

ORIGINAL

IN THE SUPREME COURT OF OHIO

In the Matter of the Application of Columbus Southern : Case No. 2010-1533
Power Company for Approval of its Program Portfolio :
Plan and Request for Expedited Consideration : Appeal from the Public Utilities
: Commission of Ohio
:
: Public Utilities
: Commission of Ohio
: Case No. 09-1089-EL-POR

APPENDIX TO THE REPLY OF APPELLANT
INDUSTRIAL ENERGY USERS-OHIO

Samuel C. Randazzo (Reg. No. 0016386)
(Counsel of Record)

Joseph E. Olikier (Reg. No. 0086088)

McNees Wallace & Nurick LLC

21 East State Street, 17th Floor

Columbus, OH 43215

Telephone: (614) 469-8000

Facsimile: (614) 469-4653

sam@mwncmh.com

joliker@mwncmh.com

**COUNSEL FOR APPELLANT,
INDUSTRIAL ENERGY USERS-OHIO**

Richard Cordray (Reg. No. 0038034)
Attorney General of Ohio

William L. Wright (Reg. No. 0018010)
Section Chief, Public Utilities Section

Thomas McNamee (Reg. No. 0017352)
(Counsel of Record)

Steven L. Beeler (Reg. No. 0078076)
Assistant Attorneys General

180 East Broad Street, 6th Floor
Columbus, OH 43215

Telephone: (614) 466-4397

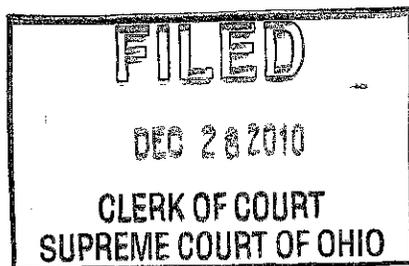
Facsimile: (614) 644-8764

william.wright@puc.state.oh.us

thomas.mcnamee@puc.state.oh.us

steven.beeler@puc.state.oh.us

**COUNSEL FOR APPELLEE,
PUBLIC UTILITIES COMMISSION
OF OHIO**



Matthew Satterwhite (Reg. No. 0071972)
(Counsel of Record)
Steven Nourse (Reg. No. 0046705)
Anne Vogel (Reg. No. 0073774)
American Electric Power Service Corporation
1 Riverside Plaza, 29th Floor
Columbus, OH 43215-2373
Telephone: (614) 716-1606
Facsimile: (614) 716-2950
mjsatterwhite@aep.com
stnourse@aep.com
amvogel@aep.com

**COUNSEL FOR INTERVENING
APPELLEE, COLUMBUS SOUTHERN
POWER COMPANY**

PUBLIC UTILITIES COMMISSION OF OHIO CASES

Other Public Utilities Commission of Ohio Cases

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this *Appendix to the Reply Brief of Appellant Industrial Energy Users-Ohio*, was sent by ordinary U.S. mail, postage prepaid, or hand-delivered to all parties to the proceeding before the Public Utilities Commission of Ohio, listed below, and pursuant to Section 4903.13 of the Ohio Revised Code, December 28, 2010.



Joseph E. Olikier
Counsel for Appellant,
Industrial Energy Users-Ohio

Matthew J. Satterwhite (0071972)
Steven T. Nourse (0046705)
Anne M. Vogel (0073774)
American Electric Power Service Company
1 Riverside Plaza, 29th Floor
Columbus, OH 43215
mjsatterwhite@aep.com
stnourse@aep.com
amvogel@aep.com

ON BEHALF OF COLUMBUS SOUTHERN POWER

Richard Cordray (0038034)
William L. Wright (0018010)
Thomas McNamee (0017352)
Steven L. Beeler (0078076)
Assistant Attorneys General
Public Utilities Section
180 East Broad Street
Columbus, OH 43215
william.wright@puc.state.oh.us
thomas.mcnamee@puc.state.oh.us
steven.beeler@puc.state.oh.us

ON BEHALF OF THE PUBLIC UTILITIES COMMISSION OF OHIO

Chester, Willcox & Saxbe, LLP, by John W. Bentine, Mark S. Yurick, and Matthew S. White, 65 East State Street, Suite 1000, Columbus, Ohio 43215-4213, on behalf of The Kroger Company.

McNees, Wallace & Nurick, LLC, by Samuel C. Randazzo, Lisa G. McAlister, and Joseph M. Clark, 21 East State Street, 17th Floor, Columbus, Ohio 43215-4228, on behalf of Industrial Energy Users-Ohio.

David C. Reinbolt and Colleen L. Mooney, 231 West Lima Street, P.O. Box 1793, Findlay, Ohio 45839-1793, on behalf of Ohio Partners for Affordable Energy.

Brickfield, Burchette, Ritts & Stone, P.C., by Michael K. Lavanga and Garrett A. Stone, 1025 Thomas Jefferson Street, N.W., 8th Floor, West Tower, Washington, D.C. 20007, on behalf of Nucor Steel Marion, Inc.

Bell & Royer Co., LPA, by Barth E. Royer, 33 South Grant Avenue, Columbus, Ohio 43215-3927, and Gary A. Jefferies, Dominion Resources Services, Inc., 501 Martindale Street, Suite 400, Pittsburgh, Pennsylvania 15212-5817, on behalf of Dominion Retail, Inc.

Vorys, Sater, Seymour & Pease, LLP, by M. Howard Petricoff and Stephen M. Howard, 52 East Gay Street, Columbus, Ohio 43216-1008, and Cynthia A. Fonner, Constellation Energy Group, Inc., 550 West Washington Street, Suite 3000, Chicago, Illinois 60661, on behalf of Constellation NewEnergy, Inc., and Constellation Energy Commodities Group, Inc.

Robert J. Triozzi, Director of Law, and Steven Beeler, Assistant Director of Law, City of Cleveland, and Schottenstein, Zox & Dunn Co., LPA, by Gregory H. Dunn, Christopher L. Miller, and Andre T. Porter, 250 West Street, Columbus, Ohio 43215, on behalf of the city of Cleveland.

Brickfield, Burchette, Ritts & Stone, P.C., by Damon E. Xenopoulos, 1025 Thomas Jefferson Street, N.W., 8th Floor, West Tower, Washington, D.C. 20007, on behalf of OmniSource Corporation.

Bell & Royer Co., LPA, by Barth E. Royer, 33 South Grant Avenue, Columbus, Ohio 43215-3927, and Nolan Moser and Trent A. Dougherty, Ohio Environmental Council, 1207 Grandview Avenue, Suite 201, Columbus, Ohio 43212-3449, on behalf of Ohio Environmental Council.

Richard L. Sites, 155 East Broad Street, 15th Floor, Columbus, Ohio 43215-3620, on behalf of Ohio Hospital Association.

The Legal Aid Society of Cleveland, by Joseph P. Meissner, 1223 West 6th Street, Cleveland, Ohio 44113, on behalf of The Neighborhood Environmental Coalition, The Empowerment Center of Greater Cleveland, United Clevelanders Against Poverty, Cleveland Housing Network, and The Consumers for Fair Utility Rates.

Leslie A. Kovacik, city of Toledo, 420 Madison Avenue, Suite 100, Toledo Ohio 43604-1219; Lance M. Keiffer, Lucas County, 711 Adams Street, 2nd Floor, Toledo, Ohio 43624-1680; Marsh & McAdams, by Sheilah H. McAdams, city of Maumee, 204 West Wayne Street, Maumee, Ohio 43537; Ballenger & Moore, by Brian J. Ballenger, city of Northwood, 3401 Woodville Road, Suite C, Toledo, Ohio 43619; Paul S. Goldberg and Phillip D. Wurster, city of Oregon, 5330 Seaman Road, Oregon, Ohio 43616; James E. Moan, city of Sylvania, 4930 Holland-Sylvania Road, Sylvania, Ohio 43560; Leatherman, Witzler, by Paul Skaff, city of Holland, 353 Elm Street, Perrysburg, Ohio 43551; and Thomas R. Hayes, Lake Township, 3315 Centennial Road, Suite A-2, Sylvania, Ohio 43560, on behalf of Northwest Ohio Aggregation Group.

Henry W. Eckhart, 50 West Broad Street, Suite 2117, Columbus, Ohio 43215, on behalf of the Natural Resources Defense Council.

Craig G. Goodman, 3333 K. Street, N.W., Suite 110, Washington, D.C. 20007, on behalf of National Energy Marketers Association.

Vorys, Sater, Seymour & Pease, LLP, by M. Howard Petricoff and Stephen M. Howard, 52 East Gay Street, Columbus, Ohio 43216-1008, and Bobby Singh, 300 West Wilson Bridge Road, Suite 350, Worthington, Ohio 43085, on behalf of Integrys Energy Services, Inc.

Sean W. Vollman and David A Muntean, 161 South High Street, Suite 202, Akron, Ohio 44308, on behalf of the city of Akron.

Bell & Royer Co., LPA, by Langdon D. Bell, 33 South Grant Avenue, Columbus, Ohio 43215-3927, and Kevin Schmidt, 33 North High Street, Columbus, Ohio 43215-3005, on behalf of Ohio Manufacturers' Association.

Vorys, Sater, Seymour & Pease, LLP, by M. Howard Petricoff and Stephen M. Howard, 52 East Gay Street, Columbus, Ohio 43216-1008, on behalf of Direct Energy Services, LLC.

F. Mitchell Dutton, FPL Energy Power Marketing, Inc., 700 Universe Boulevard, Juno Beach, Florida 33408, on behalf of FPL Energy Power Marketing, Inc., and Gexa Energy Holdings, LLC.

Henry W. Eckhart, 50 West Broad Street, Suite 2117, Columbus, Ohio 43215, on behalf of the Sierra Club, Ohio Chapter.

Bricker & Eckler, LLP, by Glenn S. Krassen, 1375 East Ninth Street, Suite 1500, Cleveland, Ohio 44114, and E. Brett Breitschwerdt, 100 South Third Street, Columbus, Ohio 43215, on behalf of Northeast Ohio Public Energy Council.

Larry Gearhardt, 280 North High Street, P.O. Box 182383, Columbus, Ohio 43218-2383, on behalf of Ohio Farm Bureau Federation.

Bricker & Eckler, LLP, by Sally W. Bloomfield and Terrence O'Donnell, 100 South Third Street, Columbus, Ohio 43215, on behalf of American Wind Energy Association, Wind on the Wires, and Ohio Advanced Energy.

Theodore S. Robinson, 2121 Murray Avenue, Pittsburgh, Pennsylvania 15217, on behalf of Citizens Power, Inc.

McDermott, Will & Emery, LLP, by Douglas M. Mancino, 2049 Century Park East, Suite 3800, Los Angeles, California, 90067-3218, and Grace C. Wung, 600 Thirteenth Street, N.W., Washington D.C., 20005, on behalf of Wal-Mart Stores East, LP, and Sam's East, Inc., LP, Macy's, Inc., and BJ's Wholesale Club, Inc.

Craig I. Smith, 2824 Coventry Road, Cleveland, Ohio 44120, on behalf of Material Sciences Corporation.

Bricker & Eckler, LLP, by Glenn S. Krassen, 1375 East Ninth Street, Suite 1500, Cleveland, Ohio 44114, and E. Brett Breitschwerdt, 100 South Third Street, Columbus, Ohio 43215, on behalf of Ohio Schools Council.

McDermott, Will & Emery, LLP, by Douglas M. Mancino, 2049 Century Park East, Suite 3800, Los Angeles, California, 90067-3218, and Gregory K. Lawrence, 28 State Street, Boston, Massachusetts 02109, on behalf of Morgan Stanley Capital Group, Inc.

Tucker, Ellis & West, LLP, by Nicholas C. York and Eric D. Weldele, 1225 Huntington Center, 41 South High Street, Columbus, Ohio 43215-6197, and Steve Millard, 100 Public Square, Suite 201, Cleveland, Ohio 44113, on behalf of Council of Smaller Enterprises.

OPINION:I. HISTORY OF THE PROCEEDING

On July 31, 2008, Ohio Edison Company, The Cleveland Electric Illuminating Company (CEI), and the Toledo Edison Company (FirstEnergy or the Companies) filed an application for a standard service offer (SSO) pursuant to Section 4928.141, Revised Code. This application is for a market rate offer (MRO) in accordance with Section 4928.142, Revised Code. Contemporaneously, in Case No. 08-935-EL-SSO, FirstEnergy filed a separate application for an electric security plan (ESP) in accordance with Section 4928.143, Revised Code (ESP case).

On August 18, 2008, a technical conference was held regarding FirstEnergy's applications. Moreover, on August 25, 2008, a prehearing conference was held in order to discuss procedural issues in the above-captioned case. Subsequently, by entry dated August 28, 2008, the attorney examiner set this matter for hearing on September 16, 2008.

On August 29, 2008, the Ohio Consumers' Counsel (OCC) filed a motion for bifurcated hearings in Case No. 08-936-EL-SSO, and a motion to consolidate Case No. 08-936-EL-SSO with Case No. 08-935-EL-SSO. On September 8, 2008, FirstEnergy filed a memorandum contra OCC's motions. The city of Cleveland (Cleveland) filed a motion for bifurcated hearings and a memorandum in support of OCC's motion on September 9, 2008. OCC filed a reply to FirstEnergy's memorandum contra on September 11, 2008. The motions to bifurcate the hearings and OCC's motion to consolidate the cases were denied by the attorney examiner on September 12, 2008.

The following parties were granted intervention by entry dated September 15, 2008: Ohio Energy Group (OEG); OCC; Kroger Company (Kroger); Ohio Environmental Council (OEC); Industrial Energy Users-Ohio (IEU-Ohio); Ohio Partners for Affordable Energy (OPAE); Nucor Steel Marion, Inc. (Nucor); Northwest Ohio Aggregation Coalition (NOAC); Constellation NewEnergy and Constellation Energy Commodities Group, Inc. (Constellation); Dominion Retail, Inc. (Dominion); Ohio Hospital Association (OHA); Neighborhood Environmental Coalition, The Empowerment Center of Greater Cleveland, United Clevelanders Against Poverty, Cleveland Housing Network, and The Consumers for Fair Utility Rates (Citizens' Coalition); Natural Resources Defense Council (NRDC); Sierra Club; National Energy Marketers Association (NEMA); Integrys Energy Service, Inc. (Integrys); Direct Energy Services, LLC (Direct Energy); city of Akron; Ohio Manufacturers' Association (OMA); FPL Energy Power Marketing, Inc and Gexa Energy Holdings, LLC (FPL); Cleveland; Northeast Ohio Public Energy Council (NOPEC); Ohio Farm Bureau Federation (OFBF); American Wind Association, Wind on Wires, and Ohio Advance Energy; Citizens Power, Inc. (Citizens); Omnisource Corporation (OmniSource); Material Sciences Corporation (Material Sciences); Ohio Schools Council (OSC); Council of

Smaller Enterprises (COSE); Morgan Stanley Capital Group; and Wal-Mart Stores East, LP and Sam's East, Inc., Macy's, Inc., and BJ's Wholesale Club, Inc. (Commercial Group).

The hearing in this proceeding commenced on September 16, 2008, and concluded on September 22, 2008. Four witnesses testified on behalf of FirstEnergy, eight witnesses testified on behalf of various intervenors, and three witnesses testified on behalf of the Staff. Briefs and reply briefs were filed on October 6, 2008, and October 14, 2008, respectively.

II. APPLICABLE LAW

The Companies are public utilities as defined in Section 4905.02, Revised Code, and, as such, are subject to the jurisdiction of this Commission.

Chapter 4928 of the Revised Code provides a roadmap of regulation in which specific provisions were put forth to advance state policies of ensuring access to adequate, reliable, and reasonably priced electric service in the context of significant economic and environmental challenges. In reviewing the Companies' application for an MRO, the Commission is aware of the challenges facing Ohioans and the electric power industry and will be guided by the policies of the state as established by the General Assembly in Section 4928.02, Revised Code, as amended by Amended Substitute Senate Bill No. 221 (SB 221), effective July 31, 2008.

Section 4928.02, Revised Code, states that it is the policy of the state to, *inter alia*:

- (1) ensure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service;
- (2) ensure the availability of unbundled and comparable retail electric service;
- (3) ensure diversity of electric supplies and suppliers;
- (4) encourage innovation and market access for cost-effective supply- and demand-side retail electric service including, but not limited to, demand-side management (DSM), time-differentiated pricing, and implementation of advanced metering infrastructure (AMI);
- (5) encourage cost-effective and efficient access to information regarding the operation of the transmission and distribution systems in order to promote both effective customer choice and the development of performance standards and targets for service quality;

- (6) ensure effective retail competition by avoiding anticompetitive subsidies;
- (7) ensure retail consumers protection against unreasonable sales practices, market deficiencies, and market power;
- (8) provide a means of giving incentives to technologies that can adapt to potential environmental mandates;
- (9) encourage implementation of distributed generation across customer classes by reviewing and updating rules governing issues such as interconnection, standby charges, and net metering; and
- (10) protect at-risk populations including, but not limited to, when considering the implementation of any new advanced energy or renewable energy resource.

Among the provisions of SB 221 were changes to Section 4928.14, Revised Code, requiring electric utilities to provide consumers with an SSO, consisting of either an MRO or an ESP. The SSO is to serve as the electric utility's default SSO. The law provides that utilities may apply simultaneously for both an MRO and an ESP; however, at a minimum, the first SSO application must include an application for an ESP.

Section 4928.142, Revised Code, authorizes electric utilities to file an MRO as their SSO, whereby retail electric generation pricing will be based, in part, upon the results of a competitive bid process (CBP). Paragraphs (A) and (B) of Section 4928.142, Revised Code, set forth the specific requirements that an electric utility must meet in order to demonstrate that the competitive bidding process and the MRO proposal comply with the statute. In determining whether an MRO meets the requirements of Section 4928.142(A) and (B), Revised Code, the Commission must read those provisions together with the policies of this state as set forth in Section 4928.02, Revised Code. Accordingly, the policy provisions of Section 4928.02, Revised Code, will guide the Commission in its implementation of the statutory requirements of Section 4928.142(A) and (B), Revised Code.

By finding and order issued September 17, 2008, in Case No. 08-777-EL-ORD, the Commission adopted new rules concerning SSO, corporate separation, and reasonable arrangements for electric utilities pursuant to Sections 4928.14, 4928.17, and 4905.31, Revised Code.¹ Section 4928.142(B), Revised Code, provides that a utility may file its

¹ See *In the Matter of the Adoption of Rules for Standard Service Offer, Corporate Separation, Reasonable Arrangements, and Transmission Riders for Electric Utilities Pursuant to Sections 4928.14, 4928.17, and 4905.31, Revised Code, as amended by Amended Substitute Senate Bill No. 221, Case No. 08-177-EL-ORD, Finding and Order (September 17, 2008).*

application for an MRO prior to the effective date of the Commission rules required under the statute; however, as the Commission determines necessary, the utility shall immediately conform its filing to the rules upon the rules taking effect.

III. DISCUSSION

A. Background and Summary of Application

The Companies are currently providing service to their customers in accordance with their rate stabilization plan and rate certainty plan (RCP) approved by the Commission (Co. Ex. 4 at 2).² The Companies procure their full requirements power to supply generation service to their retail generation customers (SSO customers) through a wholesale power purchase agreement which is scheduled to terminate on December 31, 2008 (Co. Ex. 4 at 8).

In their application, the Companies set forth a proposed MRO whereby they will conduct a CBP designed to procure supply for the provision of SSO electric generation service beginning January 1, 2009, to the Companies' retail electric customers who do not purchase electric generation service from a competitive retail electric supplier (Co. Ex. 4 at 1). The retail customers who will be served under the MRO include all retail customers served under special contracts approved under Section 4905.31, Revised Code, as well as existing and future contracts entered into under Section 4905.34, Revised Code (Co. Ex. 4 at 8-9).

The Companies are requesting that the Commission determine that their proposed MRO meets the requirements found in Section 4928.142(A) and (B), Revised Code. If this application is found to meet the statutory criteria, the earliest date the bid could be conducted would be December 29, 2008. Thus, the Companies have proposed a very aggressive CBP timeline because the retail rates based upon the results of the CBP must go into effect on January 1, 2009, because, according to the Companies, they have no wholesale power arrangements beyond 2008. The Companies note that, as part of their ESP case, which was filed contemporaneously with this case, they have proposed a short-term ESP that contains an SSO pricing proposal for January 1, 2009, through April 30, 2009. According to the applicants, approval of the short-term ESP would allow extra time for the Commission to issue a final decision on the long-term ESP and, in the event the long-term

² See *In the Matter of the Applications of FirstEnergy for Authority to Continue and Modify Certain Regulatory Accounting Practices and Procedures, for Tariff Approvals and to Establish Rates and Other Charges Including Regulatory Transition Charges Following the Market Development Period*, Case No. 03-2144-EL-ATA, Opinion and Order (June 9, 2004); and *In the Matter of the Application of FirstEnergy for Authority to Modify Certain Accounting Practices and for Tariff Approvals*, Case No. 05-1125-EL-ATA et al., Opinion and Order (January 4, 2006).

ESP is not implemented, it would allow time for the CBP that is part of the MRO process to be completed in a more measured fashion (Co. Ex. 4 at 2-3).

B. Competitive Bid Process - Section 4928.142(A)(1), Revised Code

Section 4928.142(A)(1), Revised Code, requires that an MRO be determined through a CBP that provides for all of the following: an open, fair, and transparent competitive solicitation; a clear product definition; standardized bid evaluation criteria; oversight by an independent third party; and evaluation of submitted bids prior to selection of the least-cost bid winner or winners.

1. Open, fair, and transparent competitive solicitation - Section 4928.142(A)(1)(a), Revised Code

The Companies state that the CBP will consist of, among other things: pre-solicitation activities to promote bidder interest and participation; bidder education and communication; and competitive safeguards to guard against anti-competitive behavior during bidding (Co. Ex. 1 at 11). As part of the application, the Companies have presented proposed CBP rules which establish the process under which the CBP manager will conduct the CBP. The CBP rules address: the information provided to bidders; the application process; the qualification and credit processes; the bidding rules and process; conclusion of the bidding; and confidentiality requirements (Co. Ex. 3 at 8; Co. Ex. 4, Ex. A). As part of the application, the Companies have also included a document containing proposed communication protocols, which describes the information made available during the CBP and the treatment of confidential information (Co. Ex. 4, Ex. G). In addition, the Companies state that they will make available a CBP website in order to keep interested parties informed of developments and notices related to the CBP. The Companies believe that, consistent with Section 4928.142(A), Revised Code, affiliates of the Companies may participate as bidders in the CBP solicitations and win the right to provide SSO supply (Co. Ex. 4 at 17).

The Companies explain that the bidders in the CBP would provide SSO supply for tranches comprised of all SSO customer voltage classes for all three companies (Co. Ex. 4 at 18). The Companies peak load is approximately 11,500 megawatts (MW). In the initial solicitation, the nominal size per tranche will be 100 MW, which equates to 115 tranches and each tranche represents 0.87 percent of peak load (Co. Ex. 1 at 11). As proposed by the Companies, the initial MRO competitive solicitation would procure one-third of the total SSO load for all three companies for the period from January 1, 2009, through May 31, 2010; one-third of the total SSO load for all three companies for the period January 1, 2009, through May 31, 2011; and one-third of the total SSO load for all three companies for the period from January 1, 2009, through May 31, 2012 (Co. Ex. 1 at 7; Co. Ex. 4 at 4). After the initial solicitation, beginning in 2009 and during each calendar year thereafter, the

Companies will hold two competitive solicitations, one in October and one in the subsequent January. During these solicitations, one-third of the power requirements of all three Companies' provider of last resort (POLR) load for a three-year period will be bid out as part of each of the two competitive solicitations. The results of these solicitations will be blended to formulate the generation price paid by the Companies' retail electric customers (Co. Ex. 4 at 4). The Companies submit that this approach will help balance out wholesale market price fluctuations and provide retail electric customers with a more stable price for a specified period of time (Co. Ex. 4 at 9).

The Companies explain that this MRO proposal utilizes a slice-of-system approach (Co. Ex. 4 at 5). The total amount of SSO supply to be procured will be divided into equal tranches, with each tranche representing a fixed percentage of the Companies' SSO hourly load. Bidders will bid through a descending clock (reverse auction) format to provide SSO supply (Co. Ex. 4 at 12). The winning bid price will reflect a blending of the pricing from the applicable solicitations. Once a winning bid price is known, a rate conversion process will be used to convert the blended competitive bid price to a retail rate. The rate-specific generation prices will be derived through the application of distribution line loss factors and seasonality factors, and grossing up for applicable taxes (Co. Ex. 2 at 4; Co. Ex. 4 at 5 and Ex. C at 1). Furthermore, the proposal includes a reconciliation mechanism to ensure a neutral financial outcome with regard to the Companies' provision of SSO generation service (Co. Ex. 4 at 5).

The Companies' posit that the descending clock format promotes a competitive bid format that is open, fair, and transparent. The Companies explain that, through this format, bidders can clearly understand how the final solicitation prices are determined and how to compete for a winning position. In addition, the Companies submit that the informational session and the additional training before the solicitation ensure that the bidders are fully aware of the mechanics of the bidding process (Co. Ex. 3 at 11). Constellation supports the basic form and substance of FirstEnergy's MRO and the MRO procurement process, including the provision of data and information, and the communication protocols, and believes that it meets the criteria set forth in the statute (Const. Ex. 1 at 4 and 17).

OEG argues that FirstEnergy's proposed reverse auction is not an "open, fair and transparent competitive solicitation," and would not result in the least-cost rate for consumers (OEG Ex. 1 at 3). According to OEG, outsourcing to third-party bidders of POLR risk through a reverse auction results in an unreasonable retail risk premium of between 17 and 40 percent above the Federal Energy Regulatory Commission (FERC) regulated wholesale market generation rates (OEG Ex. 1 at 3 and 14).

Cleveland submits that the rate conversion process proposed by the Companies to derive the retail rate is not an appropriate method to use because it fails to give proper

recognition to the load characteristics of the individual rate classes (Cleve. Ex. A at 4). Cleveland maintains that the Companies have the ability to account for the differences between each rate class. According to Cleveland, if the load characteristics are recognized with specificity, customers will be charged rates appropriate to the way they use electricity, thereby resulting in appropriate pricing and cost savings (Cleve. Br. at 4). Similarly, Nucor states that the result of utilizing a slice-of-system approach and a uniform blended cost to service all loads will be a set of MRO rates that indirectly create interclass subsidies, effectively ignoring the market realities and the fact that it takes lower average cost to serve higher load factor classes (Nucor Ex. 1 at 17).

Included with the application is a form of the Master SSO Supply Agreement for the CBP (Co. Ex. 4, Ex. F). The Consumer Advocates³ point out that the provision of the Master SSO Supply Agreement that makes the SSO supplier solely responsible for payment of all MISO charges discourages bidder involvement by not protecting them against new MISO and other regulatory charges (Co Ex. 4, Ex. F at 18; Con. Adv. Br. at 10). Therefore, the Consumer Advocates recommend that the Commission require that "net" changes in MISO and regulatory charges be allowed outside of the bidding. Furthermore, the Consumer Advocates state that the agreement is not fair to all potential bidders and will not encourage vigorous participation by a wide range of bidders because the agreement and the bidding process place all risk of forecasting and supply on suppliers who are not the Companies' affiliate supplier (Con. Adv. Br. at 10).

The Consumer Advocates and OPAE agree that the Companies' affiliate, FirstEnergy Solutions (FES), has an unfair advantage in the bidding process (Con. Adv. Br. at 11; OPAE Ex. 1 at 10). Consumer Advocates claim that the Master SSO Supply Agreement should not be approved until all bidders have the same information that FES has gained through supplying generation service to the Companies' territory (Con. Adv. Br. at 11). OEG agrees that the Companies have ignored the fact that FES may be able to influence the market clearing price by virtue of its concentration of generation ownership. OEG contends that, if FES has market power and the ability to control pricing, the result would not be a fair price that reflects effective competition. OEG notes that the application fails to address market power or transmission constraints that may result in market power. Absent convincing evidence that FES does not have market dominance, OEG contends that the Commission should not approve a reverse auction (OEG Ex. 1 at 7-11).

OEG recommends that, if the reverse auction proposed by FirstEnergy is rejected by the Commission, FirstEnergy's market rate offer should be procured by a third-party portfolio manager through a sealed competitive bid or request for proposal process to achieve the lowest and best price for consumers. OEG claims that a procurement process

³ OCC, Citizen Power, Lucas County, city of Toledo, and NOAC filed joint initial and reply briefs; therefore, when referring to the arguments in these documents these parties will be referred to as the Consumer Advocates.

where the Companies obtain blocks of wholesale power, rather than full requirements service, places the risk of POLR supply on FirstEnergy. As a result, the cost of wholesale generation should be significantly reduced. However, OEG believes that FirstEnergy should be fully compensated for this risk through distribution rates, including an appropriate rate of return, set by the Commission (OEG Ex. 1 at 13-14; OEG Br. at 11).

The Consumer Advocates disagree with the slice-of-system approach proposed by the Companies. Rather, the Consumer Advocates believe that bidding by class is preferable to the slice-of-system approach, because bidding by classes offers the potential to tailor bidding according to the characteristics of the customer. The Consumer Advocates point out the large customers are served using meters that register demand; therefore, they state that these demand-metered customers should be combined and bid out together (Con. Adv. Br. at 8).

OPAE states that the Companies' proposed procurement plan, which calls for the acquisition of 100 percent of the SSO load for all customer classes at one point in time by means of one type of wholesale market contract, carries the risk of higher prices and more volatility compared to other options that were not identified or considered (OPAE Ex. 1 at 11). OPAE recommends that the Commission require FirstEnergy to explore a more actively managed portfolio of wholesale market products to assure the most reasonable and lowest prices possible for the SSO, taking into account the need for price stability. As explained by OPAE, a more managed portfolio and procurement planning process would require the evaluation of a variety of contract terms and types over a longer term planning period, of between five to fifteen years, thus allowing the SSO provider to integrate energy efficiency, renewable, and traditional generation supply options to achieve the long-term lowest cost for customers. OPAE also recommends that the portfolio use a minimum of spot market and short-term transactions, because OPAE believes that such an approach will make it impossible to offer budget payment plans due to the significant changes in SSO prices and the need to levelize the payment amount during the budget year. In addition, OPAE believes that the Commission should require FirstEnergy to identify its SSO loads by class and use the power of the aggregated residential class to get a better price on its behalf (OPAE Ex. 1 at 11-14 and 19-20). OPAE believes that SSO procurement planning and prices should reflect products and prices separately for residential and small commercial customers (OPAE Ex. 1 at 33).

The Companies disagree with the active portfolio approach proposed by OEG and OPAE. According to the Companies, since they do not own or operate generation facilities, they are not in a position to assess generation portfolios and associated risks; they believe the suppliers are in the best position to manage such risks (Co. Reply Br. at 9).

Furthermore, Staff submits that the MRO application may fail to meet the requirements of some of the Commission's rules issued in Case No. 08-777-EL-ORD.

Specifically, Staff points to the requirements pertaining to the CBP, corporate separation plans, and those rules requiring the provision for certain detailed customer load information. Therefore, the Staff submits that the Companies will need to bring their proposal into compliance with the Commission rules (Staff Exs. 1A at 3 and Ex. 2 at 2-3).

OPAE further argues that the Companies have failed to meet the threshold requirement that the MRO must demonstrate compliance with Section 4928.02, Revised Code. According to OPAE, among these critical policies are the requirements to: ensure the availability of reasonably priced retail electric service; ensure diversity of suppliers and encourage development of distributed and small generation facilities; encourage market access for cost-effective supply and DSM resources; protect customers against unreasonable sales practices, market deficiencies, and market power; provide incentives to technologies that can adapt to potential environmental mandates; and protect at-risk populations (OPAE Br. at 4).

In response to OPAE, FirstEnergy argues that the provisions of a policy statute do not prevail over specific statutory mandates. FirstEnergy claims that Section 4928.02, Revised Code, does not impose any obligations or duties upon the Companies but simply reflects the policy goals and objectives of the state, as carried out by the Commission. FirstEnergy believes that, once the Commission finds that the requirements of Section 4928.142, Revised Code, have been met, any further analysis is redundant (Co. Reply Br. at 13-14).

The Commission does not agree with FirstEnergy. As a preliminary matter, we do not find that there is a conflict between the policy provisions of Section 4928.02, Revised Code, and the requirements for a CBP contained in Section 4928.142, Revised Code, such that one statute must prevail over the other. On the contrary, as we stated previously, the policy provisions of Section 4928.02, Revised Code, will guide the Commission in its implementation of the statutory requirements of Section 4928.142(A), Revised Code.

The Commission notes that Section 4928.06, Revised Code, makes the policy specified in Section 4928.02, Revised Code, more than a statement of general policy objectives. Section 4928.06(A), Revised Code, imposes on the Commission a specific duty to "ensure the policy specified in section 4928.02 of the Revised Code is effectuated." We have done so in rules governing MRO applications⁴ and will do so through our implementation of Section 4928.142, Revised Code, in this case.

Moreover, we disagree with FirstEnergy's claim that Section 4928.02, Revised Code, does not impose any obligations or duties upon the Companies. The Ohio Supreme Court recently held that the Commission may not approve a rate plan which violates the policy

⁴ See Case No. 08-777-EL-ORD.

provisions of Section 4928.02, Revised Code. See *Elyria Foundry v. Pub. Util. Comm.* (2007), 114 Ohio St. 3d 305. Accordingly, an electric utility should be deemed to have met the statutory requirements of Section 4928.142(A), Revised Code, only to the extent that the electric utility's proposed MRO is consistent with the policies set forth in Section 4928.02, Revised Code.

The Commission finds that the competitive solicitation proposed by FirstEnergy should not be approved as proposed. The Commission believes, in considering the record in this case, that FirstEnergy has not demonstrated that its proposal will result in an open, fair, and transparent competitive solicitation.

First, the Companies have not demonstrated that the reverse auction format that they have proposed is, in the universe of competitive bids, the superior format to result in the lowest and best possible prices for consumers (OEG Ex. 1 at 11-12). The record in this proceeding demonstrates that, at the time of the auction, there will be a significant concentration of generation available for bidding under the control of a single party, the Companies' affiliate, FES, and that the reverse auction format may allow a bidder holding a significant concentration of the generation to strategically withhold some of its generation to ensure a higher price (OEG Ex. 1 at 7-8, 9-11). Further, testimony in the record indicates that FES may have an undue advantage in the bidding process proposed by FirstEnergy (OPAE Ex. 1 at 10). Based upon the evidence in the record, the Commission is not persuaded that the reverse auction format, as proposed by the Companies, will protect customers from the potential of FES to exercise market power.

Moreover, as Staff points out, FirstEnergy has not adequately addressed questions regarding corporate separation in this application (Staff Ex. 1a at 3). FirstEnergy must demonstrate that it has a separation plan and policies in place that, within the context of its proposed MRO, would meet the requirements of Section 4928.17, Revised Code, and the Commission's newly adopted rules. Given the potential for FES to exercise market power, it is necessary for FirstEnergy to clearly demonstrate in the record that the functional separation between the Companies and their affiliate has effectively prevented FES and persons with a financial interest in FES' performance from improperly influencing the decision to use the reverse auction format or specific bidding requirements. Therefore, the Commission finds that the evidence in the record does not demonstrate how the auction process proposed by FirstEnergy would protect customers against market deficiencies and market power and would provide for an open, fair, and transparent competitive solicitation pursuant to Section 4928.142(A)(1), Revised Code.

In addition, SB 221 amended Section 4928.02, Revised Code, to specifically include the promotion of DSM, time-differentiated pricing, and implementation of AMI as policies of this state. As the Staff points out, the application does not address time-differentiated and dynamic retail pricing (Staff Ex. 2 at 3). Time-differentiated and dynamic retail

pricing make the economic costs to the Companies of providing retail generation service transparent to consumers. However, FirstEnergy has not demonstrated how its application promotes any of these policies. In particular, the Commission believes that AMI and time-differentiated pricing have the potential to promote an open, fair, and transparent competitive solicitation by giving customers the information needed to control their electricity bills and make appropriate decisions regarding the purchase of power, and by providing a potential check on the abuse of market power. FirstEnergy has not adequately explained how its application advances the policies of the state and achieves an open, fair, and competitive solicitation in the absence of such provisions.

Additionally, there is no evidence in the record establishing how FirstEnergy's proposal is open to and encourages participation by distributed and small generation facilities, and cost-effective and DSM resources.

2. Clear product definition - Section 4928.142(A)(1)(b), Revised Code

According to the application, the product is designed to be a full requirements SSO supply which will be provided for a specified term by the winning bidders. Thus, the product includes all energy and capacity, resource adequacy requirements, i.e., capacity associated with planning reserve requirement, transmission service, and ancillary services (Co. Ex. 1 at 10; Co. Ex. 4 at 12).

IEU-Ohio believes that, as presently designed, the slice-of-system tranches do not provide a clear product definition. According to IEU-Ohio, the design proposed by the Companies requires the bidders to bid on a product and to assume the obligation to do whatever it takes to supply FirstEnergy's retail load. IEU-Ohio believes that this approach places all of the risk of the lack of product specificity on the bidder and will work to increase prices. IEU-Ohio points out that the Master SSO Supply Agreement that bidders are required to execute identifies the products that suppliers are expected to provide and requires the suppliers to adhere to rules established by MISO, which might be amended from time to time. According to IEU-Ohio, considering how MISO markets are in a significant state of flux, if prospective bidders are requested to bid on a full requirements tranche, subject to whatever requirements MISO might put in place, then the product can not be considered clearly defined. Another example of how the proposal does not reflect a clear product definition, according to IEU-Ohio, is the fact that potential bidders will be asked to bid on tranches defined as load-following, but the quantities of electricity they will be required to provide are largely undefined and unpredictable. While each tranche is nominally 100 MW, the actual amount of electricity a successful bidder will be required to provide will vary hour by hour (IEU Ex. 1 at 10-13).

The Commission finds that FirstEnergy has not demonstrated that the application filed in this case provides a clear product definition in accordance with the requirements

of Section 4928.142(A)(1)(b), Revised Code. The Commission believes that the evidence in the record of this proceeding does not establish that the slice-of-system, load-following product proposed by the Companies, which includes all energy and capacity, resource adequacy requirements, transmission, and ancillary services, provides a clear product definition which will enable potential bidders to properly assess the risks of bidding. The Commission notes that the load-following product in the CBP will commit the winning bidders to a load which will vary over time (creating a "quantity" risk or "supply" risk) and that FirstEnergy will not be supplying forecasting data to the winning suppliers (Tr. I at 87-88; IEU Ex. 1 at 10-13). Moreover, the Commission notes that FirstEnergy has not addressed in the record in this case the potential for future changes with respect to resource adequacy in the MISO planning reserve sharing group and how such changes would impact FirstEnergy's product definition (Tr. I at 84-85).

Testimony at the hearing indicates that a procurement process where the Companies obtain blocks of wholesale power, rather than full requirements service, may result in a significantly reduced cost of wholesale generation, including consideration of the fact that the Companies would need to be compensated for absorbing the quantity risk (OEG Ex. 1 at 13-14). The Companies have not demonstrated that their proposal is superior to making forward purchases of a clearly defined quantity and flowing through, via a reconciliation adjustment, the net result of any short-term power purchases and sales needed to match load. Thus, FirstEnergy has not demonstrated that it has proposed a sufficiently clear product definition to advance the state policy goal of ensuring the availability of adequate, safe, efficient, nondiscriminatory, and reasonably priced retail electric service, such that it satisfies the requirements of Section 4928.142(A)(1)(b), Revised Code.

3. Standardized bid evaluation criteria - Section 4928.142(A)(1)(c),
Revised Code

The Companies explain that the CBP manager will establish the starting price for the solicitation in a manner to foster bidder participation in the bidding process. The bidding concludes when the number of bids for the tranches equals the total number of tranches that are offered. The price at which the tranches are offered during the final round in the CBP will be the price paid to the winning bidders for the SSO supply (Co. Ex. 4 at 12).

The Companies explain that each winning bidder will be required to execute the Master SSO Supply Agreement. Pursuant to the Master SSO Supply Agreement, every SSO supplier must be a MISO load-serving entity. In addition the agreement obligates every SSO supplier to join the MISO planning reserve sharing group and to abide by the resource adequacy requirements of that group. This provision, according to the Companies, will ensure that there is sufficient generating capacity to reliably serve future

load and comply with applicable capacity requirements and reliability standards (Co. Ex. 4 at 24).

The Companies explain that the rules of the descending clock format are pre-specified in a way that can be thoroughly replicated and verified. In addition, because bidders are prequalified, the Companies state that the evaluation of the submitted bids is on a price-only basis (Co. Ex. 3 at 11).

The Commission finds that there is not sufficient evidence in the record of this proceeding establishing that potential suppliers would be satisfactorily evaluated on their ability to provide adequate and reliable retail electric service as required by Section 4928.02(A), Revised Code. In fact, according to the testimony in the record, the bids would be evaluated only on price, and there would be no evaluation on such other factors (Co. Ex. 3 at 18).

4. Oversight by an independent third party - Section 4928.142(A)(1)(d),
Revised Code

An independent third party will be retained for each solicitation as the CBP manager, in accordance with the application (Co. Ex. 4 at 13). The Companies indicate that the CBP manager will be responsible for ensuring that the CBP is designed to be an open, fair, and transparent competitive solicitation, the product definition is clear, and there is a standardized bid criteria, consistent with Section 4928.142, Revised Code (Co. Ex. 1 at 5-6; Co. Ex. 4 at 13).

OEG argues that the MRO must be overseen by an independent third party that should be chosen by the Commission and not FirstEnergy (OEG Ex. 1 at 19). Kroger emphasizes that the Companies' proposal should be modified to make it clear that the CBP manager is accountable to the Commission, as required by statute (Kroger Ex. 1 at 4).

The Companies have retained the Brattle Group as the CBP manager (Co. Ex. 1 at 5). IEU-Ohio states that, contrary to FirstEnergy's assertions in the application, it is evident that the Brattle Group had no involvement in designing what prospective bidders would bid on. In fact, IEU-Ohio believes that FirstEnergy exclusively designed what suppliers would bid on and then turned the reigns over to the Brattle Group to administer the bidding process. IEU-Ohio opines that, had the CBP been designed by an independent third party, other structures for the bidding process, such as a mix of fixed block and load-following requirements, would have been considered (IEU Ex. 1 at 8-9).

With regard to FirstEnergy's selection of the Brattle Group as the independent third party that will design the solicitation and administer the bidding of the MRO, OEG notes that FirstEnergy currently employs two principals of the Brattle Group as expert witnesses

in its ESP proceeding. Moreover, the Brattle Group has presented testimony on behalf of the Companies in four prior cases before the Commission and in five separate proceedings before the Pennsylvania Public Utilities Commission on behalf of FirstEnergy affiliates. OEG claims that a consulting group whose principals have been and are currently employed by FirstEnergy cannot be considered an "independent third party," because there is an inherent conflict of interest when a consultant is asked to act on behalf of his employer in one proceeding and act independently from his employer in a related, contemporaneous proceeding (OEG Ex. 1 at 17).

The Commission finds that the application submitted by FirstEnergy does not meet the statutory requirement for oversight by an independent third party. FirstEnergy's application provides for a critical and central role to be played by the CBP manager. The CBP manager will be responsible for ensuring that the CBP is designed to be open, fair, and transparent, that the product definition is clear, and that there are standardized bid evaluation criteria (Co. Ex. 1 at 5-6; Co. Ex. 4 at 13). Further, the CBP manager is responsible for all communications with potential bidders and for overseeing the website which will contain essential information for the bidding process (Co. Ex. 3 at 5, 7-9). Accordingly, the CBP manager must be clearly seen as independent by any and all potential bidders.

The Commission notes that Section 4928.142(A)(1)(d), Revised Code, requires that the CBP manager be an "independent third party." It is not sufficient that the CBP manager simply be a third party as FirstEnergy claims; the CBP manager must be "independent" as well. Although the Commission does not intend to impugn the integrity or reputation of the CBP manager retained by FirstEnergy, the Commission finds that the CBP manager retained by FirstEnergy has an appearance of a conflict of interest in this case.

The record demonstrates that the CBP manager was not selected through a transparent process or in consultation with Staff or any other interested parties. Instead, the CBP manager was selected at the sole discretion of the Companies through a closed selection process (Tr. I at 119-120, 137). Moreover, principals of the CBP manager have testified for the Companies or its affiliates on several occasions in the past, including the FirstEnergy distribution rate case presently pending before the Commission. More importantly, principals for the CBP manager testified for the statutory alternative to the MRO in FirstEnergy's ESP proceeding (Tr. I at 60-61). The Commission believes that such testimony, in support of the statutory alternative to the CBP in which the CBP manager is intended to play the central role, creates an appearance of a conflict of interest, particularly in light of the fact that the CBP manager was not selected through an open, transparent process, or in collaboration with other interested parties.

5. Evaluation of submitted bids - Section 4928.142(A)(1)(e), Revised Code

In the application, the Companies explain that, at the conclusion of each solicitation, the CBP manager will submit a report to the Commission which will include the information and data necessary for the Commission to determine whether the statutory criteria has been met, along with recommendations regarding the least-cost winning bidders (Co. Ex. 4 at 15). The Companies offer that the report will answer the question posed in Section 4928.142(C), Revised Code, regarding whether there were at least four bidders, whether each product in the solicitation was oversubscribed, and whether at least 25 percent of the volume was bid on by entities other than the utility (Co. Ex. 3 at 14). Constellation agrees that the CBP proposed by the Companies provides appropriate Commission evaluation, preapproval, and oversight prior to the CBP prices becoming retail rates (Const. Ex. 1 at 19).

The Consumer Advocates do not believe that the Companies' proposal that the final prices achieved by the CBP will be filed with the Commission, immediately after close of the initial CBP and within 30 days for subsequent CBPs, provides sufficient time for public review and comment (OCC Ex. 1 at 7-8). Furthermore, the Consumer Advocates note that the Companies' proposal provides for little or no Commission oversight, which constitutes a serious flaw in the MRO that must be corrected (Con. Adv. Br. at 6). In addition, the Consumer Advocates recommend that the Commission establish an appropriate review period that includes the opportunity for stakeholders to comment on the CBP and propose improvements to the Companies' procurement and pricing procedures (OCC Ex. 1 at 8; Con. Adv. Br. at 6)

The Commission finds that the application filed by FirstEnergy meets the statutory criterion regarding evaluation of proposed bids. The Consumer Advocates believe that the proposal does not provide an adequate opportunity for public review and comment. However, Section 4928.142(C), Revised Code, plainly does not provide for such an opportunity, as it provides the Commission with only three days to reject the results of a CBP.

The Consumer Advocates also recommend that the Commission establish a review period which includes an opportunity to comment on the CBP after the fact, including comments regarding the manner in which future CBPs should be conducted. The Commission notes that Section 4928.02(I), Revised Code, provides, *inter alia*, that it is the policy of this state to ensure that retail customers are protected against market deficiencies and market power. We believe that the proposed opportunity for review and comment by stakeholders would advance this state policy.

B. Criteria for eligibility for market rate offer plan - Section 4928.142(B), Revised Code

Section 4928.142(B) requires that an MRO application detail the electric utilities' proposed compliance with the CBP requirements and the Commission's rules. In addition, this provision requires that the utility demonstrate all of the following: membership in a regional transmission organization (RTO); the RTO has a market-monitor function; and there is a published source of information that identifies pricing.

1. Membership in regional transmission organization - Section 4928.142(B)(1), Revised Code

Section 4928.142(B)(1), Revised Code, requires that an applicant filing an MRO application must demonstrate that the electric utility or its transmission service affiliate belongs to at least one RTO approved by FERC. According to the Companies, their transmission affiliate, American Transmission System, Inc. (ATSI), is a member of the Midwest Independent Transmission System, Operator (MISO), which is an RTO that has been approved by FERC. On September 1, 2003, ATSI transferred functional control of its transmission facilities to MISO (Co. Ex. 1 at 2-3; Co. Ex. 4 at 7).

No party disputed the fact that FirstEnergy and its transmission affiliate belong to MISO or that MISO is an RTO approved by FERC. Therefore, the Commission finds that the Companies have fulfilled the requirements of Section 4928.143(B)(1), Revised Code.

2. Market-monitor function - Section 4928.142(B)(2), Revised Code

Section 4928.142(B)(2), Revised Code, requires that the RTO has a market-monitor function and the ability to take actions to identify and mitigate market power or the electric utility's conduct. The Companies submit, and Constellation agrees, that MISO has an independent market-monitor function and the requisite abilities required by this section of the code (Co. Ex. 1 at 3; Co. Ex. 4 at 7; Const. Ex. 1 at 11).

Staff believes that the MRO does not meet the requirements pertaining to market monitoring and that the application is vague and ambiguous in delineating which entity, the market-monitor unit or MISO, is responsible for mitigating market power. Staff submits that Section 4928.142(B), Revised Code, contemplates that the market-monitor function will encompass both the authority to identify and act to mitigate market power; therefore, Staff maintains that the market-monitor function must be performed by a market-monitor unit, rather than MISO, which may be reluctant to police its own members (Staff Br. at 10-11).

OPAE believes that there are serious questions regarding MISO's ability to mitigate market power or the Companies' market conduct. OPAE points out that the Companies' witness Warvell could cite no instances where MISO has acted to mitigate market power, nor could he point to any evidence that such authority had been used with respect to ATSI (OPAE Br. at 3). IEU-Ohio states that, despite FERC's acceptance of MISO's market monitoring and mitigation measures, the structure of MISO's mitigation measures do not attempt to detect and mitigate market power, at least in the traditional sense. Rather, IEU-Ohio believes that MISO's mitigation measures are structured to create safe harbors of behavior that might otherwise be viewed as an exercise of market power (IEU Ex. 1 at 18 and 21).

The Commission notes that, after the deadline for briefs in this proceeding, FERC issued a decision regarding the function of the market monitor.⁵ There is no testimony in the record of this proceeding regarding the impact of this recent FERC decision on the ability of the market monitor to take actions to identify and mitigate market power or the electric utility's conduct. Because the record in this proceeding demonstrates that the precise duties of the market monitor are in flux, we find that FirstEnergy has not demonstrated that the RTO market monitor has the ability to take actions to identify and mitigate market power or the Companies' conduct.

3. Published source of pricing information - Section 4928.142(B)(3),
Revised Code

Section 4928.142(B)(3), Revised Code, requires that an MRO application demonstrate that a published source of information is available publicly or through subscription that identifies pricing information for traded electricity. According to the Companies, published information is available through a combination of such sources at the Intercontinental Exchange (ICE), New York Mercantile Exchange (NYMEX), ICAP, and Platts (Co. Ex. 1 at 4; Co. Ex. 4 at 8). Constellation agrees that these publications satisfy the statutory requirement (Const. Ex. 1 at 12).

OPAE submits that the Companies failed to show that the publications they cited represent pricing for the volume of capacity and energy necessary to meet the load of the Companies. Therefore, OPAE asserts that the publications cited are not adequate to meet the need to establish a transparent price to provide SSO service going forward, as required by statute (OPAE Br. at 4). IEU-Ohio agrees that the sources cited by the Companies are not adequate to meet the statutory requirement and that actual transactional forward pricing data, as opposed to broker quotes, must be available (IEU Ex. 1 at 15).

⁵ This decision was the subject of a motion filed by Constellation to supplement its reply brief. We find that it would be prejudicial to the other parties in this proceeding to grant Constellation's motion, as the other parties have had no opportunity to rebut Constellation's interpretation of the decision, given the accelerated schedule of this proceeding. Therefore, the motion will be denied.

The Commission finds that the record in this proceeding does not demonstrate that published sources of information are publically available or available through subscription that identify pricing information for traded electricity, in accordance with the requirements of Section 4928.142(B)(3), Revised Code. The testimony in the record does not support a finding that pricing information is available from a single source which represents actual transactions for both peak and off-peak power and that such pricing information includes specific information regarding the quantities of electricity traded in such transactions for the period specified in the statute (Tr. I at 88-89; IEU Ex. 1a at 15). Based upon the record in this proceeding, we cannot find that the requisite pricing information is consistently and reliably available.

C. Rate design

With regard to the generation rate design proposed in the MRO application, the Companies have proposed tariffs that are based solely on per kilowatt hour (kWh) charges, as opposed to the existing tariffs which include demand charges and a declining block structure. The Companies state that this change in rate design will remove disincentives for energy efficiency measures because the declining block rates will be eliminated. Furthermore, the applicants propose that seasonal pricing, which will be fixed and based on the seasonality characteristics observable in historical locational marginal prices, be applicable to all SSO generation charges. The Companies believe that seasonal pricing, which will apply to all residential and general service tariffs, will send more appropriate price signals to customers, thereby encouraging customers to reduce usage during higher priced summer periods (Co. Ex. 4 at 5-6 and 19).

Nucor states that the elimination of FirstEnergy's current rate design will result in significant rate increases for customers. Despite these increases, Nucor states that the Companies have done nothing to mitigate the rate shock to customers (Nucor Ex. 1 at 7-9). OmniSource agrees with Nucor that customers' options, such as time-of-day pricing, interruptible and economic development rates, and incentives for customers related to energy use and efficiency, must be required as part of the MRO (OmniSource Br. at 2; Nucor Ex. 1 at 7). Likewise, Kroger comments that the Companies' proposed rate design fails to account for time-of-use differences between customer classes in allocating generation costs. According to Kroger, this deficiency will result in cross-subsidization because there will be no recognition in the rates of the fact that some customer classes have a higher portion of usage in lower-cost, off-peak periods than other customer classes (Kroger Ex. 1 at 5).

The Consumer Advocates maintain that the MRO should be modified regarding interruptible service in order to reduce the procurement costs for customers served by the Companies. According to the Consumer Advocates, a well-designed load response

program could provide benefits as part of the MRO process by reducing the demand that bidders would have to meet. Under the Consumer Advocates' proposal, credits for interruptible customers, once an effective interruptible program is developed, should be paid by all customers who are combined with the interruptible customers for bidding purposes (Con. Adv. Br. at 5).

OCC disagrees with the Companies' proposal to eliminate demand components in non-residential retail generation rates. OCC believes that the elimination of historic demand charges from all non-residential generation tariffs will encourage an inefficient demand for, and use of, generation resources. According to OCC, this weakness in the rate design of the retail generation rates will be recognized by bidders in the CBP and will result in higher bids. OCC does not believe that the seasonality factor proposed by the Companies provides enough control over the growth in demand; thus, OCC recommends that the demand components be reintroduced before any bidding takes place. OCC recommends that, in future auctions, mandatory real-time pricing for large customers, rather than demand charges, should be considered as a preferred pricing mechanism (OCC Ex. 1 at 5-7). The Consumer Advocates believe that the Commission should encourage advanced metering infrastructure to attain this goal (Con. Adv. Br. at 5).

The Companies disagree with OCC's proposal to maintain demand components for non-residential customers, stating that introducing demand charges means that higher-than-average load factor customer could pay lower-than-average SSO generation charges, and conversely lower-than-average load factor customers could pay higher-than-average charges. The result, according to the Companies, is that the lower-than-average customers would have an incentive to shop in comparison to the higher-than-average customers. Therefore, the Companies argue that the level of shopping would be influenced by rate design, rather than cost. The Companies also believe this would lead to under-recovery of costs by the Companies and higher reconciliation costs for customers (Co. Ex. 9 at 5).

In response to the intervenors' overall criticisms of the rate design, the Companies maintain that inclusion in the retail rates of cost components, e.g., demand, time-of-day, or interruptible components, other than seasonal and voltage-based cost difference, would be arbitrary and could not be designed to match the costs incurred by the Companies. FirstEnergy maintains that there is no reasonable way to quantify demand, time-of-day, or interruptible components for all winning bidders in the aggregate and no way to know whether suppliers have included such components in their bids. In addition, the Companies note that, if the retail rate for a certain class of customers is reduced as a result of the suggested modifications by the intervenors, such a reduction would have to be made up by increasing the retail rate for other classes of customers (Co. Ex. 9 at 4-5). Finally, the Companies point out that the arguments raised by the intervenors regarding the rate design are more of an attack on SB 221 and not the Companies' proposal. The Companies emphasize that their proposal is for an SSO and, if customers believe that they

can get a better rate based on their particular circumstances, they are free to obtain those rates in the competitive market (Co. Br. at 4-5).

FirstEnergy argues that there is nothing in Section 4928.142, Revised Code, which requires the use of time-of-day rates or interruptible rates in market rate offers. However, there also is nothing in Section 4928.142, Revised Code, which diminishes the Commission's existing authority over rate design or duty to ensure the availability of reasonably priced electric service. Section 4928.142, Revised Code, simply provides a new mechanism for the determination of the amount of generation rates and expressly authorizes the Commission to prescribe retail rates; it does not speak to how such rates are designed or allocated among customers.

The Commission notes that the policy of the state, as codified in Section 4928.02, Revised Code, requires the Commission to ensure the availability of unbundled and comparable retail electric service that provides customers with the supplier, term, price, conditions, and quality options they elect to meet their respective needs. Further, SB 221 amended Section 4928.02, Revised Code, to specifically include the promotion of time-differentiated pricing as a policy goal of this state. FirstEnergy has not demonstrated how its proposed rate design advances these policy goals. In fact, the record clearly indicates that FirstEnergy could have proposed a rate design which would advance these goals. The Commission agrees with Kroger that time-of-day rates would recognize that some customers have a higher proportion of usage in lower-cost, off-peak periods (Kroger Ex. 1 at 5). Likewise, the record demonstrates that interruptible rates can be used to reduce generation and transmission capacity needs (Nucor Ex. 1 at 11). Moreover, the Commission notes that FirstEnergy has not demonstrated that time-of-day rates or interruptible rates are impractical or cannot be implemented as part of a competitive bidding process (Tr. I at 159; Tr. V at 21). In fact, the record in this proceeding demonstrates that FirstEnergy included both time-of-day rates and interruptible rates in its prior request, in Case No. 07-796-EL-ATA, for a competitive bidding process (Nucor Ex. 1 at 5, 10). Therefore, because the Commission finds that FirstEnergy has not demonstrated that its proposed rate design advances the state policies enumerated in Section 4928.02, Revised Code, the proposed rate design should not be adopted and approved by the Commission.

D. Riders

The Companies propose a non-bypassable cost recovery true-up reconciliation mechanism (Rider CRT) which will be applied quarterly to the retail price in order to account for the differences between the SSO generation service revenues and the SSO supply costs during the prior quarter (Co. Ex. 4 at 19-20; Co. Ex. 2 at 5-6). In addition, the Companies propose that Rider CRT be used to recover certain incremental expenses associated with the implementation of the CBP. As explained in the application, these

incremental charges include: the CBP expenses permitted by Section 4928.142(C), Revised Code, that are not recovered through the tranche fees paid by the SSO suppliers (including fees and expenses associated with the independent third party and any consultant hired by the Commission); actual uncollectible expense amounts related to the provision of SSO generation service; and the delta revenues for special contracts both those remaining after December 31, 2008, and those approved by the Commission after January 1, 2009, i.e., for economic development and energy efficiency schedules, governmental special contracts, or unique arrangements (Co. Ex. 4 at 19-21, Ex. 3 at 4). Specifically, full recovery of the total SSO revenue requirements will be ensured through the application of two separate Rider CRT charges (Rider CRT1 and Rider CRT2). Rider CRT1, which will be recovered from all customers of the Companies, will reconcile aggregate SSO revenue requirements for the Companies with the associated SSO generation revenues. Rider CRT2, which will be recovered only from CEI customers, will include the revenue variance associated with CEI's special contract customers remaining after December 31, 2008 (Co. Ex. 4, Ex. C at 3). The Companies propose that the avoidable generation charges will be equal to the customer's SSO generation charge (Co. Ex. 2 at 9).

OPAE believes that Rider CRT is not justified and that the "costs" it contains are not costs incurred by the Companies; therefore, OPAE urges that Rider CRT be rejected (OPAE Br. at 9-10). Staff, Constellation, and Dominion argue that all of the generation-related charges should be avoidable by shopping customers (Staff Ex. 3 at 3; Const. Ex. 1 at 23; Dom. Br. at 5). Furthermore, Dominion points out that the CBP pertains to wholesale competition, not retail competition; thus, Dominion argues that these costs should be recovered through the price paid by the SSO generation supply customers and not shopping customers (Dom. Br. at 5-6). OEG argues that, if the Companies' MRO is approved and they are allowed to outsource all POLR responsibility and risk to third parties for supplying the non-shopping load, then the Companies will not incur any POLR costs because all POLR costs will be reflected in the retail mark-up or the FERC-regulated market generation rates. Therefore, OEG insists that consumers who elect to shop should not have to pay the Companies any POLR charges (OEG Ex. 1 at 20).

As pointed out by the Consumer Advocates, the Companies must allow net-meterers on their systems and must credit net-meterers with the excess generation they contribute to the systems; therefore, any bundling of non-generation charges with generation charges must be addressed in crediting net-meterers for their contribution to the system. The Consumer Advocates submit that, either the Companies must create a means to take the transmission charges out of the bids or they must credit net-meterers with the full service bundle. Accordingly, the Consumer Advocates recommend that the Companies apply a reconciliation adjustment to the credits given net-meterers for their contributions to the distribution system. (Con. Adv. Br. at 13).

OEG agrees that, with the exception of the delta revenues, the generation-related charges contained in the CRT should be avoidable. Specifically, with regard to the delta revenues, OEG believes that these revenues can be non-bypassable; however, OEG believes that it is critical that the Commission formally approve in a separate docket each transaction that results in delta revenues in order to avoid the possibility of undue discrimination (OEG Ex. 1 at 21). Staff advocates that the delta revenues should be removed from Rider CRT and that recovery for delta revenues should be placed in a separate rider. In addition, Staff states that the Companies should be required to apply to recover any delta revenues in accordance with the Commission rules (Staff Ex. 3 at 3).

OCC and Cleveland disagree with the Companies' proposal pertaining to the handling of lost revenues resulting from special contracts through Rider CTR (OCC Ex. 1 at 9; Cleve. Ex. A at 7). Cleveland states that, as proposed by the Companies, Rider CRT allows them to recover 100 percent of non-quantified, unidentified, and uncontrolled delta revenues and costs related to alternative energy resources without any review by the Commission or interested parties (Cleve. Ex. A at 7). The Consumer Advocates maintain that the Companies have failed to establish a market-based SSO for CEI's special contracts customers. The Consumer Advocates state that FirstEnergy and not the customers should be responsible for the delta revenues (Con. Adv. Br. at 8-9). OCC points out that, prior to this filing, FirstEnergy's shareholders contributed to the recovery of delta revenues. Therefore, OCC advocates that the Commission should not allow any more than 50 percent of the delta revenues to be recovered from customers who do not have special contracts (OCC Ex. 1 at 10). Similarly, Kroger's witness Higgins believes that the recovery of delta revenues is inconsistent with the adoption of an MRO and that any costs of special deals made by the Companies should be absorbed by FirstEnergy and not subsidized by the customers (Kroger Ex. 1 at 6).

The Companies insist that Rider CRT is consistent with the statute which allows the Companies to recover generation-related costs through a reconciliation mechanism, Rider CRT. The Companies point out that most of the parties do not appear to dispute that certain items included in Rider CRT, i.e., the cost of recovering revenue variance, conducting the CBP, uncollectible expense, and delta revenues, should be recoverable; the dispute is whether shopping customers should also pay these charges (Co. Br. at 4-5). The Companies disagree with the proposal that all of the generation-related charges in Rider CRT should be avoidable. Specifically, with regard to Staff's proposals that the difference between purchase power expenses and retail generation revenue, as well as the fines and damages related to the auction, should be bypassable. The Companies argue that, if customers are allowed to shop and avoid such charges, there would be a shrinking pool of customers from which to recover such cost. Thus, the Companies state that they would bear the risk of not recovering all of the costs of procuring generation. In response to the proposal that uncollectible costs in Rider CRT should be avoidable, the Companies state that, if the proposal is adopted, customers taking service from third-party suppliers would

avoid sharing in the cost of the state policy provision which protects at-risk population (Co. Ex. 9 at 9-11).

FirstEnergy states that Rider CRT keeps the Companies revenue neutral. On rebuttal, the Companies state that they are entitled to recover their full costs of power supply procured in the MRO process and, if they do not recover such costs for the customer that has an approved reasonable arrangement, then such delta revenue should be recoverable from all customers. The Companies submit that, if they are not allowed to recover the delta revenues, they would be denied the opportunity to earn a reasonable rate of return (Co. Ex. 9 at 6-8).

The Commission finds that Rider CRT should not include recovery of delta revenue for the CEI special contracts which were extended beyond December 31, 2008, in the RCP case, Case No. 05-1125-EL-ATA. There is no evidence in the record that this provision was including recovery of delta revenue after December 31, 2008 (Tr. V at 35-42). In fact, FirstEnergy's witness Ridmann testified that there was no provision in the stipulation approved by the Commission in the RCP case for recovery of delta revenues after December 31, 2008 (Tr. V at 39). Further, there is no provision in Section 4928.142, Revised Code, which permits the recovery of delta revenue for contracts entered into prior to the implementation of the MRO.

Moreover, the Commission agrees with Staff witness Fortney that the delta revenue recovery for future special or unique arrangements should be made by a separate rider. Further, once delta revenue recovery is removed from Rider CRT, all remaining aspects of Rider CRT relate to generation (Staff Ex. 3 at 3). Thus, the Commission finds that Rider CRT should be avoidable for customers who shop.

The Companies propose four other riders. Two of the proposed riders only apply to CEI customers. The regulatory transition charge rider (Rider RTC) will apply to CEI customers only through December 31, 2010, in accordance with the Companies' RCP (Co. Ex. 4 at 21). The Companies submit that SB 221 allows for the continuation of this transition cost recovery as provided for in the current RCP. Rider RTC will begin January 1, 2009, and will be updated around May 1, 2009, to account for the reductions called for in the RCP. The second rider applicable to CEI customers from January 1, 2009, through April 30, 2009, is the distribution service rider (Rider DSI). As explained by the Companies, Rider DSI is necessary to provide for application of distribution charges to CEI for the designated period, since the distribution rates for CEI customers do change under the Companies' proposal in *In the Matter of the Application of FirstEnergy for Authority to Increase Rates for Distribution Service*, Case No. 07-551-EL-AIR, until May 1, 2009 (Co. Ex. 2 at 7-8; Co. Ex. 4 at 22).

The proposed grandfathered contracts rider (Rider GRC) is applicable only to certain customer facilities under a special contract entered into pursuant to Section 4905.31, Revised Code, and entered into prior to January 1, 2001. Finally, the Companies propose a deferred transmission cost recovery rider (Rider DTC). According to the Companies, Rider DTC is necessary to recover certain deferred incremental transmission and ancillary service-related costs, as well as the recovery of such deferrals, in accordance with the Commission's decision in Case Nos. 04-1931-EL-AAM and 04-1932-EL-ATA. The Companies explain that recovery of these deferrals began January 1, 2006, and, under Rider DTC, will continue from January 1, 2009, through December 31, 2010 (Co. Ex. 2 at 7-8; Co. Ex. 4 at 22).

The Commission notes that no party opposed FirstEnergy's proposals concerning Rider RTC, Rider DSI, Rider GRC, and DTC. However, it is unnecessary for the Commission to reach a decision on these riders in light of the fact that the Commission is not approving FirstEnergy's application at this time.

E. Renewable energy, energy efficiency, and peak demand reduction requirements

Sections 4928.64 and 4928.66, Revised Code, set forth requirements that electric utilities must comply with regarding alternative energy portfolios, energy efficiency, and peak demand reduction. In their application, the Companies propose that any requirements for meeting renewable energy requirements will be achieved through a separate request for proposal during 2009 so that all such requirements will be met by the end of 2009. According to the instant application, the renewable energy resources will be in the form of renewable energy credits and the cost will be passed on to customers. The Companies intend on pursuing their plans for meeting the targets pertaining to load reductions and energy efficiency through programs that are separate from this application. According to the Companies, no specific requirements related to advanced energy or advanced energy technologies are applicable during the time period contemplated by the initial CBP under this application (Co. Ex. 4 at 29).

It is the understanding of IEU-Ohio that customer-sited capabilities must be set forth by the Companies in their MRO proposal in order to meet the alternative energy resource, energy efficiency, and peak demand reduction portfolio requirements in SB 221. IEU-Ohio points out that FirstEnergy did include provisions dealing with customer-sited capabilities in its ESP case, which was filed contemporaneously with this case (IEU Ex. 1 at 6-7). OPAE agrees and recommends that FirstEnergy consider an integrated procurement plan whereby the impact of various cost-effective demand side management programs are considered as substitutes for some portion of the traditional generation supply contracts (OPAE Ex. 1 at 34-35). In addition, Nucor notes that interruptible rates, which are not proposed in the MRO application, are critical to meet the broad demand response policy

objectives of SB 221, as well as the peak demand reduction targets in the statute; therefore, Nucor avers that the Commission should require that customers be allowed to take service under interruptible rate options (Nucor Ex. 1 at 12).

The record in this case demonstrates that FirstEnergy has not included in its application a proposal for compliance with the renewable energy requirements in Section 4928.64, Revised Code (Tr. I at 81). The Commission finds that the Companies' application for an MRO cannot be approved in the absence of a proposal for compliance with the renewable energy requirements of Section 4928.64, Revised Code. The Commission notes that Section 4928.142, Revised Code, which allows electric utilities to apply for MROs, and Section 4928.64, Revised Code, which provides renewable energy requirements for electric utilities, were enacted together as part of SB 221. Reading these provisions together, it is clear that the General Assembly intended for the Commission to consider the utility's proposal for addressing the renewable energy requirement in the context of considering the utility's application for an MRO.

In addition, the Commission notes that Section 4928.02, Revised Code, states that it is the policy of this state to protect at-risk populations in considering the implementation of new advanced energy or renewable energy resources. By attempting to sever the Commission's consideration of its MRO from the consideration of its proposal for compliance with the statutory renewable energy resource requirements, FirstEnergy's application has the potential to frustrate, rather than advance, this policy goal of the state.

Moreover, by failing to include the proposal to meet the renewable energy requirements as part of its application for an MRO, FirstEnergy precludes the possibility that generation based upon renewable energy could be part of the winning bidder's portfolio in the CBP. Instead, FirstEnergy assumes that the only means of meeting the renewable energy requirement will be through the purchase of renewable energy credits, with the cost of such credits being passed through to consumers.

Likewise, the Commission finds that FirstEnergy's application for an MRO cannot be approved in the absence of a proposal by the Companies for compliance with the energy efficiency and peak demand reduction requirements of Section 4928.66, Revised Code. The Commission further notes that SB 221 amended the policies of the state, codified in Section 4928.02, Revised Code, to specifically enumerate DSM, time-differentiated pricing, and implementation of AMI as policies which should be promoted by the Commission. These provisions were all enacted as part of SB 221, and it is clear that the General Assembly intended for the Commission to consider an electric utility's plan for compliance with the energy efficiency and peak demand reduction requirements in conjunction with the consideration of its application for an MRO.

F. Other issues

The Companies have also developed contingency plans in the event one or more of the winning bidders repudiate the Master SSO Supply Agreement prior to the beginning of the delivery period, or if one or more SSO supplier defaults during the delivery period (Co. Ex. 1 at 14-15; Co. Ex. 4 at 26). Constellation supports the contingency plans proposed in the MRO (Const. Ex. 1 at 4). IEU-Ohio notes that, in the event of these types of defaults, measures should be taken to offset the costs being passed on to retail customers (IEU Ex. 1 at 22). The Consumer Advocates believe that increased oversight by the Commission should be applied to circumstances where a winning bidder fails to provide service and the Companies should not have unfettered discretion to determine how they will acquire replacement tranches (Con. Adv. Br. at 11). Constellation also recommends several changes to the propose SSO Master Supply Agreement (Const. Ex. 1 at 29).

In light of the fact that FirstEnergy's application is not being approved at this time for the reasons discussed above, the Commission finds that it is unnecessary to reach these additional issues. The Commission directs FirstEnergy, in the event it chooses to continue to pursue an MRO, to carefully consider the revisions to the Master SSO Supply Agreement proposed by the parties. In addition, the Commission notes that FirstEnergy has failed to meet the requirements of some of the Commission's rules issued in Case No. 08-777-EL-ORD. Therefore, if FirstEnergy pursues an MRO in the future it will be required to comply with the rules adopted by the Commission in Case No. 08-777-EL-ORD, once such rules become effective.

IV. CONCLUSION

Upon review of FirstEnergy's MRO application, taking in consideration the requirements established by SB 221, the Commission finds that the MRO application can not be approved as filed. In the event FirstEnergy decides to continue to pursue an MRO, FirstEnergy is directed to provide a sufficient demonstration to address the concerns we have noted herein.

FINDINGS OF FACT:

- (1) On July 31, 2008, FirstEnergy filed an application for an MRO in accordance with Section 4928.142, Revised Code.
- (2) On August 18, 2008, a technical conference was held regarding FirstEnergy's application and on August 25, 2008, a prehearing conference was held in this matter.
- (3) On September 15, 2008, intervention was granted to: OEG; OCC; Kroger; OEC; IEU-Ohio; OP&E; Nucor; NOAC; Constellation; Dominion; OHA; Citizens' Coalition; NRDC;

Sierra Club; NEMA; Integrys; Direct Energy; City of Akron; OMA; FPL; Cleveland; NOPEC; OFBF; American Wind Association, Wind on Wires, and Ohio Advance Energy; Citizens; OmniSource; Material Sciences; OSC; COSE; Morgan Stanley Capital Group; and Commercial Group.

- (4) The hearing commenced on September 16, 2008, and concluded on September 22, 2008.
- (5) Briefs and reply briefs were filed on October 6, 2008, and October 14, 2008, respectively.

CONCLUSIONS OF LAW:

- (1) The Companies are public utilities as defined in Section 4905.02, Revised Code, and, as such, are subject to the jurisdiction of this Commission.
- (2) The Companies' application was filed pursuant to Section 4928.142, Revised Code, which authorizes the electric utilities to file an MRO as their SSO, whereby retail electric generation pricing will be based upon the results of a CBP.
- (3) Paragraphs (A) and (B) of Section 4928.142, Revised Code, set forth the specific requirements that an electric utility must meet in order to demonstrate that the CBP and the MRO proposal comply with the statute.
- (4) Section 4928.142(A)(1), Revised Code, requires that an MRO be determined through a CBP that provides for: an open, fair, and transparent competitive solicitation; a clear product definition; standardized bid evaluation criteria; oversight by an independent third party; and evaluation of submitted bids prior to selection of the least-cost bid winner or winners.
- (5) Section 4928.142(B) requires that an MRO application detail the electric utilities' proposed compliance with the CBP requirements and the Commission's rules, and demonstrate: membership in an RTO; the RTO has a market-monitor function and the ability to take actions to identify and mitigate market power and the distribution utility market conduct; and that there is a published source of information that identifies pricing for on- and off-peak energy products that are contracts for delivery beginning at least two years in the future.

- (6) Section 4928.142(B), Revised Code, provides that a utility may file its application for an MRO prior to the effective date of the Commission rules required under the statute; however, as the Commission determines necessary, the utility shall immediately conform its filing to the rules upon the rules taking effect.
- (7) In keeping with Section 4928.142(A)(1)(a), Revised Code, the competitive solicitation proposed by FirstEnergy should not be approved.
- (8) The application does not provide a clear product definition in accordance with the requirements of Section 4928.142(A)(1)(b), Revised Code.
- (9) The application does not meet the statutory requirement for standardized bid evaluation found in Section 4928.142(A)(1)(c), Revised Code.
- (10) The application does not meet the statutory requirement for oversight by an independent third party found in Section 4928.142(A)(1)(d), Revised Code.
- (11) The application meets the statutory criterion regarding evaluation of proposed bids found in Section 4928.142(A)(1)(e), Revised Code.
- (12) FirstEnergy has fulfilled the requirements of Section 4928.143(B)(1), Revised Code, requiring membership in an RTO.
- (13) FirstEnergy has not demonstrated that the application meets the requirements of Section 4928.143(B)(2), Revised Code, pertaining to the market-monitor function.
- (14) FirstEnergy has not demonstrated that a source of information is available for pricing of traded electricity, in accordance with the requirements of Section 4928.142(B)(3), Revised Code.
- (15) The rate design included in the application cannot be approved because FirstEnergy has not demonstrated that the proposed rate design advances state policies.

- (16) Rider CRT should not include recovery of delta revenue for the special contracts and all remaining aspects of Rider CRT relating to generation should be avoidable. The delta revenue recovery for future special or unique arrangements should be made by a separate rider.
- (17) The application for an MRO cannot be approved in the absence of a proposal for compliance with the renewable energy requirements of Section 4928.64, Revised Code, and a proposal for compliance with the energy efficiency and peak demand reduction requirements of Section 4928.66, Revised Code.
- (18) In the event FirstEnergy chooses to continue to pursue an MRO, it should consider the revisions to the Master SSO Supply Agreement proposed by the parties.
- (19) If FirstEnergy continues to pursue an MRO, it will be required to comply with the rules adopted by the Commission in Case No. 08-777-EL-ORD, once such rules become effective.

ORDER:

It is, therefore,

ORDERED, That FirstEnergy's application for approval of its proposed MRO is not approved for the reasons set forth in this opinion and order and, in the event FirstEnergy elects to pursue an MRO, FirstEnergy is directed to provide a sufficient demonstration to address the specific concerns noted herein. It is, further,

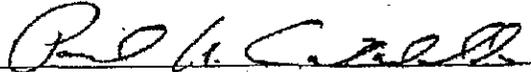
ORDERED, That Constellation's motion to supplement its reply brief be denied. It is, further,

ORDERED, That a copy of this opinion and order be served on all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO



Alan R. Schriber, Chairman



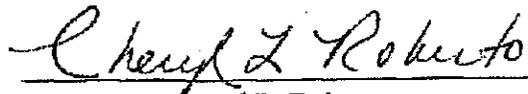
Paul A. Centolella



Ronda Hartman Fergus



Valerie A. Lemmie



Cheryl L. Roberto

CMTP/GAP/vrm

Entered in the Journal

NOV 25 2008



Renee J. Jenkins
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of a Mercantile Application)
Pilot Program Regarding Special)
Arrangements with Electric Utilities and) Case No. 10-834-EL-EEC
Exemptions from Energy Efficiency and)
Peak Demand Reduction Riders.)

ENTRY ON REHEARING

The Commission finds:

- (1) Pursuant to Section 4928.66, Revised Code, mercantile customers may commit their peak demand reduction, demand response, and energy efficiency programs for integration with an electric utility's programs. Rule 4901:1-39-05(G), Ohio Administrative Code (O.A.C.), permits a mercantile customer to file, either individually or jointly with an electric utility, an application to commit the customer's demand reduction, demand response, and energy efficiency programs for integration with the electric utility's programs.
- (2) In order to further expedite the review and approval process, by Entry issued on September 15, 2010 (September 15 Entry), the Commission adopted an 18-month pilot program for applications filed by mercantile customers under Rule 4901:1-39-05(G), O.A.C.
- (3) Motions to intervene in this proceeding have been filed by: Ohio Environmental Council (OEC); the Ohio Consumers' Counsel (OCC); Industrial Energy Users-Ohio (IEU-Ohio); Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (FirstEnergy); Ohio Energy Group (OEG); Columbus Southern Power Company and Ohio Power Company (AEP-Ohio); and The Dayton Power and Light Company (DP&L). The

Commission finds that the motions to intervene are reasonable and should be granted.

- (4) Section 4903.10, Revised Code, states that any party to a Commission proceeding may apply for rehearing with respect to any matters determined by the Commission within 30 days of the entry of the order upon the Commission's journal.
- (5) On October 13, 2010, IEU-Ohio filed an application for rehearing, alleging that the September 15 Entry was unlawful and unreasonable on four separate grounds.

Further, on October 15, 2010, OEC filed an application for rehearing, alleging that the September 15 Entry was unlawful and unreasonable on five separate grounds. FirstEnergy also filed an application for rehearing on October 15, 2010, alleging that the September 15 Entry was unreasonable and unlawful on five separate grounds. Moreover, on October 15, 2010, AEP-Ohio filed an application for rehearing, alleging that the September 15 Entry was unreasonable and unlawful on six separate grounds. Finally, DP&L filed an application on October 15, 2010, alleging that the September 15 Entry is unreasonable and unlawful.

- (6) On October 25, 2010, IEU-Ohio and FirstEnergy each filed memoranda contra the application for rehearing filed by OEC.
- (7) The Commission grants the application for rehearing filed by IEU-Ohio, OEC, FirstEnergy, AEP-Ohio, and DP&L. We believe that sufficient reason has been set forth by the parties seeking rehearing to warrant further consideration of the matters specified in the application for rehearing.

It is, therefore,

ORDERED, That the applications for rehearing filed by IEU-Ohio, OEC, FirstEnergy, AEP-Ohio, and DP&L be granted for further consideration of the matters specified in the application for rehearing. It is, further,

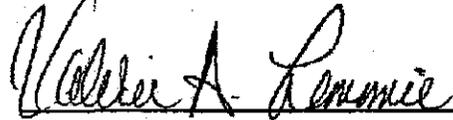
ORDERED, That a copy of this Entry on Rehearing be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO



Alan R. Schriber, Chairman

Paul A. Centolella



Valerie A. Lemmie



Steven D. Lesser

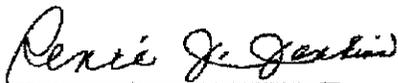


Cheryl L. Roberto

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Entered in the Journal

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Renee J. Jenkins
Secretary

4928.06 Commission to ensure competitive retail electric service.

(A) Beginning on the starting date of competitive retail electric service, the public utilities commission shall ensure that the policy specified in section 4928.02 of the Revised Code is effectuated. To the extent necessary, the commission shall adopt rules to carry out this chapter. Initial rules necessary for the commencement of the competitive retail electric service under this chapter shall be adopted within one hundred eighty days after the effective date of this section. Except as otherwise provided in this chapter, the proceedings and orders of the commission under the chapter shall be subject to and governed by Chapter 4903. of the Revised Code.

(B) If the commission determines, on or after the starting date of competitive retail electric service, that there is a decline or loss of effective competition with respect to a competitive retail electric service of an electric utility, which service was declared competitive by commission order issued pursuant to division (A) of section 4928.04 of the Revised Code, the commission shall ensure that that service is provided at compensatory, fair, and nondiscriminatory prices and terms and conditions.

(C) In addition to its authority under section 4928.04 of the Revised Code and divisions (A) and (B) of this section, the commission, on an ongoing basis, shall monitor and evaluate the provision of retail electric service in this state for the purpose of discerning any noncompetitive retail electric service that should be available on a competitive basis on or after the starting date of competitive retail electric service pursuant to a declaration in the Revised Code, and for the purpose of discerning any competitive retail electric service that is no longer subject to effective competition on or after that date. Upon such evaluation, the commission periodically shall report its findings and any recommendations for legislation to the standing committees of both houses of the general assembly that have primary jurisdiction regarding public utility legislation. Until 2008, the commission and the consumer's counsel also shall provide biennial reports to those standing committees, regarding the effectiveness of competition in the supply of competitive retail electric services in this state. In addition, until the end of all market development periods as determined by the commission under section 4928.40 of the Revised Code, those standing committees shall meet at least biennially to consider the effect on this state of electric service restructuring and to receive reports from the commission, consumers' counsel, and director of development.

(D) In determining, for purposes of division (B) or (C) of this section, whether there is effective competition in the provision of a retail electric service or reasonably available alternatives for that service, the commission shall consider factors including, but not limited to, all of the following:

- (1) The number and size of alternative providers of that service;
- (2) The extent to which the service is available from alternative suppliers in the relevant market;
- (3) The ability of alternative suppliers to make functionally equivalent or substitute services readily available at competitive prices, terms, and conditions;
- (4) Other indicators of market power, which may include market share, growth in market share, ease of entry, and the affiliation of suppliers of services. The burden of proof shall be on any entity requesting, under division (B) or (C) of this section, a determination by the commission of the existence of or a lack of effective competition or reasonably available alternatives.

(E)(1) Beginning on the starting date of competitive retail electric service, the commission has authority under Chapters 4901. to 4909. of the Revised Code, and shall exercise that authority, to resolve abuses of market power by any electric utility that interfere with effective competition in the provision of retail electric service.

(2) In addition to the commission's authority under division (E)(1) of this section, the commission, beginning the first year after the market development period of a particular electric utility and after reasonable notice and opportunity for hearing, may take such measures within a transmission constrained area in the utility's certified territory as are necessary to ensure that retail electric generation service is provided at reasonable rates within that area. The commission may exercise this authority only upon findings that an electric utility is or has engaged in the abuse of market power and that that abuse is not adequately mitigated by rules and practices of any independent transmission entity controlling the transmission facilities. Any such measure shall be taken only to the extent necessary to protect customers in the area from the particular abuse of market power and to the extent the commission's authority is not preempted by federal law. The measure shall remain the commission, after reasonable notice and opportunity for hearing, determines that the particular abuse of market power has been mitigated.

(F) An electric utility, electric services company, electric cooperative, or governmental aggregator subject to certification under section 4928.08 of the Revised Code shall provide the commission with such information, regarding a competitive retail electric service for which it is subject to certification, as the commission considers necessary to carry out this chapter. An electric utility shall provide the commission with such information as the commission considers necessary to carry out divisions (B) to (E) of this section. The commission shall take such measures as it considers necessary to protect the confidentiality of any such information. The commission shall require each electric utility to file with the commission on and after the starting date of competitive retail electric service an annual report of its intrastate gross receipts and sales of kilowatt hours of electricity, and shall require each electric services company, electric cooperative, and governmental aggregator subject to certification to file an annual report on and after that starting date of such receipts and sales from the provision of those retail electric services for which it is subject to certification. For the purpose of the reports, sales of kilowatt hours of electricity are deemed to occur at the meter of the retail customer.

Effective Date: 10-05-1999

Lawriter - ORC - 4929.04 Exempting commodity sales service or ancillary service of natural gas company from other rate provisions. Page 1 of 2

4929.04 Exempting commodity sales service or ancillary service of natural gas company from other rate provisions.

(A) The public utilities commission, upon the application of a natural gas company, after notice, after affording the public a period for comment, and in the case of a natural gas company with fifteen thousand or more customers after a hearing and in the case of a natural gas company with fewer than fifteen thousand customers after a hearing if the commission considers a hearing necessary, shall exempt, by order, any commodity sales service or ancillary service of the natural gas company from all provisions of Chapter 4905, with the exception of section 4905.10, Chapter 4909., and Chapter 4935, with the exception of sections 4935.01 and 4935.03 of the Revised Code, from sections 4933.08, 4933.09, 4933.11, 4933.123, 4933.17, 4933.28, and 4933.32 of the Revised Code, and from any rule or order issued under those Chapters or sections, including the obligation under section 4905.22 of the Revised Code to provide the commodity sales service or ancillary service, subject to divisions (D) and (E) of this section, and provided the commission finds that the natural gas company is in substantial compliance with the policy of this state specified in section 4929.02 of the Revised Code and that either of the following conditions exists:

(1) The natural gas company is subject to effective competition with respect to the commodity sales service or ancillary service;

(2) The customers of the commodity sales service or ancillary service have reasonably available alternatives.

(B) In determining whether the conditions in division (A)(1) or (2) of this section exist, factors the commission shall consider include, but are not limited to:

(1) The number and size of alternative providers of the commodity sales service or ancillary service;

(2) The extent to which the commodity sales service or ancillary service is available from alternative providers in the relevant market;

(3) The ability of alternative providers to make functionally equivalent or substitute services readily available at competitive prices, terms, and conditions;

(4) Other indicators of market power, which may include market share, growth in market share, ease of entry, and the affiliation of providers of services.

(C) The applicant shall have the burden of proof under this section.

(D) The commission shall not issue an order under division (A) of this section that exempts all of a natural gas company's commodity sales services from the chapters and sections specified in that division unless the commission finds that the company offers distribution services on a fully open, equal, and unbundled basis to all its customers and that all such customers reasonably may acquire commodity sales services from suppliers other than the natural gas company.

(E) An order exempting any or all of a natural gas company's commodity sales services or ancillary services under division (A) of this section shall prescribe both of the following:

(1) A separation plan that ensures, to the maximum extent practicable, that the operations, resources, and employees involved in the provision or marketing of exempt commodity sales services or ancillary services, and the books and records associated with those services, shall be separate from the operations, resources, and employees involved in the provision or marketing of nonexempt commodity sales services or ancillary services and the books and records associated with those services;

(2) A code of conduct that governs both the company's adherence to the state policy specified in section 4929.02 of the Revised Code and its sharing of information and resources between those employees involved in the provision or marketing of exempt commodity sales services or ancillary services and those employees involved in the provision or marketing of nonexempt commodity sales services or ancillary services. The commission, however, shall not prescribe, as part of any such separation plan or code of conduct, any requirement that unreasonably limits or restricts a company's ability to compete with unregulated providers of commodity sales services or ancillary services.

(F) Notwithstanding division (A)(2) of section 4929.08 of the Revised Code or any exemption granted under division (A) of this section, the commission has jurisdiction under section 4905.26 of the Revised Code, upon complaint of any person or upon the complaint or initiative of the commission, to determine whether a natural gas company has failed to comply with a separation plan or code of conduct prescribed under division (E) of this section. If, after notice and hearing as provided in section 4905.26 of the Revised Code, the commission is of the opinion that a natural gas company has failed to comply with such a plan or code, the commission may do any of the following:

(1) Issue an order directing the company to comply with the plan or code;

(2) Modify the plan or code, if the commission finds that such a modification is reasonable and appropriate, and order the company to comply with the plan or code as modified;

(3) Abrogate the order granting the company's exemption under division (A) of this section, if the commission finds that the company has engaged in one or more material violations of the plan or code, that the violation or violations were intentional, and that the abrogation is in the public interest.

(G) An order issued under division (F) of this section is enforceable in the manner set forth in section 4905.60 of the Revised Code. Any violation of such an order shall be deemed a violation of a commission order for the purpose of section 4905.54 of the Revised Code.

Effective Date: 09-17-1996; 05-27-2005

4901:1-39-01 Definitions.

(A) "Achievable potential" means the reduction in energy usage or peak demand that would likely result from the expected adoption by homes and businesses of the most efficient, cost-effective measures, given effective program design, taking into account remaining barriers to customer adoption of those measures. Barriers may include market, financial, political, regulatory, or attitudinal barriers, or the lack of commercially available product. "Achievable potential" is a subset of "economic potential."

(B) "Anticipated savings" means the reduction in energy usage or peak demand that will accrue from contractual commitments for program participation made in the reporting period, which measures in such programs are scheduled for installation in the subsequent reporting periods.

(C) "Capital stock" means all devices, equipment, and processes that use or convert energy.

(D) "Coincident peak-demand savings" means the demand savings for energy efficiency measures that are expected to occur during the summer on-peak period which is defined as June through August on weekdays between three p.m. and six p.m.

(E) "Commission" means the public utilities commission of Ohio.

(F) "Cost effective" means the measure, program, or portfolio being evaluated that satisfies the total resource cost test.

(G) "Demand response" means a change in customer behavior or a change in customer-owned or operated assets that affects the demand for electricity as a result of price signals or other incentives.

(H) "Economic potential" means the reduction in energy usage or peak demand that would result if all homes and businesses adopted the most efficient and cost-effective measures. Economic potential is a subset of the "technical potential."

(I) "Electric utility" has the meaning set forth in division (A)(11) of section 4928.01 of the Revised Code.

(J) "Energy baseline" means the average total kilowatt-hours of distribution service sold to retail customers of the electric utility in the preceding three calendar years as reported in the electric utility's most recent long-term forecast report, pursuant to division (A)(2)(a) of section 4928.66 of the Revised Code. The total kilowatt-hours sold shall equal the total kilowatt-hours delivered by the electric utility.

(K) "Energy benchmark" means the annual level of energy savings that an electric utility must achieve as provided in division (A)(1)(a) of section 4928.66 of the Revised Code.

(L) "Energy efficiency" means reducing the consumption of energy while maintaining or improving the end-use customer's existing level of functionality, or while maintaining or improving the utility system functionality.

(M) "Independent program evaluator" means the person(s) hired by one or more of the electric utilities, at the direction of the commission; to complete the following activities:

(1) Monitor, verify, evaluate, and report on the electric energy savings and peak-demand reductions resulting from utility program and mercantile customer activities.

(2) Determine program and portfolio cost-effectiveness.

(3) Conduct program process evaluations.

(4) Perform due-diligence reviews of evaluations or documentation provided by an electric utility or mercantile customer, as directed by the commission.

Such person shall work at the sole direction of the commission.

(N) "Market transformation" means a lasting structural or behavioral change in the marketplace that increases customer adoption of energy efficiency or peak reduction measures that will be sustained after any program promoting such behavior ceases.

(O) "Measure" means any material, device, technology, operational practice, or educational program that makes it possible to deliver a comparable level and quality of end-use energy service while using less energy or less capacity than would otherwise be required.

(P) "Mercantile customer" has the meaning set forth in division (A)(19) of section 4928.01 of the Revised Code.

(Q) "Nonenergy benefits" mean societal benefits that do not affect the calculation of program cost-effectiveness pursuant to the total resource cost test including but not limited to benefits of low-income customer participation in utility programs; reductions in greenhouse gas emissions, regulated air emissions, water consumption, natural resource depletion to the extent the benefit of such reductions are not fully reflected in cost savings; enhanced system reliability; or advancement of any other state policy enumerated in section 4928.02 of the Revised Code.

(R) "Peak demand," when measuring reduction programs, means the average maximum hourly electricity usage during the highest 100 hours on the electric utility's system in a calendar year.

(S) "Peak-demand baseline" means the average peak demand on the electric utility's system in the preceding three calendar years as reported in the electric utility's most recent long-term forecast report, pursuant to division (A)(2)(a) of section 4928.66 of the Revised Code.

(T) "Peak-demand benchmark" means the reduction in peak demand an electric utility's system must achieve as provided in division (A)(1)(b) of section 4928.66 of the Revised Code.

(U) "Person" shall have the meaning set forth in division (A)(24) of section 4928.01 of the Revised Code.

(V) "Program" means a single offering of one or more measures provided to consumers. For example, a weatherization program may include insulation replacement, weather stripping, and window replacement measures.

(W) "Staffs" means the staff or authorized representative of the public utilities commission.

(X) "Technical potential" means the reduction in energy usage or peak demand that would result if all homes and businesses adopted the most efficient measures, regardless of cost.

(Y) "Total resource cost test" means an analysis to determine if, for an investment in energy efficiency or peak-demand reduction measure or program, on a life-cycle basis, the present value of the avoided supply costs for the periods of load reduction, valued at marginal cost, are greater than the present

value of the monetary costs of the demand-side measure or program borne by both the electric utility and the participants, plus the increase in supply costs for any periods of increased load resulting directly from the measure or program adoption. Supply costs are those costs of supplying energy and/or capacity that are avoided by the investment, including generation, transmission, and distribution to customers. Demand-side measure or program costs include, but are not limited to, the costs for equipment, installation, operation and maintenance, removal of replaced equipment, and program administration, net of any residual benefits and avoided expenses such as the comparable costs for devices that would otherwise have been installed, the salvage value of removed equipment, and any tax credits.

(Z) "Verified savings" means an annual reduction of energy usage or peak demand from an energy efficiency or peak-demand reduction program directly measured or calculated using reasonable statistical and/or engineering methods consistent with approved measurement and verification guidelines.

Effective: 12/10/2009

R.C. 119.032 review dates: 09/30/2013

Promulgated Under: 111.15

Statutory Authority: 4905.04, 4905.06, 4928.02, 4928.66

Rule Amplifies: 4928.66