

**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) Case No. 14-1297-EL-SSO
Edison Company for Authority to Provide)
a Standard Service Offer Pursuant to R.C.)
§ 4928.143 in the Form of an Electric)
Security Plan.)

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

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The Office of the Ohio Consumers' Counsel ("OCC") and the Northwest Ohio Aggregation Coalition and the NOAC Communities Individually ("NOAC") file this application for rehearing¹ to protect 1.9 million consumers from, the PUCO plan for charging consumers hundreds of millions of dollars to support its financially challenged parent, FirstEnergy Corp., and/or its unregulated generation affiliate, FirstEnergy Solutions. This so-called credit support may ultimately be a bailout of affiliate-owned power plants akin to the proposal that was halted in April by Federal Energy Regulatory Commission ("FERC"). Consumers will pay a t least \$612 million dollars (and perhaps up to more than \$1 billion) but not for the electricity that they use. Instead the money they need for their families can be used to subsidize FirstEnergy's unregulated generation affiliate - FirstEnergy Solutions over three years through a Credit Support Rider (aka "Rider DMR" or "Credit Support Rider"). That plan was approved by the Public Utilities Commission of Ohio ("Commission" or "PUCO") in its Fifth Entry on Rehearing, issued October 12, 2016.

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

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

ERRORS

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

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

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

- A. The PUCO approved an unlawful transition charge.
- B. The Credit Support Rider does not meet the required standards for distribution infrastructure and modernization initiatives.
- C. The Credit Support Rider does not meet the requirements of an economic development provision as required under R.C. 1928.143(B)(2)(i).

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

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

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

- A. The PUCO found that an incentive is needed for the utility to invest in grid modernization.
- B. The PUCO found that sufficient protections are in place to ensure that effective and efficient use of funds provided to low-income customers, making competitive bidding procedures unnecessary at this time.

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

- A. The PUCO's reliance on R.C. 4928.143(B)(2)(h) to authorize the Credit Support Rider harms customers and is not in the public interest.
- B. The Credit Support Rider harms customers and is not in the public interest because it is an expensive solution to an over-stated risk.
- C. The PUCO authorized the Credit Support Rider with too many open issues such that it will harm consumers and not be in the public interest.
- D. Exclusion of the Credit Support Rider revenues from SEET harms consumers and is not in the public interest.

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

- A. The Credit Support Rider does not comply with R. C. 4928.02.
- B. The Credit Support Rider is an unlawful subsidy.

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

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

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

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

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

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

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I. INTRODUCTION

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

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

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

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

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

II. STANDARD OF REVIEW

Applications for rehearing are governed by R.C. 4903.10. The statute permits “any party who has entered an appearance in person or by counsel in the proceeding” to apply for rehearing in respect to “any matters determined in the proceeding.”

Applications for rehearing must be filed within thirty days of the PUCO’s orders.

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

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

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

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

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

³ Fifth Entry on Rehearing at 160.

⁴ Id. at 163.

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

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

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

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

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

⁶ Opinion and Order at 119.

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

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

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

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

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

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

⁹ OCC Ex. 18 at 17 (Effron Direct).

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

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

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

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

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

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

¹² Fifth Entry on Rehearing at 162.

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

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

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

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

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

electric distribution utility's standard service offer price. That price remains in effect until a subsequent standard service offer is established through a competitive bidding process.

Two different statutes, addressing different needs.

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

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

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

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

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

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

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

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

¹⁶ R. Tr. X at 1741.

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

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

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

A. The PUCO approved an unlawful transition charge.

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

¹⁷ R.C. 4928.38.

¹⁸ Fifth Entry on Rehearing at 130, ¶287.

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

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

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

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

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

²² AEP Transition Revenue Case at ¶38.

²³ AEP Transition Revenue Case at ¶36.

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

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

From the documents that are attached to Staff Witness Buckley's testimony²⁶ it becomes evident why FirstEnergy Corp.'s credit is dropping. In its rationale for changing FirstEnergy Corp.'s outlook to negative, Standard & Poor's describes "weak commodity prices" and "[t]he higher-risk competitive business greatly increases the company's [FirstEnergy Corporation] exposure to lower generation volumes and commodity prices."²⁷ Low commodity prices have resulted in the outlook weakening for FirstEnergy Corp.'s competitive affiliates, like FirstEnergy Solutions, which in turn has caused the negative outlook for the corporate parent.

There is no problem with the Ohio electric distribution utilities, who are collecting their costs and have a strong financial outlook.²⁸ The Credit Support Rider is an anti-competitive subsidy that is propping up FirstEnergy Corp. for financial problems arising from its unregulated subsidiaries. The PUCO acknowledges that it will provide the parent company with revenue to ensure it is able to maintain its credit and as a result, attract capital.²⁹ This sort of financial integrity/transition charge is exactly what the Court put a stop to in its decision in the AEP Transition Revenue Case³⁰ and the corresponding DP&L Transition Revenue case.³¹

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

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

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

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

³⁰ AEP Transition Revenue Case at ¶38.

³¹ DP&L Transition Revenue Case at ¶1.

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

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

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

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

³² Fifth Entry on Rehearing at 130, ¶287.

³³ Fifth Entry on Rehearing at 127, ¶281.

³⁴ Fifth Entry on Rehearing at 90, ¶191.

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

³⁶ R.C. 4928.143(h).

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

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

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

³⁷ Id.

³⁸ Id.

³⁹ Id.

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

⁴¹ Fifth Entry on Rehearing at 91, ¶192.

⁴² Fifth Entry on Rehearing at 91, ¶192.

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

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

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

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

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

⁴⁵ Fifth Entry on Rehearing at 148. ¶328.

⁴⁶ R.C. 4928.143(h).

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

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

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

FirstEnergy claims that the Credit Support Rider is permitted under Ohio law as a valid program for economic development and job retention.⁴⁹ The PUCO does not explicitly rule on whether the Credit Support Rider is permitted in R.C.

4928.143(B)(2)(i), but implicitly accepts the premise that keeping FirstEnergy's headquarters in Ohio is economic development.⁵⁰ These benefits include the salaries and economic benefits of having service corporation employees located in Ohio.⁵¹

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

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

⁴⁹ FE Brief at 25.

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

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

⁵² Fifth Entry on Rehearing at 112, ¶241.

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

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

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

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

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

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

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

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

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

⁵⁸ Waiver Order at ¶¶ 55, 64.

Under the approved Credit Support Rider, consumers will be forced to pay FirstEnergy approximately \$204 million per year for at least three years. The primary objective of the Credit Support Rider is to provide credit support for FirstEnergy Corp. to maintain investment grade credit rating⁵⁹ and allow FirstEnergy Corp. adequate time to implement a long-term financial solution.⁶⁰ Specifically, Dr. Choueiki states that the credit support from customers will assist the Companies in receiving more favorable terms in the capital market, thereby “enabl[ing] the Companies to procure funds to jumpstart their distribution grid modernization initiatives.”⁶¹

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

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

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

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

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

⁶³ Fifth Entry on Rehearing at ¶ 281.

The PUCO states that the Credit Support Rider does not constitute an unlawful subsidy⁶⁴ because the PUCO “direct[ed] Staff to periodically review how the Companies, and FirstEnergy Corp., use the Credit Support Rider funds to ensure that such funds are used, directly or **indirectly**, in support of grid modernization.”⁶⁵ However, a periodic review of how the funds are used will not cure the problem explained above. It is still possible for the Credit Support Rider funds collected from customers to subsidize FirstEnergy’s affiliates in violation of FERC’s rules and regulations. Rehearing should be granted.

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

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

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

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

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

⁶⁶ Fifth Entry on Rehearing at ¶212.

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

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

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

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

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

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

⁶⁸ *Id.*

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

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

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

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

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

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

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

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

⁷¹ Fifth Entry on Rehearing at PP 186-188.

⁷² Fifth Entry on Rehearing at PP 186-187.

⁷³ Fifth Entry on Rehearing at PP 186-187.

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

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

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

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

⁷⁴ Fifth Entry on Rehearing at PP 188.

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

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

⁷⁷ Fifth Entry on Rehearing at ¶ 254-255.

⁷⁸ Fifth Entry on Rehearing at ¶ 255.

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

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

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

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

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

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

⁷⁹ Fifth Entry on Rehearing at 121.

⁸⁰ Fifth Entry on Rehearing at 130.

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

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

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

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

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

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

⁸² R.C. 4928.02.

⁸³ Fifth Entry on Rehearing at 91.

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

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

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

⁸⁴ Fifth Entry on Rehearing at 92.

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

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

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

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

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

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

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

⁸⁷ OCC Ex. 46 at 6.

⁸⁸ Id. at 9.

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

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

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

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

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

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

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

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

⁹⁰ Fifth Entry on Rehearing at 89.

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

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

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

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

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

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

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

⁹² Fifth Entry on Rehearing at 11.

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

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

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

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

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

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

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

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

⁹⁴ Fifth Entry on Rehearing at 98.

⁹⁵ Fifth Entry on Rehearing at 121.

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

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

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

The PUCO also relied upon the testimony of RESA witness Crockett-McNew regarding the benefits from grid modernization that promotes additional provisions of state policy to ensure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service; and ensure the availability of unbundled and comparable retail electric service that provides consumers with the supplier, price, terms, conditions, and quality options they elect to meet their respective needs.⁹⁹

⁹⁶ Fifth Entry on Rehearing at 150.

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

⁹⁸ Fifth Entry on Rehearing at 127.

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

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

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

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

¹⁰¹ Fifth Entry on Rehearing at 97.

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

¹⁰³ FE Ex. 154 at 9-10.

¹⁰⁴ Id.

¹⁰⁵ Fifth Entry on Rehearing at 54.

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

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

B. The Credit Support Rider is an unlawful subsidy.

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

¹⁰⁶ Id.

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

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

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

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

¹⁰⁸ Fifth Entry on Rehearing at 127.

¹⁰⁹ PUCO Staff Brief at 5-6.

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

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

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

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

¹¹⁰ R.C. 4928.02(H) (Emphasis added).

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

¹¹² Fifth Entry on Rehearing 130.

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

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

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

¹¹³ Fifth Entry on Rehearing at 130.

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

¹¹⁵ Fifth Entry on Rehearing at 130.

¹¹⁶ Fifth Entry on Rehearing at 127.

¹¹⁷ Fifth Entry on Rehearing at 130.

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

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

In the PUCO’s Fifth Entry on Rehearing, the PUCO rejected claims that the Credit Support Rider violates R.C. 4905.22.¹¹⁸ The PUCO noted that the credit rider is authorized by R.C. 4928.143(b)(2)(h) which is modified by the prefatory language “notwithstanding any provision of Title XLIX of the Revised Code to the contrary***.”¹¹⁹ The PUCO interprets this prefatory language as giving the PUCO flexibility in approving ESP provisions. The PUCO reasons that the language means that the “strict requirements of R.C. Chapters 4905 and 4909 do not necessarily apply.” The PUCO concludes that “based on the plain language of R.C. 4928.143(B)(2)(h), unjust and unreasonable charges authorized by the PUCO under R.C. 4928.143(B)(2)(h) cannot be construed to violate R.C. 4905.22.”

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

¹¹⁸ Fifth Entry on Rehearing at 131.

¹¹⁹ Id.

Board of Education, 170 Ohio St. 415; 11 Ohio Op.2d 162 (1960). And the Court recently refused to rule that the “notwithstanding” provision of R.C. 4928.143 trumps other statutes, including R.C. 4928.39.¹²⁰

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

This is not a reasonable interpretation and conflicts with state policies. Included in the state policies is the requirement that the PUCO ensure customers access to adequate, safe, reliable, and reasonably priced electric service. R.C. 4928.02(A). The PUCO has found that it must be guided by these state policies when reviewing applications under Chapter 4928.¹²¹ The PUCO has an affirmative duty to implement the policies under R.C. 4928.06.

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

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

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

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

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

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

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

¹²² Fifth Entry on Rehearing at ¶ 253.

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

¹²⁴ Opinion and Order at 66-67.

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

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

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

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

Currently there are two components to demand reduction rates:

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

¹²⁵ Opinion and Order at 93, 110.

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

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

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

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

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

¹²⁶ Fifth Entry on Rehearing at ¶ P 245.

¹²⁷ Fifth Entry on Rehearing at ¶ P 245.

¹²⁸ Fifth Entry on Rehearing at ¶P 245.

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

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

The PUCO granted rehearing to clarify that FirstEnergy's right to withdraw from the modified ESP IV does not lapse during the application and appeals process.¹³⁰ The PUCO opined that once a final, non-appealable order has been issued, FirstEnergy must exercise its right to withdraw within a reasonable period of time or the filing of tariffs will be considered acceptance of modified ESP IV.

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

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

¹³⁰ Fifth Entry on Rehearing at ¶333.

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

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

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

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

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

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

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

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

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

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

III. CONCLUSION

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

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

/s/ Larry S. Sauer
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