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 MEMORANDUM CONTRA APPLICATIONS FOR REHEARING

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III. INTRODUCTION

After more than two years of litigation, the Companies[1] have abandoned both versions of their proposed Retail Stability Rider ("Rider RRS").[2] Instead of continuing with the charade that Rider RRS will provide a hedge to protect its customers against spikes in energy prices, the Companies effectively admit that their intent all along was to shore up the financial position of their parent, FirstEnergy Corp. ("FEC"). Unfortunately, the Commission's Fifth Entry on Rehearing grants, in part, the Companies' request by providing FEC a bailout in the form of "credit support." Unsatisfied with a bailout of at least $600 million over three years, the Companies seek rehearing of the Fifth Entry on Rehearing and ask the Commission to increase the bailout – up to $9 billion over eight years.[3] The Commission has fully considered the Companies' arguments in the Fifth Entry on Rehearing and should deny their request for rehearing.

IV. ARGUMENT

A. The Commission did not err by denying the Companies' modifications to Rider DMR, because the very nature of the rider, with or without modifications, is unlawful and unreasonable.

It comes as no surprise that the Companies argue that the Commission erred by not granting the Companies' proposed modifications to Rider DMR. The Companies propose the modifications solely to increase the amount of the bailout – by over $8 billion – that captive customers are being forced to provide FEC and its affiliates. If the Commission were to approve Rider DMR (which it should not), it must continue to reject the Companies' proposed modifications and thereby fulfill its statutory duty to protect consumers from unjust,

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[1]The "Companies" refer to FirstEnergy Corp.'s operating companies: The Cleveland Electric Illuminating Company, The Toledo Edison Company, and Ohio Edison Company.

[2] See Northeast Ohio Public Energy Council's ("NOPEC") Rehearing Initial Br., at 1-2.

[3]Companies Ex. 205, at 4 (Murley Rehearing Rebuttal); Companies Ex. 206, at 13-14 (Mikkelsen Rehearing Rebuttal/Surrebuttal).

unreasonable and unlawful rates. Each of the six modifications (discussed below) was fully considered by the Commission in the Fifth Entry on Rehearing. Because the Companies have no new arguments that the Commission has not previously considered, each assignment of error should be summarily denied. *See, e.g., In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Administration of the Significantly Excessive Earnings Test under Section 4928.143(F), Revised Code, and Rule 4901:1-35-10, Ohio Administrative Code*, Case No. 10-1261-EL-UNC (Entry on Rehearing, March 9, 2011); *In the Matter of the Application of The Dayton Power and Light Company for Authority to Transfer or Sell its Generation Assets*, Case No. 13-2420-EL-UNC (Entry on Rehearing, December 17, 2014).

1. Rider DMR, if approved, should not be extended to eight years.

The Companies cite their self-serving testimony in an attempt to guarantee them more bailout revenues by extending Rider DMR for the full eight-year term of ESP IV.[4] In the Fifth Entry on Rehearing, the Commission unreasonably and unlawfully provided the Companies with credit support revenues without requiring that they be used directly for distribution grid modernization,[5] and without requiring that the revenues be subject to refund.[6] The Commission should not compound the harm to consumers by guaranteeing the Companies a bailout that extends to eight years, and amounts to up to $9 billion. The Commission has already considered and rejected the Companies' proposed eight-year recovery period and found that Staff's

[4] Companies Br., at 7-8.

[5] Fifth Entry on Rehearing, at 127-128.

[6] Fifth Entry on Rehearing, at 97.

proposed three year period[7] was adequate time for the Companies to address their financial condition.[8] Because the Commission has fully considered the Companies' arguments and rejected them, rehearing on this issue should be summarily rejected.

2. The Companies should not be provided an additional $568 million a year (or over $4.5 billion over the term of ESP IV) to keep their corporate headquarters in Akron.

In this proceeding, NOPEC and other parties opposed the Companies' request for additional revenues for keeping their corporate office in Akron, because the Companies already made this commitment as a part of the "package" bargained for in Third Supplemental Stipulation and Recommendation ("Third Stipulation") submitted in this proceeding.[9] In its Fifth Entry on Rehearing, the Commission rejected NOPEC's position, finding that the Companies had stipulated to keep their headquarters in Akron only "during the duration of Rider RRS."[10] The Commission reasons that, because Rider RRS has been replaced by Rider DMR, the Companies no longer are bound by this commitment. Considering that the keystone of the Third Stipulation has been removed, the Third Stipulation no longer represents a bargained-for "package." Thus, it is unlawful for the Commission to continue to evaluate whether the "stipulated" ESP IV benefits consumers and is in the public interest on the basis of bargains made to gain approval of Rider RRS.

As stated in NOPEC's application for rehearing, to evaluate whether the drastically modified ESP IV meets the requirements of the three-pronged partial stipulation test, the Commission must require the parties to negotiate a "package" that contains Rider DMR.

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[7] As Staff explained in its initial brief on rehearing, this three year period is reasonable because it is consistent with the timing of PJM's auctions. Staff Initial Brief on Rehearing, at 16-17

[8] Fifth Entry on Rehearing, at 97; Staff Ex. 13, at 7.

[9] See, e.g., NOPEC Initial Brief on Rehearing, at 23.

[10] Fifth Entry on Rehearing, at 111.

Alternatively, absent a package negotiated that considers bargains made in approving rider DMR, the Commission must determine the validity of the modified ESP IV on an issue-by-issue basis. At a minimum, if the Commission is to retain other provisions of the Third Stipulation bargained for under Rider RRS, and evaluate ESP IV as a stipulated "package," it must also retain the Companies' commitment to keep their headquarters in Akron without further compensation. In any event, Staff is correct in its assessment that the Companies already are being adequately compensated for maintaining an Akron headquarters.[11]

3. A CFO to debt ratio higher that the 14.5 percent authorized by the Fifth Entry on Rehearing would be unreasonable.

In its bid to increase the amount of the customer-funded bailout, the Companies recycle their arguments that the Commission should adopt at 15 percent CFO to debt ratio, rather than the 14.5 percent ratio adopted in the Fifth Entry on Rehearing. The Commission fully considered these same arguments and rejected them, finding that 14.5 percent was within the range supported by Staff and the Companies.[12] Rehearing on this issue should be summarily rejected.

4. A three year average of CFO to debt ratio would be unreasonable.

The Companies continue to argue that only a three-year average of CFO to debt ratio should be used in calculating Rider DMR. They contend that the Commission erred by not excluding calendar year 2011 from the average, because the ratio for that year fell within the target range of the ratio ultimately approved.[13] The Commission considered and rejected this argument, finding that the 2011 ratio was properly considered as a part of the recent five year

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[11] Staff Rehearing Initial Br., at 18.

[12] Fifth Entry on Rehearing, at 93.

[13] Companies Application for Rehearing, at 13.

historical average.[14] Rehearing on this issue should be summarily rejected.

5. The Commission's adoption of Staff's "allocation factor" for determining the amount of revenues to be generated by Rider DMR was reasonable.

Staff and the Companies offered competing allocation factors for the Commission to consider in determining the amount of revenues to be generated by Rider DMR. The purpose of the allocation factor is to assign a credit support percentage to the Companies vis-à-vis FEC as a whole. Staff proposed using an allocation factor based upon operating revenues, which yielded a 22% allocation factor. The Companies proposed an allocation factor based upon net income, which produced an allocation factor of 40%. The Companies claim that the Staff's allocation factor understates their importance to FEC because they have a significant number of shopping customers whose revenues do not flow to the Companies.[15]

The record supports that Staff witness Buckley considered several allocation methodologies, including the Companies' net income methodology. The Commission reasonably adopted his recommendation that the operating income methodology should be used because it is the most consistent way of allocating Rider DMR.[16] The Commission has wide latitude to determine among competing allocation methodologies. Its decision to adopt Staff's methodology is supported by the record and is not unreasonable. Indeed, as reflected in Staff's Initial Brief on Rehearing, use of operating revenues was more appropriate because of the extensive shopping in the Companies service territory:

> …[T]he companies recommend a 40% allocation factor be used for Ohio customers versus the Staff recommendation of 22%.[49] They support their allocation by using net income versus operating revenues. The argument they present to support this is exactly

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[14] Fifth Entry on Rehearing, at 93-94.

[15] Companies Application for Rehearing, at 17.

[16] Fifth Entry on Rehearing, at 94; Rehearing Tr. Vol. III, at 553-554.

> wrong. They suggest that in using operating revenues, the Staff understates the significance of the companies to the FEC family because the companies experience much greater shopping than the other operating companies. But this is exactly the point. The companies *are* a less significant part of the FEC family *because there is more shopping.* Fewer customers rely on FEC subsidiaries in Ohio for services. This is the reality of shopping and this was the intent of the legislature. Far from punishing the company because of shopping, the Staff's approach shows the success of the legislative initiative. The companies' approach would deny this reality and pretend that the companies provide much more in services to Ohio customers than is the case. The significance of the companies to the FEC family has shrunk, the Staff's methodology recognizes this and should be adopted.

Staff Initial Brief on Rehearing, at 16. Emphasis Original.

6. The Commission is required to consider Rider DMR revenue in its significantly excessive earrings test ("SEET") calculations.

In its Fifth Entry on Rehearing, the Commission excluded Rider DMR revenue from the SEET calculations during the first three years of ESP IV, 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."[17] However, the Commission stated it would revisit its determination if the Companies filed for a two-year extension of Rider DMR.[18]

As NOPEC explained in its application for rehearing on this issue, 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.[19] The Commission may exclude from

[17] Entry on Rehearing at p. 98.

[18] Id.

[19] 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…

the test only earnings that do not result from the ESP. [20]

Because Rider DMR revenues were approved as a part of an ESP proceeding, they must be included in the SEET calculation, whether approved for the first three years of the ESP or an additional two years of the ESP. Thus, the Commission should reject the Companies request for rehearing on this issue and explicitly find that R.C. 4928.143(F) requires that all Rider DMR revenues received during ESP IV must be included in the SEET calculation. As a creature of statute, the Commission is bound by the plain language of R.C. 4928.143(F),[21] and must include Rider DMR revenues in the SEET test.

B. The Commission must reject the Companies' claim that the Commission made three additional errors in approving Rider DMR.

In addition to claiming that the Commission erred by failing to adopt their modifications to the Rider DMR, the Companies also claim that the Commission erred by (1) conditioning the rider on a demonstration of sufficient progress in the implementation of grid modernization programs, (2) failing to find that Rider DMR is authorized by R.C. 4938.143(B)(2)(i), and (3) failing to find that Rider DMR revenues could be collected in a rate distribution case proceeding if the Companies adopted the market rate option ("MRO"). None of the Companies' arguments have merit and must be denied.

1. The Commission's order does not go far enough in conditioning Rider DMR on sufficient progress in the implementation of grid modernization programs.

In the Fifth Entry on Rehearing, the Commission conditioned Rider DMR on a demonstration of sufficient progress in the implementation of grid modernization programs. The

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

[21] *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.).

Companies claim that the Commission's determination of "sufficient progress" is unduly vague because the determination is left to the Commission's sole discretion.[22]

NOPEC agrees that the Commission's "sufficient progress" standard is unduly vague. The standard provides no comfort to consumers who are forced to needlessly pay at least $600 million to FEC for unwarranted credit support. Whereas NOPEC seeks additional teeth in the Commission's review process, including making Rider DMR revenues subject to refund, the Companies seek elimination of any review process entirely. The Companies claim that a review process is inconsistent with the Commission's determination that Rider DMR revenues may be used for "indirect" purposes. Indeed, the Companies are concerned that the standard could be interpreted to require that such revenues be used "directly" for grid modernization deployment.[23]

The Companies' arguments confirm NOPEC's argument on rehearing – that Rider DMR is unlawful because is not a rider "regarding a utility's distribution system," as required under R.C. 4928.143(B)(2)(h). Rather, it is only intended to provide credit support to FEC.[24] If the rider is to pass muster under the statute, the Commission must adopt sufficiently stringent review standards that ensure that any revenues received are directly linked to distribution infrastructure improvements.

2. Rider DMR is not authorized under R.C. 4928.143(B)(2)(i).

Apparently concerned (and rightfully so) that Rider DMR is not a distribution rider under R.C. 4928.143(B)(2)(h), the Companies implore the Commission to find that Rider DMR

[22] Companies Application for Rehearing, at 22

[23] Companies Application for Rehearing, at 24.

[24] See NOPEC Application for Rehearing, at 3.

is authorized as an economic development rider under R.C. 4928.143(B)(2)(i). They reason that retaining FEC's corporate headquarters in Akron provides an economic benefit.[25]

R.C. 4928.143(B)(2)(i) provides that an ESP may include "provisions under which the ***electric distribution utility*** may ***implement*** economic development, job retention, and energy efficiency ***programs***." Emphasis supplied. The Companies' argument does not pass even casual scrutiny under the statute's plain language. To apply, the statute requires an electric distribution company, *e.g.*, the Companies, to implement economic development programs. Here, the Companies are not implementing any such program. Rather, their parent, FEC, is receiving a bailout from consumers in the form of credit support. To the extent the Companies claim that FEC's retention of its offices in Akron is an economic development "program" (which it is not), the statute provides only for programs implemented by the EDUs, not their non-EDU parent. The Companies' request for rehearing on this issue must be denied.

3. Credit support is not recoverable in a base rate proceeding.

In conducting the ESP v. MRO test under R.C. 4928.143(C)(1), the Commission found that credit support also could be recovered under an MRO. Specifically, the Commission relied on R.C. 4928.142(D), which permits the Commission to "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."[26] Apparently concerned that the Commission's analysis will not withstand scrutiny on appeal, the Companies also request the Commission to find that credit support revenues also can be authorized in a rate distribution proceeding under R.C. 4909.15 and 4909.18.

[25] Companies Application for Rehearing, at 25.

[26] In its application for rehearing, NOPEC explains how the Commission erred in finding that an emergency exists that threatens the Companies' financial integrity.

As a threshold matter, the ratemaking formula contained in R.C. 4909.15 contains no provisions for an EDU's recovery of credit support – and particularly for credit support provided to the EDU's parent. The Companies ignore that, under the facts of this case, if it is to be believed that any entity's financial integrity is at risk, it is FEC's, not the Companies.

Moreover, the Companies' position misstates the statutory test found in R.C. 4928.143(C)(1), which requires the Commission to compare "the electric security plan so approved…to the expected ***results that would otherwise apply under section 4928.142 of the Revised Code***." Emphasis added. The plain meaning of the statute clearly limits the Commission's analysis to the "expected results" of R.C. 4928.142, and does not contemplate consideration of the results of a distribution rate case.[27]

Moreover, the Companies' interpretation requires one to read into the statute words to the effect that the approved ESP should be compared to the expected results under R.C. 4928.142 **and a distribution rate case**. In considering the rules of statutory construction, the Ohio Supreme Court has found:

> When interpreting a statute, a court must first examine the plain language of the statute to determine legislative intent. *Cleveland Mobile Radio Sales, Inc. v. Verizon Wireless*, 113 Ohio St.3d 394, 2007-Ohio-2203, 865 N.E.2d 1275, ¶ 12. The court must give effect to the words used, ***making neither additions nor deletions from the words chosen by the General Assembly***. *Id. See, also, Columbia Gas Transm. Corp. v. Levin*, 117 Ohio St.3d 122, 2008-Ohio-511, 882 N.E.2d 400, ¶ 19. Certainly, had the General Assembly intended to require that electric distribution utilities prove that carrying costs were "necessary" before they could be recovered, it would have chosen words to that effect.[28] [Emphasis added.]

[27] R.C. 1.42.

[28] *In Re Columbus S. Power*, 138 Ohio St.3d 448, 2014-Ohio-462, 9 N.E.3d 1064, ¶ 26.

Clearly, the Companies' interpretation of the statute adds to the words chosen by the General Assembly. Had the General Assembly intended to include the expected results of a distribution rate case in the statutory test, it would have so stated.

C. The Companies have no standing to complain about the Commission's modification of the Third Stipulation.

The Companies complain that, by modifying three provisions of the Third Stipulation, the Commission seeks to "undo a bargain already approved."[29] The Companies conveniently ignore that the bargain made in the Third Stipulation already has been undone. Rider DMR was never subject to bargaining, and there was never an opportunity for signatory and non-signatory parties to the Third Stipulation to re-strike the balance in the package approved. Yet the Companies are willing to permit the Commission, on the one hand, to modify the Third Stipulation by supplanting Rider RRS with Rider DMR; but, on the other hand, claim its modifications to other provisions are unreasonable and unlawful. The Companies can't have it both ways.

What is clear from the Third Stipulation is that the three provisions at issue would enhance the Companies' financial posture at the expense of consumers. The 800,000 MWh energy efficiency/peak demand reduction goal and shared savings cap would permit the Companies to increase shared savings from $10 million to $25 million per year. The stipulated adjustment to Rider AMI's return on equity (as an "incentive" for smart grid deployment[30]) would increase the return on equity by 50 basis points.

Numerous intervenors had opposed these provisions at hearing out of concern of the additional costs they would force consumers to pay. The Commission had the authority under

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[29] Companies Application for Rehearing at 28.

[30] The Companies negotiated this incentive for grid modernization before Rider DMR was presented in this case. The Companies unreasonably seek to retain this "incentive" in addition to the incentive to "jump start" grid modernization allegedly provided by Rider DMR.

R.C. 4928.143(C)(1) to modify the stipulation, and the authority to modify its order on rehearing under R.C. 4903.10 to protect consumers' interests. The Commission's modifications are reasonable, considering that consumers otherwise are being forced to bail out FEC to the tune of at least $600 million.

D. The Commission reasonably required the Companies to file a base distribution rate case after the expiration of ESP IV.

The Companies seek rehearing of the Commission's order that they file a base distribution rate case when ESP IV ends in 2024. The Companies' claim that another ESP proceeding could be more beneficial, considering that it would permit a continuation of the base distribution rate freeze.[31] Surely, the Commission is aware that the claimed distribution rate freeze is illusory, considering that the Companies recover hundreds of millions of dollars a year for distribution expenses through the Delivery Capital Recovery Rider ("Rider DCR"). During ESP IV, the Companies could recover up to $210 million in DCR revenues in the 2016-2017 PJM planning year, which increases to $390 million in the 2023-2024 PJM planning year – and totals $2.595 billion during the eight year ESP IV.[32]

NOPEC argued on brief in this proceeding that the Commission require the Companies to file a base distribution rate case in lieu of approving Rider DCR. The Companies' last base distribution rate case was in 2007. The 2007 rate case established the Companies' authorized rate of return of 8.48 percent and return on equity of 10.5 percent, which the Companies intend to use for Rider DCR.[33] Since 2007, with interest rates at near all-time lows and stock prices at all-time highs, capital costs today are at historic lows.[34] The authorized rate of return and return

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[31] Companies Application for Rehearing, at 34-35.

[32] Tr. XXXVI, at 7573-7575 (Mikkelsen Cross).

[33] OCC/NOPEC Ex. 7 (Kahal Direct) at 30.

[34] OCC Ex. 22 (Woolridge Direct) at 3.

on equity should reflect these low capital costs. The continuation of Rider DCR is a mechanism that enables the Companies to avoid having their authorized rates of return scrutinized, as would occur in a base rate case. This avoidance of scrutiny is detrimental for customers, who pay the rate of return.

In addition, Rider DCR can lead to increases in utility rates and revenues, even when a company does not have a revenue deficiency.[35] The calculations of OCC witness Effron indicated that the Companies' earned returns in 2013 "well in excess of what could reasonably be considered an adequate return, based on returns authorized by the PUCO, as well as other utility commissions, in recent years."[36]

At the time of ESP IV's expiration, as proposed in the Third Stipulation, at least 17 years will have passed since the Companies' last rate case. The electric utility industry is dynamic and a number of significant changes can and will occur within that period. A comprehensive, periodic review of each company's finances is necessary to ensure that all costs are being appropriately incurred and recovered. The Commission reasonably required the Companies to file rate cases at the termination of ESP IV, in lieu of continued use of the Rider DCR mechanism. A rate case permits the overall earnings of the Companies to be reviewed along with all of its revenues and expenses, and it is a prudent regulatory practice to gain a proper understanding of the regulated distribution company on a regular basis. The Commission's order was well within its general supervisory powers provided in R.C. 4905.04, 4905.05, and 4905.06.

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[35] OCC Ex. 18, at 10.

[36] Id. at 11; *see also* OCC Ex. 18, at 17, "Based on that authorized ROE and the ROE's that I have calculated, OE has excess revenues of $58.9 million annually, CEI has excess revenues of $60.6 million annually, and TE has excess revenues of $15.6 million annually."

E. The Companies are not entitled to increases in revenue caps under Rider DCR if ESP IV is terminated upon a four-year review under R.C. 4928.143(E).

Because the proposed ESP IV is for a term of eight years, the Commission is required to review it in year four to determine (1) whether it is still meeting the ESP v. MRO test and will continue to do so throughout ESP IV's term, and (2) whether the prospective effect of continuing the ESP is substantially likely to provide the Companies with excessive returns on equity.[37] Under the transition provision of the Third Stipulation, if the Commission were to determine that the ESP IV should be terminated under these tests, Rider DCR revenues would continue to be collected for the initially approved eight year term.[38]

In the Fifth Entry on Rehearing, the Commission found that, if the ESP IV were terminated upon the four-year review, the Companies would not be permitted to receive Rider DCR's annual cost cap increases. The Companies seek rehearing, claiming that the Commission should permit recovery of the cap increases until ESP IV is replaced. They argue that permitting continued increases to revenues recovered under Rider DCR is supported by the Companies' historical capital expenditure trends. However, the Companies ignore that if ESP IV were terminated for the reasons listed in R.C. 4928.143(E), those trends would no longer be valid. The Commission correctly found that the increases in the annual Rider DCR revenue caps would end with the termination of EP IV. It is unreasonable and unlawful to permit the Companies to receive annual increases to the Rider DCR caps when the Commission has found that the Companies have excessive earnings or that the ESP is no longer more favorable than an MRO.

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[37] R.C. 4928.143(E).

[38] Companies Ex. 154 (Third Stipulation, Section V.K.) at 18; Tr. XXXVI at 7564-7565.

F. The Commission correctly eliminated a placeholder Rider RCE from ESP IV because it is not supported by the record in this case.

The Commission eliminated IGS' proposed Retail Competition Enhancement Rider ("Rider RCE") from ESP IV because it was not supported by the evidence of record. The Companies and IGS claim that the Commission erred in its determination. It did not.

When IGS filed the written direct testimony of its witness White in this proceeding, as supplemented on August 18, 2015, its primary concern was with revising the Companies' billing practices. IGS also complained of a lack of robust competition in the residential class in the Companies' service territories, despite introducing figures showing that 65%, 66%, and 72% of residential customers shop in TE's, OE's and CEI's service territories, respectively.[39] IGS' concern was that a large portion of the shopping taking place resulted from opt-out governmental aggregation, rather than with competitive retail electric service ("CRES") providers,[40] and that customers are not "engaged" in the competitive marketplace. To promote its business self-interests, IGS proposed that the Commission unbundle the costs of the Companies' distribution service that are required to support the standard service offer ("SSO") and include those costs as a part of SSO service, thus raising SSO customers' price relative to those offered by CRES providers.[41] IGS recommended that the Commission direct the Companies to commence this unbundling process in their next ESP proceeding or next distribution rate case, not in this proceeding.[42] Indeed, the Companies and IGS agree that Mr. White does not recommend

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[39] IGS Ex. 11 at 5-6 (White Supplemental).

[40] Id. at 4.

[41] Id. at 17-18.

[42] Id. at 21.

unbundling in this proceeding.[43] Moreover, this recommendation was not included in the Third Stipulation.

IGS recommended, for the first time on brief, that the Commission adopt Rider RCE. Proposed Rider RCE is designed solely to promote IGS' pure profit motives. IGS made absolutely no mention of this rider in its written direct testimony, or as supplemented.[44] The Companies did not propose such a rider in their Application in this case or through their witnesses' testimonies. The signatories to the Stipulation did not include Rider RCE as a part of the stipulated package in this proceeding. And no witness supported the merits of the Rider RCE at hearing. Simply put, IGS' proposed Rider RCE is not properly before the Commission in this case, and there is no legal basis for the Commission to consider its approval in this proceeding. Authorizing Rider RCE without record support would be an abuse of discretion and reversible error.[45] The Commission correctly rejected IGS' proposed Rider RCE.

To be very clear, the parties opposing the Stipulation only obtained knowledge of Rider RCE through the Companies' supplemental discovery response pertaining to "side agreements" between the parties. The discovery was served at the eleventh hour, the night of January 14, 2016, before the Companies' final day of testimony in support of the Stipulation.[46] Absent the discovery response, the parties opposing the Stipulation would have had no knowledge of the existence of the Companies' side agreement with IGS for the Companies to file a separate application for proposed Rider RCE, because it was not a part of the Stipulation and was to be an independent proceeding to be conducted in the future. The parties opposing the Stipulation cross-examined Companies witness Mikkelsen primarily to learn of the nature of the side

[43] Fifth Entry on Rehearing, at 135.

[44] IGS Ex. 11 (White Supplemental).

[45] See, *Indus. Energy Users-Ohio v. Pub. Util. Comm.*, 117 Ohio St.3d 486, 2008 Ohio 990, 885 N.E.2d 195, ¶ 30.

[46] Ohio Manufacturers' Association Energy Group ("OMAEG") Ex. 24.

agreement and its effect on the serious bargaining prong of the Commission's test for approving partial stipulations.[47] Companies witness Mikkelsen did not testify in support of the Rider RCE.

In an attempt to cite to the record, IGS attempts to create evidence out of thin air to support Rider RCE. In its application for rehearing, IGS claims that its witness White stated that "customers must be engaged in the competitive retail electric market."[48] In reality, as explained above, witness White recommended only the further unbundling of distribution rates and an allocation of certain of those costs to the SSO in a future proceeding. He made absolutely no mention of Rider RCE in his direct or supplemental testimony filed in this case. Just as disingenuously, IGS intimates that Company witness Mikkelsen supported the rider in her testimony. However, Ms. Mikkelsen only supported agreements that were included in the stipulated package. Rider RCE is not included in the package. Ms. Mikkelsen only testified as to her understanding of the meaning of language in the independent side agreement, and did not support the rider. Indeed, far from supporting Rider RCE, the Companies only agreed in the side agreement not to oppose IGS' advocacy for the rider on brief.[49]

In addition, IGS attempts to show precedent for approving Rider RCE, claiming that the Commission has approved zero placeholder riders in other ESP proceedings.[50] However, IGS conveniently neglects to inform the Commission that the parties to those proceedings had notice of the proposed riders and that the facts supporting their adoption on the merits were a part of the

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[47] Tr. XXXVII (Mikkelsen Cross).

[48] IGS Application for Rehearing, at 11. .

[49] OMAEG Ex. 24 at 3. The side agreement (The Retail Enhancement Agreement) provides in part::

> IGS agrees to advocate in its brief in Case No. 14-1297-EL-SSO for the Commission to include in the Companies' ESP a retail incentive rider set at zero and the Companies agree to not oppose IGS's position.

[50] IGS Application for Rehearing. at 13.

record.[51] None of those cases involved approval of such an incentive rider, which is a matter of first impression for the Commission. Rider RCE is not, and never has been, a part of this proceeding, and the record contains no evidence to support its adoption. If the Commission deems that the rider should be considered for approval in a separate proceeding at a later date, and the Commission ultimately approves it – after notice, an opportunity for intervention by interested parties, and a hearing – the Companies then will be at liberty to seek to implement Rider RCE though an appropriate tariff.

IGS is attempting to obtain approval of Rider RCE without the parties' ability to oppose it on the merits – and NOPEC strenuously opposes it in the Companies' service territories. The rider is designed as a bypassable charge, meaning that only SSO residential customers will pay it, while both SSO and shopping customers are credited with the revenues obtained from the charge. The effect is to increase the SSO price to the benefit of CRES providers' business self-interests. Rider RCE's theoretic basis is to unbundle distribution rates to place costs allegedly incurred only as a part of SSO service on SSO customers. However, as the Commission rightfully recognized, the record not does support this unbundling of distribution rates. In fact, the Companies – and even IGS – admit that IGS's testimony does not support unbundling in this case. The Commission's Fifth Entry on Rehearing recognizes IGS's proposed Rider RCE for what it is – an ill-conceived eleventh-hour attempt to have the Commission approve a rider that harms SSO customers for IGS's self-interest – all without record support. NOPEC's, and other parties', position that residential and small commercial customers' prices should not be arbitrarily raised must be heard before the Commission considers Rider RCE. NOPEC applauds the Commission for denying Rider RCE.

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[51] *See, e.g., In re Columbus Southern Power*, et al, Case No. 11-346-EL-SSO, Order (December 14, 2011).

Moreover, as a legal matter, the General Assembly did not create customer choice in SB 3 and SB 221 to arbitrarily raise the majority of customers' prices for the benefit of CRES providers' business models. Rather, the intent was that market forces be brought to bear to reduce those prices, and governmental aggregation has been the primary engine to provide customers with rate relief.[52] As the Commission is aware, Ohio Rev. Code Chapter 4928 provides three options under which consumers may receive electric service in this state: (1) through the SSO (Rev. Code § 4928.141), (2) through governmental aggregation programs (Rev. Code § 4928.20), and (3) through bi-lateral contracts of CRES providers (Rev. Code 4928.08). As to opt-out aggregation, the Ohio Legislature has gone to painstaking measures to assure that citizens are engaged in the aggregation process by requiring that they approve an opt-out program through a ballot initiative and that, once approved, they have the opportunity through strident notice requirements not to join the program. Rev. Code § 4928.20. IGS's statement that governmental aggregation "requires zero customer engagement" is baseless.[53] NOPEC, and other parties, deserve to be heard on the merits that Rider RCE will not increase customer "engagement" in the market, but only increase their rates to the benefit of CRES providers.

III. CONCLUSION

For the foregoing reasons, NOPEC respectfully requests the Commission to deny the Companies' and IGS's application for rehearing of the Fifth Entry on Rehearing and grant NOPEC's application for rehearing filed November 14, 2017.

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[52] See Ohio Retail Choice Programs Report of Market Activity, January 2003 – July 2005, August 2005, in which former PUCO Chairman Alan Schriber described governmental aggregation groups as the "single greatest success story of Ohio's retail electric choice market."

[53] IGS Application for Rehearing, at 5.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing *Memorandum Contra Applications for Rehearing* was served *via electronic mail* upon the parties of record this 25th day of November 2016.

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