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IN THE SUPREME COURT OF OHIO

OHIO ENVIRONMENTAL COUNCIL, ENVIRONMENTAL DEFENSE FUND, and ENVIRONMENTAL LAW AND POLICY CENTER, Appellants,	)	CASE NOS. 2017-1444, 2017-1664
	)	Appeal from the Public Utilities Commission of Ohio
v.	)	*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 in the Form of an Electric Security Plan.*
THE PUBLIC UTILITIES COMMISSION OF OHIO, Appellee.	)	
	)	Case No. 14-1297-EL-SSO

REPLY BRIEF FOR APPELLANTS OHIO ENVIRONMENTAL COUNCIL, ENVIRONMENTAL DEFENSE FUND, AND ENVIRONMENTAL LAW AND POLICY CENTER

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GLOSSARY OF TERMS AND ABBREVIATIONS

(B)(2)(h): Ohio Revised Code section 4928.143(B)(2)(h)

Commission or PUCO: The Public Utilities Commission of Ohio.

Distribution: The delivery of electricity to homes and businesses over the local poles and wires, transformers, substations and other equipment. Electricity distribution remains regulated by the Commission.

Eighth Entry: The Commission's Eighth Entry on Rehearing, Case No. 14-1297-EL-SSO (Aug. 16, 2017).

ESP: Electric security plan; the default plan for the supply and pricing of electric generation that is filed by the utility company.

Fifth Entry: The Commission's Fifth Entry on Rehearing, Case No. 14-1297-EL-SSO (Oct. 12, 2016).

FES: FirstEnergy Solutions; the generation affiliate of FirstEnergy.

FERC: The Federal Energy Regulatory Commission; a federal agency.

FirstEnergy (the Companies): Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company, which are electric distribution utilities ad defined in R.C. 4928.01(A)(6) and public utilities as defined in R.C. 4905.02.

FirstEnergy Corp.: FirstEnergy Corporation is the parent holding company of, among other subsidiaries, FES and FirstEnergy.

Generation: The production of electricity in a power plant. The Commission no longer regulates electricity generation charges.

Lost Distribution Revenues: Revenue that the utility loses due to diminished consumer energy use accompanying energy efficiency programs.

MRO: Market rate offer; a type of ESP based on the market rate for electricity.

Rider: An extra charge to distribution customers authorized under R.C. 4928.143(B).

- Rider AMI—Advanced Metering Infrastructure Rider
- Rider DMR—Distribution Modernization Rider

SB3: Senate Bill 3 (1999)

SB221: Senate Bill 221 (2008)

INTRODUCTION

The Commission's strategy on appeal is to paint the environmental and renewable energy appellants as "mired in the past" and ignorant of the need for "a twenty-first century energy system." PUCO Br. at 1. That is ironic: The Environmental Advocates oppose Rider DMR precisely because it requires no grid modernization *at all*. This fact is undisputed. As the response briefs freely admit, the Rider DMR revenues that FirstEnergy receives from the everyday working customers are not contingent on any modernization or distribution service investments whatsoever. *See* Part I.A. *infra*. That admission is fatal because it takes Rider DMR outside the realm of permissible actions authorized by statute. R.C. 4928.138(B)(2)(h) (hereafter, "(B)(2)(h)"). The General Assembly did not grant the Commission unqualified authority to charge consumers hundreds of millions of dollars without *any* guarantees that the distribution utilities will actually undertake modernization. But that is exactly what the Commission did here, justifying its approval of Rider DMR on nothing more than its "hope[]" that FirstEnergy "intends" *someday, somehow* to modernize the grid in *some form*. This Court should not read (B)(2)(h) so broadly that it will cease to actually mandate any investment in "distribution service"—but that's exactly what appellees' statutory interpretation allows.

By the same token, the General Assembly did not intend (B)(2)(h) to require captive distribution consumers to bail out generation affiliates for their own self-inflicted market failures. The legislature deregulated electricity generation decades ago. And, to ensure that the generation companies sink or swim on their own in the free market, it prohibited the Commission from authorizing "transition revenues" or their "equivalent" after a temporary transition period. R.C. 4928.38. But without using the term "transition revenue," that is exactly what the Commission authorized here. While the Commission asserts (at 1) that generation plays "no part in this case," the appellees' response briefs show otherwise. The appellees do not (and cannot) dispute that FirstEnergy faced a potential credit downgrade due to the market failures of its struggling coal and nuclear generation affiliate, FirstEnergy Solutions (FES). *See* Part III, *infra*. As Chairman Haque explained, "we got here" because the poor performance of FirstEnergy's deregulated generation affiliate led FirstEnergy to seek a cash infusion. Fifth Entry at ¶ 6 (concurring). Accordingly, even if no money is ever funneled directly to FES, Rider DMR still rests on a statutorily prohibited justification: compensating FirstEnergy for FES's market losses.

Lastly, the appellees have failed to rebut the Environmental Advocates' argument (at 41–45) that the Commission's order improperly allows FirstEnergy to collect "lost distribution revenues" for conservation efforts *independently* undertaken by consumers, in violation of R.C. 4928.66(D). FirstEnergy points to an irrelevant statute that does not address lost distribution revenues, while the Commission offers no rebuttal at all. The relevant statute lets utilities collect only those revenues that they lose "as a result of" their energy conservation programs. R.C. 4928.66(D). As a result, the Commission's decision must be reversed on these grounds as well.

ARGUMENT

I. Because Rider DMR does not require FirstEnergy to make any distribution service investments, it cannot be authorized under (B)(2)(h).

The appellees contend that Rider DMR is authorized under (B)(2)(h) because it "regards distribution service." But at the same time, they admit that there is no requirement that FirstEnergy ever invest in grid modernization or distribution service. Those two assertions are incompatible and lead to only one result: Rider DMR cannot stand.

A. It is undisputed that Rider DMR does not require FirstEnergy to ever invest in modernizing the grid or in any distribution service.

The appellees' response briefs confirm a crucial fact: Rider DMR contains no requirement that FirstEnergy modernize the grid or make any investments in distribution service—now or in the future. That is a fatal concession. The response briefs confirm that not a single penny of Rider DMR revenues must go toward providing any "distribution service." That is consistent with the Commission's order, which states: "[W]e will not place restrictions on the use of Rider DMR funds." Fifth Entry at ¶ 282. And FirstEnergy is not shy in touting that it can use Rider DMR funds for expenses far afield from distributing electricity. As its response brief explains: "Rider DMR is not intended to provide revenues that will fund specific grid modernization projects." FE Br. at 20. Instead, it is meant to "stabiliz[e] the utilities' financial metrics," PUCO Br. at 4, "improve the Companies' financial position," and facilitate "access to lower cost capital." FE Br. at 2. That's why FirstEnergy emphasizes at least three times (at 10, 12, 22) that it can use Rider DMR revenues to pay pensions and other existing debts, rather than provide or improve distribution service. Likewise, when it comes time to actually modernize the grid, FirstEnergy unabashedly acknowledges that it will "separately recover a return of and on all of [its] grid modernization investments" through a separate rider, Rider AMI. FE Br. at 21; *see also* PUCO Br. at 8 (conceding that a separate rider will cover modernization expenses).

Forced to concede that FirstEnergy does not have to use Rider DMR funds to modernize the grid, the appellees try to deflect by pointing to the future. Do not worry, the appellees say; although FirstEnergy is not required to modernize the grid with Rider DMR revenues, this credit support is "intended" to "enable" or "facilitate" its access to capital to modernize the grid later. It could, for example, facilitate borrowing for grid enhancements at more reasonable rates down the line. PUCO Br. at 8; FE Br. at 19–25. In other words, the credit support (in their view) serves the "ultimate goal" of grid modernization even if such modernization is several (highly) contingent steps removed. FE Br. at 19. But this logic is self-defeating. The only way Rider DMR can meet (B)(2)(h)'s "distribution service" requirement is if the Commission's order contains some set of *binding* conditions that requires FirstEnergy to modernize the grid. No such requirement exists. OEG Br. at 10. Indeed, the appellees' response briefs are replete with assertions that the Commission "intended" for Rider DMR's cash infusion to allow the Companies "access to" credit for grid modernization, *see, e.g.*, PUCO Br. at 4, 8, 9, 14; FE Br. at 19, 20, 21, 22, 27; OEG Br. 9, 10, but these phrases are all completely aspirational and nonbinding. Simply put, Rider DMR never requires that FirstEnergy even attempt to access capital for grid modernization, let alone actually undertake modernization.

The appellees' passing references to third-party monitors or existing (unapproved) modernization plans does not change this basic fact—Rider DMR does not mandate any expenditure on distribution service. True, the Commission's Eighth Entry requires that a third-party monitor "assist Staff and work with FirstEnergy and FirstEnergy Corp. to ensure that Rider DMR funds are expended appropriately." Eighth Entry at ¶113; *see also* PUCO Br. at 12; FE Br. at 11,22, 27. But, as explained above, because the funds are not tied to grid modernization or distribution services—they are, instead, tied to improving FirstEnergy Corp.'s "financial metrics"—there is nothing requiring that an "appropriate[]" expenditure be connected to grid improvements. The Commission made that clear in the Eighth Entry, where it explained that there are no grid modernization metrics for what constitutes "sufficient progress" under Rider DMR. *See* Eighth Entry at ¶ 115 ("'sufficient progress' language should not be interpreted to mean that Rider DMR revenues be limited in the deployment of grid modernization programs" because it can be "used for other purposes related to improving the Companies' ability to access capital markets such as debt repayment and funding pension obligations."); *see also* Environmental Advocates Br. at 22. A third-party monitor may ensure that FirstEnergy is using Rider DMR revenues to help its balance sheet (e.g., by paying pension debts), but it does nothing to overcome the fundamental problem that the rider never requires investment in distribution service.

So too for any existing modernization plans. FirstEnergy's filing of a modernization plan in a separate proceeding only highlights that FirstEnergy did not file one here. *See* PUCO Br. at 12; FE Br. at 9. Because Rider DMR does not require any modernization, no plan was necessary. As explained in our opening brief (at 38–39), Rider DMR revenues are not tied to any plan (even one in another proceeding) or any other meaningful metrics. Instead, FirstEnergy's modernizations costs are already going to be recovered by a separate modernization rider—Rider AMI. But that does not make up for the key missing component here: any modernization requirement tied to Rider DMR revenues.

At any rate, no modernization plan in this or any other proceeding has been approved or ordered by the Commission. Rather, "[t]he Commission intends on having a very robust conversation about the future of the grid and the electric industry" at an unspecified point "in the near future." Fifth Entry at ¶ 207; *id.* at ¶ 3 (Haque, Chairman, concurring). And, to add insult to injury, if FirstEnergy fails to follow-through with a plan or any actual grid modernization, if it fails to make "sufficient progress" as determined by the Commission, or even if it moves from Akron, there is no provision providing for a customer refund of these costs. *Id.*; Fifth Entry at ¶ 209.

B. The appellees' interpretation of (B)(2)(h) is so overbroad as to render it meaningless.

The appellees' concession that Rider DMR does not mandate any investment in distribution service unravels their arguments. As set forth in our opening brief (at 19–23), (B)(2)(h) authorizes ESP provisions that "regard distribution service." And, quite simply, an ESP cannot "regard distribution service," if it does not mandate any investment or changes in distribution service whatsoever. Holding otherwise would stretch the statutory language to a breaking point; the express statutory limitation would become effectively meaningless and would free the Commission to green light unrestricted cash infusions going forward. *Id.*

The Commission resists this conclusion. It says that Rider DMR "regards" distribution modernization because the Commission's "objective" or "entire point" is that FirstEnergy shores up its credit, accesses capital for infrastructure development, and eventually launches a grid modernization initiative. PUCO Br. at 12; OEG Br. at 9. In its view, because its "entire analysis around this topic" involves distribution modernization, that is enough. PUCO Br. at 12. But that view has contains no limiting principle, and is too tenuous a connection to justify Rider DMR. Anything might "regard" distribution service and therefore be charged to customers under (B)(2)(h) as long as the Commission hopes the revenues somehow inure to benefit distribution in some way down the road.

The statutory text of (B)(2)(h) requires more. Mere analysis and intentions—without concrete requirements—cannot be enough to satisfy (B)(2)(h)'s provision that the rider "regard distribution service." Were it otherwise, any funds that the Commission approves for a distribution company—even if compensating for a disaster by a nuclear generation plant, going to pay executive bonuses, or funding a nondistribution venture in hopes that it improves the utility's "financial metrics"—could fall within (B)(2)(h)—at least so long as the

Commission "intended" for it to improve distribution service in some tangential way. Even far-fetched examples would meet the Commission's test. The Commission could approve, for example, a rider to support FirstEnergy Corp. investment in and production of a Hollywood blockbuster, so long as the Commission determined that doing so might help FirstEnergy's "financial metrics" which, in turn, could allow the company to borrow on better terms and, hopefully, improve distribution service. Indeed, any revenue the utility collects will improve its "financial metrics," and thereby "enable" distribution improvements. As a result, the Commission's interpretation of (B)(2)(h) could be used to justify *all* riders—just give the company money so that it can, hopefully, help distribution. It effectively "remove[s] any substantive limit to what an electric security plan may contain,"—a "result" this Court does "not believe the General Assembly intended." *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 34.

The appellees' response to the Commission's overbroad statutory interpretation (identified in the Environmental Advocates brief at 23) is a shrug of the shoulders. PUCO Br. at 12; FE Br. at 19. Maybe the Commission approves this overbroad interpretation (and its downstream consequences), but why does it matter? It matters because the statute's plain language does not permit it. The Court here should not "read [the General Assembly's] words of limitation as a mere sham." *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655, 115 S.Ct. 1671, 131 L.Ed.2d 695 (1995). The appellees are suggesting an unreasonable interpretation. *See In re Application of Ohio Power Co.*, 144 Ohio St. 3d 1, 2015-Ohio-2056, N.E.3d 1060, ¶¶ 28, 30 (no deference given to Commission's unreasonable interpretation). This Court must reject it, lest (B)(2)(h) cease to have any circumscribed meaning.

In fact, FirstEnergy would push the permissible bounds of the statute even further. It advances the outlandish argument that, "[g]iven how the Companies' only business is distribution service," all moneys to FirstEnergy "regard" or "concern" distribution service and fall within (B)(2)(h) irrespective of what the funds are for. To FirstEnergy, nothing is out of the statute's bounds as long as it lines the Companies' pocketbook. That extreme "interpretation would remove any substantive limit to what an electric security plan may contain," and it is not the law the General Assembly drafted. *In re Application of Columbus S. Power Co., supra*, at ¶ 34.

By contrast, the interpretation of (B)(2)(h) set forth in our opening brief (at 20–23) provides modest, text-based limitations while giving the Commission and utilities "flexibility." FE Br. at 1, 18, 24. Under our reading, to "regard[] distribution service," at a minimum, the Commission must impose some concrete requirement that the utility make an expenditure or investment in its "distribution service." R.C. 4928.143(B)(2)(h). And, in responding to our brief, the appellees did not point to a single one.

C. The Commission's attempt to characterize a no-strings-attached cash infusion as an "incentive" fails.

The appellees' attempt to paint Rider DMR as a "distribution modernization incentive" under (B)(2)(h) similarly falters. The Commission argues (at 14) that an incentive can be *anything* "that stimulates one to take action, work harder," or provides "encouragement," and it need not involve any type of "coercion," or contingency. In its view, because giving a blank check to FirstEnergy may allow it to borrow at a lower rate, Rider DMR "stimulates" FirstEnergy to "jumpstart" a modernization program. It is immaterial to the appellees that FirstEnergy can take that blank check without any obligation to seek capital or actually modernize the grid. PUCO Br. at 12; FE Br. at 23.

This construction is unreasonable and not deserving of deference. As explained in our opening brief (at 24), an "incentive" encourages or stimulates an entity to perform in a particular manner by making the proffered "incentive" *contingent* on that performance. That is, there must be *some* string attached, or "[s]omething, such as the fear of punishment or the expectation of reward, that induces action or motivates efforts." American Heritage Dictionary (Fifth Ed. 2016). Without recognizing that incentives must carry contingencies, the appellees' interpretation unreasonably eliminates the line between an incentive and a gift. Receiving a gift can enable projects and expenditures that are arguably not otherwise possible. But it does not mean that one is "incentivized" to act in a particular way unless that gift comes with strings attached. For instance, one might say that winning the lottery "encourages," "stimulates," or "enables" a person to buy a private jet, but no one would say that winning the lottery "incentivizes" that purchase. Likewise, the Commission may have concluded that Rider DMR would enable and thereby stimulate grid modernization, but that does not make it an incentive.

The examples cited by FirstEnergy do not undermine this point; if anything, they support it. FE Br. at 23. FirstEnergy notes that "incentive rates can take a variety of forms," and then cites various examples of incentive ratemaking from across the country. *Id.* Notably, though, in all of the examples, the utilities are incentivized to implement energy efficiency and demand reduction programs because they are given "a portion . . . of the dollar savings in reduced consumption of electricity caused by [their conservation] programs." *Multiple Intervenors v. Pub. Serv. Comm.*, 166 A.D.2d 140, 142, 569 N.Y.S.2d 522 (N.Y.App.1991). FirstEnergy, for example, cites to the March 31 "shared savings" order in this case. FE Br. at 23. But there, the Companies were incentivized to encourage energy efficiency because they got a share of the net monetary benefits from energy savings that exceeded an annual benchmark. The more energy that was saved, the higher percentage of savings the Companies received. That's a classic incentive mechanism. The reward is linked to the action and result. Here, there is no such link because FirstEnergy receives the Rider DMR revenues whether or not it implements any distribution modernization. It cannot count as an incentive under (B)(2)(h).

D. The Commission has not provided any basis for overturning its longstanding position that distribution riders must be cost-based.

The appellees' briefs also attempt to downplay the new ground that Rider DMR breaks in authorizing distribution riders that are not tethered to the cost the utility incurs (plus a reasonable rate of return) in constructing or maintaining service. The Chairman recognized that this step was "unconventional." Fifth Entry at ¶ 5 (Haque, Chairman, concurring). It's more than unconventional. As our opening brief explained (at 25–29), Rider DMR is not "cost-based," making it unlawful under Chapters 4905 and 4904, even assuming it can fit within the strictures of (B)(2)(h). And it breaks from the Commission's longstanding interpretation of the governing statutes.[1] In trying to justify this sea change, the Commission and the intervening appellees part ways. Their divergent approaches undermine both positions.

[1] FirstEnergy, though not the Commission, argues that the Environmental Advocates waived this issue by not raising it as part of rehearing before the Commission. FE Br. at 32 n. 32. However, this issue was raised on rehearing by the Sierra Club. *See* Sierra Club's Application for Rehearing of the Fifth Rehearing Entry at 19. As long as the argument was "raised before the commission on rehearing, [the Court] may consider it," irrespective of which party raises it on appeal. *In re Application of Columbus S. Power Co.*, 128 Ohio St. 3d 402, 2011-Ohio-958, 945 N.E.2d 501, ¶ 16.

For starters, the Commission does not dispute that its longstanding position has consistently been that ESP provisions approved under (B)(2)(h) must be cost-based. PUCO Br. at 11. Perhaps recognizing the difficulty of switching positions (or worried about the future implications), the Commission tries to cast Rider DMR as cost-based and hence consistent with the statutes and its precedent. *Id.* It argues that "[t]he DMR does reflect part of the cost of maintaining the credit worthiness needed to support the large modernization initiative." *Id.* Because credit support is, in its view, a necessary cost of modernization, Rider DMR is cost-based. *Id.* That argument might make sense if Rider DMR actually required grid modernization, such that credit support could be considered part of the project's overall cost. But there is no modernization project mandated as part of Rider DMR (or otherwise approved by the Commission); $600 million cannot be considered part of the cost of a project that does not exist. No wonder the Chairman conceded that Rider DMR is not cost-based, Fifth Entry at ¶ 5 (Haque, Chairman, concurring), and FirstEnergy does not argue otherwise.

FirstEnergy's argument stands exactly opposite to the Commission's. It does not argue that Rider DMR is cost-based, but instead contends that the Commission is free to dispense with that requirement altogether. In its view (at 5), the "notwithstanding" language in (B)(2)(h) exempts Rider DMR from all other aspects of Title 49, and it points to its previous ESP (Rider RRS)—the one overruled by FERC and later rejected by the Commission—as precedent for approving distribution service riders that are not "tied to the cost of specific distribution investments."[2]

[2] Confusingly, the Commission asserts the "notwithstanding" language as a defense to the appellants' "transition fees arguments" under R.C. 4928.38, *see* PUCO Br. at 7, but not to the appellants' argument that distribution service ESPs must be cost-based pursuant to R.C. 4928.15 (and the provisions cited therein), *see* PUCO Br. at 11. That just underscores that its interpretation of this language is inconsistent and should not be adopted.

But none of the appellees present a cogent theory for just how far they can take the "notwithstanding" language. The Companies assert that the notwithstanding clause exempts ESPs from all the "regulatory limits found elsewhere in the Revised Code." FE Br. at 31. As we asked in our opening brief (at 36): Does that mean the Commission could authorize riders without being subject to judicial review, found in R.C. 4903.13, or without regard to the General Assembly's policies articulated in R.C. 4928.02? The appellees provide no answer. FirstEnergy maintains (at 26) that the only requirement a distribution service ESP has to meet is that it be better than an MRO. Does it really expect the Court to throw out all other provisions of Title 49, including judicial review? Or that the Court would let the Commission approve ESPs in secret without the hearings required by Chapter 4903? Perhaps not, but FirstEnergy cannot just pick-and-choose when the "notwithstanding" language applies.[3] Instead, the Court should recognize that pushing the "notwithstanding" language to its zenith would wreak havoc in the statutory scheme, and—as other courts have done—read this language consistent with the statutory context. *See* Environmental Advocates Br. at 36 (citing cases).[4]

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[3] To the extent FirstEnergy argues that the "notwithstanding" language only means that the "*regulatory* limits found elsewhere" in Title 49 do not apply, FE Br. at 31 (emphasis added), it only further undermines its position. On what grounds are "regulatory" limits distinguished from other limits in Title 49 based on the "notwithstanding" clause? And, indeed, what even is a regulatory versus nonregulatory limit in Title 49? FirstEnergy's passing distinction makes no sense.

[4] FirstEnergy criticizes (at 32) reliance on "non-Ohio caselaw," but persuasive reasoning in like circumstances from the United States District Court for the Southern District of Ohio, the United States District Court for the District of Columbia, the United States Court of Appeals for the Third Circuit, and the United States Supreme Court should not dismissed so cavalierly.

In interpreting statutes, the aim is always to harmonize various provisions. *See Ottery v. Bland*, 42 Ohio App.3d 85, 87, 536 N.E.2d 651 (10th Dist.1987). Given the nonsensical results that a "literal application of the clause would [bring]," this Court should apply "a narrower reading of the 'notwithstanding' clause" so it does not "nullify" the entirety of the rest of the statute. *Bark v. USFS*, 37 F. Supp. 3d 41, 53 (D.D.C.2014); *United States v. Gordon*, 961 F.2d 426, 431 (3d Cir.1992). In context, the "notwithstanding" language here "signals the [General Assembly's] intention" that certain provisions of (B)(2)(h) may "override" other directly "contrary or conflicting provisions" contained elsewhere in Title 49. *Broad Street Energy v. Endeavor Ohio, LLC*, 975 F. Supp. 2d 878, 885 (S.D.Ohio 2013); *see also* R.C. 4928.143(B)(2)(h) (providing that a distribution rider may be approved "notwithstanding anything in Title 49 *to the contrary*." (emphasis added)). But if there is nothing "to the contrary"—that is, if there is no inherent incompatibility with distribution service riders and cost-based requirements—then the notwithstanding language should not "operate to override those non-conflicting or non-contrary provisions." *Broad Street Energy*, 975 F. Supp. 2d at 885. There is no such incompatibility here. The Commission can require that distribution service riders be cost-based, just like it has always done in the past. This Court should not enforce this "unconventional" and unlawful departure from precedent.

II. FirstEnergy's fallback position, that Rider DMR can be authorized under (B)(2)(i), is not appropriate for this Court to review in the first instance.

Falling back, FirstEnergy and OEG argue that Rider DMR can alternatively be sustained under R.C. 4928.143(B)(2)(i) (hereafter, "(B)(2)(i)")—the statute's provision for economic development programs. Not so. Despite FirstEnergy's urging below, the Commission refused to approve Rider DMR on this alternative basis. Eighth Entry at ¶116.

And the Commission does not ask the Court to uphold Rider DMR under (B)(2)(i) now. It would be inappropriate for this Court to do so.

Even on its own terms, though, FirstEnergy's theory fails. The thrust of FirstEnergy's argument is that (B)(2)(i) can justify Rider DMR because the Commission recognized that "record evidence supports FirstEnergy's claim of a $568 million annual economic impact" from retaining the Companies' corporate headquarters in Akron. Eighth Entry at ¶119. To FirstEnergy, these findings were "undisputed" and thus it is a foregone conclusion that Rider DMR is an economic development program under (B)(2)(i). FE Br. at 30. Hardly.

For starters, contrary to FirstEnergy's assertion, these findings were highly disputed below. *See* Eighth Entry at ¶¶116–119 (describing parties' dispute as to economic development benefits of Rider DMR). Accordingly, to the extent FirstEnergy argues (at 30) that it is appropriate for this Court to hold, "based on the undisputed facts found by the Commission," that Rider DMR is authorized under (B)(2)(i), there are no such undisputed facts on which the Court can base its decision.

And, in any case, even accepting FirstEnergy's contention that maintaining its headquarters in Akron delivers significant economic benefits to the region, that does not amount to a determination that Rider DMR can be justified under (B)(2)(i). The appellants had argued to the Commission that because no evidence indicated that, absent Rider DMR, FirstEnergy would move its headquarters from Akron, (B)(2)(i) afforded no basis for Rider DMR. Eighth Entry at ¶ 118. As the record below reflects, FirstEnergy had "no intent to move its headquarters" for the duration of this ESP and had "already renewed its lease of [its] facilities through 2025." *Id.* Thus, it was unclear that Rider DMR's requirement that

FirstEnergy stay in Akron had any economic development benefit at all. The Commission, justifying Rider DMR instead under (B)(2)(h), chose not to resolve that dispute.

In short, the contested factual record makes it impossible to use (B)(2)(i) to justify Rider DMR. And, far from a foregone conclusion, many factual and legal questions would need to be resolved before Rider DMR could be authorized under (B)(2)(i).[5] This Court does not undertake such fact finding, making any resolution of this question inappropriate here.

III. Rider DMR constitutes unlawful transition revenues because consumers are paying to compensate for the generation affiliate's losses.

In arguing that Rider DMR does not constitute transition revenue, the appellees seem to forget, in the Chairman's words, "how we got here": the market failure of FirstEnergy's *generation* affiliate—FES. With the passage of SB3 and SB221, the Legislature deregulated the energy generation market; it provided generation companies some temporary revenue to help "transition" to a market-based system, then it banned "transition revenues and their equivalent" and demanded that generation companies be "fully on [their] own in the competitive market." R.C. 4928.38. But FES could not survive in the free market. As detailed in our opening brief, FES struggled due to both low natural gas prices that undercut FES's generation sources (coal and nuclear) and poor management decisions. Environmental Advocates Br. at 10–12. It has since declared bankruptcy. Relevant here, FES losses were such a drag on its parent company's balance sheet that, according to the Commission,

[5] The appellants also raised a host of legal barriers to authorizing Rider DMR under (B)(2)(i), *see* Eighth Entry at ¶¶ 116, 118, none of which were raised in the appeal to this Court because the Commission chose not to rely on this statutory provision.

without the cash infusion provided by Rider DMR, both the parent company and FirstEnergy faced an imminent downgrade in their credit ratings.[6]

The appellees do not contest this explanation. Instead, they pretend that FES's losses do not matter for determining whether Rider DMR is an unlawful transition charge. FE Br. at 34. But they do matter. FirstEnergy, by the Commission's own analysis, would not need Rider DMR "but-for" the FES losses. *See* Environmental Advocates Br. at 11–12. Rider DMR revenues are required only to fix the balance sheet that FES broke—nothing else. Because Rider DMR is designed to compensate for generation costs that were not "recoverable through market-based rates," it constitutes the "equivalent" of unlawful "transition revenues." *In re Application of Columbus S. Power Co.*, 147 Ohio St.3d 439, 2016-Ohio-1608, 67 N.E.3d 734, ¶¶ 15–16.

The appellees' scattershot responses are unpersuasive. *First*, the appellees begin with a series of non sequiturs. They contend that Rider DMR does not collect transition revenues because FirstEnergy already transitioned its generation assets "over a decade ago," "has no generation assets," and has no "historic costs" from the period before market deregulation. PUCO Br. at 5; *see also* FE Br. at 36 ("Rider DMR . . . is not a quid-pro-quo from transitioning to competitive markets."). But, as this Court recognized, R.C. 4928.38 is not limited to revenues collected by utilities before their generation components spun-off into the free market. Instead, the General Assembly explicitly prohibited "any revenue that amounts to transition revenue by another name." *In re Application of Columbus S. Power Co.*,

[6] Neither FirstEnergy nor the Commission demonstrated that FES losses were so grave as to place the utility in a state of emergency, meriting temporary financial relief. The General Assembly has provided for cash infusions and other relief in circumstances that pose great threats to distribution service. *See* R.C. 4909.13. Because those factors are not met here, a similar cash infusion is not supported by statute.

supra, at ¶ 21. Rider DMR is precisely the "equivalent" revenue that the Legislature explicitly banned. If anything, Rider DMR is *worse* because "[r]egulating generation is a thing of the past," PUCO Br. at 1, and "there is no transition involved in this case," FE Br. at 36—the transition is over but the Commission is still forcing consumers to compensate for market-driven generation losses.

Second, the appellees argue that Rider DMR cannot be considered transition revenue because "there is no means by which the Companies could directly transfer any funds to FES," especially with third-party monitoring. FE Br. at 34. Indeed, they use FES's own bankruptcy to rebut claims of a "secret flow of Rider DMR dollars to support FES's generation assets." *Id.* But that's immaterial. Even if Rider DMR funds are not directly funneled to FES, money is fungible, and the revenue is still meant to help FirstEnergy Corp.'s "financial metrics" to compensate for FES losses. At the end of the day, consumers are in the same boat: they are forced to compensate for generation costs that were "unrecoverable in the competitive generation market." *In re Application of Columbus S. Power Co.*, *supra*, at ¶ 14.

The Commission's contention that Ohio ratepayers are not forced to "bear the full brunt" of FES's losses, but only pay an "appropriate share," does not help. PUCO Br. at 9. As the Commission concedes, it did not calibrate Rider DMR to the amount of the *debt* that FirstEnergy contributed to its parent company's overall debt-ratio. *Id.* That is, Rider DMR does not charge distribution customers to make up for losses on the distribution side. *Id.* at 10. Instead, Rider DMR was calculated based on the parent company's debt overall—which was primarily driven by FES—and it set Rider DMR based on FirstEnergy's proportion of the parent company's operating *revenues.* The upshot: FirstEnergy's captive distribution customers are paying for FES's market-based losses in direct contravention of R.C. 4928.38.

Given this, it is unsurprising that the appellees next argue that Rider DMR need not heed the General Assembly's bar on transition revenues because the Commission can approve any rider under (B)(2)(h) "notwithstanding" anything in Title 49. PUCO Br. at 7; OEG Br. at 12. But, again, reliance on the notwithstanding clause is misplaced. *See supra* Part I.D. The statute prohibits the Commission from "authoriz[ing] the receipt of transition revenues or any equivalent revenues . . . except as expressly authorized in [enumerated sections inapplicable here]." By its text then, R.C. 4928.38 is meant to apply all revenues received by a utility (including revenues under (B)(2)(h)) as long as they are not *expressly* authorized in sections not applicable here. The appellees do not even acknowledge this plain text. The best way to harmonize this language with the "notwithstanding" clause is to read the "notwithstanding" language more narrowly, as overriding only those provisions of Title 49 that inherently conflict with (B)(2)(h). *See supra* Part I.D. There is no inherent conflict here because distribution riders can easily exist without providing transition revenues.

The appellees' argument to the contrary leads to absurd results. In their view, the Commission can authorize transition revenues via a back door—any rider that "regards" distribution under (B)(2)(h), even when there is no requirement to invest in distribution service. By appellees' reading, then, any cash infusion that is intended to inure somehow to help distribution is exempt from the ban on transition revenues in R.C. 4928.38. That would upset the entire scheme the Legislature undertook with SB3 and SB221 to keep the distribution side regulated but subject the generation side to the free market. It would be as if the General Assembly hid a rewind button in (B)(2)(h), such that its deregulatory project could just be undone through an obscure provision about distribution riders. The General Assembly, however, does not "alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Assn.*, 531 U.S. 457, 468, 121 S.Ct. 903, 149 L.Ed.2d 1 (2001).

IV. The Commission entirely fails to defend its decision to allow FirstEnergy to count lost distribution revenues stemming from independent customer decisions, and FirstEnergy's response misconstrues the law.

Our opening brief detailed another way—apart from Rider DMR—that FirstEnergy's ESP served to unlawfully enrich the Companies: it allows the Companies to collect "lost distribution revenues" for energy saved by the independent conservation efforts of consumers, rather than from any FirstEnergy efficiency program. As we explained (at 41–44), that ruling violates the plain language of R.C. 4928.66(D). Ohio law allows a utility to collect lost distribution revenues only for energy conserved "as a result of or in connection with" a distribution company's "energy efficiency or energy conservation program." R.C. 4928.66(D). Consistent with this plain language, the Commission has historically authorized recovery of lost distribution revenues only to compensate for a company's conservation efforts, not for independent actions of consumers alone. *See* Environmental Advocates' Br. at 43–44. Yet, as neither the Commission or the intervening appellees dispute, FirstEnergy's Consumer Action Program allows the Companies to do just that—recover revenues when they've done nothing to encourage the conservation.

The Commission, for its part, entirely failed to address this argument in its response brief on appeal. The Commission's prior entries merely stated that FirstEnergy could collect these lost distribution revenues as long as they were "verifiable." Fifth Entry at ¶ 324, Eighth Entry at ¶ 142. But, as we explained, that is not the statutory standard.

The Companies' attempt to justify the Commission's ruling fares no better, and is based on a fundamental misreading of the relevant statutes. Recovery of lost distribution revenues, the Companies argue (at 48), is "dictated by R.C. 4928.662, which states: 'Energy efficiency savings and peak demand reduction achieved through action taken by consumers ... shall count toward *compliance with the energy efficiency and peak demand reduction requirements.*" (Emphasis added.) Thus, counting efforts undertaken "by customers," in its view, is "specifically authorized by statute." *Id.*

But the Companies conflate, on one hand, the rules for complying with energy reduction mandates, and the recovery of lost distribution revenues on the other. The two are not the same. The statute the Companies cite, R.C. 4928.662, governs only "compliance with energy efficiency and peak demand reduction requirements." It does not govern "lost distribution revenues,"—that is controlled by R.C. 4928.66(D). While FirstEnergy may be able to count efforts "taken by customers" as part of complying with energy reduction requirements, that is separate from whether it may *charge customers* for lost distribution. And R.C. 4928.66(D) says FirstEnergy can only charge customers for lost distribution that is "a result of" a FirstEnergy conservation program.

Not only is the statutory text clear, it also makes sense. A utility should not be financially harmed by its own efforts to increase efficiency; if its program leads to financial losses because there is less distribution, the State is willing to compensate the utility. But if consumers take independent actions that are not prompted or incentivized by the utility, the utility does not deserve a reward. Thus, irrespective of any ruling on Rider DMR, this Court should reverse the Commission's approval of FirstEnergy's Consumer Action Program.

CONCLUSION

For the reasons given above, the Environmental Advocates respectfully request that the Court reverse the Commission's Fifth and Eighth Entries on Rehearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing brief was served upon the following parties of record via electronic transmission this 18th day of June, 2018.

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CERTIFICATE OF FILING

The undersigned counsel certifies that, in accordance with Supreme Court Rule of Practice 3.11(D)(2), a copy of this brief was filed with the docketing division of the Public Utilities Commission of Ohio in accordance with sections 4901-1-02(A) and 4901-1-36 of the Ohio Administrative Code on this 18th day of June, 2018. The copy was delivered by mail.

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