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**

SIERRA CLUB'S MEMORANDUM *CONTRA*
THE COMPANIES' APPLICATION FOR REHEARING
OF THE FIFTH REHEARING ENTRY

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In its Fifth Entry on Rehearing ("Rehearing Order" or "Order"), the Commission approved a so-called Distribution Modernization Rider ("DMR") under which customers of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, "FirstEnergy" or the "Companies") would be required to pay $612 million over three years, and possibly more than $1 billion over five years, to provide credit support for the Companies' parent, FirstEnergy Corp. None of that money is for the recovery of costs that were incurred for providing services to customers, nor are the Companies required to spend any of the DMR revenues on distribution modernization initiatives or to otherwise benefit their customers. Instead, these effectively unrestricted "credit support" funds can and likely will accrue to FirstEnergy Corp., its shareholders, and its unregulated affiliates. As Sierra Club explained in its application for rehearing, the Commission must rescind its approval of the DMR and remove it from ESP IV because the Commission did not have jurisdiction to approve the entirely new DMR proposal on rehearing, the DMR is not authorized under any provision of Ohio law, and the DMR is not just, reasonable, or beneficial for customers.

Dissatisfied with a $612 million gift, the Companies filed an application for rehearing complaining that the Commission should have given them more. The Companies' application reiterates their preferred methods for calculating the DMR, which would require customers to pay at least $558 million per year for more than seven years (at least $4.1 billion total)[1] to help

[1] While FirstEnergy seeks $558 million per year for credit support, the Companies also call for increasing the DMR "by an amount that recognizes, to an appropriate extent, the significant value" of FirstEnergy Corp. maintaining its headquarters and nexus of operations in Akron, Ohio. Co. App. at 9. FirstEnergy, however, has not identified an amount that it believes should be added and, therefore, it is not clear exactly how much FirstEnergy is seeking to require customers to pay under the DMR. As explained in Section I.C below, there should be no increase in the DMR to reflect the headquarters requirement.

Note: Unless stated otherwise, citations to "Co. App." and "SC App." are referring to the memoranda in support of the Companies' and Sierra Club's rehearing applications of the Rehearing Order, respectively. In addition, unless otherwise noted, all transcripts cited in this memorandum refer to the rehearing volumes. Unless stated otherwise, any references to "post-hearing" briefs ("Br.") in this memorandum

FirstEnergy Corp. maintain creditworthy cash flow from operations ("CFO") to debt levels.[2] But even if the DMR were legally permissible (it is not), in order to assess whether it is just, reasonable, and beneficial to customers, one would need to at least know the likely size of FirstEnergy Corp.'s CFO to debt shortfall in future years, the Companies' contribution to that shortfall relative to that of other FirstEnergy Corp. subsidiaries, FirstEnergy Corp.'s plan for overcoming the shortfall, and the cost that customers might face if FirstEnergy Corp.'s credit rating were downgraded. Yet the record, and the Companies' application for rehearing, is silent on all of those salient issues. As such, in addition to the DMR being unlawful, there is simply no basis in this record to demonstrate that a $612 million DMR, much less the $4.1 billion DMR sought by FirstEnergy, would be just, reasonable, or beneficial to customers.

For more than two years, FirstEnergy attempted to sell its proposed Rider RRS (in both its initial and modified versions) on the claim that customers would pay $414 million through the end of 2018, but then would receive $976 million in credits from 2019 through May 31, 2024.[3] FirstEnergy further asserted that Modified Rider RRS would enable the Companies to advance grid modernization and maintain their investment grade credit rating over the term of ESP IV.[4] While Modified Rider RRS has been abandoned by the Companies, the claims made by FirstEnergy in attempting to sell that rider cannot be ignored in evaluating the DMR. And those claims undermine the Companies' belated and unsupported attempt to make customers pay at least $4.1 billion under the DMR. As such, FirstEnergy's own testimony in support of Modified

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are to the briefs filed by the parties on August 15 and August 29, 2016. The shortforms "Co.," "SC," and "Staff" in citations are referring to the Companies, Sierra Club, and the Staff of the Public Utilities Commission of Ohio, respectively.

[2] Co. Ex. 206, Rehearing Rebuttal and Surrebuttal Testimony of Eileen M. Mikkelsen, at 14 ("Mikkelsen Rebuttal").

[3] *See, e.g.*, SC Ex. 89 (November 30, 2015 workpaper of FirstEnergy witness Eileen Mikkelsen).

[4] Tr. I at 80-81, 90-91.

Rider RRS further demonstrates why the Companies' complaints that they will receive too little money under the DMR ring hollow. For these reasons, and the reasons set forth below, the Commission should deny ground nos. 1 and 2 of the Companies' Application for Rehearing. As discussed in Section IV below, the Commission should grant rehearing grounds nos. 3 and 4.

I. The Commission Properly Rejected the Companies' Proposed Modifications to the DMR, Which are Unlawful, Unjust, and Unreasonable.

The DMR proposal was first set forth by Staff in rehearing testimony filed on June 29, 2016, as a means to provide "credit support" to FirstEnergy Corp. In that testimony, the Staff proposed that the DMR be set at a level of $131 million per year for three years, with the possibility of a two-year extension. This amount was calculated based on a backward-looking assessment of how far below 14.5% FirstEnergy Corp.'s CFO to debt ratio was in 2011 through September 30, 2015, with 22% of the resulting shortfall allocated to the Companies' customers.[5] In response to concerns raised by the Companies, the Commission increased Staff's proposal by 55.7% to $204 million per year by requiring customers to cover the prevailing federal corporate income taxes on the DMR revenues.[6] The Commission did not, however, require that the DMR revenues be invested in distribution modernization initiatives or otherwise be used to benefit customers.

Despite receiving $612 million in effectively unrestricted funds under the DMR, the Companies contend that the Rehearing Order is "unlawful and unreasonable" because it does not provide enough funding.[7] In particular, the Companies complain that the Commission did not adopt their proposed modifications to the DMR, which would have increased the cost to

[5] Staff Ex. 13, Rehearing Testimony of Joseph P. Buckley, at 3-4.

[6] Rehearing Order at 4, 95.

[7] Co. App. at 5.

customers and duration of the DMR to at least $4.1 billion over more than seven years. FirstEnergy surmises that the level and duration of the DMR revenues approved by the Commission are insufficient for "shoring up" FirstEnergy Corp.'s finances and, therefore, "seriously undercut" the purported distribution modernization purpose of the rider.[8] FirstEnergy then sets forth a series of rehearing grounds urging the Commission to adopt the Companies' preferred method for calculating the DMR.[9] The Commission should reject FirstEnergy's request, as the Companies have failed to demonstrate that its inflated DMR request is lawful, just, reasonable, or beneficial to customers, or that the Commission erred in rejecting FirstEnergy's proposed modifications.

A. FirstEnergy's Contention that it Needs $4.1 Billion in Credit Support Over the Term of ESP IV is Unlawful, Unreasonable, and Against the Manifest Weight of the Evidence.

As Sierra Club explained in its application for rehearing, the Commission's approval of $612 million of credit support through the DMR is unlawful and unreasonable in part because the record lacks any projections or other evidence regarding the future credit metrics and financial health of FirstEnergy Corp. or the Companies.[10] Given that the DMR's purported purpose is to avert a possible future event, such forward-looking information is the bare minimum needed to evaluate the proposal. Yet no such evidence has been presented and, therefore, the award of $612 million over three years for credit support is unreasonable and unsupported by the record.

The Companies double down on this fatal inadequacy by claiming that the Commission should have approved a DMR more than twice as long in duration and more than five times as

[8] *Id.* at 3, 6.

[9] *See* Companies' Application for Rehearing, Ground Nos. 1(a) to 1(e).

[10] SC App. at 26-28.

large. Dismissing the Commission-approved DMR as a "half-measure," FirstEnergy suggests that only the $4.1 billion that the Companies seek to receive through May 31, 2024, would be sufficient to allow the Companies to "maintain their investment grade ratings" and to "access capital for distribution grid modernization."[11] The Commission should reject these arguments, and the Companies' request to increase the amount and duration of customer payments under the DMR, for at least three reasons.

1. The Companies' grid modernization claims are unsupported, and their request for $4.1 billion in credit support for FirstEnergy Corp. is not authorized by Ohio law.

First, FirstEnergy's inflated DMR proposal should be rejected because the DMR itself is not authorized under Ohio law. As Sierra Club explained in its rehearing application,[12] the DMR does not qualify as a distribution modernization rider under R.C. 4928.143(B)(2)(h), cannot be approved under any other provision of R.C. 4928.143, and constitutes an unlawful transition charge. Therefore, it should be removed from ESP IV. Nothing in FirstEnergy's proposal to increase the level of DMR funding changes the lack of legal authorization for what is simply a credit support rider.

In an ongoing attempt to shoehorn the DMR into R.C. 4928.143(B)(2)(h), FirstEnergy portrays the DMR as somehow connected to and necessary for investments by the Companies in distribution modernization.[13] But as Sierra Club has recounted in detail, this purported connection is illusory.[14] In reality, there is no requirement that any of the DMR funds be spent on distribution modernization or that the Companies use any improved access to the credit

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[11] Co. App. at 3.

[12] SC App. at 10-22.

[13] *See*, *e.g.*, Co. App. at 2, 3, 5, and 8.

[14] SC App. at 11-16.

markets that might result from the DMR to "jump start" distribution modernization initiatives.[15] In addition, the record clearly establishes that the Companies could dividend the DMR funds up to FirstEnergy Corp., which would then be free to use those funds to benefit shareholders or provide support to its unregulated affiliates.[16]

While the Companies misleadingly refer to their "commitment to improve and modernize their grid,"[17] no such "commitment" exists. Instead, FirstEnergy has merely submitted for Commission review in a separate docket a grid modernization application which proposes a collaborative stakeholder process to evaluate three potential grid modernization scenarios that would take between five and fifteen years to implement.[18] Even assuming that the Commission eventually approves some distribution modernization programs in that docket, none of the DMR revenues would be used to fund such programs and the Companies would separately receive a return of and on those investments under Rider AMI or DCR.[19] As such, there is simply no legal basis to claim that the DMR is a distribution rider approvable under R.C. 4928.143(B)(2)(h).

2. FirstEnergy has provided no forward-looking evidence to support the necessity or reasonableness of its request for $4.1 billion in credit support funding.

The second reason that FirstEnergy's request for at least $4.1 billion in DMR revenues should be rejected is that the Companies have provided no basis to conclude that such sums are

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[15] *Id.* at 13-14.

[16] Tr. II at 433; Tr. III at 584-85, 613-14, 702-03; Tr. IV at 956-57; Tr. X at 1606-09.

[17] Co. App. at 5.

[18] Grid Modernization Business Plan, Case No. 16-0481-EL-UNC (Feb. 29, 2016).

[19] *See* Tr. II at 460 (distinguishing between DMR and AMI); Tr. III at 691 (Mr. Buckley acknowledging that the DMR is in addition to any existing rider); *id.* at 570-71 (Mr. Buckley confirming that the Companies would get cost recovery for smart grid investments separate from the DMR); Tr. IV at 956-57, 1015 (Dr. Choueiki discussing cost recovery under DCR and AMI riders); Tr. V at 1229 (Dr. Choueiki confirming that, if the Staff Proposal were adopted, customers could end up paying both the DMR and Rider AMI); Tr. X at 1610 (Ms. Mikkelsen confirming that Rider AMI would provide a return on equity).

necessary to protect the Companies' credit rating. The entirety of the evidence in the record regarding the purported need for credit support are a Moody's credit opinion and an S&P research update suggesting that FirstEnergy Corp. might be downgraded in the future, along with data regarding FirstEnergy Corp.'s CFO to debt ratio from 2011 through September 2015. Even accepting for sake of argument that such scant evidence shows that FirstEnergy Corp. needs some level of future credit support, it says nothing about what level of credit support might be needed. Without data regarding FirstEnergy Corp.'s expected CFO to debt ratio and CFO shortfall in the years of the DMR, there is no basis to conclude that $4.1 billion of customer payments over the next more than seven years are necessary to maintain FirstEnergy Corp.'s credit rating.

The Companies have also failed to provide any evidence regarding the CFO to debt ratios and CFO shortfalls of the Companies or any other subsidiaries of FirstEnergy Corp., or any evidence as to the level of increased costs (if any) the Companies' customers would face if FirstEnergy Corp. were downgraded. As such, even if the Companies had attempted to show that $4.1 billion were needed to maintain FirstEnergy Corp.'s credit rating, there is no basis in the record upon which to conclude that it would be reasonable to force the Companies' customers to pay such massive sums.

The fatal inadequacies facing the Companies' application for rehearing, and the DMR as a whole, are entirely of FirstEnergy's own making. The record shows that the Companies have forecasted financial information but simply refused to provide it in this proceeding. For example, the Staff submitted a data request to the Companies seeking "detailed projected financial statements," and forecasted FFO, CFO, and adjusted debt levels for the years 2016 through 2018.[20] The Companies flatly objected to those requests and did not produce any of the requested information to the Staff (or to any other party) in discovery.[21] FirstEnergy also could have provided forward-looking financial information as part of its written testimony urging a massive expansion of Staff's DMR proposal, but declined to do so. And while Ms. Mikkelsen testified at deposition to the existence of a spreadsheet forecasting the Companies' CFO to debt under ESP IV with Modified Rider RRS, the Companies refused to produce such information.[22]

Litigation choices have consequences. Here, the Companies' choices have left the Commission with a record that does not support the justness and reasonableness of a DMR of any amount, much less the massively inflated $4.1 billion DMR that the Companies seek on rehearing. As such, FirstEnergy's rehearing complaint that the Commission did not give them enough money should be rejected out of hand.

3. FirstEnergy's own testimony regarding Modified Rider RRS shows that the $4.1 billion in DMR funding proposed by the Companies is not necessary to achieve the purported goals of the DMR.

The third reason that FirstEnergy's inflated DMR request should be rejected is that the only forward-looking credit metrics evidence in the record demonstrates that not even $612 million over three years, much less $4.1 billion over more than seven years, is necessary to

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[20] SC Ex. 99 (Staff DR-34).

[21] Tr. I at 107-08; Tr. III at 527-31. The Companies apparently allowed the Staff to see some of the requested information in the context of settlement discussions, but did not allow the Staff to retain any of that information. Tr. III at 527-28.

[22] Tr. I at 19-30. FirstEnergy attempted to excuse its refusal to provide any information about future credit metrics on the grounds that such information purportedly constituted "material nonpublic information," the provision of which the Companies' counsel claimed could violate federal securities law. Tr. X at 1617-18; Tr. I at 26-27. As Sierra Club explained in its initial post-hearing brief, this claim is false, and has been rejected by the Ohio PUC and other forums. SC Br. at 62-63 (citing *In the Matter of the App. of: Cincinnati Gas & Elec. Co. for an Increase in Elec. Distribution Rates*, Case No. 05-0059-EL-AIR, et al., 2005 WL 915770, at *3 (Apr. 20, 2005); *Stuckey v. Online Res. Corp.*, 909 F. Supp. 2d 912, 939 (S.D. Ohio 2012); *In the Matter of Nw. Energy's Application for Approval for Auth. to Establish Increased Nat. Gas & Elec. Delivery Serv. Rates,* Case No. D2007.7.82, Order No. 6852h, 2008 WL 9894541, at *3 (Mont. P.S.C. July 18, 2008)).

achieve the purported goals of the DMR. In particular, while FirstEnergy was still trying to sell its Modified Rider RRS proposal, it claimed that, over the term of ESP IV, it could provide customers with $561 million in net credits under Modified Rider RRS while advancing grid modernization and maintaining the Companies' investment grade credit rating. The Companies made that claim as recently as July 11, 2016,[23] when Ms. Mikkelsen testified regarding ESP IV with Modified Rider RRS that:

> The companies looked at the proposal in the context of the entire ESP. So recognizing that certainly with respect to the proposal there would be dollars that came into the company early that could be used, as we've discussed, for things like funding the SmartGrid, once those investments are made, the ESP IV calls for a quarterly update and a forward-looking rate with respect to the investments in the SmartGrid. So there will be dollars coming back in associated with the revenue requirements arising from that SmartGrid investment.
>
> The ESP IV also includes dollars coming in associated with the distribution -- rider DCR as well as shared savings and other elements of the proposal.
>
> So when the company evaluated the proposal in the totality of the ESP IV, it concluded that it would be able to fund the credits that occurred in the out years without harm to the investments that it was likely to be directed to make under the SmartGrid proposal.[24]

In response to a question from the Attorney Examiner regarding the impact of Modified Rider RRS on the Companies' credit metrics in light of the Companies' projection that customers would receive a net credit of $561 million over the term of the rider, Ms. Mikkelsen testified that:

> The cash into the companies in the early years, I believe, would have a positive impact on the companies' credit rating. That if you carry that out throughout the term, looking at all of the elements of the ESP,

[23] This testimony was provided after the Staff filed its DMR proposal, and after the release of the Moody's credit opinion and S&P research update that FirstEnergy relies on to claim that FirstEnergy Corp. needs credit support.

[24] Tr. I at 80-81.

> I think that the companies would still remain above -- or investment grade.[25]

Table 1 below compares the projected annual charges and credits under Modified Rider RRS with those under the DMR, both as approved by the Commission and with FirstEnergy's requested modifications.

Table 1: Customer Costs, in $ Millions, Under Modified Rider RRS, the Commission-approved DMR, and FirstEnergy's requested DMR

Year	Modified Rider RRS[26]	DMR	FirstEnergy's DMR
2016	155[27]	0	0
2017	175	204	558
2018	84	204	558
2019	(126)	204	558
2020	(207)	0 to 204	558
2021	(216)	0 to 204	558
2022	(177)	0	558
2023	(190)	0	558
2024[28]	(60)	0	232
TOTAL	(561)	612 to 1,020	4,138

As Table 1 shows, FirstEnergy claimed that Modified Rider RRS would have provided the Companies with $414 million in additional revenues over the first 31 months, but then provided customers $976 million in credits over the last five-and-a-half years of the rider. FirstEnergy deemed such revenue impacts to be sufficient, in conjunction with the rest of ESP IV, to advance grid modernization and maintain the Companies' investment grade credit rating. Yet FirstEnergy now dismisses as an insufficient "half-measure" the DMR that would provide the

[25] *Id.* at 90-91.

[26] SC Ex. 89, line 12.

[27] FirstEnergy projected a $155 million charge to customers in 2016 under Modified Rider RRS if that rider had been in effect starting June 1, 2016. At the time of Mikkelsen's July 11 rehearing testimony regarding the adequacy of Modified Rider RRS to fund distribution modernization and maintain the Companies' credit rating, FirstEnergy was seeking to have that rider go into effect on September 1. Mikkelsen Rebuttal at 16. Multiplying FirstEnergy's 2016 projection by 4/7 leads to a total of $88 million under Modified Rider RRS in that year.

[28] FirstEnergy's ESP IV ends on May 31, 2024, so the 2024 costs for FirstEnergy's DMR are 5/12 of the annual amount proposed by the Companies.

Companies with an additional $612 million in revenue over the first three years, and potentially $408 million more in the fourth and fifth years, with no credits provided to customers in the later years of ESP IV. And FirstEnergy further contends that it must receive $558 million in DMR revenue per year, for more than seven years, in order for the Companies to advance grid modernization and maintain their credit rating.

No explanation has been provided for the blatant inconsistency in this testimony. But especially given the complete lack of any other forward-looking evidence regarding the level of credit support that would purportedly be needed in any year or ESP IV, FirstEnergy's testimony regarding Modified Rider RRS renders meritless the Companies' belated claim that they need $4.1 billion over seven plus years in order to advance grid modernization and maintain their investment-grade credit rating. As such, the Commission should reject ground no. 1 of the Companies' Application for Rehearing.

B. The Commission Properly Rejected FirstEnergy's Proposed Modifications to the DMR.

Turning from its overall complaint that the $612 million DMR does not provide enough unrestricted cash to the Companies, FirstEnergy also challenges in its rehearing petition the Commission's rejection of a number of the Companies' proposed modifications to the DMR.[29] None of these challenges, however, hold water.

1. FirstEnergy has not demonstrated any error in the Commission's rejection of the Companies' claim that the DMR should last the entire term of ESP IV.

FirstEnergy claims that the Commission "erroneously and improperly limited the term of Rider DMR to three (or potentially five) years" rather than extending the DMR to the full term of

[29] *See* Companies' Application for Rehearing, Grounds Nos. 1(a), 1(c), 1(d), and 1(e).

ESP IV.[30] According to FirstEnergy "[n]either a three-year nor a five-year Rider DMR will provide sufficient credit support for the Companies," because the potential distribution modernization initiatives the Companies identified in their distribution modernization business plan filing may extend through 2033.[31] But, as the record makes clear, none of the DMR funds would be spent on distribution modernization and, therefore, the fact that the Companies are proposing to slow walk any distribution modernization investments over a period of ten to fifteen years does not justify extending the duration of the DMR. In addition, FirstEnergy's claim that the three-to-five-year term of the DMR is "contrary . . . to Rider DMR's purposes"[32] fails given that, as FirstEnergy acknowledges, the purported purpose of the DMR is to "jumpstart" investments in distribution modernization,[33] not to provide long term funding for such investments.

Even if it were legally permissible to charge the Companies' customers to provide credit support to FirstEnergy Corp., FirstEnergy's rehearing claim fails because the Companies have not provided any evidence regarding the necessary duration of the DMR. As explained in Section I.A.2 above, the Companies chose to not provide any forward-looking information regarding the expected CFO to debt ratios, CFO shortfalls, or other credit metrics for FirstEnergy Corp., the Companies, or any other FirstEnergy Corp. subsidiary for any year of ESP IV. Without that information, there is no basis upon which to conclude for how many years (if any) credit support might be needed, and there is certainly no basis to conclude that the Commission

[30] Companies' Application for Rehearing, Ground No. 1(a); Co. App. at 7-8.

[31] Co. App. at 8.

[32] Companies' Application for Rehearing, Ground No. 1(a).

[33] Co. App. at 2, 24, 32.

somehow erred in failing to extend the DMR to the more than seven year term that FirstEnergy desires. As such, FirstEnergy's rehearing ground no. 1(a) should be rejected.[34]

2. FirstEnergy has not demonstrated any error in the Commission's rejection of the Companies' preferred method for calculating the DMR.

In its effort to inflate the cost of the DMR, FirstEnergy also contends that the Commission should have calculated the DMR differently. According to FirstEnergy, the Commission should have: (1) based the DMR on FirstEnergy Corp's CFO shortfall in 2012 through 2014, rather than 2011 through 2014; (2) targeted a 15% CFO to debt ratio, rather than 14.5%; and (3) used net income instead of energy operating revenues in deciding how much of the CFO shortfall to allocate to the Companies' customers.[35] But FirstEnergy has failed to demonstrate that the Commission erred in rejecting any of these particular elements of the Companies' preferred calculation method.

At the outset, FirstEnergy's preferred method for calculating the DMR is unreasonable because it is based entirely on backward-looking information about what FirstEnergy Corp.'s CFO to debt ratio and CFO shortfall was in past years. Such information says nothing about the likely size of any shortfalls in future years, even though those purported shortfalls are what the DMR is purportedly addressing. Without a forecast of the size of any future shortfalls, there is no way to determine the justness and reasonableness of any DMR value, much less the highly inflated values sought by FirstEnergy. For that reason alone, ground nos. 1(c), 1(d), and 1(e) of FirstEnergy's rehearing application should be rejected.

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[34] FirstEnergy's claim that the DMR needs to extend through the end of ESP IV in order to achieve the purported goals of the DMR is also undermined by the Companies' testimony, discussed in Section I.A.3 above, that 31 months of added revenue (followed by five-and-a-half years of credits to customers) under Modified Rider RRS would have been sufficient to both advance distribution modernization and preserve the Companies' investment grade credit rating.

[35] Companies' Application for Rehearing, Grounds Nos. 1(c), 1(d), and 1(e); Co. App. at 12-20.

Turning to the specific errors alleged by FirstEnergy, no error has been identified in the Commission's decision not to use a target CFO to debt ratio of 15%. As the Commission explained, it used a 14.5% ratio because it sought to "provide the minimum amount" that is purportedly needed to facilitate access to the credit markets.[36] FirstEnergy claims that a 15% ratio is the "minimum amount,"[37] but that is plainly inaccurate as 15% is the midpoint in the CFO to debt target range identified by Moody's. The midpoint, of course, is not the minimum.

FirstEnergy also criticizes the Commission's decision not to exclude 2011 data from its calculation of FirstEnergy Corp.'s CFO shortfall.[38] As the Commission noted, if you are going to base the CFO shortfall on a historic average, the mere fact that there was not a shortfall in a particular year does not justify excluding that year from the average.[39] FirstEnergy's desire to further inflate the cost of the DMR by excluding 2011 data does not demonstrate that the Commission's judgment on this issue was in error.

Finally, FirstEnergy contends that the Commission erred in allocating FirstEnergy Corp.'s historic CFO shortfall based on the Companies' energy operating revenues, rather than their net income.[40] According to FirstEnergy, the use of energy operating revenues caused the Commission to "underestimat[e] the Companies' contribution to FirstEnergy Corp.'s CFO to debt ratio."[41] FirstEnergy contends that, by contrast, net income better reflects the Companies'

[36] Rehearing Order at 93.

[37] Co. App. at 12-13.

[38] Companies' Application for Rehearing, Ground No. 1(d); Co. App. at 13-15.

[39] Rehearing Order at 94.

[40] Companies' Application for Rehearing, Ground No. 1(e); Co. App. at 16-20.

[41] Co. App. at 6.

"true contribution" to FirstEnergy Corp.'s CFO.[42] It would also lead to an allocation factor of 34% to 40%[43] and, therefore, significantly increase the cost to customers of the DMR.

FirstEnergy's allocation factor challenge fails because, contrary to its claim, the Companies' net income does not "match the metric being used to calculate appropriate credit support."[44] In particular, net income does not consider whatever debt levels the Companies may have and, therefore, does not provide a full picture of the Companies' contribution to FirstEnergy Corp.'s purportedly inadequate CFO to debt ratio. And, as the Commission explained and FirstEnergy has not rebutted, the use of net income runs the risk of causing the Companies to effectively subsidize other FirstEnergy Corp. subsidiaries that may be "under-earning or losing money."[45] In short, the use of net income would allocate FirstEnergy Corp.'s CFO shortfall on the basis of the amounts that the Companies' customers already contribute to maintaining FirstEnergy Corp.'s CFO, not on the basis of the comparative responsibility that the Companies might bear for the shortfall that FirstEnergy Corp. is purportedly facing.

The fundamental problem with FirstEnergy's allocation challenge is that the record does not include any information regarding the CFO to debt levels, or other relevant credit metrics, for the Companies or other FirstEnergy Corp. subsidiaries.[46] Without such information, there is no way to determine whether the proportion of FirstEnergy Corp.'s CFO shortfall being allocated to the Companies' customers is consistent with the Companies' comparative responsibility for causing such shortfall. The solution to that problem would be to require the Companies to provide forward-looking credit metrics information regarding the Companies and the other

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[42] *Id.* at 17.

[43] *Id.* at 20.

[44] *Id.* at 16.

[45] Rehearing Order at 95.

[46] SC App. at 37-38.

FirstEnergy Corp. subsidiaries so that Ohio customers are not being required "to improperly subsidize FirstEnergy affiliates who are either under-earning or losing money and, thus, who are disproportionately contributing to the overall CFO to debt ratio shortfall of FirstEnergy Corp."[47] It is not, as FirstEnergy advocates in its rehearing application, to pick a different unrepresentative allocation factor that would do nothing but inflate the cost to customers of the DMR.

C. The Companies' Demand for Additional DMR Revenues if FirstEnergy Corp. Remains Headquartered in Akron is Unreasonable, and Approving Such a Revenue Stream Would be Unlawful and Unreasonable.

In their rehearing application, the Companies complain that the Commission should have awarded them additional revenue under the DMR due to the Rehearing Order's requirement that FirstEnergy Corp. maintain its headquarters and nexus of operations in Akron (hereinafter, the "headquarters condition").[48] The Companies' position is meritless for at least four reasons.

First, the Companies' argument fails because the Commission could not lawfully approve this revenue stream under R.C. 4928.143. The Companies argue that their requested revenue stream is permissible under R.C. 4928.143(B)(2)(i) as an "economic development and job retention program."[49] Under the Companies' theory, FirstEnergy Corp.'s mere existence – i.e., the fact that this company employs people, and happens to be headquartered in Akron (where its predecessor has been located for decades)[50] – somehow qualifies as an economic development or job retention program. But as explained in Section II below, the DMR, including the

[47] Rehearing Order at 95.

[48] Co. App. at 9-12.

[49] *Id.* at 9, 11.

[50] FirstEnergy Corp. has been headquartered in Akron since the company was formed in 1997. *See In Re Cleveland Elec. Illuminating Co.*, Case No. 96-1211-EL-UNC, et al., 176 P.U.R.4th 481, Opinion and Order, at Att. A (Ohio P.U.C. Jan. 30, 1997). And Ohio Edison has been located in Akron since long before then. *See In the Matter of the Complaint of Jack C. Bradway, II, Complainant*, Case No. 82-1029-EL-CSS, 1982 WL 974045, at *1 (Sept. 15, 1982).

headquarters condition, would not implement any economic development or job retention program. Consequently, even if the Commission were inclined to add a new revenue stream to the DMR based on this headquarters condition, it could not legally do so.

Second, all of the purported economic development benefits that the Companies attribute to the headquarters condition are illusory. These purported benefits stem from the fact that FirstEnergy Corp.'s headquarters and nexus of operations are located in Akron.[51] But there is no evidence that FirstEnergy Corp.'s headquarters and nexus of operations might move during the term of ESP IV without this condition.[52] In fact, there is affirmative evidence to the contrary, because just last year FirstEnergy Corp. renewed the lease on its headquarters through June 2025.[53] In effect, the Companies are asking to be paid more for something that FirstEnergy Corp. is already planning to do. Because these benefits are illusory, the Commission should disregard them.[54]

The Companies also miss the mark in citing to Ms. Mikkelsen's redirect testimony in the closing minutes of the rebuttal hearing.[55] Through this testimony, the Companies tried to backfill the record with other purported "economic development benefits" of the DMR.[56] And now, the Companies are relying on this testimony to ask for more money. The Commission

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[51] Co. App. at 9-11 (citing testimony from Sarah Murley, Joseph Buckley, Hisham Choueiki, and Eileen Mikkelsen).

[52] Tr. X at 1603-04 (Mikkelsen cross).

[53] *See* Dynegy Ex. 1, Direct Testimony of Dean Ellis, at 10-11 (discussing FirstEnergy Corp.'s commitment to keep the headquarters in Akron).

[54] The Commission should similarly disregard FirstEnergy's crocodile tears over the DMR amounts awarded in the Rehearing Order. *See, e.g.*, Co. App. at 11 ("the Commission's ruling limits their options by requiring their headquarters to remain in Akron on pain of the Companies losing up to $612 million"). There is nothing "painful" about receiving $612 million of no-strings-attached cash, which is exactly what the Companies would get in the first three years of the DMR.

[55] *Id.* at 10-11 (citing Tr. X at 1818-19).

[56] Tr. X at 1818-19.

should reject this argument. For one thing, none of these purported benefits were quantified, or even described with any specificity; Ms. Mikkelsen merely provided a cursory laundry list of "benefits."[57] More importantly, these purported benefits are contingent on the Companies investing in grid modernization projects.[58] And because there is no requirement that the DMR revenues be invested in grid modernization,[59] all of these purported benefits are hypothetical. Consequently, awarding the Companies additional DMR revenues based on Ms. Mikkelsen's redirect testimony would be improper.

Third, the Companies err in claiming that they are not currently being compensated for the Akron-based headquarters and nexus of operations.[60] The Companies have provided no evidentiary support for their claim that the headquarters and nexus of operations are uncompensated. Moreover, Staff noted in their initial post-hearing brief that the Companies "are already recompensed adequately for the presence of the headquarters."[61] Although FirstEnergy may disagree about whether their level of compensation is adequate, the fact remains that they are being compensated. The Companies' suggestion otherwise is misplaced.[62]

Finally, even assuming, *arguendo*, that (i) the Companies could lawfully receive a revenue stream for the headquarters condition, (ii) the purported benefits of the headquarters

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[57] *Id.*

[58] *Id.* at 1818-19, 1827-28, 1829-33.

[59] Tr. IV at 956-57; Tr. X at 1607-09.

[60] Co. App. at 9 (characterizing the headquarters requirement as "an uncompensated economic development and job retention program").

[61] Staff Br. at 18.

[62] Thus, the Companies' statement that "[t]he headquarters requirement is an uncompensated economic development and job retention program that has been grafted onto an unrelated distribution modernization incentive" contains three separate errors. Co. App. at 9. In truth, the DMR, including the headquarters condition, is not an "economic development and job retention program"; the Companies *are* being compensated for the headquarters; and as Sierra Club has explained in prior briefing, the DMR is not a "distribution modernization incentive."

condition were not illusory, and (iii) the Companies were not already being recompensed for the presence of the headquarters, it would still be unreasonable to increase the DMR amount based on the headquarters condition. This is because the record lacks evidence regarding the size of the benefit provided by FirstEnergy Corp.'s headquarters. FirstEnergy points to Ms. Murley's estimate that the headquarters has an annual economic impact of $568 million.[63] But "impacts" are not the same as benefits, and Ms. Murley's study did not examine the costs and benefits of the FirstEnergy Corp. headquarters.[64] At FirstEnergy's direction, she ignored costs and focused instead on economic impacts.[65] Because there is nothing in the record identifying the economic benefit that FirstEnergy Corp.'s headquarters provides, the Commission lacks an evidentiary basis on which it could increase the annual DMR amount to reflect such benefit.

In sum, the Companies argue that the Commission should pay them for something that FirstEnergy Corp. already plans to do: stay in Akron. Crediting this argument would be unlawful, unreasonable, and against the manifest weight of the evidence. Accordingly, the Commission should deny ground no. 1(b) of the Companies' rehearing application.

II. FirstEnergy Errs in Claiming that the DMR is Authorized by R.C. 4928.143(B)(2)(i).

As Sierra Club has already explained, the Rehearing Order is unlawful and unreasonable because, *inter alia*, the Commission erroneously concluded that the DMR can be authorized under R.C. 4928.143(B)(2)(h).[66] This rider cannot be approved under any provision of the ESP

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[63] *Id.* at 9-10.

[64] Consequently, Ms. Mikkelsen erred in suggesting that the Murley study estimated $568 million in economic benefits. *See, e.g.*, Mikkelsen Rebuttal at 14 (referencing "the economic benefits outlined by Company witness Sarah Murley"); Tr. X at 1755 (Mikkelsen cross).

[65] Tr. IX at 1467, 1486-90; *see also* Staff Br. at 18 n.52.

[66] SC App. at 11-21 (explaining errors in the Commission's ruling).

statute. Nevertheless, FirstEnergy attempts to find a statutory hook by arguing that the DMR is permissible under R.C. 4928.143(B)(2)(i).[67] And in its rehearing application, FirstEnergy yet again urges the Commission to find that the DMR can be authorized pursuant to R.C. 4928.143(B)(2)(i).[68] The Companies contend that the DMR is permissible under (B)(2)(i) because "the Commission conditioned the recovery of Rider DMR revenues upon FirstEnergy Corp. keeping its corporate headquarters and nexus of operations in Akron, Ohio," such that "the rider provides economic benefits to the Companies' customers."[69] The Companies are wrong. As explained below, the DMR – which would permit the Companies to collect hundreds of millions of dollars with no restriction on the use of those dollars – cannot be shoehorned into ESP IV under (B)(2)(i).

First, authorizing the DMR based on R.C. 4928.143(B)(2)(i) would be contrary to law because the DMR does not implement any economic development or job retention program. Section 4928.143(B)(2)(i) states that an ESP may include "[p]rovisions under which the electric distribution utility may implement economic development, job retention, and energy efficiency programs."[70] The plain language and obvious intent of this subsection is to authorize provisions that will implement programs, such as the energy efficiency and economic development riders that were approved by the Commission in the AEP ESP III order, that are specifically targeted at one or more of the three categories enumerated in the statute.[71] FirstEnergy, however, claims

[67] Although the Rehearing Order summarizes this argument, the Commission declined to address that argument in its decision approving the DMR. *See* Rehearing Order at 60-62, 87-99.

[68] Co. App. 4, 22, 25-26.

[69] *Id.* at 25.

[70] R.C. 4928.143(B)(2)(i).

[71] *In re Ohio Power Co.*, Case No. 13-2385-EL-SSO, et al., Opinion and Order, at 68 (Feb. 25, 2015) (approving the EE/PDR rider, which allows AEP to offer energy efficiency programs); *id.* at 69

that the DMR is permissible under (B)(2)(i) even though this rider would not implement any economic development, job retention, or energy efficiency programs.

Under the Companies' theory, the mere existence of FirstEnergy Corp. qualifies as an economic development or job retention program. In other words, the Companies believe that they can collect customer money through a completely independent rider, and use that money however they wish, simply because their parent company is based in Akron. If this theory were credited, there would be no meaningful limits on what could be included in an ESP because *any* type of rider could be nominally tethered to a condition that FirstEnergy Corp. maintain its headquarters in Akron. Such an "interpretation would remove any substantive limit to what an electric security plan may contain."[72] Because the DMR, either as approved by the Commission or with the Companies' proposed modifications, would not implement any economic development or job retention program, the DMR cannot be authorized under R.C. 4928.143(B)(2)(i). Thus, any decision authorizing the DMR under this statutory provision would be unlawful, unreasonable, and against the manifest weight of the evidence.

Second, even setting aside the fatal flaw discussed above, the purported economic benefits that FirstEnergy relies on are illusory and lack record support. Here again, FirstEnergy cites to Ms. Murley's claims about the estimated economic impact of the FirstEnergy Corp. headquarters.[73] But as explained above in Section I.C, there is no evidence in the record that the FirstEnergy Corp. headquarters and nexus of operations might leave Akron before the end of ESP IV (while there is affirmative evidence to the contrary). Thus, even if the Commission

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(approving the Economic Development Rider, which enables recovery of foregone revenues associated with reasonable arrangement approved under R.C. 4905.31).

[72] *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 34.

[73] Co. App. at 25.

agreed with the flawed premise that the Akron headquarters' existence is an "economic development program," the Commission could still not approve the DMR under (B)(2)(i) because there is no evidence that the headquarters will move.

In their post-hearing reply brief, the Companies dispute this, warning that there could be a change in control that would result in FirstEnergy Corp.'s nexus of operations moving out of Akron.[74] But this argument is a red herring, because if FirstEnergy Corp. were acquired by or merged with another company, the DMR would automatically terminate, so the possibility of a move from Akron under new ownership is a moot point.[75]

Third, the DMR cannot be approved on this record because even if FirstEnergy Corp. maintaining its headquarters and nexus of operations in Akron somehow did qualify as an economic development or job retention program, there is no evidence concerning the costs of such program. A rider approved under R.C. 4928.143(B)(2)(i) can only allocate the "program costs" to customers.[76] In other words, such a rider cannot be set based solely on the benefits that

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[74] Co. Reply Br. at 101-02.

[75] Rehearing Order at 96 ("The Commission finds that recovery of revenue under Rider DMR should be conditioned upon: . . . (2) no change in 'control' of the Companies as that term is defined in R.C 4905.402(A)(1)"). Because changes to the management of a utility's holding company would be a change in control under R.C. 4905.402(A)(1), the DMR would cease if FirstEnergy were acquired by another company.

The Companies' other arguments are equally misplaced. Even accepting the "but for" point that the Companies laboriously hammer on, Co. Reply Br. at 100-01, Rehearing Order at 62, the fact remains that the Companies are asking to be paid for something that FirstEnergy Corp. plans to do anyway. And the Commission cannot lawfully authorize DMR revenues based on the headquarters condition, because this would not be a provision implementing an economic development, job retention, or energy efficiency program. R.C. 4928.143(B)(2)(i). Such revenues would also be contrary to basic ratemaking requirements of Ohio law. The Companies' further argument, that the headquarters condition "constitutes a program of the Companies . . . because the continuation of Rider DMR and possibly the refund condition is imposed directly on the Companies," Co. Reply Br. at 101-02, is meritless. The notion that the Companies' collection of money constitutes a "program" for purposes of (B)(2)(i) would enable any rider, for any purpose, to be authorized under this subsection of the ESP statute. This interpretation, which is contrary to the statutory language and would lead to absurd results, must be rejected.

[76] FirstEnergy erroneously asserts that a rider approved under (B)(2)(i) need not be limited to program costs. Co. Reply Br. at 102-03. FirstEnergy misreads the statute. The ESP statute permits "[p]rovisions

the Akron headquarters purportedly provides. Instead, if any rider were appropriate here, it would have to be based on the Companies' costs of keeping the headquarters and nexus of operations in Akron, minus any amounts that the Companies are already compensated for (so as to avoid double billing). There is no evidence in the record, however, regarding such costs. The absence of any such cost evidence is an additional reason why the DMR cannot be authorized under (B)(2)(i).

The Companies' additional argument, that the DMR is permissible under (B)(2)(i) due to other "notable economic development benefits," is equally deficient.[77] In support of their argument, the Companies again cite to Ms. Mikkelsen's cursory discussion of purported benefits in the closing minutes of the hearing.[78] This argument is misplaced. First, as noted above, these purported benefits are contingent on the Companies investing in grid modernization projects,[79] and there is no requirement that the DMR revenues be invested in such projects.[80] Consequently, these purported benefits are hypothetical and cannot support the Companies' (B)(2)(i) argument.

Second, even assuming, *arguendo*, that the DMR would result in grid modernization projects – an assumption belied by the record – the rider could still not be authorized under (B)(2)(i). In effect, the Companies are arguing that any rider which has an economic impact can

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under which the electric distribution utility may implement economic development, job retention, and energy efficiency programs, which provisions may allocate program costs across all classes of customers of the utility and those of electric distribution utilities in the same holding company system." R.C. 4928.143(B)(2)(i). The "may" that FirstEnergy focuses on in its brief simply vests the Commission with discretion in how program costs are allocated. The statute does not permit a utility to collect revenues that are untethered to the costs of an economic development, job retention, or energy efficiency program. In any event, as noted above, the DMR is impermissible under (B)(2)(i) because it does not implement any such program.

[77] Co. App. at 25.

[78] *Id.* at 25-26 (citing Tr. X at 1818-19).

[79] Tr. X at 1818-19, 1827-28, 1829-33.

[80] Tr. IV at 956-57; Tr. X at 1607-09, 1826-27.

be characterized as an economic development or job retention program. But that is not what the statute says. Simply noting that a certain activity provides economic impacts (or even benefits) does not make that activity a program targeted at "economic development" or "job retention" for purposes of R.C. 4928.143(B)(2)(i). Likewise, because virtually every rider has *some* economic impact (and therefore can be characterized as producing economic "benefits"), the Companies' reading would stretch R.C. 4928.143(B)(2)(i) to encompass every potential rider considered by this Commission. This would render other provisions of the ESP statute, such as (B)(2)(d) and (B)(2)(h), superfluous. The Commission should reject this interpretation, which "would remove any substantive limit to what an electric security plan may contain."[81] Because all of the Companies' (B)(2)(i) arguments are legally and factually wrong, the Commission should deny ground no. 2(b) of their Application for Rehearing.[82]

III. The Companies' Requested Findings on the ESP vs. MRO Test are Improper and Should be Rejected.

As Sierra Club has explained, the Commission erred in finding that its approval of the DMR satisfied the ESP vs. MRO test.[83] One of the central flaws in the Rehearing Order's application of this test is the erroneous conclusion that the DMR is quantitatively neutral because such revenues could potentially be recovered under R.C. 4928.142(D)(4).[84]

[81] *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 34.

[82] For these same reasons, the Commission should reject FirstEnergy's conclusory invitation to "recognize the economic development and job retention benefits of the headquarters condition by adding a new section to Rider EDR that takes these benefits into account." Co. App. at 9 n.26. This revenue stream – which would pay the Companies for something FirstEnergy Corp. already plans to do – could not be approved under either (B)(2)(h) or (B)(2)(i).

[83] SC App. at 50-60.

[84] Rehearing Order at 161-63.

In their rehearing application, the Companies seek to compound the Commission's errors by asking it to find that DMR revenues could be collected in a base rate case or Rider AMI (or similar rider).[85] But this argument fails because, as Sierra Club has previously discussed,[86] the DMR is not based on the recovery of any costs that the Companies have incurred or investments the Companies would make to provide service to their customers. Rider AMI, by contrast, is designed to ensure that the Companies can receive a return of and on any investments that they make in advanced metering for their customers. And the Companies can only seek through a base rate adjustment a reasonable rate of return on utility property in service and recovery of expenses incurred in providing service to customers.[87] Neither a base rate case nor Rider AMI would permit the no-strings-attached revenue stream provided by the DMR.

The fact that FirstEnergy could not seek the DMR revenues through a base rate case proceeding is well illustrated by the Ohio Supreme Court's ruling in *Office of Consumers' Counsel v. Public Utilities Commission*.[88] In that case, the Court held that the Commission could not approve for inclusion in rates the amortization of a utility's investment in four proposed nuclear plants that had been terminated because those plants "never provided any service whatsoever to the utility's customers."[89] In so holding, the Court specifically rejected the argument that such costs should be allowed to be recovered because the utility could suffer harm in the capital markets if the costs were not recoverable. As the Court explained:

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[85] Co. App. at 26-27.

[86] SC Reply Br. at 34-37; SC App. at 17-21.

[87] R.C. 4909.15; *Columbus S. Power Co. v. Pub. Util. Comm.*, 67 Ohio St.3d 535, 535, 620 N.E.2d 835 (1993); *Dayton Power & Light Co. v. Pub. Util. Comm. of Ohio*, 4 Ohio St.3d 91, 103, 447 N.E.2d 733 (1983) ("[C]onsumers may not be charged 'for utility investments and expenditures that are neither included in the rate base nor properly categorized as costs.'").

[88] *Office of Consumers' Counsel v. Pub. Util. Comm.*, 67 Ohio St.2d 153, 164, 423 N.E.2d 820 (1981).

[89] *Id.* at 164.

> The commission, CEI, and the amici argue strenuously that to rule as we have today will seriously disadvantage Ohio utilities in capital markets thereby "driv(ing) up the return on investment required by investors in Ohio utilities." This gloomy scenario, however, does not imbue the commission with the authority to rewrite the statutes. The statutes in question contain no provisions insulating investors from the type of losses sustained in the cancelled-plants venture.
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> If, as has been argued, these are parlous times for the utilities industry, and if, therefore, in order to attract and retain investment capital, utility companies must not only be granted a fair and reasonable rate of return pursuant to statute but must also be assured the return of capital invested in failed projects that would otherwise not be recoverable under the ratemaking formula, then the commission and the utilities should petition the General Assembly to enact changes in the ratemaking structure so as to provide this extra modicum of protection for the investors. Absent such explicit statutory authorization, however, the commission may not benefit the investors by guaranteeing the full return of their capital at the expense of the ratepayers. Under the ratemaking formula now in effect consumers are not chargeable for utility investments and expenditures that are neither included in the rate base nor properly categorized as costs.[90]

In other words, the Court found that concerns about capital markets did not justify ignoring the clear requirement that costs recovered from customers should be for service actually provided to customers.[91] Here, the DMR is not based on the recovery of any costs incurred by the Companies or any investments in distribution modernization initiatives to be made. Instead, customers would not receive any services for the money they would pay under the DMR and, therefore, the DMR revenues could not be collected through a base rate case or Rider AMI.

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[90] *Id.* at 167.

[91] It is important to note that credit support can still be provided to the Companies through the traditional approach of providing a utility a return of and on actual investments made to serve its customers. *See* SC Br. at 82. As Ms. Mikkelsen testified, "any time a utility makes a filing that includes a return on investment, that return on investment serves to provide credit support to that company." Tr. X at 1642. Therefore, if the Commission had required that the Companies spend DMR revenues on specific distribution modernization projects, this would have provided credit support to FirstEnergy while ensuring that customers receive some benefits in return.

Consequently, the Commission should reject the Companies' argument that the DMR is quantitatively neutral under the ESP vs. MRO test.

The Commission should also reject FirstEnergy's contention that the DMR's costs "are more than offset by the annual value to the state of Ohio of Rider DMR's headquarters condition."[92] For one thing, there is no evidence that the headquarters and nexus of operations might move from Akron without the DMR, so the headquarters condition provides very little if any benefit to customers. In addition, the $568 million per year annual economic impact figure cited by FirstEnergy fails to analyze the costs associated with the headquarters operations,[93] as Ms. Murley did not perform a cost-benefit analysis.[94] Because Ms. Murley's study focused on economic impacts, rather than benefits, the record is devoid of any calculation of the headquarters condition's purported quantitative benefits. Thus, there is nothing to which the DMR's costs can be compared. Finally, if any benefits of the headquarters condition were included in the ESP vs. MRO calculation, then the costs to customers both through the DMR and through the other ways in which customers pay for the headquarters and nexus of operations would have to be included in the calculation also.[95] Yet the record lacks any evidence regarding those costs. Accordingly, there is no evidentiary basis for claiming that the headquarters condition would produce quantitative benefits for purposes of the ESP vs. MRO test. And FirstEnergy's further claim, that "the net of Rider DMR costs and the quantitative benefit of the

[92] Co. App. at 27.

[93] Tr. IX at 1502.

[94] *Id.* at 1489.

[95] To ensure an apples-to-apples comparison with Ms. Murley's figures, the analysis would need to include both direct costs (such as the $204 million customers would directly pay under the DMR), as well as induced and indirect costs. *Cf.* Co. Ex. 205, Rebuttal Rehearing Testimony of Sarah Murley, at 2-3 (discussing the direct, indirect, and induced economic impacts).

[headquarters condition] will be greater than or equal to zero,"[96] is entirely without merit. The Commission should deny ground no. 2(c) of FirstEnergy's Application for Rehearing.

IV. The Commission Should Grant Rehearing on Grounds Nos. 3 and 4, and Modify the Rehearing Order So As to Allow the Shared Savings Cap Increase to go into Effect Immediately and to Ensure that FirstEnergy Budgets for at Least 800,000 MWh of Energy Efficiency Savings Per Year.

As approved in the Commission's March 31 Order, ESP IV includes two provisions that could encourage the Companies to undertake cost-effective energy efficiency programs. First, ESP IV provides that the Companies will propose energy efficiency programs with an annual goal of 800,000 MWh of energy savings per year.[97] Second, ESP IV increases the cap on shared savings from $10 million to $25 million per year.[98] If implemented correctly, both of these provisions could save customers money by increasing cost-effective energy efficiency. Unfortunately, the Rehearing Order modifies both provisions in ways that make cost-effective energy efficiency less likely.

With regards to shared savings, the Rehearing Order delays the increase in the shared savings cap "until such time as the Companies are no longer receiving revenue under Rider DMR."[99] In doing so, the Commission noted that it is "mindful" of the increases in customer electric bills that will result from the DMR and, therefore, delayed the shared savings cap increase "in the interest of gradualism."[100] Sierra Club is certainly concerned about the significant costs that the DMR will place on customers if it is not rescinded. But, respectfully,

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[96] Co. App. at 27 (quoting Mikkelsen Rebuttal at 20).

[97] March 31, 2016 Opinion and Order ("March 31 Order") at 23.

[98] *Id.* at 95.

[99] Rehearing Order at 147.

[100] *Id.*

delaying the increase in the shared savings cap is not a good way to address those concerns. As the Commission previously found, increasing the shared savings cap is in the public interest because it encourages the Companies to pursue additional cost-effective energy efficiency that will save customers more money.[101] Delaying an action that would help customers save money is an unreasonable way to try to offset the substantial cost impacts of the DMR. Therefore, the Commission should grant FirstEnergy's rehearing ground no. 3 and reinstate the increase in the shared savings cap now.

Importantly, in granting rehearing on ground no. 3, the Commission should ensure that shared savings are allocated only to those programs that the Companies have a direct impact on. Thus, the Commission should not disturb its prior ruling that "the Companies may not receive shared savings for energy savings under the Customer Action Program,"[102] and any industrial opt-out savings should not increase the amount of the Companies' shared savings. Shared savings should be reserved for programs that create additional savings for customers which would not occur if the Companies were not directly involved.[103]

With regards to the energy efficiency provision, the Rehearing Order "clarif[ies] that the goal of 800,000 MWh of energy efficiency savings" set forth in ESP IV is "simply a goal."[104] The Order further provides that the Companies are to set their energy efficiency budgets based on the "annual statutory energy efficiency mandate," rather than the 800,000 MWh goal.[105] That

[101] March 31 Order at 95.

[102] Rehearing Order at 147.

[103] This is necessary to ensure that the shared savings incentive mechanism is structured so that it truly serves as an incentive. If not structured properly, shared savings would simply be a payment to the Companies for "business as usual," without furthering the goals that this incentive mechanism is designed to achieve.

[104] Rehearing Order at 147.

[105] *Id.*

"clarification" is largely meaningless if the statutory mandate requires the equivalent of more than 800,000 MWh of savings, as the Companies would have to budget to meet that mandate regardless. The "clarification," however, is problematic if there is no statutory mandate or if the mandate is the equivalent of less than 800,000 MWh of savings. In those situations, if the Companies have to budget based on the statutory mandate (or lack thereof), there would be no way they would achieve the 800,000 MWh savings goal. As such, the Commission should grant FirstEnergy's rehearing ground no. 4, and the Rehearing Order should be modified to provide that the Companies must budget to achieve at least the 800,000 MWh savings goal or whatever higher savings level might be established under state mandates or benchmarks.

November 23, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of Sierra Club's Memorandum *Contra* the Companies' Application for Rehearing of the Fifth Rehearing Entry has been served upon the following parties via electronic mail on November 23, 2016:

s/ Michael Soules
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