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**

MEMORANDUM OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY CONTRA THE INTERVENORS' APPLICATIONS FOR REHEARING OF FIFTH ENTRY ON REHEARING

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I. INTRODUCTION

The Commission has wisely determined that grid modernization is vital to Ohio's energy future. A modernized grid will maintain reliability, assure Ohio's global competitiveness and foster efficient energy usage. To these ends, the Distribution Modernization Rider ("Rider DMR") puts Ohio Edison Company ("Ohio Edison"), The Cleveland Electric Illuminating Company ("CEI") and The Toledo Edison Company ("Toledo Edison") (collectively, the "Companies") on a sure and steady path towards a modernized grid.

In their respective Applications for Rehearing on the Fifth Entry on Rehearing, those opposing Rider DMR,[1] for the most part, repeat the very same arguments made in their briefs following the rehearing hearings. This alone is reason for denying many of their assignments of error. It is well settled that the Commission will deny applications for rehearing that "simply reiterate[] arguments that were considered and rejected by the Commission."[2] Indeed, the Commission has held on numerous occasions that the mere restatement of arguments already addressed in a previous order does not provide grounds for rehearing.[3]

[1] These intervenors are: the Cleveland Municipal School District ("CMSD"); Northeast Ohio Public Energy Council ("NOPEC"); the Office of the Ohio Consumers' Counsel ("OCC"), the Northwest Ohio Aggregation Coalition ("NOAC"), and the NOAC Communities Individually (collectively, "OCC/NOAC"); the Ohio Environmental Council ("OEC"), Environmental Defense Fund ("EDF"), and Environmental Law & Policy Center ("ELPC") (collectively, "OEC/EDF/ELPC"); the Ohio Manufacturers' Association Energy Group ("OMAEG"); the PJM Power Providers Group ("P3") and the Electric Power Supply Association ("EPSA") (collectively, "P3/EPSA"); and Sierra Club.

[2] *Wiley v. Duke Energy Ohio, Inc.,* Case No. 10-2463-GE-CSS, 2011 Ohio PUC LEXIS 1276, Entry on Rehearing, at *6-7 (Nov. 29, 2011).

[3] *See, e.g.*, *Wiley*, 2011 Ohio PUC LEXIS 1276, at *6-7*; In the Matter of the Application of Duke Energy Ohio for Approval of a Market Rate Offer to Conduct a Competitive Bidding Process for Standard Service Offer Electric Generation Supply, Accounting Modifications, and Tariffs for Generation Service,* Case No. 10-2586-EL-SSO, 2011 Ohio PUC LEXIS 543, Entry on Rehearing, at *15-16 (May 4, 2011) (rejecting an application for rehearing that "raised nothing new"); *City of Reynoldsburg v. Columbus Southern Power Co.,* Case No. 08-846-EL-CSS, 2011 PUC LEXIS 680, Entry on Rehearing, at *19-20 (June 1, 2011) (holding that no grounds for rehearing existed where no new arguments had been raised); *In the Matter of the Application of Columbia Gas of Ohio, Inc. for Approval of a General Exemption of Certain Natural Gas Commodity Sales Services or Ancillary Services,* No. 08-1344-GA-EXM, 2011 Ohio PUC LEXIS 1184, Entry on Rehearing, at *9-10 (Nov. 1, 2011) (denying application for rehearing

Although raised in different contexts (*e.g.,* whether discussing the three-pronged stipulation approval test, the statutory authorization of the rider or the statutory "ESP v. MRO" test), the intervenors opposing Rider DMR make largely the same erroneous arguments. These arguments share a deliberate shading of the record – a series of half-truths. This, too, is reason alone to reject their position. The Commission need not embrace intervenors' selected facts. When the record is viewed as a whole, which the Commission must do, there is ample evidence to support the adoption of Rider DMR.

For example, some intervenors contend that Rider DMR is not a distribution rider and that it has "nothing to do" with grid modernization. They point to the "facts" that: (1) Companies are not "required" to use Rider DMR revenues to fund grid modernization directly; and (2) the "real" purpose of Rider DMR is to provide credit support to FirstEnergy Corp.

Yet these intervenors fail to tell the rest of the story. They ignore that: (1) the Companies' credit ratings are inextricably tied to FirstEnergy Corp.'s credit rating; (2) the credit ratings of all of these entities are on the cusp of non-investment grade status; (3) without action by the Commission in this case, the credit ratings agencies have warned that a downgrade to non-investment grade status will occur; and (4) having a non-investment grade status credit rating will make the Companies' ability to access capital more difficult and more costly. More importantly, these intervenors ignore that if the Companies are to modernize their grid – which they have committed to do and which, upon Commission approval of their grid modernization plans, the Companies will be required to do – the ability of the Companies to access capital at reasonable cost is crucial.

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because applicant "raised nothing new on rehearing that was not thoroughly considered" in the Commission order at issue).

Intervenors' arguments about the fact that there is no "requirement" to spend Rider DMR revenues on distribution-related expenses border on the frivolous. The Companies have a grid to operate and maintain. They have a duty to operate their system and to provide safe and reliable service. They face enormous capital outlays: for infrastructure, for pension liabilities, for retiring debt, among other things. There is no evidence that the Companies will use Rider DMR revenues for anything but their distribution business.

That intervenors appear to make arguments for argument's sake is best shown by their contradictory positions on the efficacy of Rider DMR. For example, on the one hand, they say that the Companies do not need credit support. On the other hand, they say that Rider DMR will not prevent a downgrade.

Unlike these intervenors, neither the Companies nor the Commission can afford the luxury of looking at part of the facts or relying on unsupported conjecture as a basis for decision making. The Companies and the Commission have responsibilities to assure that customers in Ohio receive safe, reliable and reasonably priced electric service. Accordingly, if (as is undisputed) grid modernization is necessary for Ohio customers, then the Companies must be put in a position to be able to deliver on that promise. The Commission has rightly determined that Rider DMR serves that purpose. Intervenors' arguments otherwise should be rejected.

II. ISSUES RELATING TO RIDER RRS ARE NOW MOOT.

As the Companies previously noted,[4] the Retail Rate Stability Rider ("Rider RRS") had played a prominent role in the Companies' fourth Electric Security Plan ("ESP IV"). The Commission has now rejected that rider in favor of Rider DMR. Neither the Companies nor any other party have sought that the Commission revisit that decision on rehearing.

[4] *See* Memorandum in Support of Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Rehearing of Fifth Entry on Rehearing ("Companies' AFR"), p. 1.

Notwithstanding the Commission's ultimate decision on Rider RRS, several intervenors raise a number of arguments regarding the rider in the applications for rehearing.[5] The Commission need not address these arguments. As the Ohio Supreme Court observed, "An issue is moot when it has no practical significance and, instead, presents a hypothetical or academic question."[6] Because Rider RRS is no longer part of Stipulated ESP IV, any assignments of error concerning that rider present hypothetical questions, rather than actual controversies for the Commission to resolve. As the Commission has recognized, under Ohio law, assignments of error pertaining to Rider RRS are now moot as a result.[7]

III. THE COMMISSION HAD JURISDICTION TO CONSIDER RIDER DMR.

Sierra Club and P3/EPSA again challenge the Commission's jurisdiction to consider Rider DMR on rehearing.[8] The Commission considered and rejected these arguments in its Fifth Entry on Rehearing.[9] Because these intervenors have not raised any new issues, the Commission should deny these arguments on this basis alone.[10]

Sierra Club and P3/EPSA argue that the Commission lacks jurisdiction to consider Rider DMR because R.C. 4903.10 limits challenges to and reconsideration of only those matters that the Commission "determined in the proceeding."[11] These intervenors again misunderstand the

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[5] Application for Rehearing of the PJM Power Providers Group and the Electric Power Supply Association ("P3/EPSA AFR"), p. 13 (arguing that Rider RRS is not authorized under R.C. 4928.143(B)(2)(d)); Memorandum in Support of Application for Rehearing of the Ohio Manufacturers' Association Energy Group ("OMAEG AFR"), pp. 7-10 (arguing that the Commission did not have jurisdiction to consider the modified Rider RRS proposal); OMAEG AFR, pp. 10-12 (arguing that Rider RRS is not authorized under R.C. 4928.143(B)(2)(d)); OMAEG AFR, pp. 37-46 (arguing that the Commission erred in upholding the attorney examiners' rulings striking portions of testimony relating to Rider RRS).

[6] *State ex rel. Ford v. Ruehlman,* 2016-Ohio-3529, ¶ 55 (citation and internal quotation marks).

[7] Fifth Entry on Rehearing, p. 173.

[8] Sierra Club's Application for Rehearing of the Fifth Rehearing Entry ("Sierra Club AFR"), pp. 4-9; P3/EPSA AFR, pp. 3-8. *See also* Sierra Club's Initial Post-Hearing Brief on Rehearing, pp. 41-43; Sierra Club's Post-Hearing Reply Brief on Rehearing, pp. 29-30; Joint Initial Rehearing Brief of P3/EPSA, pp. 21-25; Joint Rehearing Reply Brief of P3/EPSA, pp. 10-11.

[9] *See* Fifth Entry on Rehearing, pp. 9-14; Third Entry on Rehearing, pp. 9-12.

[10] *See supra* n. 3.

[11] Sierra Club AFR, p. 4-5; P3/EPSA AFR, pp. 4-5.

multi-step rehearing process set out in R.C. 4903.10. The first step requires a party to "apply for a rehearing in respect to any matters determined in the proceeding."[12] The application must "set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful."[13] The Companies did exactly this in their Application for Rehearing filed on May 2, 2016. The Companies' sixth, seventh, and eighth grounds for rehearing provided specific bases upon which the Commission erred in how it modified and approved Rider RRS as originally proposed, to wit:

6. The Order is unreasonable because it requires the Companies to bear the burden for any capacity performance penalties.

7. The Order is unreasonable because the Commission prohibited cost recovery for Plant outages greater than 90 days.

8. The Order is unreasonable because it does not reflect the ruling by the Federal Energy Regulatory Commission Order issued on April 27, 2016 in Docket Number 16-34-000.

Through these grounds for rehearing, the Companies underscored that rehearing was necessary because, among other things, the Commission's March 31, 2016 Opinion and Order ("March 31 Order") imposed risks on the Companies that they did not have in the original Rider RRS proposal. These grounds for rehearing plainly relate to "matters determined in the proceeding."

P3/EPSA also argue that the Commission's Third Entry on Rehearing approving Rider DMR violates R.C. 4903.10 because Rider DMR is not a "matter specified in such application."[14] As P3/EPSA note, R.C. 4903.10 provides that the Commission may "grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient

[12] R.C. 4903.10.
[13] R.C. 4903.10.
[14] P3/EPSA AFR, p. 6.

reason therefor is made to appear."[15] The Commission also must specify the purpose for which rehearing is granted.[16] The Commission satisfied this second step of the rehearing process by granting rehearing and limiting the scope of its rehearing review to specific issues being reheard.

In their Application for Rehearing, the Companies suggested the need to revisit Rider RRS due to an intervening ruling by the Federal Energy Regulatory Commission ("FERC") and certain modifications to the Third Supplemental Stipulation made by the Commission. The Commission thus defined the scope of rehearing as addressing potential remedies to address the problems with timely implementation of Rider RRS, and specifically, the Companies' modified Rider RRS and any alternatives such as Rider DMR.[17] The Commission accordingly granted rehearing on the matter specified.

Sierra Club also argues the Commission's consideration of the DMR proposal violated the requirement of R.C. 4903.10 that the Commission "shall not upon such rehearing take any evidence that, with reasonable diligence, could have been offered upon the original hearing."[18] Sierra Club contends that Staff could have proposed Rider DMR prior to the Commission's March 31 Order.[19] But Sierra Club fails to explain how Staff could have foreseen the unforeseeable events leading up to the multiple applications for rehearing filed on May 2, 2016, and the Commission's decision to grant rehearing to consider alternative proposals. For example, Sierra Club provides no precedent for FERC's decision to require the Companies to obtain FERC approval of a PPA between the Companies and FirstEnergy Solutions Corp.

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[15] R.C. 4903.10.
[16] R.C. 4903.10.
[17] *See* Entry, ¶ 15 (June 3, 2016) (setting hearing regarding provisions of the Proposal and limiting the scope of the hearing to "provisions of, and alternatives to, the Modified RRS Proposal."); Third Entry on Rehearing, ¶ 25 (affirming attorney examiner's June 3 Entry setting matter for hearing and establishing scope of rehearing); Third Entry on Rehearing, ¶ 30 (noting that no party is prejudiced because each party may participate in hearing considering the Proposal and to present any relevant evidence in opposition to the Proposal or to provide an alternative).
[18] Sierra Club AFR, p. 7.
[19] Sierra Club AFR, p. 7.

(“FES”).[20] In fact, there is no case in which FERC has determined that transactions between two affiliates, already having a waiver of the affiliate-restriction rules, nevertheless needed FERC approval.

Nor has Sierra Club provided any fact to support the view that Staff should have known that the credit ratings agencies were going to put FirstEnergy Corp. on negative outlook. In fact, the rating agencies specified that they would view a negative outcome in this case for the Companies as a reason to downgrade FirstEnergy Corp.’s credit rating to non-investment grade status *after* the prior hearings concluded, and indeed *after the Commission’s March 31 Order*.[21] In short, Sierra Club has not shown that Staff was obligated to provide testimony in support of Rider DMR during the original hearings.

Certain parties seem to suggest that a new rider simply cannot be approved on rehearing, even if it addresses the purpose of the rehearing. Sierra Club and P3/EPSA argue that approval of Rider DMR is contrary to the requirement in R.C. 4903.10 that, following rehearing, “the commission may abrogate or modify” the original order or any part thereof that “is in any respect unjust or unwarranted, or should be changed.”[22] Sierra Club similarly suggests that approval of Rider DMR requires a *de novo* review outside the scope of rehearing authorized by R.C. 4903.10.[23] They are wrong.

The Commission did not on rehearing conduct a *de novo* review of the Companies’ ESP IV. Instead, as the Commission specified in its Third Entry on Rehearing, the Commission sought to examine whether, in light of the issues raised in the Companies’ Application for

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[20] *See Elec. Power Supply Ass’n v. FirstEnergy Solutions Corp.,* 155 FERC ¶61,101, FERC Docket No. EL 16-34-000, Order Granting Complaint (Apr. 27, 2016).
[21] *See* Direct Ex. 1 (Moody’s placing FirstEnergy Corp. on negative outlook on April 28, 2016); Rehearing Testimony of Joseph P. Buckley (June 29, 2016), Att. 3 (S&P placing First Energy Corp. on negative outlook on April 28, 2016) (“Buckley Rehearing Test.”).
[22] Sierra Club AFR, pp. 6-7; P3/EPSA AFR, p. 6. *See* R.C. 4903.10.
[23] Sierra Club AFR, pp. 4-6.

Rehearing, ESP IV should be changed to include a modified Rider RRS or any alternative to Rider RRS.[24] R.C. 4903.10 provides, "Following a rehearing, the Commission need only be of the opinion that the original order should be changed for it to modify the same."[25] The Commission thus is not limited, as suggested by Sierra Club, solely to making changes to Rider RRS.[26] Rather, the Commission can make changes to its March 31 Order as it deems reasonable in light of the issues raised in the applications for rehearing. Thus, having granted rehearing and having properly specified the scope of the rehearing, the Commission had broad discretion to modify its March 31 Order within the scope of that rehearing, including alternatives to Rider RRS such as Rider DMR.

Sierra Club and P3/EPSA claim that it was improper for the Commission to consider Rider DMR because it is different than Rider RRS.[27] These arguments present only part of the record. They ignore that the two riders have numerous similarities:

- Both riders would provide credit support over the next three years or so.[28] Rider RRS was projected to provide revenues of approximately $400 million over the first three years of the ESP.[29] Rider DMR, as currently approved, will provide a little over $600 million.
- Both riders are designed to promote more reliable service. Rider RRS would promote reliable service through, among other things, obviating the need for

[24] R.C. 4903.10 ("If, after such rehearing, the commission is of the opinion that the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may abrogate or modify the same").
[25] *Columbus & S. Ohio Elec. Co. v. Pub. Util. Comm.*, 10 Ohio St.3d 12, 15, 460 N.E.2d 1108 (1984).
[26] Sierra Club AFR, p. 6.
[27] Sierra Club AFR, pp. 5-6; P3/EPSA AFR, pp. 4-5.
[28] *See* Rehearing Tr. Vol. I, p. 91 (Mikkelsen Cross) ("The cash into the companies in the early years [under Rider RRS] . . . would have a positive impact on the companies' credit ratings."); Rehearing Testimony of Hisham M. Choueiki, p. 15 (June 29, 2016) ("Choueiki Rehearing Test.") (describing that Rider DMR will collect revenues intended to provide credit support in order to enable the Companies to jumpstart grid modernization).
[29] *See* Rehearing Tr. Vol. II, p. 325 (Baron Cross); Sierra Club Ex. 89.

transmission realignment.[30] Rider DMR will promote reliability through a modernized grid.[31]

- Both riders will promote economic development. Both riders were approved with conditions to keep FirstEnergy Corp.'s headquarters and nexus of business in Akron. [32]
- Both riders will promote stability in the electricity costs incurred by customers. Rider RRS was designed to be a countercyclical hedge for market risk.[33] Rider DMR will lead to a modernized, "smart grid" that will allow customers to better understand and control their electricity usage.[34]

The attempts by Sierra Club and P3/EPSA to distinguish *CG&E*[35] lack merit.[36] As discussed on several previous occasions,[37] the issue presented in *CG&E* was whether CG&E's application for rehearing was sufficient to allow the Commission to consider an alternative proposal on rehearing. Here, the Companies' May 2, 2016 Application for Rehearing satisfied all statutory requirements and, thus, was sufficient to allow the Commission to consider the Companies' modified Rider RRS and alternatives thereto, including Staff's proposed Rider DMR. The fact that Rider DMR was proposed by Staff and not the Companies is of no consequence; once the Commission found grounds for rehearing to consider modifications to

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[30] Supplemental Testimony of Rodney L. Phillips, pp. 6-8 (May 4, 2015) (demonstrating that Rider RRS would have avoided the costs of substantial transmission upgrades).
[31] Rehearing Rebuttal and Surrebuttal Testimony of Eileen M. Mikkelsen, p. 5 (July 25, 2016) ("Mikkelsen Rehearing Rebuttal Test.").
[32] March 31 Order, p. 97 (Rider RRS); Fifth Entry on Rehearing, p. 96 (Rider DMR).
[33] *See* Hearing Tr. Vol. XVIII, p. 3650 (Savage Cross); *see also* Direct Testimony of Steven E. Strah, p. 4 (Aug. 4, 2014).
[34] Mikkelsen Rehearing Rebuttal Test., p. 5 (Rider DMR will, among other things, allow the Companies to prepare the distribution system for integration with smart grid technologies).
[35] *In re Ohio Consumers' Counsel v. Pub. Util. Comm.,* 111 Ohio St.3d 300, 2006-Ohio-5789.
[36] *See* Sierra Club AFR, pp. 9-10; P3/EPSA AFR, pp. 7-8.
[37] *See* Third Entry on Rehearing, pp. 9-12; Fifth Entry on Rehearing, pp. 12-13; Companies' Memorandum Contra the Joint Application for Rehearing of the PJM Power Providers Group and the Electric Power Supply Association, pp. 9-10 (Aug. 15, 2016).

Rider RRS, it had discretion to consider alternatives to its March 31 Order. The Commission's discussion of *CG&E* in the Third Entry on Rehearing and Fifth Entry on Rehearing is directly on point. Intervenors raise no new arguments justifying rehearing.

Sierra Club also contends that the Commission's rehearing process was inadequate.[38] The Commission easily and properly rebutted this contention in its Fifth Entry on Rehearing.[39] As the Commission found, Sierra Club and other parties had ample opportunity to: (1) review the modified Rider RRS and Rider DMR; (2) present testimony; (3) cross-examine witnesses (including all three Staff witnesses supporting Rider DMR); and (4) file post-hearing and reply briefs.[40] Indeed, Sierra Club fails to cite a single fact or issue it was unable to address at hearing. Neither Sierra Club nor any other party were prejudiced by this process.

Sierra Club and P3/EPSA have again failed to demonstrate that the Commission lacked jurisdiction to grant rehearing and to approve Rider DMR as a change to ESP IV. Thus, the Commission should deny their assignments of error contesting the Commission's jurisdiction.

IV. STIPULATED ESP IV, AS MODIFIED BY THE FIFTH ENTRY ON REHEARING, PASSES THE THREE-PRONG TEST FOR STIPULATIONS.

The Commission properly found that Stipulated ESP IV, as modified by the Fifth Entry on Rehearing, continues to satisfy the Commission's three-prong test for stipulations. CMSD and NOPEC claim that the Commission erred by applying the three-prong test in its consideration of Rider DMR.[41] Specifically, CMSD asserts that the three-prong test is inapplicable to Rider DMR because the rider "is not the subject of a stipulation."[42] Rider DMR,

[38] Sierra Club AFR, pp. 48-49.
[39] *See* Fifth Entry on Rehearing, p. 13.
[40] Fifth Entry on Rehearing, p. 13.
[41] Memorandum in Support of Application for Rehearing of the Cleveland Municipal School District ("CMSD AFR"), p. 5; Memorandum in Support of Northeast Ohio Public Energy Council's Second Application for Rehearing ("NOPEC AFR"), pp. 19-20.
[42] CMSD AFR, p. 5.

CMSD claims, must therefore be "evaluated strictly on its own merits."[43] NOPEC makes a similar assertion, but focuses its attention on the serious bargaining analysis. According to NOPEC, the Commission committed "plain error" by finding that Stipulated ESP IV is the product of serious bargaining because the parties never had an opportunity to negotiate Rider DMR.[44] NOPEC asks the Commission to reconsider the entire proceeding "on the basis of all parties' positions on the merits of each issue raised."[45]

None of these claims holds water. Regarding the serious bargaining argument, the Commission squarely addressed and rejected NOPEC's position in the Fifth Entry on Rehearing:

> [T]he signatory parties to the Stipulations were aware that the Commission may modify the Stipulations, both prior to adoption of the Stipulations and on rehearing; and the signatory parties included provisions in the Stipulations to protect their interests in the event of Commission modification of the Stipulations. Individual signatory parties may, or may not, invoke those provisions as they see fit, based upon our adoption of Rider DMR or any other modification of the Stipulations by the Commission. . . . [W]e decline to find that Commission modification of a stipulation means that the stipulation is not the result of serious bargaining among capable, knowledgeable parties.[46]

This passage is unsurprising; the Commission has routinely found that stipulations it modified nevertheless satisfied the three-prong test.[47] And, as the Commission noted in the Fifth Entry on Rehearing, there is no precedent holding otherwise.[48] Further, the Commission's

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[43] CMSD AFR, p. 5.
[44] NOPEC AFR, pp. 19-20.
[45] NOPEC AFR, p. 20.
[46] Fifth Entry on Rehearing, p. 104.
[47] *See, e.g.*, *In the Matter of the Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider*, Case No. 14-1693-EL-RDR, *et al.*, 2016 WL 3482857, Opinion and Order, at *91 (May 31, 2016) ("The stipulation meets the criteria used by the Commission to evaluate stipulations, is reasonable, and should be adopted, as modified by this Opinion and Order."); *In the Matter of the Continuation of the Rate Freeze and Extension of the Market Development Period for The Dayton Power and Light Company*, Case No. 02-2779-EL-ATA, *et al.*, 2003 WL 22142843, Opinion & Order (Sept. 2, 2003) (finding that a stipulation, as modified by the Opinion and Order, satisfied the stipulation test); *In re Ohio Bell Telephone Company*, Case No. 93-487-TP-ALT, *et al.*, 1994 WL 736263, Opinion and Order, at *61, (Nov. 23, 1994) (same).
[48] Fifth Entry on Rehearing, p. 104.

reasoning is well supported by settled precedent finding an abiding interest in the amicable resolution of disputes.[49] If the Commission were to adopt NOPEC's position, the efficacy of the bargaining process would be thrown into doubt. Parties would be less inclined to come to the table when a future modification of a stipulation could render their efforts to negotiate a settlement meaningless. That would be especially true in cases like this one, where many diverse parties representing diverse constituencies must navigate extremely complex issues during the bargaining process. Likewise, as the Commission noted, signatory parties anticipating the risk that the Commission might modify the stipulation have expressly addressed that risk in their settlement agreements.

NOPEC's argument also rings particularly hollow in this case given that no Signatory Party has indicated its intent to withdraw support from the Stipulated ESP IV, as modified by the Commission, particularly as a result of Rider DMR. Rider DMR was proposed months ago. It was extensively discussed during rehearing and in the briefs that followed. It has now been approved by the Commission. Yet, all Signatory Parties still support Stipulated ESP IV; none filed an application for rehearing taking issue with the Commission's adoption of Rider DMR.[50]

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[49] *See, e.g.*, *In the Matter of the Determination of the Existence of Significantly Excessive Earnings for 2010 Under the Elec. Sec. Plan of Ohio Edison Co., The Cleveland Elec. Illuminating Co. & The Toledo Edison Co.*, Case No. 11-4553-EL-UNC, 2012 WL 252212, Opinion and Order (Jan. 18, 2012) ("[T]he Stipulation is in the public interest because it avoids further litigation in this matter."); *In Re Ne. Ohio Nat. Gas Corp.*, Case No. 06-209-GA-GCR, 2006 WL 2433256, Opinion and Order, at *5 (Aug. 23, 2006) ("By avoiding the cost of litigation, we conclude that the stipulation will benefit ratepayers and is in the public interest."); *In Re Cincinnati Gas & Elec. Co.*, Case No. 02-218-GA-GCR, 2003 WL 22473331, Opinion and Order (Oct. 15, 2003) (same); *In Re Dayton Power & Light Co.*, Case No. 91-414-EL-AIR, 1992 WL 281169, Slip Op. (Jan. 22, 1992) ("[A]ll parties are benefited in that extensive litigation has been avoided. Absent the stipulation and recommendation, the costs of a fully-litigated case would ultimately be passed on to ratepayers through higher rates or reflected in their tax payment to support the experts protecting their interests.").

[50] To be sure, two Signatory Parties, OEG and Nucor, have filed applications for rehearing on the Fifth Entry on Rehearing. But those parties challenge Rider DMR's rate design, not whether the rider should be adopted as an effort to jumpstart grid modernization.

CMSD is plainly wrong when it argues that the three-prong test is inapplicable to Rider DMR because the rider "is not the subject of a stipulation."[51] The Commission expressly modified previously adopted Stipulated ESP IV "to eliminate . . . Rider RRS . . . and to authorize the Companies to implement Rider DMR as recommended by Staff, subject to the modifications [in the Fifth Entry on Rehearing]."[52] It was therefore incumbent upon the Commission to again analyze Stipulated ESP IV under the three-pronged stipulation approval test. And, as noted, the Commission frequently applies that test to the stipulations it modifies.

In any event, even assuming the traditional three-prong test is inapplicable to Rider DMR, the Commission's approval of the rider would still be reasonable. Beyond the serious bargaining analysis, the stipulation approval test considers whether a settlement is beneficial to ratepayers and the public interest and whether the settlement violates any important regulatory principles. These inquiries are useful to evaluate Rider DMR's merits, regardless of whether they are applied as part of a formal test. Indeed, one is left to wonder what possible standard could satisfy NOPEC and CMSD if the Commission's express findings here – that Rider DMR will benefit both ratepayers and the public interest[53] without violating any law or regulatory principle[54] – are not enough for them. The Commission did not err, even if the stipulation approval test does not apply.

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[51] CMSD AFR, p. 5.
[52] Fifth Entry on Rehearing, p. 88.
[53] Fifth Entry on Rehearing, p. 121 (Stipulated ESP IV, modified to include Rider DMR, "benefit[s] ratepayers and [is] in the public interest").
[54] Fifth Entry on Rehearing, p. 150 (Stipulated ESP IV, modified to include Rider DMR, "do[es] not violate any important regulatory principle or practice.").

A. Stipulated ESP IV, As A Package And As Modified By The Fifth Entry On Rehearing, Benefits Ratepayers And Is In The Public Interest.

The benefits of ESP IV, as modified by the Commission, are well supported. The Commission has appropriately described them.[55] The Companies need not repeat that recitation here.

As demonstrated below, contrary to intervenors' claims, Rider DMR will promote a modernized grid and economic development. The Commission properly rejected intervenors' suggested changes relating to Rider DMR, all of which would have defeated the purpose of the rider and made the promise of a modernized grid more difficult and more costly to achieve.

Intervenors' quibbles about the non-Rider DMR provisions of ESP IV are also without merit. OCC/NOAC complain about the adequacy of protections for ESP IV's low income programs and Rider GDR have been previously raised and rejected. They should be rejected again.

OCC/NOAC's complaints about the Commission's clarification regarding the Companies' right to withdraw the ESP should meet a similar fate. OCC/NOAC's position is wholly unsupported and is squarely rebutted by the plain language of the statute.

1. Rider DMR will enable the Companies to jumpstart their grid modernization efforts.

Despite intervenors' attempts to ignore or obfuscate it, the connection between Rider DMR and grid modernization is well supported. The record shows that by providing credit support, Rider DMR will enable the Companies to access capital more easily and at a more reasonable cost. Intervenors' arguments to the contrary should be rejected.

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[55] March 31 Order, pp. 78-79, 92-99; Fifth Entry on Rehearing, pp. 106-22.

a. The Companies face a serious risk of a credit downgrade that would have adverse effects on the Companies and their customers.

Rider DMR was adopted, in part, for two reasons: (1) the Companies face a serious risk of a credit downgrade; and (2) such a downgrade will adversely affect customers by making it more costly to access the capital markets for grid modernization projects. Neither proposition should be subject to serious debate.

Regarding the Companies' credit ratings and the likelihood of a downgrade, the record evidence leaves little doubt that the Companies face an immediate threat of a downgrade. Moody's has assigned both CEI and Toledo Edison a Baa3 rating (one notch above non-investment grade), while Ohio Edison is rated Baa1 (three notches above non-investment grade).[56] Like CEI and Toledo Edison, Moody's assigned FirstEnergy Corp. a Baa3 rating.[57] S&P similarly rated FirstEnergy Corp. one notch above non-investment grade in its ratings scheme at BBB-.[58] Under S&P's "family approach," if FirstEnergy Corp. is downgraded, the Companies would also be downgraded.[59] Although Moody's separately rates each legal entity, an investment grade parent is credit positive to its subsidiaries, and a non-investment grade parent is credit negative to its subsidiaries.[60]

Moody's and S&P have recently taken negative outlooks on FirstEnergy Corp. and expressed deep concern with its financial health going forward.[61] What's more, both Moody's and S&P have cited concerns about the outcome of *this proceeding* as a factor influencing their

[56] Mikkelsen Rehearing Rebuttal Test., p. 6.
[57] Mikkelsen Rehearing Rebuttal Test., pp. 6-7.
[58] Mikkelsen Rehearing Rebuttal Test., p. 7 n. 7.
[59] Buckley Rehearing Test., p. 6; Rehearing Tr. Vol. I, pp. 133-34 (Mikkelsen Cross).
[60] Mikkelsen Rehearing Rebuttal Test., p. 7 n. 7.
[61] *See* Buckley Rehearing Test., Att. 3, p. 2 (S&P opinion placing FirstEnergy Corp. on a negative outlook); Direct Ex. 1, p. 4 (Moody's placing FirstEnergy Corp. on a negative outlook); P3/EPSA Ex. 21, p. 1 (Moody's reaffirming its negative outlook).

negative outlooks. Moody's stated, "A negative rating action could . . . occur if a modified ESP does not allow FE to maintain financial metrics adequate for investment grade ratings."[62] And S&P observed that FirstEnergy Corp. and its subsidiaries have "minimal cushion at the current rating level" and cited doubts regarding the Commission's approval of ESP IV as one basis for its negative outlook.[63]

Regarding whether a downgrade would adversely affect customers, the record is equally unequivocal. Indeed, the evidence demonstrates that a credit downgrade, especially to a non-investment grade rating, could be severe. If the Companies' credit ratings were to fall below investment grade, the Companies' access to capital would be limited to more restrictive terms and conditions—potentially including a pledge of security and more rigid financial covenants.[64] As a result of being forced to access capital from a less liquid market, at higher borrowing costs, the Companies' long-term cost of debt will rise.[65] Over time, the Companies would be forced to recover these long-term debt increases from customers in a distribution rate case.[66] These points and the benefits of maintaining the Companies' credit ratings were demonstrated by both Mr. Buckley[67] and Ms. Mikkelsen.[68] Even OCC witness Kahal agreed that the adverse consequences of a credit rating downgrade to non-investment status described by Mr. Buckley and Ms. Mikkelsen were true.[69] He admitted, among other things, the Companies could experience

[62] Buckley Rehearing Test., p. 4 (quoting Moody's).
[63] Buckley Rehearing Test., Att. 3, pp. 2-3.
[64] Mikkelsen Rehearing Rebuttal Test., p. 7.
[65] Mikkelsen Rehearing Rebuttal Test., p. 7.
[66] Mikkelsen Rehearing Rebuttal Test., p. 7.
[67] Buckley Rehearing Test., pp. 5-6.
[68] Mikkelsen Rehearing Rebuttal Test., pp. 6-8.
[69] Rehearing Tr. Vol. VIII, pp. 1384-85, 1387-91 (Kahal Rebuttal Cross).

"sharp increases" in the cost of borrowing if they fell below investment grade[70] and that he had previously testified that any "credit quality slippage could result in reduced access to capital."[71]

Notably, no witness provided any credible testimony to rebut the evidence recited above. Nevertheless, some parties attempt to argue that the record does not support the need for Rider DMR. For example, Sierra Club argues that the Commission erred in finding that the Companies face a serious risk of a credit downgrade because the Companies previously asserted that they could provide $561 million in net credits under Modified Rider RRS.[72] According to Sierra Club, the Commission ignored this "inconsistency."[73] But Sierra Club omits that the Companies projected credits under Rider RRS only in the later years of ESP IV. In the early years, the Companies were projected to receive around $400 million in funds that would have provided immediate credit support to the Companies.[74] Further, the Commission found that "there is substantial evidence in the record of this proceeding . . . that the Companies and FirstEnergy Corp. face financial challenges *at this time*."[75] The Commission specifically identified ample evidence establishing an immediate need for credit support, including current credit ratings on the cusp of falling below investment grade and the opinions of ratings agencies threatening credit

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[70] Rehearing Tr. Vol. VIII, pp. 1387-88 (Kahal Rebuttal Cross).
[71] Rehearing Tr. Vol. VIII, p. 1390 (Kahal Rebuttal Cross); *See also* Company Ex. 202, p. 21.
[72] Sierra Club AFR, pp. 29-30.
[73] Sierra Club AFR, p. 30.
[74] Rehearing Tr. Vol. I, p. 91 (Mikkelsen Cross).
Sierra Club's omission of this information is rich, considering that, prior to its current AFR, Sierra Club pointed out this $400 million "cost to customers" in every single post-hearing brief it submitted. *See* Sierra Club Initial Post-Hearing Brief, p. 14 ("There is no dispute that the Companies' customers would incur hundreds of millions of dollars of losses through 2018 if Rider RRS is approved."); Sierra Club Post-Hearing Reply Brief, p. 1 ("Whereas even FirstEnergy acknowledges that customers would lose $363 million over the first 31 months of Rider RRS, the evidence shows that the cost to customers would almost certainly be higher."); Sierra Club AFR, p. 20 (Apr. 29, 2016) ("According to the Companies' own projections, customers would lose $363 million on a net present value basis ($414 million nominal) over the first 31 months of Rider RRS."); Sierra Club Memorandum Contra the Companies' Application for Rehearing, p. 15 (same); Sierra Club Initial Rehearing Brief, p. 24 (same); Sierra Club Rehearing Reply Brief, p. 4 ("[E]ven the Companies' own projections show that customers would begin losing money the day that Modified Rider RRS went into effect and would continue doing so through at least 2018."). Other intervenors also did not hesitate to highlight the $400 million "cost" at hearing. *See, e.g.*, Hearing Tr. Vol. II, p. 879 (Mikkelsen Cross); Rehearing Tr. Vol. II, p. 325 (Mikkelsen Cross).
[75] Fifth Entry on Rehearing, p. 49 (emphasis added).

downgrades in the absence of Commission action in this case.[76] Even other intervenors otherwise opposing Rider DMR "do not dispute that FirstEnergy Corp. and the Companies are in financial distress."[77] Sierra Club's fabricated "inconsistency" is not only contrary to the record, but demonstrates a willfully false parsing of the facts so as to call *Sierra Club's* credibility into question.

OMAEG claims that the evidence does not show that "Rider DMR is necessary to improve the credit rating of FirstEnergy Corp."[78] In support, OMAEG points to the current investment grade ratings of the Companies and FirstEnergy Corp.[79] Sierra Club similarly argues, "there has been no showing that the Companies, all of which have investment grade credit ratings, are currently unable access the financial markets."[80] These parties miss the point. The fact that FirstEnergy Corp.'s and the Companies' ratings are not currently below investment grade or that these companies may be able to access the capital markets *now* are not reasons for the Commission not to act.

OMAEG and Sierra Club ignore the substantial evidence demonstrating a current need for credit support to prevent a possible downgrade in the near future. Specifically they would have the Commission overlook: (1) the threat by credit rating agencies that, absent Commission action, a downgrade would occur;[81] and (2) a credit downgrade would have adverse

[76] Fifth Entry on Rehearing, p. 126.
[77] Memorandum in Support of Application for Rehearing by the Ohio Environmental Council, Environmental Defense Fund, and Environmental Law & Policy Center ("OEC/EDF/ELPC AFR"), p. 5.
[78] OMAEG AFR, p. 16.
[79] OMAEG AFR, p. 17.
[80] Sierra Club AFR, p. 31.
[81] Buckley Rehearing Test., Att. 3, p. 2 (S&P opinion placing FirstEnergy Corp. on a negative outlook); Direct Ex. 1, p. 4 (Moody's placing FirstEnergy Corp. on a negative outlook); P3/EPSA Ex. 21, p. 1 (Moody's reaffirming its negative outlook).

consequences for the Companies and their customers.[82] As noted, a non-investment grade rating signals significant credit risk to the capital markets and could result in severe consequences for the Companies and their customers.[83]

The question here is not, as OMAEG and Sierra Club would pose it, whether the Companies can access the capital markets *at all*; the relevant inquiries are how more difficult will accessing capital be and what will it cost to access available capital? Rider DMR addresses those issues. It is intended to ensure that the Companies can easily access the capital markets on favorable terms.[84] It also makes no sense to wait for the consequences of a credit downgrade to occur as OMAEG and Sierra Club seem to suggest. As Staff witness Buckley recognized, it is easier to forestall a credit downgrade than to reverse one.[85]

b. Rider DMR is necessary to facilitate the Companies' access to the capital markets.

In the Fifth Entry on Rehearing, the Commission found that "Rider DMR is necessary to assist the Companies in accessing the capital markets in order to make needed investments in their distribution systems."[86] The Commission's finding is well supported by the evidence of record, which demonstrates cause for concern that the Companies will be able to access the capital markets at reasonable cost in the absence of the revenues provided through Rider DMR.[87] Indeed, as noted, Moody's and S&P have placed FirstEnergy Corp. on negative outlook with threats of a potential downgrade in the near future.[88]

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[82] *See* Mikkelsen Rehearing Rebuttal Test., pp. 6-8; Sierra Club Ex. 99; Buckley Rehearing Test., pp. 5-6; s*ee also* Fifth Entry on Rehearing, p. 127 ("The rehearing testimony shows that a downgrade would have adverse consequences for the Companies.").
[83] Mikkelsen Rehearing Rebuttal Test., pp. 6-8; Buckley Rehearing Test., pp. 5-6.
[84] Choueiki Rehearing Test., p. 15; Mikkelsen Rehearing Rebuttal Test., pp. 5-6.
[85] Rehearing Tr. Vol. III, p. 601 (Buckley Cross); *see also* Mikkelsen Rehearing Rebuttal Test., p. 15 ("[I]mproving credit ratings takes time.").
[86] Fifth Entry on Rehearing, p. 90.
[87] *See supra* Section IV.A.1.a.
[88] *See supra* Section IV.A.1.a.

Moody's and S&P's opinions are critical: the Companies' access to and cost of capital are dependent on these agencies' ratings. As the Commission observed, "The Companies already need capital to make investments in the distribution systems simply to maintain reliability" and also "need cash to meet debt redemption requirements which will exceed one billion dollars through 2024."[89] Recognizing the Companies' precarious credit position and current and future capital needs, the Commission therefore correctly determined that Rider DMR was necessary to facilitate access to the capital markets at reasonable terms in order for the Companies to fund their distribution modernization initiatives. Yet, many intervenors wrongly assert that the Commission erred.

Some parties argue that, even assuming there is a serious risk of a credit downgrade, Rider DMR will not facilitate the Companies' access to the capital markets because there is no evidence demonstrating that the rider will prevent a downgrade.[90] This argument, however, both misinterprets Rider DMR and ignores the record evidence. To begin, no one has ever suggested that Rider DMR would be the sole remedy for the Companies' financial issues. As the Companies showed, a properly constructed Rider DMR – *along with actions taken by the Companies and by FirstEnergy Corp. and its affiliates* – should avert a credit rating downgrade by collectively improving the financial metrics valued by the ratings agencies.[91] And, as demonstrated below, FirstEnergy Corp. and its affiliates have implemented numerous aggressive initiatives to improve their collective financial profile.[92]

The parties attempting to downplay the efficacy of Rider DMR further ignore that the ratings agencies that already placed FirstEnergy Corp. on negative outlook have made it clear

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[89] Fifth Entry on Rehearing, pp. 90-91; *see also* Mikkelsen Rehearing Rebuttal Test., p. 6.
[90] *See* Sierra Club AFR, p. 26; OMAEG AFR, pp. 17-18; OEC/EDF/ELPC AFR, p. 17.
[91] Companies' Post Rehearing Reply Brief, pp. 111-12.
[92] Mikkelsen Rehearing Rebuttal Test., pp. 17-18. *See infra* pp. 78-80.

that FirstEnergy Corp.'s ratings will be downgraded *absent action in this case*.[93] Contrary to the intervenors' claims, Rider DMR will play an important role in facilitating the Companies' access to capital on favorable terms.

Sierra Club asserts that the Commission improperly relied upon Moody's and S&P reports.[94] It complains that instead the Companies should have been required to provide their own projections about their respective financial health.[95] There are several things wrong with this argument. First, Sierra Club's insistence on projections is ironic given its previous repeated assertions that the Companies' projections are unreliable and should be ignored.[96] Second, Sierra Club pretends that the Companies could have provided such projections, blithely ignoring that the Companies could not have provided that information without revealing highly confidential material nonpublic information.[97] Third, Sierra Club's view that the Commission should not be properly informed by Moody's and S&P's assessments is based on nothing. Sierra Club fails to provide a single reason why these ratings agencies' opinions are unreliable or otherwise not worthy of serious consideration. Indeed, given that these agencies are independent and widely relied upon in the field of finance,[98] Sierra Club's failure to provide a reason to dismiss these agencies' opinions is even more egregious. Fourth, even if these agencies' projections and opinions are wrong (which Sierra Club hasn't even come close to showing), the

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[93] Buckley Rehearing Test., p. 4; Buckley Rehearing Test., Att. 3, pp. 2-3.
[94] Sierra Club AFR, p. 28.
[95] Sierra Club AFR, p. 28.
[96] *See, e.g.,* Sierra Club Initial Brief, pp. 20, 22-34, 72 (calling witness Rose's forecasts into question).
[97] Indeed, when asked at hearing to confirm that her testimony "does not employ any projection of FirstEnergy Corp.'s CFO to debt level" either with or without Rider DMR, Ms. Mikkelsen responded: "That's correct, because that would be material nonpublic information." Rehearing Tr. Vol. X, p. 1617 (Mikkelsen Rebuttal Cross). Further, as the Companies have explained, Sierra Club has not shown that the Protective Agreement in this case protects the Companies from liability under federal securities law, and the Companies could not have produced material nonpublic information without a serious risk of liability. Companies' Rehearing Reply Brief, p. 108 n. 437.
[98] Ms. Mikkelsen testified to the importance of the credit ratings issued by Moody's and S&P, noting that there are real-world consequences tied to the opinions these entities issue. Mikkelsen Rehearing Rebuttal Test., pp. 6-8. Staff witness Buckley similarly stated, "Financial analysts rely on information provided by these agencies in performing financial analyses of capital markets, as did I." Buckley Rehearing Test., p. 2 n. 1.

fact is that the opinions of these agencies are what they are. And these will be the basis of the agencies' future actions. Thus, when these agencies warn that, without further action from the Commission in this case, a downgrade is likely, the Commission can – and must – take them at their word. Given the undisputed critical role that the credit ratings have in determining the Companies' ability to access capital, Sierra Club's dismissive treatment of credit rating agencies' statements is utterly without merit.[99]

Sierra Club also contends that the Commission's approval of Rider DMR was "unjust and unlawful" because the evidence does not demonstrate that Rider DMR will help stave off a downgrade where the Companies produced no "plan or strategy explaining how FirstEnergy Corp. intends to maintain an investment grade credit rating."[100] Sierra Club mischaracterizes the record. Specifically, Sierra Club contends that Company witness Mikkelsen stated that she had not seen a written plan for FirstEnergy Corp. to achieve a 15 percent CFO to debt level.[101] But Ms. Mikkelsen never stated that she was unaware of a plan for FirstEnergy Corp. to improve its credit metrics. Her testimony was quite to the contrary:

> Q. And you have not seen any written plan from FirstEnergy Corp. on how it would get to a 15-percent CFO to debt level, correct?
>
> A. While I haven't seen a written plan specifically designed to achieve 15 percent for CFO to debt, I am aware of a number of actions that have been taken and continue to be taken within the FirstEnergy Corporation in order to support the credit metrics of the companies as well as FirstEnergy Corp.[102]

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[99] In a footnote, Sierra Club resurrects its argument that the purported "evidentiary gap" is of the Companies' making because the Companies refused to produce forward-looking information that constitutes material nonpublic information, which could violate federal securities law. Sierra Club AFR, p. 28 n. 74. The Companies already responded to Sierra Club's flawed argument. Companies' Rehearing Reply Brief, p. 108 n. 437. As noted, suffice to say here that Sierra Club has not shown that the Protective Agreement in this case protects the Companies from liability under federal securities law, and the Companies could not have produced material nonpublic information without a serious risk of liability. Companies Rehearing Reply Brief, p. 108 n. 437.
[100] Sierra Club AFR, p. 35.
[101] Sierra Club AFR, p. 35.
[102] Rehearing Tr. Vol. X, pp. 1619-20 (Mikkelsen Rebuttal Cross).

Ms. Mikkelsen added that among the actions she referred to were those specifically discussed in her Rebuttal and Surrebuttal Testimony.[103] As demonstrated further below,[104] FirstEnergy Corp. and its stakeholders are and have been taking aggressive steps to shore up FirstEnergy Corp.'s financial health.

Relatedly, Sierra Club, CMSD and OEC/EDF/ELPC contend the Commission erred by approving Rider DMR because the evidence does not show that the Companies have any role in creating FirstEnergy Corp.'s current credit predicament.[105] Selectively citing and quoting from certain credit agency reports, Sierra Club suggests that the only problem with FirstEnergy Corp.'s finances is its competitive businesses. Thus, Sierra Club contends the Companies' customers shouldn't have to pay to shore up FirstEnergy Corp.'s financial health.[106] For example, Sierra Club states, "both Moody's and S&P identify continued weakening markets with low energy prices as a factor that could lead to a downgrade of FirstEnergy Corp., *even with the DMR,* because of the merchant generation owned by the company's affiliates."[107] But Sierra Club cites only to an S&P report; there is nothing cited from Moody's. Further, the S&P report is dated April 28, 2016, before Rider DMR was ever suggested. Thus S&P couldn't have made any judgments about FirstEnergy Corp.'s future finances with Rider DMR.

Similarly, Sierra Club says, "S&P further opined that a possible 'upside scenario' for FirstEnergy Corp. could occur if 'the company's business profile materially improves by reducing the size of its higher-risk competitive business.'"[108] But the complete quote from the report reads:

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[103] Rehearing Tr. Vol. X, p. 1620 (Mikkelsen Rebuttal Cross); Mikkelsen Rehearing Rebuttal Test., pp. 17-18.
[104] *See infra* pp. 78-80.
[105] Sierra Club AFR, pp. 26, 37-38.
[106] Sierra Club AFR, pp. 35-37.
[107] Sierra Club AFR, pp. 35-36 (emphasis added) (citing Buckley Rehearing Test., Att. 3, p. 3.).
[108] Sierra Club AFR, p. 37 (citing Buckley Rehearing Test., Att. 3, p. 3).

> We could affirm the rating and revise the outlook to stable if financial measures are consistently maintained reflecting FFO to debt of about 13%, *or* if the company's business risk materially improves by reducing the size of its higher-risk competitive business.[109]

Thus, S&P suggested two paths – not one – by which FirstEnergy Corp. could maintain its credit rating. Notably, the alternative path conveniently omitted by Sierra Club is, of course, exactly what Rider DMR will help to achieve.

In any event, the causes of FirstEnergy Corp.'s and its subsidiaries' current credit issues have little to do with whether Rider DMR is necessary to facilitate the Companies' access to the capital markets. FirstEnergy Corp. has not met, is not meeting and, without assistance, will not meet key credit metrics to maintain its (and the Companies') investment grade status.[110] Credit ratings agencies are looking to the Commission to provide some assistance to meet this financial challenge.[111] As the Commission properly stated, whatever the reasons, the Companies are currently faced with a serious credit predicament and "Rider DMR will address a demonstrated need for credit support . . . in order to ensure the Companies have access to capital markets in order to make investments in their distribution system."[112]

c. Rider DMR will promote grid modernization.

In approving Rider DMR, the Commission found that "the evidence in the record demonstrates that Rider DMR would provide a needed incentive to the Companies to focus innovation and resources on grid modernization."[113] No party can seriously dispute that grid

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[109] Buckley Rehearing Test., Att. 3, p. 3 (emphasis added).
[110] *See* Direct Ex. 1; P3/EPSA Ex. 21; Buckley Rehearing Test., Att. 3.
[111] Buckley Rehearing Test., p. 4 (quoting Moody's); Buckley Rehearing Test., Att. 3, pp. 2-3.
[112] Fifth Entry on Rehearing, pp. 87-88.
[113] Fifth Entry on Rehearing, p. 88.
OCC/NOAC take issue with the Commission's determination that Rider DMR is a "needed incentive," arguing that the Commission violated R.C. 4903.09 by failing to explain "why this incentive is necessary." Application for Rehearing by the Office of the Ohio Consumers' Counsel and the Northwest Ohio Aggregation Coalition and the NOAC Communities Individually ("OCC/NOAC AFR"), pp. 21-22. But the Commission's reasoning is obvious

modernization will provide a host of benefits to all customers. Indeed, witnesses for the Companies, Staff, and intervenors all stated as much.[114]

In response, the intervenors argue that Rider DMR will not promote grid modernization because there is no requirement that the Companies directly spend Rider DMR revenues on grid modernization.[115] They claim, therefore, that Rider DMR "has nothing to do"[116] with distribution modernization or that the benefits of grid modernization are "illusory."[117] These arguments misread the record and misunderstand the function of Rider DMR.

Dr. Choueiki, the witness who proposed Rider DMR, testified unequivocally that Rider DMR is intended to "enable the Companies to procure funds to jumpstart their distribution grid modernization initiatives."[118] That point was emphasized during rehearing.[119] Dr. Choueiki further explained at hearing that Rider DMR's dual purposes of "credit support" and distribution modernization cannot be separated, emphasizing that both facets of Staff's proposal "have to be together."[120] Later, Dr. Choueiki was even more direct: "The objective is to modernize the distribution grid in Ohio. That's our objective."[121]

Ms. Mikkelsen also testified regarding the Companies' intentions with respect to the Rider DMR revenues. While the Companies did not "commit" to use such revenues solely for

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and supported by the record. Rider DMR is a "needed incentive" in this context because it will, as previously discussed, allow the Companies to access the capital markets at reasonable cost, thereby paving the way for the Companies to make the needed investments to modernize the distribution grid.

[114] *See, e.g.*, Mikkelsen Rehearing Rebuttal Test., pp. 5-6; Choueiki Rehearing Test., p. 15; Direct Rehearing Testimony of Brenda Crockett-McNew, p. 7 (June 22, 2016) ("Crockett-McNew Rehearing Test.").

[115] *See* CMSD AFR, pp. 18-19; OCC/NOAC AFR, pp. 14-15; OEC/EDF/ELPC AFR, pp. 8-10; OMAEG AFR, pp., 13-15, 21; P3/EPSA AFR, pp. 9-10; Sierra Club AFR, pp. 24-26.

[116] OCC/NOAC AFR, p. 14.

[117] Sierra Club AFR, p. 26.

[118] Choueiki Rehearing Test., p. 15.

[119] *See* Rehearing Tr. Vol. IV, pp. 956-57 (Choueiki Cross) (stating that Rider DMR is meant "to jump-start this whole [distribution modernization] process upfront and provide a cash infusion to commence the . . . modernization initiatives."); Rehearing Tr. Vol. V, p. 1223 (Choueiki Cross) (same).

[120] Rehearing Tr. Vol. IV, pp. 1020-21 (Choueiki Cross).

[121] Rehearing Tr. Vol. IV, p. 1029 (Choueiki Cross).

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

> Q. And the companies are not willing to commit to spend the revenues collected under rider DMR on distribution grid modernization initiatives, correct?
>
> A. It is the companies' intention to use the dollars collected in rider DMR for purposes within the companies' operations including grid modernization, as well as other things, such as other activities associated with modernizing the company's grid, perhaps for debt that is maturing over the term, potentially for funding of pensions, by way of example.[122]

The relationship between Rider DMR and the benefits of grid modernization identified by these witnesses is bolstered by understanding the realities of the Companies' grid modernization obligations. As the Commission noted, Stipulated ESP IV required the Companies to file a grid modernization business plan, which the Companies filed in February of this year.[123] The Commission will approve a plan in that case—and likely other plans in future cases.[124] The Companies will have to meet the obligations ordered by the Commission. Those obligations will require that the Companies have access to capital in order to begin significant investments to modernize the distribution system.[125] Those obligations are in addition to many other demands on capital available to the Companies.[126] The credit support provided by Rider DMR will be instrumental in ensuring that the Companies can invest in grid modernization while also meeting their other capital demands.

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[122] Rehearing Tr. Vol. X, p. 1607 (Mikkelsen Rebuttal Cross).
[123] Fifth Entry on Rehearing, p. 89 (citing the *FirstEnergy Grid Modernization Case*, Case No. 16-481-EL-UNC).
[124] *See* Fifth Entry on Rehearing, p. 89 (recognizing that Staff intends Rider DMR to enable the Companies' investments in grid modernization initiatives to continue beyond the currently filed grid modernization case).
[125] Mikkelsen Rehearing Rebuttal Test., pp. 5-6. Indeed, the other possible uses for capital obtained through credit support from Rider DMR revenues – refinancing debt or funding pensions – are also legitimate distribution-related outlays.
[126] *See* Mikkelsen Rehearing Rebuttal Test., p. 6; Rehearing Tr. Vol. X, pp. 1623-25 (Mikkelsen Rebuttal Cross).

The fundamental misperception held by those opposing Rider DMR is that all dollars received through the rider must go directly to fund grid modernization. But there are at least two things wrong with this view.

First, the revenue provided through Rider DMR would represent only a fraction of what is likely to be necessary to modernize the Companies' distribution grid. As Ms. Mikkelsen testified, there will be numerous, substantial investments required to modernize the distribution grid.[127] And those investments will need to take place over the course of many years.[128] The Companies will need to access the capital markets to fund grid modernization efforts.

Second, a key issue in whether the Companies can successfully modernize their grid is whether the Companies can access capital at reasonable cost. As noted, given that the Companies' credit ratings sit at the cusp of non-investment grade status and the credit ratings agencies have threatened to downgrade the Companies' ratings, the Companies face a real threat to achieving grid modernization goals. This is why, as the Commission found and as the testimony shows, Rider DMR will "jumpstart" modernization initiatives, to the ultimate benefit of the Companies' customers.[129] Indeed, the term "jumpstart" with regard to Rider DMR's purpose was wisely chosen: it understands that funds recovered under this rider will revitalize the Companies' financial situation to allow grid modernization to be ultimately successful. Denying that Rider DMR provides grid modernization benefits because revenues under the rider are not required to be directly invested in modernization initiatives requires deliberate disregard of the record and reality.

[127] Mikkelsen Rehearing Rebuttal Test., pp. 5-6; *see also* Rehearing Tr. Vol. X, pp. 1622-23 (Mikkelsen Rebuttal Cross).
[128] Mikkelsen Rehearing Rebuttal Test., p. 15.
[129] Fifth Entry on Rehearing, pp. 88-89.

d. FirstEnergy Corp. and its stakeholders are sharing in the burden of improving FirstEnergy Corp.'s financial health.

When discussing the allocation factor for Rider DMR, the Commission properly recognized that "the record demonstrates that all of FirstEnergy Corp.'s stakeholders are sharing in the burden of improving its financial health."[130] Sierra Club asserts that consideration of the contributions of ratepayers in other jurisdictions to credit support shows that Rider DMR is unreasonable. According to Sierra Club, the Companies' customers "get nothing in return" for the "no-strings-attached DMR," while customers of other FirstEnergy Corp. utilities pay rates to cover the revenue requirement for services their utilities provide.[131] Sierra Club's argument is based on several flawed premises.

Far from getting "nothing in return" for Rider DMR, Ohio customers will get a modernized distribution grid at a more reasonable cost. The fact that Rider DMR dollars are not earmarked for specific grid modernization initiatives is irrelevant. The point of Rider DMR is to put the Companies in a better financial position to enable them to jumpstart the grid modernization plan once it is approved, and to do so at a lower cost to customers. On cross-examination, OCC witness Kahal agreed that the credit rating of a capital intensive business like the Companies is important to the business having access to capital and access to liquidity.[132]

Contrary to Sierra Club's assertions, Rider DMR is not a "no-strings-attached" proposition. The Companies are expected to engage in ambitious grid modernization efforts. In adopting Staff's proposed Rider DMR, the Commission explained that "Rider DMR will provide a needed incentive to the Companies to focus innovation and resources on grid

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[130] Fifth Entry on Rehearing, p. 95.
[131] Sierra Club AFR, pp. 39-40.
[132] Rehearing Tr. Vol. VIII, p. 1384 (Kahal Cross).

modernization."[133] The Commission further explained that the Companies' grid modernization efforts should exceed those required in their pending grid modernization proceeding:

> The Commission notes the Stipulations modified and approved by the Commission in this proceeding provide that the Companies file a grid modernization business plan. Pursuant to this provision, the Companies filed an application on February 29, 2016, in the *FirstEnergy Grid Modernization Case*. However, Staff witness Choueiki testified that the Companies grid modernization efforts should extend beyond this application.[134]

Therefore, the Commission should deny Sierra Club's Application for Rehearing on this issue.

2. Rider DMR promotes economic development.

Another benefit of Rider DMR is that it promotes economic development. Rider DMR promotes economic development in at least three ways. First, to the extent that Rider DMR leads to the successful implementation of grid modernization or other capital projects, there are economic development benefits arising from those activities.[135] Second, to the extent Rider DMR leads to a modernized grid that is more reliable and allows customers to understand and potentially control their energy usage, the Companies' service territories are more attractive places in which to do business.[136] Third, because the continuation of Rider DMR is conditioned on, among other things, FirstEnergy Corp. keeping its headquarters and principal place of business in Akron, there are economic development benefits arising from maintaining that business there.

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[133] Fifth Entry on Rehearing, p. 87.
[134] Fifth Entry on Rehearing, p. 89.
[135] Rehearing Tr. Vol. X, pp. 1818-19 (Mikkelsen Rebuttal Redirect).
[136] Rehearing Tr. Vol. X, pp. 1818-19 (Mikkelsen Rebuttal Redirect).

Using the widely accepted IMPLAN model,[137] Company witness Murley evaluated the impact of keeping FirstEnergy Corp.'s headquarters and nexus of operations in Akron, Ohio ("FirstEnergy's Headquarters"). Specifically, Ms. Murley quantified the direct, indirect and induced economic impacts of keeping the FirstEnergy's Headquarters in Akron to both Akron and the State of Ohio.[138] Ms. Murley observed that FirstEnergy Corp. (through FirstEnergy Service Company) directly employs 1,360 people with an annual payroll of $151.3 million in the Akron, Ohio area.[139] Further, the FirstEnergy's Headquarters supports an additional 2,047 jobs (i.e., 756 supply chain jobs plus 1,291 jobs related to employee spending) and $93.3 million annually by other Ohio businesses.[140] Based on this data and using the IMPLAN model, Ms. Murley calculated the total economic impact of the FirstEnergy's Headquarters as follows:

> The HQ has an estimated annual economic impact of $568.0 million on Ohio's economy, and directly and indirectly supports approximately 3,407 jobs and $244.6 million in annual payroll throughout the state. While it is not possible to isolate the taxes exclusively paid by the HQ, the local and state tax revenues from FirstEnergy Corp. HQ employees and other supported jobs are estimated at $20.0 million per year.[141]

In its Fifth Entry on Rehearing, the Commission recognized the substantial benefit associated with FirstEnergy's Headquarters. The Commission properly accepted the unrebutted testimony of Company witness Murley that the annual economic impact of the headquarters is $568 million.[142]

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[137] This is the same widely accepted and used model that she employed for her previous testimony, and which was relied on by the Commission in the March 31 Order. *See generally*, Supplemental Direct Testimony of Sarah Murley (May 4, 2014) ("Murley Supp. Test."); March 31 Order, p. 88.
[138] Rebuttal Rehearing Testimony of Sarah Murley, p. 3 (July 22, 2016) ("Murley Rehearing Rebuttal Test.").
[139] Murley Rehearing Rebuttal Test., p. 3.
[140] Murley Rehearing Rebuttal Test., p. 3.
[141] Murley Rehearing Rebuttal Test., pp. 3-4.
[142] Fifth Entry on Rehearing, pp. 111-12.

Sierra Club argues that there is no benefit to Rider DMR's requirement that the FirstEnergy Headquarters remain in Akron.[143] Sierra Club argues that there is no evidence that FirstEnergy Corp. intended to move during the ESP period. In support of this position, Sierra Club argues that FirstEnergy Corp. is incapable of moving before 2025 since its lease does not expire until then.[144]

This argument is based on more speculation than fact. The lease at issue was not admitted as an exhibit. Thus, the terms of the lease, including an ability to terminate the lease upon events such as bankruptcy or merger, is not part of the record. In any event, there is nothing in the record to show that, notwithstanding the lease's term, it could not be in FirstEnergy Corp.'s economic interest to terminate the lease early. Thus, Sierra Club's assertion that FirstEnergy Corp. could not move before 2025 is not supported by anything but mere guesswork.

OMAEG goes further and claims that "Rider DMR actually harms economic development" in Ohio and that Ms. Murley "ignor[ed] the impacts of Rider DMR on various other sectors of the [Ohio] economy [outside of Akron]."[145] OMAEG's arguments are identical to the ones it raised in its initial post-rehearing brief,[146] and the Commission expressly acknowledged them in the Fifth Entry on Rehearing.[147] The Commission rejected OMAEG's arguments, stating, "No other party has produced evidence to dispute [Ms. Murley's] estimate, and we find that no testimony elicited on cross-examination undermines or casts doubt on this estimate."[148] Further, OMAEG ignores the benefits provided by Rider DMR through: (1) lower

[143] Sierra Club AFR, pp. 40-41.
[144] Sierra Club AFR, pp. 40-41.
[145] OMAEG AFR, pp. 32-33.
[146] *Compare* OMAEG Initial Post-Rehearing Brief, p. 52 *with* OMAEG AFR, pp. 32-33.
[147] Fifth Entry on Rehearing, pp. 77-78.
[148] Fifth Entry on Rehearing, p. 112.

costs resulting from improved credit support; and (2) savings arising from a modernized grid in the form of a stimulated competitive market and consumers more informed about their energy usage. OMAEG offers nothing new on this issue; it again fails to point to any evidence refuting Ms. Murley's analysis.

3. To maintain the benefits of Rider DMR, the Commission properly rejected certain proposed modifications to the rider.

Although the Companies have some issues with how the Commission approved of its calculation of the revenues to be collected under Rider RRS, the intervenors' criticisms are mistaken and their suggested changes would make things worse. As shown below, the notion that Rider DMR is required to be cost-based is at odds with the statute. Requiring DMR revenues once collected to be refunded for any reasons undercuts the purpose of the rider. As would the suggestions to restrict the uses for Rider DMR funds.

a. The Commission correctly rejected certain proposals regarding the calculation of Rider DMR revenue.

CMSD claims that the Commission erred by violating "longstanding Commission precedent against determining the amount of a rate increase based upon the amount of revenue necessary to satisfy rating agency metrics."[149] In support, CMSD cites a single Commission decision from 1980, *In the Matter of the Application of The Cleveland Electric Illuminating Company for Authority to Amend and Increase Certain of its Filed Schedules Fixing Rates and Charges for Electric Service*, Case No. 79-537-EL-AIR, 1980 WL 642583, Opinion and Order (July 10, 1980). This case is inapposite. As an initial matter, it is neither binding nor informative for this ESP proceeding, because that matter arose under an application for a rate increase pursuant to R.C. 4909.18.[150] ESPs are expressly excepted from the requirements of

[149] CMSD AFR, pp. 23-24.
[150] Case No. 79-537-EL-AIR, Opinion and Order (July 10, 1980), p. 1.

Chapter 4909. R.C. 4928.143(B)(2), in listing in terms of an ESP, provides that the provisions of an ESP may be allowed "[n]otwithstanding any other provision of Title XLIX of the Revised Code."

In any event, the 1980 CEI case cited by CMSD is otherwise of little help to CMSD. Specifically, the passage quoted by CMSD involved the Commission's rejection of a single witness' comparable earnings analysis used to support a recommended return on equity ("ROE").[151] The witness recommended that the Commission adopt an ROE comparable to utilities that had higher ratings. The Commission refused, noting, among other things, the "inherent problems" in the specific methodology argued by the witness, *i.e.*, the comparable earnings approach.[152] In short, the case has nowhere near the broad application CMSD ascribes to it.

Sierra Club argues that any allocation of credit support to customers of the Companies should reflect the relative responsibility of the Companies for FirstEnergy Corp.'s CFO to debt ratio shortfall.[153] Notably, this is exactly what the Companies did using net income as a reasonable proxy. This is also what the Commission endeavored to do, using energy operating revenues as a proxy.

Sierra Club, however, insists that a proper credit support allocation requires a calculation of individual CFO to debt ratios for the Companies and other FirstEnergy Corp. subsidiaries.[154] Sierra Club believes that had the Commission performed this calculation, the individual

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[151] Case No. 79-537-EL-AIR, Opinion and Order (July 10, 1980), p. 34.
[152] Case No. 79-537-EL-AIR, Opinion and Order (July 10, 1980), p. 34.
[153] Sierra Club AFR, p. 37.
[154] Sierra Club AFR, p. 39.

subsidiaries' CFO to debt ratios would have enabled the Commission to calculate the portion of the shortfall in FirstEnergy Corp.'s CFO to debt ratio for which each subsidiary is responsible.[155]

To the contrary, as the Companies demonstrated in their memorandum in support of their Application for Rehearing on the Fifth Entry on Rehearing,[156] such a calculation would not have produced meaningful information, much less shown the portion of the shortfall in FirstEnergy Corp.'s CFO to debt ratio for which the Companies are responsible. There are at least two reasons why. First, because each subsidiary has different debt, there is no common denominator. This makes direct comparisons mathematically meaningless for the purpose of allocating a shortfall in FirstEnergy Corp.'s CFO to debt ratio across its subsidiaries. Second, trying to compare a subsidiary's CFO to debt ratio to FirstEnergy Corp.'s ratio ignores the fact that FirstEnergy Corp. does not generate any revenues on its own, but holds some debt separately from its subsidiaries. For both of these reasons, all of the subsidiaries' company-specific CFO to debt ratios cannot be added together to reach FirstEnergy Corp.'s CFO to debt ratio.[157]

One specific issue raised by the intervenors was whether a "gross up" was necessary. Grossing up Rider DMR revenue for income taxes is necessary because the additional revenue will generate additional income subject to income tax. If not grossed up, Rider DMR would fall short of achieving the target CFO. Therefore, the Companies recommended that Rider DMR revenue be grossed up by the Companies' average tax rate of 36 percent.[158] While the Commission agreed with grossing up Rider DMR revenue, the Commission grossed it up by the Companies' Federal corporate income tax rate.[159]

[155] Sierra Club AFR, p. 39.
[156] Companies' AFR, pp. 18-19.
[157] *See* Companies' AFR, p. 19.
[158] Mikkelsen Rehearing Rebuttal Test., p. 11.
[159] Fifth Entry on Rehearing, p. 95.

OMAEG argues that Rider DMR is unjust and unreasonable in violation of R.C. 4905.22 as a result of the Commission's approval of the gross-up of Rider DMR at the Federal corporate income tax rate.[160] OMAEG's arguments confuse two different income tax rates, however. It is important to distinguish the Companies' recommendation and the Commission's decision. While the Companies recommended that the Rider DMR amount be grossed up at the Companies' composite tax rate of 36 percent, the Commission approved a gross-up at the lesser Federal corporate income tax rate. Thus, when OMAEG challenges the gross-up because the Companies did not consider a tax rate other than 36 percent,[161] OMAEG is actually taking issue with the Companies' recommendation, instead of the Commission's actual decision.

In any event, OMAEG also argues that the Companies' tax rate may be significantly lower than 36 percent (again, which the Commission did not approve) due to bonus depreciation. The record does not support this assertion. At hearing, Company witness Mikkelsen testified that claiming bonus depreciation would reduce the Companies' taxable income, and that she did not know whether the 36 percent tax rate accounts for any such reductions to taxable income.[162] There is no evidence to suggest that the Companies may even claim bonus depreciation, much less sufficient bonus depreciation to reduce taxable income to a degree that causes the Companies' Federal corporate income tax rate to be "significantly" lower. To the contrary, Ms. Mikkelsen explained at hearing that the Companies' 36 percent composite tax rate does not change frequently or dramatically, so the 36 percent figure is a representative suggestion for use

[160] OMAEG AFR, pp. 25-26. As demonstrated further below, R.C. 4905.22 does not apply. *See infra* pp. 83-85.
[161] OMAEG AFR, p. 25
[162] Rehearing Tr. Vol. X, p. 1800 (Mikkelsen Rebuttal Cross).

in the calculation.[163] Accordingly, the Commission should deny OMAEG's Application for Rehearing on this issue.

b. Rider DMR should not be subject to refund.

The Commission has conditioned the continuation of Rider DMR on, among other things, having FirstEnergy Corp.'s headquarters and nexus of business remain in Akron.[164] OCC/NOAC contend that this condition is insufficient protection for customers. They assert that the Commission should require that the conditions be met under penalty of having Rider DMR revenues be refunded.[165] Notably, OCC/NOAC provide no record support for their suggestion. Indeed, they don't address the issues raised by the Companies with refunding Rider DMR, namely: (1) potentially refunding Rider DMR revenues would make the availability of these revenues for credit support purposes uncertain thereby defeating one of the purposes of the rider;[166] and (2) refunding revenues previously collected under authorized rates would constitute unlawful retroactive ratemaking.[167] Given this failure, the Commission can (and should) easily reject OCC/NOAC's suggestion.

c. Rider DMR revenues should be excluded from the SEET calculation.

OCC/NOAC, OMAEG and NOPEC again argue that revenues collected under Rider DMR should not be excluded from the calculation of the annual SEET.[168] The Commission properly considered and rejected these arguments on rehearing.[169] As the Commission found, including Rider DMR revenue in the SEET calculation "would introduce an unnecessary element

[163] Rehearing Tr. Vol. X, p. 1799 (Mikkelsen Rebuttal Cross). Indeed, as Ms. Mikkelsen noted, the 36 percent tax rate is used in the Companies' DCR filings (which would presumably include the impact of any bonus depreciation). Mikkelsen Rehearing Rebuttal Test., p. 11, n. 9
[164] Fifth Entry on Rehearing, p. 96.
[165] OCC/NOAC AFR, p. 28.
[166] Mikkelsen Rehearing Rebuttal Test., pp. 21-22.
[167] Mikkelsen Rehearing Rebuttal Test., p. 24.
[168] OCC/NOAC AFR, pp. 19-21; OMAEG AFR, pp. 23-24; NOPEC AFR, p. 9.
[169] Fifth Entry on Rehearing, p. 98.

of risk to the Companies and undermine the purpose of providing credit support to the Companies."[170] The Commission should reject intervenor arguments to the contrary.

OMAEG claims that excluding Rider DMR revenue from the SEET calculation will not impede the purpose of providing credit support and will not impose additional risk on the Companies.[171] However, simply disagreeing with Commission findings is an inadequate basis for rehearing. OMAEG makes no attempt to show that the Commission's findings were not supported by the record; it cites no record support for its claims. Indeed, all record evidence supports the Commission's findings. The purpose of Rider DMR is, over time, to improve the Companies' credit metrics, thereby improving access to capital markets as a means to jumpstart grid modernization and fund other necessary operations. Making Rider DMR revenues subject to the SEET calculation would short-circuit this approach to improve the Companies' credit metrics.[172] Including Rider DMR in the SEET calculation would increase the chances of an inappropriate SEET refund and would not improve the Companies' credit metrics.[173] Indeed, improved access to capital markets would disappear if the Companies had to return revenues from Rider DMR.[174] OMAEG has not stated a basis for rehearing.

OCC/NOAC, OMAEG and NOPEC all argue that Rider DMR revenues must be included in the SEET because: (1) all ESP provisions must be included in the SEET; and (2) Rider DMR is an ESP provision.[175] These intervenors rely on language in R.C. 4928.143(F) requiring the

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[170] Fifth Entry on Rehearing, p. 98.
[171] OMAEG AFR, p. 24.
[172] Mikkelsen Rehearing Rebuttal Test., p. 22.
[173] Mikkelsen Rehearing Rebuttal Test., p. 22.
[174] Mikkelsen Rehearing Rebuttal Test., p. 22. "In addition, the SEET calculation is, by definition, only concerned with a utility's ability to generate significantly excessive earnings. It is not a test of a utility's creditworthiness. A finding of significantly excessive earnings would not in and of itself be indicative of investment grade credit ratings at a utility." Mikkelsen Rehearing Rebuttal Test., p. 22.
[175] OCC/NOAC AFR, p. 20; OMAEG AFR, p. 23; NOPEC AFR, p. 9.

Commission to consider "if any adjustments resulted in excessive earnings."[176] To be sure, this language has been used by the Commission – and affirmed by the Ohio Supreme Court – to exclude from the SEET certain earnings not caused by an ESP.[177] However, this is not the only basis to exclude revenues from the SEET; it does not address how revenues from ESP-related provisions are treated in the complicated SEET calculation.

The SEET calculation requires the Commission to compare the "earned return on common equity of the electric distribution utility" to "the return on common equity that was earned during the same period by publicly traded companies, including utilities that face comparable business and financial risk, with such adjustments for capital structure as may be appropriate."[178] The Commission must also consider "the capital requirements of future committed investments" in Ohio.[179] As the Ohio Supreme Court has noted, the statute requires the Commission to make "numerous related determinations" regarding how this calculation is performed,[180] including defining "earned return" and determining how to make the comparison to "comparable" companies.

Excluding Rider DMR revenues from the SEET calculation is lawful for three reasons: (1) Rider DMR charges are "extraordinary items"; (2) there are no comparable companies with a mechanism like Rider DMR and thus, no valid comparison for the purposes of the SEET calculation could be made; and (3) the March 31 Order provides for SEET exclusions "associated with any additional liability or write-off of regulatory assets due to implementing the Companies' ESP IV."[181] Remarkably, although each of these arguments was set out in the

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[176] R.C. 4928.143(F).
[177] *See In re Columbus S. Power Co.*, 134 Ohio St.3d 392, 2012-Ohio-5690, 983 N.E.2d 276, ¶ 40.
[178] R.C. 4928.143(F).
[179] R.C. 4928.143(F).
[180] *In re Columbus S. Power Co.*, 134 Ohio St.3d 392, 2012-Ohio-5690, 983 N.E.2d 276, ¶ 38.
[181] Mikkelsen Rehearing Rebuttal Test., pp. 22-23.

Companies' Post-Rehearing Reply Brief,[182] intervenors fail to address any of these three grounds for exclusion of Rider DMR revenues from the SEET calculation.

First, the Commission's Finding and Order in Case No. 09-786-EL-UNC (June 30, 2010) (the "Generic SEET Order"), determined that, for purposes of the SEET calculation, "the earned return will equal the electric utility's profits after deduction of all expenses, including taxes, minority interest, and preferred dividends, paid or accumulated, *and excluding any non-recurring, special, and extraordinary items*."[183] Charges under Rider DMR count as an "extraordinary item," as explained by Company witness Mikkelsen:

> Rider DMR would be justifiably excluded from the SEET calculation because the credit support necessary to achieve Staff's stated goal of developing one of the nation's most intelligent distribution grids, as well as the commitment to retain FirstEnergy Corp.'s headquarters and nexus of operations in Akron, Ohio, are both extraordinary in nature.[184]

While Rider DMR revenues are an "adjustment" of ESP IV and thus must be considered by the Commission when performing the SEET, that consideration only extends so far as to exclude Rider DMR revenues from the statutory calculation as extraordinary items.

Second, as prescribed in the SEET statute, the earned return on equity of a utility must be compared to the earned return of comparable companies.[185] There are, however, no comparable companies that have a mechanism like Rider DMR to jumpstart capital investment through improving access to capital markets on more favorable terms, conditioned upon retaining its

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[182] Companies' Post-Rehearing Reply Brief, pp. 161-63.
[183] Generic SEET Order, p. 18 (emphasis added). OCC witness Duann agreed that any item deemed nonrecurring, special or extraordinary may be excluded from net income for purposes of the SEET calculation. Rehearing Tr. Vol. IV, pp. 919-21 (Duann Cross).
[184] Mikkelsen Rehearing Rebuttal Test., pp. 22-23. OCC witness Duann agreed that an extraordinary item is any item that is out-of-the-ordinary, not ordinary or unusual. Rehearing Tr. Vol. IV, pp. 924-27 (Duann Cross).
[185] Mikkelsen Rehearing Rebuttal Test., p. 23.

headquarters in a particular state.[186] Thus, charges under Rider DMR lawfully may be excluded from the SEET calculation for this reason as well.

Third, the March 31 Order allows for SEET exclusions "associated with any additional liability or write-off of regulatory assets due to implementing the Companies' ESP IV."[187] Pursuant to Staff's recommendation, Rider DMR would be implemented in conjunction with a Commission directive for the Companies to invest in grid modernization.[188] This directive from the Commission likely would cause the Companies to take on additional liabilities for the debt needed to fund the investments.[189] Through the credit support provided by Rider DMR, the rider is associated with these additional liabilities, so the Rider DMR revenues should therefore be excluded from the SEET calculation.[190]

Intervenors' arguments that charges under Rider DMR should be included in the annual SEET calculation are meritless. The Commission should deny rehearing on this issue.

d. Sierra Club's proposed modifications to Rider DMR were properly rejected.

Sierra Club argues that the Commission's rejection of its proposed restrictions to Rider DMR was unreasonable and unlawful.[191] Sierra Club fails, however, to offer anything new and instead repeats arguments raised in its earlier briefs. In its brief following the last hearing, Sierra Club asserted that: (1) Rider DMR revenues should be set aside in a separate account (or accounts);[192] (2) revenues collected under Rider DMR should be earmarked for grid modernization or other beneficial projects and such funds be spent within a reasonable amount of

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186 Mikkelsen Rehearing Rebuttal Test., p. 23.
187 *See* Direct Testimony of Santino L. Fanelli, p. 11 (Aug. 4, 2014) ("Fanelli Direct Test."). *See generally* March 31 Order approving the Companies' Stipulated ESP IV with the updated proposed in Mr. Fanelli's direct testimony.
188 Mikkelsen Rehearing Rebuttal Test., p. 23.
189 Mikkelsen Rehearing Rebuttal Test., p. 23.
190 Mikkelsen Rehearing Rebuttal Test., p. 23.
191 Sierra Club AFR, pp. 43-47.
192 Sierra Club Initial Rehearing Brief, p. 80.

time;[193] and (3) the Companies should be precluded from receiving "double recovery" on capital investments made with Rider DMR funds, specifically the Companies should not recover depreciation expense on grid modernization projects.[194] Sierra Club went on to argue that Rider DMR, if modified per these recommendations, would still satisfy the "credit support" purpose of rider.[195] The Commission rejected Sierra Club's proposals,[196] finding that "placing restrictions on the use of Rider DMR funds would defeat the purpose of Rider DMR."[197] In its Application for Rehearing, Sierra Club merely retreads the arguments that have been briefed, considered, and rejected.[198] This alone is grounds for denying rehearing on this issue.[199]

In any event, Sierra Club's proposed restrictions are no less misguided now than when Sierra Club first proposed them. Sierra Club still misses the fundamental point that there is a difference between revenues necessary to provide credit support to access capital to pay for grid modernization projects and the capital necessary to pay for such projects. The former is what Rider DMR is intended to be; the latter is what Sierra Club mistakenly thinks Rider DMR will or should be. As. Mr. Buckley's testimony showed, the revenue to be generated through Rider DMR is based on improving a key ratings metric: the CFO to debt ratio. This intended incremental improvement in the CFO to debt ratio through Rider DMR pales in comparison to the capital necessary to fund the Companies' grid modernization. Indeed, there is no evidence

[193] Sierra Club Initial Rehearing Brief, pp. 80-81.
[194] Sierra Club Initial Rehearing Brief, p. 81.
[195] Sierra Club Initial Rehearing Brief, pp. 81-83.
[196] Fifth Entry on Rehearing, p. 86.
[197] Fifth Entry on Rehearing, p. 127.
[198] Sierra Club AFR, pp. 43-47.
[199] *See, e.g.*, *Wiley v. Duke Energy Ohio, Inc*., Case No. 10-2463-GE-CSS, 2011 Ohio PUC LEXIS 1276, Entry on Rehearing, at *6-7 (Nov. 29, 2011) (rejecting an application for rehearing where "the application for rehearing simply reiterates arguments that were considered and rejected by the Commission"); *In the Matter of the Application of Duke Energy Ohio for Approval of a Market Rate Offer to Conduct a Competitive Bidding Process for Standard Service Offer Electric Generation Supply, Accounting Modifications, and Tariffs for Generation Service*, Case No. 10-2586-EL-SSO, 2011 Ohio PUC LEXIS 543, Entry on Rehearing, at *15-16 (May 4, 2011) (rejecting an application for rehearing that "raised nothing new").

that Rider DMR, as authorized, would provide revenues sufficient to fund any grid modernization projects, which, as Ms. Mikkelsen testified, require significant investments over the course of many years.[200]

Further, Sierra Club argues that Rider DMR funds should be: (1) kept in a separate account (or accounts) within the Companies; and (2) earmarked for grid modernization projects. But, as the Commission correctly observed, doing so would undercut the purpose of the rider. Rider DMR was never intended to provide cash directly to the Companies to use for specific projects.[201] Instead, Rider DMR will provide access to the capital markets to allow the Companies to fund their grid modernization initiatives.[202] As noted, Rider DMR will provide a boost to the Companies' (and FirstEnergy Corp.'s) CFO to debt ratio and otherwise improve their financial condition.[203] The resulting improved financial metrics will maintain the Companies' investment grade credit rating.[204] An investment grade credit rating lowers the cost of capital (and the cost of doing business otherwise) which the Companies will need to fund the extensive grid modernization and other capital projects.[205] The additional cash inflow provided by Rider DMR will also allow the Companies to shore up their balance sheets in other ways, if necessary. For example, the funds may be used to pay off retiring debt or fund pension liabilities.[206] Requiring funds collected under Rider DMR to be set aside in a separate account and to only be used for direct investments in grid modernization would defeat the purpose of the

[200] Rehearing Tr. Vol. X, pp. 1622-23 (Mikkelsen Rebuttal Cross); Mikkelsen Rehearing Rebuttal Test., p. 15.
[201] Choueiki Rehearing Test., p. 15; Buckley Rehearing Test., p. 2.
[202] Fifth Entry on Rehearing, p. 91 (citing Rehearing Tr. Vol. III, pp. 571-73 (Buckley Cross) and Choueiki Rehearing Test., p. 15).
[203] Mikkelsen Rehearing Rebuttal Test., pp. 8-9.
[204] Mikkelsen Rehearing Rebuttal Test., pp. 8-9.
[205] Mikkelsen Rehearing Rebuttal Test., pp. 7-9.
[206] Rehearing Tr. Vol. X, p. 1607 (Mikkelsen Rebuttal Cross); Mikkelsen Rehearing Rebuttal Test., pp. 8-9.

rider because it would restrict the Companies' ability to do what they believe is necessary to maintain their investment grade ratings.

Sierra Club's call for the Commission to preclude "double recovery on capital investments made with the DMR funds" [207] is also misplaced and unnecessary. Sierra Club confuses Rider DMR and Rider AMI. Rider DMR will provide access to reasonably cost capital. Rider AMI recovers a return on and of grid modernization investments.[208] As noted, Rider DMR is not tied to specific capital investments, and it does not recover a return on any investments. Contrary to Sierra Club's mistaken thinking, Rider DMR will not recover the same costs as Rider AMI. There is no double recovery.

In language literally copied and pasted from its initial rehearing brief,[209] Sierra Club suggests that the Commission's rejection of its proposed restrictions was contrary to the evidence. Sierra Club asserts that Rider DMR, restructured per Sierra Club's recommendations, would still provide "credit support."[210] In support, Sierra Club points to, among other things, Ms. Mikkelsen's statement that "any time a utility company makes a filing that includes a return on investment, that return on investment serves to provide credit support to that company."[211] Ms. Mikkelsen's statement—which simply asserts an axiom—is altogether unremarkable. The filings referenced by Ms. Mikkelsen provide cash inflow to a company *after* expenses have already been incurred.[212] In contrast, the purpose of Rider DMR is to facilitate access to capital to make other investments *before* such expenses have been incurred.

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[207] Sierra Club AFR, p. 44.
[208] Rehearing Tr. Vol. V, pp. 1227-30 (Choueiki Cross); Companies Post Rehearing Reply Br., p. 157.
[209] *Compare* Sierra Club Rehearing Br., pp. 82-83 *with* Sierra Club AFR, pp. 45-46.
[210] Sierra Club AFR, p. 45.
[211] Sierra Club AFR, p. 45 (citing Rehearing Tr. Vol. X, p. 1642 (Mikkelsen Rebuttal Cross)).
[212] *See* Rehearing Tr. Vol. X, pp. 1675-76 (Mikkelsen Rebuttal Cross).

Sierra Club further contends that the Commission's decision not to place restrictions on Rider DMR funds was made absent "any evidentiary basis."[213] To the contrary, the Commission found ample evidence that: (1) the Companies are at serious risk of a credit downgrade that would have adverse effects upon the Companies' ability to access the capital markets;[214] (2) the Companies would suffer adverse consequences as a result of a downgrade;[215] (3) Rider DMR is intended to provide credit support to the Companies in order to avoid a downgrade;[216] and (4) maintaining the Companies' current ratings will allow the Companies to access capital markets in order to fund grid modernization investments.[217]

The Commission correctly rejected Sierra Club's proposed modifications to Rider DMR because Sierra Club fundamentally misunderstood the purpose of Rider DMR. There is ample evidence to support the Commission's decision to reject Sierra Club's suggested modifications. The Commission should reject them again.

4. The Commission need not explore "ring fencing" measures.

Only NOPEC took issue with the Commission's decision not to implement ring-fencing measures. NOPEC argued that the Commission unreasonably failed to implement ring fencing and that "[t]he Commission should not wait" to do so.[218] As an initial matter, the Commission recognized that no one – not even the witness who proposed the exploration of ring fencing, OCC witness Kahal – recommended that the Commission impose such measures in this case.[219] Indeed, OCC/NOAC similarly observed in their rehearing brief that they "do not recommend

[213] Sierra Club AFR, p. 46.
[214] Fifth Entry on Rehearing, p. 126.
[215] Fifth Entry on Rehearing, p. 127.
[216] Fifth Entry on Rehearing, p. 127.
[217] Fifth Entry on Rehearing, p. 127.
[218] NOPEC AFR, pp. 6-7.
[219] Fifth Entry on Rehearing, pp. 96, 127.

ring-fencing at this time."[220] The Commission therefore acted reasonably in deciding not to impose ring-fencing measures.

The Commission had a sound basis to reject imposing any ring fencing measures in this case. First, Mr. Kahal (the only intervenor witness to address ring fencing) did not identify any specific ring-fencing measures.[221] Notably, NOPEC similarly fails to do so in its Application for Rehearing. Second, ring-fencing measures are unnecessary. The Companies are already subject to (and in compliance with) an approved corporate separation plan. Mr. Kahal admitted during rehearing that he had never reviewed the plan, never reviewed any statute regarding corporate separation in Ohio, and never reviewed any Ohio corporate separation regulations.[222] The Commission could not have reasonably imposed ring-fencing measures on the basis of this all but nonexistent record. The Commission should reject NOPEC's assignment of error on this issue.

5. The PUCO properly found sufficient protections for low income customers made competitive bidding unnecessary.

ESP IV, as approved, provides substantial benefits for low income customers, including millions of dollars of funding to various agencies which serve low income customers for a Fuel Fund Program, the Ohio Partners for Affordable Energy, and the Citizens Coalition for establishing a Customer Advisory Agency.[223] OCC/NOAC previously advocated that these programs be subjected to competitive bidding.[224] The Commission rejected this suggestion.[225]

In the March 31 Order, the Commission stated, "The Stipulations benefit the public interest by providing for shareholder funding for low-income customer assistance programs in

[220] OCC/NOAC Rehearing Brief, p. 44.
[221] Rehearing Rebuttal Testimony of Matthew I. Kahal, p. 14 (July 15, 2016) ("Kahal Rehearing Rebuttal Test.").
[222] Rehearing Tr. Vol. VIII, pp. 1401-02 (Kahal Rebuttal Cross).
[223] *See* Fifth Supplemental Testimony of Eileen M. Mikkelsen, pp. 11-12 (Dec. 1, 2015).
[224] OCC/NOAC AFR, p. 63 (May 2, 2016).
[225] Fifth Entry on Rehearing, p. 117.

order to aid those customer struggling to make ends meet. . . Many of these programs have been in place for several years, and the Stipulations extend the funding for eight additional years . . . ."[226] Addressing OCC/NOAC's suggestion on rehearing, the Commission said:

> In response to OCC/NOAC's argument that the Commission should have required competitive bidding of low-income programs, we note that we identified several benefits that would accrue to low-income customers during term of ESP IV… Additionally, in order to mitigate concerns regarding the funding being provided to certain consumer groups, the Commission modified the Stipulated ESP IV to incorporate an additional degree of oversight and review of programs to support low- and moderate-income customers…. We find that significant benefits through the low-income programs exist, as illustrated in our Order, and sufficient protections are in place to ensure the cost-effective and efficient use of funds provided to low-income customers, making competitive bidding procedures unnecessary at this time. Thus, this assignment of error should be denied.[227]

OCC/NOAC's contention that the Commission failed to meet its obligations under R.C. 4903.09 is both factually and legally wrong. As a factual matter, the Commission specifically considered OCC's proposal and rejected it, finding that Stipulated ESP IV included sufficient protections for low income customers. The Commission specifically identified the portions of the March 31 Order which addressed benefits to low income customers. Moreover, the Commission laid out the ways in which the Commission had modified Stipulated ESP IV expressly to protect low-income customers further.[228]

As a legal matter, OCC/NOAC misconstrue what R.C. 4903.09 requires. That statute provides, "the commission shall file . . . findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based on said findings of fact." It does not, however, require the Commission to address in detail every suggested alternative to the stipulation under

[226] March 31 Order, p. 96 (record citations omitted).
[227] Fifth Entry on Rehearing, p. 117.
[228] Fifth Entry on Rehearing, p. 117.

review. The Commission's obligation is to explain how its decision is within its statutory authority and sustained by the weight of the evidence. OCC/NOAC present no argument that the Commission lacked legal authority for its decision or that the low income programs approved violated any Ohio law. As is clear from the March 31 Order and rehearing entries, the Commission considered how best to protect low income customers and made a choice different than OCC/NOAC. That the Commission preferred its choice does not require a further explanation to comply with R.C. 4903.09.

6. The Commission appropriately found that the Companies' right to withdraw the ESP does not end until at least the issuance of a non-appealable order.

R.C. 4928.143(C) provides:

> If the commission modifies and approves an application under division (C)(1) of this section, the electric distribution utility may withdraw the application, thereby terminating it, and may file a new standard service offer under this section or a standard service offer under section 4928.142 of the Revised Code.

In the March 31 Order, the Commission modified Stipulated ESP IV in a number of ways.[229] That Order directed the Companies to file compliance tariffs and then stated that the Companies would be deemed to have accepted the Commission's modifications if the Companies filed tariffs complying with the Order.[230] In the Companies' previous Application for Rehearing, the Companies demonstrated that the March 31 Order unlawfully restricted their right to withdraw their ESP application.[231]

The Fifth Entry on Rehearing granted rehearing on this issue, and clarified that the "filing of tariffs before the conclusion of the application for rehearing and appeals process will be subject to the rehearing and appeal process and the Companies' right to withdraw from the

[229] March 31 Order, pp. 86, 96-99.
[230] March 31 Order, pp. 86, 99.
[231] Companies' AFR, pp. 2-4.

Stipulated ESP IV, as modified by the Commission, will not lapse until the conclusion of that process."[232] This conclusion is correct, and the Commission correctly granted rehearing on this assignment of error.

OCC/NOAC ask the Commission to grant rehearing to require the Companies to make a decision whether to withdraw from the ESP shortly after the Commission rules on rehearing, and before any appeals are taken from that decision.[233] OCC/NOAC's position has no support in the statute – or common sense. The statutory right to withdraw has no express time limit. Therefore, at the very least, the time to exercise the right to withdraw should lapse no earlier than when the exercise of that right can be meaningful and complete. The right of withdrawal provides the utility the opportunity not to go forward with an ESP that is different from the ESP proposed. The General Assembly wisely determined that a utility should not be forced to provide service under an ESP that is unacceptable in the utility's discretion. A utility cannot make a determination regarding the merits of an ESP until all of its terms are completely known. Because the final terms of an ESP may not be known until the end of the appeal process, the right to withdraw an ESP cannot lapse at least until the end of that process. If OCC/NOAC's position prevailed, the Companies could potentially be saddled with an ESP that they did not want, a situation the statute expressly allows them to avoid.

OCC/NOAC argue that the statute does not permit the utility to withdraw an ESP upon completion of the appellate process because the statute provides the Companies with the right to withdraw only after the Commission modifies the ESP.[234] There are at least two things wrong with this view. First, the Commission has already modified the ESP. Thus, the right of

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[232] Fifth Entry on Rehearing, p. 150.
[233] OCC/NOAC AFR, p. 41.
[234] OCC/NOAC AFR, pp. 42-43.

withdrawal has been triggered. Second, any appeal that would reverse the Commission's order and change the ESP would nevertheless require Commission action to put Supreme Court's decision into effect. That action would modify the ESP and thus fit squarely into even OCC/NOAC's reading of R.C. 4928.143(C)(2)(a).

OCC/NOAC also argue that there would be logistical difficulties if a utility was allowed to withdraw the ESP after a Supreme Court decision.[235] Although OCC/NOAC provide no basis to believe that reverting to the prior ESP would be "difficult," the statute nevertheless provides what it provides. In any event, there is little reason to believe that any "difficulties" would be insurmountable. Indeed, the recent DP&L ESP proceedings, as an example, show otherwise. In that case, DP&L withdrew from its 2012 ESP proceeding in 2016, and the Commission approved DP&L's withdrawal, even though it was no longer possible to return to the exact rates which were in effect in 2012.[236] As shown by that recent case, the Commission is more than capable of dealing with logistical hurdles associated with a return to previous rates.

As the Commission acknowledged, the Ohio Supreme Court has already made clear the Commission may not improperly limit the Companies' statutory right to withdraw from the ESP.[237]   OCC/NOAC's unlawful suggestion to limit the Companies' right to withdraw the ESP should be rejected.

7. Rider GDR was properly approved.

In approving Rider GDR, the Commission specifically addressed the intervenor criticisms of Rider GDR. Specifically, the Commission addressed claims by OCC/NOAC that

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[235] OCC/NOAC AFR, p. 43.

[236] *In the Matter of the Application of the Dayton Power and Light Co. To Establish a Standard Service Offer in the Form of an Electric Security Plan,* Case No. 12-426-EL-SSO, Finding and Order (Aug. 26, 2016).

[237] Fifth Entry on Rehearing, p. 149 (citing *In re Application of Ohio Power Co.,* 2015-Ohio-2056, ¶ 26, 144 Ohio St.3d 1, 8) (finding that the Commission's order was unlawful because the Order made "it impossible for Ohio Power to exercise its statutory right to withdraw the modified ESP.")).

Rider GDR: (1) does not provide benefits to customers; (2) is single issue ratemaking; (3) will cause the Companies to receive significantly excessive earnings; (4) lacks an incentive for the Companies to seek rate reductions resulting from changes in government allegations; and (5) fails to identify the costs associated with the rider.[238]

In its original Application for Rehearing, OCC/NOAC reiterated these same arguments.[239] In the Fifth Entry on Rehearing, the Commission correctly pointed out that OCC/NOAC has raised nothing new on this issue and rejected OCC/NOAC's assignment of error.[240]

In their most recent Application for Rehearing, OCC/NOAC once again raised these very arguments. As they did twice previously, OCC/NOAC argue that: (1) Rider GDR is asymmetric; (2) there is no incentive to reduce the rate of costs; and (3) the rider will not be properly monitored by the Commission.[241] The Commission has already considered and rejected each of these arguments twice, once in the Opinion and Order and once in the Fifth Entry on Rehearing.[242] The Commission should do the same here and find OCC/NOAC have raised nothing new for the Commission's consideration.

B. Stipulated ESP IV, As Modified By The Fifth Entry On Rehearing, Does Not Violate Any Important Regulatory Principle Or Practice.

Intervenors' attacks on the lawfulness of Rider DMR are mostly a rehash of previously argued and dismissed positions. Given the rider's purpose to provide credit support to jumpstart the Companies' grid modernization efforts, Rider DMR falls squarely within the Commission's authority under R.C. 4928.143(B)(2)(h). Given the economic benefit provided by the

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[238] March 31 Order, p. 67.
[239] OCC/NOAC AFR, pp. 38-39.
[240] Fifth Entry on Rehearing, p. 116.
[241] OCC/NOAC AFR, p. 39.
[242] March 31 Order, p. 67; Fifth Entry on Rehearing, p. 116.

requirement that FirstEnergy Corp. maintain its headquarters and nexus of operations in Akron – not to mention the economic impact of the grid modernization projects themselves – the Commission is authorized to approve Rider DMR under R.C. 4928.143(B)(2)(i).

Intervenors' other legal claims are similarly devoid of merit. Their arguments about whether Rider DMR furthers state policies in R.C. 4928.02, including the prohibition on subsidies, are at odds with the facts. On the subsidy issue particularly, there simply is no credible evidence that Rider DMR revenues will be used for anything else other than for the Companies' customers. Similarly, the contention that Rider DMR constitutes unlawful recovery of transition costs goes begging for the simple reason that no generation related costs are being recovered. And arguments regarding the applicability of R.C. 4905.22 are directly refuted by the plain language of the ESP statute, R.C. 4928.143(B)(2).

Intervenors also get it wrong when they repeat now rejected arguments in ESP IV's energy efficiency provisions. These arguments should be rejected again.

1. Rider DMR is authorized under Ohio law.

Rider DMR is authorized to be included in ESP IV under divisions (B)(2)(h) and (b)(2)(i) of R.C. 4928.143. An ESP rider, such as Rider DMR, is duly authorized by statute if it falls within the ambit of one of nine categories.[243] Specifically, Section 4928.143(B)(2) provides, in relevant part:

> (B) Notwithstanding any other provision of Title XLIX of the Revised Code to the contrary except division (D) of this section, divisions (I), (J), and (K) of section 4928.20, division (E) of section 4928.64, and section 4928.69 of the Revised Code:
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> * * *
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> (2) The plan may provide for or include, without limitation, any of the following:

[243] *In re Application of Columbus Southern Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 33.

> * * *
>
> (h) Provisions regarding the utility's distribution service, including, without limitation and notwithstanding any provision of Title XLIX of the Revised Code to the contrary, provisions regarding single issue ratemaking, a revenue decoupling mechanism or any other incentive ratemaking, and provisions regarding distribution infrastructure and modernization incentives for the electric distribution utility. The latter may include a long-term energy delivery infrastructure modernization plan for that utility or any plan providing for the utility's recovery of costs, including lost revenue, shared savings, and avoided costs, and a just and reasonable rate of return on such infrastructure modernization. As part of its determination as to whether to allow in an electric distribution utility's electric security plan inclusion of any provision described in division (B)(2)(h) of this section, the commission shall examine the reliability of the electric distribution utility's distribution system and ensure that customers' and the electric distribution utility's expectations are aligned and that the electric distribution utility is placing sufficient emphasis on and dedicating sufficient resources to the reliability of its distribution system.
>
> (i) Provisions 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.

This statutory language affords the Commission considerable latitude in authorizing allowable charges. In this case, Rider DMR is authorized by both R.C. 4928.143(B)(2)(h) and (B)(2)(i).

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

The Commission correctly found that Rider DMR is authorized by R.C. 4928.143(B)(2)(h).[244] As the Commission noted, Staff witness Choueiki testified that Rider DMR is a distribution charge and not a generation-related charge.[245] The Commission also found that Rider DMR is an "incentive" under the plain language of R.C. 4928.143(B)(2)(h) because the rider is intended to jump-start the Companies' grid modernization efforts. The rider

[244] Fifth Entry on Rehearing, pp. 89-90.
[245] Fifth Entry on Rehearing, p. 90 (citing Rehearing Tr. Vol. IV, pp. 1009-11).

will facilitate the Companies' access to the capital required for distribution grid modernization on more favorable terms.[246] Access to the required capital on more favorable terms will reduce the Companies' future costs of providing distribution service.[247] Thus, the Commission reasonably concluded that Rider DMR is a distribution modernization incentive expressly authorized by R.C. 4928.143(B)(2)(h).[248]

Some intervenors find fault with the Commission's findings, repeating their previous unsupported arguments that Rider DMR is not related to distribution service.[249] They assert these objections again, apparently believing the Commission did not seriously consider them. (Sierra Club goes so far as to assert that the Commission "brushed aside these arguments."[250]) Yet the Commission's discussion of this issue in the Fifth Entry on Rehearing, with its multiple references to the record, demonstrates that the Commission seriously considered – and rejected – these objections.[251] Because these intervenors raise no new arguments, their objections should be denied.[252]

Some intervenors again argue that Rider DMR is not a provision "regarding the utility's distribution service" because there is no requirement to spend Rider DMR revenues on distribution modernization.[253] They note that the Commission refused to restrict the use of Rider DMR revenues for this purpose.[254] They also contend that Rider DMR's purpose is to only

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[246] Fifth Entry on Rehearing, p. 90. *See* Mikkelsen Rehearing Rebuttal Test., pp. 5-6.
[247] Mikkelsen Rehearing Rebuttal Test., pp. 8-9.
[248] Mikkelsen Rehearing Rebuttal Test., pp. 8-9.
[249] Sierra Club AFR, pp. 11-19; OCC/NOAC AFR, p. 14; P3/EPSA AFR, pp. 8-9; OEC/EDF/ELPC AFR, pp. 8-10; OMAEG AFR, pp. 12-15.
[250] Sierra Club AFR, p. 10.
[251] *See* Fifth Entry on Rehearing, pp. 89-90.
[252] *See, e.g. Wiley v. Duke Energy Ohio, Inc.*, Case No. 10-2463-GE-CSS, 2011 Ohio PUC LEXIS 1276, Entry on Rehearing, at*6-7 (Nov. 29, 2011) (rejecting an application for rehearing where "the application for rehearing simply reiterates arguments that were considered and rejected by the Commission").
[253] Sierra Club AFR, pp. 11-14; OCC/NOAC AFR, p. 14; P3/EPSA AFR, pp. 8-9; OMAEG AFR, pp. 12-15.
[254] NOPEC AFR, p. 4.

benefit FirstEnergy Corp. by providing it credit support.[255] While the Companies are not required to use Rider DMR revenues exclusively for distribution grid modernization initiatives, Company witness Mikkelsen explained that the Companies intend to use capital obtained through the credit support provided by Rider DMR revenues for distribution grid modernization, among other uses:

> Q. And the companies are not willing to commit to spend the revenues collected under rider DMR on distribution grid modernization initiatives, correct?
>
> A. It is the companies' intention to use the dollars collected in rider DMR for purposes within the companies' operations including grid modernization, as well as other things, such as other activities associated with modernizing the company's grid, perhaps for debt that is maturing over the term, potentially for funding of pensions, by way of example.[256]

As a result, the relationship between Rider DMR and grid modernization is undeniable. And the other potential uses by the Companies are themselves legitimate distribution-related outlays.[257] The parties arguing that Rider DMR's purpose is solely to provide credit support refuse to acknowledge that credit support is a means to two distribution service ends: (1) jumpstarting grid modernization by facilitating the Companies' access to capital on more favorable terms; and (2) reducing the Companies' future costs of providing distribution service. Any concern regarding the Companies' use of Rider DMR funds should have been assuaged by the Commission's

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[255] NOPEC AFR, pp. 3-5; P3/EPSA AFR, p. 8-9. *See* Sierra Club AFR, p. 12 (suggesting the Companies could dividend Rider DMR funds up to FirstEnergy Corp.).
[256] Rehearing Tr. Vol. X, p. 1607 (Mikkelsen Rebuttal Cross).
[257] P3/EPSA grossly mischaracterize this specific testimony by Ms. Mikkelsen. According to P3/EPSA, she testified that "Rider DMR revenues could be transferred to FirstEnergy Corp. through dividends, where that money could be spent on a host of things entirely unrelated to distribution infrastructure, such as maturing debt, funding of pensions, or other items, distributions to shareholders, or used to provide support to FirstEnergy Corp.'s unregulated merchant business." P3/EPSA AFR, pp. 9-10. Ms. Mikkelsen was clear that the Companies' intent was to use Rider DMR dollars for purposes within the Companies' operations, not FirstEnergy Corp.'s operations. Rehearing Tr. Vol. X, p. 1607 (Mikkelsen Rebuttal Cross).

direction to Staff to ensure Rider DMR funds are used, directly or indirectly, in support of grid modernization.[258]

NOPEC points to Staff witness Buckley's testimony to support its claim that Rider DMR does not relate to the Companies' distribution service but is, instead, for credit support.[259] According to NOPEC, "Staff witness Buckley, the individual who introduced Rider DMR, admitted as much at hearing."[260] But the transcript citations provided by NOPEC do not relate to Mr. Buckley's testimony. Instead, at that part of the record, Staff witness Turkenton testified how the credit support provided by Rider DMR will incentivize grid modernization and is, thus, a provision regarding the Companies' distribution service:

> A. Yes. What I state here is that based on Dr. Choueiki's testimony and Mr. Buckley's testimony that this is credit support to the company for them to be able to access the capital markets. And then, in turn, by accessing the capital markets, we hope that they modernize the grid.
>
> Q. So this -- would this be characterized as a form of incentive ratemaking to incentivize grid modernization?
>
> A. It could be.[261]
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> * * *
>
> I believe Staff Witnesses Buckley and Dr. Choueiki and myself believe that this is a form of credit support for the company to be able to access -- access the capital markets and hopefully they will, in turn, modernize the grid. So there is a distribution component to it . . . .[262]

Intervenors' gamesmanship is apparent in their reliance on off-hand comments made by Staff witnesses Buckley and Turkenton, given that Dr. Choueiki was the Staff witness

[258] *See* Fifth Entry on Rehearing, pp. 127-28.
[259] NOPEC AFR, p. 3.
[260] NOPEC AFR, p. 3.
[261] Rehearing Tr. Vol. II, p. 426 (Turkenton Cross).
[262] Rehearing Tr. Vol. II, p. 429 (Turkenton Cross).

responsible for testifying regarding Rider DMR's purpose as a distribution rider. Dr. Choueiki was the witness who made the Rider DMR recommendation, and he was the appropriate witness to discuss whether the rider relates to distribution service. When asked to discuss the Rider DMR recommendation in his own testimony, Dr. Choueiki made clear that Rider DMR relates to distribution service:

> A. If you look at page 15, starting on line 14, it's not only recommending the new rider be formed and 131 be collected in it, but the Commission should direct -- I mean, you have got to take the two paragraphs together; you can't just take the first one and not the second one. So accordingly, the Commission should direct the companies to invest in modernization -- modernizing the distribution grid. Those are together, not separate.[263]

When pressed further, Dr. Choueiki explained that Rider DMR and distribution investment are tied together.[264] Dr. Choueiki stated, "The objective is to modernize the distribution grid in Ohio. That's our objective."[265] He further testified that Rider DMR was necessary in order to achieve Staff's ambitious goals for the Companies' grid modernization program:

> A. Our recommendation is for the grid to be modernized and to become one of the most intelligent grids in the current industry. We would like Ohio, the entire state of Ohio, with all of its distribution electric utilities, to develop a modernization grid that is self-healing, that is open, that is available for retailers and consumers and third-party providers to, as I state in my testimony, interact and transact and offer all sorts of services to consumers and empower consumers in the state of Ohio.
>
> Q. Thank you.
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> In -- Dr. Choueiki, you're referring to page 15 of your rehearing testimony, starting on line 14; is that correct?
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> A. Yes.

[263] Rehearing Tr. Vol. IV, p. 959 (Choueiki Cross).
[264] Rehearing Tr. Vol. IV, pp. 1020-21 (Choueiki Cross).
[265] Rehearing Tr. Vol. IV, p. 1029 (Choueiki Cross).

> Q. And is it staff's official recommendation that the Commission direct the companies to invest in modernizing the distribution grid?
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> A. It is our -- in our recommendation, yes.[266]

The record demonstrates that Rider DMR's purpose is to incentivize the Companies' grid modernization.

NOPEC and OCC/NOAC contend that because the Companies have the Advanced Metering Infrastructure/Modern Grid Rider ("Rider AMI") and the Delivery Capital Recovery Rider ("Rider DCR"), Rider DMR somehow is not related to distribution service.[267] But, each rider relates to distribution service in different ways. Capital expenditures needed under a grid modernization program will have to be funded well before the Companies recover specific costs under Rider AMI. Rider DMR allows the Companies access to the necessary capital at a reasonable price. As Staff Witness Choueiki testified, credit support through Rider DMR and the return on and of investment under Rider AMI are different.[268] Rider DMR funds will support investment in grid modernization, and the Companies will separately recover a return of and on their investments through Rider AMI. In fact, appropriate credit support under Rider DMR "could give rise to more-favorable terms with vendors and suppliers that the [C]ompany does business with, with respect to grid modernization. In that case, the dollars collected under Rider AMI could be lower for those reasons in addition to the borrowing costs."[269] And Rider DCR serves a different purpose of allowing "the Companies to continue to make necessary infrastructure investments in their distribution system, subject to Commission review, to promote the safe and reliable provision of electric service during ESP IV for the benefit of customers."[270]

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[266] Rehearing Tr. Vol. IV, pp. 967-68 (Choueiki Cross).
[267] *See* NOPEC AFR, pp. 4-5; OCC/NOAC AFR, p. 15.
[268] Rehearing Tr. Vol. V, pp. 1227-30 (Choueiki Cross).
[269] Rehearing Tr. Vol. X, pp. 1610-11 (Mikkelsen Rebuttal Cross).
[270] Fanelli Direct Test., p. 4.

The fact that Rider AMI is a distribution modernization rider and Rider DCR supports distribution reliability does not prevent Rider DMR from being a distribution modernization incentive under R.C. 4928.143(B)(2)(h).

Apparently believing that the Commission believed that the connection between Rider DMR and distribution service was tenuous, certain parties attempt to portray some of Rider DMR's conditions as feeble attempts to create a connection. Sierra Club and OMAEG question the "sufficient progress" condition created by the Commission in the Fifth Entry on Rehearing as "essentially meaningless" and "undefined."[271] The Companies agree, as discussed in their Application for Rehearing of the Fifth Entry on Rehearing, that the Commission's "sufficient progress" condition is vague, potentially arbitrary, unduly counterproductive and ultimately unnecessary.[272] However, the fact that the "sufficient progress" condition may be unworkable and unnecessary does not contradict the Commission's conclusion that Rider DMR is a provision regarding distribution service under R.C. 4928.143(B)(2)(h). Rider DMR is not intended to be a dollar-for-dollar investment in grid modernization.[273] Improving the Companies' financial position will enable the Companies better access to capital, including capital needed for grid modernization. Thus, a review that focuses solely on the progress toward grid modernization serves little purpose. And this condition is not needed to "bootstrap" a relationship between Rider DMR and grid modernization, as alleged by P3/EPSA.[274] Rider DMR is a provision regarding the Companies' distribution service regardless of whether this "sufficient progress" condition is in place.

[271] Sierra Club AFR, pp. 14-16; OMAEG AFR, p. 14.
[272] Companies' AFR, pp. 21-24.
[273] *See* Fifth Entry on Rehearing, pp. 127-28.
[274] P3/EPSA AFR, pp. 10-11.

In contrast, the Commission further supported its conclusion that Rider DMR is authorized under R.C. 4928.143(B)(2)(h) by directing Staff to ensure that Rider DMR funds are used, directly or indirectly, in support of grid modernization.[275] Some intervenors also question whether this review has value and once again raise the specter of Rider DMR funds flowing to FirstEnergy Corp.[276] Intervenors lack any record support for their favorite bogeyman becoming true. This "dividend" myth was first conjured up as a defense against Rider RRS, and these intervenors lack any logic for repurposing it here. The purpose of Rider DMR is to "prime the pump" so that the Companies "will be able to obtain lower financing costs when grid modernization spending begins, resulting in lower rates for customers."[277] The Companies have significant cash requirements over the term of the ESP, including significant dollars for grid modernization, $1.1 billion in debt maturing and $750 million to $1 billion in pension funding commitments, among other things.[278] Further, the record shows that two of the Companies have not issued a dividend in recent years.[279] Thus, the Companies' intent is to use Rider DMR revenues for purposes of the Companies operations.[280] While Rider DMR will help stabilize FirstEnergy Corp.'s CFO to debt metric, the dollars themselves are needed at the Companies. And the Staff review set out in the Fifth Entry on Rehearing ensures that Rider DMR funds are used directly or indirectly in support of grid modernization.[281]

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[275] Fifth Entry on Rehearing, pp. 127-28.
[276] *See* Sierra Club AFR, p. 16; NOPEC AFR, p. 7; OEC/EDF/ELPC AFR, pp. 8-10.
[277] Mikkelsen Rehearing Rebuttal Test., p. 16.
[278] Rehearing Tr. Vol. X, pp. 1622-23.
[279] Rehearing Tr. Vol. VIII, p. 1400 (Kahal Rebuttal Cross) (admitting that CEI has not paid a dividend to FirstEnergy Corp. since April 2015 and Toledo Edison has not done so since February 2014).
[280] Rehearing Tr. Vol. X, pp. 1604-05
[281] NOPEC raises the non sequitur that Staff's review will not prevent unregulated businesses from affecting FirstEnergy Corp.'s credit ratings. NOPEC AFR, p. 7. The purpose of the review, however, is to ensure Rider DMR funds are used directly or indirectly in support of grid modernization. And given that the Companies' intent is to use Rider DMR funds for this purpose or for other distribution-related expenses, Rider DMR is authorized by R.C. 4928.143(B)(2)(h).

Sierra Club questions whether the Commission can enforce its requirement that Rider DMR funds be used in support of grid modernization.[282] This objection merely reveals Sierra Club's lack of familiarity with Ohio regulatory practice. The Companies need not explain to the Commission the multiple arrows it has in its quiver to investigate utility actions and enforce Commission orders. And lack of jurisdiction over parent companies has never prevented the Commission from exercising its authority over regulated utilities.

Some intervenors point to the lack of a direct tie between Rider DMR charges and specific distribution costs. Sierra Club argues Rider DMR cannot be "incentive ratemaking" because "it is not connected to any costs that FirstEnergy has incurred or will incur to provide distribution service to its customers."[283] CMSD similarly argues that Rider DMR cannot be "single-issue ratemaking" because it is not recovering specific costs or expenses.[284] These are not valid criticisms of the Commission's decision, given that the Commission decided that Rider DMR is a distribution modernization incentive, not single-issue ratemaking or incentive ratemaking.[285] Regardless, the Commission could have concluded, based on the extensive record before it, that Rider DMR is a provision regarding single-issue ratemaking or an incentive ratemaking. Rider DMR deals with a specific issue – credit support for the Companies – and is intended to incentivize the Companies to be better able to obtain capital for purposes of grid modernization.[286]

Sierra Club and CMSD err in assuming that pre-S.B. 221 cost-based ratemaking provisions must apply to an ESP.[287] Under R.C. 4928.143(B)(2)(h), the Companies may include

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[282] Sierra Club AFR, p. 16.
[283] Sierra Club AFR, p. 17.
[284] CMSD AFR, p. 25.
[285] *See* Fifth Entry on Rehearing, p. 90.
[286] Mikkelsen Rehearing Rebuttal Test., p. 5.
[287] Sierra Club AFR, p. 17; CMSD AFR, p. 25.

in ESP IV any provisions regarding their distribution service, with two conditions: (1) distribution expectations must be aligned; and (2) the ESP in the aggregate must be more favorable than the expected results of an MRO.[288] There is no requirement in R.C. 4928.143(B)(2)(h) that distribution rates be based on specific costs or expenses. The only reference to costs in R.C. 4928.143(B)(2)(h) appears in the second sentence, which describes an *optional* long-term energy delivery infrastructure modernization plan.[289] While this section lists four types of provisions regarding distribution service that may be authorized under (B)(2)(h) – single issue ratemaking, a revenue decoupling mechanism, any other incentive ratemaking, and distribution infrastructure and modernization incentives – these examples are not meant to limit the section's scope. The section makes this clear by its use of "including, without limitation and notwithstanding any provision of Title XLIX of the Revised Code to the contrary . . . ." Thus, all the Commission need determine is that Rider DMR is a provision regarding the Companies' distribution service, which it undoubtedly is. Criticisms that Rider DMR diverges from traditional pre-S.B. 221 ratemaking principles miss the point and are irrelevant.

Moreover, Sierra Club's argument is based on the fallacy that Rider DMR charges "are entirely unrelated to the provision of any services to customers."[290] According to Ms. Mikkelsen, however, Rider DMR charges are directly related to the Companies' ability to provide distribution service to customers:

> The credit support provided by Rider DMR will allow the Companies to fund, either through capital support or through access to the capital markets under more favorable terms,

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[288] R.C. 4928.143(B)(2)(h), 4928.143(C)(1).
[289] R.C. 4928.143(B)(2)(h) ("The latter *may* include a long-term energy delivery infrastructure modernization plan for that utility or any plan providing for the utility's recovery of costs" (emphasis added)). NOPEC converts this sentence to a mandatory requirement that incentives be tied to actual investments in infrastructure modernization. NOPEC AFR, p. 5. Because the statute uses the permissive term "may," it falls within the Commission's discretion. *In re Ormet Primary Aluminum Corp.*, 129 Ohio St.3d 9, 2011-Ohio-2377, 949 N.E.2d 991, ¶ 17.
[290] Sierra Club AFR, p. 19.

> investments to begin modernizing the distribution system, preparing it for integration with smart grid technologies, or for evaluation and possible integration of battery technology. Significant investments to modernize the distribution system could focus on, among other things, the rehabilitation of urban area network systems, the replacement of underground cable, and the upgrade of overhead circuits and substation equipment. These conversions and equipment upgrade projects would benefit the Companies and their customers in terms of reliability, safety, and customer satisfaction.[291]

The Companies are facing significant investments that must be made during the term of ESP IV and beyond, and Rider DMR is necessary for the Companies to make those investments. Sierra Club and other intervenors are mistaken that Rider DMR is unrelated to the Companies' distribution costs, which includes the cost to access capital markets.

Sierra Club's reliance on the Commission's discussion of R.C. 4928.143(B)(2)(h) in AEP Ohio's first ESP Order ("AEP ESP1 Order")[292] also is misguided. Sierra Club quotes the Commission's statement, "While SB 221 may have allowed Companies to include such provisions in its ESP, the intent could not have been to provide a 'blank check' to electric utilities."[293] Notably, Sierra Club fails to include the text that immediately follows this statement. This omission is important; it deletes the Commission's explanation that the last sentence of (B)(2)(h) – requiring that utility and customer interests be aligned – limits the ability of utilities to include distribution provisions in ESPs.[294] Here, the Commission determined in its Fifth Entry on Rehearing that expectations are aligned and thus Rider DMR is not a "blank check."[295] The second portion of the AEP ESP1 Order quoted by Sierra Club, which appears

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[291] Mikkelsen Rehearing Rebuttal Test., p. 5.
[292] *In re Approval of Columbus Southern Power Co. for Approval of an Electric Security Plan*, Case Nos. 08-917-EL-SSO *et al*., Opinion and Order (Mar. 18, 2009).
[293] Sierra Club AFR, p. 20 (citing AEP ESP1 Order, pp. 34-36). This statement actually appears on page 32 of the order.
[294] AEP ESP1 Order, p. 32.
[295] *See* Fifth Entry on Rehearing, p. 90.

two pages later in the Order, simply recognizes that AEP's recovery of the costs of its enhanced vegetation management program should be subject to a prudence review.[296] The Commission's AEP ESP1 Order does not stand for the proposition that all provisions approved under R.C. 4928.143(B)(2)(h) must operate under the same cost-recovery principles as AEP's enhanced vegetation management program.

Sierra Club's misreading of the AEP ESP1 Order is shown by the Commission's subsequent approval of the Companies' Delivery Service Improvement Rider ("Rider DSI") in their first ESP proceeding. Sierra Club relies on the December 19, 2008 Opinion and Order in that proceeding, which questioned Rider DSI for not being cost-based.[297] However, this Order has no precedential value because it was replaced by the Commission's March 25, 2009 Second Opinion and Order.[298] Rider DSI, which was approved under R.C. 4928.143(B)(2)(h), was similar to Rider DMR in that it also provided annual revenue to support the delivery of distribution services without being tied to specific distribution investments.[299] Of course, as with Rider DMR, there were clearly recognized investment needs – and thus distribution costs – justifying the Commission's approval.

Intervenor criticisms that Rider DMR is not an incentive also miss the mark.[300] Sierra Club complains that Rider DMR cannot be an incentive because it is not conditioned on the Companies actually carrying out grid modernization.[301] Yet the Commission had ample

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[296] AEP ESP1 Order, p. 34.
[297] Sierra Club AFR, pp. 20-21.
[298] *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan,* Case No. 08-935-EL-SSO, Second Opinion and Order (March 25, 2009).
[299] Case No. 08-935-EL-SSO, Second Opinion and Order (March 25, 2009).
[300] *See* Sierra Club AFR, pp. 17-19; NOPEC AFR, p. 6
[301] Sierra Club AFR, p. 18. Sierra Club also chides the Commission for not citing case law to support its use of an incentive that is not tied to costs. Sierra Club AFR, p. 18. But R.C. 4928.143(B)(2)(h) has not generated substantial case law during the nine years it has been in effect. The lack of precedent is of no consequence. Neither is FERC's

evidence before it from which it could conclude that Rider DMR will incent the Companies to "focus their innovation and resources on modernizing their distribution systems."[302] Ms. Mikkelsen testified at length and in detail regarding how Rider DMR would help jumpstart distribution grid modernization initiatives.[303] Dr. Choueiki affirmed that Rider DMR will assist the companies in accessing capital markets and thereby procure funds to jumpstart their distribution initiatives.[304] The full extent of the modernization investments to be made has not yet been determined (this awaits future proceedings), but there is no doubt that modernization investments will be significant. And there is no doubt that rehabilitating the Companies' credit metrics before the Companies must seek access to capital markets to fund those significant investments will benefit customers.[305] The Commission did not err in determining that Rider RRS is an incentive.

OCC/NOAC argue that Rider DMR cannot meet the requirements of R.C. 4928.143(B)(2)(h) because the Commission "must determine, *before approving the provision*, that customers' and the distribution utility's expectations are aligned."[306] Yet the Commission followed the plain language of the statute in its Fifth Entry on Rehearing.[307] As part of the Commission's determination to allow Rider DMR in ESP IV, the Commission examined the reliability of the Companies' distribution system and ensured that customers' and the Companies' expectations are aligned.[308] The Commission's findings were supported by the

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incentive program for transmission investment, cited by Sierra Club (Sierra Club AFR, pp. 18-19), which is not designed to jumpstart grid modernization.

302 Fifth Entry on Rehearing, p. 90.
303 Mikkelsen Rehearing Rebuttal Test., pp. 5-9, 16.
304 Choueiki Rehearing Test., p. 15.
305 Mikkelsen Rehearing Rebuttal Test., p. 16.
306 OCC/NOAC AFR, p. 15 (emphasis in original).
307 *See* Fifth Entry on Rehearing, p. 90.
308 Fifth Entry on Rehearing, p. 90.

testimony of both Company witness Mikkelsen and Staff witness Nicodemus.[309] Ms. Mikkelsen explained that the Companies' actual reliability performance has consistently outperformed their reliability standards from 2010 through 2013, and that the results of a 2013 customer perception survey demonstrated customers' perception that distribution reliability is improving and that they are being interrupted less frequently than in the past.[310] Staff witness Nicodemus agreed that the Companies have met the requirements of R.C. 4928.143(B)(2)(h) because "the Companies' reliability expectations are consistent with those of their customers."[311] Accordingly, the record already demonstrates the reliability of the Companies' distribution system and that customers' and the Companies' expectations are aligned. The Commission's finding was not in error.

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

Rider DMR includes an economic development and job retention component by including a requirement that FirstEnergy Corp. keep its corporate headquarters and nexus of operations in Akron, Ohio, for the entire term of Rider DMR or else recovery of revenue under Rider DMR will cease.[312] As a rider that will lead to grid modernization, Rider DMR also promotes economic development through the construction activity required and the benefits provided by a reliable smart grid.[313] However, OCC/NOAC object that Rider DMR should not be considered an economic development and job retention program under R.C. 4928.143(B)(2)(i).[314] OCC/NOAC's arguments lacks merit.

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[309] *See* Direct Testimony of Eileen M. Mikkelsen, pp. 9-11 (Aug. 4, 2014) ("Mikkelsen Direct Test."); Direct Testimony of Jacob Nicodemus, pp. 6-10 (Sept. 18, 2015) ("Nicodemus Direct Test.").
[310] Company Ex. 7 (Mikkelsen Direct Testimony), pp. 9-11.
[311] Nicodemus Direct Test., pp. 6-10. Relying on OCC witness Williams' testimony, OCC/NOAC argue that customers' and the Companies' expectations are not aligned. OCC/NOAC AFR, p. 15. The Companies already thoroughly addressed and refuted that claim, demonstrating that Mr. Williams' assertion was based on the patent misuse of the 2013 customer perception survey undertaken on behalf of the Companies. Companies' Post-Hearing Reply Brief, pp. 228-29.
[312] Fifth Entry on Rehearing, p. 96.
[313] *See* Rehearing Tr. Vol. X, pp. 1818-19 (Mikkelsen Rebuttal Redirect).
[314] OCC/NOAC AFR, pp. 16-17.

OCC/NOAC contend that Rider DMR cannot be an economic development and job retention program because the Companies are compensated through distribution rates for FirstEnergy Service Company expenses allocated to the Companies.[315] As Attorney Examiner Price recognized, the economic development benefits from Rider DMR are entirely separate from an allocation of FirstEnergy Service Company expenses.[316] The Companies' distribution customers pay a portion of the cost of service company employees who provide distribution service to those customers. In contrast, maintaining the FirstEnergy Corp. headquarters in Akron "has an estimated annual economic impact of $568.0 million on Ohio's economy, and directly and indirectly supports approximately 3,407 jobs and $244.6 million in annual payroll throughout the state."[317] In addition, "the local and state tax revenues from FirstEnergy Corp. HQ employees and other supported jobs are estimated at $20.0 million per year."[318] Moreover, Rider DMR would provide other economic development benefits that include: (1) spending on human resources and equipment; (2) a modernized grid, which will help customers better control and manage their energy expenses; and (3) reduced outages and improved reliability.[319] There is no double collection of costs, but a requirement that produces substantial benefits for Ohio in every future year while the headquarters remain in Akron.[320]

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315 OCC/NOAC AFR, p. 16. *See* Rehearing Tr. Vol. X, p. 1753 (Ms. Mikkelsen testifying that an allocation of service company expense may be included in distribution rates, but not service company plant).

316 *See* Rehearing Tr. Vol. X, pp. 1750-52.

317 Murley Rehearing Rebuttal Test., pp. 3-4.

318 Murley Rehearing Rebuttal Test., p. 4.

319 Rehearing Tr. Vol. X, pp. 1818-19 (Mikkelsen redirect).

320 OCC/NOAC improperly rely on a belief stated in Staff's post-hearing brief to support its argument here. *See* OCC/NOAC AFR, p. 17. But statements in a brief are not evidence. *Clark v. Clark*, 2012-Ohio-3249, ¶ 5 (8th Dist. Ct. App. July 19, 2012); *State v. Mathia*, 1992 Ohio App. LEXIS 6217, at *4 (11th Dist. Ct. App. Dec. 11, 1992). And Staff's legal counsel hedged his opinion by stating that it was "arguable" and for the Commission to decide. Staff Post-Hearing Brief, p. 18 (Aug. 15, 2016).

OCC/NOAC also erroneously claim that the headquarters requirement is not an economic development program because the headquarters is already in Akron.[321] Many economic development programs, however, are directed towards maintaining existing economic benefits that are under threat. In determining whether certain provisions of an ESP qualify under R.C. 4928.143(B)(2)(i), the Commission has never limited R.C. 4928.143(B)(2)(i) to new development. Programs that maintain employment or retain industry are (and have been) properly considered to be economic development programs, including the economic development programs in the Companies' ESP I and ESP II.[322] OCC/NOAC are simply wrong that economic development programs must be limited to new development in Ohio. Not surprisingly, OCC/NOAC cite no authority to support their novel reading of R.C. 4928.143(B)(2)(1).

Moreover, regardless of FirstEnergy Corp.'s present intent, the jobs at FirstEnergy Corp.'s headquarters (and, thus, the multiplier effect on other jobs and industry throughout Ohio) are potentially at risk.[323] Ms. Mikkelsen testified:

> What I know from experience is that as a corporation's financial condition deteriorates, they are at increased risk of a change of control. And when a change of control occurs, the headquarters

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[321] OCC/NOAC AFR, p. 16.

[322] *See In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 08-935-EL-SSO, *et al.,* Second Opinion and Order, pp. 13-14 (March 25, 2009) ("ESP I Order") (Rider ELR for existing customers); ESP I Order, p. 14 ($25 million economic development contributions to various projects without requiring proof that businesses would cease operations without those contributions); *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan,* Case No. 10-388-EL-SSO, Opinion and Order, p. 27 (Aug. 25, 2010) ("ESP II Order") (Rider EDR credits to help existing domestic automakers and provide funding to the Cleveland Clinic).

[323] *See* Rehearing Tr. Vol. III, p. 694 (Staff witness Buckley testifying that "[w]ith a multiplier effect of, you know, money being spent, it really helps invigorate the Akron area and the State of Ohio in general.").

> would no longer and the nexus of operations would no longer remain in Akron, Ohio.[324]

The economic development and job retention benefits of the headquarters requirement come from maintaining, against external threats, the FirstEnergy Corp. headquarters and nexus of operations in Akron in future years.

OCC/NOAC also erroneously claim that the headquarters requirement does not satisfy R.C. 4928.143(B)(2)(i) because it is not an electric distribution company program.[325] However, the headquarters requirement constitutes a program of the Companies (as opposed to FirstEnergy Corp.) because the condition that Rider DMR does not continue if the headquarters is moved is a potential loss of revenue to the Companies. Indeed, an entity seeking to acquire FirstEnergy Corp. and move its headquarters would consider those lost revenues as an acquisition cost tied directly to the Companies. All else equal, this makes it more likely that the headquarters and nexus of operations remain in Akron throughout the term of Rider DMR (and provides an independent basis for extending the term of Rider DMR).

c. Rider DMR complies with R.C. 4928.02.

The Commission also reviews ESPs to determine whether they further state policies expressed in R.C. 4928.02.[326] OCC/NOAC claim that Rider DMR does not comply with R.C. 4928.02.[327] OCC/NOAC offer a rambling list of general complaints about Rider DMR. OMAEG includes a similar argument.[328] All of these arguments were previously raised and

[324] Rehearing Tr. Vol. X, p. 1715 (Mikkelsen Rebuttal Cross). The fact that FirstEnergy Corp. has a lease for its headquarters building in Akron is of little consequence, since the primary value at issue is FirstEnergy's people, not its offices. *See* Sierra Club Post-Rehearing Brief, p. 52 (noting lease ending June 2025); OMAEG Post-Rehearing Brief, p. 42 (same). A lease does not prevent the nexus of operations from being moved out of the Akron area.
[325] OCC/NOAC AFR, pp. 16-17.
[326] Fifth Entry on Rehearing, p. 9.
[327] OCC/NOAC AFR, pp. 30-33.
[328] OMAEG AFR, pp. 20-23.

considered by the Commission. The Commission correctly rejected them, finding that Rider DMR complies with R.C. 4928.02.[329] The Commission should make that same finding here.

OCC/NOAC argue that the Commission erred in finding that the DMR would benefit Ohio.[330] OMAEG similarly claims that Rider DMR will diminish, not ensure, the diversity of supplies and suppliers under R.C. 4928.02(C).[331] These arguments were previously rejected. The Commission found:

> Rider DMR promotes state policy to "[e]nsure diversity of electricity supplies and suppliers, by giving consumers effective choices over the selection of those supplies and suppliers and by encouraging the development of distributed and small generation facilities" and to "[e]ncourage innovation and market access for cost-effective supply-and demand-side retail electric service including, but not limited to, demand-side management, time-differentiated pricing, waste energy recovery systems, smart grid programs, and implementation of advanced metering infrastructure."[332]

The Commission also found that:

> Rider DMR, by incentivizing and supporting grid modernization, promotes additional provisions of state policy to: ensure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service; and ensure the availability of unbundled and comparable retail electric service that provides consumers with the supplier, price, terms, conditions, and quality options they elect to meet their respective needs. R.C. 4928.02(A); R.C. 4928.02(B). Finally, the Commission finds that the retention of FirstEnergy Corp.'s headquarters and nexus of operations in Akron, Ohio serves to facilitate the state's effectiveness in the global economy. R.C. 4928.02(N).[333]

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[329] Fifth Entry on Rehearing, p. 122.
[330] OCC/NOAC AFR, p. 30 (citing Fifth Entry on Rehearing at 122, citing Staff Ex. No. 15 at 14-15; R.C. 4928.02(C) and (D)).
[331] OMAEG AFR, pp. 21-22.
[332] Fifth Entry on Rehearing, pp. 122-23.
[333] Fifth Entry on Rehearing, p. 123.

Other than to state their disagreement and cite their own testimony, these parties provide no reason to conclude that the Commission was wrong, especially given the evidence supporting the Commission's finding.

OCC/NOAC and OMAEG next argue that there are no benefits to Ohio because the Commission has not required the Companies to spend all DMR funds directly on grid modernization.[334] The Commission has also considered and rejected this argument.[335] The Commission explained that it would review the Companies' use of Rider DMR funds and declined to adopt further restrictions on DMR funds.[336] The Commission's decision was well founded because earmarking or otherwise restricting the dollars from Rider DMR could make it impossible for the Companies to operate their business appropriately or satisfy credit obligations or meet other cash or capital obligations.[337] The Commission correctly left the decision on which projects to pursue to another case and gave the Companies the necessary discretion to use the Rider DMR funds as necessary.

OCC/NOAC also argue that there is no need to provide credit support to incentivize grid modernization.[338] Once again, this argument was considered and rejected by the Commission. The Companies have provided substantial evidence of the need for credit support.[339] The Commission relied on that evidence in its decision, and specifically discussed the Companies' cash flow needs in the Fifth Entry on Rehearing.[340] The Commission also discussed the effect that a potential credit rating downgrade could have on the Companies.[341] The Commission

[334] OCC/NOAC AFR, p. 30; OMAEG AFR, pp. 20-23.
[335] Fifth Entry on Rehearing, pp. 53-56 (outlining arguments of the parties).
[336] Fifth Entry on Rehearing, p. 96.
[337] Mikkelsen Rehearing Rebuttal Test., pp. 7-9.
[338] OCC/NOAC AFR, p. 31.
[339] *See* Companies' Post-Hearing Brief, pp. 104-113.
[340] Fifth Entry on Rehearing, pp. 62-66.
[341] Fifth Entry on Rehearing, pp. 66-69.

correctly found that Rider DMR was necessary based on the financial situation facing the Companies.

OCC/NOAC also contend that Rider DMR is not necessary because the Companies already committed to filing a grid modernization plan as part of the Third Supplemental Stipulation in this case.[342] OCC/NOAC fail to take into account the realities associated with the Companies' current financial situation. In light of that situation, there are substantial questions about whether the Companies could fund the grid modernization activities included in that plan at reasonable cost without the rider.

d. Rider DMR is not an unlawful subsidy.

Some intervenors argue that Rider DMR is an unlawful subsidy. Notably, these parties aren't consistent regarding what is being subsidized or how that subsidy occurs. On the one hand, they claim that Rider DMR will subsidize FES.[343] These intervenors are short on details about exactly how that would happen. It appears that they believe that FES would get the money indirectly via FirstEnergy Corp.[344] On the other hand, these parties also claim that FirstEnergy Corp. is receiving the subsidy. To support this claim, they focus on the fact that one of the purposes of Rider DMR is to provide credit support to FirstEnergy Corp. and that there is no "guarantee" that any money would be spent on any distribution expense, especially any grid modernization expense.[345] At each turn, these parties are wrong; their arguments are either wholly without support or based on a selective slice of the record.

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[342] OCC/NOAC AFR, p. 31.
[343] OEC/EDF/ELPC AFR, pp. 16-19; OMAEG AFR, pp. 15-20; P3/EPSA AFR, pp. 11-13; NOPEC AFR, pp. 7-8; OCC/NOAC AFR, pp. 32-34.
[344] OCC/NOAC AFR, p. 33; P3/EPSA AFR , p. 11.
[345] OCC/NOAC AFR, p. 33; OMAEG AFR, pp. 16-17; P3/EPSA AFR, p. 11.

For example, NOPEC claims that Rider DMR will directly benefit FES.[346] However, NOPEC's theory of how FES would benefit is anything but direct. NOPEC claims that Rider DMR revenues will address FirstEnergy Corp. financial problems that were caused by FES,[347] and therefore Rider DMR will "provide[] a direct benefit to FES."[348] NOPEC's claims that FES's cash flow is responsible for the CFO shortfall lack any record support. Indeed, FES's CFO to debt metric is currently 24 percent, with Moody's projecting it will fall to 16 percent by 2018. Thus, FES's CFO to debt ratio is (and is projected to be) higher than FirstEnergy Corp.'s CFO to debt ratio.

NOPEC further argues that by improving FirstEnergy Corp's credit rating, FES will benefit, e.g., by being able to post less collateral.[349] This patently absurd subsidy theory touches on nothing unique to Rider DMR. Under NOPEC's theory, any source of revenue for the Companies, such as base distribution rates, would qualify as an unlawful subsidy to FES.

P3/EPSA and OEC/EDF/ELPC contend that there is no assurance that Rider DMR revenues will not be used for a dividend to FirstEnergy Corp. and thus a possible subsidy to FES.[350] There are several things wrong with this argument. First, as noted with NOPEC's argument, under these theories, any source of revenue for the Companies would qualify as an unlawful subsidy to FES.

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[346] NOPEC AFR, p. 7.

[347] In arguing that responsibility for FirstEnergy Corp.'s credit shortfall should not be allocated to the Companies, Sierra Club also asserts incorrectly that FES is the cause of FirstEnergy Corp.'s CFO shortfall. Sierra Club, pp. 37-38. As previously noted, *see supra* pp. 23-24, Sierra Club improperly and selectively uses the S&P report in its attempt to support this argument. When fairly read, however, the S&P report squarely recommends the very relief provided by Rider DMR.

[348] NOPEC AFR, p. 8.

[349] NOPEC AFR, p. 8 (citing OCC Ex. 46 (Kahal's Rehearing Rebuttal Test., pp. 4-5, 12-13).

[350] P3/EPSA AFR, p. 11; OEC/EDF/ELPC AFR, pp. 16-19.

Second, the Companies have numerous substantial financial obligations, including debt obligations, pension funding and capital commitments related to grid modernization. [351] In fact, two of the Companies have not issued a dividend recently.[352] Third, even if these dividends were issued, FirstEnergy Corp. management has stated that FirstEnergy Corp. is not going to make any more investments in FES going forward.[353] In sum, there is simply no evidence to show that any Rider DMR revenues would go to FES.

Similarly, OCC/NOAC contend that Rider DMR implicates the same concerns that caused the FERC to rescind the waiver of affiliate power sales restrictions granted to FirstEnergy Corp.'s market-regulated power sales affiliates for the PPA proposed to underlie Rider RRS.[354] OCC/NOAC fail to explain how Rider DMR conceivably relate to wholesale sales of power, the subject of the FERC rules.

Perhaps realizing the lack of evidentiary support for any subsidy to FES, OCC/NOAC alternatively argue that Rider DMR subsidizes FirstEnergy Corp. OCC/NOAC contend that Rider DMR's "primary objective" is to provide credit support to FirstEnergy Corp. to enable that company to maintain its credit rating.[355] Repeating arguments in their Post-Hearing Brief on rehearing,[356] OCC/NOAC rely upon the testimony of Staff witness Buckley, who merely calculated Staff's recommended amount of Rider DMR. They ignore testimony from Staff witness Choueiki, who actually made the Rider DMR recommendation and specifically testified to Rider DMR's purposes. As the Companies have previously shown, Dr. Choueiki's testimony made clear that Rider DMR relates to distribution service, and that Rider DMR is accompanied

[351] Rehearing Tr. Vol. X., pp. 1622-23 (Mikkelsen Rebuttal Cross).
[352] Rehearing Tr. Vol. VIII, p. 1400 (Kahal Rebuttal Cross).
[353] Rehearing Tr. Vol. I, p. 158 (Mikkelsen Cross).
[354] OCC/NOAC AFR, p. 17.
[355] OCC/NOAC AFR, p. 18.
[356] OCC/NOAC Post-Hearing Br., p. 39.

by a directive to modernize the distribution grid.[357] These parties completely ignore all this record evidence of Staff's objectives for Rider DMR. As noted, these parties also overlook that: (1) the Companies, having filed a grid modernization plan, will be obligated to implement that plan once it is approved;[358] (2) grid modernization will require substantial capital – an amount well beyond what the Companies may recover under Rider DMR;[359] (3) the Companies will thus need to access the capital markets;[360] (4) how successfully and how costly the Companies may be able to access the capital markets depends on the Companies' credit ratings;[361] and (5) the Companies' ratings, directly and indirectly, depend on FirstEnergy Corp.'s credit rating.[362] Thus, shoring up FirstEnergy Corp.'s credit rating helps the Companies and their customers.

OCC/NOAC further claim that there is no assurance that Rider DMR revenues will be spent on distribution modernization or other initiatives by the Companies.[363] As noted, Rider DMR is accompanied by: (1) a directive by the Commission to modernize the distribution grid; and (2) expectations by the Commission that the Companies will make progress in implementation.[364] As also noted, the Companies will need more funds for their grid modernization than Rider DMR can provide.[365] Thus, Rider DMR can't be the source of all grid modernization capital. Further, Company witness Mikkelsen explained that the Companies intend to use capital obtained through the credit support provided by Rider DMR revenues for

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[357] *See* Companies' Post-Hearing Reply Br., pp. 94-95.
[358] Mikkelsen Rehearing Rebuttal Test., pp. 5-6.
[359] Mikkelsen Rehearing Rebuttal Test., p. 15; Rehearing Tr. Vol. X, pp. 1622-23 (Mikkelsen Cross).
[360] Mikkelsen Rehearing Rebuttal Test., p. 7-9
[361] Mikkelsen Rehearing Rebuttal Test., p. 7.
[362] Buckley Rehearing Test., p. 6; Rehearing Tr. Vol. I, pp. 133-34 (Mikkelsen Cross); Mikkelsen Rehearing Rebuttal Test., p. 7, n. 7.
[363] OCC/NOAC AFR, p. 18.
[364] Fifth Entry on Rehearing, pp. 87-89
[365] Mikkelsen Rehearing Rebuttal Test., p. 15; Rehearing Tr. Vol. X, pp. 1622-23 (Mikkelsen Cross).

distribution grid modernization, among other uses.[366] Notwithstanding the practical difficulty of earmarking Rider DMR dollars for grid modernization efforts,[367] Company witness Mikkelsen explained that the Companies understand Staff's expectation that Rider DMR revenues would be used to jump-start grid modernization.[368]

OCC/NOAC argue that because of the Commission's refusal to restrict the uses of Rider DMR revenues, customers have no protection relating to how the monies will be used.[369] Such a requirement is unnecessary, and fails to recognize the degree of authority the Commission has to review the Companies' books. As Company witness Mikkelsen explained, the Commission has broad discretion to review the Companies' operations.[370] As Company witness Mikkelsen also explained, the Commission has ample existing authority to review how the Company is using these funds.[371] Neither Staff nor the Companies have ever proposed that Rider DMR somehow be excluded from the Commission's existing review authority over the Companies.

Several parties make bald assertions that absent a restriction on the use of Rider DMR revenues, Staff's periodic review is inadequate to assure Rider DMR revenues are used properly.[372] P3/EPSA argue that the Commission's position is inconsistent, because a lack of specific restrictions on the use of Rider DMR revenues cannot be reconciled with a Staff review of uses of the funds to assure that the funds are used directly or indirectly for grid

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[366] *See* Companies' Post-Hearing Reply Br., p. 96-97; *see* Rehearing Tr. Vol. X, p. 1607 (Mikkelsen Rebuttal Cross). To be sure, Ms. Mikkelsen also mentioned other possible uses for these funds, e.g., refinancing soon to mature debt or payment towards pension liabilities. Rehearing Tr. Vol. X, p. 1607 (Mikkelsen Rebuttal Cross); Mikkelsen Rehearing Rebuttal Test., p. 9. Both types of outlays are legitimate distribution-related expenses.
[367] Rehearing Tr. Vol. X, pp. 1605-06 (Mikkelsen Rebuttal Cross).
[368] Rehearing Tr. Vol. X, pp. 1609-10 (Mikkelsen Rebuttal Cross).
[369] OCC/NOAC AFR, p. 33.
[370] Rehearing Tr. Vol. X, p. 1609 (Mikkelsen Rebuttal Cross).
[371] Rehearing Tr. Vol. X, p. 1609 (Mikkelsen Rebuttal Cross) ("The companies are not including a provision [for Commission review] nor did the staff. Certainly, the Commission is free to review whatever they would like with respect to the companies' operations.").
[372] OCC/NOAC AFR, p. 19; P3/EPSA AFR, p. 12; OMAEG AFR, p. 15.

modernization.[373] But there is no inconsistency. Given the many needs that the Companies have for the funds, and given that the Companies' grid modernization efforts will require access to the capital markets, it makes little sense to restrict Rider DMR funds to be used for any specific purpose. Further, because restrictions on funds may be discounted for purposes of credit rating agencies' CFO to debt ratios, such restrictions would run counter to one of the rider's purposes: *i.e.*, to improve the Companies' and FirstEnergy Corp.'s CFO to debt ratios in order to improve their credit ratings. Nevertheless, the Commission can review the Companies' expenditures to make sure that the Companies are prudently spending funds. To the extent that the Companies do not spend Rider DMR funds directly for grid modernization, the Commission can review what the Companies have done to assure that the Companies are: (1) providing safe, reliable and reasonably priced service; (2) maintaining a healthy financial position; and (3) putting themselves in a position to move forward with grid modernization and other distribution infrastructure projects.

OMAEG argues that there is no evidence that Rider DMR is necessary to support FirstEnergy Corp's credit rating.[374] To the contrary, the record shows that the Companies' credit ratings should be a cause for concern. CEI and Toledo Edison are rated one notch above non-investment grade, while Ohio Edison is three notches above non- investment grade.[375] All have a negative outlook.[376] Further, FirstEnergy Corp. is at risk of falling below investment grade.[377] Moody's has even cautioned that a negative rating action may result if the Commission's actions in the case do not allow FirstEnergy Corp. to achieve an appropriate credit profile in a timely

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[373] P3/EPSA AFR, p. 13.
[374] OMAEG AFR, pp. 16-17.
[375] Rehearing Tr. Vol. X, p. 1716 (Mikkelsen Rebuttal Cross). *See also* Rehearing Tr. Vol. X, p. 1611 (Mikkelsen Rebuttal Cross); Mikkelsen Rehearing Rebuttal Test., pp. 6-7.
[376] Buckley Rehearing Test., Att. 3, p. 2; Direct Ex. 1, p. 4.
[377] Buckley Rehearing Test., Att. 3, p. 2; Direct Ex. 1, p. 4

manner.[378] This is important because the ratings of FirstEnergy Corp. influence the Companies' ratings.[379] Under S&P's "family approach" to ratings, a downgrade of FirstEnergy Corp. would result in a downgrade of the Companies as well.[380] While Moody's rates each legal entity separately, a non-investment grade parent is credit negative to the subsidiaries.[381] The record evidence shows that the consequences of additional credit downgrades, especially to a non-investment grade rating, could be severe. The Companies will have difficulty obtaining financing in the capital markets to make the necessary investments in distribution service, and will be forced to recover the increased cost of debt from customers.[382]

After arguing that no credit support is necessary, OMAEG also advances the contradictory argument that there is no guarantee Rider DMR will prevent a downgrade of either FirstEnergy Corp's or the Companies' credit rating.[383] OMAEG made this same argument previously.[384] As the Companies previously explained, OMAEG's argument falsely attributes to the Companies a position that the Companies never took. The Companies have repeatedly shown that a properly constructed Rider DMR, *along with actions taken by the Companies and by FirstEnergy Corp. as a whole*, should avert a credit rating downgrade, by collectively providing the improvement the rating agencies want.[385] There is no dispute that more than Rider DMR is needed to avert a credit rating downgrade. That is why for the last several years

[378] Direct Ex. 1, p. 3
[379] Buckley Rehearing Test., p. 6; Rehearing Tr. Vol. I, pp. 133-134 (Mikkelsen Cross); Mikkelsen Rehearing Rebuttal Test., p. 7 n. 7.
[380] Buckley Rehearing Test., p. 6; Rehearing Tr. Vol. I, pp. 133-134 (Mikkelsen Cross).
[381] Mikkelsen Rehearing Rebuttal Test., p. 7 n. 7.
[382] See Companies' Post-Rehearing Reply Br., pp. 104-109.
[383] OMAEG AFR, pp. 17-18.
[384] OMAEG Post-Rehearing Brief, pp. 37-38.
[385] Rehearing Tr. Vol. X, pp. 1790-91 (Mikkelsen Rebuttal Cross).

FirstEnergy Corp. implemented numerous aggressive corporate-wide initiatives described by Company witness Mikkelsen.[386]

OMAEG and OEC/EDF/ELPC argue, as they've done before,[387] that the record does not support a finding that FirstEnergy Corp. has taken steps to address its financial situation, or that FirstEnergy Corp.'s other constituents are doing their part to provide credit support.[388] The record contains ample evidence otherwise. Company witness Mikkelsen identified a variety of substantial ongoing contributions by employees, management, shareholders and customers of other FirstEnergy utilities in supporting FirstEnergy Corp. as an investment grade entity.[389] FirstEnergy Corp. has changed medical and other benefits[390] and staff reductions have occurred.[391] A Cash Flow Improvement Program ("CFIP") has been instituted.[392] The CFIP is expected to yield hundreds of millions of dollars in savings over the next several years.[393] OCC witness Kahal admitted that "[t]he target [of the CFIP] I've seen, is 200 million; something along those lines."[394] Shareholders have also contributed significantly. The annual dividend from FirstEnergy Corp. has been reduced from $2.20 to $1.44 per share – a reduction equaling over $300 million annually.[395] At hearing, Mr. Kahal acknowledged that FirstEnergy Corp.'s dividend had been reduced by "roughly a third" since 2014.[396] He further admitted that CEI has not paid a dividend to FirstEnergy Corp. since April 2015 and Toledo Edison had not done so

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386 Mikkelsen Rehearing Rebuttal Test., pp. 17-18.
387 OMAEG Post-Rehearing Brief, pp. 50-51; EDF/OEC Rehearing Brief, pp. 30, 34-35.
388 OEC/EDF/ELPC AFR, pp. 18-19; OMAEG AFR, pp. 18-20.
389 Mikkelsen Rehearing Rebuttal Test., pp. 17-18.
390 Mikkelsen Rehearing Rebuttal Test., p. 17.
391 Mikkelsen Rehearing Rebuttal Test., p. 17.
392 Mikkelsen Rehearing Rebuttal Test., p. 17.
393 Mikkelsen Rehearing Rebuttal Test., p. 17.
394 Rehearing Tr. Vol. VIII, p. 1401 (Kahal Rebuttal Cross).
395 Mikkelsen Rehearing Rebuttal Test., p. 17.
396 Rehearing Tr. Vol. VIII, p. 1400 (Kahal Rebuttal Cross).

since February 2014.[397] In addition, FirstEnergy Corp. has issued equity through stock investment and other employee benefits plans and further continues to assess the appropriateness and timing associated with issuing additional equity.[398]

Customers of FirstEnergy Corp.'s other utilities have also contributed substantially to this effort. In New Jersey, the FirstEnergy utility will recover $736 million for storm costs incurred in 2011 and 2012.[399] That utility also has a pending rate case seeking an increase of $142 million annually.[400] In Pennsylvania, the four FirstEnergy utilities obtained approval in 2015 of rate increases totaling $293 million annually, and have additional rate cases pending that seek total increases of $439 million annually.[401] The Pennsylvania utilities also have capital recovery filings that will enable a $245 million rate increase over five years.[402] In West Virginia, a rate increase and vegetation management rider combined generate almost $100 million in additional

[397] Rehearing Tr. Vol. VIII, p. 1400 (Kahal Rebuttal Cross).
[398] Mikkelsen Rehearing Rebuttal Test., p. 17.
[399] Mikkelsen Rehearing Rebuttal Test., p. 18. Indeed, as Ms. Mikkelsen explained at hearing:

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

Rehearing Tr. Vol. X, p. 1646 (Mikkelsen Rebuttal Cross).
[400] Mikkelsen Rehearing Rebuttal Test., p. 18. *See also* Rehearing Tr. Vol. X, p. 1650 (Mikkelsen Rebuttal Cross) ("The purpose of the base rate case proceeding was to provide credit support, additional revenues for JCP&L, which, in turn, would provide credit support to FirstEnergy Corp.").
[401] Mikkelsen Rehearing Rebuttal Test., p. 18. *See also* Rehearing Tr. Vol. X, pp. 1654-58 (Mikkelsen Rebuttal Cross); Rehearing Tr. Vol. VIII, p. 1399 (Kahal Rebuttal Cross).
[402] Mikkelsen Rehearing Rebuttal Test., p. 18.

revenue annually.[403] At hearing, Ms. Mikkelsen explained how a rate increase for any FirstEnergy utility provides credit support.[404]

e. Rider DMR does not collect transition revenues.

Citing recent Supreme Court cases,[405] intervenors attempt to argue that Rider DMR will collect unlawful transition charges.[406] These intervenors argue that these cases stand for the propositions that: (1) the Commission must look to the "nature of the revenue" received[407] and; (2) funds that provide financial support to a utility's corporate parent must be considered transition revenues.[408]

As the Companies have previously demonstrated,[409] the Supreme Court decisions that intervenors rely on are inapposite. For example, in the case involving AEP Ohio, the rider at issue was "designed to generate enough revenue . . . to achieve a certain rate of return on [the Company's] generation assets as it transitions to full auction pricing.[410] There was a similar rider in the case involving DP&L.[411]

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

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

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

[404] Rehearing Tr. Vol. X, p. 1664 (Mikkelsen Rebuttal Cross). See also Rehearing Tr. Vol. X, p. 1642 (Company witness Mikkelsen explaining that "I think that any time a utility company makes a filing that includes a return on investment, that return on investment serves to provide credit support to that company.").

[405] *See In re Application of Dayton Power & Light Co.,* 2016-Ohio-3490 (June 20, 2016) ("*DP&L SSR* Decision"); *In re Application of Columbus Southern Power Co.,* 2016-Ohio-1608 (April 21, 2016) ("*AEP RSR* Decision").

[406] OCC/NOAC AFR, pp. 10-13; OEC/EDF/ELPC AFR, pp. 12-16; OMAEG AFR, pp. 28-30; NOPEC AFR, pp. 9-12; Sierra Club AFR, pp. 22-23.

[407] OMAEG AFR, p. 29; NOPEC AFR, p. 10

[408] OCC/NOAC AFR, pp. 12-13; OEC/EDF/ELPC AFR, pp. 12-13;

[409] *See* Companies Post-Hearing Brief, pp. 68-71 (Feb. 16, 2016).

[410] *AEP RSR* Decision, 2016-Ohio-1608, ¶23.

[411] *In the Matter of the Application of The Dayton Power and Light Company for Approval of Its Electric Security Plan,* Case No. 12-426-EL-SSO, *et al.*, Opinion & Order, p. 16 (Sept. 4, 2013).

Here, Rider DMR has nothing to do with generation assets. This key fact obliterates any claim that Rider DMR recovers transition costs. Under SB3, the only things subject to any transition were generation services and assets. These services and these assets, which prior to SB3 had been fully regulated, now were required to participate in the competitive markets.[412] The recovery of transition costs was allowed under SB3 to assure that utilities recovered costs incurred in the establishment and operation of regulated generation, which costs would not be recoverable in a competitive market.

As a distribution-related rider, Rider DMR, by definition, cannot and does not recover transition costs. As Company witness Mikkelsen testified, the likely uses of Rider DMR revenues would be for things like grid modernization or other capital projects, funding pension liabilities or retiring debt.[413] All of these are legitimate distribution-related expenses.

Given these facts, intervenors are left with rank speculation that there may be some possibility that Rider DMR revenues could in some way end up helping FES.[414] But the record shows that there is no means by which the Companies could directly transfer any funds to FES.[415] Company witness Mikkelsen testified, "There are no contracts or any other form of an agreement between the Companies and FES" that would enable the Companies to share or transfer monies recovered under either rider with FES.[416] As Ms. Mikkelsen again explained at hearing, "I'm not aware of any mechanism within the companies' organization that would allow them to share dollars collected with FES."[417]

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[412] R.C. 4928.01, *et seq*.
[413] Rehearing Tr. Vol. I, pp. 208, 226, 227 (Mikkelsen Cross); Rehearing Tr. Vol. X, p. 1607 (Mikkelsen Rebuttal Cross).
[414] OCC/NOAC AFR, pp. 10-13; OMAEG AFR, p. 29; Sierra Club AFR, pp. 22-23.
[415] Rehearing Testimony of Eileen M. Mikkelsen, p. 11 (May 2, 2016) ("Mikkelsen Rehearing Test.").
[416] Mikkelsen Rehearing Test., p. 11.
[417] Rehearing Tr. Vol. I, p. 226 (Mikkelsen Cross). *See also* Rehearing Tr. Vol. I, pp. 208; 227 (Mikkelsen Cross).

To be sure, Company witness Mikkelsen could not preclude the theoretical possibility that the Companies could issue a dividend to FirstEnergy Corp. But the notion that Rider DMR could, via such a dividend, support FES founders on the facts.

First, as noted, CEI has not paid a dividend to FirstEnergy Corp. since April 2015 and Toledo Edison had not done so since February 2014.[418]. Further, as also noted, the Companies have hundreds of millions of dollars in expenses, including significant dollars for grid modernization, $1.1 billion in debt maturing, and $750 million to $1 billion in pension funding commitments, among other things.[419] .

Second, Ms. Mikkelsen testified without rebuttal that FirstEnergy Corp. management had stated that FirstEnergy Corp. is no longer willing to provide financial support to FES and that those business must be self-sustaining.[420] Thus, even if there were any dividends issued by the Companies, there is no intend to use those funds to support FES.

Third, as Ms. Mikkelsen further testified, it is difficult to "paint [] dollars,"[421] *i.e.,* to trace specific revenue received through Rider DMR or any other rate. Thus, if the mere fact that the Companies might issue a dividend to FirstEnergy Corp. means that revenues paid to the Companies constitute recovery of transition costs, then the Companies could never lawfully charge customers any rate to customers and provide any dividend to FirstEnergy Corp. That is not and has never been the law.

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[418] Rehearing Tr. Vol. VIII, p. 1400 (Kahal Rebuttal Cross).
[419] Rehearing Tr. Vol. X, pp. 1622-23 (Mikkelsen Rebuttal Cross).
[420] Rehearing Tr. Vol. I, p. 158 (Mikkelsen Cross).
[421] Rehearing Tr. Vol. X, pp. 1605-06 (Mikkelsen Rebuttal Cross).

f. Intervenors' arguments based on R.C. 4905.22 were properly rejected.

OCC/NOAC and OMAEG object to the Commission's determination that R.C. 4905.22 does not apply to an ESP.[422] Yet R.C. 4928.143 expressly provides that ESPs may include any of the provisions authorized in R.C. 4928.143(B)(2) "[n]otwithstanding any other provision of Title XLIX of the Revised Code to the contrary," with limited exceptions not applicable here.[423] R.C. 4905.22 is generally applicable to traditional base rate cases, while an ESP is governed only by R.C. 4928.141 and 4928.143. Electric distribution utilities apply to the Commission to establish a Standard Service Offer in accordance with R.C. 4921.142 or 4928.143, and R.C. 4928.143 specifies the components that an ESP may include ***notwithstanding*** any other provision of Title 49, including R.C. 4905.22. Thus, the Commission did not err in finding that R.C. 4905.22 does not apply to provisions approved under R.C. 4928.143(B)(2)(h).[424]

OCC/NOAC's reliance on *State ex rel. Carmean v. Bd. of Educ.*, 170 Ohio St. 415, 165 N.E.2d 918 (1960), is surprising given that it supports the Commission's finding in this proceeding. The Court in *Carmean* quoted the definition in *Webster's New International Dictionary* of "notwithstanding" as meaning "without prevention or obstruction from or by; in spite of."[425] Relying on that definition, the Court found that the use of "notwithstanding" in a statute meant that that statute clearly took precedence over another statute.[426] The same is true here: R.C. 4928.143(B)(2)(h) takes precedence over R.C. 4905.22 because R.C.

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[422] OCC/NOAC AFR, pp. 36-37; OMAEG AFR, pp. 24-25.
[423] R.C. 4928.143(B). The only exceptions are R.C. 4928.143(D), R.C. 4928.20(I), (J), and (K), R.C. 4928.64(E), and R.C. 4928.69. R.C. 4928.143(B).
[424] Fifth Entry on Rehearing, p. 131.
[425] *State ex rel. Carmean v. Bd. of Educ.*, 170 Ohio St. 415, 422, 165 N.E.2d 918 (1960).
[426] *Carmean*, 170 Ohio St. at 422.

4928.143(B)(2)(h) applies in the context of an ESP without prevention or obstruction by, and in spite of, R.C. 4905.22.[427]

Citing *In re Dayton Power & Light*, 2016-Ohio-3490 (June 20, 2016), OCC/NOAC also misleadingly suggest that the Ohio Supreme Court recently refused to apply the notwithstanding language in R.C. 4928.143(B) to trump other parts of Title 49. Yet the Court's decision in that appeal simply reversed the Commission's order on the authority of *In re Application of Columbus S. Power Co.*, 2016-Ohio-1608 (April 21, 2016). In both appeals, the "notwithstanding" clause in R.C. 4928.143(B)(2)(h) was not at issue. Indeed, applicability of the "notwithstanding" clause in R.C. 4928.143(B) was not a question preserved on appeal.[428] Notably, five justices opined that the "notwithstanding" clause in R.C. 4928.143(B) appears to create an exception to other Title 49 provisions.[429] Thus, the Court's recent dicta supports the Commission's findings here.

Applying R.C. 4928.143(B) as written does not mean, as claimed by OCC/NOAC, that "the PUCO could authorize provisions in an ESP that could result in virtually unlimited charges to customers" or that the ESP4 violates R.C. 4928.02.[430] Nor does it mean, as claimed by OMAEG, that ESPs are exempt from consumer protections.[431] To the contrary, although R.C. 4905.22 is inapplicable, the Commission must apply the statutory test that applies to ESPs: whether "the electric security plan so approved, including its pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, is more favorable in the aggregate as compared to the expected results that would otherwise apply under section

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[427] *See also State v. Rush*, 83 Ohio St.3d 53, 57-58, 1998-Ohio-423, 697 N.E.2d 634 ("notwithstanding" expresses General Assembly's intent that a special provision takes precedence over a general provision).
[428] *In re Application of Columbus S. Power Co.*, 2016-Ohio-1608, ¶ 38 n. 3 and ¶ 77.
[429] *In re Application of Columbus S. Power Co.*, 2016-Ohio-1608, ¶ 38 n. 3 and ¶¶ 76-79.
[430] OCC/NOAC AFR, p. 37.
[431] *See* OMAEG AFR, p. 25.

4928.142 of the Revised Code."[432] The ESP v. MRO test is the sole standard for reviewing the reasonableness of charges included in ESPs.[433]

Leaving aside the legal flaws in this position, the intervenors are merely seeking to substitute their judgment for the Commission's as to the advantages of Rider DMR. Indeed, OMAEG argues that Rider DMR violates R.C. 4905.22 because OMAEG disagrees with how Rider DMR revenues are calculated or used.[434] Given the lack of merit of each of these objections (discussed above), the Commission is more than justified in finding that R.C. 4905.22 has not applicability to Rider DMR.

2. The intervenors' criticisms of the energy efficiency provisions of the Fifth Entry on Rehearing mostly lack merit.

a. The Commission should restore the Companies' ability to recover up to $25 million of shared savings annually on an after-tax basis and the Companies should therefore be able to budget toward the stipulated goal of 800,000 MWh of annual energy efficiency savings rather than the statutory mandate.

OEC/EDF/ELPC argue that the Commission erred by not requiring the Companies to comply with their obligation under the Third Supplemental Stipulation to "strive to achieve 800,000 MWh of annual energy savings."[435] In their own Application for Rehearing, the Companies explained that if the Commission grants rehearing to authorize the increase in the shared savings cap to $25 million annually, the Commission should also affirm its March 31 Order approving the 800,000 MWh goal for purposes of the Companies' 2017-19 EE/PDR

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[432] R.C. 4928.143(C)(1).

[433] In addition, the Commission has also reviewed ESPs with regard to the State policies set forth in R.C. 4928.02. *See, e.g.*, Case No. 11-346-EL-SSO, Opinion and Order, p. 13 (Aug. 8, 2012) ("In reviewing AEP-Ohio's application, the Commission . . . will be guided by the policies of the state as established by the General Assembly in Section 4928.02, Revised Coded."); *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan,* Case No. 12-1230-EL-SSO, Opinion and Order, p. 6 (July 18, 2012) ("ESP III Order") (same). That statute lists a number of customer-oriented policies.

[434] OMAEG AFR, pp. 25-28.

[435] OEC/EDF/ELPC AFR, pp. 23-25.

portfolio program.[436] Accordingly, the Companies agree with OEC/EDF/ELPC's position, *provided* that the Commission also grants rehearing to authorize the increase in the shared savings cap to $25 million annually.

b. The Companies should collect lost distribution revenue arising under the Customer Action Program.

OEC/EDF/ELPC contend that the Commission unreasonably allowed the Companies to recover lost distribution revenues based on energy savings measured through the Customer Action Program ("CAP") without explaining its reasoning, in violation of R.C. 4903.09.[437] OEC/EDF/ELPC fail to recognize that the Commission did, in fact, address this issue previously, in its March 31 Order. There, the Commission recognized that the recovery of lost distribution revenues arising under the CAP is: (1) an integral part of the Stipulated ESP IV; and (2) an energy efficiency program authorized by R.C. 4928.662 and contained in the Companies' Commission-approved EE/PDR Portfolio Plan in Case No. 12-2190-EL-POR.[438] Further, the CAP identifies kWh savings as a result of energy efficiency being undertaken by customers. Just like all other Commission-approved energy efficiency programs, these customer savings will give rise to lost distribution revenue.[439] In addition, similar to all other Commission-approved energy efficiency programs, savings arising from the CAP would also be subject to the same measurement and verification protocols before any savings, which would lead to lost distribution revenues, may be counted.[440]

OEC/EDF/ELPC have not provided an adequate basis for the Commission to grant rehearing. The CAP is a Commission-approved energy efficiency program, and, therefore, meets

[436] Companies' AFR, pp. 29-31.
[437] OEC/EDF/ELPC AFR, pp. 29-30.
[438] March 31 Order, p. 107.
[439] Hearing Tr. Vol. III, p. 541 (Mikkelsen Cross).
[440] Hearing Tr. Vol. III, p. 559 (Mikkelsen Cross).

the standard set out by the Commission related to the ability to recover lost distribution revenues.[441] Because the CAP is an approved energy efficiency program specifically authorized by SB 310, and OEC/EDF/ELPC have not presented any evidence as to why this energy efficiency program should be treated differently from other approved energy efficiency programs, rehearing should be denied.

c. The Commission properly allowed customers who have opted out of EE and PDR programs to still participate in Rider ELR program and receive credits thereunder.

OEC/EDF/ELPC contend that the Commission unlawfully and unreasonably held that customers may receive credits for providing peak demand reduction through Economic Load Response Rider ("Rider ELR"), even after having opted out of the Companies' Energy Efficiency and Peak Demand Reduction ("EE/ PDR") programs.[442] As the Companies demonstrated previously, Rider ELR customers may opt-out of the Companies' EE/PDR Portfolio Plans and continue to receive Rider ELR credits because those credits do not "arise from" the Companies' EE/PDR Portfolio Plans.[443] To the contrary, those credits will be authorized components of, and will arise from, Stipulated ESP IV. Indeed, they were created in the Companies' ESP I – as both an economic development program and an energy efficiency program under R.C. 4928.143(B)(2)(i) – and were continued as authorized ESP components in the Companies' ESP II and ESP III.[444] The Rider ELR credits approved in ESP I pre-dated the Companies' first EE/PDR Portfolio Plan by approximately two years. Because Rider ELR credits

[441] *See* 2011 EE/PDR Order, p. 21.
[442] OEC/EDF/ELPC AFR, pp. 25-29.
[443] Companies' Post-Hearing Reply Brief (Feb. 26, 2016), pp. 296-97.
[444] ESP I Order, pp. 10, 17-18 (approving Rider ELR as proposed by the Companies and as modified by a stipulation); ESP II Order, p. 45 ("The Commission notes that continuation of Riders ELR and OLR has been one objective of several parties in this proceeding since the filing of the *MRO Case*. The recommendation to continue Riders ELR and OLR was the result of good faith negotiations between those parties and the other signatory parties to the Combined Stipulation."); ESP III Order, pp. 37-38.

do not arise from the Companies' EE/PDR Portfolio Plan, Stipulated ESP IV does not authorize opt outs and therefore does not violate R.C. 4928.6613. Instead, Stipulation ESP IV simply makes clear that Rider ELR customers may opt-out while continuing to receive the benefits of Stipulated ESP IV. For those reasons, the Commission should deny rehearing on this issue.

V. STIPULATED ESP IV, AS MODIFIED BY THE FIFTH ENTRY ON REHEARING, IS MORE FAVORABLE IN THE AGGREGATE THAN THE EXPECTED RESULTS OF AN MRO.

A. Stipulated ESP IV, As Modified By The Commission, Is Quantitatively More Favorable Than The Expected Results Of An MRO.

In its Fifth Entry on Rehearing, the Commission correctly found that Stipulated ESP is quantitatively more favorable than the expected results of an MRO.[445] With the addition of Rider DMR, Stipulated ESP IV is more beneficial than an MRO by at least \$51.1 million.[446] Further, Riders DMR and DCR do not add quantitative costs to the Stipulated ESP IV. Here, the Companies would recover the equivalent of any Rider DMR or Rider DCR costs under either an ESP or MRO. As a result, those costs are not included in the ESP v. MRO analysis.[447]

Intervenors, nonetheless, argue that the Commission erred in omitting Rider DMR and Rider DCR costs from its quantitative analysis. In support of this contention, intervenors raise a number of arguments that the Commission has already rejected. They should be rejected again.

1. Revenues collected under Rider DMR should be excluded from the quantitative analysis.

Consistent with its precedent, the Commission could properly determine that the revenues equivalent to Rider DMR revenues could be recovered in a base rate case and thus that Rider DMR was "a wash" for purposes of the ESP v. MRO test as a result. The Commission

[445] Fifth Entry on Rehearing, pp. 161-63.
[446] Mikkelsen Rehearing Rebuttal Test., p. 20; Rehearing Testimony of Tamara S. Turkenton, p. 3 (June 29, 2016) ("Turkenton Rehearing Test."). As noted by the Commission in the March 31 Order at p. 119, "the low-income funding furthers state policy by protecting at-risk populations as provided by R.C. 4928.02(L)."
[447] *See*, *e.g.*, March 31 Order, p. 119.

has previously held that when an electric distribution utility would recover the equivalent of the same costs under either an ESP or MRO, those costs should be removed from the ESP v. MRO analysis.[448]

Here, the Companies could recover revenues equivalent to Rider DMR revenues in a base rate case or under a grid modernization rider; *i.e.*, the Companies could recover these revenues outside of ESP proceedings. The Commission should so find on rehearing, thus providing an alternative basis for determining that Rider DMR would have no quantitative effect on the ESP v. MRO test. Intervenors' arguments to the contrary should be rejected.

The record confirms that the Companies could recover revenues equivalent to Rider DMR revenues in a base rate case proceeding, or in another mechanism similar to Rider DMR.[449] Here, Rider DMR revenues will be used for credit support for distribution grid modernization, distribution infrastructure improvements, debt refinancing or pension funding,[450] all of which are distribution-related costs that could be recovered in a bate rate case or a grid modernization rider.[451]

OCC/NOAC contend that the Commission's decision endorsing this approach would render meaningless the ESP v. MRO test because the same thing could be said for any rider.[452] OCC/NOAC provide no authority to support this position. Nor can they, given that the Commission and Supreme Court have already approved this approach in the Companies' ESP III

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[448] *See* Case No. 12-1230-EL-SSO, Opinion and Order, p. 56 (July 18, 2012) ("[T]hese costs should be considered substantially equal and removed from the ESP v. MRO analysis.").
[449] Mikkelsen Rehearing Rebuttal Test., p. 19; Rehearing Tr. Vol. II, pp. 482-83, 85. For example, in a base distribution rate case, the Commission could make an adjustment, as it deems appropriate, to test year expense, or normalize test year expenses, or provide an incentive return on equity.
[450] Mikkelsen Rehearing Rebuttal Test., p. 9; Rehearing Tr. Vol. X, p. 1607 (Mikkelsen Rebuttal Cross).
[451] For example, in a distribution base rate case, the Commission could make adjustments, as it deems appropriate, to test-year expense, or normalize test-year expenses, or provide an incentive rate of return on equity. *E.g., In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Increase Rates for Distribution Service*, Case No. 07-551-EL-AIR, Opinion, pp. 13-14 (Jan 21, 2009) (adjusting labor expense).
[452] OCC/NOAC AFR, p. 9.

case with respect to Rider DCR.[453] The Commission should reject OCC/NOAC's argument accordingly.

With little explanation, Sierra Club argues that Rider DMR is not similar to Rider AMI and that revenues equivalent to Rider DMR revenues could not be recovered under such a rider.[454] This argument ignores that Rider DMR revenues will be used for credit support that will jumpstart the Companies' ability to access reasonably cost capital for grid-related improvements.[455]

The Commission is authorized to establish riders like Rider AMI (*i.e.,* grid modernization riders) under the Energy Policy Act of 2005, and thus it is free to do so outside of ESP proceedings.[456] Indeed, Rider AMI and the charge for that rider were both established outside of any ESP.[457] Therefore, charges to provide credit support for grid modernization initiatives, like Rider DMR, could be recovered outside of an ESP as well. Moreover, the record is clear that the Companies would likely pursue grid modernization initiatives outside of any ESP in light of state policy, the Commission's and Staff's support for grid modernization, and progress made to date on smart grid-related technologies.[458]

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[453] ESP III Order, pp. 50-52, 55-57; *In re Application of Ohio Edison Co.*, 2016-Ohio-3021, ¶¶23-27, 146 Ohio St. 3d 222.
[454] Sierra Club AFR p. 55, n.171.
[455] Mikkelsen Rehearing Rebuttal Test., p. 9; Rehearing Tr. Vol. X, p. 1607 (Mikkelsen Rebuttal Cross).
[456] *In the Matter of the Commission's Response to Provisions of the Federal Energy Policy Act of 2005 Regarding Net Metering, Smart Metering and Demand Response, Cogeneration and Power Production Purchase and Sale Requirements, and Interconnection*, Case No. 05-1500-EL-COI, Finding and Order, p. 1 (Mar. 28, 2007).
[457] *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Increase Rates for Distribution Service Modify Certain Accounting Practices and For Tariff Approvals*, Case No. 07-551-EL-AIR, Opinion and Order, p. 44-45 (Jan. 21, 2009) (establishing the rider); *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of Ohio Site Deployment of the Smart Grid Modernization Initiative and Timely Recovery of Associated Costs*, Case No. 09-1820-EL-ATA, Finding and Order, p. 9 (June 30, 2010) (establishing charge).
[458] Mikkelsen Rehearing Rebuttal Test., p. 19.

Sierra Club offers the conclusory argument that there is no evidence to support the Companies' position that such revenues could be recovered outside of an ESP proceeding.[459] To the contrary, as demonstrated by Ms. Mikkelsen's and Ms. Turkenton's testimony, the Companies could recover revenues equivalent to Rider DMR revenues under in a base rate case proceeding or under grid modernization rider.[460] Sierra Club's argument is therefore without merit and should be rejected here.

2. Rider DCR also has no quantitative effect on the ESP v. MRO analysis.

The Commission correctly decided that Rider DCR has no quantitative effect on the ESP v. MRO analysis.[461] Under Commission precedent, the recovery of distribution capital costs through Rider DCR is deemed to be equivalent to the recovery of similar costs through a distribution base rate case.[462] The record supports this conclusion, as demonstrated by Company witness Fanelli's testimony.[463]

OCC/NOAC disagree.[464] First, OCC/NOAC baldly assert that the Commission violated R.C. 4903.09 when it relied purportedly solely on previous cases in support of its finding.[465] Tellingly, OCC/NOAC cite no authority in support. Further, it ignores that the record here supports the Commission's findings.[466] Nevertheless, in the Commission's decision in the Companies' ESP III case, a decision upheld by the Ohio Supreme Court, the Commission

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[459] Sierra Club AFR, p. 55, n.171.
[460] Mikkelsen Rehearing Rebuttal Test., p. 19; Rehearing Tr. Vol. II, pp. 482-83, 85 (Turkenton Cross).
[461] March 31 Order, p. 119.
[462] *See* ESP III Order, p. 56 ("[T]hese costs should be considered substantially equal and removed from the ESP v. MRO analysis.").
[463] Fanelli Direct Test., p. 7 ("Consistent with the Commission's decision in the Companies' most recent ESP III case and other companies' cases, because these distribution-related capital costs would also be recoverable under an MRO through a base distribution rate case, there is no quantifiable cost of the proposed ESP IV associated with this provision.") (citing Case No. 12-1230-EL-SSO, Opinion and Order, pp. 55-56 (July 18, 2012); Case No. 11-346-EL-SSO, Opinion and Order, p. 31 (Dec. 14, 2011)).
[464] OCC/NOAC AFR, pp. 4-5.
[465] OCC/NOAC AFR, p. 4.
[466] *See supra* n. 463.

concluded that the same Rider DCR had no quantitative effect on the ESP v. MRO analysis.[467] Moreover, there is nothing in R.C. 4903.09 that requires the submission of evidence to support a settled proposition. Any argument to the contrary is absurd on its face.

Here, the Companies have presented testimony confirming that "distribution-related capital costs," like Rider DCR, "would also be recoverable under an MRO through a base distribution rate case," and therefore, "there is no quantifiable cost of the proposed ESP IV associated with this provision."[468] The Rider DCR tariff filings in the record here also show that Rider DCR will permit the recovery on and of the plants, including incremental property taxes.[469] There can be no serious dispute that the Companies could recover in a base rate case those very expenses on plant included in the Companies rate base.[470]

Second, OCC/NOAC argue that the Commission failed to address evidence of the Companies' alleged over-earning on the distribution portion of their business.[471] Specifically, OCC/NOAC allege that the Commission ignored the testimony of OCC witnesses Effron and Kahal.[472] As an initial matter, OCC/NOAC's copy and paste arguments[473] have already been rejected by the Commission.[474] Having rejected OCC/NOAC's argument once, the Commission should reject it again here.

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[467] ESP III Order, pp. 50-52, 55-57; *In re Application of Ohio Edison Co.,* 2016-Ohio-3021, ¶¶23-27, 146 Ohio St. 3d 222.
[468] Fanelli Direct Test., p. 7 (citing Case No. 12-1230-EL-SSO, Opinion and Order, pp. 55-56 (July 18, 2012); Case No. 11-346-EL-SSO, Opinion and Order, p. 31 (Dec. 14, 2011)).
[469] *See generally* the Rider DCR tariff filings in Case Nos. 14-1628-EL-RDR, 14-1629-EL-RDR, and 14-1630-EL-RDR. These filings were administratively noticed by the Attorney Examiners. Hearing Tr. Vol. XXXIV, p. 7178.
[470] *In re Application of Ohio Edison Co.*, 2016-Ohio-3021, ¶¶ 23-27, 146 Ohio St.3d 222 (affirming the Commission's conclusion that Rider DCR revenues should be considered a "wash")
[471] OCC/NOAC AFR, pp. 4-5.
[472] OCC/NOAC AFR, pp. 4-5.
[473] *See* OCC/NOAC Application for Rehearing, pp. 52-53 (May 2, 2016) (raising the same arguments).
[474] March 31 Order, p. 119 (concluding that Rider DCR has no quantitative effect on the ESP v. MRO analysis); Fifth Entry on Rehearing at 116 (rejecting all assignments of errors concerning Rider DCR).

In any event, on the merits, the Commission did not err in failing to credit the testimony of OCC witnesses Effron and Kahal. Mr. Effron is not a rate-of-return expert.[475] As the record shows, in an effort to produce a favorable result, Mr. Effron created a calculation of his own making, which both ignored the SEET test and the methodology used in a distribution rate case.[476] Mr. Kahal's conclusions were based on the data supplied by Mr. Effron's ad hoc and unreliable calculations.[477] In view of the foregoing, the Commission correctly decided that Rider DCR had no quantitative impact on the ESP v. MRO test.

OCC/NOAC contend that prior cases finding that Rider DCR did not quantitatively effect the ESP v. MRO test are inapplicable because of the evidence of alleged overearning.[478] According to OCC/NOAC, in a rate case, other revenues and costs would be considered and the total recovery would be less, resulting in significant costs under the ESP v. MRO test.[479] OCC/NOAC have already raised these same arguments before the Commission without success.[480] They fare no better here, and the Court should reject them again.

B. The Commission Correctly Determined That Stipulated ESP IV Is Qualitatively More Favorable Than The Expected Results Of An MRO.

As modified by the Commission, ESP IV continues to provide more favorable qualitative benefits than what would be expected under the results of an MRO. Rider DMR further increases the qualitative benefits provided by ESP IV. It will further Ohio policy by, among

[475] *See* Companies' Post-Hearing Reply Brief, pp. 222-27 (Feb. 26, 2016). The Companies incorporate its arguments therein.
[476] Companies' Post-Hearing Reply Brief, pp. 222-27 (Feb. 26, 2016).
[477] Supplemental Direct Testimony of Matthew I. Kahal, p. 30 (March 2, 2015) (relying on OCC witness Effron's conclusion that "[the Companies] are potentially over-earning for distribution utility service.").
[478] OCC/NOAC AFR, pp. 5-6.
[479] OCC/NOAC AFR, pp. 5-6.
[480] *See* OCC/NOAC Application for Rehearing, p. 52-53 (May 2, 2016) (raising the same arguments). *See also* ESP III Order, p. 50 (summarizing OCC's argument that Rider DCR cannot be considered a "wash" due to the net cost attributable to the lag in distribution cost recovery); ESP II Order, p. 43 (summarizing OCC's arguments that the ESP was less favorable than an MRO because Rider DCR would recover millions more in revenues than the Companies could recover in a base rate case).

other things: (1) supporting grid modernization efforts; and (2) promoting a diversity of electricity supply and suppliers. Moreover, the qualitative benefits relied upon by the Commission in its March 31 Order will remain in place.

CMSD contends that the Commission erred in its balancing of the quantitative and qualitative benefits in its ESP v. MRO analysis.[481] According to CMSD, the Commission effectively decided that ESP is more favorable than an MRO based on ESP IV's qualitative benefits "regardless of the outcome of the quantitative test."[482] Moreover, CMSD emphasizes, additional costs a customer would incur under an ESP must be proportional to the qualitative benefits the ESP would promote; because the Commission failed to perform this proportionality review, CMSD maintains its ESP v. MRO analysis is erroneous as a result.[483]

CMSD's arguments misrepresent the Commission's decision and rest on the erroneous premise that ESP IV is a negative cost rather than a positive quantitative benefit. Here, the Commission conducted a thorough review of both the quantitative and qualitative benefits of ESP IV.[484] It concluded that, with the addition of Rider DMR, ESP IV is more beneficial than an MRO by at least $51.1 million of quantitative benefits from shareholder funder commitments and included significant qualitative benefits.[485] In view of the positive quantitative *and* qualitative benefits resulting from ESP IV, the Commission concluded that Stipulated ESP IV was more favorable in the aggregate than the results of an MRO.[486]

Contrary to CMSD's assertion, the Commission did not make this finding "regardless of the outcome of the quantitative test." Rather, the Commission concluded that, with the addition

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[481] CMSD AFR, pp. 17-18.
[482] CMSD AFR, p. 17.
[483] CMSD AFR, pp. 17-18.
[484] Fifth Entry on Rehearing, pp. 160-64.
[485] Fifth Entry on Rehearing, pp. 160-64.
[486] Fifth Entry on Rehearing, p. 164.

of Rider DMR, [487] ESP IV still resulted in a *positive* quantitative benefit.[488] In combination with the significant qualitative benefits provided by ESP IV, the positive quantitative benefits weighed in favor of a finding that ESP IV was more favorable than an MRO.[489] CMSD's argument is meritless as a result.

CMSD's argument concerning the need for "proportionality" review is wrong a number of fronts. As an initial matter, CMSD cites no authority for this proposition, and the plain language of R.C. 4928.143(C)(1) does not support it. More importantly, both the quantitative and qualitative analyses undertaken by the Commission – independently and taken together – supported a finding that Stipulated ESP IV was more favorable in the aggregate than the results of an MRO.

Even had the Commission determined that ESP IV is quantitatively less favorable than an MRO, the outcome of the test would not be any different. Indeed, the Commission has previously held that an ESP that failed the quantitative analysis by over $380 million was still more favorable than an MRO.[490] In that proceeding, after finding that "an MRO is more favorable by approximately $386 million" the Commission stated, "By statute, our analysis does not end here, however, as we must consider the non-quantifiable aspects of the modified ESP, in order to view the proposed plan in the aggregate."[491] After summarizing the significant qualitative benefits of the ESP, the Commission held that the "non-quantifiable benefits significantly outweigh any of the costs" and therefore that the ESP was more favorable in the

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[487] As demonstrated above, Rider DMR is a wash for purposes of the quantitative analysis. *See supra* pp. 88-91.
[488] Fifth Entry on Rehearing, pp. 160-64.
[489] Fifth Entry on Rehearing, p. 164.
[490] *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No, 11-346-EL-SSO, Opinion and Order, pp. 75-77 (Aug. 8, 2012).
[491] Case No. 11-346-EL-SSO, Opinion and Order, p. 75 (Aug. 8, 2012).

aggregate than an MRO.[492] The same would be true here; as discussed, the qualitative benefits of Stipulated ESP IV are numerous and substantial.

1. Rider DMR will provide easier access to capital markets and enable the Companies to invest in a more extensive grid modernization program.

The Commission correctly found that Rider DMR will facilitate the Companies' access to capital markets on favorable terms, which will further Ohio's interest in having a modernized grid. This will result in significant benefits to the State's citizens and economy. As both Company witness Mikkelsen and Staff witness Turkenton testified, Rider DMR's credit support will ensure the Companies have the ability to fund capital intensive grid modernization projects – including smart grid programs, advanced metering infrastructure and implementing distributed generation.[493]

Some intervenors nonetheless argue that Rider DMR has nothing to do with grid modernization.[494] According to them, Rider DMR is designed solely to provide a cash infusion to the Companies to support FirstEnergy Corp.'s credit rating.[495] Sierra Club further argues that grid modernization will occur without Rider DMR and that any grid modernization benefits of Rider DMR are illusory.[496] The Commission has previously rejected these recycled arguments.[497] They should be rejected again.

As noted, the record demonstrates that the purpose of Rider DMR is ultimately to modernize the Companies' grid.[498] Intervenors' arguments to the contrary confuse the ends of Rider DMR with its means. Rider DMR will help the Companies maintain investment grade

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[492] Case No. 11-346-EL-SSO, Opinion and Order, p. 76-77 (Aug. 8, 2012).
[493] Mikkelsen Rehearing Rebuttal Test., p. 20; Turkenton Rehearing Test., p. 4. *See* R.C. 4928.02(D) and (K).
[494] OMAEG AFR, p. 32; CMSD AFR p. 18; Sierra Club AFR, pp. 56-57.
[495] OMAEG AFR, p. 32; CMSD AFR, p. 18; Sierra Club AFR, pp. 56-57.
[496] Sierra Club AFR, pp. 56-57.
[497] *See* Fifth Entry on Rehearing, p. 160-64.
[498] Rehearing Tr. Vol. IV, p. 967 (Choueiki Cross).

credit ratings, which will allow them to access capital on better terms.[499] That access to capital is essential to fund capital-intensive grid modernization projects, the very purpose of Rider DMR.[500] As Ms. Mikkelsen testified, the Companies intend to use Rider DMR funds for credit support for distribution grid modernization or other distribution infrastructure improvements, debt refinancing, or pension funding.[501]

CMSD contend that there is no guarantee that Rider DMR will prevent a ratings downgrade and that, as a result, the Commission erred in finding that the benefits of grid modernization outweigh the costs of Rider DMR.[502] CMSD and other Intervenors have previously made this same argument,[503] and the Commission has already rejected it.[504]

To be sure, Rider DMR by itself is not sufficient to avert a credit ratings downgrade, and the Companies have not argued otherwise. Rather, the Companies have consistently maintained that Rider DMR is one element of a comprehensive plan to improve the Companies' and FirstEnergy Corp.'s financial position in order to avert a credit rating downgrade.[505] Indeed, cash received by the Companies from Rider DMR revenues will increase the Companies' and FirstEnergy Corp.'s CFO and likewise improve their CFO to debt ratios.[506] Improving this metric makes it more likely that the Companies will keep their investment grade ratings.[507] (Indeed, without Commission action, it is likely that, as the credit ratings agencies have warned,

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499 Mikkelsen Rehearing Rebuttal Test., pp. 7-8.
500 As the Commission correctly recognized, Rider DMR will provide direct and indirect support for grid modernization. Indirect support for grid modernization may include using Rider DMR funds to reduce outstanding pension obligations, reduce debt, or take steps to reduce long-term costs of accessing capital. Fifth Entry on Rehearing, p. 130.
501 Mikkelsen Rehearing Rebuttal Test., p. 9; Rehearing Tr. Vol. X, p. 1607 (Mikkelsen Rebuttal Cross).
502 CMSD AFR, pp. 19-20.
503 *See* CMSD Rehearing Brief, pp. 17-19; OMAEG Rehearing Brief, pp. 37-38; Sierra Club Rehearing Brief, pp. 71-74.
504 Fifth Entry on Rehearing, p. 160-64.
505 Rehearing Tr. Vol. X, pp. 1790-91 (Mikkelsen Rebuttal Cross).
506 Mikkelsen Rehearing Rebuttal Test., pp. 8-9; Buckley Rehearing Test., p. 4 (quoting Moody's).
507 Mikkelsen Rehearing Rebuttal Test., pp. 8-9; Buckley Rehearing Test., p.4.

there will be a downgrade.[508]) Maintaining an investment grade credit rating will allow the Companies to issue debt at a lower interest rate than otherwise would occur, with "more favorable conditions."[509] Rider DMR is therefore essential to preserving the Companies' credit rating and ensuring the Companies' access to capital markets to further grid modernization projects.

2. Rider DMR will promote diversity of supplies and suppliers and promote Ohio's competitiveness in the global marketplace.

The Commission correctly determined that Rider DMR will promote diversity of supplies and suppliers and promote Ohio's competitiveness in the global marketplace.[510] Intervenors' arguments to the contrary lack merit. OMAEG argues that Rider DMR is a "corporate bailout" that will actually diminish the diversity of supply and suppliers.[511] Again, OMAEG has already raised this argument before the Commission without success.[512] OMAEG adds nothing new here to change the Commission's finding in its Fifth Entry on Rehearing. Moreover, the record demonstrates that Rider DMR will promote diversity of supplies and suppliers by "enabling competitive providers to offer innovative products and services to serve customers in Ohio."[513] Encouraging the deployment of SmartGrid will cause more competitive suppliers to enter the market and to offer more products to retail customers.[514]

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[508] Buckley Rehearing Test., Att. 3, p. 2; Direct Ex. 1, p. 4
[509] Rehearing Tr. Vol. V, p. 1229 (Choueiki Cross).
[510] Fifth Entry on Rehearing, pp. 163-64.
[511] OMAEG AFR, p. 32.
[512] Fifth Entry on Rehearing, p. 158 ("OMAEG and NOPEC also contend that … Rider DMR may actually deter other generation suppliers from entering the market upon seeing the competitive advantage provided to FirstEnergy Corp. and its subsidiaries."); Fifth Entry on Rehearing, p. 163 (citing RESA and staff witnesses' testimony and concluding that "grid modernization will promote customer choice and promote the state's competitiveness in the global market place.").
[513] Turkenton Rehearing Test., p. 4; Rehearing Tr. Vol. II, p. 464 (Turkenton Cross) ("through the deployment of this advanced technology, we will have a more intelligent grid which will allow suppliers, either wholesale or retail suppliers, to provide more innovative and, you know, customer-type-friendly products to the marketplace").
[514] Rehearing Tr. Vol. IV, pp. 844-45.

OMAEG's argument that Rider DMR will actually harm economic development in the state of Ohio is similarly unpersuasive. The record contains significant evidence that Rider DMR will spur economic development in Ohio and increase Ohio's competitiveness in the global marketplace.[515] As the Commission recognized, FirstEnergy Corp.'s headquarters in Akron, Ohio has an estimated economic impact of $568 million on Ohio's economy.[516] This includes approximately 3,407 jobs and $244.6 million in annual payroll throughout the state of Ohio.[517] Further, for every $1 million of goods and services created by FirstEnergy Corp., an additional $920,000 in economic activity is generated within the state's economy.[518]

In addition to FirstEnergy Corp. maintaining its corporate headquarters and nexus of operations in Akron for the entirety of ESP IV, Rider DMR will result in significant expenditures on human resources and equipment; a modernized grid; and reduced outages and improved reliability.[519] These factors will help customers better control and manage their energy costs, and, in turn, foster economic development. The Commission correctly decided that Rider DMR will promote diversity of supplies and suppliers and promote Ohio's competitiveness in the global marketplace

3. The five qualitative benefits previously relied upon by the Commission remain unchanged.

As the Commission recognized in its March 31 Order, ESP IV provides a number of qualitative benefits, including: (1) a base rate freeze; (2) rate options; (3) energy efficiency; (4) grid modernization; and (5) resource diversity through use of battery technology and renewable

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[515] Turkenton Rehearing Test., p. 4; Rehearing Tr. Vol. II, p. 464 (Turkenton Cross) ("through the deployment of this advanced technology, we will have a more intelligent grid which will allow suppliers, either wholesale or retail suppliers, to provide more innovative and, you know, customer-type-friendly products to the marketplace"); Rehearing Tr. Vol. IV, pp. 844-45.
[516] *See* Fifth Entry on Rehearing, p. 77.
[517] Fifth Entry on Rehearing, p. 77.
[518] Fifth Entry on Rehearing, p. 77.
[519] Rehearing Tr. Vol. X, p. 1818 (Mikkelsen Redirect).

energy resources. Those benefits are unaffected by the adoption of Rider DMR here.[520] As explained by Ms. Mikkelsen:

> The Companies will remain obligated to fulfill the remaining terms, conditions, and commitments set forth in Stipulated ESP IV, as approved. And the multiple quantitative and qualitative benefits of Stipulated ESP IV remain unaffected, such as the $100 million risk sharing mechanism, the grid modernization and resource diversification initiatives, the base distribution rate freeze, programs to preserve and enhance rate options for customers, and support for retail competition. Moreover, the Commission-ordered mechanism limiting average customer bills will provide additional customer protections.[521]

Sierra Club nonetheless argues that the CO_2 reduction commitment and the 800,000 MWh reduction goal are illusory and should not be considered qualitative benefits because they are unenforceable.[522] These arguments were made[523] and rejected previously.[524] In any event, the record here does not support Sierra Club's contention.

On November 1, 2016, the Companies filed their report with the Commission describing FirstEnergy Corp.'s carbon reduction efforts.[525] The Companies will continue to file reports with the Commission on the status of FirstEnergy Corp.'s carbon reduction efforts every five years through 2045,[526] and the Companies intend to meet this goal even if the EPA's Clean Power Plan is overturned by court order.[527] As Ms. Mikkelsen explained:

> While the Third Supplemental Stipulation and Recommendation does not include a penalty provision, should FirstEnergy Corp. fail to meet this CO-2 emissions reduction goal, the company takes its regulatory commitments very seriously, and I believe a pattern of failure to meet your regulatory commitments without good cause

[520] Rehearing Tr. Vol. II, pp. 448-49 (Turkenton Cross); Mikkelsen Rehearing Rebuttal Test., p. 20.
[521] Mikkelsen Rehearing Test., p. 7.
[522] Sierra Club AFR, p. 58-60.
[523] OMAEG Post-Hearing Brief, p. 89-90 (Feb. 16, 2016); ELPC Post-Hearing Brief, p. 51 (Feb. 16, 2016); Sierra Club Post-Hearing Brief, p. 119 (Feb. 16, 2016).
[524] March 31 Order, p. 94-95.
[525] Case No. 14-1297-EL-SSO, Resource Diversification Report (Nov. 1, 2016).
[526] Hearing Tr. Vol. XXXVI, pp. 7634-35, 7644-45 (Mikkelsen Cross).
[527] Third Supp. Stip., Section V.E.1.

> shown would have a very chilling effect on the companies' ability to work successfully with its regulators in a going-forward basis.[528]

In short, the Companies' commitment to carbon reduction is real and will provide a significant benefit to the people of the State of Ohio.

Despite Sierra Club's complaints, the Companies are committed to achieving substantial annual energy savings. For the same reasons as the carbon reduction commitment, the Companies intend to uphold their commitment to achieving these energy savings. As regulated public utilities, the Companies take seriously their obligation to honor commitments they have entered to before the Commission. Sierra Club's argument to the contrary is without merit, and the Commission correctly considered the commitment to annual energy savings as a qualitative benefit under Stipulated ESP IV.

VI. CONCLUSION

For the foregoing reasons, intervenors' applications for rehearing, as described herein, should be denied.

[528] Hearing Tr. Vol. XXXVI, p. 7529 (Mikkelsen Cross).

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the above was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on this 25th day of November, 2016. The PUCO's e-filing system will electronically serve notice of the filing of this document on counsel for all parties. Further, a courtesy copy has been served upon parties via electronic mail.

/s/ David A. Kutik
One of the Attorneys for the Companies