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 and Electric Security Plan.	))))))))	Case No. 14-1297-EL-SSO

JOINT INITIAL REHEARING BRIEF OF ENVIRONMENTAL DEFENSE FUND AND OHIO ENVIRONMENTAL COUNCIL

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I. INTRODUCTION

Just a little over two years ago, Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison ("the Companies") proposed an Electric Security Plan, that had at its centerpiece a proposal to enter into a commitment to purchase the output from uneconomic power plants owned by its sister company FirstEnergy Solutions ("FES") through a Power Purchase Agreement ("PPA"). The PPA would have been secured or guaranteed by payments made by their customers under a new fee which they propose to call a "Retail Rate Stabilization Rider" or Rider RRS, and, FES would transfer to the Companies the right to sell all output, including energy, capacity, ancillaries, and environmental attributes from the FES share of the Ohio Valley Electric Corporation ("OVEC") which includes two sixty-year old, coal-fired power plants (Kyger Creek in Cheshire, Ohio and Clifty Creek in Madison, Indiana) , the fifty-two year old, Sammis coal-fired plant and the Davis-Bessie nuclear plant. The PUCO approved the Companies' initial proposal based on a set of principles that it was convinced would benefit ratepayers and the public interest, all of which were related to the economic benefits – jobs and local tax revenue – of keeping particular power plants operating.

Now two years after that initial proposal, in this rehearing phase, the Commission has before it three "alternative" plans to that approved earlier proposal: the Companies' Modified Rider RRS, The Commission's staff's proposed Distribution Modernization Rider ("Rider DMR"), and the Companies' counter-proposal to the Staff's Rider DMR. These new subsidy proposals fail to apply, achieve, or even address any of those Commission approved principles. The goals of these alternatives, simply put, are to put money in the hands of the shareholders and to make up for years of bad financial bets on fossil fuels and against clean and efficient energy. As we and others argued after the first phase of this proceeding, these were the same goals of the original Rider RRS, not to protect the public interest, but business interests – not protect ratepayers, but shareholders.

Each of these proposals, as we address throughout this brief, are unlawful, unreasonable, and worst of all, unconscionable. Both Modified Rider RRS and Rider DMR, among other enumerated illegalities, unlawfully involve a non-competitive service (i.e., the utility's duty to provide default service) to subsidize a competitive service in violation of ORC 4928.02. Both Modified Rider RRS and Rider DMR unreasonably put customers at risk of millions of dollars of charges and costs. Modified Rider RRS unconscionably hides behind a virtual PPA to evade an otherwise federally illegal affiliate PPA to prop up aging fossil fuel units. But worst of all, Rider DMR even more unconscionably blames hardworking Northern Ohio families for the bad fiscal position of First Energy Corp., and looks to charge them hundreds of millions if not billions of dollars for that responsibility along with a tax for the privilege of having First Energy's headquarters in Akron. Rejecting any and all such subsidies would be best for Ohio's manufacturers, consumers, and environment.

As we outline below, an ESP with Modified Rider RRS, Rider DMR, or any combination of the two is wholly unjust and unreasonable and inconsistent with the policy of the state of Ohio. Thereby, OEC and EDF urge the Commission to deny the Modified Rider RRS, and further deny the Staff and Companies' "alternative" Rider DMR. So pursuant to the procedural schedule established by the Attorney Examiners in this case, Environmental Defense Fund ("EDF") and Ohio Environmental Council ("OEC") respectfully submit the following initial post-rehearing brief.

II. FACTS

On August 4, 2014, FirstEnergy filed an application pursuant to R.C. 4928.141 to provide for an SSO to provide generation pricing for the period from June 1, 2016 to May 31, 2019. The application was for an ESP, in accordance with R.C. 4928.143. In order to fund its aging coal plants, FirstEnergy proposed the Retail Rate Stability rider ("RRS"), which would be paid for by customers.

On March 31, 2016, the Commission issued its Opinion and Order, approving FirstEnergy's application and stipulations with several modifications (Case No. 14-1297, Opinion and Order, Mar. 31, 2016). Though not exactly what FirstEnergy requested, the order approved a PPA under which customers would be charged the new RRS rider to fund operation of FirstEnergy's aging coal plants for a number of years. However, on April 27, 2016, the Federal Energy Regulatory Commission ("FERC") ruled that the power purchase agreement proposed by FIrstEnergy and approved by the Commission was illegal, and ordered FirstEnergy (and other companies) to submit plans for federal review.

On April 29, 2016, applications for rehearing were filed by the following parties: Sierra Club; Dynegy, Inc. (Dynegy); the PJM Power Providers Group and the Electric Power Supply Association (collectively, P3/EPSA); and the Retail Energy Supply Association (RESA). On May 2, 2016, MidAtlantic Renewable Energy Coalition (MAREC); Cleveland Municipal School District (Cleveland Schools); The Ohio Schools Council, Ohio School Boards Association, Buckeye Association of School Administrators; and Ohio Association of School Business Officials, dba Power4Schools (Power4Schools); Northeast Ohio Public Energy Council (NOPEC); Environmental Law and Folic}' Center, Ohio Environmental Council, and

Environmental Defense Fund (Environmental Advocates); the Ohio Manufacturers' Association Energy Group (OMAEG); and the Ohio Consumers' Counsel and Northwest Ohio Aggregation Coalition (collectively, OCC/NOAC) also filed applications for rehearing.

Rather than submitting plans for the PPA to FERC, on May 2, 2016, FirstEnergy also filed an application for rehearing. In its application for rehearing, FirstEnergy proposed a modified calculation for its Rider RRS as approved by the Commission's March 31, 2016 Opinion and Order. By Entry on Rehearing issued May 11, 2016, the Commission granted the applications for rehearing filed by the Companies, Sierra Club, P3/EPSA, Dynegy, RESA, MAREC, CMSD, Power4Schools, NOPEC, Environmental Advocates, OMAEG, and OCC/NOAC, for further consideration of the matters specified in the applications for rehearing. Upon consideration of the arguments raised in the applications for rehearing and the memoranda contra the applications for rehearing, a hearing should be held regarding the provisions of the Modified RRS Proposal. The scope of the hearing was purported to be limited to the provisions of, and alternatives to, the Modified RRS Proposal.

On June 29, 2016, Staff then proposed an entirely new rider, referring to it as the Distribution Modernization Rider ("DMR"), which would give FirstEnergy a cash bailout of $131 million per year for three years to help it maintain its credit rating. If the $393 million is not sufficient to bailout FirstEnergy, the Staff's proposal permits it to apply for an additional two year extension of an undisclosed amount.

FirstEnergy filed *Rehearing Rebuttal and Surrebuttal Testimony of Eileen M. Mikkelsen*, on July 25, 2016, which disagreed with the amounts proposed by Staff, and indicated that it would need significantly more, which it calculated at $558 million per year for 8 years plus an adder for the economic development impact of the First Energy Akron Headquarters. In total, the cost to customers under the Companies' counter proposal to Rider DMR could cost ratepayers over $9 billion.

III. STANDARD OF REVIEW

The Commission is required to engage in the statutory standard for review of an ESP by "determin[ing] whether the ESP is more favorable in the aggregate than MRO, pursuant to Section 4928.143(C)(1), Revised Code." *In re Columbus S. Power Co.*, Case No. 11-346-EL-SSO, et al., Opinion and Order (Dec. 14, 2011) at 27.). Additionally, the burden is on the FirstEnergy Utilities to show that the elements of the ESP are "just and reasonable and are consistent with the policy of the state as delineated in" R.C. 4928.02. Ohio Adm. Code 4901:1-35-06(A).

In reviewing a proposed stipulation, "[t]he ultimate issue for the Commission's consideration is whether the agreement . . . is reasonable and should be adopted." *In re Columbus S. Power Co.*, Case No. 11-346-EL-SSO, *et al.*, Opinion and Order (Dec. 14, 2011) at 27. The Commission uses three criteria to determine the reasonableness of a stipulation:

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

Id.

The Commission must also still ensure its decision is "guided by the policies of the state as established by the General Assembly in" R.C. 4928.02. *In re Columbus S. Power Co.,* Opinion and Order (Dec. 14, 2011) at 17; see also *Id*. at 27. Further, the Commission must apply the statutory standard for review of an ESP by "determin[ing] whether the ESP is more favorable in the aggregate than MRO, pursuant to Section 4928.143(C)(1), Revised Code." *Id.* at 27.

Finally, the signatory parties to a stipulation carry the burden of showing that it meets the stipulation standard. *In re Columbus S. Power Co.*, Case No. 11-346-EL-SSO, *et al.*, Entry on Rehearing (Feb. 23, 2012) at 8.

IV. ARGUMENT

A. The Commission should deny Modified Rider RRS as unjust, unreasonable and inconsistent with the policy of the State of Ohio, and further so materially changes Stipulated ESP IV as to contravene the Commission's three-part test for approving a stipulations.

As outlined above, FERC issued an Order on April 27, 2016 in Docket Number EL16-34-000 ("FERC Order") ruling that FES must obtain prior approval for sales under the PPA, demonstrating that the PPA was entered into under competitive conditions. In response, Companies have chosen to return to FERC, but have modified the Rider RRS to shield it from FERC review, and suggest the subsidy go directly to the electricity-distribution utilities, without guaranteeing the uneconomic power plants would continue to operate. In the rehearing phase of this proceeding, FirstEnergy has modified Rider RRS to eliminate the PPA such that Rider RRS will now be based on the costs, and the projections of sales and revenues from the Plants, but FirstEnergy will guarantee these prices itself and will not purchase the output from the Plants, or use any type of physical or financial hedging instrument to support the Rider RRS prices. What was once a Rider that was meant to keep all of the purported benefits of the physical plants to the economy of Ohio and the reliability of the grid, and did so by connecting the rider to a PPA for the physical output of said plants, is now a "virtual PPA" that merely moves money around from subsidiary to parent holding company.

Nevertheless, with all of the modifications to riders, proposals and counter proposals in this rehearing process, we must first be reminded that this rehearing was triggered by a modification to the centerpiece rider of an approved Stipulation in the Companies' fourth ESP. As stated above, the Commission decides the reasonableness of a stipulation by considering the following criteria: (1) Is the settlement a product of serious bargaining among capable, knowledgeable parties? (2) Does the settlement, as a package, benefit ratepayers and the public interest? (3) Does the settlement package violate any important regulatory principle or practice? While OEC and EDF continue to maintain that the approved Stipulation itself violated the Commission's reasonable test for stipulations, we further hereby proffer that the Companies' Modification of its Rider RRS, fails to meet this reasonableness standard by an even larger degree.

1. **The record concerning the material change to Rider RRS clouds the assertion that the first prong of the reasonableness test for the Stipulation as a whole.**

First, we recognize that the Commission found in its March 31, 2016 Opinion and Order ruled that Stipulated ESP IV was a product of serious bargaining among capable, knowledgeable parties. That, ruling however, does not necessarily mean that every modification to the Stipulation's major provisions is accorded the same deference. Here, the Companies' modified Rider RRS in a materially significant way, and no evidence was ever offered that other parties to the Stipulated ESP IV agreed to this change. No party presented evidence suggesting that there was discussion of this change, or that any bargaining with other parties occurred regarding this change, and the sheer speed of the filing of this substantive modification to the core piece of the ESP, begs one to wonder how any of such bargaining could have meaningfully occurred.

The timeline here is significant to the analysis under prong number one. FERC issued a ruling stating that the federal agency would need to review the Companies' PPA to determine whether it is consistent with a competitive procurement process, on April 27, 2016. The Companies filed their modified proposal on May 2, 2016 - less than one week after the FERC effectively overturned the PPA. There has been no evidence presented that any bargaining occurred during this short period of time. The only showing of the potential that agreement was accomplished, was a letter drafted and signed by the Companies and submitted to the docket after the filing, purporting to acknowledge the support of all the Signatory parties to the new Modified Rider RRS proposal. *See* Companies Ex. 198. While the document characterizes the Modifications to Rider RRS as "modest," the changes are quite significant as evidenced by the volumes of testimony and evidence produced over the additional days of rehearing, and constitute a material change to the Stipulated proposal. *Id.*

As OEC/EDF Witness Finnigan points out, the lack of evidence that true bargaining occurred in that 5 day period does not show adherence to the Commission's first prong of deciding the reasonableness of the stipulation, but rather, "it appears that the companies unilaterally modified the Rider RRS proposal to eliminate the PPA and replace it with an uncovered hedge." OEC/EDF Ex. 3 at 3. Such unilateral activity to modify the central part of the Stipulation, patently fails the first prong of the reasonableness test, and thus this presumed modified stipulation fails.

2. **The Commission should deny Modified Rider RRS as it operates to the detriment of ratepayers and the public interest.**

The Modified Rider RRS, as OEC/EDF Witness Finnegan points out, is a material change in the approved Stipulated ESP IV because the rider is no longer backed up by a PPA with First Energy Solutions ("FES"). OEC/EDF Ex. 3 at 4. Instead, the Companies will simply flow through the projected revenues and costs from the Plants as if the PPA were still in place. But without the PPA in effect, the revenues the Companies collect from Rider RRS will not flow through to FES to pay for the Plants. The projected revenues and costs that the Companies will reflect in RRS will not be based on the actual costs that the Companies pay for power used to serve default customers. Mr. Finnegan points out that the Companies characterize modified RRS as a price hedge for customers but this really is a guaranteed price at which the Companies will sell power to customers, even though the Companies own no generation and will not be entering into any contract with a third party to buy the power at this price or to financially hedge the transaction. *Id.* This is an extremely risky proposition that harms ratepayers and the public interest.

a. The material change to the Approved Rider RRS removes the Commission's acknowledged and approved benefits of the Rider

The revenues the Companies collect under modified Rider RRS will no longer go to FES to pay for the Plants. This materially changes the costs and benefits under Stipulated ESP IV. For example, the Commission's March 31, 2016 Opinion and Order discusses that Rider RRS would: (1) avoid $400 million to $1.1billion in additional transmission costs; (2) encourage resource diversity in Ohio by supporting 2,220 MW of coal generation capacity and 908 MW of nuclear generation capacity; (3) allow millions of dollars to flow to the local communities where the plants are located in economic development benefits by retaining the jobs at the Plants; and (4) attract other businesses to locate in Ohio due to enhanced reliability and stability. Opinion and Order (March 31, 2016) at 87-88. While it is our position that the promises of original Rider RRS are hollow and the Rider RRS's legality remains dubious, if the promises were to be believed, all of these benefits would be eliminated under modified Rider RRS, to the great detriment of ratepayers and the public interest. The modified Rider RRS proposal adds no new benefits to replace these lost benefits. Furthermore, without a true PPA to fall back on, and as we outline below, the Companies could incur significant financial losses that could impair their financial condition and interfere with their ability to make the investments needed to provide safe, adequate and reliable electric service for their customers.

b. Modified RRS puts ratepayers and the Companies at great financial risk.

The Modified Rider RRS makes little to no fiscal sense for either the Companies or the ratepayer, and surely not the public interest. Companies' Witness Mikkelsen discusses how, in the early years of the Modified Rider RRS proposal, the Companies could collect revenues from customers in excess of the costs the Companies pay to buy the power, and how these revenues could be used for investments such as grid modernization. But her testimony does not discuss what could happen in the later years of the Modified Rider RRS proposal when, per the evidence submitted by the Companies, the revenues are expected to fall significantly short of costs. This would have a devastating impact on the Companies' financial condition and would adversely impact ratepayers because they would likely be forced to pay higher rates as a result. There is no evidence that the Companies considered this issue before making the Modified Rider RRS proposal, or engaged in negotiations with other settling parties regarding this issue.

As Witness Finnigan further points out, the Companies will likely face a major revenue shortfall due to the Modified RRS proposal. In the Commission's March 31, 2016 order, the Commission concluded that the Rider RRS proposal would result in a net credit to ratepayers of $561 million in nominal dollars. Opinion and Order (March 31, 2016) at 81. The Commission stated that, using an average of the $561 million credit with the projection of a $50 million charge by OCC Witness Wilson based on a U.S. DOE Energy Information Administration reference case, the net credit to ratepayers would be $256 million. *Id., See also* OEC/EDF Ex. 3 at 6. This means that the Companies would experience a revenue shortfall of this amount during the term of the Modified RRS throughout the term of the ESP. The original Rider RRS transaction acquired the power through a PPA with FirstEnergy Solutions, so FirstEnergy's shareholders would have absorbed this loss. By eliminating the PPA, the Companies will absorb this loss and ratepayers will suffer. There is no evidence that the Companies considered this or negotiated with the other settling parties regarding how to protect ratepayers against the impact of the modified transaction.

This problem was further evaluated during hearing, and the consequences are more unsettled. Looking at the workpapers produced by the Companies, during the period of January 1, 2019 through May 31, 2024, the Companies project credits to customers of $976 million in nominal dollars (or $623 million net present value) from Rider RRS. Sierra Club Ex. 89 (Mikkelsen Workpaper). Under this modification it is unclear how the Companies intend to provide such a credit. During that four and a half year timeframe, the Companies would receive $976 Million less cash as a result of the proposed Modified RRS. Tr. Vol I at 79. In response to that nearly billion dollar gap in Companies' revenue, Witness Mikkelsen points to "dollars coming back in associated revenue requirements arising from . . . SmartGrid investment," dollars coming in associated with . . . rider DCR as well as shared savings, and lost distribution revenue. *Id.* at 81-85. Such use of these funds Witness Mikkelsen actually states that the parent (First Energy Corp.) "has a long history of providing equity to the utility companies, when it is necessary, in order to help those companies maintain their investment grade status, so I would view this as an additional opportunity." *Id.* When juxtaposed with the Staff's and Companies' reasoning for proposing Rider DMR -- a desperate need for First Energy Corp. to obtain credit support and a cash flow infusion to stay in good financial health – this statement is at the least laughably ironic and at the most untrue as it relates to the evidence on record.

The uncertainty over how the Companies intend to compensate for the proposed Modified Rider RRS's loss of nearly a billion dollars of revenue creates insurmountable risk, and is irrefutable evidence that this Rider is detrimental to ratepayers and public interest. Nevertheless, as OEC/EDF Witness Finnigan states in his testimony, this risk to ratepayers could be mitigated if the Companies would enter into a PPA or a financial hedge contract with an independent third party, negotiated at arm's length. In this case, the third party would bear the risk of loss. OEC/EDF Ex. 3 at 5. Yet, there is no evidence that the Companies evaluated this or negotiated with other settling parties regarding the possibility of entering into a PPA or a financial hedge negotiated at arm's length with an independent third party. Furthermore, this would potentially pass FERC muster based on its call for just a competitive bid request under its May 2016 ruling. Therefore, if the Commission does consider approving Modified Rider RRS as a hedge mechanism, at a minimum this mechanism should be done through an independent third party so that customers and the public are protected.

3. **The Stipulated ESP IV with modified Rider RRS violates important regulatory principles and practices.**

The merit as to this Modified proposal in general, and especially in regard to the third prong of the reasonableness test, can clearly be seen through the evolution of the support and ultimately opposition to the current proposal by the Staff of the Commission. As originally proposed by the Companies two years ago, the Staff recommended that the Commission deny

Rider RRS as proposed, however, if properly conceived, may be in the public interest. Staff Ex. 15 at 6. Staff's position on Rider RRS was altered by the Third Stipulation where it signed, due in part to the Companies' addressing of several concerns such as: the term of Rider RRS; the inclusion of a risk sharing mechanism and a severability provision; and the Companies' agreement to rigorous regulatory oversight of Rider RRS and to full information sharing. *Id.* at 7.

Staff now recommends that the Commission deny the Companies' Modified RRS because the Modified Rider RRS is no longer comprised of a PPA that is tied to specific power stations in the state; the Modified Rider RRS may have potential implications with FERC's authority over wholesale power markets; and the Modified Rider RRS is "at its core a generational rider." *Id.* at 13-14. As outlined below, these and other deficiencies that are the basis for Staff's change of position as it pertains to this central piece of the Third Stipulation show violations of important regulatory principles.

a. **Modified Rider RRS violates the Commission's principles for approving this type of rate stabilization mechanism.**

In Ohio Power's third ESP case, and in this very proceeding, the Commission directed that any filing seeking cost recovery for a PPA under such a rider "should, at a minimum, address" several factors: 1) "financial need of the generating plant"; 2) "necessity of the generating facility, in light of future reliability concerns, including supply diversity"; 3) "description of how the generating plant is compliant with all pertinent environmental regulations and its plan for compliance with pending environmental regulations"; and 4) "the impact that a closure of the generating plant would have on electric prices and the resulting effect on economic development within the state." AEP ESP 3 Case, Opinion and Order (Feb. 25, 2015) at 25. The Commission also directed that any PPA rider proposal must "include an alternative plan to allocate the rider's financial risk between both the Company and its ratepayers." *Id*. In rejecting AEP's PPA rider proposal in that case, the Commission ultimately faulted AEP for making a showing that the proposal "would provide customers with sufficient benefit from the rider's financial hedging mechanism or any other benefit that is commensurate with the rider's potential cost." AEP ESP 3 Case, Opinion and Order (Feb. 25, 2015) at 25. The Commission should focus on that same issue in its consideration of the Modified Rider RRS element of the Companies' ESP proposal here, which has been characterized in this hearing as a "virtual PPA."

As outlined in Witness Finnegan's testimony, Modified Rider RRS proposal eliminates the PPA between the Companies and FES, so the Companies will not purchase power from the FES Plants and none of the revenues that the Companies collect under modified RRS would flow to FES. OEC/EDF Ex. at 8. He further opines that as a result, "the Modified Rider RRS will have no impact on the Plants, and the Companies are unable to meet any of the prongs of this four-part test for approving a rate stabilization mechanism." *Id.* The original Rider RRS was predicated on keeping 3,200 MW of power running, and maintaining the thousands of jobs that are supported in Ohio by the Sammis and Davis Bessie plants. Yet, as was made clear at hearing, the Companies' proposal does nothing to mitigate the risk of those plants (or any plants) from shutting down. Tr. Vol I at 263. The job retention and economic development benefits of those plants would be at risk under this modification. First Energy Solutions is free to close these plants at any moment, and the potential costs to the customers would stay, including the costs to pay for the $1 Billion –plus transmission costs. OEC/EDF Ex. 3 at 8. Furthermore, the issue of maintaining supply diversity – a question which was at the heart of the majority of the early part of this proceeding -- is gone.

The AEP Factors test was created by this Commission for this very type of rate stabilization Rider, and this Modified Rider RRS fails that test.

b. Modified Rider RRS would result in unlawful, anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service, or vice versa.

If the prices the Companies actually pay for power to supply customers are *higher* than the revenues the Companies collect from customers under modified Rider RRS, then the Companies would incur a loss. The only way the Companies could make up this loss would be through a rate increase. If this occurs, then anticompetitive subsidies would flow from a noncompetitive service to pay for competitive retail electric service, in violation of R.C. 4928.02(H). On the other hand, if the prices the Companies actually pay for power to supply customers are *lower* than the revenues the Companies collect from customers under modified Rider RRS, then the Companies would incur a profit. If this occurs, then anticompetitive subsidies would flow from a competitive retail electric service to pay for noncompetitive retail electric service, in violation of R.C. 4928.02(H).

Furthermore, despite testimony that "the cash associated with Rider RRS charges would not flow to FES, thereby potentially making more cash available for the Companies to support more important initiatives such as grid modernization and other new technologies, those benefits are nowhere near a guarantee. *See* Companies' Ex. 197 at 6-7. As the record shows The Companies are not willing to commit that they will not use the cash collected under Modified Rider RRS to provide dividends to First Energy Corp. Tr. Vol I at 75. Further, the Companies acknowledge that there are no prohibitions on them from moving money to unregulated affiliate generation company FES. *Id.*

c. **Modified Rider RRS effectively would allow unlawful recovery of transition costs.**

As Staff Witness Dr. Choueiki points out, Modified Rider RRS *is at its core a generation rider"* and all of its credits and charges are explicit functions of unspecified generation. Staff Ex. 15 at 14. Both Dr. Choueiki and OEC/EDF Witness Finnigan conclude therefore that to the extent that modified Rider RRS allows the Companies to collect revenues based on the costs of operating the First Energy Corp. owned plants, the Companies would be unlawfully recovering transition costs in violation of R.C. 4928.37 and 4928.39. *See Id., See also* OEC/EDF Ex. 3 at 10.

Here, starting in 1999, the Revised Code provided an electric utility the opportunity to receive transition revenues that may assist it in making the transition to a fully competitive retail electric generation market ORC 4928.37. A utility is only permitted to receive those transition revenues, upon application, when the Commission finds that:

> (A) The costs were prudently incurred; (B) The costs are legitimate, net, verifiable, and directly assignable or allocable to retail electric generation service provided to electric consumers in this state; (C) The costs are unrecoverable in a competitive market; and (D) The utility would otherwise be entitled an opportunity to recover the costs. ORC 4928.39.

Companies' Witness Mikkelsen testified that "since the proposal is projected to be a net credit over the term of the ESP IV, it can't be considered a transition charge." Tr. Vol X at 1689. The obvious translation is that, this Modified Rider RRS is designed in a way that it *could* be a transition charge. Thus, this Rider would be a transition charge definitely in the early years when there is projected to be a cost to customers, and potentially if the alleged credits are not materialized.

d. **The Modified Rider RRS would likely cause the Companies to experience significantly excessive earnings during the early years of the Rider.**

Any utility that opts to provide service under an ESP must undergo an annual earnings review. R.C. 4928.143(F) requires the Commission to annually consider whether the ESP resulted in "significantly excessive earnings" compared to companies facing "comparable" risk. If so, the utility must return the excess earnings to its customers. *In re Application of Columbus S. Power Co.*, 2012-Ohio-5690, ¶ 5. Additionally, any ESP that exceeds a three year period is subject to a four year review as well under R.C. 4928.143(E). Under both R.C. 4928.143(E) and (F), the burden of proof for demonstrating that the return on equity is not significantly excessive is borne by the electric utility. *See also* O.A.C. 4901:1-35-03(C)(10).

To determine whether an ESP resulted in excessive earnings, the Commission must consider:

> "whether the earned return on common equity of the electric distribution utility is significantly in excess of 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."

O.R.C. 4928.143(F); *In re Application of Columbus S. Power Co.*, 2012-Ohio-5690, ¶ 5.

The Commission permits extraordinary items to be excluded from the SEET calculation. However, such circumstances are extremely limited, and must truly be *extraordinary*. *See e.g.*, *In the Matter of the Application of the Dayton Power & Light Co. for Auth. to Transfer or Sell Its Generation Assets.*, 316 P.U.R.4th 307 (Ohio P.U.C. Sept. 17, 2014) (where company was considering the sale of generation assets to a third party, this constituted an extraordinary item and was not included in the SEET calculation).

Company witness Eileen Mikkelsen stated that, "[t]he charges associated with 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." Companies Ex. 206 at 22-23. This is inconsistent with the Commission's past determinations as to what constitutes "extraordinary". In fact, it goes directly against what staff has indicated it meant by extraordinary. Staff stated that extraordinary items were to be excluded because they "could overwhelm normal levels of earnings and would not be pertinent to the SEET *unless directly tied to an ESP or MRO*." *In the Matter of the Investigation into the Dev. of the Significantly Excessive Earnings Test Pursuant to Amended Substitute Senate Bill 221 for Elec. Utilities.*, 283 P.U.R.4th 436 (Ohio P.U.C. June 30, 2010) (emphasis added). In this matter, the "extraordinary" charges are *directly tied* to the ESP. There is no justification to permit it to be considered an extraordinary charge in this case.

As pointed out during Witness Finnigan's cross-examination, the SEET test requires excessive earnings to be determined through an analysis of similarly situated utilities. Tr. Vol V at 1164. As Mr. Finnigan points out, no other utilities have a rider like Rider RRS which proports to offer a price to customers based on certain units that is not backed up by a PPA or actual physical generation. *Id.* The implication from the questioning was that because no other utility has such a rider, there is no similarly situated utility. That implication is faulty, however, as novelty of a rider construct is not an excuse or free pass for significantly excessive earnings.

As OCC Witness Duann pointed out, that "adjustments (if any) to the revenues and expenses for SEET calculation are generally limited to extraordinary, special, one-time-only events such as gains and write-offs associated with asset disposition or regulatory events or earnings from affiliated companies." OCC Ex. 43 at 8. It is clear that the Modified Rider RRS, is an adjustment resulting from an ESP as referenced in the Ohio Revised Code 4928.143(F). Accordingly, all the revenues and expenses (if any) associated with this particular ESP adjustment should be included in the annual SEET review and eligible for refund to customers. In other words, all the revenues and expenses (if any) associated with the Modified Rider RRS should be included in calculating the annual net incomes of the three electric distribution utilities.

So, although Company Witness Mikkelsen, testifies that the revenues from Modified Rider RRS should be excluded from the SEET test as a "special item" per the Commission's decision in Case No. 09-786-EL-UNC, Companies' Ex. 197 at 18, there is no basis for excluding these revenues. Just as novelty does not a "special item" make, neither should novelty excuse unlawfully excessive earnings.

B. The Commission should reject any proposal to require First Energy's Customers to provide Credit Support to First Energy Corp.

As stated above, the PUCO Staff testified in opposition to the Companies' proposed modification to the Rider RRS. As an alternative, however, Staff proposes a credit support mechanism cloaked with the moniker Distribution Modernization Rider ("DMR"). The Staff's proposed Rider DMR would allow for recovery of $131 Million per year from the Companies' Ohio Regulated Distribution Utility Customers for at least the next three to five years. Staff Ex. 13 at 2. As a basis for this, Staff's Witness Buckley observes that First Energy Corp. is rated

Baa(3) by Moody's Investor Service ("Moody's") and BBB- by Standard & Poor's ("S&P"), the lowest investment grade ratings possible. *Id.* at 5. Witness Buckley calculates the collection of $131 Million for the next three to five years as the Companies' allocated share of 22% of the total amount of cash flow needed to achieve a cash flow to debt, or CFO to debt, ratio of 14.5%. *Id*. at 3. While allocating 22% to the Companies' customers is much less than 100%, the lack of evidence to support this Rider on the record reveals it as more likely a 100% customer funded grant to First Energy Corp.. The testimony presented by Staff shows a lack of evidence that the charge to customers will protect or improve credit ratings of First Energy Corp.; a lack of evidence that customers are at all responsible for the credit shortfall; and a lack of evidence that any other constituency will pick up the remaining 78%. Rider DMR, as presented, therefore is contrary to public interest, and in fact inflicts an unwarranted financial injury to ratepayers.

To add customer insult to the proposed customer injury of proposed Rider DMR, the Companies propose a counter-offer to the Staff that increases the costs to customers to somewhere in the ballpark of $568 million to $1.126 Billion annually for eight years. *See* Companies' Ex. 206 at 14. The Companies' disagree with Staff's, as we argue unreasonable, allocation of 22% of the needed cash flow infusion by the Companies' customers, and recommend an allocation factor of 40% along with a recalculation of the Staff's CFO to debt calculation. *Id.* at 11-12. The Companies' suggest a contribution from customers of $558 Million, and not over three to five, but the entire eight year ESP. *Id.* Additionally, the Companies recommend adding up to an additional amount of $568 million over that same eight years to cover the "substantial value" of "economic development and job retention" qualities of First Energy Corp.'s Akron Headquarters. *Id.* at 13, *See also* Companies' Ex. 205 at 3-4. This counter proposal, thus, if approved as recommended, would cost ratepayers an additional $9.008

BILLION over the course of the ESP. This takes a the negative impact on public and ratepayer interests under Rider DMR, and effectively increases it 22-fold.

Nevertheless, in either manifestation, proposed Rider DMR is in no way an alternative to Rider RRS or the Companies' proposed Modified RRS. Rider DMR does not provide a hedge against alleged price volatility. Rider DMR does not even guarantee the investment in distribution modernization that its name implies. These Riders are a handout to unregulated utility holding Company to protect itself and its shareholders from the effects of poor credit ratings. A decision by this Commission to approve any credit support rider unreasonably and unlawfully rewards First Energy Corp.'s bad behavior. Approval of the proposal sends a clear message for all EDUs – if your parent company makes bad investments, if management has no plans to protect its credit rating or cash flow, do not worry, the Commission will make sure customers cover it. However, a decision to reject customer-funded credit support and tell the utilities to sell off those bad investments, close uneconomic plants, and deal with shareholder and executive dividends and payouts *before* you come to the Commission to ask for distribution customer support.

Thus, as we outline below, each of these credit support subsidies should be rejected by the Commission in their entirety.

1. **The Staff's $393 Million-plus credit support proposal should be denied as unreasonable, unlawful and an unconscionable cost to customers that does not benefit ratepayers or the public interest.**

We do not dispute that First Energy Corp. and the Companies are in dire financial straits. There are volumes of testimony, exhibits, hearing transcripts, and party post hearing briefs that go into detail that the major credit rating institutions (Moody's and S&P) have designated negative ratings or near negative ratings to the Companies and/or First Energy Corp. We do not dispute that if First Energy Corp. falls below investment grade that they will have difficulty obtaining financing in the capital markets. Staff Witness Dr. Choueiki asserts that we need healthy Companies, and to have healthy companies you need a healthy parent company. Tr. Vol IV at 1029. We agree. Dr. Choueiki also states that we would like a modernized grid – and to that we too agree. We, too, agree.

However, we must dispute the charging of additional fees to customers to make up for credit problems brought on by poor decisions is the, or any, answer, and believe that he Staff's overall reasoning is unfounded, unjust, and unreasonable. Dr. Choueiki espouses the faulty reasoning that "regardless of whatever decisions were made in the past" by the Companies or the parent company, that the Companies' customers need to pay to cover those decisions. Yet, we believe, the credit support is to pay back the Corporate giant for investing n old and dirty power generation when other utilities are looking to the efficient and cleaer sources and technologies of the future. Dr. Choueiki further states that the way to get to a modern grid, he too suggests, is through a cash infusion funded by hard working customers – despite the fact that First Energy Corp. should have been investing in such advanced technology and embracing a modern grid all along. Additionally, the Companies' Witness Mikkelsen fully admits that it is uncertain that the collection of money from customers would have *any* impact on First Energy Corp.'s credit rating. Tr. Vol I at 77 (emphasis added).

But what is the most troubling is the idea that it is not the executives or shareholders of the monopoly First Energy Companies, but the people of Northern Ohio who are to blame. Customers do not owe the Companies for the Companies' monopoly, the Company in exchange for its monopoly power owes the customers the duty to stay healthy and provide services. It is not the Commission's job to bail out utilities that make bad business decisions. Rather than burden its customers, FirstEnergy executives and shareholders, like any company within America's free enterprise system, can take many measures to reduce its own debt: reducing executive pay and bonuses; cutting shareholder dividends, issuing more equity, etc. Put another way, subsidies and bailouts run counter to American and Ohioan values in markets and competition. Ohio has moved slowly over the past decade and a half, in some stakeholder's eyes too slowly, toward electric competition. This competition has, and if allowed to reach its potential, encourages innovation that lowers costs, lowers rates, and lowers environmental impact from the electricity sector. If the Commission ascends to this utility's pleas, the customers' may lose confidence in the Commission's authority and ability to advance grid modernization and the integration of efficiency and distributed resources, and looked at backwards rather than promoting a more modern and efficient future that attracts innovation and investment.

Despite creative naming, hopes and promises of money available for modernizing the grid, and conditions that would require refund if not met, neither Ohio's law governing ESPs nor Ohio's codified energy policies permits such a rider. Even if such a Rider were permitted, the blaming of customers for even a small portion of the credit problems of First Energy Corp. is unreasonable, and charging them nearly $400 million to boot, is unconscionable. Thus, and as we further outline below, the Commission must reject Staff's Rider DMR proposal.

a. Staff's proposal will not support the state of Ohio's codified energy policies as there is zero guarantee that Rider DMR will encourage innovation and smart grid programs

To support its proposed Rider DMR, the Staff alleges that approval of the Rider would further the policy of the state to encourage the modernization of the grid, the offerings of innovative services , and the diversity of supply and suppliers. Staff Ex. 15 at 14-15. Staff, here focuses on Ohio's codified energy policy in ORC 4928.02 (C) and (D) which states:

> (C) Ensure 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;
>
> (D) Encourage 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;
>
> O.R.C. 4928.02(C) and (D).

Nothing however, in the record directly supports the connotation that the annual $131 million charge ensures or encourages either of these state policies. In fact, in a few cases the evidence is to the contrary.

First, there has been no evidence that suggests that this Rider DMR proposal will be "giving consumers effective choices over the selection of those supplies and suppliers" or "encourage innovation and market access for cost-effective supply- and demand-side retail electric service." OMAEG Witness Lause, an executive at one of Northern Ohio's largest manufacturers, raises the apt argument that the proposal of Staff "will actually diminish diversity of supply and suppliers and limit consumers' effective choices over those supplies and suppliers." OMAEG Ex. 39 at 7. He makes the conclusion that that "new entrants to the generation supply market will be deterred as First Energy and its subsidiaries are receiving a significant competitive advantage." *Id.* As clean energy and environmental protection advocates, we see this same retreat from Ohio's policies, and not promotion of them from Staff's proposed subsidy. Rider DMR, as proposed, only discourages investments by entrepreneurs and deep-pocketed competitors in the grid innovations needed to ensure reliability and affordability. Put another way, subsidies given to a few discourage investments from the many; put yet another way, subsidies for the status quo discourage investments in innovation.

Next, and probably more stark, is that the Rider does not support Ohio's policy to encourage innovation in smart grid and advanced metering infrastructure because, despite its name, it does not require ANY investment in grid modernization. As we touch on later, Staff's proposed Distribution Modernization Rider is named simply to fit the rider under the framework of an ESP. Despite its name, there is zero requirement that FirstEnergy use any of the funds raised by the DMR for grid modernization. Rather, Staff witness Tamara Turkenton testified that it is the Staff's "hope" that FirstEnergy will use it for those purposes. (Rehearing Tr. Vol II at p.426. It is clear, and further acknowledged at hearing, that the Companies could seek to invest in distribution modernization, regardless of whether Rider DMR is approved. Tr. Vol III at 573. In fact, it is our position that the Companies should have been investing in grid modernization prior to this proposal. Staff is hoping that the Companies will be able to do more, but the Rider DMR does not require anything more. Tr. Vol III at 574. The record in this case is quite clear, the proposed credit support is not for the provision of a distribution service by the distribution companies to the ratepayers, despite being called that. Tr. Vol III at 611. Therefore it should not be considered as supporting Ohio's stated policies.

Moreover, not only will the Rider DMR not support the Staff's enumerated policies, but will violate an important section of Ohio law. If the PUCO would approve a credit support rider to boost FirstEnergy Corp.'s credit rating, this would be illegal under 4928.02 as it would involve a non-competitive service (i.e., the utility's duty to provide default service) to subsidize a competitive service. In this instance, it is the funding of an unregulated competitive service holding company through a distribution rider. This is patently violate of Ohio's stated energy law.

b. Utilizing Rider DMR as an alternative to Rider RRS is inappropriate and questions the ESP's passage of the requisite ESP vs. MRO test.

The true rationale for this rider is merely a bailout for FirstEnergy. As Staff Witness Turkenton notes, this rider could also be included in a MRO under R.C. 4928.142(D)(4), which has nothing to do with grid modernization.[1] Rather, the section is explicitly related to providing assistance to a company in financial trouble, and therefore if this rider was implemented under the framework of a MRO, the name would have nothing to do with grid modernization as it is not a suggested use under the MRO framework. Staff Witness Turkenton indicated that this is a form of credit support, rather than a rider designed specifically to assist in grid modernization. In response questions related to how the proposed $131 million per year rider is allocated, and whether "the fact that this is a distribution rider under the distribution portion of the ESP statute" influences her thinking, Staff Witness Turkenton replied:

> "[I]t is named "distribution modernization rider," but 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, but I don't know that staff believes that it is a distribution rider, per se. That late recovery will happen when they apply for this in the SmartGrid rider."

Tr. Vol. II at p.429.

[1] R.C. 4928.142(D)(4) states, in part: "the commission may adjust the electric distribution utility's most recent standard service offer price by such just and reasonable amount that the commission determines necessary to address any emergency that threatens the utility's financial integrity…".

What makes this improper naming of the Rider the most troublesome is that Staff improperly utilizes the name of the Rider to justify its inclusion in the ESP, and that it thus passes the ultimate standard of review whether the ESP is more favorable than an MRO. Staff suggests that the revenues under proposed Rider DMR would have no impact on the ESP vs. MRO test since equivalent revenues could potentially be recovered through an MRO under ORC 4928.142(D)(4) or an ESP application per ORC 4928.143(B)(2)(h). Staff Ex. 14 at pg. 4. Yet, the conclusion that Rider DMR would have no impact on the MRO vs. ESP test is based on faulty interpretation of statute, and a blind adherence to the ruse that this is a grid modernization rider. The section that Staff points out under the ESP Statute states that the Plan may provide for or include:

> 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**.
>
> O.R.C. 4928.143(B)(2)(h) (emphasis added).

However, as the record indicates, the money collected under this Rider will not be used for grid modernization, but for credit support and cash flow infusion for the parent utility holding company. In fact, there is only the Staff's suggestion that the Commission direct the Companies to invest in the distribution grid through the deployment of advanced hardware and software. Staff Ex. 15 at 15. This suggestion was explained that there is no mandate that cash collected through the Rider DMR would go to various smart grid initiatives. Tr. Vol I at 956-957.

Furthermore, the Commission Staff has not provided any evidence as to the plan for grid modernization by the company and how, if at all, it aligns with customer expectations and whether sufficient resources will be allocated. In fact, the opposite is true as it relates to sufficient funds. Staff asserts that a cash influx would assist the Companies in receiving more favorable terms when accessing the capital market, and procure the funds to “jumpstart” the Companies’ distribution modernization initiatives. Staff Ex. 15 at 15. A “jumpstart” is not sufficient funds under this statute, and as Staff’s Witness testified: “But is rider DMR sufficient to achieve the objectives of grid modernization of the entire FE distribution system? And the answer is no.” Tr. Vol V at 1254.

Thus, inclusion of a Rider that patently does not provide for the benefits it purports to under O.R.C. 4928.143(B)(2)(h) is unlawful in the context of an ESP. And therefore, Staff cannot make the statement that there is no impact on the ESP vs. MRO test, because this credit support rider cannot be approved under an ESP. Merely slapping a name on an unlawful rider that sounds like it can qualify under O.R.C. 4928.143(B)(2)(h) does not make it magically lawful. If the Commission chooses to approve this Rider, it must modify its name so that it more clearly signifies to customers what it is and what it is paying for, and to make the record clear that this is NOT a rider that can be approved under O.R.C. 4928.143(B)(2)(h).

c. Staff's proposal allocates costs to customers who are without blame for the financial problems of First Energy Corp. or the Companies

The record in this case is quite clear, the proposed credit support is not for the provision of a distribution service by the distribution companies to the ratepayers, despite being called that. It is meant for "ensuring the Companies can provide credit support to First Energy Corp. *Id.* at 510. More precisely, it is a "bridge", according to Staff, for First Energy Corp. to get to and maintain appropriate investment grade. *Id.* at 612. The purpose of the Rider DMR, according to Staff, is to allow the Ohio regulated utilities to provide the appropriately allocated support for FE Corp. Tr. Vol. III at 612. That "appropriately allocated support" of First Energy Corp., as the record shows, is a technical term meaning the support (financial support)that the staff believes the utility customers should help – the customers portion that First Energy Corp. needs to stay investment grade. *Id.*

The essence of Staff's proposal is an allocation to First Energy's Ohio utility customers a share of the responsibility (ergo, the blame) for the corporate parent's fiscal problems. The fiscal problems were not and are not the fault of the customers, period, let alone 22% or even 40% as the Staff and Companies suggest. No evidence was suggested that a customer's mere choice to live or maintain a business in the Companies' service territory does not put them at blame for the mismanagement of a utility holding company. Nevertheless, Staff's proposal is predicated on the faulty and offensive presumption that because the Companies' have played a major role in the cash dividends to its parent and recently, the credit rating difficulties, that the Companies distribution customers should pick up the tab. This is seen by the Staff's myopic commitment to charge customers, and total disregard for Management's faults nor other contributors outlined below.

First, Staff did not do any evaluation of whether other subsidiaries of FirstEnergy Corp. might contribute or might have been the cause of more of the CFO shortfall for FirstEnergy Corp. than the Companies. Tr. Vol III at 541. The Staff did not believe any additional constituents were warranted. Tr. Vol III at 648. This statement by the Staff's key financial witness is difficult to comprehend from the Staff of an agency that is meant to regulate utilities' impact on consumers. Effectively, Witness Buckley is stating that Staff felt that no one else was warranted to pay for the financial abyss of a Fortune 500 Company. It is wholly unconscionable to apply any monetary blame on the customers of the Companies for First Energy Corp.'s poor financial bets, stubbornish failure to embrace clean and efficient energy, and neglecting to modernize the grid. The management, shareholders and executives bear the entire burden of stabilizing the finances of the utility holding company. What is more, the Staff only has put on customers a cost, and a hefty one at that. There are no guaranteed benefit to the customers (only a hope that sometime the Companies would be in a position to invest in grid modernization).

Secondly, Staff's proposal presumes that proportionate contributions to First Energy Corp.'s cash flow will come from other subsidiaries. To reach the goal of 14.5%, other subsidiaries in other jurisdictions must make up the remaining 78%. There has been no evidence that these other contributors are ready, willing, or able to provide that share of credit support. Even if the other contributing entities had a plan of action, this Commission has no jurisdiction over them in order to enforce these goals. According to Staff, there are certain constituents that it was "discussing that would not have been involved at all in the shortfall; shareholders, employees they did not create this shortfall . . . [s]o I don't believe that would believe that would be the appropriate way to look at this." Tr. Vol III at 537-8. However, the Staff did not look beyond the Ohio operating companies when evaluating. Tr. Vol III at 540. What is more, even with $131 Million per year in customer cash influx, Staff's finance expert concedes that there is no certainty that it will help achieve the goal of enabling FirstEnergy Corp. to increase its CFO or FFO to debt ratios. Tr. Vol III at 531-534.

Furthermore, the Staff did not feel that they should recommend price protection for the Rider RRS, even though price protection was a piece of the Approved Rider RRS. The only actual conditions to the upfront payment of nearly $400 million are for the First Energy Corp. headquarters to stay in Akron, and First Energy Corp. not be sold. Staff Ex. 13 at 7. However, there is no analysis done by the Staff and offered as evidence to support these conditions as adequate consideration for the customers' payment of hundreds of millions of dollars. No analysis that the customers receive any benefit from the Akron headquarters. No analysis as the financial impact of moving the headquarters to another Ohio location, or out of state. No analysis of whether selling the Company would have a net positive or negative impact on the customers. The latter lack of analysis is troubling, since new ownership arguably could bring a more fiscally sound utility or holding company and thus allow for self-funded credit support that would potentially relieve any ratepayer support.

Finally, the lack of any conditions upon the Companies and or First Energy Corp. to require action by the utility and/or holding company parent to institute a plan of action that includes First Energy Management to strengthen its balance sheet is unreasonable. Staff ignores any and all Corporate Executive responsibility for its descending credit rating. As with any other business, it is First Energy's management actions that are at the root cause of the credit downgrade, and therefore FE management actions must be the source of credit protection. OCC Witness Kahal provides a simple but appropriate solution set. – have First Energy submit a plan with the Commission showing how it will address the credit problem and measures it will implement to strengthen FE Corp.'s balance sheet, first, and in doing so implement ring-fencing measures to *protect* customers not *charge* customers. OCC Ex. 46 at 6-7. While OEC and EDF do not believe any credit support is warranted, at the very least, the Companies and First Energy Corp. must demonstrate that it has a plan to right its finances, and we urge the Commission to require this showing in a separate docket before any further contemplation of customer bailouts.

d. **Staff's conditions are not reasonable consideration for nearly $400 million in credit support.**

For argument sake, even if it were prudent or permissible to charge customers $400 million under Rider DMR, the reasonable consequence would be for the customers to receive a benefit or some consideration for this cost. However, despite the title of the rider, there is no guaranteed consideration that the Companies will invest in grid modernization as a condition of this charge. As the only conditions placed on the at least $131 million annual charge to customers are Staff recommendations that FE keep its corporate headquarters in Akron, Ohio for the term of the ESP or the entire amount of the rider is subject to refund, and if there is an announcement of a change in ownership the DMR would cease. Staff Ex. 13 at 7.

This "condition" is wholly inadequate as the Companies' do not need incentive to keep its parent company headquarters in Akron, Ohio. Although adding this as its main condition for the lucrative Rider DMR, Staff testified that it has not seen any information that First Energy Corp. is "considering moving from Akron" in the short term, nor in the entire term of the ESP IV. Tr. Vol III at 578. What is more, the Commission has already approved a provision in the Approved Stipulation that requires First Energy Corp. to maintain its headquarters in Akron. Furthermore, on May 21, 2015 First Energy Corp. announced it signed an 8 ½ year lease extension agreement to keep its headquarters in Akron - facts that were put in evidence in the first phase of this proceeding by Company Witness Dean Ellis and reiterated in this phase during hearing. Tr. Vol. 3 at 1531.

2. **The Commission must deny the Companies' counter-proposal for Rider DMR that imposes astronomical charges that will be devastating to consumers and businesses in the service territory.**

First Energy, in its counter-proposal to the Staff's $131 million annual credit stability charge for 3 -5 years, is recommending that the Staff's proposed Distribution Modernization Rider be increased to $558 million annually associated with credit support, plus an additional amount associated with the economic development value of keeping the companies' headquarters and nexus of operations in Akron, Ohio, continue annually over the term of the ESP. That "economic development value" is reflected in Witness Murley's testimony as $568 million/year, and is stated as "a conservative estimate." This proposal, therefore, could be as much as $1.126 Billion charged annually to customers. There would be no requirement to spend the money on anything other than keeping the First Energy headquarters in Akron, OH something the Company has already committed to previously in this proceeding, and has signed a lease extension until 2025.

What is more, the Companies counterproposal does not necessarily replace the Rider RRS (virtual PPA rider). The credits and charges from that rider are meant to be a rate stabilization mechanism or hedge to protect customers from volatile energy prices – and therefore, theoretically, could be implemented in tandem with the rider DRM and its economic development adder. The Companies, in their "rebuttal" testimony to the Staff's proposal, suggest that their Modified Rider RRS proposal should be maintained to ensure that the alleged benefits of retail rate stability and hedging against volatility is maintained. Companies Ex. 206 at 4. In that scenario, the risks to consumers and impacts to Ohio law referred to earlier and coupled with astronomical charges that will be devastating to consumers and businesses in the service territory.

a. The Companies' counter proposal to Rider DMR unreasonably charges customers $558 Million per year for the next eight years to cover its credit rating problem.

The Companies suggests that a "properly designed Rider DMR could benefit customers, although the Staff's proposal calling for a cash infusion of nearly $400 Million in the next three years, apparently, is not enough to achieve the goals of the Staff's proposal. *Id.* at 9. Therefore, the Companies suggest that a higher amount of credit support is needed for the Companies to maintain investment grade, and an even larger amount – some 40% - come directly from the Companies' distribution customers.

Witness Mikkelsen testifies that the Companies' customers should not be the only constituents providing customer credit support. Companies' Ex. 206 at pg. 17. While this is something that Staff does not acknowledge, Ms. Mikkelsen's explanation of what other constituents have done, is just as insulting as the Staff's position. Ms. Mikkelsen's rebuttal testimony lays out a number of measures that she suggest represent how First Energy employees, management, shareholders and other "constituents" have "significantly invested, and continue to invest" in credit support. Companies' Ex. 206 at pg. 17. Yet these "investments" certainly do not represent anything approaching the costs proposed to be borne on the distribution customers. Furthermore, when examined, each of these "constituents" have not provided adequate credit support – or in some cases any credit support. For example, Ms. Mikkelsen enumerates that the

FE Management and Employees contributed to credit support through completed reductions in medical and other benefits, staffing reductions, and a cash flow improvement plan. Companies' Ex. 206 at 17. However, she offers no evidence to the degree of these efforts or to the quantitative impact these efforts have made toward the credit support needed by First Energy Corp. or the contents or timeframe of the plan. Similarly, Ms. Mikkelsen adds no evidence or detail as to the measures provided by shareholders. *Id.* Ms. Mikkelsen further asserts that the First Energy Corp. subsidiaries in New Jersey, Pennsylvania, and West Virginia have contributed to credit support through a number of regulatory cases. *Id. at 18.* Yet, as was revealed through a lengthy portion of the record on cross-examination , that these enumerated cases had nothing to do with credit support (certainly not the type requested of the Companies' customers). Tr. Vol X at 1634-1668. These enumerated cases were combinations of base rate cases, capital recovery filings, and vegetation management cases, which are and were designed to recoup moneys already allocated by the companies for other purposes or develop rate design and cost – they have not and cannot be considered as contributions to cash infusion to assist with credit support. What can be determined is that the residential, business, and manufacturing customers of the Companies' service territory are being unreasonably asked to foot a majority of, if not the entire bill for righting First Energy Corp.'s financial ship. A bill for credit support that is nearly $4.5 billion over the course of the ESP IV.

b. The Companies' $4.5 Billion request for payment to incent First Energy Corp. to maintain headquarters and nexus of operations in Akron is patently unreasonable and not supported by any evidence

As testimony shows, not only are the customers being asked under the Companies' counter proposal to Rider DMR to provide a handout to the Companies and First Energy Corp. of $4.5 billion, the Companies further would require the customers to pay an adder to "recognize the value" of keeping First Energy Corp.'s headquarters and nexus of operations in Akron. Companies Ex. 206 at 14. While Ms. Mikkelsen does not offer her own value for this adder to Rider DMR, she does suggest that that amount should not exceed the value outlined by Company Witness Murley. *Id.* Ms. Murley, through an economic impact analysis akin to the testimony she provided vis-a-vis the PPA units in the first phase of this proceeding, found an estimated annual economic impact of $568 million each year. Companies' Ex. 205 at 4. Thus, according to Ms. Mikkelsen's testimony, an additional $568 million annually – or over $4.5 Billion over the term of the ESP, is needed from customers to "assure the economic benefits" of keeping the First Energy headquarters in Akron. Companies' Ex. 206 at 14.

Like Staff, the Companies are suggesting that an incentive is needed to keep First Energy Corp. headquarters and nexus of operation in Akron. *Id.* at 22. Yet, the same evidence to the contrary as discussed above, and the same lack of evidence from the Companies to support the need of an incentive lacking throughout this proceeding, still apply and still weigh toward rejection of this condition to Rider DMR as valuable consideration. However, what is even more unreasonable, the Companies' request suggests that the customers should pay for the privilege of having the headquarters in Akron, with no evidence as to why the customers should pay. The Companies, through Witness Murley, provide merely an analysis of *what* the economic benefits (not costs) of having that corporate headquarters in that particular city, but not *why* this is relevant to the Companies' customers to the tune of $4.5 Billion. Furthermore, as outlined below, that analysis is questionable.

c. Companies' Witness Murley's analysis of the need for the Akron Headquarters is of little or no relevance or trustworthiness and the Commission should provide it little to no weight

Even if the need for an analysis of the economic development impact of the First Energy Corp. was valid, and even accepting that customers owe First Energy Corp. for keeping its headquarters in Ohio, Companies' Witness Murley's analysis is less than trustworthy. As outlined below, and throughout her cross examination on the record, Ms. Murley did not, and could not, provide the actual analysis of the $568 million annual impact of the headquarters.

First, as the hearing showed, Witness Murley did not conduct any actual analysis to ascertain the value of the services provided by the shared services employees within First Energy Corp. Tr. Vol IX at 1480. Ms Murley utilized only the IMPLAN multiplier and numbers provided by First Energy Staff. *Id.* at 1481. She conducted no independently verifiable analysis of whether First Energy's vendor purchases actually support the 756 jobs and personal income of $39.8 Million that she purports. *Id*. at 1483-4.

Secondly, as with Ms. Murley's testimony on the plants' economic impact in the earlier phase of this proceeding, Ms. Murley does not analyze or address the *costs* of having the headquarters in Akron, if any, or included the costs of the millions of dollars of Rider DMR to the people of the area. *Id* at 1488. There was no cost-benefit analysis performed of the costs of this deal juxtaposed to the alleged benefits of keeping the headquarters. *Id. at 1489.* If fact, Ms. Murley states that it is *impossible* to provide "actual results." *Id. at 1558*. This impossibility is not an excuse, but proof that the burden of proof to defend this egregious plan has not and cannot be met. The Commission needs a full picture and analysis of why hundreds of millions to billions of dollars of customer dollars being handed to this huge utility holding company, but, agreeing with Witness Murley, it is "impossible."

Furthermore, there is no evidence shown that First Energy Corp. has had any credit rating devaluation due to the fact that its headquarters are located in Akron, Ohio. In a world where First Energy Corp. *could* provide such evidence that moving from Akron would help its credit rating, but they are choosing to stay in Akron as good neighbor to provide the alleged economic benefits to Ohio and Akron, then there may be an argument that the customers may bear some of the burden to keep local headquarters. Yet, First Energy did not, and we argue could not, provide any such evidence in any stage of this long and detailed proceeding.

Finally, Ms. Murley identifies six other Fortune 500 Companies in Northeast Ohio that were in her testimony, yet however, were none were analyzed by Witness Murley. (Tr. Vol. VI at 1539). Nor was there any analysis of manufacturing in the area. *Id.* This lack of analysis is not accidental as any analysis would show substantial detriment to these economic contributors. These very manufacturers and Fortune 500 Companies who contribute to the overall economy of Northeast Ohio, will be paying more to First Energy Companies, but unlike First Energy Corp., they will not be given credit support or cash flow infusion, and no extra compensation for putting their headquarters in our great state. The double standard for First Energy Corp. is unfounded, and this inequitable treatment should not be allowed to persist. Allowing so is patently against the interest of the public and especially the interest of the business and manufacturers of Northeast Ohio who cannot get relief to pay their bills.

Justice and fairness requires a complete analysis of the benefits that will be received by the customers who are forced to pay First Energy potentially over $4.5 Billion over the next eight years. Ms. Murley's testimony provides none of that analysis, and therefore deserves no weight in determining whether the Companies' version of Rider DMR should be considered.

3. If First Energy Corp. and/ or the Companies need credit support, First Energy must follow the proper legal recourse.

There is a clearly defined procedure for situations in which a utility truly needs temporary assistance due to financial struggles, yet FirstEnergy ignored the existence of the procedure and instead requests over $8 billion from customers in what amounts to a permanent rate increase. Under R.C. 4909.16, the Commission may "temporarily alter, amend, or, with the consent of the public utility concerned, suspend any existing rates, schedules, or order relating to or affecting any public utility or part of any public utility in this state" when the Commission "deems it necessary to prevent injury to the business or interests of the public or of any public utility of this state in case of any emergency...." "Rates so made by the commission shall apply to one or more of the public utilities in this state, or to any portion thereof, as is directed by the commission, and shall take effect at such time and remain in force for such length of time as the commission prescribes." If First Energy is truly in as desperate a situation as it claims to be, it should have requested temporary rate relief under R.C. 4909.16.

Ohio caselaw requires an applicant to put on evidence and prove that some emergency exists, and that the PUCO's finding of an emergency is reasonable. *Gen. Motors Corp. v. Pub. Utilities Comm'n*, 54 Ohio St. 2d 357, 376 N.E.2d 1345 (1978). The standard for what constitutes an emergency is flexible and within the discretion of the Commission. This process exists to provide *temporary* relief, and has been used to provide only the assistance absolutely necessary to prevent injury to the utility that could in turn injure the public. The "ultimate question for the Commission is whether, absent emergency relief, the utility will be financially imperiled or its ability to render service will be impaired. If the applicant utility fails to sustain its burden of proof on this issue, the commission's inquiry is at an end." *In the Matter of the Application of the Toledo Edison Co. for Auth. to Change Certain of Its Filed Schedules Fixing Rates & Charges for Elec. Serv.*, 84-1286-EL-AEM, 1987 WL 1466442, at *3 (F.E.D.A.P.J.P. May 12, 1987).

First Energy ignored the appropriate procedure in Ohio, which would be to request emergency *temporary* rate relief under R.C. 4909.16, and further did not submit the type of evidence necessary to show that it in fact needs temporary relief. Even if it had, its condition does not rise to the type of "extraordinary" situation that is required for the Commission to confer emergency rate relief, and its request is purely a cash grab. For example, in *In the Matter of the Application of the Toledo Edison Co. for Auth. to Change Certain of Its Filed Schedules Fixing Rates & Charges for Elec. Serv.*, 84-1286-EL-AEM, 1987 WL 1466442, at *7 (F.E.D.A.P.J.P. May 12, 1987), the company was awarded temporary emergency rate relief where its "lowest investment grade ratings have seriously limited the company's financial flexibility", and continuing adequate service was actually in jeopardy. The court held that it be granted emergency rate relief, and only granted the "relief which is the *minimum needed by the company to carry on its operations*", which was less than the company requested in its application. Toledo Edison submitted large amounts of testimony proving that the company would be at risk of failing to provide adequate service before the Commission was willing to provide any type of assistance to the company. The Commission then determined the minimum amount of relief necessary to ensure adequate service continued.

The difference between *Toledo* and the instant case, however, is that adequate service is not a concern in this setting, so even if First Energy had applied under R.C. 4909.16 for emergency temporary rate relief, it has not met the burden required for the Commission to grant such a request. Further, even if the Commission were to find that First Energy's financial condition necessitated emergency rate relief under R.C. 4909.16, it would surely be significantly less money than what First Energy has requested here. "Section 4909.16, Revised Code, vests the Commission with broad powers in determining when an emergency exists and in tailoring a remedy to meet the emergency", and, as in the *Toledo* case, it has limited the amount of monetary relief to only that necessary and limited the time period in which the rate relief applies in order to ensure the amount charged to the customers is only what is necessary to ensure adequate service continues, not to give the utility a windfall.

As former Commissioner Sally Bloomfield wrote on a discussion of the topic of emergency rate relief under R.C. 4909.16 in 1976, "[t]he central issue in an emergency case [...] is not rate of return, but how to protect the applicant from the injurious effects of its particular financial circumstances, so that its ability to provide adequate service will not be impaired." The Companies, however, are not arguing for relief to ensure adequate service; the Companies just want a cash infusion to use as it pleases.

Commissioner Bloomfield goes on to point out that "a company's inability to meet its fixed charges or its operating expenses is grounds for requesting emergency relief, and if the Commission finds such relief appropriate it will order a rate which will enable the company to meet its financial obligations and continue operations pending its permanent rate application. Even if a company's revenues cover its fixed charges and operating expenses, it may still have grounds for requesting an emergency rate if rising costs have eroded its earnings so as to render impossible the issuance of new debt and equity on reasonable terms, thus jeopardizing substantially the quality of utility service. In such a case, if the Commission finds emergency relief appropriate, it will order a rate which will allow the company to compete for new capital and will protect the quality of the company's service from further deterioration pending the company's permanent rate application." Again, instead of going through a proper process and asking for temporary rate increase to help it in a time of financial distress, First Energy is basically arguing for a permanent rate increase. In the *Toledo* case, the Commission's order awarded a temporary amount which would be reviewed by the Commission and discontinued as soon as the extraordinary threat which necessitated the emergency rate relief had subsided.

As stated by Staff witnesses, Staff is not testifying that there are threats to the Companies' financial integrity, and therefore not stating that there is an emergency. Tr. Vol. III 515-16. An emergency case is a "dire situation" where you cannot make short term payments. The Commission has historically hesitated to increase rates unless the utility's ability to provide adequate service was in imminent jeopardy, and that should be the case today as well. First Energy is not in dire financial conditions that could jeopardize service, and does not need a temporary <u>or</u> permanent rate increase at this time.

Further, while the opportunities are available for First Energy Corp. and the Companies to seek **temporary** relief and they have yet to apply for emergency rate relief, it is also important to recognize that under Ohio law emergency relief should not be granted until a utility exhausts all possibilities. First Energy has <u>not</u> exhausted their options, yet is asking for even more money in the rehearing testimony than it did in its initial filing. If a utility has not exhausted its remedies, emergency relief is inappropriate. For example, where a utility "is not approaching any legal limitations on its ability to issue either short or long-term debt" and there is no "expectation that [it] will be unable to issue stock on realistic terms", "it is clear that the extraordinary measure of temporary rate relief is not the only practical mechanism available to [an] applicant to obtain funds required to continue to provide adequate service." *Cincinnati Gas & Elec. Co.*, PUCO Case No. 74-845-EL-AIR, at 3 (Apr. 4, 1975).

At a minimum, First Energy must go through the proper legal channels to demonstrate that emergency relief is necessary, and the Companies cannot and should not be permitted to simply ask for eight years worth of "credit support."

Furthermore, If the PUCO wants to approve a rate increase to be used for grid modernization, then the PUCO must follow the process it has approved in past ESP cases where it has approved distribution riders. In those previous cases, the utility must make quarterly filings showing how much it has invested; the filings are subject to prudency review and parties have full due process rights. As a financial safeguard, the utility thus must refund any amount not approved for recovery in the prudency reviews.

V. CONCLUSION

Ultimately, the Companies bear the burden to demonstrate that the proposed Modified Rider RRS is reasonable and merit Commission approval. The record demonstrates the Companies' failure to satisfy this burden across the board. They have provided a flawed plan that is not meant to protect plants or plant workers, but to protect shareholders and evade FERC review of it. Approval of the proposed Modified Rider RRS would also contravene Ohio law barring such affiliate deals. Finally, the Companies have not shown that the Modified Rider RRS offer concrete benefits to customers that justify the significant risks that would harm customers and/or violate Ohio law and policy. For these reasons, the Commission should reject Modified Rider RRS and the proposed Stipulation provisions discussed above.

Furthermore, Staff's "alternative" and the Companies' counterproposal, similarly should be denied as unlawful, unreasonable, and unconscionable. At a time when regular Ohioans are struggling to keep their cash flow and credit rating above water so they can house and feed their families, no billion dollar corporation should have the audacity to take their moneyto help its credit score. Here, the Commission must make a final call on whether or not FirstEnergy can charge its customers millions of dollars a year - by the evidence presented in this case the impact to the Companies' customers will be a loss estimated in the range between $131 million/year for 3 to 5 years to $1.126 Billion ($558 million/year for 8 years plus an additional amount up to $568 million/year to cover the economic development benefits of having FE's headquarters in Akron) – to make up for years of poor credit protection. Ohio's electricity consumers are struggling to see how the Commission's approval of such a proposal gets Ohio any closer to a clean energy future. The transition to clean energy is already underway in Ohio, and FirstEnergy is behind. This is not the fault of customers, and they should not be forced to handout their hard-earned income to make up for First Energy's poor investments. Therefore, we urge the Commission to reject this credit support subsidy.

The precedent to be made in this case cannot be understated. The Commission has a decision that will determine the future of Ohio's electric regulation. Rushing to approve subsidies that are contrary to Commission precedent and create a special customer backed bailout for a huge utility threatens the agency's image of independence in the eyes of Ohioans and opens it to the perception that corporate welfare reigns supreme over human welfare. Yet, that does not have to be the case, and the Commission can show the public that their interest is what matters, and giant utility holding companies do not deserve customer-funded handouts. This will show that Ohio is capable of looking forward and has the ability to advance grid modernization and the integration of efficiency and distributed resources, and promote a more modern and efficient future that attracts innovation and investment.

For the reasons enumerated in this brief, each of the "alternatives" to approved Rider RRS would harm customers and/or violate Ohio law and policy. Thus, the Commission should reject Modified Rider RRS and proposed Rider DMR in their entirety as unjust unreasonable and inconsistent with the policy of the state.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been served upon the parties referenced on the service list of this docket by electronic mail this 15th day of August, 2016.

__**/s/ Trent Dougherty**______________________

Trent Dougherty