement. Intervenors make two flawed arguments in attempting to contest the addition of such value. First, intervenors claim that such an addition to the Rider DMR revenue requirement allegedly will lead to customers being charged twice for the value of the services generated by FirstEnergy's Headquarters, once in base rates and again under Rider DMR. Second, intervenors accuse the

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[531] OEC/EDF Rehearing Brief, p. 38; OMAEG Rehearing Brief, p. 52.

[532] Rehearing Tr. Vol. IX, pp. 1499-1500 (Murley Cross).

Companies of seeking to lump their proposed annual revenue requirement under rider DMR together with the results of Ms. Murley's IMPLAN analysis to arrive at an annual Rider DMR amount of $1.126 billion. Both of these arguments fail.

First, OCC/NOAC argue that the Companies are double-counting the value of FirstEnergy Corp.'s employees in both base rates and towards the value of FirstEnergy's Headquarters to be included in Rider DMR.[533] Allegedly, the Companies are then seeking to recover this value twice from customers: once in base rates and once under Rider DMR. At hearing, the Attorney Examiners rejected this argument out of hand, sustaining the Companies' objection to it on grounds of relevance. Specifically, the following exchange occurred with the bench sustaining the Companies' objection:

> MR. KUTIK: There is no question, your Honor, that customers are not paying double. The customers are paying their share. There is no indication that they are not. And what -- what's being discussed here is whether the Ohio customers are getting the benefit or the economic benefit of the employees who live in Ohio or live in the companies' service territory. They are two different things.
>
> EXAMINER PRICE: Ms. Willis?
>
> MS. WILLIS: Well, your Honor, while we would -- or while Mr. Kutik would like to make it about economic development, the proposal is to take an economic development that's been – that Ms. Murley produced from her study, saying here is the economic development. The proposal is to change that economic development directly into rates so that customers then are responsible for the entire salaries, taxes, everything associated with FirstEnergy Services Company -- FirstEnergy Services Company. And so, I do believe that there is a question of double payment. It goes beyond. Had this not been a -- an economic development study that was turned into a rate charge, then I would agree with

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533 OCC/NOAC Rehearing Brief, p. 72.

> Mr. Kutik, but we have a very different proposal here. And it is -- does cause an issue of, perhaps, double charges.
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> EXAMINER PRICE: I don't see the double charges at all. Sustained.[534]

The Bench recognized that while customers may pay for some of the services of FirstEnergy Service Company employees, customers also recognize an economic benefit by having those employees work, live and pay for goods, services and taxes in the Companies' service territory or in Ohio. Accordingly, there is no double recovery.

Second, intervenors advance the wayward claim that the Companies covertly are seeking to have the annual revenue requirement of Rider DMR exceed over a billion dollars.[535] This allegedly is so because the Companies are requesting that the Commission take account of the value of FirstEnergy's Headquarters for the purposes of the Rider DMR revenue requirement, given that it is a condition of Rider DMR as proposed by Staff.[536] Nothing could be further from the truth. As Ms. Mikkelsen explained in her Rebuttal Testimony, "The value to the state of Ohio from the condition [regarding FirstEnergy's Headquarters] Mr. Buckley proposed should be reflected in a higher Rider DMR value."[537] The Companies simply are requesting that the value for Rider DMR be increased to reflect that FirstEnergy's Headquarters provides value in terms of job retention and economic development benefits.[538] At hearing, however, intervenors asked Ms. Mikkelsen a series of questions, repeatedly assuming that the Companies were asking

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534 Rehearing Tr. Vol. X, pp. 1751-52 (Mikkelsen Rebuttal Cross).

535 OCC/NOAC Rehearing Brief, p. 48.

536 OCC/NOAC Rehearing Brief, p. 52.

537 Mikkelsen Rehearing Rebuttal Test., p. 14.

538 Mikkelsen Rehearing Rebuttal Test., p. 14.

the Commission simply to add the value determined by Ms. Murley to the Companies' proposed revenue requirement for Rider DMR.[539] In response, Ms. Mikkelsen explained:

> Again, the companies' proposal is that staff's proposed rider DMR, as modified, should be set at $558 million a year, plus an additional amount *to be determined by the Commission* to reflect the value associated with the condition of maintaining the corporate headquarters and nexus of operations.[540]

At no time have the Companies ever requested the amount suggested by intervenors. Indeed, Attorney Examiner Price at hearing eventually sustained the Companies' objections, observing:

> [Ms. Mikkelsen] has answered this question three or four times for you and three or four times for everybody else. I think we have trod this ground. You are just trying to get a highly-prejudicial number out there that has no basis in reality.[541]

The Companies agree with the Staff position on brief that "[t]he benefits of the headquarters are certainly very large and it is an economic boon for that area."[542] The Companies further agree that the amount of that addition to Rider DMR is a matter for the Commission to decide. Any suggestion to the contrary is belied by the record.

D. Adjustments to the Staff's Methodology For Calculating Rider DMR's Requirements Are Necessary.

Staff witness Buckley recommended an annual amount of Rider DMR based on a set of assumptions regarding cash flow. The Companies recommended modifications to Mr. Buckley's assumptions. These modifications are necessary in order for Rider DMR to achieve Staff's

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[539] *See*, *e.g*., Rehearing Tr. Vol. X, pp. 1805-08 (Mikkelsen Rebuttal Cross).

[540] Rehearing Tr. Vol. X, p. 1806 (Mikkelsen Rebuttal Cross) (emphasis added).

[541] Rehearing Tr. Vol. X, pp. 1811-12 (Mikkelsen Rebuttal Cross).

[542] Staff Rehearing Brief, p. 18.

objective to enable the Companies to jumpstart grid modernization and benefit customers. The Companies also recommended lengthening the term of Rider DMR, consistent with the term of ESP IV and in recognition of the time necessary to achieve Staff's ambitious grid modernization goals. Staff, OCC, OMAEG and Sierra Club challenge various modifications recommended by the Companies.

With respect to the target goal for CFO to debt, Staff's recommendation of 14.5% reflected the midpoint of a target range of 14-15% set forth in a January 2016 Moody's credit opinion.[543] The Companies recommended instead a target goal of 15%, which would, consistent with Staff's methodology, reflect the midpoint of a target range of 14-16% subsequently set forth in a April 2016 Moody's credit opinion.[544] Staff contends this adjustment based on the subsequent target range is unnecessary because "[t]he slight change in the target range appears to have had no effect." According to Staff, "[a]pparently the change is unimportant to Moody's and, therefore, is unimportant to the analysis."[545] To the contrary, it was obviously important enough to Moody's to make the change in target range. If Staff were correct and the target range were unimportant, then Moody's would not have raised it. There is no target range more reflective of where Moody's concluded that FirstEnergy Corp. needed to be at the time Staff made its recommendation. Staff has raised no valid reason not to use the midpoint of the most

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[543] Buckley Rehearing Test., p. 4.

[544] Mikkelsen Rehearing Rebuttal Test., p. 10.

[545] Staff Rehearing Brief, p. 14; *see also* OCC/NOAC Rehearing Brief, p. 49 (contending that Staff witness Buckley "had the availability" of both the January 2016 guidance and the April 2016 guidance when he prepared his testimony, and he chose the "more conservative" earlier guidance).

recent, actual target CFO to debt range provided by Moody's at the time Staff recommended Rider DMR.

With regard to the range of historic CFO to debt data, Staff calculated a five-year average drawing on four full years beginning 2011 through 2014, but without a comparable 12-month period for 2015.[546] The Companies recommended using a three year-average beginning in 2012 and continuing through 2014 because it more accurately reflected FirstEnergy Corp.'s circumstances and more accurately addressed the concern of facilitating the Companies' access to capital markets to jump-start grid modernization.[547] Staff recommends rejecting this modification. According to Staff, the five-year period should be used because "five years is the period that is available," and because five years "represents the entire period since the last significant restructuring of [FirstEnergy Corp.]"[548] Neither justification addresses the circumstances surrounding FirstEnergy Corp.'s CFO to debt metric, nor presents a compelling reason for choosing this particular five-year period. Staff presents no analysis to support a view that the five-year period it uses is not, at least in part, anomalous or that it is truly representative.

For instance, one of Rider DMR's dual purposes is to address a trend of worsening CFO to debt at FirstEnergy Corp. beginning in 2012. The purpose of Staff's use of the historic CFO to debt data is to identify the average difference between FirstEnergy Corp.'s annual CFO to debt and Staff's target range of 14-15%. Staff's five-year period, however, includes 2011, a year preceding FirstEnergy Corp.'s trend of worsening CFO to debt. In 2011, FirstEnergy Corp.'s

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[546] Buckley Rehearing Test., pp. 3-4.

[547] Mikkelsen Rehearing Rebuttal Test., p. 10.

[548] Staff Rehearing Brief, p. 14.

CFO to Debt was 14%, already in Staff's target range. To include a year preceding the downward trend, when the CFO to debt already met Staff's target, ignores the credit support purpose of Rider DMR. Further, Staff's argument that the beginning of the five-year period represents the entire period since FirstEnergy Corp.'s merger with Allegheny Energy lacks any explanation as to how that transaction relates to Rider DMR's purpose. This argument is based on nothing more than a coincidence.

Company witness Mikkelsen, explained exactly why it is necessary to exclude 2011 and 2015 from the historic data used in the calculation if Rider DMR is to facilitate the Companies' access to capital on more favorable terms to jump-start grid modernization:

> While I agree with the use of historic data to calculate the amount of Rider DMR, Mr. Buckley's methodology looks too far into the past, and ignores a trend of worsening CFO to Debt at FirstEnergy Corp. beginning in 2012 and continuing through 2014. This is evident when viewing the table on page 4 of his testimony. Given this clearly deteriorating situation, using an average that factors in history preceding the trend ignores the purpose of the Rider DMR calculation methodology. In fact, in 2011, the first year of Mr. Buckley's five-year range, FirstEnergy Corp.'s CFO to Debt was 14%, already in Staff's target range of 14-15%. Therefore this first year should be excluded. In addition, Mr. Buckley's 2015 values should be excluded from the comparison because they are anomalous as a result of a one-year spike in capacity prices in the ATSI zone and because they are not a comparable 12-month period ending December 31, 2015. A three-year range beginning in 2012 (the year when FirstEnergy Corp.'s CFO to Debt first fell below Moody's 14-16% target range) more accurately reflects FirstEnergy Corp.'s circumstances, and more accurately addresses the objective of facilitating the Companies' access to capital markets to jump-start distribution grid modernization initiatives.[549]

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[549] Mikkelsen Rehearing Rebuttal Test., p. 10.

Thus, OCC/NOAC cannot credibly charge that the Companies have "cherry-pick[ed] the worst three-years [sic] from Mr. Buckley's five-year review."[550] To the contrary, the Companies' recommendation to use a three-year period, far from ignoring 2011 and 2015, is based on a reasoned analysis tailored to one of the dual purposes of Rider DMR. Accordingly, the Commission should adopt the Companies' recommended three-year period.

Further, Staff's argument that the 2015 spike in capacity prices in the ATSI zone "had no effect on the credit metrics – and is therefore irrelevant"[551] – is inconsistent with Staff's own methodology for calculating Rider DMR. Higher capacity revenues necessarily mean higher cash flows and a beneficial effect on credit metrics. While Mr. Buckley's calculations are based on the CFO to debt of FirstEnergy Corp., Staff's brief, for this particular issue, relies upon an answer of Company witness Mikkelsen that does not relate to FirstEnergy Corp.[552] Rather, the answer was responding to questioning about the impact of capacity prices *on the Companies*. From the Companies' perspective, generation is a pass-through. The Companies' perspective, however, is irrelevant to Staff's methodology for calculating Rider DMR, which is based on *FirstEnergy Corp.'s CFO to debt*.

With respect to the Companies' recommendation to use pre-tax revenues in the Rider DMR calculation, Staff agrees the amount to be collected should be adjusted for taxes, "but only

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[550] OCC/NOAC Rehearing Brief, p. 49. Indeed, given that Mr. Buckley's data shows that, as of September 30, 2015, there was a larger shortfall than as of December 31, 2012, if the Companies were truly "cherry-picking," they would have selected the period starting January 1, 2013 through September 30, 2015 – or perhaps the year of the largest shortfall, 2014. *See* Buckley Rehearing Test., p. 4

[551] Staff Rehearing Brief, p. 15 n. 48.

[552] Staff Rehearing Brief, p. 15 n. 48 (citing Rehearing Tr. Vol. X, p. 1816 (Mikkelsen Rebuttal Redirect)).

in a limited sense."[553] Staff would adjust the amount only to the extent that the Companies experience actual cash outlays for income tax in a given year.[554] Staff posits that "[t]he nominal tax rate does not have any direct impact on cash flow."[555] This is incorrect. Rider DMR revenue – a cash inflow – will increase the Companies' taxable income. The Companies must pay income tax on their taxable income at their respective composite tax rates.[556] Therefore, the Companies will in fact "experience actual cash outlays for income tax" associated with each dollar of Rider DMR revenue received and these cash outlays are necessarily based on the Companies' respective composite income tax rates. As shown in the Companies' FERC Form 1s, the Companies have, in fact, made cash payments for federal income taxes.[557]

If Rider DMR is to provide the Companies with credit support, its design must recognize that each of the Companies will have this tax obligation. To the extent Staff's reference to "large corporations" that "sometimes pay no tax at all" reflects an intent by Staff to discount the income tax gross-up to recognize tax offsets, such as a tax loss carryforward or other timing

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[553] Staff Rehearing Brief, p. 15.

[554] Staff Rehearing Brief, pp. 15; *see also* OCC/NOAC Rehearing Brief, pp. 51-52.

[555] Staff Rehearing Brief, p. 15.

[556] OCC is incorrect when it contends that the composite tax rate is "the standard corporate tax rate of 36 percent" and is something different than "what the Utilities actually paid in income taxes." OCC/NOAC Rehearing Brief, p. 52.

[557] Staff Rehearing Brief, p. 15. Page 262 of the Companies' FERC Form 1s for 2015 (Direct Energy Exhibits 2, 3, 4) show the Companies paid over $200 million in cash in 2015 for federal and local income taxes. In addition, page 261 of the FERC Form 1s show the calculation of the Companies' federal income tax liability using a 35% tax rate. Obligations for local income taxes would be in addition to the 35% federal income tax rate, producing composite income tax rate for the Companies of approximately 36%. Mikkelsen Rehearing Rebuttal Test., p. 11.

differences,[558] this position fails to recognize that absent the additional Rider DMR revenue, such offsets would be used against other cash inflows. Thus, Rider DMR revenues would create taxable income that results in such tax offsets being used sooner than otherwise would occur, which has the same economic value as the Companies' proposed income tax gross-up adjustment. Any approach to grossing up Rider DMR revenue for income taxes that does not recognize the Companies' need to pay income taxes at their respective composite income tax rates on all Rider DMR revenue will fall short of achieving the desired cash flow objectives.

With regard to the allocation factor, the Companies recommended an allocation factor of 40% based on net income, rather than Staff's recommended allocation factor of 22% based on operating revenues.[559] Company witness Mikkelsen explained that because the CFO in the CFO to debt metric nets cash inflows and outflows, the allocator should likewise take into account both cash inflows and outflows.[560] While the Company's recommended basis for allocation, net income, accounts for both cash inflows and outflows, Staff's recommended basis for allocation, operating revenues, does not.

Another reason operating revenues are an inappropriate measure of the Companies' contributions to FirstEnergy Corp. cash flow is because the Companies' operating revenues exclude generation-related revenue for shopping customers. Because of the high level of shopping among the Companies' customers, operating revenues inappropriately understate the

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[558] Staff Rehearing Brief, p. 15. OMAEG clearly advances this position, speculating that the Companies' recommended tax gross-up percentage is different than the level of income taxes the Companies actually pay. OMAEG Rehearing Brief, p. 48.

[559] Mikkelsen Rehearing Rebuttal Test., pp. 11-12.

[560] Mikkelsen Rehearing Rebuttal Test., p. 12.

Companies' contributions to FirstEnergy Corp. cash flow.[561] Staff maintains that its allocation factor is appropriate precisely because the Companies' operating revenues are reduced by shopping.[562] Staff argues that the diminished significance of the Companies reflects the success of the Ohio General Assembly and somehow accurately reflects the Companies' contribution to FirstEnergy Corp.'s credit metrics.[563] Staff's argument, however, does not address that operating revenues are not a proper measure of the Companies' contribution to FirstEnergy Corp.'s CFO because CFO is a number that reflects revenue net of expenses.

The point of Ms. Mikkelsen's discussion of shopping was to highlight why using operating revenues is wrong because of the different effect that generation revenues and costs have on operating revenues versus CFO. For the Companies, generation costs are a pass-through. Thus, while higher shopping levels reduce operating revenues, they have no effect on CFO. For this reason, with higher shopping levels relative to their affiliates, the Companies' contribution to CFO is understated if operating revenues are used as an allocation factor.

Sierra Club insists that the credit support allocation should be based on the relative responsibility of the Companies for FirstEnergy Corp.'s credit issues.[564] This argument, however, is completely divorced from Staff's Rider DMR objectives and methodology. Staff's objective is to give Ohio customers the benefits of "one of the most intelligent grids in the

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[561] Mikkelsen Rehearing Rebuttal Test., pp. 11-12.

[562] Staff Rehearing Brief, p. 16.

[563] *Id.*

[564] Sierra Club Rehearing Brief, pp. 64-65.

current industry."[565] And the Staff's focus on enabling the Companies to achieve this depends on providing credit support to the Companies and FirstEnergy Corp., and Staff's supporting analysis is based on the CFO to debt credit metric. Allocating credit support based on debt is inappropriate because there is debt that resides at the FirstEnergy Corp. level. FirstEnergy Corp., however, has no ability to generate CFO.[566] Thus Sierra Club's allocation based on debt would allocate a portion of the CFO shortfall to an entity with no CFO, while understating the Companies' share.

Some parties challenge the Companies' recommendation to extend the term of Rider DMR to eight years.[567] Staff's insistence that "[t]hree years is a sufficient amount of time for various measures to be taken to attempt to improve the financial situation" is speculative and contradicted by the Companies' experience. As Company witness Mikkelsen explained, FirstEnergy Corp. has been taking significant steps to address its financial situation for over three years.[568] Staff's position fails to recognize that improving credit ratings takes time.[569] Also, the capital-intensive work to implement Staff's ambitious grid modernization objectives will not end in three years.[570] In addition, Staff proposes that Rider DMR be conditioned on FirstEnergy Corp. keeping its headquarters and nexus of operations in Akron, Ohio for the full

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[565] Rehearing Tr. Vol. IV, p. 967 (Choueiki Cross).

[566] Rehearing Tr. Vol. X, pp. 1632-33 (Mikkelsen Rebuttal Cross).

[567] Staff Rehearing Brief, p. 16; OCC/NOAC Rehearing Brief, pp. 46-47; OMAEG Rehearing Brief, pp. 48-49.

[568] Staff Rehearing Brief, p. 16; Mikkelsen Rehearing Rebuttal Test., p. 15.

[569] Mikkelsen Rehearing Rebuttal Test., p. 15.

[570] Mikkelsen Rehearing Rebuttal Test., p. 15.

eight years of ESP IV, under penalty of discontinuing Rider DMR and possibly a full refund.[571] For all these reasons, the term of Rider DMR should match the eight-year term of ESP IV.

OMAEG challenges the Companies' recommendation that Rider DMR be implemented immediately upon Commission approval, without a requirement to simultaneously commence grid modernization.[572] OMAEG's position, however, fails to recognize the Companies' need to rehabilitate their credit metrics before they seek access to the capital markets.[573] Starting Rider DMR only once the Companies need to access the markets will be too late to obtain financing on the favorable terms Staff envisioned in proposing Rider DMR.

E. Rider DMR, Whether As Proposed By Staff or As Modified By The Companies, Does Not Change the Outcome of the ESP v. MRO Test.

Although the Companies believe that adoption and implementation of the Proposal is the preferred and most customer-beneficial path forward, adopting proposed Rider DMR and including that rider in ESP IV still results in having this ESP pass the ESP v. MRO test. Quantitatively, ESP IV with Rider DMR is still more beneficial than an MRO by at least $51.1 million (the amount of the Companies' commitment to fund economic development, energy efficiency and low income customer support programs).[574] Considering the economic impact of Rider DMR's proposed Headquarters Condition, ESP IV with Rider DMR is more favorable than an MRO by as much as $619 million (adding the economic impact as estimated by Company witness Murley to the $51 million funding commitment).

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[571] Buckley Rehearing Test., p. 7.

[572] OMAEG Rehearing Brief, p. 49.

[573] Mikkelsen Rehearing Rebuttal Test., p. 16.

[574] Mikkelsen Rehearing Rebuttal Test., p. 20.

A key consideration in this quantitative analysis is whether Rider DMR should be treated like Rider DCR and other distribution riders, i.e., as a "wash" for purposes of the ESP v. MRO test. Staff witness Turkenton and Company witness Mikkelsen agree, albeit for different reasons, that Rider DMR would be a "wash."[575]

Intervenors take a different view. CMSD merely asserts that Rider DMR is a cost of the ESP.[576] Sierra Club baldly claims that revenues under Rider DMR could not be recovered under alternate means.[577] Both are wrong. As Ms. Mikkelsen observed, the likely uses of such funds would be for credit support for distribution grid modernization or other distribution infrastructure improvements, debt refinancing or pension funding.[578] All of these uses represent legitimate distribution-related outlays that would otherwise be recoverable in a base rate case or in the Companies' existing Rider AMI or some similar rider.[579] Indeed, as Sierra Club labored so mightily to discuss with Ms. Mikkelsen, rate cases provide credit support, like Rider DMR is proposed to do.

Further, grid modernization related expenses are recoverable outside of ESPs. The Companies' Rider AMI arose from authority delegated to the Commission under the Energy

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[575] Rehearing Testimony of Tamara S. Turkenton ("Turkenton Rehearing Test."), pp. 3-4; Mikkelsen Rehearing Rebuttal Test., pp. 18-20.

[576] CMSD Rehearing Brief, p. 5, 21-25.

[577] Sierra Club Rehearing Brief, p. 77.

[578] Mikkelsen Rehearing Rebuttal Test., p. 9; Rehearing Tr. Vol. X, p. 1607 (Mikkelsen Rebuttal Cross).

[579] For example, in a distribution base rate case, the Commission could make adjustments, as it deems appropriate, to test-year expense, or normalize test-year expenses, or provide an incentive rate of return on equity. *E.g., In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Increase Rates for Distribution Service*, Case No. 07-551-EL-AIR, Opinion, pp. 13-14 (Jan 21, 2009) (adjusting labor expense).

Policy Act of 2005.[580] The establishment of Rider AMI and the charge for that rider were both established outside of any ESP.[581] Consequently, charges to provide credit support for such initiatives could be recovered outside of an ESP as well.

OCC/NOAC and OMAEG contend that Rider DMR should not be considered a "wash" because the rider would not be permitted under an MRO.[582] This cribbed view of the ESP v. MRO analysis was argued by intervenors in the Companies' ESP III case regarding Rider DCR – and was rejected by the Commission[583] and the Ohio Supreme Court.[584] Given that an MRO would not preclude a base rate case or the implementation of some other rate mechanism to provide credit support for grid modernization, Rider DMR revenues are considered appropriately recoverable on both sides of the ESP v. MRO test.

OCC/NOAC similarly misunderstand how the ESP v. MRO test works when they assert that because the Companies agreed to a base rate freeze, Rider DMR could not be recovered in a base rate case.[585] OCC/NOAC apparently forget that the base rate freeze is part of the

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580 *In the Matter of the Commission's Response to Provisions of the Federal Energy Policy Act of 2005 Regarding Net Metering, Smart Metering and Demand Response, Cogeneration and Power Production Purchase and Sale Requirements, and Interconnection*, Case No. 05-1500-EL-COI, Finding and Order, p. 1 (Mar. 28, 2007).

581 *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Increase Rates for Distribution Service*, Case No. 07-551-EL-AIR, Opinion and Order, p. 44-45 (Jan. 21, 2009) (establishing the rider); *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of Ohio Site Deployment of the Smart Grid Modernization Initiative and Timely Recovery of Associated Costs*, Case No. 09-1820-EL-ATA, Finding and Order, p. 9 (June 30, 2010) (establishing charge).

582 OCC/NOAC Rehearing Brief, p. 11; OMAEG Rehearing Brief, p. 56.

583 ESP III Order, pp. 50-52, 55-57.

584 *In re Application of Ohio Edison Co.*, 2016-Ohio-3021, ¶¶ 23-27, 146 Ohio St. 3d 222.

585 OCC/NOAC Rehearing Brief, p. 11.

Companies' ESP IV. In reviewing the MRO side of the ESP v. MRO test, one considers the results *without an ESP*. Simply put, if there was no ESP, there would be no base rate freeze.[586]

From a qualitative perspective, ESP IV with Rider DMR still promotes the benefits specifically relied upon by the Commission in its ESP v. MRO analysis in the March 31 Order, to wit: a base rate freeze, rate options, energy efficiency, grid modernization and resource diversity through use of batter technology and renewable energy resources. Further, Rider DMR will help maintain the Companies' credit rating, something that will undoubtedly benefit customers. The record amply demonstrates the harm that will result if the Companies lose their investment grade rating status.[587]

Notwithstanding such evidence, several intervenors attempt to argue that ESP IV with Rider DMR will be qualitatively inferior. Notably, none of these parties show (nor could they) that ESP IV with Rider DMR is qualitatively inferior *to an MRO*. Instead, they concentrate their efforts to demonstrate either: (1) Rider DMR is qualitatively inferior to Rider RRS; or (2) Rider DMR is net qualitatively inferior. Yet none of these arguments really rebut the qualitative superiority of ESP IV with Rider DMR versus an MRO.

For example, certain intervenors argue that adopting Rider DMR would eliminate the benefits of Rider RRS "relied upon" by the Commission in the March 31 Order's ESP v. MRO

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[586] OEC/EDF and OMAEG also contend that Rider DMR cannot be considered as part of either an ESP or an MRO because Rider DMR is "unlawful." OEC/EDF Rehearing Brief, pp. 27-28; OMAEG Rehearing Brief, pp. 43-44, 55-56. As demonstrated above (*see* pp. 91-103, *supra*), this is wrong.

[587] Mikkelsen Rehearing Rebuttal Test., pp. 6-8; Buckley Rehearing Test., pp. 5-6.

analysis.[588] Each of the specific qualitative benefits of ESP IV mentioned by the Commission in the March 31 Order are still present with Rider DMR. In fact, in the paragraph in which the March 31 Order addresses the qualitative benefits of ESP IV, neither Rider RRS nor any of its benefits are mentioned at all. Instead, the Commission mentioned the base rate freeze, various rate options, the CO_2 emission reductions, energy efficiency programs, grid modernization, a potential SFV rate design and resource diversity through battery technology and renewable resources.[589]

The intervenors opposing ESP IV also attempt to downplay the economic benefit arising from the Headquarters Condition in Rider DMR. Some assert that the Companies were already required to keep FirstEnergy's Headquarters in Akron.[590] These parties overlook the specific language of the Third Supplemental Stipulation, which gave rise to the prior commitment. Paragraph V.I.3 of the Third Supplemental Stipulation states: "FirstEnergy will maintain its corporate headquarters and its nexus of operations in Akron, Ohio *for the duration of Rider RRS*."[591] There can be little debate about what this sentence means – no Rider RRS, no headquarters commitment. By proposing Rider DMR in place of Rider RRS, the Staff took the language of the Third Supplemental Stipulation to mean what it says. Accordingly, the Staff inserted the Headquarters Condition to capture a commitment that would be lost if Rider RRS is rejected.

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[588] CMSD Rehearing Brief, pp. 5, 13-14; NOPEC Rehearing Brief, p. 22; OMAEG Rehearing Brief, pp. 44-46, 56-57.

[589] March 31 Order, pp. 119-20.

[590] P3/EPSA Rehearing Brief, p. 56; OCC/NOAC Rehearing Brief, pp. 12-13; CMSD Rehearing Brief, pp. 5-6, 16.

[591] Company Ex. 154, p. 17.

OMAEG repeats that the Headquarters Condition is illusory because FirstEnergy Corp. has a lease through the term of ESP IV.[592] As shown above,[593] this overlooks that a change in control (something more likely with a financially challenged company) would moot any lease.

OEC/EDF argue that the Headquarters Condition is not "adequate consideration" for Rider DMR.[594] Others contend that any possible grid modernization benefits are illusory because there is no requirement on the Companies[595] and no commitment by the Companies[596] to conduct such activities. As demonstrated above,[597] the Companies intend to modernize the grid. Among other ways, this will take place as part of the Companies' grid modernization plan, once approved by the Commission.[598] Revenues received under Rider DMR will provide credit support to enable the Companies to maintain investment grade credit ratings and thus to access capital markets and commercial relationships on a reasonable cost basis.[599] Investment grade credit ratings are essential to the successful completion of numerous capital-intensive funding requirements that the Companies will face over the term of ESP IV. Rider DMR will contribute towards the maintenance of that credit rating status.

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[592] OMAEG Rehearing Brief, pp. 42, 53-54.

[593] *See* p. 105 *supra.*

[594] OEC/EDF Rehearing Brief, pp. 31-33, 35-36.

[595] Sierra Club Rehearing Brief, p. 77; OHA Rehearing Brief, p. 13; NOPEC Rehearing Brief, p. 21.

[596] OCC/NOAC Rehearing Brief, pp. 11-12; OMAEG Rehearing Brief, p. 45; Direct Rehearing Brief, pp. 7, 13.

[597] *See* pp. 97, 110-111, 121-124 *supra.*

[598] Mikkelsen Rehearing Rebuttal Test., pp. 5-6.

[599] Mikkelsen Rehearing Rebuttal Test., pp. 7-8.

CMSD states that "approval of Rider DMR would pull the rug from under Commission's reliance on the distribution rate freeze as a qualitative benefit of ESP IV."[600] This is simply not true. The Companies' commitment to a freeze of base distribution rates remains unchanged. Rider DMR is a stand-alone mechanism with a specified term, completely separate from base distribution rates. Thus, Rider DMR has no impact on the Commission's determination that the base distribution rate freeze is a qualitative benefit of ESP IV. In fact, Rider DMR will create additional qualitative benefits by promoting modernization of the grid through the deployment of advanced technology, and the continued promotion of competition by enabling competitive providers to offer innovative products and services to serve customers in Ohio.[601]

CMSD also complains that there has been no quantitative analysis of the benefit of keeping the Companies' credit rating at investment grade.[602] As Ms. Mikkelsen testified, doing such an analysis would be difficult, if not impossible:

> Q. And you have not in any way quantified the impact to customers of increased borrowing costs that would result from a credit downgrade to non-investment grade, correct?
>
> A. I don't think that quantification can occur today. It would be dependent upon a number of future circumstances such as what level of debt is being sought, what the market conditions are at that time, what the companies' credit ratings are at that time; things of that nature would be very important in order to provide an estimate.[603]

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[600] CMSD Rehearing Brief, p. 15.

[601] Turkenton Rehearing Test., p. 4.

[602] CMSD Rehearing Brief, pp. 22-23.

[603] Rehearing Tr. Vol. X, pp. 1627-28 (Mikkelsen Rebuttal Cross).

Even CMSD concedes the difficulty of the analysis.[604] The evidence shows without rebuttal, however, that keeping the Companies at investment grade credit ratings will benefit customers. These benefits were discussed by Mr. Buckley[605] and Ms. Mikkelsen.[606] Indeed, OCC witness Kahal agreed that many of the benefits pointed out by Mr. Buckley and Ms. Mikkelsen were true.[607] Thus, the fact that the credit support benefits of Rider DMR cannot be quantified fails to diminish the importance and relevance of such benefits in an ESP v. MRO analysis. Indeed, the Commission has always considered qualitative benefits (i.e., benefits that cannot be quantified) in ESP v. MRO analyses.[608]

Some intervenors baldly claim that Rider DMR will adversely affect the diversity of generation suppliers in Ohio.[609] But these arguments are based on the illusion that Rider DMR revenues would somehow fund FES's operations. As demonstrated above[610] the evidence is otherwise.

F. Should the Commission Approve Rider DMR as Modified by the Companies, It Does Not Need to Consider Sierra Club's Proposed Modifications.

Sierra Club argues that Rider DMR would benefit customers, but only if it is structured differently.[611] Contrary to the evidence provided by Staff and the Companies demonstrating that

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[604] CMSD Rehearing Brief, pp. 22-23.

[605] Buckley Rehearing Test., pp. 5-6.

[606] Mikkelsen Rehearing Rebuttal Test., pp. 6-8.

[607] Rehearing Tr. Vol. VIII, pp. 1384-85, 1387-91 (Kahal Rebuttal Cross).

[608] *See, e.g.*, March 31 Order, pp. 119-20; *AEP ESP3* Order, pp. 94-95; ESP III Order, p. 56; ESP II Order, p. 44.

[609]OMAEG Rehearing Brief, p. 45; NOPEC Rehearing Brief, p. 21; OEC/EDF Rehearing Brief, p. 24..

[610] *See* pp 99, 110-111, 121-124 *supra.*

[611] Sierra Club Rehearing Brief, pp. 79-83.

a properly structured Rider DMR would benefit customers, Sierra Club asserts that the Commission should redesign Rider DMR "so that customers actually receive some benefit" from Rider DMR.[612] Sierra Club further confuses the purpose of Rider DMR by asserting a myriad of "safeguards" that it believes are necessary for Rider DMR. One fundamental point missed by Sierra Club is the difference between revenues necessary to provide credit support to access capital for projects and cash to pay for such projects. Indeed, there is no evidence that the $131 million proposed by Staff (or the Companies' suggested modified revenue amount) would be sufficient to fund any of the grid modernization projects that Sierra Club proposes or the grid modernization business plan that the Companies proposed.

As an initial matter, Sierra Club perpetuates this confusion by arguing that any funds collected through Rider DMR should remain with the Companies.[613] However, Rider DMR is not intended to provide cash directly to the Companies to use for any specific project, rather it will provide credit support to the Companies so that they are able to fund distribution modernization projects.[614] As Ms. Mikkelsen testified:

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[612] Sierra Club Rehearing Brief, pp. 79-80; *see also* Direct Rehearing Brief, p. 17.

[613] Sierra Club Rehearing Brief, pp. 80-81. The Commission should also ignore Sierra Club's assertion that the Companies could "attempt to circumvent the FERC Order" because it ignores the fact that the Companies have strict code of conduct laws and rules to follow both at the federal and state level prohibiting such conduct and with stiff penalties for doing such a thing. Sierra Club Rehearing Brief, p. 80. Indeed, as the record demonstrates, the Companies lack the means to somehow effectuate a transfer of monies to FES. As Ms. Mikkelsen explained at hearing, "I'm not aware of any mechanism within the companies' organization that would allow them to share dollars collected with FES." Rehearing Tr. Vol. I, p. 226 (Mikkelsen Cross). Moreover, FirstEnergy Corp. has indicated that it is not going to make any more investments in FES going forward. Rehearing Tr. Vol. I, p. 158 (Mikkelsen Cross). Thus, Sierra Club's claims are baseless.

[614] Choueiki Rehearing Test., p. 15. See also Buckley Rehearing Test., p. 2 ("The rider would be established to allow the Ohio Regulated Distribution Utilities to provide the appropriately allocated support for FirstEnergy Corporation (FE) to maintain investment grade by the major credit rating agencies.").

> The credit support provided by Rider DMR will allow the Companies to fund, either through capital support or through access to the capital markets under more favorable terms, investments to begin modernizing the distribution system, preparing it for integration with smart grid technologies, or for evaluation and possible integration of battery technology.[615]

In short, "[t]he Rider DMR credit support would improve the Companies' access to the capital markets, and enable the Companies to access capital on more favorable terms."[616]

Sierra Club's contention that cash from Rider DMR should stay with the Companies and earmarked for certain projects undermines the entire purpose of Rider DMR. As Ms. Mikkelsen testified:

> By 'priming the pump', the Companies will be able to obtain lower financing costs when grid modernization spending begins, resulting in lower rates for customers. If the Companies instead must wait to collect Rider DMR until they need immediate access to capital for grid modernization, Rider DMR revenues will have no effect on the Companies' financing of grid modernization projects. This would defeat the purpose of Rider DMR.[617]

Despite the fact that Rider DMR was proposed to provide credit support and not directly fund certain projects, Sierra Club argues that the Commission should require that the DMR revenues be set aside in a separate account (or accounts) within the Companies and restricted for use only within the Companies.[618] However, as Ms. Mikkelsen testified several times, the

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[615] Mikkelsen Rehearing Rebuttal Test., p. 5.

[616] Mikkelsen Rehearing Rebuttal Test., p. 8.

[617] Mikkelsen Rehearing Rebuttal Test., p. 16.

[618] Sierra Club Rehearing Brief, p. 80.

Companies intend to use the monies collected through Rider DMR within the Companies.[619] Any such restriction is not necessary. As Ms. Mikkelsen testified regarding revenues collected under Rider RRS, [620] it is reasonable to assume that revenues recovered under Rider DMR would be recorded under a separate general ledger account in order to provide the necessary tracking for true-ups. Further restrictions are not necessary.

Sierra Club's misinterpretation of Rider DMR is further evidenced by its argument that "the Companies should be precluded from getting double recovery on capital investments made with the DMR funds."[621] As noted above, Rider DMR is not tied to specific capital investments and is not a recovering a return on investment through this rider. Therefore, there is no double recovery. Capital expenditures needed under a grid modernization program would have to be funded well before the Companies recover specific costs under Rider AMI. Rider DMR as proposed by Staff allows the Companies access to the necessary capital at a reasonable price. As Staff Witness Choueiki testified, credit support through Rider DMR and the return on and of investment under Rider AMI are different.[622] To the extent that funds are used to invest in grid modernization, the Companies are still entitled to full recovery of a return of and on the investments through Rider AMI. This is consistent with traditional ratemaking practices where funds from operations may be used to re-invest in the Companies' infrastructure. Sierra Club's

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[619] Rehearing Tr. Vol. X, p. 1607 (Mikkelsen Rebuttal Cross).

[620] Rehearing Tr. Vol. I, pp. 71-72 (Mikkelsen Cross).

[621] Sierra Club Rehearing Brief, p. 81.

[622] Rehearing Tr. Vol. V, pp. 1227-30 (Choueiki Cross).

assertion that there would be double recovery is simply incorrect and not consistent with traditional ratemaking practices.

Similarly, Sierra Club's assertion that Rider DMR should replicate cost recovery mechanisms used by the Companies and FirstEnergy Corp.'s other operating companies for capital projects is misplaced.[623] Sierra Club misinterprets Ms. Mikkelsen's testimony that those cost recovery mechanisms provide credit support because a rider that provides cash flow to the Companies would provide credit support. The cost recovery mechanisms described by Sierra Club provide cash inflow to the operating companies *after* expenses have already been incurred.[624] The purpose of Rider DMR is to provide favorable conditions to acquire capital to make other investments *before* such expenses have been incurred.

Sierra Club's argument is also based on the erroneous premise that the credit support that Rider DMR offers, as Staff indicated, has no benefit to customers.[625] On the contrary, there is ample evidence that a properly designed Rider DMR and the credit support it provides will benefit customers including:

> Credit support that would put the Companies in a position to jump-start investment in the distribution grid modernization initiatives.[626]
>
> Significant investments to modernize the distribution system including the rehabilitation of urban area network systems, the replacement of underground cable, and the upgrade of overhead circuits and substation equipment. Completion of

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[623] Sierra Club Rehearing Brief, p. 82.

[624] *See* Rehearing Tr. Vol. X, pp. 1675-76 (Mikkelsen Rebuttal Cross).

[625] Sierra Club Rehearing Brief, p. 79.

[626] Rehearing Tr. Vol. X, pp. 1697-98 (Mikkelsen Rebuttal Cross) .

> such projects will allow for the full utilization of advanced technologies.[627]
>
> Enabling an array of innovative products and services.[628]
>
> Increased reliability, safety, and customer satisfaction.[629]
>
> Lower borrowing costs which lowers the cost of doing business keeping costs down for customers.[630]
>
> Additional economic development benefits associated with rider DMR . . . arising from the dollars being spent both, from a human resource and physical resource perspective, in terms of jobs and purchases of equipment that would provide economic development in the companies' service territories.[631]

As the evidence shows, there are a myriad of benefits that a properly designed Rider DMR provides to customers.

Sierra Club also argues that if the Commission approves Rider DMR with Sierra Club's modifications, the Companies have ample opportunity to make investments such as grid modernization, energy efficiency and renewable energy.[632] As the Companies have indicated throughout this proceeding, the various stipulations approved by the Commission benefit customers through the provisions related to grid modernization, energy efficiency and renewable energy. Indeed, the Companies already have begun to implement the customer benefits offered

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[627] Mikkelsen Rehearing Rebuttal Test., pp. 5-6.

[628] Mikkelsen Rehearing Rebuttal Test., p. 6; Rehearing Tr. Vol. X, p. 1818 (Mikkelsen Rebuttal Redirect).

[629] Mikkelsen Rehearing Rebuttal Test., p. 5; Rehearing Tr. Vol. X, p. 1818 (Mikkelsen Rebuttal Redirect).

[630] Mikkelsen Rehearing Rebuttal Test., p. 8. Staff Witness Buckley also recognized this in his testimony and stated: "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." Buckley Rehearing Test., p. 5.

[631] Rehearing Tr. Vol. X, p. 1818 (Mikkelsen Rebuttal Redirect).

[632] Sierra Club Rehearing Brief, pp. 83-92.

by the various stipulations by filing a grid modernization business plan and robust energy efficiency plans. And, as Ms. Mikkelsen testified, the Companies with appropriate cost recovery would comply with whatever Commission directive is made in those respective cases.[633] Although Sierra Club criticizes the Companies' plans and offers several modifications to those plans (issues that really should be addressed on those specific dockets), the Companies have followed through with the March 31 Order in implementing Stipulated ESP IV, as modified by the Commission. It appears that Sierra Club wants the Companies to begin large investments in grid modernization, energy efficiency and renewable energy without Commission approval of their plans – which would not be prudent or realistic for a public utility to do.

G. Rider DMR Should Not Be Subject to Refund.

Staff proposes that the entire amount collected under Rider DMR should be collected subject to refund in the event that FirstEnergy Corp. relocates its headquarters and nexus of operations from Akron, Ohio at any point during the term of ESP IV.[634] Similarly, OCC/NOAC broadly assert that the revenues collected under Rider DMR, if it is approved at all, should be subject to refund.[635] These positions are, however, unsupported by long-standing Ohio law and Commission precedent. Further, approving Rider DMR subject to refund threatens the primary purposes of the rider—providing credit support to the Companies to improve their access to capital markets.

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[633] Rehearing Tr. Vol. X, pp. 1733, 1763-64 (Mikkelsen Rebuttal Cross).

[634] Buckley Rehearing Test., p. 7; Staff Rehearing Brief, p. 17 (discussing the condition on the location of FirstEnergy Corp.'s headquarters).

[635] OCC/NOAC Rehearing Brief, pp. 2, 42.

Approving Rider DMR subject to refund would require the Commission to engage in impermissible retroactive ratemaking.[636] Indeed, since the Ohio Supreme Court's decision in *Keco Industries, Inc. v. Cincinnati & Suburban Bell Telephone Co.*, the rule has been "that any rates set by the Public Utilities Commission are the lawful rates until such time as they are set aside as being unreasonable and unlawful by the Supreme Court."[637] The Court has more recently reaffirmed its support of that holding.[638] Based on the prohibition on retroactive ratemaking set forth in *Keco*, "Neither the commission nor [the Supreme Court] can order a refund of previously approved rates."[639]

The Commission's decision in *In re Application of The Dayton Power and Light Co. for Approval of Tariff Changes Associated with the Request to Implement a Billing Cost Recovery Rider*[640] also is instructive. In that decision, the Commission considered, among other things, the amount to be collected through DP&L's proposed billing rider, which would recover certain

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[636] Ms. Mikkelsen explained at rehearing with regards to Modified RRS:

> If the Commission were to make the dollars collected under the proposal subject to refund pursuant to Dr. Duann's recommendation, then the answer is yes [that would constitute retroactive ratemaking]. If the dollars collected under the proposal would be subject to refund because [the Companies] over-collected the dollars in a period, [the Companies] need to return those dollars to the customers, or because there was found to be an error in the calculation and [the Companies] had to return those dollars to the customers, something of that nature coming out of a staff audit, the answer would be no.

Rehearing Tr. Vol. X, p. 1691 (Mikklesen Rebuttal Cross). This reasoning is equally applicable to approving Rider DMR subject to refund.

[637] 166 Ohio St. 254, 259 (1957).

[638] *See, e.g.*, *In re Columbus Southern Power Co.*, 138 Ohio St.3d 448, 460, 2014-Ohio-462 (citing *Keco* and its progeny and stating, "These cases teach that present rates may not make up for excessive rate charges due to regulatory delay[.]").

[639] *Green Cove Resort I Owners' Ass'n v. Pub. Util. Comm'n.*, 103 Ohio St.3d 125, 130 (2004).

[640] Case No. 05-792-EL-ATA, 2006 Ohio PUC LEXIS 143, Opinion and Order (Mar. 1, 2006).

billing modification costs, the costs of a prudence audit, and carrying charges.[641] As OCC/NOAC do here, OCC argued that the billing rider, if approved at all, should be approved subject to refund.[642] The Commission flatly rejected OCC's proposal, finding that "approving the rider subject to refund . . . would be inconsistent with comparable precedent."[643]

Faced with the Supreme Court's holdings and the Commission precedent in accord, neither Staff nor OCC/NOAC cite any authority suggesting that the Commission can or should approve Rider DMR subject to refund in its entirety. Thus, neither Staff nor OCC/NOAC's positions are premised on any sound legal basis.[644]

The positions of Staff and OCC/NOAC also are counterproductive from a policy perspective. Approving Rider DMR subject to refund would potentially divest the rider of its purpose by threatening the value of the credit support to be provided.[645] Making Rider DMR

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641 *Id.* at *5-6, *11.

642 *Id.* at *8.

643 *Id.* at *32 (citing *Application of The Dayton Power and Light Company for approval of Tariff Changes Associated with a Request to Implement a PJM Admin. Fee*, Case No. 05-844-EL-ATA, Finding and Order (Jan. 25, 2006)).

644 The lack of any authority is surprising. The Commission generally authorizes monies to be collected subject to refund in very limited circumstances, none of which apply here. *See, e.g.*, *In the Matter of the Commission Review of the Capacity Charges of Ohio Power Co.*, Case No. 10-2929-EL-UNC, 2016 Ohio PUC LEXIS 477, Entry, at *7 (May 18, 2016) (finding that going-forward revenues collected under AEP's retail stability rider should be recovered subject to refund pending the completion of proceedings on remand from the Supreme Court); *In the Matter of the Application of Akron Thermal, Ltd. P'ship for an Emergency Increase in its Steam & Hot Water Rates & Charges*, Case No. 00-2260-HT-AEM, 2001 Ohio PUC LEXIS 1071, Opinion and Order, at *12-13 (Jan. 25, 2001) (approving stipulation establishing emergency surcharge subject to refund in the event that the percentage increase granted in the permanent rate case was less than the emergency relief agreed to by the company and staff in the stipulation); *In re the Matter of the Inclusion of Take or Pay Costs in the Gas Cost Recovery Rates of Dayton Power and Light Co. & Related Matters*, Case No. 88-1446-GA-UNC, 1988 Ohio PUC LEXIS 952, Finding and Order, at *1-2 (Oct. 12, 1988) (permitting a utility to recover subject to refund certain natural gas costs related to FERC-approved pass-through take-or-pay pending the outcome of the Commission's investigation into the treatment of such charges).

645 *See, e.g.*, Mikkelsen Rehearing Rebuttal Test., pp. 5-6, 22; Choueiki Rehearing Test., p. 15.

funds subject to refund would imbue such funds with doubt; there would be a continuing risk that the Companies would be forced to return the monies collected.[646] This risk would place a figurative asterisk on the Companies' cash flow numbers as reviewed by ratings agencies, thereby making it less likely that the ratings agencies would treat Rider DMR revenues as a credit positive.[647] And this would, in turn, threaten the Companies' access to capital markets, defeating the purpose of the rider altogether.[648] Thus, approving Rider DMR subject to refund, notwithstanding the prohibition on retroactive ratemaking, makes little sense.

H. Any Revenues Collected Under Rider DMR Must Be Excluded From The SEET Calculation.

OCC/NOAC seek to include the revenues collected under a properly designed Rider DMR in the calculation of the annual SEET test.[649] The Commission must reject such a suggestion for four reasons: (1) making Rider DMR subject to the SEET calculation would defeat the purposes of the rider; (2) charges associated with Rider DMR warrant exclusion from the SEET calculation as "extraordinary items"; (3) there are no comparable companies with a mechanism like Rider DMR and thus, no valid comparison for the purposes of the SEET calculation could be made; and (4) the March 31 Order provides for SEET exclusions

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[646] Companies' Rehearing Brief, p. 41 (citing Mikkelsen Rehearing Rebuttal Test., p. 22).

[647] Companies' Rehearing Brief, p. 41 (citing Mikkelsen Rebuttal Test., p. 22). OCC/NOAC's own witness testified that ratings agencies would take into account the risk of future refunds of revenues collected under a rider, which could affect the Companies' ability to access capital markets. Rehearing Tr. Vol. IV, pp. 947-48 (Duann Cross) (in the context of making Modified Rider RRS subject to refund).

[648] Companies' Rehearing Brief, p. 41.

[649] OCC/NOAC Rehearing Brief, pp. 54-55.

"associated with any additional liability or write-off of regulatory assets due to implementing the Companies' ESP IV."[650] Intervenors' arguments to the contrary are misplaced.

First, the purpose of Rider DMR is, over time, to improve the Companies' credit metrics, thereby improving access to capital markets as a means to jumpstart grid modernization and fund other necessary operations. Making charges under Rider DMR subject to the SEET calculation would short-circuit this approach to improve the Companies' credit metrics.[651] Including Rider DMR in the SEET calculation would increase the chances of an inappropriate SEET refund.[652] A refund involving the return of Rider DMR dollars would not improve the Companies' credit metrics.[653] Indeed, improved access to capital markets would disappear if the Companies had to return revenues from Rider DMR.[654]

Second, as discussed above in the case of Rider RRS, the Generic SEET Order provides that "extraordinary items" may be excluded for purposes of the SEET calculation.[655] By any measure, charges under Rider DMR would count as an "extraordinary item." Specifically, as Ms. Mikkelsen explained:

> Rider DMR would be justifiably excluded from the SEET calculation because the credit support necessary to achieve Staff's stated goal of developing one of the nation's most intelligent

[650] Mikkelsen Rehearing Rebuttal Test., pp. 22-23.

[651] Mikkelsen Rehearing Rebuttal Test., p. 22.

[652] Mikkelsen Rehearing Rebuttal Test., p. 22.

[653] Mikkelsen Rehearing Rebuttal Test., p. 22.

[654] Mikkelsen Rehearing Rebuttal Test., p. 22. "In addition, the SEET calculation is, by definition, only concerned with a utility's ability to generate significantly excessive earnings. It is not a test of a utility's creditworthiness. A finding of significantly excessive earnings would not in and of itself be indicative of investment grade credit ratings at a utility." *Id.*

[655] *See* Generic SEET Order, p. 18

> distribution grids, as well as the commitment to retain FirstEnergy Corp.'s headquarters and nexus of operations in Akron, Ohio, are both extraordinary in nature.[656]

Third, as prescribed in the SEET statute, the earned return on equity of a utility must be compared to the earned return of comparable companies.[657] There are no comparable companies, however, that have a mechanism like Rider DMR to jumpstart capital investment through improving access to capital markets on more favorable terms, conditioned upon retaining its headquarters in a particular state.[658] Thus, charges under Rider DMR should be excluded from SEET for this reason as well.

Fourth, the March 31 Order allows for SEET exclusions "associated with any additional liability or write-off of regulatory assets due to implementing the Companies' ESP IV."[659] Pursuant to Staff's recommendation, Rider DMR would be implemented in conjunction with a Commission directive for the Companies to invest in grid modernization.[660] This directive from the Commission likely would cause the Companies to take on additional liabilities for the debt needed to fund the investments.[661] Through the credit support provided by Rider DMR, the rider is associated with these additional liabilities, so the Rider DMR revenues should therefore be excluded from the SEET calculation.[662]

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[656] Mikkelsen Rehearing Rebuttal Test., pp. 22-23.

[657] Mikkelsen Rehearing Rebuttal Test., p. 23.

[658] Mikkelsen Rehearing Rebuttal Test., p. 23.

[659] *See* Direct Testimony of Santino L. Fanelli, p. 11 (Aug. 4, 2014). *See generally* March 31 Order approving the Companies' Stipulated ESP IV with the updated proposed in Mr. Fanelli's direct testimony.

[660] Mikkelsen Rehearing Rebuttal Test., p. 23.

[661] Mikkelsen Rehearing Rebuttal Test., p. 23.

[662] Mikkelsen Rehearing Rebuttal Test., p. 23.

As such, OCC/NOAC's arguments that charges under Rider DMR should be included in the annual SEET calculation are meritless.

VI. THE ATTORNEY EXAMINERS' EVIDENTIARY RULINGS WERE CORRECT.

In granting rehearing regarding the Companies' proposed modifications to Rider RRS, the Commission neither contemplated nor countenanced a rehash of the many issues it considered and decided in the March 31 Order. The Commission's May 11, 2016 Entry on Rehearing granted rehearing so that additional evidence could be taken on the Proposal in anticipation of "further evidentiary hearings."[663] The June 3 Entry then set a hearing so that the Commission could consider: "*the provisions of, and alternatives to, the Modified RRS Proposal*. No further testimony will be allowed regarding other assignments of error raised by parties."[664] The Commission "affirmed in all respects" the June 3 Entry, including the limited scope of rehearing.[665]

Yet, significant portions of the rehearing direct testimony of the witnesses for Sierra Club, OCC/NOAC, and P3/EPSA ignored the Commission's entries by: (1) regurgitating exactly what these witnesses had testified to previously with general criticisms of Rider RRS; or (2) providing "updated" projections under Rider RRS using the same flawed methodology considered and rejected by the Commission in its March 31 Order. These portions of testimony

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[663] Entry on Rehearing, ¶ 9 (May 11, 2016).

[664] Entry, ¶ 15 (June 3, 2016) (emphasis added). Indeed, as the Attorney Examiner observed on the second day of the hearing on rehearing, "the companies' proposal . . . is the genesis of this hearing." Rehearing Tr. Vol. II, p. 481.

[665] Third Entry on Rehearing, ¶ 25.

were either cumulative or went well beyond the permissible scope of the matter before the Commission, i.e., the Proposal and any alternative proposals.

Simply put, the Commission did not grant rehearing to allow intervenors a "do over" to contest issues that the Commission already had decided in its March 31 Order. Yet in seeking, among other things, to provide updated revenue projections of Rider RRS as approved by the Commission, a "do over" is exactly what Sierra Club, OCC/NOAC, and P3/EPSA sought. Most blatantly, each of these parties sought to sponsor rehearing testimony that revisited the wisdom of Rider RRS as approved by the Commission in the March 31 Order. This testimony went well beyond the scope of rehearing by seeking to provide updated revenue projections for Rider RRS *per se*, eschewing any quantitative comparison of Rider RRS as modified with Rider RRS as approved.

Indeed, in the March 31 Order, the Commission found that only two sets of projections were methodologically reliable: (1) the Companies' projections prepared by Company witness Rose of ICF international and Company witness Lisowski; and (2) one projection prepared by Mr. Wilson that was based upon the 2014 Energy Information Agency Annual Energy Outlook ("EIA AEO") reference case.[666] Further, the Commission reviewed and rejected all of the other

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[666] Regarding the Companies' projections, the Commission found:

> Despite the various criticisms of the projections prepared by FirstEnergy witness Rose and the modeling prepared by FirstEnergy witness Lisowski, we are not persuaded by arguments against giving weight to the projections and models. Although we are mindful of the fact that FirstEnergy has the burden of proof in this proceeding, no other party has presented a full projection of energy prices and the net revenues under Rider RRS. Even OCC witness Wilson derives much of his projection from the numbers prepared by Mr. Rose and Mr. Lisowski.

March 31 Order, p. 81.

intervenor witness projections entered into evidence, including those of Mr. Wilson and Dr. Kalt, because those projections were beset by various methodological flaws, e.g., they were "internally inconsistent," "arbitrarily chose[n]," lacking in "sufficient reliability and should be given no weight by the Commission," and of "little value as a projection."[667] The Commission also considered and rejected various intervenors' claims that the Companies should have updated their projections repeatedly throughout the course of this lengthy proceeding.[668]

Thus, the Attorney Examiners properly granted the Companies' motions to strike. There is no basis here for reversing the Attorney Examiners' routine evidentiary rulings. Such run-of-the-mill rulings fall well within an Attorney Examiners' discretion. Nothing in those rulings in any way impeded Sierra Club, OCC/NOAC, OMAEG, and P3/EPSA from fully prosecuting their cases within the proper scope of this rehearing proceeding. Hence, the Commission should deny the these intervenors' requests for reversal of the Attorney Examiners' evidentiary rulings.[669]

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[667] March 31 Order, pp. 82, 83, 84, 85. Regarding Mr. Comings' projection, the Commission found:

> As this projection is based upon confidential information, it is impossible for us to include this projection in our estimate of the net credit or charges to customers under RRS without confidential information being easily derived from the calculation. However, we will note that, if we had included this projection in the average with the other two projections to develop our estimate, it would not change our decision in this case as there would continue to be a projected net credit to customers over the eight years of Rider RRS.

March 31 Order, p. 85.

[668] *See* March 31 Order, p. 81.

[669] In a single sentence in its rehearing brief, NOPEC asks that the Attorney Examiners' evidentiary rulings be reversed – no argument or authority is provided. *See* NOPEC Rehearing Brief, pp. 14-15. Resorting to apparent self-help, NOPEC then goes on to cite liberally to material that was stricken. *See* NOPEC Rehearing Brief, pp. 15-16 (citing to stricken portions of the Rehearing Testimony of OCC/NOAC witness Wilson). This reference should be stricken per the Companies' Motion to Strike Portions of the Brief on Rehearing of Northeast Ohio Public Energy Council, filed concurrently with this Rehearing Reply Brief.

A. There Is No Legal Basis For Reversing The Attorney Examiners' Routine Evidentiary Rulings.

Notably, Sierra Club, OCC/NOAC, OMAEG, and P3/EPSA did not seek a request for certification of an interlocutory appeal on this issue—for good reason. Such a request, in light of the ordinary and routine evidentiary rulings at issue, likely would have been rejected out of hand.[670]

Indeed, Rule 4901-1-27, O.A.C., in pertinent part provides:

> The presiding hearing officer shall regulate the course of the hearing and the conduct of the participants. Unless otherwise provided by law, the presiding hearing officer may, *without limitation*:
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> *****

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[670] Attorney examiners regularly deny requests for certification of interlocutory appeals from routine evidentiary and procedural rulings. *See, e.g., In the Matter of the Application of Duke Energy Ohio, Inc. to Adjust Rider DR-IM and Rider AU for 2013 SmartGrid Costs,* Case No. 14-1051-GE-RDR 2015 Ohio PUC LEXIS 118, Entry, at *11 (Feb. 5, 2015) (denying interlocutory appeal of ruling granting motion to strike intervenor testimony that was beyond the scope of the proceeding); *In the Matter of the Self Complaint of Suburban Nat. Gas Co. Concerning its Existing Tariff Provisions*, Case No. 11-5846-GA-SLF, 2012 Ohio PUC LEXIS 677, Entry, at *4-5 (July 6, 2012) (denying request for certification of interlocutory appeal because "[r]ulings, such as the one questioned herein by Suburban, are frequently made during Commission hearings…The ruling by the presiding examiner was not a departure from past precedent, as it followed past precedent of the Commission in disallowing questions on recross of a witness that exceed the scope of redirect of that witness"); *In the Matter of the Application of Columbus S. Power Co. and Ohio Power Co. for Auth. to Recover Costs Associated with the Constr. & Ultimate Operations of an Integrated Gasification Combined Cycle Elec. Generating Facility,* Case No. 05-376-EL-UNC, 2005 Ohio PUC LEXIS 234, Entry, at *3 (May 10, 2005) (denying request to certify an interlocutory appeal regarding the setting of a procedural schedule because "[e]stablishing a procedural schedule in a Commission hearing proceeding is a routine matter with which the Commission and its examiners have had long experience"); *In the Matter of Betty Teeters v. GTE North Inc.*, Case No. 92-730-TP-PEX, 1994 Ohio PUC LEXIS 325, Entry, at *1-4 (Apr. 20, 1994) (denying request for certification of interlocutory appeal from a denial of a motion to dismiss because movants sought to interject material that was "beyond the scope of [the] proceeding" and met neither requirement of Rule 15(B)); *In the Matter of the Application of Ohio Edison Co., The Cleveland Elec. Illuminating Co., and The Toledo Edison Co. for Approval of a New Rider & Revision of an Existing Rider*, Case No. 10-176-EL-ATA, 2010 Ohio PUC LEXIS 1400, Entry, at *8-10 (Dec. 22, 2010) (denying request for certification of an interlocutory appeal from a ruling ordering the "pre-filing of non-expert testimony" because such an order fell within the discretion vested in an attorney examiner by Rule 4901-1-27, O.A.C., "to assure an orderly and expeditious proceeding" thereby meeting neither requirement of Rule 15(B)).

> Rule on objections, procedural motions, and other procedural matters.
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> *****
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> *Take such actions as are necessary to*:
>
> Avoid unnecessary delay.
>
> *Prevent the presentation of irrelevant or cumulative evidence*.
>
> Prevent argumentative, repetitious, cumulative, or irrelevant cross-examination.
>
> *Assure that the hearing proceeds in an orderly and expeditious manner*.[671]

Hence, Rule 4901-1-27 vests attorney examiners with broad discretion and authority, e.g., to grant a motion to strike testimony that is cumulative or beyond the scope of a proceeding.

Further, the Commission regularly affirms attorney examiner evidentiary rulings that grant a motion to strike. Indeed, in the March 31 Order, the Commission affirmed a ruling granting a motion to strike intervenor witness redirect testimony that was beyond the scope of cross-examination.[672] In that instance, the Commission held, "Here, we find that it was *well within the attorney examiner's discretion* to find that the redirect testimony subject to the motion to strike was far beyond the scope of the cross-examination."[673]

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[671] O.A.C. 4901-1-27 (emphasis added).

[672] March 31 Order, pp. 33-34.

[673] March 31 Order, p. 34 (emphasis added). *See also*, *In the Matter of the Application of The Cleveland Elec. Illuminating Co. for Auth. to Amend & to Increase Certain of Its Filed Schedules Fixing Rates and Charges for Elec. Serv.;*, Case No. 88-170-EL-AIR, 1988 Ohio PUC LEXIS 1210, at *7 (Dec. 15, 1988) (affirming Attorney Examiner's granting of motion to strike supplemental testimony); *In the Matter of the Application of Cincinnati Bell Tel. Co. for Auth. to Increase and Adjust its Rates & Charges & to Change Regulations & Practices Affecting the*

In line with Rule 4901-1-27 and settled Commission precedent, the motions to strike that the Attorney Examiners granted in the instant proceeding targeted those portions of testimony that were cumulative or were beyond the scope of rehearing.[674] The Attorney Examiners also properly struck two sentences from Staff witness Choueiki's testimony and properly refused to take administrative notice of the Companies' application and a Staff report from the Companies' last rate case, Case No. 07-551-EL-AIR. OCC/NOAC's unsupported claim that the Attorney Examiners' routine evidentiary rulings were somehow "arbitrary and capricious" is meritless.[675] The rehearing transcript demonstrates that the Attorney Examiners' evidentiary rulings were well founded, conservatively applied, and entirely consistent with established Commission precedent.

Notably, Sierra Club, P3/EPSA, and OMAEG fail to cite to *any* authority – from the Commission or otherwise – in support of their requests for reversal. Only OCC/NOAC seek to rely on some sort of Commission authority. Given the routine nature of the evidentiary rulings at issue, it should come as no surprise that these decisions are readily distinguishable. Specifically, OCC/NOAC claim that these decisions stand for the proposition that those portions of intervenor rehearing testimony which properly were stricken instead "should be admitted and accorded whatever weight is appropriate."[676] Nothing could be further from the truth.

Same, Case No. 84-1272-TP-AIR, 1985 Ohio PUC LEXIS 745, at *2-3 (Sept. 10, 1985) (affirming Attorney Examiner's granting of motion to strike objection to a Staff report).

[674] The Attorney Examiners also granted motions to strike intervenor witness testimony that: (1) constituted hearsay without exception; or (2) referenced portions of Ms. Mikkelsen's testimony that were withdrawn from the Commission's consideration on the first day of the hearing on rehearing. *See* Rehearing Tr. Vol. IV, p. 882. These rulings were not challenged by intervenors on brief.

[675] OCC/NOAC Rehearing Brief, p. 62.

[676] OCC/NOAC Rehearing Brief, p. 66.

Indeed, the Commission decisions cited by OCC/NOAC have a completely different procedural posture: generally, each involves affirming an attorney examiner's routine evidentiary ruling, specifically the *denial* of a motion to strike. None involve the reversal of such a ruling, or more relevant here, the reversal of the *granting* of a motion to strike. If anything, these decisions demonstrate the deference that the Commission gives to an attorney examiner's broad discretion to issue routine evidentiary rulings. As such, OCC/NOAC's attempt to rely on these Commission decisions fails.

For instance, in *In the Matter of the Application of Ohio Power Co. and Columbus Southern Power Co. for Authority to Merge and Related Approvals*, Case No. 10-2376-EL-UNC, the Commission affirmed the denial of a motion to strike by OCC.[677] OCC sought to have certain applicant witness' direct testimony stricken from the record as hearsay because the witness claimed he had relied on the "advice of counsel."[678] Because "advice of counsel" testimony was permitted throughout the proceeding, the Commission agreed that the attorney examiner acted within his or her discretion to deny the motion to strike.[679] *In the Matter of the Application of Duke Energy Ohio, Inc., for Approval of an Electric Security Plan*, Case No. 08-920-EL-SSO, the second case relied on by OCC/NOAC, is more of the same.[680] It too involves the affirmance of the denial of a motion to strike; this time regarding the direct testimony of a

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[677] 2011 Ohio PUC LEXIS 1325, Opinion and Order, at *26-29 (Dec. 14, 2011).

[678] 2011 Ohio PUC LEXIS 1325, at *27.

[679] 2011 Ohio PUC LEXIS 1325, at *28-29.

[680] 2008 Ohio PUC LEXIS 762, Opinion and Order, at *80-81 (Dec. 17, 2008).

non-attorney witness that appeared to make a legal argument.[681] Likewise, *In the Mattter of the Application of the Ohio Bell Telephone Co. for Authority to Increase & Adjust its Rates & Charges & to Change Regulations & Practices Affecting the Rates and Charges in Each of its Duly Filed Intrastate Tariffs*, Case No. 74-761-TP-AIR, also involves the affirmance of the denial of a motion to strike witness testimony due to issues regarding the competency of the witness.[682] Similarly, *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*, Case No. 86-07-EL-EFC, involves the affirmance of a denial of a motion to strike witness testimony as related to the witness's qualifications.[683] None of these decisions in any way support the proposition stated by OCC/NOAC and none of them undermine the Attorney Examiners' routine evidentiary rulings here.[684]

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[681] 2008 Ohio PUC LEXIS 762, at *80-81.

[682] Case No. 74-761-TP-AIR, 1976 Ohio PUC LEXIS 4, Opinion, at *82-83 (July 8, 1976).

[683] Case No. 86-07-EL-EFC, 1987 Ohio PUC LEXIS 107, Opinion and Order, at *34-36 (Feb. 18, 1987).

[684] Without explanation, OCC/NOAC also cite to *In the Matter of the Application of Ohio Edison Co., The Cleveland Elec. Illuminating Co., and The Toledo Edison Co. for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 10-388-EL-SSO, 2010 Ohio PUC LEXIS 862, at *33-35 (Aug. 25, 2010). In that case the Commission affirmed the ruling of an attorney examiner that admitted the testimony of one intervenor over the opposition of another. It is unclear what, if any, bearing this decision has on the present issue. As an apparent aside, OCC/NOAC also cite to the Concurring Opinion in *In the Matter of the Application of Columbus Southern Power Co. for Approval of an Electric Security Plan*, Case No. 08-917-EL-SSO, Entry on Rehearing (July 23, 2009), to stand for the proposition that the Commission allows parties to its proceedings to "update their forecasts based upon more recent information." OCC/NOAC Rehearing Brief, p. 66, n. 258. This decision, however, actually supports the Attorney Examiners' evidentiary rulings here. In *In re Columbus Southern,* on rehearing and in the context of the ESP v. MRO test, an intervenor complained that a market price relied on by the Commission was "too high, and that, since testimony was filed in the proceeding, market prices have declined." *In re Columbus S.*, p. 50. After observing that the intervenor was "suggesting that the Commission…base its opinion on information and data that is not in the record of the proceeding," the Commission denied rehearing on the issue. *Id.* The Commission found: "The Commission weighed the evidence in the record and adopted Staff's estimated market prices, as well as Staff's methodology….Based on the record before it, it was reasonable for the Commission to adopt Staff's estimated

B. The Attorney Examiners Were Correct To Strike Cumulative Material Contained In Intervenor Witnesses' Rehearing Testimony.

Rule 4901-1-27 explicitly authorizes an attorney examiner to "without limitation . . . Take such actions as are necessary to: . . . Prevent the presentation of irrelevant or *cumulative evidence.*"[685] Significant portions of the rehearing testimony at issue did nothing more than regurgitate, at times almost verbatim, prior direct and supplemental testimony proffered by Mr. Comings, Mr. Wilson, and Dr. Kalt that predated the March 31 Order. Such redundant material clearly meets *Black's Law Dictionary* definition for "cumulative evidence," to wit: "additional evidence of the same character as existing evidence . . . ."[686] Under Rule 4901-1-27, the Attorney Examiners properly excluded intervenors' cumulative evidence here.

For instance, in his rehearing testimony, Mr. Comings repeated, once again, his oft made claims regarding the correlation of natural gas prices with energy prices and his commentaries on various ICF forecasts.[687] As Attorney Examiner Price observed, other than Mr. Comings' use of the word "modified" regarding Rider RRS, his rehearing testimony here is "exactly [what] he did

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market rates and Staff's metholodogy…[Intervenor's] argument lacks merit and, thus, is rejected." *Id.*, pp. 50-51. Contrary to the claim by OCC/NOAC here, no "updates" were permitted in that case.

[685] O.A.C. 4901-1-27(B)(7)(6) (emphasis added). *See also In the Matter of the Investigation Into Ameritech Ohio's Entry Into In-Region InterLATA Serv. Under Section 271 of the Telecommunications Act of 1996*, Case No. 96-702-TP-COI, 1996 Ohio PUC LEXIS 730, Entry, at *9 (Oct. 23, 1996) (observing that "the parties are reminded that the attorney examiner will take all actions necessary to avoid unnecessary delay [and] prevent the presentation of irrelevant or cumulative evidence"); *In the Matter of the Application of the Cleveland Elec. Illuminating Co. for Auth. to Amend & to Increase Certain of its Filed Schedules Fixing Rates & Charges for Elec. Serv.*, Case No. 88-170-EL-AIR, 1988 Ohio PUC LEXIS 437, at *4 (Apr. 20, 1988) ("Those intervenors which represent residential customers of the applicant are advised that the attorney examiner conducting the case has the right, pursuant to Rule 4901-1-27, Ohio Administrative Code, to take such actions as are necessary to avoid unnecessary delay in the hearing process, prevent the presentation of cumulative evidence, and prevent repetitious or cumulative cross-examination.").

[686] *Black's Law Dictionary*, 10th ed. 2014.

[687] *See, e.g.*, Rehearing Testimony of Tyler Comings, p. 7, lines 3-9; p. 21, lines 6-15 ("Comings Rehearing Test.").

give previously" and further, Mr. Comings "was arguing the last trip here that the ICF forecasts are outdated and that was an issue you [i.e., Sierra Club] raised in your brief."[688]

Only OMAEG challenges this ruling.[689] OMAEG erroneously claims that "the portions of the data that were stricken could not possibly have repeated previous arguments" allegedly because Rider RRS is now based upon different inputs.[690] OMAEG misses the point here. Although Rider RRS will be calculated now based on different inputs, the projected cost or benefit of Rider RRS is unchanged. To determine the projected effect of both versions of Rider RRS, the same projected costs, outputs and market prices may be used. The Proposal changes none of the inputs previously used for projections regarding Rider RRS. In any event, OMAEG points to no new facts that were contained in this portion of Mr. Comings' rehearing testimony that were not already in his prior testimonies – the essence of cumulative evidence.[691]

Other intervenor witnesses' testimony clearly trod old ground. In Mr. Wilson's rehearing testimony, for example, he was asked to "briefly summarize your evaluation and main conclusions regarding Rider RRS from your earlier testimony in this proceeding" and was further asked to recap his recommendations "with regard to the proposed Rider RRS in your earlier testimony."[692] As Attorney Examiner Priceobserved, in those portions of Mr. Wilson's rehearing testimony, he was "simply repeating on rehearing his direct testimony, which not only

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[688] Rehearing Tr. Vol. IV, pp. 776.

[689] Notably, Sierra Club, the sponsor of Mr. Comings' rehearing testimony, does not take issue with the Attorney Examiners' ruling regarding cumulativeness.

[690] OMAEG Rehearing Brief, p. 11.

[691] *See, generally*, OMAEG Rehearing Brief, pp. 11-13.

[692] *See* Wilson Rehearing Test., pp. 3-5.

he could have given before, he did give before."[693] In its request for reversal on this issue, OMAEG makes no showing otherwise; i.e., that the relevant portions of Mr. Wilson's rehearing testimony actually established new facts.[694] Notably, OCC/NOAC appear not to contest this ruling in their post-rehearing brief.[695]

OMAEG was also the only party to contest the rulings granting motions to strike regarding the rehearing testimony of OCC witness Rose.[696] The Attorney Examiners granted the Companies' motion to strike portions of Dr. Rose's rehearing testimony on grounds of cumulativeness, finding that "it's cumulative, it's simply summarizing testimony that is already in the record in this proceeding, and the parties are free to cite to in their brief."[697] This testimony related to, and directly quoted from, the direct testimony of various Company witnesses regarding Rider RRS as approved by the Commission.[698] In response, OMAEG conclusory claims that these portions of Dr. Rose's testimony somehow are not "wholly cumulative" and should be allowed in to add context.[699] Again, vested with the broad discretion

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[693] Rehearing Tr. Vol. IV, p. 858. *See also*, Wilson Rehearing Test., p. 28, lines 19-21 (citing direct testimony and discussing retirement of plants); p. 32, lines 7-19 (citing direct testimony regarding rate stabilizing effects of the "earlier Rider RRS proposal"); p. 33, lines 16-21 (citing direct testimony and impact of Rider RRS on "price stability").

[694] *See* OMAEG Rehearing Brief, p. 14. The best that OMAEG apparently can muster is "Mr. Wilson's rehearing testimony also addresses the calculation changes contained in the modified Rider RRS." But OMAEG points to nothing in Mr. Wilson's testimony that does so. *See id.* OMAEG does not otherwise engage the Attorney Examiner's cumulativeness ruling regarding Mr. Wilson's rehearing testimony.

[695] *See generally* OCC/NOAC Rehearing Brief, pp. 58-67 (failing to discuss or address the issue of cumulativeness regarding Mr. Wilson's rehearing testimony).

[696] *See* OMAEG Rehearing Brief, pp. 15-17.

[697] Rehearing Tr. Vol. V, p. 1175.

[698] Rehearing Tr. Vol. V, p. 1175.

[699] OMAEG Rehearing Brief, p. 15.

contained in Rule 4901-1-27, the Attorney Examiners properly excluded this testimony for the reasons stated.

In the same vein, Dr. Kalt's rehearing testimony repeatedly cited to his direct and supplemental testimonies, introducing this repetitious material with phrases such as "For reasons I have set out previously . . . ,"[700] "As I have previously found . . . ,"[701] or "As I explained in my Direct Testimony . . . ."[702] Indeed, Dr. Kalt cited to his prior testimony five times in three footnotes on a single page of his rehearing testimony.[703] Far from providing "context and support," as P3/EPSA claim, Dr. Kalt's testimony here simply recapitulated exactly what he testified to previously.[704] OMAEG gives away the game when it claims, "[W]hile Dr. Rose [sic, meaning Kalt] references some portions of his previous testimony, he does so only to demonstrate that the Companies' new modified Rider RRS raises the same concerns as the original Rider RRS."[705] In fact, as the record amply demonstrates and the Attorney Examiners properly found, Dr. Kalt simply was repeating what he testified to on previous occasions.

Given that Rule 4901-1-27 vests attorney examiners with the broad discretion to exclude cumulative evidence, and given that the fact that these portions of the rehearing testimony of these witnesses were clearly cumulative, the Attorney Examiners' ruling granting the

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[700] Kalt Rehearing Test., p. 7, line 9.

[701] Kalt Rehearing Test., p. 9, line 9.

[702] Kalt Rehearing Test., p. 10, line 7. *See also id*., p. 14, n. 18 ("As I explained in my Second Supplemental Testimony. . . ,"); p. 20, line 5 ("As I have explained. . . ,").

[703] *See,* Kalt Rehearing Test., p. 9.

[704] P3/EPSA Rehearing Brief, p. 67.

[705] OMAEG Rehearing Brief, p. 16.

Companies' motions to strike on these grounds is hardly surprising. They are entirely consistent with Rule 4901-1-27 and settled Commission precedent.

C. The Attorney Examiners Correctly Struck Material That Was Beyond The Scope Of Rehearing.

The Attorney Examiners also properly granted several motions to strike portions of the rehearing testimony of Mr. Comings, Mr. Wilson, Dr. Kalt and Mr. Kahal on the grounds that such testimony was beyond the scope of the hearing on rehearing as set forth in the June 3 Entry. Throughout their rehearing testimony, these witnesses sought to revisit the wisdom of Rider RRS, as approved by the Commission, by providing updated "projections" of the revenues potentially generated under Rider RRS. Nowhere in their respective rehearing testimonies did these witnesses provide any quantitative analyses comparing Rider RRS as modified to Rider RRS as approved by the Commission.

As a general matter, the Attorney Examiners properly found that any updated forecasts related to Rider RRS as approved which were contained in the rehearing testimony of Mr. Comings, Mr. Wilson, Mr. Kahal, and Dr. Kalt were beyond the scope of rehearing. This is a fact which Sierra Club, OCC/NOAC, and P3/EPSA should have known in light of the June 3 Entry and the Third Entry on Rehearing. As the Bench observed:

> Updated forecasts are beyond the scope of this proceeding and updated -- and we would have made it clear that updated forecasts were beyond the scope of this proceeding if anybody had asked us prior to the hearing. There were weeks that went by nobody asked the Bench for guidance on this question. Many filings were made. Nobody asked the Bench for guidance as to whether the scope of this hearing would include forecasted -- updated forecasts. And if

> you had asked that question, we would have given you an answer.[706]

And further:

> The point of the hearing today is to give information that you couldn't *reasonably -- or evidence you couldn't reasonably have given in the last hearing*. The fact that market conditions have changed and the fact that projections are now different, you know, we could spend another three months on different projections again and by the time we get done the projections will once again be different. I mean, it's a rolling – it's a rolling problem.[707]

The material stricken from Mr. Comings' rehearing testimony on the grounds that it was beyond the scope of rehearing – a hodgepodge of updated natural gas, energy and capacity price projections that went to the revenue calculation of Rider RRS as approved by the Commission – is a case in point. Indeed, Mr. Comings admitted this in his deposition (which counsel for the Companies read into the record):

> The Question [from the deposition of Mr. Comings page 34, line 11]: 'The question I asked you, did you do a comparison between the effect of rider RRS as approved and Rider RRS as proposed by the company on rehearing? You didn't do that, did you?'
>
> Answer: 'I'm -- I don't believe I used the -- I compared the NPV that was developed previously for Rider RRS, since that has not changed.
>
> So I didn't do a direct comparison of the Rider RRS to the modified proposal. I've -- but I do refer to information that was

[706] Rehearing Tr. Vol. V, p. 1087.

[707] Rehearing Tr. Vol. IV, p. 779 (emphasis added). As Attorney Examiner Price also correctly noted: "[Y]ou know every few months, the U.S. Energy Information Administration changes their outlook. So, I mean, they do short-term outlooks. They do annual-energy outlooks. We'll never get done if we keep trying to update that." Rehearing Tr. Vol. V, pp. 1139-40.

> provided under the Rider RRS, because that -- to the effect that that hasn't changed.'
>
> And then I asked him now on line – on page 34, line 11, 'Question: Again, I'm just looking for anything in your study, your testimony, that compares Rider RRS as approved versus Rider RRS as proposed by the company. There is not such a comparison, fair to say?'
>
> 'Answer: Okay. I think that's fair to say.'[708]

As counsel for the Companies further explained at the hearing on rehearing:

> And that's the point of our motion, that this testimony does not prepare -- is not properly within the scope of this hearing. This hearing is to address the proposals -- or the proposal by the company. It certainly is fair game for anyone to talk about how the proposal has changed and what that proposal's effect is versus the modified proceed -- the original proposal as approved. The Commission has already ruled on the merits of rider RRS and the benefits of rider RRS. The -- the parties opposing rider RRS don't get a second bite of the apple to explain why rider RRS is inappropriate in their view. If they want to talk about the adverse effect or effects at all of rider RRS proposed, versus rider RRS as approved, that's fair game, but they didn't do that, and this is just a rehash of old arguments, certainly with updated information, but updates can go ad infinitum and is improper. The Commission has already ruled and therefore it's beyond the scope of this hearing.[709]

For example, in his rehearing testimony, Mr. Comings repeated, once again, the assertions that he made several times in his previous testimony, i.e., that the Companies' energy, natural gas and capacity forecasts were allegedly "stale." He then proceeded to provide "updates" to all three projections.[710] As Attorney Examiner Price properly found, "his

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[708] Rehearing Tr. Vol. IV, p. 783.

[709] Rehearing Tr. Vol. IV, pp. 783-84.

[710] *See* Comings Rehearing Test., p. 7, lines 10-19 (discussing whether natural gas prices changed since the Companies' valuation of the proposed transaction); p. 8, line 1 to p. 12, line 11 (providing commentary on recent

testimony is solely about the part of the [Rider RRS] calculation that hasn't changed. His testimony is not about the part of the calculation that has changed."[711] And further: "But you [Sierra Club] are not presenting any evidence as to the modification [of Rider RRS]. You are presenting evidence as to what hasn't changed."[712] Thus, these portions of Mr. Comings' rehearing testimony addressed issues beyond the scope of rehearing and the Attorney Examiners properly granted the Companies' motion to strike them.

Sierra Club's three arguments to the contrary are meritless. First, Sierra Club claims, "There can be no reasonable dispute that projections of charges and credits are relevant to the provisions of the rider as they go directly to the financial impact that Modified Rider RRS would have on customers."[713] Not so. Mr. Comings' stricken testimony sought to provide updates to revenue projections of Rider RRS as approved by the Commission.[714] In fact, as noted, he admitted in his deposition that his analysis did not compare the Proposal to Rider RRS as approved.[715]

Second, Sierra Club claims that "the method for calculating revenues under Modified Rider RRS is substantively different than under the initial rider;" under Rider RRS energy revenues "were to be based on nodal pricing at both Sammis and Davis-Besse" as opposed to

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ICF natural gas price projections); p. 15, line 1 to p. 16, line 3 (providing commentary on recent PJM energy price forecast); p. 17, line 12 to p. 21, line 3 (providing commentary on recent ICF capacity price forecasts).

[711] Rehearing Tr. Vol. IV, p. 786.

[712] Rehearing Tr. Vol. IV, pp. 789-90.

[713] Sierra Club Rehearing Brief, p. 30.

[714] *See, e.g.*, Comings Rehearing Test., pp. 2, 6 (providing updated revenue projection under Rider RRS "using a recent PJM energy price forecast"); pp. 13-15 (providing updated energy price forecasts).

[715] Rehearing Tr. Vol. IV, p. 783.

"AEP Dayton Hub energy pricing" under the Proposal.[716] This is a distinction without a meaningful difference. The substantive difference between Rider RRS as approved and Rider RRS as modified is that, under the latter, costs, plant output and cleared capacity are now *fixed* [717]– an issue that Mr. Comings never engages. Regardless of whether nodal (i.e., at the Plants) or AEP Dayton Hub pricing is used for the revenue calculation, as the Attorney Examiner found, "What hasn't changed is the market risk in terms of the revenues generated."[718] Hence, Sierra Club's claim falls flat.

Third, Sierra Club argues that the Companies "opened the door" to revisit the revenue calculation of Rider RRS as approved by the Commission because the Companies proposed modifications to Rider RRS.[719] This argument too fails. As delineated in the Rehearing Testimony of Ms. Mikkelsen, the Companies' proposal involves changing the cost calculation under Rider RRS.[720] Subsequently, in the June 3 Entry (affirmed "in all aspects" by the Commission's Third Entry on Rehearing), the Attorney Examiner strictly limited the scope of rehearing to the Companies' proposal and any alternative proposals, *full stop*.[721] The Companies never proposed, and the scope of the rehearing contained in the June 3 Entry never contemplated,

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[716] Sierra Club Rehearing Brief, p. 30.

[717] *See* Mikkelsen Rehearing Test., p. 5.

[718] Rehearing Tr. Vol. IV, p. 787.

[719] Sierra Club Rehearing Brief, p. 31.

[720] *See* Mikkelsen Rehearing Test., pp. 5-6.

[721] *See* Entry, ¶ 15(June 3, 2016); Third Entry on Rehearing, p. 4.

a wholesale re-visitation of the wisdom of Rider RRS as approved by the Commission in the March 31 Order.[722]

Likewise, significant portions of Mr. Wilson's rehearing testimony simply provided updated projections to the revenue calculation of Rider RRS using the identical methodology he has used since the filing of his direct testimony in 2014; i.e., holding everything else constant save for projections of natural gas prices under various "scenarios" and then plugging those numbers into the Companies' projections.[723] Notably, Mr. Wilson provided no quantitative analytical comparison of Rider RRS as modified to Rider RRS as approved by the Commission. Instead, Mr. Wilson merely updated his revenue projections regarding Rider RRS, thereby once again seeking to attack the wisdom of RRS itself, notwithstanding the approval of Rider RRS by the Commission in its March 31 Order.

Counsel for OCC/NOAC could not provide a credible response when asked by Attorney Examiner Price, "Why is the rate impact on the revenue portion part of the calculation any different today than it was before? I get that the cost side is different, so I get that. But we're

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[722] OMAEG once again misses the point here, apparently viewing the rehearing proceeding as essentially unlimited in scope, notwithstanding the June 3 Entry to the contrary. *See* OMAEG Rehearing Brief, pp. 11-13.

[723] *See* Wilson Rehearing Test., p. 9, line 14 to p. 10, line 7 (discussing alleged costs estimates to customers based upon updated revenue projections under Scenarios 1 and 3); p. 12, line 1 to p. 14, line 18 (including Table 1) (providing updated versions of projections under Scenarios 1 and 3); p. 15, line 11 to p. 17, line 4 (including Table 2 and Exhibits JFW-1 and JFW-2) (providing updated alleged projected costs to customers based upon updates to projected revenue calculation under Rider RRS); p. 21, lines 7-21 (including Exhibit JFW-3) (providing updated future market price projections using "current forward prices for the AD Hub point (data accessed on June 16, 2016)); p. 22, lines 8-17 (including Exhibit JFW-4) (providing updated "current forward prices" as related to revenue generation from W. H. Sammis plant).

not talking – [Mr. Wilson's] not talking about the cost side."[724] Indeed, as the Attorney Examiner rightly found:

> What the company is proposing, rightly or wrongly, but it's their proposal, is that those cost figures are in place. Now, you are free to argue on brief that those cost figures should be different, but what they have simply said is this is the base -- the costs are a baseline and the Commission should use that baseline to apply these. That's what their actual proposal is.
>
> If intervenors would like to do a different alternative, which is your -- which is your option under the Commission's *rules of the scope of the hearing*, of using a different way to calculate costs, you are free to do so. But that's not what the companies' proposed and that's not what [Mr. Wilson] is testifying to today.[725]

And further:

> Nothing in the company's proposal changed the revenue side. It is simply an effort [by Mr. Wilson] to update his projections once again. And we are not going to spend our limited hearing time, and *it wasn't within the scope of this hearing, to relitigate all of the projections which the Commission thoroughly addressed in its Opinion and Order in this proceeding*. [726]

OCC/NOAC's argument to the contrary fails. OCC/NOAC argue that Mr. Wilson should have been allowed to provide updated forecasts to his revenue calculation of Rider RRS because doing otherwise "prohibited OCC/NOAC from offering relevant evidence on whether the

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[724] Rehearing Tr. Vol. IV, p. 869. In their rehearing brief, OCC/NOAC apparently have, to no avail, sought to remedy this deficit by inappropriately using the term "cost" instead of the term "revenue projection." *See, e.g.*, OCC/NOAC Rehearing Brief, p. 59 ("Because the Proposal is part of FirstEnergy's pending ESP, [Mr. Wilson's] testimony about the Proposal's *cost*, and the *cost's* impact on the MRO vs. ESP test, should not have been stricken.") (emphasis added).

[725] Rehearing Tr. Vol. IV, pp. 871-72 (emphasis added).

[726] Rehearing Tr. Vol. IV, p. 884 (emphasis added). The Commission also properly struck those portions of Mr. Kahal's rehearing testimony that simply piggybacked on Mr. Wilson's updated projections of the revenue calculation under Rider RRS as approved by the Commission. *See* Kahal Rehearing Test., p. 8, line 20 to p. 9, line 16 (referencing and relying on Mr. Wilson's "update" regarding Rider RRS as approved by the Commission); p. 10, lines 7-12 (same); p. 17, line 13 to p. 18, line 20 (same); p. 20, lines 4-8 (same); p. 21, lines 5-21 (same).

Proposal [i.e., Modified Rider RRS] passes the MRO v. ESP test."[727] Putting aside that it is ESP IV, as modified by the Proposal, and not the Proposal that must pass the ESP v. MRO test, OCC/NOAC mischaracterize the excluded evidence. In short, it was nothing more than Mr. Wilson's updates to two of his three revenue projections for Rider RRS as approved by the Commission. The only relevant issue regarding that test on rehearing is whether (and, if so how) the Proposal – and specifically the manner in which Rider RRS was to be calculated – changed the calculus of the ESP v. MRO test. Accordingly, Mr. Wilson's projections have no relevance here because they do not relate to the change in the calculation under the Proposal. Neither do they in any way quantitatively compare Rider RRS as approved with Rider RRS as modified.[728] For this reason, the Attorney Examiners' routine evidentiary ruling which found that portions of Mr. Wilson's testimony were beyond the scope of rehearing was entirely correct and proper.

In the bulk of the relevant stricken portions of his rehearing testimony, Dr. Kalt did the same thing that Messrs. Comings and Wilson did: offering little more than an update of projected revenues under Rider RRS using recent forward prices with an escalator of his own choosing applied.[729] As with the case of Mr. Comings and Mr. Wilson, nothing in Dr. Kalt's rehearing testimony provides a quantitative analysis comparing Rider RRS as modified to Rider RRS as approved by the Commission. Instead, there were merely updated revenue projections

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[727] OCC/NOAC Rehearing Brief, p. 59. *See also id.*, pp. 63-65.

[728] Mr. Wilson's other defender, OMAEG, makes no such showing either. *See* OMAEG Rehearing Brief, pp. 14-15.

[729] *See* Kalt Rehearing Test., p. 7, line 17 to p. 8 line 5 (including footnote 9) (updated projections of "marketplace risks" of Rider RRS); p. 8, lines 9-23 and p. 9, lines 2-7 (updated projected revenues under Rider RRS); p. 13, line 13 to p. 15 line 7 (including projections contained in Attachments JPK-RH-1 and JPK-RH-2) (updates to projections of "power price forecasts" under Rider RRS).

under Rider RRS which are, as the Attorney Examiner correctly found, beyond the limited scope of rehearing.[730]

P3/EPSA's attempt to argue otherwise goes nowhere. P3/EPSA claim that the Attorney Examiners should not have stricken this material because "Dr. Kalt's stricken testimony demonstrated that, up to and beyond 2018, the [Companies'] changed calculations are unsupported by reliable evidence and make unreasonable assumptions given factual information relevant to the Companies' new formula."[731] Not true. In fact, the relevant stricken portions of Dr. Kalt's testimony deal explicitly with "projected revenues" under Rider RRS for the eight-year term of Stipulated ESP IV "based on reported futures prices."[732] Hence, like Mr. Comings and Mr. Wilson, Dr. Kalt did little more than provide an updated revenue projection for Rider RRS as approved by the Commission.[733] As such, granting the Companies' motion to strike here was proper.

Given the scope of rehearing, as limited by the June 3 Entry and affirmed by the Commission in the Third Entry on Rehearing, the Attorney Examiners properly struck the material at issue. The stricken material improperly seeks to revisit the wisdom of Rider RRS as

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[730] *See* Rehearing Tr. Vol. V, pp. 1149-50; 1151.

[731] P3/EPSA Rehearing Brief, p. 68. Hence, OMAEG simply is wrong when it claims that Dr. Kalt allegedly only attacked the "the fixed proxy costs in the Modified Rider RRS calculations. " *See* OMAEG Rehearing Brief, p. 16.

[732] Kalt Rehearing Test., p. 17.

[733] Further, P3/EPSA conveniently ignore the unrebutted prior evidence regarding the unreliability of natural gas futures prices as a basis to project energy prices. *See* J. Rose Rebuttal Test., pp. 48-53, 55. The questionable reliability of such prices was thoroughly argued and decided by the Commission. *See, e.g.*, Companies' Initial Reply Brief, pp. 99-107; OCC/NOAC Initial Reply Brief, p. 16; P3/EPSA Initial Reply Brief, pp. 28-30; March 31 Order, p. 85. By seeking to double-down on their expert's continued and improper reliance on such prices, P3/EPSA merely seek to relitigate the general issue of the propriety of Rider RRS, an issue that is squarely beyond the expressly stated scope of the rehearing testimony.

approved by the Commission by providing projections and forecasts; nowhere is there any sort of quantitative comparison of Rider RRS as modified to Rider RRS as approved. All of this material was beyond the scope of rehearing. Further, there is nothing out of the ordinary regarding such routine evidentiary rulings that could possibly form a basis for reversal by the Commission.[734]

Sierra Club, OCC/NOAC, OMAEG, and P3/EPSA further are incapable of showing that the Attorney Examiner's routine evidentiary rulings unduly prejudiced them such that Commission reversal is warranted.[735] To be sure, the Attorney Examiners' rulings properly prevented Sierra Club, OCC/NOAC, OMAEG, and P3/EPSA from revisiting, once again, the wisdom of RRS as approved by the Commission. But this fact hardly caused *undue* prejudice to these intervenors; indeed, it caused them no prejudice at all.

Within the scope of rehearing set by the June 3 Entry, and affirmed by the Commission in the Third Entry on Rehearing, Sierra Club, OCC/NOAC, OMAEG and P3/EPSA were, and continue to be, free to prosecute their cases as they see fit. They have engaged in sustained

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[734] Attorney examiners regularly exclude materials that are beyond the scope of a proceeding. *See, e.g.*, *In the Matter of the Application of Duke Energy Ohio, Inc. to Adjust Rider DR-IM and Rider AU for 2013 SmartGrid Costs*, Case No. 14-1051-GE-RDR, Entry, pp. 2-4 (Jan. 22, 2015) (striking a portion of the direct testimony of an OCC witness, and the direct testimony of another intervenor witness in its entirety, because the testimony at issue was beyond the scope of, and not relevant to, the proceeding) (motion to certify interlocutory appeal denied at Entry, No. 14-1051-GE-RDR, 2015 Ohio PUC LEXIS 118, at *11 (Feb. 5, 2015)); *In the Matter of the Complaint of OHIOTELNET.COM, INC.*, Case No. 09-515-TP-CSS, 2010 Ohio PUC LEXIS 1314, at *10 (Dec. 1, 2010) (granting motion to strike testimony that was beyond the scope of the proceeding); *In the Matter of the Application of Time Warner Communications of Ohio*, Case No. 94-1695-TP-ACE, 1995 Ohio PUC LEXIS 454, at *17-18 (May 30, 1995) (denying motion to compel interrogatory response because "this issue is beyond the scope of any testimony to be taken during the narrowly focused hearing in the initial phase of this proceeding"); *In the Matter of the Petition of Theodore Miller, Jr.*, Case No. 86-2197-TP-PEX, 1987 Ohio PUC LEXIS 1528, at *3 (Sept. 10, 1987) (granting motion to strike information contained in late-filed exhibit because it was beyond the scope).

[735] *See* OCC/NOAC Rehearing Brief, p. 67; P3/EPSA Rehearing Brief, p. 68.

cross-examination of the Companies' and Staff's rehearing witnesses and filed post-rehearing briefing. They could have presented an alternative proposal, as Staff did, but chose not to do so. They also could have provided quantitative analyses comparing Rider RRS as modified to Rider RRS as approved by the Commission. Sierra Club, OCC/NOAC, OMAEG, and P3/EPSA didn't pursue that avenue either. Instead, each chose to retread well-trod ground. The consequences of those ill-conceived choices, as reflected in the Attorney Examiners' well-reasoned evidentiary rulings, hardly amount to undue prejudice that necessitates Commission reversal. Indeed, as the Commission found in the Third Entry on Rehearing:

> [W]e find that no party is prejudiced by our consideration of the Modified RRS Proposal because each party will have a full and fair opportunity to cross examine the Companies' witnesses and to present any relevant evidence in opposition to the Modified RRS Proposal, or to propose an alternative, at hearing.[736]

Nothing in the Attorney Examiners' routine evidentiary rulings disturbed this finding. As such, claims of undue prejudice by these intervenors ring hollow. Therefore, the Commission summarily should reject the requests for reversal by Sierra Club, OCC/NOAC, OMAEG and P3/EPSA.

D. The Attorney Examiners Were Correct To Exclude Hearsay.

The Attorney Examiners granted the Companies' motion to strike regarding certain materials generated by non-party ICF International ("ICF") and referenced in the rehearing testimony of Mr. Comings. The grounds for the Companies' motion was that ICF's information

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[736] Third Entry on Rehearing, ¶ 30.

was hearsay.[737] Notably, this specific motion to strike was mooted by the Attorney Examiners' ruling granting the Companies' motion to strike those portions of Mr. Comings' rehearing testimony referencing and relying upon those ICF materials as beyond the scope of rehearing.[738]

Nevertheless, in its Rehearing Brief, Sierra Club claims that, pursuant to Rules 702 and 703 of the Ohio Rules of Evidence, Mr. Comings was entitled to rely upon these materials and to attach them to his rehearing testimony.[739] But Sierra Club misunderstands Ohio's rules relating to expert testimony. Unlike Rule 703 of the Federal Rules of Evidence, which allows evidence merely relied upon by experts, Rule 703 of the Ohio Rules of Evidence requires, "the facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by the expert or admitted in evidence at the hearing."[740] Thus, the ICF material Mr. Comings attempted to offer must be independently admissible. Otherwise, it was improper.

Sierra Club offers no argument that the ICF material is not hearsay or that it is otherwise covered by an exception to the hearsay rule. Plainly, the ICF material is an out of court statement offered for its truth and thus is classic hearsay. The best that Sierra Club can say is to compare these ICF materials – prepared for third parties and not for this proceeding – to energy and capacity forecasts produced by EIA and PJM. But studies by government (or even perhaps quasi-governmental) agencies having duties to report those studies are, for the most part, public

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[737] Rehearing Tr. Vol. IV, pp. 771-72.

[738] *See* Rehearing Tr. Vol. IV, pp. 771-74; 803.

[739] *See* Sierra Club Rehearing Brief, p. 32.

[740] Ohio Evid. R. 703. *See also State v. Jones*, 9 Ohio St.3d 123, 124 (1984) ("[Rule 703] clearly requires that the facts upon which an expert opinion is based must be perceived by the expert or admitted in evidence. The commentators on Ohio evidence agree that each element of fact upon which the opinion is based must either be perceived by the expert or admitted during the course of the trial.").

records and thus are within a recognized exception to the hearsay rule.[741] It should go without much explanation that studies by ICF are not public records.

Sierra Club implies that because an expert from ICF previously has testified on behalf of the Companies, any ICF materials per se would constitute an admission on the part of the Companies. Sierra Club offers no authority for this view. The unfairness of such a rule is obvious and shown by the facts here. At the evidentiary rehearing, there was no one from ICF to testify before the Commission, and whom the Companies can cross-examine, regarding who prepared this material, for what purpose, and the assumptions upon which it relied. In any event, such hearsay has no place in Commission proceedings and excluding it in no way provides ground for reversal. Moreover, Rules 702 and 703 hardly provide an expert with the license to import hearsay without exception into a Commission proceeding. Indeed, Attorney Examiners regularly strike, or otherwise exclude, hearsay without exception.[742]

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[741] Ohio Evid. Rule 803(8); *see also Klein v. Bros. Masonry, Inc.*, 6th Dist. Lucas No. L-02-1080, 2003-Ohio-3098, ¶ 67 (rejecting argument that OSHA report was admitted in error and stating, "Portions of administrative investigative reports can be admissible as an exception to the hearsay rule pursuant to . . . [Evid.R.] 803(8) when a proper foundation has been laid."); *Apple v. Water World, Inc.*, 8th Dist. Cuyahoga No. 80823, 2002-Ohio-6326, ¶ 22 (finding that a city's building inspection report constituted a public record under Evid.R. 803(8) and noting that "the summary form is . . . a record setting forth a matter [the city] has a duty to observe and report.").

[742] *See, e.g., In the Matter of FAF, Inc., Notice of Apparent Violation and Intent to Assess Forfeiture*, Case No. 06-786-TR-CVF, 2006 Ohio PUC LEXIS 705, at *3-4 (Nov. 21, 2006) ("The Commission is of the opinion that the affidavit is hearsay, not excused by any exception to the rules of evidence governing hearsay, and is inadmissible as evidence….Therefore, the motion to strike will be granted."); *In the Matter of the Complaint of S. G. Foods*, Case No. 04-28-EL-CSS, 2006 Ohio PUC LEXIS 270, at *14-15 (April 26, 2006) (affirming exclusion of report from evidence on grounds of hearsay); *In the Matter of the Complaint of Gabriela Kaplan*, Case No. 96-663-EL-CSS, 1997 Ohio PUC LEXIS 439, at *5, n.1 (June 19, 1997) (excluding exhibit as "inadmissible as hearsay" because "[n]o witness was available for cross-examination" concerning contents of exhibit).

E. The Attorney Examiners Correctly Excluded Opinion Testimony Regarding The Authority Of The Federal Energy Regulatory Commission.

The Attorney Examiners also properly struck approximately two lines from the rehearing testimony of Staff witness Choueiki because the material involved speculation regarding FERC's authority over wholesale markets. As Attorney Examiner Price correctly observed:

> Issues regarding FERC's authority over the wholesale markets are essentially questions of preemption – preemption of essentially questions that are constitutional. The Commission is an administrative agency with powers specifically granted by the Revised Code. It has no authority to declare matters of unconstitutionality, *Reading* [*v*.] *Public Utilities Commission*, 109 Ohio St.3d 193, 195, (citing *Panhandle*, 56 Ohio St.2d 224, 346.).[743]

In response, OMAEG makes the following tortured argument: "Dr. Choueiki's testimony includes rationale regarding why Staff does not support the Companies' Proposal, including a concern that the Proposal could have FERC implications."[744] This is wrong. The stricken material involves a Staff witness speculating on the preemptive powers of FERC. As Attorney Examiner Price observed, including such testimony would be inconsistent with settled Ohio Supreme Court precedent. OMAEG cites no authority to the contrary because there is none. The Attorney Examiners' ruling to strike this material was proper.

F. The Attorney Examiners Properly Denied Administrative Notice Of Certain Documents From The Companies' Last Base Rate Case.

At the hearing on rehearing, OCC sought to have the Attorney Examiners take administrative notice of the Application and Staff Report in the Companies' last rate case, Case

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[743] Rehearing Tr. Vol. V, pp. 1264-65.

[744] OMAEG Rehearing Brief, p. 17.

No. 07-551-EL-AIR.[745] In its cross-examination of Company witness Murley, OCC had requested that the Attorney Examiners take administrative notice of the documents at issue; the Attorney Examiners deferred ruling on this issue, given stated concerns regarding the relevance of the material to this proceeding.[746] Prior to Ms. Mikkelsen's rebuttal cross-examination, the Attorney Examiners properly denied OCC's request for administrative notice "because no questions were asked regarding those documents or any references made to them."[747] Hence, the documents were irrelevant to the instant proceeding.

Yet, according to OCC/NOAC, these documents are necessary to support OCC/NOAC's baseless assertion that "FirstEnergy seeks to charge Ohioans twice for the same service."[748] Specifically, OCC/NOAC argue that the Companies are "double-counting" the value of FirstEnergy Corp.'s employees in both base rates and in Rider DMR.[749]

Denying OCC's request for administrative notice of the materials from Case No. 07-551-EL-AIR, as previously noted,[750] the Attorney Examiners rejected OCC/NOAC's "double-charging" argument out of hand.[751] As the Attorney Examiners recognized, while ratepayers may pay for the services of FirstEnergy Services Company employees through base rates, persons living in the greater Akron area also enjoy the economic benefits of having those

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[745] OCC/NOAC Rehearing Brief, p. 73.

[746] Rehearing Tr. Vol. IX, p. 1512.

[747] Rehearing Tr. Vol. X, p. 1580.

[748] OCC/NOAC Rehearing Brief, p. 72.

[749] *See* OCC/NOAC Rehearing Brief, p. 72.

[750] *See,* pp. 134-135 *supra.*

[751] Rehearing Tr. Vol. X, pp. 1751-52.

employees living, working and paying for taxes, goods and services in the area. The latter was properly the subject of Ms. Murley's rebuttal testimony and was the basis of Ms. Mikkelsen's view that Rider DMR should reflect that value. That customers pay for services rendered by these individuals does not reduce, moot or render duplicative the impact of the contribution of these employees to the greater Akron area or to Ohio.

Given the irrelevance of OCC's "double-charging" argument, any documents to support that putative claim would, of necessity, be irrelevant as well. Hence, pursuant to Rule 4901-1-27, the Attorney Examiners' decision to deny administrative notice of these materials was proper and a matter of routine evidentiary discretion.[752] Contrary to the suggestion of OCC/NOAC, the Attorney Examiners' ruling was in no way trying to "shield[] these documents from the light of day."[753] Indeed, an Attorney Examiner is under no obligation to take administrative notice of irrelevant information.[754] To no surprise, OCC/NOAC cite to no authority in support of their request – because there is none. Thus, the Commission should deny OCC/NOAC's request accordingly.

VII. CONCLUSION

The Commission should determine on rehearing that the Companies' Proposal provides the greatest benefit for customers and should approve the proposed modifications to Rider RRS.

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[752]Rule 4901-1-27 vests an Attorney Examiner with the broad discretion to "Prevent the presentation of irrelevant…evidence." O.A.C. 4901-1-27.

[753] OCC/NOAC Rehearing Brief, p. 74. Literally, this claim is odd given that these documents ***are public***.

[754] *See, e.g.*, *In the Matter of the Complaint of Andrew Hehemann v. Ohio American Water Company*, Case No. 05-1275-WW-CSS, 2008 Ohio PUC LEXIS 250, at *7 (April 23, 2008) (denying request for administrative notice in part because "the Commission finds that the documents from the prior rate case for which [the respondent] sought administrative notice are not relevant to our decision today").

Alternatively, there is sufficient evidence in the record for the Commission to approve a properly designed Rider DMR.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that this Post-Rehearing Reply Brief was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on this 29th day of August, 2016. The PUCO's e-filing system will electronically serve notice of the filing of this document on counsel for all parties. Further, a courtesy copy has been served upon parties via electronic mail.

s/ James F. Lang
One of Attorneys for the Companies