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

NORTHEAST OHIO PUBLIC ENERGY COUNCIL'S APPLICATION FOR REHEARING

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NORTHEAST OHIO PUBLIC ENERGY COUNCIL'S SECOND APPLICATION FOR REHEARING

The Northeast Ohio Public Energy Council ("NOPEC"), through counsel and pursuant to R.C. 4903.10, and O.A.C. 4901-1-35, hereby requests rehearing of the Fifth Entry on Rehearing issued by the Public Utilities Commission of Ohio ("Commission") in this proceeding on October 12, 2016 ("Entry on Rehearing"). NOPEC submits that the Commission's Entry on Rehearing is unlawful and unreasonable based on the following grounds:

A. The Entry on Rehearing is unlawful, unreasonable and against the manifest weight of the evidence because Rider DMR does not fall within any of the provisions of R.C. 4928.143(B). *In Re Application of Columbus Southern Power Co., et al.*, 128 Ohio St. 3d 512, 2011-Ohio-1788, 945 N.E.2d 655, ¶¶ 31-35.

   1. The Commission's approval of Rider DMR is a "credit support" rider for FirstEnergy Corp ("FEC"), which does fall within R.C. 4928.143(B)(2)(h).

   2. Rider DMR is not a "grid modernization incentive" under R.C. 4928.143(B)(2)(h).

   3. The Commission's approval of Rider DMR is unreasonable because the Commission is forcing Ohio ratepayers to fix FEC's credit problems although these credit problems were caused by FirstEnergy Solutions ("FES").

B. The Entry on Rehearing is unlawful and unreasonable because Rider DMR violates R.C. 4928.02(H) and forces the Companies' captive distribution customers to pay for the credit problems of FEC's unregulated competitive market subsidiaries.

C. The Entry on Rehearing is unlawful and unreasonable because the Commission determined that revenues from Rider DMR should be excluded from the SEET test. R.C. 4928.143(F); In re Application of Columbus S. Power Co., 134 Ohio St.3d 392, 2012-Ohio-5690.

D. By approving Rider DMR, the Commission authorized the collection of unlawful transition revenues.

E. The Commission acted unlawfully and unreasonably by determining that the Companies' electric security plan ("ESP IV"), on a quantitative basis, is more favorable than an MRO.

   1. The Commission's precedent demonstrates that the Commission erred in determining that an emergency situation would exist in the present case to justify equivalent DMR revenue under the MRO statute.

   2. Even if the present facts could support the determination of an emergency situation under the MRO statute, the Commission would not be justified in simply awarding the utilities equivalent DMR revenue.

F. The Entry on Rehearing is unlawful and unreasonable because the Commission used the wrong standard of review.

G. The stipulation, as modified by the Commission, violates important regulatory principles and does not benefit ratepayers.

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

The Entry on Rehearing presents yet another unfortunate chapter in FirstEnergy Corp.'s ("FEC") effort to force the Companies'[1] captive customers to repair the financial damage done by the Companies' competitive market affiliate, FirstEnergy Solutions ("FES"). The history of this proceeding shows that the Companies first sought to subsidize FES's competitive operations through a purchase power agreement ("PPA") supported by the proposed Retail Rate Stability Rider ("Rider RRS"). However, the Federal Energy Regulatory Commission ("FERC") essentially nixed Rider RRS by rescinding the waiver for affiliate power sales restrictions,[2] causing the Companies on rehearing to propose a "virtual PPA" supported by a revised Rider RRS. Opposed to the revised Rider RRS, Commission Staff proposed a new, eleventh-hour method of providing financial support to FEC and FES. The proposal is an unconventional and unprecedented form of outright financial support, which requires captive distribution utility customers to provide financial support to FEC and, thus, its unregulated generating affiliates. Attempting to divorce its proposal from the frailties of supporting competitive generation, Staff

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[1] Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company are referred to as the "Companies."

[2] See 155 FERC ¶ 61,101 ("FERC Order").

captioned its newly proposed rider as the "Distribution Modernization Rider" ("DMR"). Rider DMR, however, in reality has nothing to do with modernizing the Companies' distribution systems. The true purpose of Rider DMR is to help alleviate FEC's financial problems, and those of its unregulated generating subsidiaries, including FES.

Ohio law does not allow for such unfair subsidies between a non-competitive distribution utility and its competitive market affiliate. R.C. 4928.02(H). Further, Ohio law recognizes that riders adopted to support a utility's "financial integrity", such as Rider DMR, are nothing more than unlawful transition charges prohibited by R.C. 4928.38. In addition, R.C. 4928.143(B)(2) does not authorize the Commission to force the Companies' captive customers to provide a cash infusion to the Companies' corporate parent, especially when these funds are not connected to actual investments in the electric distribution system.

The record on rehearing demonstrates that Rider DMR is unlawful, unreasonable, and against the manifest weight of the evidence. The Companies' captive customers should not be held responsible for the ongoing financial troubles of FEC and its affiliate, FES. FEC's shareholders, who have reaped past benefits from competitive marketplace, should now solely shoulder the burden of FES's uncompetitive posture in it. Nothing in Ohio law requires or justifies shifting this burden to the Companies' captive customers.

II. GROUNDS FOR REHEARING

A. The Entry on Rehearing is unlawful, unreasonable, and against the manifest weight of the evidence because Rider DMR does not fall within any of the provisions of R.C. 4928.143(B). *In Re Application of Columbus Southern Power Co., et al.*, 128 Ohio St. 3d 512, 2011-Ohio-1788, 945 N.E.2d 655, ¶¶ 31-35.

1. The Commission's approval of Rider DMR is a "credit support" rider for FEC, which does fall within R.C. 4928.143(B)(2)(h).

The Supreme Court of Ohio has held that only the nine items enumerated in R.C. 4928.143(B)(2) may be included in an ESP.[3] In this case, the Commission claims that it has authority to authorize Rider DMR under R.C. 4928.143(B)(2)(h), which allows for "[p]rovisions regarding the utility's distribution service…" The record demonstrates that Rider DMR is not related to the Companies' provision of distribution service. Staff witness Buckley, the individual who introduced Rider DMR, admitted as much at hearing.[4] Indeed, throughout the Entry on Rehearing the Commission explicitly finds that Rider DMR is intended to provide "credit support" to FEC with the hope that it alleviates FEC's financial woes.[5] In fact, these findings are supported by Chairman Haque's concurrence, in which he states that the purpose of Rider DMR is to provide FEC with an "infusion of capital" to help address FEC's "credit issues."[6]

The manner in which the Commission determined the Rider DMR amount further proves that Rider DMR is unrelated to the Companies' provision of distribution service. The Rider DMR amount was set by determining the amount of cash necessary for FEC to maintain a Cash Flow to Operations ("CFO") debt ratio of 14.5 percent, and then allocating 22 percent of that amount to the Companies' captive customers, based upon the Companies' share of FEC's

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[3] *In Re Application of Columbus Southern Power Co., et al.*, 128 Ohio St. 3d 512, 2011-Ohio-1788, 945 N.E.2d 655, ¶¶ 31-35.

[4] Rehearing Tr. Vol. 2 at 426, 429.

[5] Entry on Rehearing at pp. 72, 93 127, and 163.

[6] Chairman Haque's Concurring Opinion at pp. 2 and 3.

operating revenues.[7] Obviously, this amount is not related to actual or projected investment in the Companies' distribution system.

Most importantly, the Commission refused to restrict the use of the Rider DMR revenues specifically to distribution system investment, nor did it require that the revenues be used to directly support any grid modernization infrastructure.[8] The record clearly demonstrates that Rider DMR is structured solely to provide "credit support" to FEC, and thus for the benefit of FEC's affiliates, including its generation affiliate in Ohio, FES, and well as non-jurisdictional generating affiliates in other states. Requiring Ohio ratepayers to bailout an unregulated holding company and unregulated competitive market affiliates from financial difficulties of their own making was not the General Assembly's intent when it enacted R.C. 4928.143(B)(2)(h). The Commission's authorization of Rider DMR is unlawful, unreasonable and against the manifest weight of the evidence.

2. Rider DMR is not a "grid modernization incentive" under R.C. 4928.143(B)(2)(h).

Although the record shows that the purpose of Rider DMR is to remedy FEC's financial troubles, the Entry on Rehearing attempts to paint Rider DMR as a "grid modernization incentive." However, the evidence demonstrates that Rider DMR has nothing to do with grid modernization. The Companies have a separate rider that is intended to fund investment in grid modernization - Rider AMI.[9] Staff witness Turkenton testified that the Companies' investment in grid modernization infrastructure will be recovered through Rider AMI, and **not** through Rider DMR.[10] She admitted that the true purpose of Rider DMR is for credit support, and testified that

[7] Entry on Rehearing at p. 93, 95. *See, also,* Chairman Haque's Concurring Opinion at p. 3 ("…[W]e calculated Rider DMR to account for Ohio's share (22%) of FirstEnergy Corp.'s credit issue.")

[8] Entry on Rehearing at pp. 127-128

[9] Tr. Vol. II at 473-474.

[10] Tr. Vol. II at 426, 429, and 472.

Staff "hopes" the cash infusion from Rider DMR will eventually encourage the Companies to invest in grid modernization.[11] Rider DMR may be based on a "hope" that the Companies will eventually invest in their distribution systems, but the law requires more for it to be considered a legitimate "incentive" under R.C. 4928.143(B)(2)(h).

As Chairman Haque acknowledged, Rider DMR is "undoubtedly unconventional." In fact, it is completely inconsistent with the purpose of R.C. 4928.143(B)(2)(h), which clearly provides that "grid modernization incentives" should be tied to *actual investments* in utilities' distribution systems. R.C. 4928.143(B)(2)(h) states:

> [M]odernization incentives for the electric distribution utility… may include a long-term energy delivery infrastructure modernization plan for that utility or any plan providing for the ***utility's recovery of costs***, including lost revenue, shared savings, and avoided costs, and ***a just and reasonable rate of return on such infrastructure modernization***. (emphasis added)

This language shows that incentives (such as recovery of lost revenues, shared savings and a reasonable rate of return) are appropriate only where a utility is ***actually incurring cost for investments for infrastructure modernization.*** The incentive (or reward, *e.g*., a higher rate of return) is to be provided only for actual investments made. Rider DMR revenues do not incentivize the Companies to do anything, because they are guaranteed the revenues for three years (without the possibility of refund) regardless of the grid modernization efforts undertaken.[12] R.C. 4928.143(B)(2)(h) does not give the Commission blanket authority to provide FEC an infusion of capital based solely upon the "hope" that the cash might eventually

[11] *Id.*

[12] These grid modernization efforts are the focus of a separate proceeding, Case No. 16-0481, which will ensure that the Companies recover their expenses and a rate of return on investments actually made through Rider AMI. The rate of return initially will be set at 10.38 percent, with a 50 basis points adder. See Application, Case No. 16-0481, at 15.

encourage the Companies to invest in their electric distribution systems. This form of regulation is not simply "unconventional" – it is unlawful and inconsistent with R.C. 4928.143(B)(2)(h).

3. The Commission's approval of Rider DMR is unreasonable because the Commission is forcing Ohio ratepayers to fix FEC's credit problems although these credit problems were caused by FES.

Not only is the Commission's approval of Rider DMR unlawful, but it is also unreasonable considering that FES – <u>not the regulated Companies</u> – is largely responsible for FEC's alleged financial problems. The underlying basis for Rider DMR is the amount of cash necessary for FEC to maintain a CFO to debt ratio of 14.5 percent.[13] Staff then allocated to the Companies' a 22% share based upon the Companies' proportional share of FEC's operating revenues.[14] Although the Commission claims that this amount is the Companies' "fair share" of FEC's credit issues, there is no evidence in the record demonstrating that the Companies were responsible for any of FEC's credit woes. In fact, while developing the Rider DMR proposal, Staff did not evaluate how much of FEC's credit issues were due to any shortfall in CFO to Debt specific to any other FEC subsidiaries, such as its competitive market subsidiaries like FES.[15] This failure to consider whether FEC's credit issues were caused by other FEC subsidiaries is unreasonable. This is especially true considering that there is evidence in the record that indicates that FEC's higher-risk competitive market business was largely the cause of these credit issues.[16]

Although the record indicates that FES is the main contributor to FEC's financial troubles, the Commission refused to implement any ring-fencing provisions to protect Ohio

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[13] Entry on Rehearing at p. 196.

[14] *Id.*

[15] Rehearing Tr. Vol. 3. at 540-542; Rehearing Tr. Vol. 10 at 1618, 1630.

[16] Staff Ex. 13, Attachment 3 at 3 (Buckley Direct).

ratepayers from these ongoing issues.[17] The Commission states that Staff will "periodically review" Rider DMR to ensure that there are no unlawful subsidies, but this review process will not protect the Companies from the continuing credit problems of FEC's competitive market subsidiaries. Recent developments show that the actions of FEC's competitive market subsidiaries continue to have a potentially negative impact on FEC. On November 4, 2016, Moody's downgraded FES' credit rating,[18] and it has been widely reported that FES might file bankruptcy because of its financial struggles.[19] The financial woes of FES—an entity that is not regulated by the Commission—continue to potentially drag down the credit worthiness of FEC.

The Commission may find itself in the same position three years from now when it is deciding whether it should extend Rider DMR. At that point, if FEC still has "credit issues," the Companies will again attempt to justify an extension of Rider DMR based on the failures of FEC's other subsidiaries. Ohio ratepayers will be approximately $600 million in the hole at that point and will have little to show for it. The Commission should not wait to implement ring-fencing measures to protect Ohio ratepayers from the unwise business decisions of FEC's management.

B. The Entry on Rehearing is unlawful and unreasonable because Rider DMR violates R.C. 4928.02(H) and forces the Companies' captive distribution customers to pay for the credit problems of FEC's unregulated competitive market subsidiaries.

Rider DMR will directly benefit FEC's unregulated competitive market subsidiaries – the very same subsidiaries that caused FEC's financial troubles. This violates R.C. 4928.02(H), which states that it is the policy in this state to:

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[17] Entry on Rehearing at p. 127.

[18] https://www.moodys.com/research/Moodys-downgrades-FirstEnergy-Solutions-CFR-to-Caa1-from-Ba2-Allegheny--PR_356746

[19] http://www.cleveland.com/business/index.ssf/2016/11/firstenergy_hopes_to_move_its.html

> 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 rate.

The Supreme Court of Ohio has held that it is unlawful under R.C. 4928.02(H) for the Commission to allow an electric distribution utility to use revenues from noncompetitive distribution service to subsidize competitive generation-service.[20] Because Rider DMR is collected from all captive distribution customers, its revenues are derived from a noncompetitive retail electric service. Yet, the record demonstrates that Rider DMR revenues will benefit the competitive retail electric service of FEC's generation affiliates, including FES.

The Entry on Rehearing uses FEC's weak credit ratings to justify Rider DMR. However, many of FEC's financial problems were directly caused by FES's bad business decisions.[21] Because Rider DMR will be used to address the problems caused by FES, it provides a direct benefit to FES. As OCC witness Kahal testified, by increasing FEC's overall credit rating, Rider DMR will require FES to post less collateral.[22] The Companies' captive distribution customers are providing this financial benefit to FES and FEC's other competitive subsidiaries. The subsidy is anti-competitive because no other competitive retail electric service providers in Ohio receive it. The Commission must grant rehearing and find that Rider DMR violates R.C. 4928.02(H).

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[20] *Indus. Energy Users-Ohio v. Pub. Util. Comm.*, 117 Ohio St. 3d 486, 2008-Ohio-990, 885 N.E.2d 195, ¶ 4. See also *Elyria Foundry Co. v. Pub. Util. Comm.*, 114 Ohio St. 3d 305, 2007-Ohio-4164, 871 N.E.2d 1176, ¶ 58 (the Court held the Commission violated R.C. 4928.02(G), the predecessor to R.C. 4928.02(H), when it allowed FirstEnergy to recover generation related cost from all distribution customers).

[21] OCC Ex. 46, at 4-5 (Kahal Rehearing Rebuttal).

[22] OCC Ex. 46, at 12-13. (Kahal Rehearing Rebuttal).

C. The Entry on Rehearing is unlawful and unreasonable because the Commission determined that revenues from Rider DMR should be excluded from the SEET test. R.C. 4928.143(F); *In re Application of Columbus S. Power Co*., 134 Ohio St.3d 392, 2012-Ohio-5690.

The plain language of R.C. 4928.143(F) requires that the Commission consider all provisions approved in an electric security plan ("ESP") when annually considering whether the ESP provided the electric distribution utility with significantly excessive earnings.[23] The Commission may exclude from the test only earnings that do not result from the ESP. [24]

In this case, Rider DMR unquestionably was approved as a provision of the Companies' ESP under the authority of R.C. 4928.143(B)(2)(h). However, the Commission excluded Rider DMR revenues, finding that "[i]ncluding the revenue in SEET would introduce an unnecessary element of risk" and "undermine the purpose of providing credit support for the Companies."[25] The Commission lacks authority to arbitrarily pick and choose what revenues from riders will be included in the SEET calculations. As a creature of statute, the Commission is bound by the plain language of R.C. 4928.143(F),[26] and must include Rider DMR revenues in the SEET test.

D. By approving Rider DMR, the Commission authorized the collection of unlawful transition revenues.

As part of Senate Bill 3, R.C. 4928.37 provided each electric utility with a limited opportunity "to receive transition revenues to assist the utilities in making the transition to a fully competitive retail electric generation market." Specifically, the Companies had until December 31, 2005 to receive generation transition revenue. After that date, R.C. 4928.38

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[23] R.C. 4928.143(F) provides, in part:

> With regard to *the provisions that are included* in an electric security plan under this section, the commission shall consider, following the end of each annual period of the plan, if any such adjustments resulted in excessive earnings…

[24] *In re Application of Columbus S. Power Co*., 134 Ohio St.3d 392, 2012-Ohio-5690, ¶ 5 (the "*CSP Case*").

[25] Entry on Rehearing at p. 98.

[26] *See, e.g., Tongren v. Pub. Util. Comm.* (1999), 85 Ohio St.3d 87, 88 (As a creature of statute, the Commission has and may exercise only the authority conferred upon it by the General Assembly.).

prohibits the Commission from "authoriz[ing] the receipt of transition revenues ***or any equivalent revenues*** by an electric utility. . . . ." Emphasis supplied.

The Supreme Court of Ohio recently reversed the Commission's decision approving AEP's Retail Stability Rider ("RSR") as unlawful transition revenue.[27] In doing so, the Court rejected the Commission's reasoning that Rider RSR did not constitute unlawful transition revenue because AEP had not expressly sought transition revenue in its application. The Court determined that the Commission too narrowly defined transition revenue, noting that the General Assembly barred transition revenue "or any equivalent revenue."[28] To the Court, this indicated the intent of the General Assembly "to bar not only transition revenue associated with costs that were stranded during the transition to market following S.B. 3 *but also any revenue that amounts to transition revenue by another name*."[29] The Court, "after looking at *the nature of the revenue* recovered under the RSR" found that "the record supports a finding that AEP is receiving the equivalent of transition revenues through that rider."[30]

In evaluating the nature of the revenue recovered under Rider RSR, the Court noted that Rider RSR revenues were tied largely to generation related losses, with a purpose to "ensure [AEP] maintains its financial integrity."[31] Not long after this decision, the Court again reversed the Commission in a similar case involving the approval of the Dayton Power and Light Company's Service Stability Rider "on the authority of *In re Application of Columbus Southern Power*."[32]

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[27] *In re Application of Columbus Southern Power Co.*, No. 2013-0521, 2016-Ohio-1608 (April 21, 2016).

[28] *Id*. at ¶21.

[29] *Id.* Emphasis added.

[30] *Id*. at ¶22. Emphasis added.

[31] *Id.* at ¶24; ¶36.

[32] *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 (June 20, 2016).

Rider DMR is an unlawful transition charge by another name that requires consumers to subsidize the Companies' parent, FEC, and, ultimately, the generation assets held by FEC, including those of its subsidiary, FES. The record is indisputably clear that the purpose of Rider DMR is to provide a "cash infusion" for the benefit of keeping FEC at an investment grade rating.[33] The Commission's decision adopted this rationale for approving Rider DMR, by "find[ing] that Rider DMR is necessary to assist the Companies in accessing the capital markets"[34] because "there is ample evidence in the record establishing that a downgrade of the Companies' credit rating is a serious risk."[35] The risk to the Companies' credit ratings is entirely due to the risk of a downgrade of their parent, FEC.[36]

Even a cursory review of the record quickly demonstrates that FEC's potential downgrade stems largely from FES's difficulties in the merchant energy markets. The Commission placed great weight on the credit rating agencies' outlooks to support its rationale for approving Rider DMR and to calculate the amount of revenue to be collected under Rider DMR.[37] The credit agencies' reports indicate that the need for the credit support is directly related to generation related losses. For instance, Standard & Poor's describes "weak commodity prices" and "[t]he higher-risk competitive business greatly increases the company's [FEC]] exposure to lower generation volumes and commodity prices."[38]

The Commission acknowledged that FEC's need for credit support is based in part from the "continued weakening of merchant energy markets." Chairman Haque, in his concurrence, also identified the challenges facing coal-fired or nuclear generation in restructured states as a

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[33] See PUCO Staff Ex. 13 at 2 (Buckley Direct).

[34] Entry on Rehearing at 90.

[35] *Id.* at 91.

[36] *Id*. at 92.

[37] *Id*. at 90-93.

[38] Staff Ex. 13 at Attachment 3, pp. 2-3 (Buckley Direct).

reason for "how we got here."[39] But for the generation-related losses and financial difficulties, we would not be "here." Yet, the Commission insists that Rider DMR will not provide transition revenue to the Companies and is "entirely unrelated to generation".[40] The Commission offers little support for this assertion except for stating there is no "transition" because the Companies "transferred their generation assets to FES many years ago."[41]

Like it did when approving AEP's Rider RSR, the Commission again adopts too narrow of a definition of what constitutes transition revenue. The Supreme Court of Ohio's recent precedent is clear that the nature of the revenue collected must be examined. As described above, it is clear that the nature of the revenue to be collected under Rider DMR is directly tied to FEC's generation related losses. For these reasons, Rider DMR constitutes unlawful transition revenues.

E. The Commission acted unlawfully and unreasonably by determining that the Companies' electric security plan ("ESP IV"), on a quantitative basis, is more favorable than an MRO.

The Commission unlawfully and unreasonably concluded that the approximately $600 million of revenue collected over three years under Rider DMR would have no impact on the ESP versus MRO test. The Commission reasoned there would be no impact because equivalent revenues could potentially be recovered through an MRO application.[42] By excluding the Rider DMR revenues from the ESP versus MRO test, the Commission concluded that, on a quantitative basis, ESP IV is more favorable than an MRO in the amount of $51.1 million.[43] If the Commission had not erred by excluding $600 million in Rider DMR revenue from the test, ESP

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[39] Chairman Haque Concurring Opinion at p. 3.

[40] Entry on Rehearing at p. 130.

[41] *Id.*

[42] Entry on Rehearing at p. 161.

[43] *Id.*at 163.

IV would be undeniably less favorable than an MRO, by approximately $550 million.

The Commission based its determination that revenues equivalent to Rider DMR could be recovered through a hypothetical MRO through R.C. 4928.142(D)(4).[44] Under this provision, "the commission may adjust the electric distribution utility's most recent standard service offer price by such just and reasonable amount that the commission determines necessary to address any emergency that threatens the utility's financial integrity. . . ."

At a minimum, for revenues equivalent to Rider DMR to be recovered under R.C. 4928.142(D)(4) through an MRO, the Commission would first have to first determine that an "emergency" exists. The Commission admitted that "we have never determined the standards under which we would review an application under this section."[45] As a result, the Commission decided that, "for the purposes of the ESP versus MRO test, we must construe this this section [R.C. 4928.142(D)(4)] as if a hypothetical application for an MRO has been submitted based *upon the same facts as are in the record in this case*."[46]

For guidance as to whether an emergency would exist under an MRO based on the facts in this case, the Commission looked to R.C. 4909.16, which authorizes the Commission to grant emergency rate relief to utilities.[47] Specifically, the Commission considered the application of R.C. 4909.16 in an earlier case, *In re Cleveland Elec. Illum. Co.* ("1988 CEI Rate Case").[48] According to the Commission, this previous case establishes that an S&P bond rating of "BBB-"

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[44] *Id*. at 161.

[45] *Id.* at 162.

[46] *Id*. Emphasis added.

[47] R.C. 4909.16 states: "When the public utilities commission deems it necessary to prevent injury to the business or interests of the public or of any public utility of this state in case of any emergency to be judged by the commission, it may temporarily alter, amend, or, with the consent of the public utility concerned, suspend any existing rates, schedules, or order relating to or affecting any public utility or part of any public utility in this state. Rates so made by the commission shall apply to one or more of the public utilities in this state, or to any portion thereof, as is directed by the commission, and shall take effect at such time and remain in force for such length of time as the commission prescribes."

[48] Case No. 88-170-EL-AIR.

places a utility at risk of falling below investment grade and is sufficient basis for the Commission to determine that an emergency exists.[49] Therefore, the Commission determined that the potential downgrade of FEC's current BBB- credit rating could be construed as an "emergency that threatens the utility's financial integrity" under R.C. 4928.142(D).[50] For this reason alone, the Commission found that it would likely grant relief in response to a hypothetical MRO application based upon the facts in this case under R.C. 4928.142(D).[51]

The Commission misapplied its own precedent. The facts in this case would not support the finding of an emergency or a grant of relief, especially in the form of a massive cash bailout. Indeed, the single case the Commission used to support its reasoning shows that the Commission got it wrong.

1. The Commission's precedent demonstrates that the Commission erred in determining that an emergency situation would exist in the present case to justify equivalent DMR revenue under the MRO statute.

In the 1988 CEI Rate Case, CEI and Toledo Edison ("TE") sought interim relief, alleging that they faced a financial emergency.[52] When evaluating CEI and TE's request, the Commission first noted that while the Supreme Court has construed R.C. 4909.16 as vesting the Commission discretionary powers,[53] "[t]he Court has also cautioned the Commission that its power to grant emergency relief is extraordinary in nature."[54] The Commission then set out several standards to guide the exercise of its discretion:

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[49] Entry on Rehearing at p. 162.

[50] *Id.*

[51] *Id.*

[52] *In re Cleveland Elec .Illum. Co.*, 1988 PUC LEXIS 809, *8 (Aug. 23, 1999).

[53] *Id.*, citing *Manufacturer's Light and Heat Company v. Public Utilities Commission*, 163 Ohio St. 78 (1955).

[54] *Cincinnati v. Public Utilities Commission*, 149 Ohio St. 570 (1948).

> "First, the existence of an emergency is a condition precedent to any grant of temporary rate relief.
>
> Second, applicant's evidence will be reviewed with the ***strictest scrutiny*** and that evidence must clearly and convincingly demonstrate ***the presence of extraordinary circumstances which constitute a genuine emergency situation.***
>
> Next, emergency rate relief will not be granted under Section 4909.16, Revised Code, if the emergency request was filed merely to circumvent, and as a substitute for, permanent rate relief under Section 4909.18, Revised Code.
>
> Finally, the Commission will grant temporary rate relief only at the minimum level necessary to avert or relieve the emergency. ***The ultimate question for the Commission is whether, absent emergency relief, the utility will be financially imperiled or its ability to render service will be impaired. If the applicant utility fails to sustain its burden of proof on this issue, the Commission's inquiry is at an end***."[55]

Emphasis added.

The Commission also noted that, "for large utilities," the factors it focuses on are "interest rate coverage rations, financial ratings, *and* cash flow analysis" when determining if an emergency exists.[56] Emphasis added.

In the 1988 CEI Rate Case, after reviewing the evidence with "strict scrutiny," the Commission found that CEI and TE had established that an emergency existed and that their "financial health was in serious peril."[57] CEI and TE had significant negative cash flow of $324 million and $269 million, respectively, and that revenues were insufficient to meet cash obligations for current operations.[58]

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[55] *In re Cleveland Elec .Illum. Co.*, *12.

[56] *Id*. at *13.

[57] *Id*. at *24.

[58] *Id*. at *17.

The Companies' present situation is simply not comparable with the circumstances facing CEI and TE in the 1988 CEI Rate Case.[59] Here, the Commission did not review the evidence under the "strictest scrutiny," nor did it identify the "presence of extraordinary circumstances which constitute a genuine emergency situation." In this case, the record does not establish that the Companies face negative cash flows that risk their current operations or that their health is in "serious peril." The Commission's concern with a *potential* downgrade of the Companies' *parent* is not so the Companies may simply maintain their current operations but rather so that the Companies will be in a better place to someday invest in grid modernization.[60] That is no emergency.

2. Even if the facts in this case could support the determination of an emergency situation under the MRO statute, the Commission would not be justified in simply awarding the utilities equivalent DMR revenue.

In the 1988 CEI Rate Case, the Commission determined that CEI and TE's financial health was in "serious peril." CEI and TE each had negative cash flow in the hundreds of millions of dollars, which threatened their ability simply to maintain their current operations. For these reasons and others, as discussed above, the Commission determined that an emergency existed. Notably, however, the Commission decided <u>not</u> to provide CEI and TE with an immediate rate increase.

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[59] See also, *In the Matter of the Application of Ohio Suburban Water Company for an Emergency and Temporary Increase in the Rates to be Charged and Collected for Water Service*, 1989 Ohio PUC LEXIS 711 (July 19, 1989) (an emergency existed due to the immediate risk of a water company's ability to provide uncontaminated water); *In the Matter of the Application of Akron Thermal, Limited Partnership for an Emergency Increase in its Steam and Hot Water Rates and Charges*, 2001 Ohio PUC LEXIS 1071 (Jan. 25, 2001) (a severe cash flow shortage posed an immediate risk to the utility's ability to meet ongoing expenses of operation, thereby constituting an emergency situation).

[60] Chairman Haque Concurring Opinion at p. 1 ("The primary purpose is to ensure that FirstEnergy retains a certain level of financial health and creditworthiness so that it can invest in future distribution modernization endeavors.").

In the 1988 CEI Rate Case, the staff recommended that the Commission grant an increase in rates for CEI of approximately $112 million and for TE approximately $45 million annually.[61] Although the Commission had found that an emergency existed, it nonetheless concluded that "no additional rate relief is warranted in the current circumstances."[62] Instead the Commission decided to allow the utilities to make some immediate accounting adjustments and to monitor the situation, noting that a permanent rate case was pending and could offer additional relief.[63] The Commission also placed responsibilities on the CEI and TE:

> [P]erhaps most importantly, the Commission believes that the companies absolutely must take very aggressive steps to enhance their revenues and minimize their expenses particularly during this interim period in order to avoid the negative consequences of the current financial emergency. In Case No. 84-1286-EL-AEM, the prior Toledo Edison emergency case, the Commission granted certain emergency relief in the form of additional rates to Toledo Edison. At that time, we found that Toledo Edison was in an emergency circumstance and forcefully directed the company to act as if it were in an emergency. We reiterate that direction to TE and CEI.[64]

The Commission went further, lecturing CEI and TE:

> What has been presented in terms of reduction of expenses in this record does not inspire us to the belief that these companies as yet comprehend the concept of 'austerity' – a concept which is mandatory in a financial emergency such as the one the companies face.

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[61] *In re Cleveland Elec .Illum. Co.*, *12.

[62] *Id.* at *31.

[63] *Id.* at *32.

[64] *Id*. at *35. Significantly, in Case No. 84-1286-EL-AEM, **the $30 million in emergency relief granted by the Commission was subject to a refund in the form of a credit once the financial emergency passed**. In this case, no such mechanism to eventually make ratepayers whole was even entertained.

> We must question the wisdom of recent management decisions relating to cost containment. We are puzzled by the apparent lack of aggressiveness in pursuing revenue enhancement options . . .and we are troubled by an attitude which seems to suggest that the companies believe that major steps which they have taken . . . are enough and that it is now time for the Commission to subject ratepayers to higher rates.[65]

The Commission's current actions stand in stark contrast to its actions in the 1988 CEI Rate Case. Rather than first requiring clear actions on the part of the Companies (and, by extension, FEC) to improve the financial situation or implementing ring-fencing to separate the Ohio utilities financially from their struggling parent, the Commission immediately decided to allow the Companies to collect hundreds of millions of dollars from captive customers to support FEC and its affiliate's unregulated generation assets. For the Commission to assume, for the purposes of the MRO versus ESP test in the present case, that it would simply find an emergency and simply hand over equivalent revenues under the current set of facts is nothing short of an abandonment of its own precedent, which it has failed to explain. This failure alone is reversible error.[66]

In sum, it would be unlawful and unreasonable in a hypothetical case for the Commission to determine that the present facts constitute an emergency situation under the MRO statute that justifies an immediate remedy of hundreds of millions of dollars from captive customers. Such a grant of relief would require the Commission to ignore its precedent and render the extraordinary circumstance of an emergency meaningless—nothing less than an abuse of the Commission's discretion. For these reasons, the Commission in this case acted unlawfully and unreasonably by finding that equivalent revenues could be collected in a hypothetical case under the MRO

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[65] *Id.* at *36.

[66] *See, also, Consumers' Counsel v. Pub. Util. Comm.* (1984), 10 Ohio St.3d 49; *Consumers' Counsel v. Pub. Util. Comm.* (1985), 16 Ohio St.3d 21 (requiring the Commission to explain its departure from precedent).

statute's emergency provisions. Without this unlawful and unreasonable finding, ESP IV cannot be found as more favorable in the aggregate to an MRO.

F. The Entry on Rehearing is unlawful and unreasonable because the Commission used the wrong standard of review.

In issuing its Entry on Rehearing, the Commission used the traditional three-prong analysis for approving partial stipulations, endorsed by the Ohio Supreme Court in *Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, 592 N.E.2d 1370 (1992). The standard considers:

1. Is the settlement a product of serious bargaining among capable, knowledgeable parties?
2. Does the settlement package violate any important regulatory principle or practice?
3. Does the settlement, as a package, benefit ratepayers and the public interest?

From the time the Companies filed their ESP IV application on August 4, 2014, until the Commission issued its opinion and order in this proceeding on March 31, 2016 ("Order"), the pivotal issue concerned the lawfulness and reasonableness of the proposed Retail Rate Stability rider ("Rider RRS"). The Order approved a partial stipulation that included Rider RRS as part of a "package" that the parties negotiated and that the Commission, as a whole, found reasonable.

Rider DMR was not a part of the stipulation the Commission's Order approved. In fact, it wasn't even a part of the record until Staff proposed it through eleventh hour testimony on rehearing. As such, the parties were denied the opportunity to negotiate a settlement to this case with the substituted Rider DMR as the lynchpin. The parties, both stipulating and non-stipulating, were denied the right to negotiate a different balance of interests in a stipulated package that would include Rider DMR. Yet, the Entry on Rehearing reviewed this proceeding under the partial stipulation standard, even though negotiations never were held on whether the pivotal Rider DMR should be adopted. The Commission's finding that the settlement was the product of serious bargaining is plain error. The Commission must grant rehearing and consider this proceeding not on the basis of testimony that supports approval of a stipulation as a package, as it did in the Entry on Rehearing, but on the basis of all parties' positions on the merits of each issue raised.

G. The stipulation, as modified by the Commission, violates important regulatory principles and does not benefit ratepayers.

The Commission's approval of Rider DMR is unlawful because the stipulation does not meet the second and third prong of the three-pronged partial stipulation analysis. First, the stipulation violates a number of important regulatory principles and practices. As discussed above, Rider DMR is contrary to a number of provisions in Title 49 and Supreme Court of Ohio precedent which established sound regulatory principles. Rider DMR violates these principles, such as prohibitions against anti-competitive subsidies and the provision of transition revenue.

In addition, the stipulation, as modified, does not benefit ratepayers or the public interest. The Companies' captive customers are required to provide credit support for FEC due to the financial troubles of FES. Although the Commission claims that Rider DMR will lead to grid modernization, the record demonstrates that Rider AMI, and not Rider DMR, is designed to fund the Companies' investment in grid modernization. Rider DMR is not connected to the Companies' provision of utility service or actual investment in infrastructure. As such, Rider DMR does not benefit the Companies' ratepayers.

III. CONCLUSION

For the foregoing reasons, NOPEC respectfully request that the Commission grant rehearing in the case and that the Commission deny the Rider DMR.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Application for Rehearing was served *via electronic mail* upon the parties of record this 14th day of November 2016.

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