ORIGINAL

IN THE SUPREME COURT OF OHIO

Northeast Ohio Public Energy Council,	)	
	)	
Appellant,	)	Case No. 13-0513
	)	
v.	)	
	)	Appeal from the Public
The Public Utilities Commission of Ohio,	)	Utilities Commission of Ohio
	)	Case No. 12-1230-EL-SSO
Appellee.	)	
	)	

NOTICE OF APPEAL
OF
APPELLANT NORTHEAST OHIO PUBLIC ENERGY COUNCIL

Glenn S. Krassen (Reg 0007610)
Bricker & Eckler LLP
1001 Lakeside Avenue, Suite 1350
Cleveland, OH 44114
Telephone: (216) 523-5405
Facsimile: (614) 227-23900
gkrassen@bricker.com

Matthew W. Warnock (Reg 0082368)
J. Thomas Siwo (Reg 0088069)
Bricker & Eckler LLP
100 South Third Street
Columbus, OH 43215-4291
Telephone: (614) 227-2300
Facsimile: (614) 227-2390
mwarnock@bricker.com
tsiwo@bricker.com

Counsel for Appellant
Northeast Ohio Public Energy Council

Michael DeWine (Reg. No. 0009181)
Attorney General of Ohio

William L. Wright (Reg. No. 0018010)
Section Chief, Public Utilities Section
Thomas McNamee (Reg. No. 0017352)
Assistant Attorneys General
Public Utilities Commission of Ohio
180 East Broad Street, 6th Floor
Columbus, Ohio 43215-3793
Telephone: (614) 644-4397
Facsimile: (614) 644-8764
william.wright@puc.state.oh.us
thomas.mcNamee@puc.state.oh.us

Counsel for Appellee,
Public Utilities Commission of Ohio

FILED
MAR 29 2013
CLERK OF COURT
SUPREME COURT OF OHIO

NOTICE OF APPEAL

Appellant, Northeast Ohio Public Energy Council, pursuant to Ohio Revised Code Sections ("R.C.") 4903.11, 4903.13 and S. Ct. Prac. R. 10.02, hereby gives notice to the Supreme Court of Ohio and to the Public Utilities Commission of Ohio ("Appellee" or the "Commission") of this appeal to the Supreme Court of Ohio from: 1) the Commission's Opinion and Order entered in its Journal on July 18, 2012; and 2) the Commission's Second Entry on Rehearing entered in the Commission's Journal on January 30, 2013 in the above-captioned case.

On August 17, 2012, and pursuant to R.C. 4903.10, Appellant timely filed an Application for Rehearing from the Opinion and Order dated July 18, 2012. On September 12, 2012, the Appellant's Application for Rehearing and all other intervenor applications for rehearing were granted by the Commission for further consideration. The Appellant's Application for Rehearing ultimately was denied with respect to the issues being raised in this appeal by the Commission's Second Entry on Rehearing entered in the Commission's Journal on January 30, 2013.

Appellant files this Notice of Appeal complaining and alleging that Appellee's August 17, 2012 Opinion and Order, and Appellee's January 30, 2013 Entry on Rehearing, are unlawful and unreasonable, and that the Appellee erred as a matter of law in the following respects, each of which were raised in the Appellant's Application for Rehearing before the Commission:

1. The Stipulation and Recommendation approved by the Commission on August 17, 2012 in Case No. 12-1230-EL-SSO (the "ESP 3 Stipulation") violates R.C. 4928.143(C)(1) because it is not "more favorable in the aggregate as compared to the expected results that otherwise apply under [an MRO]."

2. The Commission erred in considering qualitative factors to determine whether the ESP 3 Stipulation is "more favorable in the aggregate as compared to the expected results that otherwise apply under [an MRO]."

3. The Commission erred in approving the ESP 3 Stipulation because the ESP 3 Stipulation fails a quantitative analysis under R.C. 4928.143(C)(1).

4. The Commission erroneously concluded that, for purposes of calculating the benefits of the ESP 3 Stipulation as compared with the expected results of an MRO, FirstEnergy would be awarded a $405 million distribution rate increase by the Commission in a hypothetical distribution rate case during the two-year period of the ESP 3 Stipulation.

5. The Commission erred in concluding that the ESP 3 Stipulation satisfies the Commission's three-part test for determining the reasonableness of a stipulation.

6. The Commission erred in concluding that the ESP 3 Stipulation is the product of serious bargaining because there was no genuine participation from residential consumers.

7. The Commission violated NOPEC's due process rights under the Ohio Constitution when it unlawfully took administrative notice of portions of the record from separate, already completed, proceedings, despite the fact that NOPEC and other non-signatory parties to the ESP 3 Stipulation did not have knowledge of and/or an opportunity to explain and rebut the facts administratively noticed.

WHEREFORE, Appellant respectfully submits that Appellee's July 18, 2012 Opinion and Order, and the Commission's January 30, 2013 Second Entry on Rehearing, are unreasonable and/or unlawful and should be reversed. This case should be remanded to the Commission with instructions to correct the errors complained of herein.

Respectfully submitted,

Matthew W. Warnock

Glenn S. Krassen (Reg 0007610)
Bricker & Eckler LLP
1001 Lakeside Avenue, Suite 1350
Cleveland, OH 44114
Telephone: (216) 523-5405
Facsimile: (216) 523-7071
gkrassen@bricker.com

Matthew W. Warnock (Reg 0082368)
J. Thomas Siwo (Reg 0088069)
Bricker & Eckler LLP
100 South Third Street
Columbus, OH 43215-4291
Telephone: (614) 227-2300
Facsimile: (614) 227-2390
mwarnock@bricker.com
tsiwo@bricker.com

Counsel for Appellant
Northeast Ohio Public Energy Council

CERTIFICATE OF FILING

I certify that a Notice of Appeal of Northeast Ohio Energy Council has been filed with the docketing division of the Public Utilities Commission of Ohio in accordance with sections Ohio Administrative Code Rules 4901-1-02(A) and 4901-1-36.

Matthew W. Warnock
Counsel for Appellant
Northeast Ohio Public Energy Council

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Notice of Appeal of Northeast Ohio Public Energy Council was served upon Chairman of the Public Utilities Commission of Ohio by leaving a copy at the office of the Chairman at 180 East Broad Street, Columbus, Ohio 43215, and upon the parties of record listed below by regular U.S. Mail, this 29th day of March 2013.

Matthew W. Warnock
Counsel for Appellant
Northeast Ohio Public Energy Council

James W. Burk, Counsel of Record
Arthur E. Korkosz
Kathy J. Kolich
Carrie M. Dunn
FirstEnergy Service Company
76 South Main Street
Akron, OH 44308
burkj@firstenergycorp.com
korkosza@firstenergycorp.com
kjkolich@firstenergycorp.com
cdunn@firstenergycorp.com

David A. Kutik
Jones Day
901 Lakeside Avenue
Cleveland, OH 44114
dakutik@jonesday.com

Ohio Edison Company
Cleveland Electric Illuminating Company
Toledo Edison Company

Thomas McNamee (Reg. No. 0017352)
Assistant Attorney General
Public Utilities Commission of Ohio
180 East Broad Street, 6th Floor
Columbus, Ohio 43215-3793
thomas.mcNamee@puc.state.oh.us

The Public Utilities Commission of Ohio

David F. Boehm
Michael L. Kurtz
Jody M. Kyler
Boehm, Kurtz & Lowry
36 East Seventh Street, Suite 1510
Cincinnati, OH 45202
dboehm@bkllawfirm.com
mkurtz@bkllawfirm.com
jkyler@bkllawfirm.com

Vincent Parisi
Matthew White
Interstate Gas Supply, Inc.
6100 Emerald Parkway
Dublin, OH 43016
vparisi@igsenergy.com
mswhite@igsenergy.com

Barth E. Royer

The Ohio Energy Group

Dane Stinson
Bailey Cavalieri LLC
10 West Broad Street, Suite 2100
Columbus, OH 43215
dane.stinson@baileycavalieri.com

Gexa Energy-Ohio, LLC

Christopher J. Allwein
Williams, Allwein and Moser, LLC
1373 Grandview Avenue, Suite 212
Columbus, OH 43212
callwein@wamenergylaw.com

Robb W. Kapla
Sierra Club
Environmental Law Program
85 Second Street, Second Floor
San Francisco, CA 94105-3459
Robb.kapla@sierraclub.org

Natural Resources Defense Council
The Sierra Club

Morgan E. Parke, Counsel of Record
Michael R. Beiting
FirstEnergy Service Company
76 South Main Street
Akron, OH 44308
mparke@firstenergycorp.com
beitingm@firstenergycorp.com

FirstEnergy Solutions Corp.

Douglas M. Mancino
McDermott Will & Emery LLP
2049 Century Park East, Suite 3800

Bell & Royer Co., LPA
33 South Grant Avenue
Columbus, OH 43215-3927
BarthRoyer@aol.com

Interstate Gas Supply, Inc.
David C. Rinebolt
Colleen L. Mooney
Ohio Partners for Affordable Energy
231 West Lima Street
PO Box 1793
Findlay, OH 45839-1793
drinebolt@ohiopartners.org
cmooney2@columbus.rr.com

Ohio Partners for Affordable Energy

Larry Sauer
Terry Etter
Melissa R. Yost
Assistant Consumers' Counsel
Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, OH 43215-3485
sauer@occ.state.oh.us
etter@occ.state.oh.us
yost@occ.state.oh.us

Office of the Ohio Consumers' Counsel

Justin M. Vickers
Robert Kelter
Environmental Law & Policy Center
35 East Wacker Drive, Suite 1600
Chicago, IL 60601
jvickers@elpc.org
rkelter@elpc.org

Environmental Law & Policy Center

C. Todd Jones
Gregory H. Dunn
Christopher L. Miller

Los Angeles, CA 90067-3218
dmancino@mwe.com

Gregory K. Lawrence
McDermott Will & Emery LLP
28 State Street
Boston, MA 02109
glawrence@mwe.com

Morgan Stanley Capital Group Inc.

Allen Freifeld
Viridity Energy, Inc.
100 West Elm Street, Suite 410
Conshohocken, PA 19428
afreifeld@viridityenergy.com

Viridity Energy, Inc.

Steven T. Nourse
Matthew J. Satterwhite
American Electric Power Service Corporation
1 Riverside Plaza, 29th Floor
Columbus, OH 43215
stnourse@aep.com
mjsatterwhite@aep.com

Ohio Power Company

Robert J. Triozzi, Director of Law
City of Cleveland
Cleveland City Hall
601 Lakeside Avenue, Room 106
Cleveland, OH 44114-1077
rtriozzi@city.cleveland.oh.us

City of Cleveland

Asim Z. Haque
Ice Miller LLP
250 West Street
Columbus, OH 43215
Gregory.dunn@icemiller.com
christopher.miller@icemiller.com
asim.haque@icemiller.com

Association of Independent Colleges & Universities of Ohio
Direct Energy Services, LLC
Direct Energy Business, LLC

Matthew R. Cox
McDonald Hopkins LLC
600 Superior Avenue, East
Suite 2100
Cleveland, OH 44114
mcox@mcdonaldhopkins.com

Council of Smaller Enterprises

Garrett A. Stone
Michael K. Lavanga
Brickfield, Burchette, Ritts & Stone, P.C.
1025 Thomas Jefferson Street, NW
8th Floor, West Tower
Washington, DC 20007
gas@bbrslaw.com
mkl@bbrslaw.com

Nucor Steel Marion, Inc.

Cheri B. Cunningham
Director of Law
City of Akron
161 South High Street, Suite 202
Akron, OH 44308
ccunningham@akronohio.gov

Joseph Oliker
McNees Wallace & Nurick LLC
21 E. State Street, 17th Floor
Columbus, OH 43215
joliker@mwncmh.com

Christopher Horn
3030 Euclid Avenue, Suite 406
Cleveland, OH 44118
chorn@mcsherrylaw.com

The Empowerment Center of Greater Cleveland, Cleveland Housing Network and Consumers Protection Association

Glen Thomas
1060 First Avenue, Suite 400
King of Prussia, PA 19406
gthomas@gtpowergroup.com

Laura Chappelle
4218 Jacob Meadows
Okemos, MI 48864
laurac@chappelleconsulting.net

PJM Power Providers Group

Sandy I-Ru Grace
Assistant General Counsel
Exelon Business Services Company
101 Constitution Avenue N.W.
Suite 400 East
Washington, DC 20001
sandy.grace@exeloncorp.com

Stephen Bennett
Retail Policy Manager
Exelon Generation Company, LLC
300 Exelon Way
Kennett Square, PA 19348
Stephen.bennett@exeloncorp.com

David M. Stahl (for Exelon)
Eimer Stahl LLP
224 S. Michigan Avenue, Suite 1100

City of Akron

Barth E. Royer
Bell & Royer Co., LPA
33 South Grant Avenue
Columbus, OH 43215-3927
BarthRoyer@aol.com

Cleveland Municipal School District

David I. Fein
Vice President, State Government Affairs-East
Exelon Corporation
550 West Washington Boulevard, Suite 300
Chicago, IL 60661
David.fein@constellation.com

Cynthia Brady
Senior Counsel
Constellation Energy Resources, LLC
550 West Washington Boulevard, Suite 300
Chicago, IL 60661
Cynthia.brady@constellation.com

Constellation NewEnergy, Inc.

M. Howard Petricoff
Stephen M. Howard
Michael J. Settineri
Lija Kaleps-Clark
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street
PO Box 1008
Columbus OH 43216-1008
mhpetricoff@vorys.com
smhoward@vorys.com
mjsettineri@vorys.com
lkalepsclark@vorys.com

Retail Energy Supply Association
Exelon Generation Company, LLC
Constellation NewEnergy, Inc.
PJM Power Providers Group

Chicago, IL 60604
dstahl@eimerstahl.com

Exelon Generation Company, LLC

Amy B. Spiller
Jeanne W. Kingery
139 E. Fourth Street, 1303-Main
P.O. Box 961
Cincinnati, OH 45201-0960
Jeanne.Kingery@duke-energy.com
Amy.Spiller@duke-energy.com

Duke Energy Retail Sales, LLC
Duke Energy Commercial Asset Management, Inc.

Leslie A. Kovacik
City of Toledo
420 Madison Avenue, Suite 100
Toledo, OH 43604-1219
leslie.kovacik@toledo.oh.gov

Thomas R. Hays
John Borrell
Lucas County Prosecutor's Office
700 Adams Street, Suite 251
Toledo, OH 43604
trhayslaw@gmail.com

Northwest Ohio Aggregation Coalition

Trent Dougherty
Cathryn N. Loucas
The Ohio Environmental Council
1207 Grandview Avenue, Suite 201
Columbus, OH 43212-3449
Trent@theoec.org
Cathy@theoec.org

Ohio Environmental Council

Michael D. Dortch
Kravitz Brown & Dortch, LLC
65 East State Street, Suite 200
Columbus, OH 43215

Samuel C. Randazzo
Frank P. Darr
Matthew R. Pritchard
McNees Wallace & Nurick LLC
21 East State Street, 17th Floor
Columbus, OH 43215-4228
sam@mwncmh.com
fdarr@mwncmh.com
mpritchard@mwncmh.com

Industrial Energy Users-Ohio

Joseph M. Clark
Direct Energy
6641 North High Street, Suite 200
Worthington, OH 43085
jmclark@vectren.com

Direct Energy Services, LLC
Direct Energy Business, LLC

Judi Sobecki
Randall V. Griffin
Dayton Power and Light Company
1065 Woodman Drive
Dayton, OH 45432
Judi.sobecki@DPLINC.com
Randall.griffin@DPLINC.com

Dayton Power and Light Company

J. Thomas Siwo
Bricker & Eckler LLP
100 South Third Street
Columbus, OH 43215

mdortch@kravitzllc.com

AEP Retail Energy Partners, LLC

Gregory J. Poulos
EnerNOC, Inc.
471 E. Broad Street, Suite 1520
Columbus, OH 43215
gpoulos@enernoc.com

EnerNOC, Inc.

Theodore S. Robinson
Citizen Power, Inc.
2121 Murray Avenue
Pittsburgh, PA 15217
robinson@citizenpower.com

Citizen Power, Inc.

tsiwo@bricker.com

OMA Energy Group

Mark S. Yurick
Taft Stettinius & Hollister LLP
65 E. State Street, Suite 1000
Columbus, OH 43215-4213
myurick@taftlaw.com

The Kroger Co.

Craig I. Smith
15700 Van Aken Blvd, Suite #26
Cleveland, OH 44120
vttpmlc@aol.com

Materials Science Corporation

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan.	)))))))	Case No. 12-1230-EL-SSO

OPINION AND ORDER

The Commission, considering the above-entitled application, hereby issues its opinion and order in this matter.

APPEARANCES:

James W. Burk, Arthur E. Korkosz, Kathy Kolich, and Carrie Dunn, FirstEnergy Service Company, 76 South Main Street, Akron, Ohio 44308; Calfee, Halter & Griswold LLP, by James F. Lang and Laura C. McBride, 1405 East Sixth Street, Cleveland, Ohio 44114; and Jones Day, by David A. Kutik, North Point, 901 Lakeside Avenue, Cleveland, Ohio 44114-1190, on behalf of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company.

Mike DeWine, Ohio Attorney General, by Thomas W. McNamee, Assistant Attorney General, Public Utilities Section, 180 East Broad Street, 6th Floor, Columbus, Ohio 43215-3793, on behalf of the Staff of the Public Utilities Commission of Ohio.

Bruce J. Weston, Ohio Consumers' Counsel, by Larry Sauer, Melissa Yost, and Terry Etter, Assistant Consumers' Counsel, 10 West Broad Street, Suite 1800, Columbus, Ohio 43215-3485, on behalf of the residential utility consumers of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company.

Kravitz, Brown & Dortch, LLC, by Michael D. Dortch, 65 East State Street, Suite 200, Columbus, Ohio, on behalf of AEP Retail Energy Partners, LLC.

Bricker & Eckler, LLP, by Matthew W. Warnock, 100 South Third Street, Columbus, Ohio 43215-4291, and Bricker & Eckler, LLP, by Glenn S. Krassen, 1001 Lakeside Avenue East, Suite 1350, Cleveland, Ohio 44114, on behalf of the Northeast Ohio Public Energy Council and the Ohio Schools Council.

Thomas Hays, 717 Cannons Park Road, Toledo, Ohio 43617, and Leslie A. Kovacik, City of Toledo, 420 Madison Avenue, Suite 100, Toledo, Ohio 43604-1219, on behalf of Northwest Ohio Aggregation Group.

Vorys, Sater, Seymour and Pease, LLP, by M. Howard Petricoff and Lija Kaleps-Clark, 52 East Gay Street, P.O. Box 1008, Columbus, Ohio 43216-1008, on behalf of the Retail Energy Supply Association, Exelon Generation Company, and Constellation NewEnergy, Inc.

Eimer, Stahl, Klevorn & Solberg, LLP, by David M. Stahl, 224 South Michigan Avenue, Suite 1100, Chicago, Illinois 60604, on behalf of Constellation NewEnergy and Exelon Generation Company, LLC.

Matthew J. Satterwhite, Steven T. Nourse, and Marilyn McConnell, American Electric Power Service Corporation, One Riverside Plaza, Columbus, Ohio 43215, on behalf of Ohio Power Company.

Joseph M. Clark, 6641 North High Street, Suite 200, Worthington, Ohio 43085, and Ice Miller LLP, by Asim Z. Haque, Christopher L. Miller, Gregory J. Dunn, and Alan G. Starkoff, 250 West Street, Columbus, Ohio 43215, on behalf of Direct Energy Services, LLC, and Direct Energy Business, LLC.

Craig I. Smith, 15700 Van Aken Boulevard, Shaker Heights, Ohio 44120, on behalf of the Material Sciences Corporation.

Boehm, Kurtz, & Lowry, by Michael L. Kurtz, David Boehm, and Jody Kyler, 36 East Seventh Street, Suite 1510, Cincinnati, Ohio 45202, on behalf of Ohio Energy Group.

Williams, Allwein & Moser, by Christopher J. Allwein, 1373 Grandview Avenue, Suite 212, Columbus, Ohio 43212, and Robb Kapla, 85 Second Street, Second Floor, San Francisco, California 94105-3459, on behalf of the Sierra Club.

Williams, Allwein & Moser, by Christopher J. Allwein, 1373 Grandview Avenue, Suite 212, Columbus, Ohio 43212, on behalf of Natural Resources Defense Council.

Gregory J. Poulos, 471 East Broad Street, Suite 1520, Columbus, Ohio 43215, on behalf of EnerNOC, Inc.

Jeanne W. Kingery, 155 East Broad Street, 21st Floor, Columbus, Ohio 43215, on behalf of Duke Energy Ohio, Inc.

Amy B. Spiller, 139 East Fourth Street, Cincinnati, Ohio 45202, on behalf of Duke Energy Retail Sales and Duke Energy Commercial Asset Management.

Bricker & Eckler, LLP, by Lisa McAlister and J. Thomas Siwo, 100 South Third Street, Columbus, Ohio 43215-4291, on behalf of Ohio Manufacturers Association.

Cathryn N. Loucas, 1207 Grandview Avenue, Suite 201, Columbus, Ohio 43212, on behalf of Ohio Environmental Council.

Colleen Mooney, 231 West Lima Street, Findlay, Ohio 45840, on behalf of Ohio Partners for Affordable Energy.

Theodore S. Robinson, 2121 Murray Avenue, Pittsburg, Pennsylvania 15217, on behalf of Citizen Power.

Judi L. Sobecki, 1065 Woodman Drive, Dayton, Ohio 45432, on behalf of Dayton Power & Light, Inc.

McNees, Wallace & Nurick, LLC, by Frank P. Darr, Samuel C. Randazzo, and Matthew R. Pritchard, Fifth Third Center, 21 East State Street, Suite 1700, Columbus, Ohio 43215-4228, on behalf of Industrial Energy Users Ohio.

Sherry B. Cunningham, Director of Law, City of Akron, 161 South High Street, Suite 202, Akron, Ohio 44308, and McNees, Wallace & Nurick, LLC, by Joseph E. Oliker, Fifth Third Center, 21 East State Street, Suite 1700, Columbus, Ohio 43215-4228, on behalf of the City of Akron.

Justin M. Vickers, 35 East Wacker Drive, Suite 1600, Chicago, Illinois 60601-2110, on behalf of the Environmental Law & Policy Center.

Bell & Royer Co., LPA, by Barth E. Royer, 33 South Grant Avenue, Columbus, Ohio 43215, on behalf of Cleveland Municipal School District.

Matthew White, 6100 Emerald Parkway, Dublin, Ohio 43016, and Bell & Royer Co., LPA, by Barth E. Royer, 33 South Grant Avenue, Columbus, Ohio 43215, on behalf of Interstate Gas Supply, Inc.

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

Christopher Horn, 3030 Euclid Avenue, Suite 406, Cleveland, Ohio 44118, on behalf of Cleveland Housing Network, the Empowerment Center of Greater Cleveland, and the Consumer Protection Association.

OPINION:

I. HISTORY OF THE PROCEEDINGS

On April 13, 2012, Ohio Edison Company (OE), The Cleveland Electric Illuminating Company (CEI), and The Toledo Edison Company (TE) (collectively, FirstEnergy or the Companies) filed an application pursuant to Section 4928.141, Revised Code, to provide for a standard service offer (SSO), commencing no later than June 20, 2012. The application is for an electric security plan (ESP), in accordance with Section 4928.143, Revised Code, and the application includes a stipulation and recommendation (Stipulation) agreed to by various parties regarding the terms of the proposed ESP (ESP 3). In the Stipulation, FirstEnergy represents that it and numerous other parties engaged in a wide range of discussions over a period of time related to the development of the ESP 3, which extends, with modifications, the stipulation and second supplemental stipulation (Combined Stipulation) modified and approved by the Commission in Case No. 10-388-EL-SSO (*ESP 2 Case*) for an additional two years. By entry issued April 19, 2012, the attorney examiner established a procedural schedule, scheduling a technical conference regarding the application for April 26, 2012, and setting the matter for hearing on May 21, 2012.

Moreover, pursuant to a request contained in FirstEnergy's application, on April 19, 2012, the attorney examiner granted intervention in this proceeding to all parties who participated as intervenors in the *ESP 2 Case*: Ohio Consumers' Counsel (OCC), Ohio Energy Group (OEG), The Kroger Company (Kroger), Industrial Energy Users-Ohio (IEU-Ohio), Ohio Partners for Affordable Energy (OPAE), Nucor Steel Marion, Inc. (Nucor), Constellation New Energy, Inc., and Constellation Energy Commodities Group, Inc., (jointly, Constellation), the city of Cleveland (Cleveland), the Ohio Environmental Council (OEC), the Environmental Law and Policy Center (ELPC), the Ohio Hospital Association (OHA), the Ohio Manufacturers' Association (OMA), The Neighborhood Environmental Coalition, The Empowerment Center of Greater Cleveland, United Clevelanders Against Poverty, Cleveland Housing Network, and The Consumers for Fair Utility Rates (collectively, Citizens' Coalition), Northwest Ohio Aggregation Group (NOAC), Natural Resources Defense Council (NRDC), Direct Energy Services, LLC (Direct Energy), Citizen Power, Inc. (Citizen Power), Material Sciences Corporation (MSC), Ohio Schools Council (OSC), Northeast Ohio Public Energy Council (NOPEC), the Association of Independent Colleges and Universities of Ohio (AICUO), FirstEnergy Solutions Corporation (FES), Morgan Stanley Capital Group, Inc. (Morgan Stanley), Council of Smaller Enterprises (COSE), EnerNOC, Inc. (EnerNOC), the city of Akron (Akron), and CPower, Inc., Viridity

Energy, Inc., Energy Connect, Converge, Inc., Enterprise Technologies, Inc., and Energy Curtailment Specialists, Inc. (collectively, the Demand Response Coalition). Additionally, on May 15, 2012, the attorney examiner granted motions to intervene filed by AEP Retail Energy Partners, LLC (AEP Retail), the Consumer Protection Association (CPA), Dayton Power and Light Company (DP&L), Duke Energy Commercial Asset Management, Inc. and Duke Energy Retail Sales, LLC (jointly, Duke), Exelon Generation Company, LLC (Exelon), Interstate Gas Supply, Inc. (IGS), Ohio Power Company (Ohio Power), Retail Energy Supply Association (RESA), and the Sierra Club (Sierra Club). On that same date, the attorney examiner granted motions for admission *pro hac vice* filed by Michael Lavanga, Justin Vickers, and Theodore Robinson.

On April 24, 2012, ELPC, NRDC, NOPEC, NOAC, OCC, and the Sierra Club (collectively, the Ohio Environmental and Consumer Advocates or OCEA), filed an interlocutory appeal arguing that the procedural schedule set by the attorney examiner does not provide significant time for intervenors to adequately prepare. Thereafter, on April 25, 2012, the Commission granted in part, and denied in part, certain waivers of the standard filing requirements found in Rule 4901:1-35, O.A.C., filed by FirstEnergy. Additionally, on April 26, 2012, OCEA filed a joint motion to extend the procedural schedule and continue the evidentiary hearing. Shortly thereafter, on April 27, 2012, AEP Retail filed a motion to modify the procedural schedule to afford the parties more time to conduct discovery. By entry issued May 2, 2012, the attorney examiner denied OCEA's interlocutory appeal, but granted the motions of OCEA and AEP Retail, with modifications, to extend the procedural schedule. Specifically, the attorney examiner rescheduled the evidentiary hearing for June 4, 2012.

Thereafter, on May 9, 2012, Direct Energy filed a motion to compel FirstEnergy to respond to discovery. By entry issued on May 17, 2012, the attorney examiner granted in part, and denied in part, Direct Energy's motion to compel. Additionally, on May 29, 2012, AEP Retail filed a motion to continue the hearing date. On June 1, 2012, NOPEC, NOAC, and OCC joined AEP Retail's motion to continue the hearing. On that same day, the attorney examiner denied the motion to continue the hearing date.

The hearing commenced, as rescheduled, on June 4, 2012, and continued through June 7, 2012. At the hearing, the attorney examiners granted the motion for admission *pro hac vice* filed by Robb Kapla. Additionally, the attorney examiners orally granted motions for protective order filed by NOPEC and NOAC, as well as FirstEnergy, on the basis that the information sought to be protected constituted trade secrets.

Twelve witnesses testified at the hearing. Three witnesses testified in favor of the Stipulation and the remaining witnesses testified in opposition to the Stipulation in general or to certain provisions of the Stipulation. One witness testified on rebuttal. The attorney examiners established a briefing schedule requiring initial briefs by June 22, 2012, and reply briefs by June 29, 2012. Initial briefs were timely submitted by FirstEnergy, OCC and Citizen Power (jointly, OCC/CP), MSC, ELPC, Nucor, RESA and Direct Energy, AEP Retail, Sierra Club, OSC, OEG, EnerNOC, NOPEC and NOAC (jointly, NOPEC/NOAC), Ohio Power, Exelon and Constellation, IEU-Ohio, IGS, and Staff. Reply briefs were timely submitted by FirstEnergy, OCC/CP, MSC, city of Akron, ELPC, Nucor, RESA and Direct Energy, AEP Retail, Sierra Club, OEG, EnerNOC, NOPEC/NOAC, IEU-Ohio, IGS, and Staff.

Pursuant to published notice, public hearings were held in Akron on June 4, 2012; in Toledo on June 7, 2012; and in Cleveland on June 12, 2012.

II. DISCUSSION

A. Applicable Law

Chapter 4928 of the Revised Code provides an integrated system of regulation in which specific provisions were designed 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 considering these cases, the Commission is cognizant of the challenges facing Ohioans and the electric power industry and is 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 221 (S.B. 221).

In addition, S.B. 221 amended Section 4928.14, Revised Code, which provides that, beginning on January 1, 2009, electric utilities must provide customers with an SSO, consisting of either a market rate offer (MRO) or an ESP. The SSO is to serve as the electric utility's default SSO. Section 4928.143, Revised Code, sets out the requirements for an ESP. Section 4928.143(C)(1), Revised Code, provides that the Commission is required to determine whether the ESP, including its pricing and all other terms and conditions, including deferrals and future recovery of deferrals, is more favorable in the aggregate as compared to the expected results that would otherwise apply under Section 4928.142, Revised Code.

B. Summary of the Stipulation

In this proceeding, certain parties submitted a Stipulation. According to the Stipulation, the signatory parties agree to and recommend that the Commission approve and adopt all terms and conditions contained within the Stipulation. The signatory parties assert that the Stipulation essentially extends the combined stipulation as partially modified and approved by the Commission in the *ESP 2 Case* for two additional years. The Stipulation includes, *inter alia*, the following provisions:

(1) For the period between June 1, 2013, and May 31, 2016, retail generation rates for SSO will be determined by a descending-clock format competitive bid process (CBP). In the CBP, the Companies will seek to procure, on a slice of system basis, 100 percent of the aggregate wholesale full requirements SSO supply. The CBP will be conducted by an independent bid manager. The bidding will occur using three products of varying lengths and multiple bid processes over the term of the ESP 3. The bidding schedule has been modified from the ESP 2 so that the bids to occur in October 2012 and January 2013 will be for a three-year period rather than a one-year period. All bidders, including FES, may participate subject to the limitations contained in the Stipulation. The independent auction manager will select the winning bidder(s), but the Commission may reject the results within 48 hours of the auction conclusion. (Co. Ex. 1, Stip. at 7-8.)

(2) The Companies will provide their Percentage of Income Payment Plan (PIPP) customers with a six percent discount off the otherwise applicable price to compare during the period of the ESP 3 (*Id.* at 9).

(3) There will be no minimum stay for residential and small commercial non-aggregation customers (*Id.* at 10).

(4) There will be no minimum default service rider, standby charges, or rate stabilization charges. Unless otherwise noted in the Stipulation, all generation rates for the ESP 3 period are avoidable, and there are no shopping credit caps. (*Id.* at 10.)

(5) Renewable energy resource requirements for the period of June 1, 2014, through May 31, 2016, will be met by using a separate request for proposal (RFP) process to obtain renewable energy credits (RECs). If the Companies are unable to acquire the required number of RECs through the RFP process, then the Companies may seek the remaining needed RECs through bilateral contracts. The costs related to the procurement of all RECs, including costs associated with administering the RFP, will be included in Rider AER for recovery in the year in which the RECs are utilized to meet the Companies' renewable energy requirements, with any reconciliation between actual and forecasted information being

recognized through Rider AER in the subsequent quarter. (*Id.* at 10-11.)

(6) The rate design currently in effect will remain in place, except as modified below. However, the Commission may, with the Companies' concurrence, institute a changed revenue neutral distribution rate design. (*Id.* at 12.)

(a) The average total rate overall percentage increase for the 12-month period ending May 2015, resulting from the CBP for customers on Rate GT, Private Outdoor Lighting, Traffic Lighting, and Street Lighting rates shall not exceed a percentage in excess of one and one-half times the system average overall percentage rate increase by the Companies. If the average percent change by the Companies is negative, then all lighting schedules shall be limited to a maximum increase of zero percent and no cap shall be applied to Rate GT customers.

(b) Any revenue shortfall resulting from the application of the interruptible credits in Rider OLR and Rider ELR will be recovered from all non-interruptible customers as part of the non-bypassable demand side management and energy efficiency rider (Rider DSE).

(c) The seasonality factors adopted in the *ESP 2 Case* shall be adopted in this proceeding.

(d) Capacity costs that result from the PJM Interconnection, LLC (PJM), capacity auctions will be used to develop capacity costs for Rider GEN.

(e) Rate schedule RS will have a flat rate structure.

(*Id.* at 12-13.)

(7) The Generation Service Uncollectible Rider (Rider NDU) shall be continued to recover non-distribution related uncollectible costs associated with supply cost from the CBP arising from SSO customers and will be avoidable (*Id.* at 13-14).

(8) The Generation Cost Reconciliation Rider (Rider GCR) will be avoidable by customers during the period that the customer purchases retail electric generation service from a CRES provider unless the allowed balance of Rider GCR reaches five percent of the generation expense in two consecutive quarters (*Id.* at 14).

(9) Recovery of costs through Rider DFC and Rider DGC may be accelerated if such acceleration would be beneficial to customers and other signatory parties (*Id.*).

(10) The Commission may order a load cap of no less than 80 percent on an aggregated load basis across all auction products for each auction date such that any given bidder may not win more than 80 percent of the tranches in any auction (*Id.* at 15).

(11) The Companies will honor the commitments they made in the Combined Stipulation related to conducting a maximum of four RFPs through which the Companies will seek competitive bids to purchase RECs, including solar RECs, through ten-year contracts. The Companies will file with the Commission a separate application for approval of an RFP the Companies deem most appropriate. The filing of the application shall be within 90 days after the Commission's Opinion and Order or final Entry on Rehearing in this proceeding. The number of solar RECs will continue to be conditioned upon the SSO load of the Companies. The applications to the Commission will seek approval of recovery of all costs associated with acquiring RECs through the ten-year contracts through Rider AER or such other rider established to recover such costs. Additionally, such costs shall be recovered over the contract period (including any period for reconciliation) and shall be recovered irrespective of the Companies' need for RECs to meet their statutory requirement. (*Id.* at 15-18.)

(12) During the ESP 3 period, no proceeding will be commenced whereby an adjustment to the base distribution rates of the Companies would go into effect prior to June 1, 2016, subject to riders and other charges provided in the tariffs and subject to the significantly excessive earnings test (SEET), except in the case of an emergency pursuant to the provisions of Section 4909.16, Revised Code. The Companies are not precluded during this period from implementing changes in rate design

that are designed to be revenue-neutral or any new service offering, subject to Commission approval. (*Id.* at 18-19.)

(13) The Delivery Capital Recovery Rider (Rider DCR) will continue to be in effect to provide the Companies with the opportunity to recover property taxes, commercial activity tax, and associated income taxes, and earn a return on and of plant-in-service associated with distribution, subtransmission, and general and intangible plant, including general plant from FirstEnergy Service Company that supports the Companies and was not included in the rate base determined in *In re FirstEnergy*, Case No. 07-551-EL-AIR, et al., Opinion and Order (January 21, 2009). The return earned on such plant will be based on the cost of debt of 6.54 percent and a return on equity of 10.5 percent determined in that proceeding utilizing a 51 percent debt and 49 percent equity capital structure. (*Id.* at 19.)

For the twelve-month period from June 1, 2014, through May 31, 2015, that Rider DCR is in effect, the revenue collected by the Companies shall be capped at $195 million; for the following twelve-month period, the revenue collected under Rider DCR shall be capped at $210 million. Capital additions recovered through Riders LEX, EDR, and AMI, or any other subsequent rider authorized by the Commission to recover delivery-related capital additions, will be excluded from Rider DCR and the annual cap allowance. Net capital additions for plant-in-service for general plant shall be included in Rider DCR provided that there are no net job losses at the Companies or as a result of involuntary attrition due to the merger between FirstEnergy Corp. and Allegheny Energy, Inc. (*Id.* at 20-21.)

Rider DCR will be updated quarterly, and the quarterly Rider DCR update filing will not be an application to increase rates within the meaning of Section 4909.18, Revised Code. The first quarterly filing will be made on or about April 20, 2014, based upon the actual plant-in-service balance as of May 31, 2014, with rates effective for bills rendered as of June 1, 2014. For any year that the Companies' spending would produce revenue in excess of that period's cap, the overage shall be recovered in the following cap period subject to such period's cap. For any year that the revenue collected under the Companies' Rider DCR is less than the annual cap allowance, the difference between the revenue collected and the cap shall be applied to increase the level of the subsequent period's cap. (*Id.* at 21-23.)

(14) Any charges billed through Rider DCR will be included as revenue in the return on equity calculation for purposes of the SEET test and will be considered an adjustment eligible for refund (*Id.* at 23).

Additionally, the Distribution Uncollectible Rider and the PIPP Uncollectible Rider may be audited by an independent consultant or Staff (*Id.* at 24).

(15) Network integration transmission services (NITS) and other non-market-based Federal Energy Regulatory Commission (FERC)/Regional Transmission Organization (RTO) charges will be paid by the Companies for all shopping and non-shopping load, and the amount shall be recovered through the Non-Market-Based Services Rider (Rider NMB). Winning bidders and retail suppliers will remain responsible for all other FERC/RTO imposed or related charges such as congestion and market-based ancillary services and losses, which would be bypassable as part of Rider GEN. (*Id.* at 24.)

(16) All MTEP charges that are charged to the Companies shall be recovered from customers through Rider NMB. The Companies agree not to seek recovery through retail rates for Midwest ISO (MISO) exit fees or PJM integration costs from retail customers of the Companies. The Companies further agree not to seek recovery through retail rates of legacy Regional Transmission Expansion and Planning (RTEP) costs for the longer of: (1) the five-year period between June 1, 2011, through May 31, 2016, or (2) when a total of $360 million of legacy RTEP costs have been paid by the Companies and have not been recovered by the Companies through retail rates from Ohio retail customers. (*Id.* at 25-27.)

(17) The demand response capabilities of customers taking services under Riders ELR and OLR shall count toward the Companies' compliance with peak demand reduction benchmarks as set forth in Section 4928.66, Revised Code, and shall be considered incremental to interruptible load on the Companies' system that existed in 2008 (*Id.* at 28).

(18) The following issues in the Companies' proposal for cost recovery, Case No. 09-1820-EL-ATA, for the Ohio site deployment of the smart grid initiative were approved in the *ESP 2 Case* as set forth below and shall continue under these terms and conditions. All other issues that were pending in that proceeding were decided in that proceeding.

(a) Costs shall be recovered from customers of OE, CEI, and TE, exclusive of rate schedule GT customers.

(b) All costs approved in Case No. 09-1820-EL-ATA associated with the project will be considered incremental for recovery under Rider AMI.

(c) Recovery of the costs approved in Case No. 09-1820-EL-ATA shall be over a ten-year period for recovery under Rider AMI. The recovery of costs over a ten-year period is limited to this ESP and shall not be used as precedent in any subsequent AMI or smart grid proceeding.

(d) Return on the investment shall be at the overall rate of return from the Companies' last distribution case.

(e) Rate base is defined as plant-in-service, depreciation reserve and accumulated deferred income taxes.

(f) All reasonably incurred incremental operating expenses associated with the project will also be recovered.

(g) During the term of the ESP 3, the deployment of the smart grid initiative will not include prepaid smart meters and there will be no remote disconnection for nonpayment absent compliance with the requirements of Rule 4901:1-18-05, O.A.C.

(h) The Companies shall not complete any part of the Ohio site deployment that the United States

> Department of Energy does not match funding in an equal amount.

(*Id.* at 29-30.)

(19) In lieu of the fixed monthly compensation provided pursuant to Case No. 09-553-EL-EEC, the Companies will provide funding to COSE, AICUO, OHA, and OMA for their roles as energy administrators for completed energy efficiency products in the following amounts, with such amounts being recovered through Rider DSE: COSE, $25,000 in 2014, $50,000 in 2015, and $25,000 in 2016; AICUO, $41,333 in 2014, $21,000 in 2015, and $21,000 in 2016; OHA, $25,000 in 2014, $50,000 in 2015, and $25,000 in 2016; and OMA, $100,000 in 2014, $100,000 in 2015, and $50,000 in 2016 (*Id.* at 30-31).

(20) During the term of the ESP 3, the Companies shall be entitled to receive lost distribution revenue for all energy efficiency and peak demand reduction programs approved by the Commission, except for historic mercantile self-directed projects. The collection of such lost distribution revenues by the Companies after May 31, 2016, is neither addressed nor resolved by the terms of the Stipulation. (*Id.* at 31.)

(21) The Companies will continue funding the Community Connections program under the same terms and conditions and amounts set forth in Case Nos. 07-551-EL-AIR, et al., and 08-935-EL-SSO, for the period of the ESP 3; however, provide that the amount may be increased as a result of the energy efficiency collaborative approval of such funding increase, and the Commission approval of the increase and authorization of recovery of the increased funding through Rider DSE or other applicable rider. OPAE shall be paid an administrative fee equal to five percent of the program funding. (*Id.* at 31-32.)

(22) An AICUO college or university member may elect to be treated as a mercantile customer, and the Companies will treat such college or university as a mercantile customer for the limited purposes of Section 4928.66, Revised Code, provided that the aggregate load of facilities situated on a campus and owned or operated by the college or university qualifies such entity as a mercantile customer and makes the college or university eligible for any incentive, program, or other benefit

made available to a mercantile customer pursuant to Section 4928.66, Revised Code (*Id.* at 32).

(23) The Companies will provide energy efficiency funding to the city of Akron to be used for the benefit of OE customers in the city of Akron in the following amounts, with such amounts recovered through Rider DSE: $100,000 in 2014, and $100,000 in 2015. The Companies also will provide energy efficiency funding to Lucas County to be used for the benefit of TE customers in Lucas County in the following amounts, with such amounts recovered through Rider DSE: $100,000 in 2014, and $100,000 in 2015. (*Id.* at 32-33.)

(24) The Companies are test deploying the Volt-Var Control distribution and communication hardware infrastructure and software systems as part of the Ohio smart grid initiative approved in Case No. 09-1820-EL-ATA. The results of the pilot study, including analysis of the associated costs and benefits, will be shared with the Commission and United States Department of Energy as they become available. (*Id.* at 34.)

(25) For the period of June 1, 2014, through May 31, 2016, the Companies will contribute, in the aggregate, $2 million to support economic development and job retention activities within their service areas. The Companies will not seek recovery of such contribution from customers, and such contribution will not be used to fund special contracts and/or reasonable arrangements filed with the Commission. (*Id.*)

(26) The provisions regarding the Cleveland Clinic Foundation agreed to in the Combined Stipulation shall continue under the terms approved in the *ESP 2 Case*, which included that CEI will be responsible for the cost of the electric utility plant, facilities, and equipment to support the Cleveland Clinic's Main Campus expansion plan to the extent that such cost might otherwise be demanded by CEI from the Clinic in the form of a contribution in aid of construction or otherwise. CEI shall be entitled to classify the original cost of investment made in utility plant, facilities, and equipment at or below the subtransmission level as distribution plant-in-service subject to the Commission's jurisdiction for ratemaking purposes at the time of the next base rate case. The first $70 million of the original cost of such plant, facilities, and equipment shall be funded by a non-

bypassable distribution rider that shall apply to retail residential, commercial, and industrial customers (exclusive of customers on rate schedules STL, TRF, and POL). Further, the Cleveland Clinic will be obligated to work in good faith to install cost-effective energy efficiency measures in its facilities, with, where needed, the assistance of an independent energy facility auditor selected by the Clinic with input from the Companies and Staff. The Cleveland Clinic will work with the Companies and Staff for the purpose of committing its new customer-sited capabilities to the Companies for integration into their Section 4928.66, Revised Code, compliance benchmarks, in exchange for the Companies' investment in the distribution utility plant, facilities, and equipment. (*Id.* at 34-37.)

(27) Domestic automaker facilities that used more than 45 million kilowatt-hours at a single site in 2009 will receive a discount on usage which exceeds, by more than ten percent, a baseline energy consumption level based upon their average monthly consumption for the year 2009. Any discount provided will be collected based on a levelized rate for all three Companies under Rider EDR from customers under the RS, GS, GP, and GSU rate schedules. (*Id.* at 37.)

(28) CEI agrees to continue the LED streetlight program approved in the *ESP 2 Case* for the city of Cleveland for the period of the ESP 3 (*Id.* at 38).

(29) The Companies agree to continue providing enhanced customer data and information and web-based access to such information, subject to and consistent with the Commission's rules (*Id.* at 39).

(30) The Companies' corporate separation plan approved in *In re FirstEnergy*, Case No. 09-462-EL-UNC, remains approved and in effect as filed (*Id.*).

(31) The Companies will file a separate application to commence recovery of any new or incremental taxes arising after June 1, 2011, whether paid by or collected by the Companies, and not recovered elsewhere, the recovery of which is contemplated by the Stipulation (*Id.*).

(32) Time-differentiated pricing concepts as proposed by the Companies and approved by the Commission in Case No. 09-541-EL-ATA shall continue in effect through the term of the ESP 3 (*Id.*).

(33) The Signatory Parties agree for themselves, and recommend to the Commission, to withdraw from FERC cases *FirstEnergy Service Co. v. PJM*, Docket No. EL10-6-000, and *American Transmission Systems, Inc.*, Docket No. ER09-1589-000 (*Id.* at 40).

(34) The Companies will make available $1 million dollars to OPAE for its fuel fund program, allocated as $500,000 in 2015, and $500,000 in 2016 (*Id.*).

(35) In order to assist low-income customers in paying their electric bills from the Companies, the fuel fund provided by the Companies shall be continued consisting of $4 million to be spent in each calendar year from 2015 through 2016 (*Id.*).

(36) Nothing in the Companies' proposed ESP 3 is intended to modify the Commission's order in Case No. 10-176-EL-ATA (*Id.* at 42).

(37) MSC agrees to dismiss with prejudice its complaint against TE, filed in Case No. 12-919-EL-CSS, upon Commission approval of the Stipulation, which authorizes TE to bill and collect a charge of $6.00 per kVa of billing demand under Rider EDR (*Id.*).

(38) The ESP 3 is more favorable in the aggregate as compared to the expected results that would otherwise occur under an MRO alternative, represents a serious compromise of complex issues, and involves substantial customer benefits that would not otherwise have been achievable (*Id.* at 40).

C. Procedural Issues

1. Waiver of Filing Requirements

OCC/CP claim that procedural due process has been denied in this proceeding. Specifically, OCC/CP note that the Commission granted, in part, and denied, in part, the Companies' motion for a waiver of certain filing requirements contained in Rule 4901:1-35-03, Ohio Administrative Code (O.A.C.). However, OCC/CP claim that granting the waivers, in part, denied parties' due process rights. OCC/CP acknowledge that, on June 1, 2012, the attorney examiner granted a motion to compel discovery submitted by

AEP Retail and that the Companies subsequently complied with the discovery request, providing additional analysis regarding the impact on customers' bills of the proposed ESP 3.

FirstEnergy responds that the Commission properly granted certain waivers of the filing requirements. FirstEnergy argues that OCC/CP had the opportunity to respond to the motion requesting waivers and that they took advantage of that opportunity by filing a memorandum contra the motion for waivers.

The Commission finds that any claims by OCC/CP regarding the waivers of the filing requirements are not timely. FirstEnergy filed a motion for waivers of the filing requirements on April 13, 2012, contemporaneous with the filing of the application. Several parties timely filed memoranda contra the motion. Subsequently, on April 25, 2012, the Commission granted, in part, and denied, in part, the request for waivers of the filing requirements. Neither OCC nor CP filed an application for rehearing of the April 25, 2012, Entry within 30 days of the issuance of the Entry as required by Section 4903.10, Revised Code. Accordingly, any claims by OCC or CP regarding the waivers are not timely and should be disregarded.

2. Administrative Notice

Moreover, OCC/CP, AEP Retail, ELPC, and NOPEC/NOAC argue that the Commission should reverse the attorney examiners' ruling taking administrative notice of parts of the record from Case No. 09-906-EL-SSO and the *ESP 2 Case*. OCC/CP contend that the attorney examiners' ruling taking administrative notice of the record from the previous cases was unreasonable and unlawful. OCC/CP concede that the Companies requested that administrative notice be taken of the record in the *ESP 2 Case* in the application filed in this proceeding on April 13, 2012, and that, at hearing, the examiners required the Companies to submit a list of specific documents for which administrative notice was requested rather than the entire record of the *ESP 2 Case* (Tr. I at 29).

NOPEC/NOAC contend that, although there is precedent for taking administrative notice in Commission proceedings, such precedent is inapplicable here because the parties did not have prior knowledge of the facts to be administratively noticed and were not provided with the opportunity to rebut such facts. NOPEC/NOAC argue that, although FirstEnergy had requested the Commission to take administrative notice of the record in the *ESP 2 Case* in its application, they did not have knowledge of the specific facts to be administratively noticed until the third day of the hearing when FirstEnergy provided a list of documents at the request of the attorney examiners. AEP Retail and ELPC also claim that parties had no prior notice of the facts administratively noticed, stating that parties had no way of knowing which facts from the *ESP 2 Case* would be administratively noticed. ELPC also claims that parties had no opportunity to explain and rebut the administratively noticed facts because the examiners did not rule on FirstEnergy's request for administrative notice until the third day of the hearing.

OCC/CP argue that the Commission may not take administrative notice of the record in another case if the decision lessens the Companies' burden of proof, noting that administrative notice, even when taken, has no effect other than to relieve one of the parties of the burden of resorting to the usual forms of evidence and that administrative notice does not mean that the opposing parties are prevented from disputing the matter by evidence if the opposing matter believes it is disputable. *Ohio Bell Tel. Co. v. Pub. Util. Comm.*, 301 U.S. 292, 301-302, 57 S.Ct. 724, 81 L.Ed. 1093 (1937). Moreover, OCC/CP claim that the non-signatory parties did not have knowledge of the specific documents which the Companies were requesting to be noticed until June 6, 2012, the third day of the evidentiary hearing. OCC/CP contend that it is unreasonable to expect parties to conduct discovery to determine the specific documents for which FirstEnergy sought administrative notice or to subpoena witnesses who did not file testimony in this case. OCC/CP further claim that the effect of this ruling was to lessen the Companies' burden of proof as prohibited by the Ohio Supreme Court in *Canton Storage and Transfer Co. v. Pub. Util. Comm.*, 72 Ohio St.3d 1, 9, 647 N.E.2d 136 (1995). OCC/CP claim that the reduction in the burden of proof was prejudicial to the non-signatory parties in the proceeding because the Companies bear the burden of proof in this proceeding. Section 4928.143(C), Revised Code.

NOPEC/NOAC and AEP Retail also argue that the attorney examiners erred in taking administrative notice of facts which were not undisputed. NOPEC/NOAC and AEP Retail claim that the Ohio Rules of Evidence limit administrative notice to adjudicative facts not subject to reasonable dispute. Evid.R. 201(B).

FirstEnergy and Nucor respond that the Commission properly took administrative notice of the record in the prior case. FirstEnergy and Nucor note that the arguments raised in opposition to the taking of administrative notice already have been considered and rejected by the Commission. *ESP 2 Case*, Entry on Rehearing (May 13, 2010) at 6. FirstEnergy argues that the Companies provided notice to all parties in the application filed on April 13, 2012, that the Companies sought administrative notice of the record in prior cases and that the parties did not seek any discovery regarding the Companies' request. Nucor also claims that the parties had every opportunity to contest or rebut Nucor's evidence. The Companies also reject OCC/CP's and NOPEC/NOAC's claims that the taking of administrative notice has reduced the Companies' burden of proof. The Companies claim that the Commission also rejected this argument in the *ESP 2 Case*. *ESP 2 Case*, Entry on Rehearing (May 13, 2010) at 7.

The Companies further argue that the attorney examiners did not err by taking administrative notice of opinions, as alleged by OCC/CP and NOPEC/NOAC.

FirstEnergy notes that OCC/CP and NOPEC/NOAC cite to no case that holds that administrative notice is inappropriate. Moreover, the Companies posit that administrative notice is a means of putting evidence in the record rather than a finding that the evidence is undisputed. The Companies argue that OCC/CP misinterpret *Ohio Bell*, failing to appreciate that the United States Supreme Court held in that case that "[Administrative notice] does not mean that the opponent is prevented from disputing the matter by evidence if he believes it disputable." *Ohio Bell*, 301 U.S. at 301-302, 57 S.Ct. 724.

The Commission notes that, with respect to the arguments raised by parties regarding the taking of administrative notice of certain documents, the Supreme Court has held that there is neither an absolute right for nor a prohibition against the Commission's taking administrative notice of facts outside the record in a case. Instead, each case should be resolved on its facts. The Court further held that the Commission may take administrative notice of facts if the complaining parties have had an opportunity to prepare and respond to the evidence and they are not prejudiced by its introduction. *Canton Storage* at 8. In addition, the Court has held that the Commission may take administrative notice of the record in an earlier proceeding, subject to review on a case by case basis. Further, parties to the prior proceeding presumably have knowledge of, and an adequate opportunity to explain and rebut, the evidence, and prejudice must be shown before an order of the Commission will be reversed. *Allen v. Pub. Util. Comm.*, 40 Ohio St.3d 184, 185-186, 532 N.E.2d 1307 (1988).

With respect to the claims that the Commission may not take administrative notice of opinions or that the Commission is bound by Evid.R. 201, the Commission notes that the Court has placed no restrictions on taking administrative notice of expert opinion testimony, and we decline to impose such restrictions in this case. Thus, expert opinion testimony may be administratively noticed if it otherwise meets the standards set forth in *Allen*. Likewise, the narrow provisions for judicial notice the parties claim are set forth in Evid.R. 201 are not consistent with the standards for Commission proceedings set forth in *Allen*; and, in any event, no party has cited any case demonstrating that administrative proceedings before the Commission are strictly bound by the Ohio Rules of Evidence.

In this proceeding, the Companies requested in the application filed on April 13, 2012, that administrative notice be taken of the full record of FirstEnergy's last SSO proceeding, the *ESP 2 Case*. In the *ESP 2 Case*, the Commission had taken administrative notice of an earlier proceeding, *In re FirstEnergy*, Case No. 09-906-EL-SSO (*MRO Case*); thus, the record of the *ESP 2 Case* includes the full record of the *MRO Case*. No party filed a memorandum contra or any other pleading in opposition to the request in the application in this case. At the hearing, the attorney examiners requested that the Companies provide a list of the specific documents for which administrative notice was sought (Tr. I at 29). The Companies complied with the attorney examiners' request (Tr. III at 11-12), and Nucor moved for administrative notice to be taken of one document (Tr. III at 19). Subsequently, the examiners took administrative notice of the enumerated documents (Tr. III at 171).

The Commission affirms the ruling of the attorney examiners that the parties had ample opportunity to prepare for and respond to the evidence administratively noticed in the *ESP 2 Case* and the *MRO Case*. The Commission notes that, at the request of the attorney examiners, FirstEnergy specified a relatively small number of documents for which it sought administrative notice (Tr. III at 11-12). Nucor supplemented this request with the inclusion of a single document (Tr. III at 19). Nothing prevented any party to this proceeding from making a similar discovery request of FirstEnergy, Nucor, or any other party. However, despite that fact that the parties were on notice that FirstEnergy was seeking administrative notice of documents in the record of the *ESP 2 Case* and the *MRO Case*, there is no record that any party requested in discovery that FirstEnergy specifically identity the evidence in the record of the *ESP 2 Case* and the *MRO Case* that the Companies intended to rely upon in this proceeding or that FirstEnergy refused such a request. Further, although motions to compel discovery were filed by parties in this proceeding and were promptly granted by the attorney examiners, no motions to compel discovery on this issue were filed by any party.

Further, the Commission notes that the parties had ample opportunity to explain or rebut the evidence for which FirstEnergy sought administrative notice, as the Commission described in our ruling on this same issue in the *ESP 2 Case*. *ESP 2 Case*, Entry on Rehearing (May 13, 2010) at 6-7. The parties had the opportunity to conduct further discovery on FirstEnergy and any other party regarding any evidence presented in the *ESP 2 Case* or the *MRO Case*. The record indicates that the parties had the opportunity to serve multiple sets of discovery upon the Companies in this proceeding; for example, OCC alone served six sets of discovery upon FirstEnergy (Tr. I at 18). Further, the parties had the opportunity to request a subpoena to compel witnesses from the *ESP 2 Case* or the *MRO Case* to appear for further cross-examination at hearing in this proceeding. The parties had the opportunity to cross-examine the witnesses at this hearing regarding any testimony presented in the *ESP 2 Case* or the *MRO Case* which was administratively noticed in this proceeding; in fact, OCC did cross-examine Staff witness Fortney regarding his testimony in the *ESP 2 Case* (Tr. II at 245-246, 250-251). Moreover, the parties had the opportunity to present testimony at hearing in this proceeding to explain or rebut any evidence in the record of the *ESP 2 Case* or the *MRO Case* which was administratively noticed in this proceeding.

Further, the Commission finds that the parties have not demonstrated that they were prejudiced by the taking of administrative notice of evidence in the record of the *ESP 2 Case* or the *MRO Case*. OCC/CP broadly claim that the taking of administrative notice lessened the burden of proof on FirstEnergy. This claim has been rejected by the Commission in identical circumstances. As we noted in the *ESP 2 Case*, the circumstances in an SSO proceeding are not remotely analogous to those in *Canton Storage*. In *Canton Storage*, the Court determined that the Commission "never expressly took administrative notice of any testimony below." *Canton Storage*, 72 Ohio St.3d at 8, 647 N.E.2d 136. Further, *Canton Storage* involved separate applications by 22 motor carriers seeking statewide operating authority rather than three affiliated utilities filing a single application for an electric security plan. In *Canton Storage*, the Commission relied upon shipper testimony as a whole to support the applications rather than on testimony related to the individual applicants, which the Court rejected as an elimination of a portion of the applicant's burden of proof. *ESP 2 Case*, Entry on Rehearing (May 13, 2010) at 7, citing *Canton Storage* at 8-10. In this case, there is no claim that FirstEnergy used evidence from one of the three affiliated electric utilities or from any other Ohio utility to bolster the case of any of the companies.

In addition, in our ruling in the *ESP 2 Case*, the Commission specifically noted that, pursuant to Section 4928.143(C)(1), Revised Code, the burden of proof was on FirstEnergy, and the Commission neither intended to nor eliminated any portion of that burden of proof on FirstEnergy by taking administrative notice of evidence in the prior proceeding. *ESP 2 Case*, Entry on Rehearing (May 13, 2010) at 7-8. However, consistent with our ruling in the *ESP 2 Case*, FirstEnergy, as well as every other party in this proceeding, is entitled to rely upon the evidence administratively noticed in the record of the prior proceeding to meet its burden of proof, and the Commission may rely upon evidence administratively noticed in reaching our decision in the instant proceeding.

Finally, the Commission notes that all claims of prejudice have been vague and overly broad. No party has identified a single specific document for which administrative notice was taken that in any way prejudices such party. No party has presented any arguments detailing how that party was prejudiced by the single document for which Nucor sought administrative notice. Therefore, consistent with our holding in the *ESP 2 Case*, we find that the taking of administrative notice of evidence in the prior proceeding has not lessened or reduced FirstEnergy's burden of proof in any way, and we find that no party has demonstrated that it has been prejudiced in any way in this proceeding.

3. Procedural Schedule

In addition, OCC/CP argue that the parties were denied thorough and adequate preparation for participation in this proceeding, in contravention of Rule 4901-1-16(A), O.A.C. OCC/CP claim that the parties had only 52 days to prepare for the hearing in this proceeding and that the consequence of the procedural schedule was that parties were limited in their ability to conduct follow-up discovery on initial and later responses. OCC/CP further note that the Companies filed a voluminous amount of material in the docket on May 2, 2012, in response to the Commission's denial of certain waivers sought by the Companies, which OCC/CP claim severely limited the parties' ability to conduct discovery on the material.

FirstEnergy claims that the procedural schedule in this proceeding was appropriate to consider the issues in dispute. The Companies note that Section 4928.143(C)(1), Revised Code, sets a maximum period in which the Commission should act upon an application for an ESP. It does not set a minimum period and the Commission has previously rejected claims that parties are entitled to the full 275-day period. *ESP 2 Case*, Entry on Rehearing (May 13, 2010) at 8. The Companies also argue that an expedited schedule was necessary because the Companies seek to modify the auction currently scheduled for October 2012 and that any Commission order modifying the auction must provide time for the Companies to implement the changes as well as allow for consideration of applications for rehearing (Co. Ex. 3 at 19; OCC Ex. 1).

The Companies also claim that the parties had adequate opportunities for discovery. The Companies claim that the parties fail to identify how they were prejudiced by the discovery schedule and that the Companies timely responded to numerous discovery requests served by intervenors (Tr. I, 18-19, 236).

The Commission notes that, by entry dated April 19, 2012, the attorney examiner shortened the discovery response time in this proceeding to ten days. With the shortened discovery response time, OCC was able to serve, and receive responses for, no less than six sets of discovery prior to the hearing in this proceeding (Tr. I at 18; Tr. III at 146-147). Further, the Commission notes that motions to compel discovery were filed by both Direct Energy and AEP Retail; these motions were granted, at least in part, and there is no indication in the record that the Companies failed to timely comply with the discovery orders. In addition, according to OCC/CP, the Companies filed a "voluminous" amount of material in the docket on May 2, 2012, in response to the denial of certain waiver requests by the Commission. Thus, the Commission cannot find that OCC/CP were denied the opportunity for through and adequate participation in this proceeding.

The Commission also notes that, on the last business day prior to the hearing, OCC/CP and other parties filed a motion for a continuance of the hearing. We note that objective facts which may be considered in determining whether to grant a continuance include the length of delay requested; whether other continuances have been granted; the inconvenience to parties' witnesses and opposing counsel; whether the delay is for legitimate reasons; whether the movant contributed to the necessity of the continuance; and any other facts unique to the case. *Niam Investigations, Inc. v. Gilbert*, 64 Ohio App.3d 125, 128, 580 N.E.2d 840 (1989). In this case, the attorney examiner denied the motion for a continuance based upon the following facts: the motion was filed on the eve of the hearing; the Commission had previously granted an extension of the hearing date; inconvenience to the parties' witnesses and counsel, many of whom had made travel arrangements to attend the hearing; and the discovery which gave rise to the motion could have been timely served and responded to, with minimal diligence by the moving parties (Tr. I at 25-26). *The Commission affirms the ruling of the examiner denying the* continuance.

4. Admission of AEPR Exhibit 6

AEP Retail argues that the attorney examiners erred when they did not admit AEPR Ex. 6 into evidence. AEP Retail submits that it offered AEPR Ex. 6 solely to illustrate how the proposed three-year blended auction rates necessarily increase migration risks and how a migration risk necessarily induces a CBP bidder to raise the price of its bid. AEP Retail represents that AEPR Ex. 6 adopted the Companies' own projections of wholesale rates under the current ESP 2 and the proposed ESP 3 blend; further, AEP Retail claims that, to illustrate how the proposed blend must increase costs, AEP Retail assumed a hypothetical migration rate in response to the price changes. AEP Retail claims that AEPR Ex. 6 is probative of the manner in which risk migration can be quantified and how that quantification results in a higher price as a result of the blending.

FirstEnergy responds that AEPR Ex. 6 was properly excluded because it lacked a foundation and because AEPR Ex. 6 is based on assumptions that are not in the record in this proceeding. FirstEnergy claims that AEP Retail is seeking the introduction of AEPR Ex. 6 for the sole purpose of showing that the longer a particular product is, the more potential there is for migration risk. FirstEnergy argues that AEP Retail is free to argue this point, notwithstanding whether AEPR Ex. 6 is admitted.

The Commission affirms the ruling of the attorney examiners not to admit AEPR Ex. 6 (Tr. IV at 153-154). The Commission notes that AEP Retail was free to provide a witness to sponsor AEPR Ex. 6 in order to lay a proper foundation for the exhibit, including the assumptions underlying the exhibit, subject to cross examination. AEP Retail chose not to provide a witness to sponsor AEPR Ex. 6, attempting instead to seek the admission of the exhibit through FirstEnergy rebuttal witness Stoddard. However, AEP Retail has provided no basis in the record for the assumptions contained in AEPR Ex. 6, and FirstEnergy witness Stoddard declined to agree with the assumptions (Tr. IV at 77-89). Accordingly, the Commission finds that AEP Retail failed to establish a proper foundation for AEPR Ex. 6, that the exhibit lacks any probative value in this proceeding, and that the attorney examiners properly denied admission of the exhibit. In any event, the Commission has thoroughly reviewed AEPR Ex. 6, and we find that its admission would not alter in any way the Commission determinations below.

D. Consideration of the Combined Stipulation

Rule 4901-1-30, O.A.C., authorizes parties to Commission proceedings to enter into a stipulation. Although not binding on the Commission, the terms of such an agreement are accorded substantial weight. *Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, 125, 592 N.E.2d 1370 (1992), citing *Akron v. Pub. Util. Comm.*, 55 Ohio St.2d 155, 157, 378 N.E.2d 480 (1978). The standard of review for considering the reasonableness of a stipulation has been discussed in a number of prior Commission proceedings. *Cincinnati Gas & Electric Co.*, Case No. 91-410-EL-AIR (April 14, 1994); *Western Reserve Telephone Co.*, Case No. 93-230-TP-ALT (March 30, 1994); *Ohio Edison Co.*, Case No. 91-698-EL-FOR, et al. (December 30, 1993). The ultimate issue for our consideration is whether the agreement, which embodies considerable time and effort by the signatory parties, is reasonable and should be adopted. In considering the reasonableness of a stipulation, the Commission has used the following criteria:

(1) Is the settlement a product of serious bargaining among capable, knowledgeable parties?

(2) Does the settlement, as a package, benefit ratepayers and the public interest?

(3) Does the settlement package violate any important regulatory principle or practice?

The Ohio Supreme Court has endorsed the Commission's analysis using these criteria to resolve issues in a manner economical to ratepayers and public utilities. *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.*, 68 Ohio St.3d 559, 629 N.E.2d 423 (1994), citing *Consumers' Counsel* at 126. The Court stated in that case that the Commission may place substantial weight on the terms of a stipulation, even though the stipulation does not bind the Commission.

1. Is the settlement a product of serious bargaining among capable, knowledgeable parties?

FirstEnergy, OEG, Nucor, MSC, and Staff argue that the Stipulation is the product of serious bargaining among capable, knowledgeable parties, in conformance with the first prong of the Commission's test for the evaluation of stipulations. OEG, Nucor, MSC, and the Companies note that each of the signatory parties has a history of participation and experience in Commission proceedings and is represented by experienced and competent counsel (Co. Ex. 3 at 10-11). Staff claims that support for the Stipulation is broad and varied with support from industrial customers, commercial customers, and the public; FirstEnergy also claims that the signatory parties are numerous and diverse (Co. Ex. 3 at 10). The Companies note that the signatory parties include many of the same capable and knowledgeable parties that the Commission recognized in approving the current ESP 2. *ESP 2 Case*, Opinion and Order (Aug. 25, 2010) at 24. FirstEnergy claims that the absence of OCC, NOPEC, and NOAC does not diminish the diversity of the signatory parties, noting that, in past cases, OCC has considered OPAE and the Citizens' Coalition as representatives of the interests of "consumers" (Tr. III at 109-113; Co. Ex. 10, 11).

OCC/CP claim that the settlement is not a product of serious bargaining among capable, knowledgeable parties because the settlement lacked serious negotiations among all interested parties. OCC/CP and NOPEC/NOAC claim that, unlike negotiations in other proceedings, the parties to this case did not meet as a group even once before the filing of the Stipulation (OCC Ex. 11 at 7). OCC/CP contend that this violates the spirit of the Supreme Court's admonition regarding exclusionary settlement processes. *Time Warner AxS v. Pub. Util. Comm.*, 75 Ohio St.3d 229, 661 N.E.2d 1097 (1996). OCC/CP also note that intervenors who were not parties to the *ESP 2 Case*, such as AEP Retail and Sierra Club, were not included in the settlement discussions. Thus, OCC/CP posit that, because of the exclusionary nature of the settlement discussions, the Stipulation fails the first prong.

OCC/CP and NOPEC/NOAC contend that, although the Companies claim that a broad range of interests support the Stipulation, there is not a broad residential interest represented in the Stipulation. NOPEC/NOAC claim that the City of Akron is not a genuine representative of residential customers in the city. Likewise, AEP Retail claims that no customer receiving service through residential or commercial rates and no entity that represents residential or commercial customers in their capacity as ratepayers is a signatory party to the Stipulation. OCC/CP claim that, without a party that represents all residential customers, the Stipulation fails to represent the interests of most of FirstEnergy's customers and thus fails the first prong. OCC/CP acknowledge that OPAE and the Citizens' Coalition represent residential customers; however, OCC/CP claim that their interests are limited to low-income and moderate-income residential customers in the case of OPAE and low-income residential customers in the case of the Citizens' Coalition. OCC/CP further note that FirstEnergy will provide a $1.4 million fuel fund contribution to OPAE and the Citizens' Coalition to assist low-income customers in the years 2012 through 2016 (OCC Ex. 11, Att. 1).

AEP Retail argues that any appearance of broad support for the Stipulation exists solely because the Companies have agreed to subsidize the activities of certain parties at the expense of FirstEnergy's ratepayers. AEP Retail claims that large industrial customers support the proposed ESP 3 because benefits secured in the *ESP 2 Case* continue to flow to them. AEP Retail claims that all other signatory parties, except Staff, signed in support of the Stipulation in order to obtain a specific benefit in return for their support.

Akron responds that, in *Time Warner*, the Supreme Court held that a settlement is not a product of serious bargaining if an entire customer class is excluded from settlement negotiations. *Time Warner*, 75 Ohio St.3d at 241, 661 N.E.2d 1097. Akron claims that OCC/CP and NOPEC/NOAC are unable to claim that the entire residential class was excluded from negotiations because each of these parties was contacted prior to the execution of the settlement and given the opportunity to review and comment upon the draft stipulation prior to its filing (Tr. III at 25, 26, 101). Moreover, in response to NOPEC/NOAC's claim that Akron does not represent residential customers, Akron claims that NOPEC/NOAC witness Frye admitted that municipalities may represent residential customers and that neither NOAC nor NOPEC would have any connection to residential customers but for their agency relationship to local governments (Tr. III at 27-29).

The Commission finds that the Stipulation, as supplemented, appears to be the product of serious bargaining among capable, knowledgeable parties. We note that the signatory parties routinely participate in complex Commission proceedings and that counsel for the signatory parties have extensive experience practicing before the Commission in utility matters (Co. Ex. 3 at 10-11). The signatory parties represent diverse interests including the Companies, a municipality, competitive suppliers, commercial customers, industrial consumers, advocates for low and moderate-income customers, and Staff (*Id.* at 10). AEP Retail is simply wrong in its claim that there is no representation of residential or commercial customers in support of the Stipulation. OPAE advocates on behalf of low and moderate-income customers, and the Citizens' Coalition advocates on behalf of low-income customers. COSE and AICUO represent customers in the commercial rate classes.

Further, OCC/CP have specified a test under which a stipulation may be approved by the Commission only if the stipulation is agreed to by a representative of all residential customers in the Companies' service territory, and the only party which represents all residential customers is OCC. However, the Commission has already rejected this test, holding that we will not require any single party, including OCC, to agree to a stipulation in order to meet the first prong of the three-prong test. *Dominion Retail v. Dayton Power & Light Co.*, Case No. 03-2405-EL-CSS, Opinion and Order (February 2, 2005) at 18; Entry on Rehearing (March 23, 2005) at 7.

With respect to the form and manner of the negotiations, the Commission declines to impose a requirement that all interested parties meet as a group prior to the filing of a stipulation. Many parties or their counsel are not located in this state. There is no reason to impose a requirement that they be physically present in this state at least one time prior to the execution of a stipulation. On the other hand, with advances in technology, information and settlement proposals can be easily and quickly shared among parties located in or out of this state. Moreover, in order to promote confidentiality in settlement negotiations, the Commission has available to it a very limited record with respect to the settlement process in any given proceeding; in this case, however, it appears that every party to the *ESP 2 Case* was contacted by FirstEnergy during the negotiations and that each party was given an opportunity to review and comment upon the draft stipulation before it was filed with the application in this proceeding (Tr. III at 101). In addition, there is no evidence in the record that an entire customer class was excluded from the settlement negotiations, which was the factual predicate of *Time Warner*. *Constellation NewEnergy, Inc. v. Pub. Util. Comm.*, 104 Ohio St.3d 530, 2004-Ohio-6767, 820 N.E.2d 885, at ¶ 8-9. Accordingly, we do not find that the settlement negotiations were exclusionary or that the negotiations violated the admonition in *Time Warner*.

Further, the Commission notes that many signatory parties receive benefits under the Stipulation, but the Commission will not conclude that these benefits are the sole motivation of any party in supporting the Stipulation, as AEP Retail alleges without any evidentiary support. The Commission expects that parties to a stipulation will bargain in support of their own interests in deciding whether to support that stipulation. The question for the Commission under the first prong of our test for the consideration of stipulations is whether the benefits to parties are fully disclosed as required by Section 4928.145, Revised Code.

The Commission also finds that OCC/CP misrepresent the fuel fund contribution to assist low-income customers as a "side-deal." The fuel fund contribution is fully disclosed in the Stipulation (Co. Ex. 1, Stip. at 40-42). OCC's witness Gonzalez admitted that there is no agreement that provides for some additional payment above and beyond the payment provided for by the Stipulation (Tr. III at 114-115).

Accordingly, we find that, based upon the record before the Commission, all benefits to signatory parties are fully and adequately disclosed pursuant to Section 4928.145, Revised Code. The Commission will determine whether the cumulative benefits parties receive under the Stipulation, as a package, benefit ratepayers and the public interest in our consideration of the second prong of our test for the consideration of stipulations below.

2. Does the settlement, as a package, benefit ratepayers and the public interest?

a. General Arguments

The Companies contend that the Stipulation will benefit ratepayers and the public interest because the Stipulation proposes to adopt an ESP that contains essentially the same terms as the ESP 2, which has produced several successful auctions that have benefited customers with reasonably priced generation service. Further, the Companies argue that the ESP 3 will provide greater price certainty during its term.

The Companies argue that the CBP proposed in the Stipulation mirrors the process the Commission accepted in its approval of the ESP 2. The Companies further point out that OCC witnesses Gonzalez and Wilson and NOPEC/NOAC witness Frye admitted in their testimony that the Companies' SSO auctions have been successful (Tr. II at 112; Tr. III at 49-50, 143). Additionally, the Companies contend that the proposed ESP 3 will allow the Companies to blend the results from the October 2012 and January 2013 auctions with results from prior auctions to set the price for the June 1, 2013, through May 31, 2014, period in the ESP 2 (Co. Ex. 1, Stip.; Co. Ex. 3 at 3-4). The Companies also argue that, like the prior CBPs, the proposed CBPs in the ESP 3 are open, fair, transparent, competitive, standardized, clearly defined, and independently administered processes (Co. Ex. 3 at 11-12). The Companies note that the proposed CBPs continue to allow for significant Commission oversight and benefit ratepayers and the public interest by continuing to provide an open and competitive process that promotes lower and more stable generation prices during the two-year term of the proposed ESP 3 (Co. Ex. 1, Stip.). As to competition, the Companies note that, under the ESP 2, governmental aggregation and customer shopping have been very active, leading to savings for customers, and that the ESP 3 will also contain no minimum default service charges, standby charges, or shopping caps, which will continue to support governmental aggregation and customer shopping (Co. Ex. 3 at 12). Further, the Companies note that, in an agreement with Constellation and Exelon, the Companies have agreed to make a number of changes to the electronic data interchange protocol to further support customer shopping (Tr. II at 73-76; Co. Ex. 7).

The Companies claim that the ESP 3 incorporates an improvement over the ESP 2 because the ESP 3 extends the products in the currently scheduled October 2012 and January 2013 auctions from 12 months to 36 months, for a portion of the Companies' SSO load, in order to capture the value of current low energy and capacity prices for the term of the ESP 3 (Co. Ex. 3 at 8). The Companies state that this use of varied lengths of SSO load over multiple auctions, or "laddering," will smooth out generation prices, and that laddering is a mitigation strategy for risk and price volatility that has been accepted by the Commission for use to procure loads under the ESP 2 (Co. Ex. 3 at 8). *ESP 2 Case*, Opinion and Order (Aug. 25, 2010) at 8, 36. The Companies state that, if laddering is not used, customers could experience substantial year-to-year increases (Tr. I at 155).

Regarding distribution, FirstEnergy contends that the distribution provisions of the ESP 3 will provide additional certainty and stability to customer rates because the ESP 3 continues the distribution rate freeze instituted by the *ESP 2 Case* through May 31, 2016, except for certain emergency conditions provided for by Section 4909.16, Revised Code (Co. Ex. 3 at 12-13). FirstEnergy further notes that the ESP 3 would continue to provide for investments in the Companies' distribution infrastructure by continuing Rider DCR through the ESP 3 period, which would also be capped (Co. Ex. 1, Stip. at 18-20; Co. Ex. 3 at 14). Additionally, the Companies point out that Staff and other signatory parties would have the opportunity to review quarterly updates and participate in an annual audit process (Co. Ex. 1, Stip. at 21-23).

Another improvement in the proposed ESP 3, according to the Companies, is the extension of the recovery period for renewable energy credit costs over the life of the proposed ESP 3 (Co. Ex. 1, Stip. at 10-11). FirstEnergy argues that this extension will mitigate the near-term rate impact on customers related to the costs for the Companies' compliance with the statutory benchmarks for renewable energy resources (Co. Ex. 3 at 8).

Next, FirstEnergy asserts that the ESP 3 continues to provide substantial support for energy efficiency and peak demand reduction requirements. Specifically, the proposed ESP 3 will continue Riders ELR and OLR as a demand response program under Section 4928.66, Revised Code (Co. Ex. 1, Stip. at 28-29). The Companies contend that this provision may benefit all customers because suppliers will take into account the ability to reduce load at peak pricing in their CBP bids, which may promote lower prices resulting from the CBP (Co. Ex. 1, Stip. at 28). OEG similarly contends that continuation of the Companies' interruptible credit under Riders ELR and OLR may reduce capacity costs for customers and will facilitate economic development (Co. Ex. 1, Stip. at 28-29).

FirstEnergy next argues that recovery of lost distribution revenue is both permissible and proper under the proposed ESP 3. FirstEnergy points to Section 4928.143, Revised Code, as allowing the collection of lost distribution revenue. Additionally, the Companies note that the lost distribution recovery collection period proposed in the ESP 3 seeks authority to recover during the period of June 1, 2014, through May 31, 2016 (Co. Ex. 1, Stip. at 31). Finally, the Companies note that the Commission has previously found that any recovery of lost distribution revenue beyond the time period covered by the stipulation at issue is not relevant. *ESP 2 Case*, Opinion and Order (Aug. 25, 2010) at 44-45.

With regard to transmission, the Companies state that the Stipulation will continue their commitment not to seek recovery from customers for Midwest ISO (MISO) exit fees and PJM integration costs. Further, the Companies contend that they will continue to not seek recovery of RTEP legacy charges, for the longer of the five year period of June 1, 2011, through May 31, 2015, or when a total of $360 million of legacy RTEP charges have been paid by the Companies, but not recovered through retail rates.

The Companies further assert that, under the ESP 3, AICUO member schools will continue to be eligible to institute mercantile customer-sited energy efficiency projects if their aggregate load qualifies as a mercantile customer (Co. Ex. 1, Stip. at 32). Moreover, the Companies note that the ESP 3 will continue to provide for an LED streetlight pilot program for Cleveland, energy efficiency funding for Akron and Lucas County; and continued funding for energy efficiency administrators, as approved in the *ESP 2 Case*.

The Companies further emphasize that the ESP 3 will continue to provide economic development funding to help stimulate the economy of the Companies' territories and job development and retention in those regions. The ESP 3 will continue to support the expansion of the Cleveland Clinic, one of the largest private employers in northern Ohio. Additionally, the ESP 3 will continue to provide incentives for domestic automakers that increase production. Further, the ESP 3 continues to provide rate mitigation for certain rate schedules and shareholder funding for economic development and job retention programs. (Co. Ex. 1, Stip. at 34-38.)

The Companies also claim that the ESP 3 will continue to provide support for low-income residential customers. This includes continuation of a six percent discount for PIPP customers off the price-to-compare. This discount will continue to be provided through a bilateral contract with FES. (Co. Ex. 1, Stip. at 9.) However, the Stipulation recognizes that the Ohio Department of Development (ODOD) may secure a better price with another supplier pursuant to Section 4928.66, Revised Code (Tr. I at 113-114, 123-124). The ESP 3 also continues to provide funding for the Community Connections program and for low-income customer assistance through the fuel fund program (Co. Ex. 3 at 7; Co. Ex. 1, Stip. at 31-32, 40-41).

Finally, FirstEnergy notes that the Stipulation will resolve several other matters that would otherwise be the subject of litigation. This includes *Material Sciences Corporation v. The Toledo Edison Company*, Case No. 12-919-EL-CSS, as well as the possibility of a distribution base rate increase during the term of the ESP 3 (Co. Ex. 1, Stip. at 18-19). Further, the Stipulation resolves disputes related to the Companies' recovery of lost distribution revenue associated with energy efficiency and peak demand reduction programs through May 31, 2016 (Co. Ex. 1, Stip. at 31).

OEG, IEU-Ohio, Nucor, and MSC all concur that the Stipulation benefits ratepayers and the public interest.

Staff contends that the Stipulation is beneficial to the public and the ratepayers for many of the reasons that the ESP 2 is beneficial but that, particularly, the primary benefit of the Stipulation is the blending effect of prices that will be achieved through the use of laddered auction products in order to lower volatility (Tr. II at 154). Staff contends that the Stipulation is also beneficial because it provides for a discount from the auction price for PIPP customers, supports shopping by the absence of shopping caps and standby charges, retains a variety of bill credits, and continues support for economic development and low-income customers (Co. Ex. 3 at 3-8).

OEG argues that the Stipulation supports competition, both at the wholesale and retail level, which can result in savings benefits for customers (Co. Ex. 3 at 12). OEG also points out that the Stipulation provides benefits to multiple customer groups, including low-income customers, non-standard residential customers, schools, local governments, and large industrial customers (Co. Ex. 3 at 13). Nucor contends that the Stipulation continues the existing cost allocation and rate design, which the Commission has previously found to be just and reasonable (Co. Ex. 3 at 8; Tr. II at 114-115). MSC states that the Stipulation benefits ratepayers and the public interest by providing MSC with a load factor adjustment, which will promote economic development in the Toledo, Ohio, region, and supports MSC retention of existing manufacturing (Co. Ex. 1, Stip. at 42-43).

b. Competitive Bid Process

OCC/CP argue that the Stipulation, as a package, does not benefit ratepayers and is not in the public interest because it subjects FirstEnergy's customers to higher rates so that price stability may be accomplished. OCC/CP specify that impending plant retirements, planned transmission upgrades, and uncertain market reaction to provide new generation, demand response, and energy efficiency capacity, have rendered future generation supply and prices in the American Transmission System Incorporated (ATSI) zone highly uncertain (OCC Ex. 9 at 3-4). Due to that high uncertainty, OCC/CP contend that the proposed three-year auction product creates risks that will raise costs for the Companies' customers. Further, OCC/CP argue that customers do not need the Stipulation to achieve stability but can obtain price stability in the market through use of a CRES provider. OCC/CP continue that the generation prices resulting from the proposed three-year product do not serve the public interest, but serve to benefit FES, FirstEnergy's affiliate, because FES will receive higher auction clearing prices that will result from the uncertainties that cause other bidders to raise their offer prices (OCC Ex. 9 at 7-8).

Similarly, NOPEC/NOAC argue that the ESP 3 proposal does not benefit ratepayers and the public interest because residential and small commercial customers will be negatively affected by the proposed alterations to the CBP schedule. AEP Retail also argues that the Stipulation will result in higher rates because of the proposed auction structure and claims that record evidence necessary to quantify the magnitude of that increase is lacking.

The Companies respond to other parties' concerns about high risk premiums caused by uncertainty by arguing that this result is unlikely based on past experience. In support of this assertion, the Companies point out that OCC witness Wilson predicted similar calamities in 2009 during the *ESP 2 Case* proceedings (Co. Ex. 14 at 4, 14) but that the CBPs during the ESP 2 period were characterized by numerous bidders and the procurement of reasonably priced reliable power. Further, the Companies point to FirstEnergy witness Stoddard's testimony that a three-year product has been widely used in similar auctions and note that OCC witness Wilson presented no evidence that a three-year period was difficult to hedge or carried a significant premium (Co. Ex. 14 at 5, 16-17). Further, the Companies respond to OCC/CP's argument that customers can obtain price stability by purchasing power in the market from a CRES provider by pointing out that nonshopping customers should also be able to receive this benefit, particularly during a time OCC/CP claim is characterized by high uncertainty.

In their reply brief, OCC/CP argue that FirstEnergy has not offered any evidence to dispute the fact that FES does not face the same degree of uncertainty and risk as its competitors and, thus, that FES will benefit from the higher auction clearing prices. Further, OCC/CP contend that the Commission should not over-rely upon the historical success of the FirstEnergy auctions under the ESP 2 because unprecedented unknowns in the future will impact the generation portion of a customer's bill. OCC/CP also state that the significant increase in capacity prices obtained in the recent base residual auction may be an indication that increased energy prices will result from future auctions.

In its reply brief, AEP Retail contends that, although the Companies have claimed that approval will permit them to "lock in" low prices, they have introduced no evidence concerning what energy prices within the ATSI zone might be at the time of their proposed auctions, and no information suggesting what the price of energy might be at any later point. Further, AEP Retail argues that the Companies have ignored information currently available regarding future energy prices and contends that the recent base residual auction results strongly suggest that prices will increase dramatically if the 2015/2016 year is included in the October 2012 CBP auction. AEP Retail also argues that, during the ESP 2, customers paid the costs associated with the benefits of laddering in advance and were to receive the benefits of that payment in the third year of the ESP 2. If the ESP 3 is approved, however, AEP Retail argues that these planned nominally lower rates will be replaced by nominally higher rates that reflect the new costs that must be paid up front in return for nominally lower rates to be expected in the 2015/2016 year.

The Commission agrees with the Companies and Staff that the laddering of products in order to smooth out generation prices, mitigating the risk of price volatility, will benefit ratepayers and the public interest. The Commission finds that OCC/CP and AEP Retail's arguments have merely established that future prices are uncertain; however, unlike OCC/CP and AEP Retail, the Commission believes that future price uncertainty makes laddering of products in order to mitigate volatility an even greater benefit for ratepayers (Co. Ex. 3 at 8; Tr. I at 155; Tr. II at 154). *ESP 2 Case*, Opinion and Order (Aug. 25, 2010) at 8, 36. Further, although OCC/CP contend that customers could achieve price stability by purchasing power in the market from a CRES provider, the Commission believes that non-shopping customers are also entitled to receive the benefit of price stability.

c. Distribution Rate Freeze and Rider DCR

OCC/CP argue that the continued use of Rider DCR is not in the public interest. Initially, OCC/CP admit that Ohio law provides an opportunity for an electric distribution utility (EDU) to request recovery for distribution expenditures as part of an ESP proposal under Section 4928.143(B)(2)(h), Revised Code. However, OCC/CP note that the statute also requires the Commission to review the reliability of the EDU's distribution system to ensure that customers' and the EDU's expectations are aligned and that the EDU is placing sufficient emphasis on and dedicating sufficient resources to the reliability of its distribution system. Here, OCC/CP argue that the Companies have failed to provide the information necessary for the Commission to complete this review. OCC/CP contend that testimony presented by Staff witness Baker demonstrated that the reliability standards were achieved in 2011 but did not correlate the Companies' reliability performance in 2011 to the Rider DCR recovery sought in the proposed ESP 3. Further, OCC/CP argue that the evidence submitted on customer expectations utilized reliability standards established in 2009 or 2010 compared to the Companies' actual performance in 2011 (Staff Ex. 2 at 5; Tr. II at 221-222). OCC/CP state that this information will be "stale" at the beginning of the term of the proposed ESP 3. Further, OCC/CP argue that the Companies' and customers' expectations are not aligned, that the resources the Companies have dedicated to enhance distribution service are excessive, and that there is no remedy to address excessive distribution-related spending in the annual Rider DCR audit cases.

Similarly, NOPEC/NOAC argue that the ESP 3 proposal does not benefit ratepayers and the public interest because residential and small commercial customers will be negatively affected by increases of approximately $405 million in the amount of distribution improvement costs proposed to be recovered through Rider DCR.

AEP Retail also argues that the "cap" on recovery under Rider DCR under the Stipulation may provide a benefit, or may not, depending on the amounts FirstEnergy invests in distribution over the ESP 3 period. However, AEP Retail claims that the Companies have failed to introduce evidence concerning their anticipated distribution investments or accumulated depreciation, making it impossible for the Commission to evaluate this claimed benefit.

OSC contends that Rider DCR recovery is only limited by certain revenue caps and could total $405 million during the period of the proposed ESP 3. OSC argues that, instead of Rider DCR, the Companies should be required to file a formal distribution rate increase case, as, in the past, the Commission has not awarded the Companies the full amount of the requested increase for distribution-related investments. *Distribution Rate Case*, Case No. 07-551-EL-AIR, Opinion and Order (January 21, 2009) at 48.

The Companies respond that the reliability information utilized in this proceeding was not "stale," citing the fact that OCC witness Gonzales admitted that the Companies' reliability performance standards are not required to be updated (Tr. III at 117-118). Further, the Companies point out that they are also not required by statute to prove that additional investments in the system will impact reliability performance or demonstrate that the Companies' reliability performance and customers' expectations for a proposed ESP are aligned. The Companies also argue that OCC/CP and OSC's claims that the Companies have proposed to recover $405 million as increased distribution revenue recovery is wrong. The Companies proffer that the ESP 3 proposes that recoveries under Rider DCR be capped, and that the caps are proposed to increase by $15 million on an annual basis, identical to the annual increases in the *ESP 2 Case* (Co. Ex. 3 at 14). The Companies state that this increase in the amount of the caps represents a cumulative $45 million increase over the caps allowed in the *ESP 2 Case*. Further, the Companies note that, as stated in the Stipulation, they will be required to show what they spent and why it is appropriate to recover these investments through Rider DCR and that the recovery will also be subject to an annual audit.

The Commission finds that the Companies have demonstrated the appropriate statutory criteria to allow continuation of Rider DCR as proposed in the Stipulation. As discussed in Staff's testimony, Staff examined the reliability of the Companies' system and found that the Companies complied with the applicable standards (Staff Ex. 2 at 5-6). Further, the Stipulation provides for an annual audit of recovery under Rider DCR and requires the Companies to demonstrate what they spent and why the recovery sought is not unreasonable. Additionally, the Commission notes that the caps on Rider DCR do not establish certain amounts that the Companies will necessarily recover—thus, the Commission emphasizes that the $405 million figure discussed by NOPEC/NOAC and OSC is the maximum that could be collected under Rider DCR and is not a guaranteed amount. (Co. Ex. 1, Stip. at 20-23; Co. Ex. 3 at 14.)

d. Renewable Energy Credit Recovery Period

NOPEC/NOAC argue that the ESP 3 proposal does not benefit ratepayers and the public interest because residential and small commercial customers will be negatively affected by the proposed modifications to the recovery period of renewable energy credit costs. Similarly, RESA/Direct Energy contend that the Companies' proposal to extend the recovery period for renewable energy credit costs over the life of the ESP 3 is not in the ratepayers' best interest. Specifically, RESA/Direct Energy argue that the proposed extension would cause the Companies' price-to-compare to be artificially low when comparing it to offers from CRES providers, which would dampen shopping (RESA Ex. 1; Tr. I at 255). Further, RESA/Direct Energy contend that, in the long-term, customers will still be charged for the renewable energy credit costs in addition to seven percent carrying costs.

In their reply brief, OCC/CP echo RESA/Direct Energy's concerns about carrying costs. By way of example, OCC/CP point out that, from 2011, the Companies accrued nearly $680,000 in carrying charges associated with Rider AER deferrals (OCC Ex. 5).

In their reply brief, the Companies respond to these arguments regarding the recovery period for renewable energy credit costs by noting that CRES providers are free to take advantage of the same opportunity to extend the period for recovery of alternative energy costs. Further, the Companies counter RESA/Direct Energy's argument regarding artificially low prices by arguing that the current situation actually reflects an artificially high Rider AER. The Companies explain that, because the statutory alternative energy requirements are based on a historical baseline, if the Companies' customers shop, there is less SSO load over which to spread the recovery of a larger potential cost, which inflates Rider AER (Tr. I at 257-258). This sentiment is echoed in Nucor and OEG's reply briefs.

The Commission finds that the extension of the recovery period for renewable energy credit costs over the life of the proposed ESP 3 is an appropriate method to mitigate rate impacts on customers related to the costs for the Companies' compliance with statutory renewable energy requirements (Co. Ex. 3 at 8). As stated in our discussion of the proposed changes to the competitive bid process, the Commission believes that mitigating the risks of price volatility and smoothing of prices is a benefit for ratepayers and is in the public interest. Further, the Commission finds that the mitigating effects of this benefit outweigh the potential carrying costs (*Id.*). Further, as to RESA/Direct Energy's argument that extension of the recovery period will artificially lower the Companies' price-to-compare and inhibit shopping, the Commission finds that, as argued by FirstEnergy, CRES providers are not prohibited from seeking to extend the period for recovery of alternative energy compliance costs to lower their own prices. Consequently, the Commission finds that the extension of the recovery period for renewable energy credits is competitively neutral.

e. Energy Efficiency/Peak Demand Reduction

OCC/CP first contend that the resolution of issues related to Riders ELR and OLR would be more appropriately determined in the Companies' energy efficiency/peak demand reduction portfolio filing. Additionally, OCC/CP argue that it is unreasonable for the Companies to seek collection of the costs associated with Riders ELR and OLR from all customers, including residential customers (Co. Ex. 1, Stip. at 12-13). In support of their argument, OCC/CP note that large customers are not required to pay for residential energy efficiency and peak demand reduction programs. Consequently, OCC/CP argue that this provision in the Stipulation should be eliminated in favor of full cost collection from non-residential customers.

EnerNOC states that, although it does not oppose the Stipulation and agrees that the Stipulation is a fair compromise, it did not sign the Stipulation as a supporting party because it cannot support the proposed ESP 3 provision that extends the ELR program from June 1, 2014, through May 31, 2016. EnerNOC argues that the Commission should enforce language in the Stipulation limiting participation in the Companies' ELR program to those customers who signed up prior to May 3, 2012. EnerNOC contends that failure to enforce this deadline could reduce the amount of available customers with interruptible load capacity that might participate in the PJM base residual auctions going forward.

Sierra Club notes that Section 4928.143, Revised Code, permits electric utilities to include in an ESP provisions for energy efficiency programs. Sierra Club argues that, despite ample notice of the 2015/2016 base residual auction and the likely consequences for the Companies' customers, the Companies failed to take any steps to prepare for the base residual auction. Instead, Sierra Club argues that FirstEnergy made only a token bid of energy efficiency obtained through lighting programs, which cleared a mere 36 megawatts (MW) of energy efficiency (Tr. I at 301). Sierra Club claims that FirstEnergy's viable energy efficiency resources amount to 339 MW.

Sierra Club rejects the explanations offered by FirstEnergy witness Ridmann as *post hoc* excuses (Tr. I at 288). Sierra Club argues that the Companies planned compliance with future benchmarks mitigates any risks to the Companies and that the Companies could have made up any shortfall by purchasing needed resources in future incremental auctions. Sierra Club observes that, although questions of ownership of the energy efficiency resources are legitimate, this question could have been addressed by making it a condition of future participation in energy efficiency programs. Accordingly, Sierra Club argues that FirstEnergy should be held accountable for financial harm caused to its customers. Sierra Club recommends that financial harm to ratepayers be quantified and that FirstEnergy be required to compensate its customers by investing in energy efficiency programs above the statutory minimums without compensation to the Companies through shared savings.

In its reply brief, OEG contends, in response to EnerNOC's argument, that FirstEnergy witness Ridmann testified that, given the procedural schedule set by the Commission in this case, the May 3, 2012, deadline was no longer necessary (Co. Ex. 4 at 6). Similarly, IEU-Ohio contends in its reply brief that FirstEnergy intends to rely upon customers electing service under Rider ELR as an option to meet its statutorily required peak demand reduction, and that FirstEnergy witness Ridmann testified that the Companies would inform relevant customers of the new required date to elect to continue service pursuant to Rider ELR following the issuance of a Commission order in this proceeding in light of the fact that the Stipulation was not approved prior to the May 7, 2012, base residual auction (Tr. I at 311; Co. Ex. 4 at 6).

In its reply, Nucor argues that EnerNOC's recommendation that only customers who renewed their commitment by May 3, 2012, be permitted to stay on Rider ELR should be rejected because it would punish other ELR customers. Further, Nucor argues that EnerNOC's claim that a Rider ELR extension will result in less interruptible load to be bid into the 2016/2017 and 2017/2018 base residual auctions is nonsensical, and that EnerNOC has failed to demonstrate any harm from the elimination of the May 3 deadline. Nucor recommends that the Commission clarify in its order that current ELR customers do not need to have signed a contract addendum by May 3, 2012, in order to qualify for the ELR extension. Finally, Nucor opposes OCC/CP's recommendations and contends that Riders ELR and OLR should be addressed in this proceeding and that allocation and recovery of ELR and OLR costs under Rider DSE is appropriate because the rates provide benefits spanning all customer classes.

In its reply brief, FirstEnergy urges the Commission to reject OCC/CP's recommendation that the Commission reject continuation of the provisions in the ESP 2 that allow for the costs arising from Riders ELR and OLR to be recovered from all customers. FirstEnergy argues that OCC/CP's complaint that these costs should not be recovered from residential consumers lacks rationality because OCC witness Gonzalez admitted that these riders benefit residential customers (Tr. III at 99). Further, FirstEnergy responds that EnerNOC's argument regarding the May 3, 2012, deadline ignores the condition precedent in the Stipulation requiring Commission approval of the ESP 3 by May 2, 2012, in order to trigger the requirement that customers sign up for the approved tariff by May 3, 2012 (Co. Ex. 1, Stip. at 28-29).

The Commission agrees with FirstEnergy and Nucor that OCC/CP have failed to support their recommendations that the costs related to Riders ELR and OLR should not be collected from all customers, and no reason is apparent in light of the fact that all customer classes benefit from the rates related to ELR and OLR (Tr. III at 99). Additionally, the Commission finds that OCC/CP have set forth no persuasive reason why Riders ELR and OLR would be more appropriately addressed in another proceeding.

Additionally, as to EnerNOC's arguments, the Commission notes that the Stipulation provides for extension of the ELR and OLR programs and states that Commission approval of the continuation of Riders ELR and OLR will potentially enable the Companies to bid the demand response resources arising from these tariffs into the PJM base residual auction scheduled for May 7, 2012 (Co. Ex. 1, Stip. at 28). Further, this provision states that customers wishing to continue to remain on Rider ELR must sign an addendum to their contract for electric service by May 3, 2012, signaling their commitment of their demand response capabilities to the Companies (*Id.* at 28-29). In light of the fact that the Stipulation specified this deadline would be triggered by Commission approval of the ESP 3, which had not yet occurred by May 3, 2012, the Commission finds that EnerNOC's argument regarding the May 3, 2012, deadline is unreasonable. Consequently, the Commission clarifies that current ELR customers do not need to have signed a contract addendum by May 3, 2012, in order to qualify for the ELR extension.

With respect to energy efficiency and participation in base residual auctions, the Commission finds that this proceeding was not opened to investigate the Companies' actions in the 2015/2016 base residual auction and that the record does not support a finding that the Companies' actions in preparation for bidding into the 2015/2016 base residual auction were unreasonable. Sierra Club witness Neme acknowledged that the ownership concerns are legitimate, and no party has claimed that it brought these concerns to FirstEnergy's attention in its energy efficiency collaborative or raised this issue before the Commission in the Companies' most recent program portfolio proceeding, *In re FirstEnergy*, Case Nos. 09-1947-EL-POR, et al. (Tr. I at 352-353, 363-365). The Commission did open a proceeding to review FirstEnergy's preparations for the 2015/2016 base residual auction, and, in response, the Companies did bid energy efficiency resources into the auction.

However, the Commission notes that additional steps may be taken to mitigate the impact of the transmission constraint in the ATSI zone for future base residual auctions. Specifically, the Companies should take steps to amend their energy efficiency programs to ensure that customers, knowingly and as a condition of participation in the programs, tender ownership of the energy efficiency resources to the Companies. Further, the Companies should continue to take the necessary steps to verify the energy savings to qualify for participation in the base residual auctions, and the Companies should bid qualifying energy resources into the auction. The record demonstrates that there has been tremendous growth in the use of energy efficiency resources in the capacity auctions, and the Companies are well positioned to substantially increase the amount of energy efficiency resources they can bid into the auction, which will assist in mitigating the impact of the transmission constraint in the ATSI zone. Further, the Commission will continue to review the Companies' participation in future base residual auctions until such time as the transmission constraint in the ATSI zone is resolved.

f. Lost Distribution Revenue

OCC/CP contend that the lost distribution revenue provision in the Stipulation does not benefit residential consumers. Specifically, OCC/CP argue that the Stipulation allows for an open-ended lost distribution revenue collection period that is excessive and unprecedented because it is not capped by either a dollar amount or a time period. Further, OCC/CP argue that this provision in the Stipulation could allow collection of lost distribution revenues of $50 million if the Companies ceased their energy efficiency programs on December 31, 2012, or hundreds of millions if the Companies continued their programs past that point (OCC Ex. 11 at 39; Tr. III at 150-151). Finally, OCC/CP contend that members of the Commission have previously raised concerns with the recovery of lost distribution revenues. *In re FirstEnergy*, Case Nos. 09-1947-EL-POR, et al., Opinion and Order (March 23, 2011) (*Snitchler, concurring*) (*Roberto, concurring*). Similarly, NOPEC/NOAC argue that residential and small commercial customers will be negatively affected by the continuation of full recovery for lost distribution revenue from energy efficiency efforts, which NOPEC/NOAC contend that no other EDU in Ohio enjoys.

FirstEnergy responds to these arguments concerning lost distribution revenue by pointing out that OCC witness Gonzalez admitted in his testimony that he had testified in other past proceedings in favor of lost distribution revenue recovery because such recovery provided an incentive for utilities to participate in energy efficiency efforts (Tr. III at 121). Further, FirstEnergy points out that OCC/CP's arguments are a repeat of the opposition to the same provisions in the ESP 2, which the Commission rejected in the *ESP 2 Case* (Tr. III at 103). *ESP 2 Case*, Opinion and Order (Aug. 25, 2010) at 45. The Companies additionally argue that OCC/CP's estimate that the lost distribution revenue recovery under the ESP 3 will be $50 million, or perhaps hundreds of millions, is a gross exaggeration and point out that OCC witness Gonzalez admitted that, using the Companies' currently available information, the amount of lost distribution recovery that would be added as a result of the ESP 3 would be $22.2 million (Tr. III at 124). Finally, the Companies note that the collection period is not open-ended as argued by OCC/CP, but is limited by the Stipulation to the period of the ESP 3, which is set to end on May 31, 2016.

In their reply brief, OCC/CP argue that the Companies ignored OCC witness Gonzalez's testimony that he had testified in previous cases involving lost distribution revenue and had, in fact, expressed concern about growing levels of cumulative lost distribution revenues in Case No. 11-351-EL-AIR. Further, OCC/CP criticize the Companies for admitting they did not consider another mechanism even after members of the Commission had raised concerns over lost distribution revenue recovery mechanisms (Tr. I at 180).

The Commission finds that the lost distribution revenue collection provision in the Stipulation is the result of a reasonable compromise and should be adopted. In so finding, the Commission emphasizes that, although the Commission has previously approved the collection of lost distribution revenues through its adoption of the Combined Stipulation in the *ESP 2 Case*, we are currently examining methods of innovative rate design to promote energy efficiency as well as the policies set forth in Section 4928.02, Revised Code, and that a docket has been initiated in order to examine issues related to lost distribution revenue. *See In the Matter of Aligning Electric Distribution Utility Rate Structure with Ohio's Public Policies to Promote Competition, Energy Efficiency, and Distributed Generation*, Case No. 10-3126-EL-UNC, Entry (December 29, 2010). Further, in contrast to OCC/CP's assertion, the provision in the Stipulation is not open-ended but clearly states that the collection of lost distribution revenues by the Companies after May 31, 2016, is not addressed or resolved by the Stipulation. Thus, as of June 1, 2016, the Commission will have the opportunity to revisit the lost distribution revenue collection mechanism. The Commission also emphasizes that the Stipulation provides that the Commission may, with the Companies' concurrence, institute a changed revenue-neutral rate design, which would also permit the Commission to revisit the lost distribution revenue collection mechanism (Co. Ex. 1, Stip. at 12). Finally, the Commission notes that, despite NOPEC/NOAC's argument that no other utility in Ohio enjoys full recovery for lost distribution revenue from energy efficiency efforts, other utilities in Ohio are made whole for such losses through other recovery mechanisms, such as balancing adjustment riders.

g. Purchase of Receivables Program

IGS argues that the Commission should modify the ESP 3 as proposed to require FirstEnergy to offer a purchase of receivables (POR) program to those CRES providers to which it provides consolidated billing service. IGS contends that such a POR program would provide benefits to consumers because it would enhance competition and provide other benefits to customers, such as lower prices. Further, IGS contends that a POR program would provide benefits to the host distribution utility. IGS also refutes the reasons set forth by FirstEnergy in opposition to adoption of a POR program. Specifically, IGS argues that the factors cited by FirstEnergy in support of its claim that there is no correlation between the availability of a POR program and the state of competition do not represent relevant measures for determining the state of competition. Additionally, IGS argues that FirstEnergy's concern that expanding its generation-related uncollectible expense rider to provide for the recovery of shopping customer bad debt will require SSO customers to subsidize CRES providers is unfounded. Next, IGS argues that, although POR programs that utilize non-bypassable uncollectible expense riders to make the utility whole assure that CRES providers are paid in full, customers are the primary beneficiaries of POR programs. Further, IGS states that, contrary to FirstEnergy's claim, POR programs that utilize non-bypassable uncollectible expense riders to make the utility whole will serve the interests of low-income customers. Finally, IGS argues that FirstEnergy operating subsidiaries offer POR programs in other states and that FirstEnergy has agreed to a form of a POR arrangement in connection with governmental aggregation service as part of the Stipulation. IGS concludes by proposing that the Commission modify the Stipulation to include a term requiring FirstEnergy to offer to purchase the receivables of CRES providers and to expand the generation-related uncollectible expense rider to permit purchase of such receivables at no discount.

RESA/Direct Energy argue that the Stipulation, as a package and as proposed, does not benefit ratepayers and public interest and violates important regulatory principles and practices. RESA/Direct Energy argue that the Stipulation could be modified, however, in order to bring it into compliance with the Commission's standards. RESA/Direct Energy propose that the Stipulation be modified to include a POR program, as suggested by IGS. RESA/Direct Energy contend that the Commission could remove a large barrier to competition by directing the Companies to implement a POR program, which they contend would place CRES providers on par with the utilities for amounts that must be paid for a customer to avoid disconnection. Further, RESA/Direct Energy argue that implementation of a POR program would encourage more CRES providers to make offers in the Companies' service territories.

In its reply brief, FirstEnergy argues that the absence of a POR program is appropriate because a POR program is unnecessary. Initially, the Companies contend that requiring nonshopping customers to pay the cost of a CRES provider's uncollectible expenses is a subsidy that is contrary to the policy of the state of Ohio. Additionally, the Companies argue that IGS, RESA, and Direct Energy provided no concrete proposal of a POR program or any quantitative analysis of the costs and benefits of such a program. More specifically, the Companies suggest that a POR program is unnecessary to jumpstart shopping because the Companies already have shopping levels that are the highest in the state. Next, the Companies contend that the lack of a POR program is not a barrier to competition because the Companies have high levels of shopping, numerous registered CRES providers, and several CRES providers actively making offers. The Companies also argue that a POR program would create unnecessary costs for customers due to the burden of administering and collecting CRES providers' uncollectible expenses. Further, the Companies contend that they also will not benefit from a POR program, as they would be required to design and implement a new system to track arrearages, implement processes to seek collections, retrain employees on the new systems, and handle customer confusion and complaints due to the program. Finally, FirstEnergy argues that IGS, RESA, and Direct Energy are asking the Commission to ignore its own order in Case No. 02-1944-EL-CSS, in abrogating a settlement that remains in full force and effect today.

The Commission notes that we have previously addressed the question of the purchase of receivables in the FirstEnergy service territories. *WPS Energy Services, Inc., and Green Mountain Energy Company v. FirstEnergy Corp., et al.*, Case No. 02-1944-EL-CSS (*WPS Energy*). In *WPS Energy*, two marketers filed a complaint against the Companies for failing to offer a purchase of receivables program. On August 6, 2003, the Commission adopted a stipulation resolving the case (IGS Ex. 1a at 13). In the stipulation, the Commission approved the modification of the partial payment posting priority set forth in Commission rules, the marketers agreed to dismiss their complaints, and the Commission approved a waiver of any obligation of the Companies to purchase accounts receivable. *WPS Energy*, Case No. 02-1944-EL-CSS, Opinion and Order (August 6, 2003) at 3, 5, 8. Although the marketers have demonstrated that the purchase of receivables by the utility is their preferred business model, there is no record in this proceeding demonstrating that the absence of the purchase of receivables has inhibited competition. There is no record in this proceeding that the Companies are under any legal obligation to purchase receivables. There is no record that circumstances have changed since the adoption of the stipulation to justify abrogating the stipulation. In fact, at the hearing, IGS witness Parisi was unable to specify any changes in the competitive market since the adoption of the stipulation (Tr. II at 213-214). Accordingly, although the Commission retains the authority to modify a prior order adopting a stipulation, the Commission finds that RESA, IGS, and Direct Energy have not demonstrated sufficient grounds to disturb the stipulation adopted in *WPS Energy*.

However, the Commission notes that the record includes uncontroverted testimony indicating issues regarding the implementation of the stipulation in *WPS Energy* with respect to customers on deferred payment plans (RESA Ex. 3 at 8-12). Although the Commission does not believe, at this time, that this testimony justifies the abrogation of the stipulation adopted in *WPS Energy*, the Commission believes that the issues raised merit further review. Accordingly, the Commission directs Staff to hold a workshop in the newly-opened five-year rule review for Chapter 4901:1-10, O.A.C., specifically for the purpose of reviewing FirstEnergy's implementation of the partial payment priority, including, but not limited to, the implementation of the stipulation with respect to customers on deferred payment plans. At the conclusion of the workshop, Staff shall identify whether, in order to protect consumers, protect the financial integrity of the Companies, and promote competition in the Companies' service territories, amendments to Chapter 4901:1-10, O.A.C., are necessary, additional waivers of Chapter 4901:1-10, O.A.C., are necessary, modifications to FirstEnergy's tariffs or practices are necessary, or additional measures should be undertaken as recommended by Staff.

h. Commission Decision.

In light of the reasons set forth above, the Commission finds that the evidence in the record indicates that, as a package, the Stipulation benefits the public interest by resolving all of the issues raised in these matters without resulting in expensive litigation and by providing for stable and predictable rates, established by a competitive procurement process and use of laddered auction products to lower the volatility of prices for customers during both the last year of ESP 2 and the period of the ESP 3 (Tr. II at 154). The Stipulation further serves the public interest by resolving potential subjects of litigation, including a complaint case between TE and MSC, the possibility of a distribution base rate increase during the term of the ESP 3, as well as disputes related to the Companies' recovery of lost distribution revenue associated with energy efficiency and peak demand reduction programs through May 31, 2016 (Co. Ex. 1, Stip. at 18-19, 31, 42-43). Additionally, the proposed ESP 3 supports shopping because there are no shopping caps or standby charges (Co. Ex. 3 at 3-8).

Moreover, the record indicates that there are significant additional benefits for customers in the Stipulation. In the Stipulation, the Companies have provided for a discount from the auction price for PIPP customers, have retained a variety of bill credits, have committed shareholder funding for economic development and assistance for low-income customers, have provided funding for energy efficiency coordinators, have continued significant support for the distribution system, and have spread renewable energy cost recovery over a longer period in order to reduce customer prices. (Co. Ex. 3 at 3-8.)

Nonetheless, before the Commission can find that the Stipulation is in the public interest, the Commission believes a number of modifications and clarifications are necessary where the Stipulation differs from the Combined Stipulation in the *ESP 2 Case*.

The Stipulation provides that the CBP process will be conducted by an independent auction manager but does not specify who selects the auction manager (Tr. II at 40). The Commission will clarify that the Companies shall select the independent auction manager, subject to the approval of the Commission. However, this clarification should not be interpreted to require the Companies to seek a new independent auction manager, or to seek the approval of the Commission to retain its current auction manager, for the auctions currently scheduled for October 2012 and January 2013.

Further, with respect to Rider DCR, the Commission encourages the Companies to consult with Staff to select projects, among others, which will mitigate effects of the transmission constraint in the ATSI zone of PJM (Co. Ex. 1, Stip. at 19-20). There is an ample record in this proceeding that the transmission constraint has resulted in a higher charge for capacity in the ATSI zone than PJM as a whole. Moreover, the record demonstrates that there are projects which can be undertaken by the Companies to mitigate, at the distribution level, the transmission constraint, in order to reduce capacity charges resulting from future base residual auctions (Tr. I at 335-336; Staff Ex. 1; Tr. II at 240-242). The Stipulation also adopts the terms and conditions of the Combined Stipulation regarding distribution rate design, as clarified by the Commission in the *ESP 2 Case*.

The Stipulation provides that, if the Commission rejects the results of the long term RFPs described in the Stipulation, the event shall be deemed a force majeure and the Companies shall incur no penalty. The Stipulation does not specify whether it is intended for the force majeure to apply for the entire ten-year term of the RFP or just the first year; the Commission clarifies that the force majeure determination will only apply to the first year covered by the rejected RFP.

The Commission also notes that the auditor for Rider DCR is to be selected by the Staff with the consent of the Companies (Co. Ex. 1, Stip. at 22). Although the Commission is confident that the Companies would not unreasonably withhold consent, the Commission uses independent, outside auditors for a number of functions, and the Commission generally does not obtain the consent of the utility. Although this case does include unique circumstances, the Commission does not find that such circumstances justify this departure from general Commission practice. Accordingly, we will eliminate the provisions of the Stipulation requiring the consent of the Companies in the selection of the auditor for Rider DCR.

The Commission notes that the Stipulation provides that the riders listed on Attachment B of the Stipulation shall be subject to ongoing Staff review and audit. According to the terms of the Combined Stipulation and past practice, separate dockets have been opened for the review of Riders DCR, AMI, and AER. The Commission clarifies that the Companies annually should file applications in separate dockets for the review and audit of Riders DCR, AMI, AER, NMB, and DSE. In addition, the Companies annually should file an application for the combined review of Riders PUR, DUN, NDU, EDR, GCR, and GEN. The Commission directs the Companies and Staff to develop a schedule for the filing of the annual reviews and audits. For all other riders on Attachment B, the Companies should continue to docket the adjusted tariff sheets; however, these tariff sheets should be filed in a separate docket rather than this proceeding, as has been the practice in the *ESP 2 Case*. Further, all filings adjusting riders listed on Attachment B should include the appropriate work papers.

With this clarification, the Commission finds that the Stipulation as modified benefits ratepayers and the public interest, in accordance with the second prong of our test for the consideration of stipulations.

3. Does the settlement package violate any important regulatory principle or practice?

FirstEnergy, Nucor, OEG, MSC, and Staff all represent that the Stipulation violates no important regulatory principle or practice. The parties note that most of the provisions of the proposed ESP 3 are similar or identical in all material respects to the provisions of the Combined Stipulation approved by the Commission in the *ESP 2 Case* and that the Commission determined that such provisions did not violate important regulatory principles or practices. *ESP 2 Case*, Opinion and Order (Aug. 25, 2010) at 39-42.

Staff further claims that the Stipulation affirmatively supports the state policies enumerated in Section 4928.02, Revised Code. Staff contends that the Stipulation supports competition by avoiding standby charges and other limitations consistent with Ohio policy. Section 4928.02(B), (C), Revised Code. It supports reliability though the continuation of the DCR mechanism consistent with Ohio policy. Section 4928.02(A), Revised Code. Staff claims that the Stipulation supports energy efficiency efforts through the support of energy coordinators, Section 4928.02(M), Revised Code, and supports at-risk populations, Section 4928.02(L), Revised Code. Finally, Staff contends that economic development measures support Ohio's effectiveness in the global economy consistent with state policy. Section 4928.02(N), Revised Code.

a. Proposed Modification of ESP 2 Auction Product

NOPEC/NOAC claim that the provision in the proposed ESP 3 to alter the previously approved one-year auction product in the Combined Stipulation to a three-year product allows FirstEnergy to unilaterally change the terms of the Commission-approved stipulation. NOPEC/NOAC claim that it is inappropriate for FirstEnergy to seek to unilaterally modify an existing Commission-approved stipulation without the written approval of all of the signatory parties of the stipulation.

The Commission notes that, while the proposed ESP 3 does materially change the bidding product for the last year of the ESP 2, it is inaccurate to characterize this as a "unilateral" action by FirstEnergy. The Stipulation in this proceeding was agreed to by 19 parties including the three FirstEnergy electric utilities, and five additional parties formally agreed not to oppose the Stipulation. More importantly, no modifications to the bidding product for the last year of the ESP 2 will take effect without the approval of the Commission, and all parties, including NOPEC/NOAC, have been given a full and fair opportunity to oppose any modifications through the hearing process.

It is well-established that the Commission may change or modify previous orders as long as it justifies any changes. *Consumers' Counsel v. Pub. Util. Comm.*, 114 Ohio St.3d 340, 2007-Ohio 4276, 872 N.E.2d 269, at ¶ 5-6, citing *Consumers' Counsel v. Pub. Util. Comm.*, 10 Ohio St.3d 49, 50-51, 561 N.E.2d 303 (1984). In fact, the Supreme Court has expressly rejected the argument that the agreement of all signatories to a stipulation was required before the Commission could approve a modification to the stipulation. *Consumers' Counsel* at ¶ 6. Accordingly, we find that the proposed modification of the auction product for the final year of the ESP 2 does not violate an important regulatory principle or practice.

b. Transparency and Public Participation

AEP Retail claims that the Stipulation violates the regulatory principles of transparency and public participation. AEP Retail contends that the Commission's rules facilitate public participation in proceedings before the Commission and that those rules contemplate the filing of a proposal, public notice of the proposal, an opportunity for interested parties to review the proposal, to seek intervention, and to meaningfully participate in the proceedings through discovery, settlement negotiations, and evidentiary hearings.

ELPC claims that the Companies did not file a proper ESP application, comparing the length of the application in this case with applications filed by FirstEnergy and other electric utilities in previous SSO proceedings. ELPC claims that the taking of administrative notice of the *MRO Case* and the *ESP 2 Case* does not cure the deficiencies in the Companies' application. ELPC further argues that FirstEnergy and ratepayers will not be harmed if the Commission rejects the expedited application and requires the Companies to file a complete application. ELPC notes that the first part of the bid application for the October 2012 auction is not due until September 5, 2012 (OCC Ex. 1 at 3) and that FirstEnergy witness Ridmann could not confirm whether the duration of the auction product would have any bearing on the first part of the bidders' applications (Tr. I at 196-197).

OCC/CP allege that procedural due process has been denied in this proceeding. OCC/CP contend that Ohio law establishes 275 days as the period of time for the review of an ESP application although OCC/CP acknowledge that the Commission is not required to use the entire 275 day period allotted under the statute. Section 4928.143(C)(1), Revised Code.

AEP Retail also claims that the Companies failed to provide meaningful projections of bill impacts, avoiding the intent of the Commission's rules. Likewise, OCC/CP note that the Companies provided typical bill impacts which did not include projections of generation costs under the proposed ESP 3 and that the attorney examiners granted AEP Retail's motion to compel discovery regarding the impact on customer bills of such costs. OCC/CP acknowledge that the Companies complied with the examiners' ruling on June 4, 2012, the first day of the hearing.

FirstEnergy contends that the parties all had ample opportunity to conduct discovery and that most of the provisions of the proposed ESP 3 are similar to provisions in the current ESP 2 and, thus, are known to the parties in this proceeding.

Although the Commission has addressed above the specific challenges raised by parties to the attorney examiners' rulings regarding procedural issues, the Commission further finds that the issues regarding transparency and public participation raised by AEP Retail, OCC/CP, and ELPC do not constitute a violation of important regulatory principles and practices. With respect to ELPC's concerns regarding the length of the application, the Commission finds that there is no minimum length requirement for an application; the question is whether the Companies' application complies with the filing requirements set forth in Chapter 4901:1-35, O.A.C. The Commission notes that, on May 2, 2012, in response to the denial of certain waiver requests, the Companies filed supplemental information regarding the application on May 2, 2012, which OCC/CP acknowledge contained a "voluminous" amount of material regarding the application. We further note that neither ELPC nor any other party has identified any specific provision of Chapter 4901:1-1-35, O.A.C., that the application fails to meet where such provision has not been waived by the Commission.

With respect to bill impacts, the Commission notes that, in prior cases, we have not required electric utilities to provide projections of generation costs in bill impacts because the results of future CBPs are inherently unknowable. In this case, FirstEnergy was required by the attorney examiners to include the known impacts from PJM's most recent base residual auction. Entry (June 1, 2012) at 4-5.

Accordingly, we find that the record includes all information regarding bill impacts which is currently knowable. Moreover, with respect to the capacity costs stemming from the base residual auction, the Commission notes that these capacity charges are the result of a FERC regulated, PJM auction and that such charges will be in place irrespective of whether the proposed ESP is adopted or a market rate offer is adopted.

Moreover, in this proceeding, the parties had 52 days to prepare for the hearing after the filing of the Stipulation in this case. The time period is not an unusually brief length of time between the filing of a stipulation and the hearing in an SSO proceeding. Many of the parties had been previously contacted and were aware that the Companies were preparing the Stipulation to be filed in conjunction with the application (Tr. III at 101). As noted earlier, discovery response times were shortened to ten days in order to allow ample opportunity for multiple sets of written discovery; for example, OCC served and received responses to six sets of discovery (Tr. I. at 18). Where discovery disputes arose, the attorney examiners promptly ruled on motions to compel discovery. Entry (May 17, 2012) at 4-5; Entry (June 1, 2012) at 4-5. No party was denied intervention, and intervention out of time was granted to a party that missed the deadline to intervene. Entry (May 15, 2012) at 2. Moreover, the Commission notes that, prior to the evidentiary hearing, three public hearings were held in which 48 public witnesses testified regarding the Stipulation. At the evidentiary hearing, the parties presented testimony by a total of 13 witnesses.

c. Deferred Carrying Charges

OCC/CP and NOPEC/NOAC claim that the provision of the Stipulation that provides for the exclusion of deferred interest income from the SEET test required by Section 4928.143(F), Revised Code, is inconsistent with Commission precedent. OCC/CP and NOPEC/NOAC cite to the Commission's decision in the AEP-Ohio SEET proceeding, in which the Commission determined that deferrals, including deferred interest income, should not be excluded from the electric utility's return on equity calculation for purposes of SEET. *In re Columbus Southern Power Company and Ohio Power Company*, Case No. 10-1261-EL-UNC, Opinion and Order (July 2, 2012) (*AEP-Ohio SEET Case*) at 31.

FirstEnergy replies that the Commission has determined that it will address the question of deferrals in SEET reviews on as case-by-case basis. *In the Matter of the Investigation into the Development of the Significantly Excessive Earnings Test*, Case No. 09-786-

EL-UNC, Finding and Order (June 30, 2010) at 16. FirstEnergy notes that the AEP-Ohio ESP which gave rise to the SEET proceeding was silent on the treatment of deferred interest income while the Commission has previously approved stipulations which expressly provided that deferred interest income should be excluded from the SEET. *ESP 2 Case*, Opinion and Order (Aug. 25, 2010) at 12. Further, FirstEnergy claims that the impact of including the deferred carrying charges would be minimal; for example, for CEI, the maximum impact would be only 100 basis points in the return on equity calculation (Tr. I at 220).

The Commission notes that, under the terms of the proposed Stipulation, charges billed though Rider DCR will be included as revenue in the return on equity calculation for purposes of SEET and will be considered an adjustment eligible for refund. However, the Stipulation specifically excludes deferred carrying charges from the SEET calculation (Co. Ex. 1, Stip. at 23). We find that the provision of the Stipulation that provides for the exclusion of deferred carrying charges from the SEET does not violate an important regulatory principle or practice. Although the *AEP-Ohio SEET Case* stands for the principle that deferrals, including deferred carrying charges, generally should not be excluded from the SEET, Section 4928.143(F), Revised Code, specifically requires that consideration "be given to the capital requirements of future committed investments in this state." Rider DCR will recover investments in distribution, subtransmission, and general and intangible plant. Therefore, the Commission finds that, in order to give full effect to this statutory requirement, we may exclude deferred carrying charges from the SEET where, as in the instant proceeding, such deferred carrying charges are related to capital investments in this state and where the Commission has determined that such deferrals benefit ratepayers and the public interest. Accordingly, we find that the Stipulation provision excluding deferred carrying charges from the SEET does not violate an important regulatory principle or practice.

OCC/CP, AEP Retail, and other parties also contend that the Stipulation violates important regulatory principles or practices because the ESP proposed in the Stipulation is not more favorable in the aggregate as compared to the expected results that would otherwise apply under Section 4928.142, Revised Code. The Commission will address all arguments related to this issue below.

4. <u>Is the proposed ESP more favorable in the aggregate as compared to the expected results that would otherwise apply under Section 4928.142, Revised Code.</u>

The Commission must also consider the applicable statutory test for approval of an ESP. Section 4928.143(C)(1), Revised Code, provides that the Commission should approve, or modify and approve, an application for an ESP if it finds that the ESP, including its pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, is more favorable in the aggregate as compared to the expected results that would otherwise apply under Section 4928.142, Revised Code.

a. Summary of the Parties' Arguments

FirstEnergy argues that the provisions of the ESP 3 are more favorable than an MRO from both a quantitative and qualitative perspective. In so arguing, FirstEnergy initially points out that the ESP 3 is a continuation of many provisions in the ESP 2, which the Commission previously found to be more favorable than an MRO. *ESP 2 Case*, Opinion and Order (Aug. 25, 2010) at 42-45.

FirstEnergy first contends that the quantitative benefits of the ESP 3 are more favorable than an MRO. FirstEnergy specifies that, in its ESP v. MRO analysis, it considered the following quantitative provisions of the ESP: (1) estimated Rider DCR revenues from June 1, 2014, through May 31, 2016; (2) estimated PIPP generation revenues for the period of the ESP 3, reflecting the six percent discount provided by the Companies; (3) economic development funds and fuel fund commitments that the Companies' shareholders will contribute; and (4) estimated RTEP costs that will not be recovered from customers (Co. Ex. 3 at 17-19). Further, FirstEnergy states that it considered the following quantitative provisions of the MRO: (1) estimated revenue from base distribution rate increases based on the proposed Rider DCR revenue caps; and (2) generation revenue from PIPP customers excluding the six percent discount provided by the Companies. After comparing these quantitative factors, the Companies calculate that the quantitative benefits of the ESP 3 exceed the quantitative benefits of an MRO by $200 million. (Co. Ex. 3 at 17-19.)

In its discussion of the quantitative benefits of the ESP 3, FirstEnergy acknowledges that Staff witness Fortney provided a different perspective of the ESP v. MRO analysis. In particular, the Companies note that Staff witness Fortney testified that the costs to customers of Rider DCR, which are included in FirstEnergy witness Ridmann's ESP analysis, and the costs of a distribution case, which are included in FirstEnergy witness Ridmann's MRO analysis, could be considered as a "wash" (Staff Ex. 3 at 4-5). Consequently, the Companies point out that Staff witness Fortney concluded that, even if foregoing RTEP cost recovery was eliminated as a benefit of the ESP 3, he would nevertheless consider the ESP 3 as benefiting customers relative to an MRO by over $21 million (Staff Ex. 3 at 5).

Next, FirstEnergy argues that the qualitative benefits of the ESP 3 are more favorable than an MRO. Specifically, FirstEnergy contends that the qualitative benefits of the ESP 3 that are not present in an MRO include economic development, rate design provisions, energy efficiency funding, support for customer shopping, and price certainty and stability for customers (Co. Ex. 1, Stip.). Further, FirstEnergy emphasizes that Staff has recommended approval of the ESP 3 based, in large part, on its qualitative benefits (Staff Ex. 3 at 4).

As noted by the Companies, Staff also takes the position that an MRO is not preferable to the ESP 3 in this proceeding. In its ESP v. MRO analysis, Staff states that there are two ways to view the situation. Under the first view, Staff argues that one should remove the effect of the agreement to forego collection of RTEP costs from the analysis because this benefit was agreed to and provided in the ESP 2 and brings no new value to the ESP 3. Under this interpretation, Staff finds that the difference in cost between the ESP and MRO is less than $8 million. Staff contends that this is a sufficiently small difference in costs that the flexibility provided by the proposed ESP 3 makes it superior to an MRO. Further, Staff notes that the qualitative benefits of the ESP 3 further counterbalance the nominal difference in cost. Under the second view, Staff argues that the costs of Rider DCR under the ESP 3 and the effects of a rate case under an MRO are essentially a "wash," and that FirstEnergy witness Ridmann's analysis should be adjusted to remove the Rider DCR costs from the ESP 3 and the rate case expense from the MRO, respectively. Under this view, Staff argues that the ESP 3 is the more advantageous option by $21 million, even disregarding qualitative factors. (Staff Ex. 3 at 2-5.)

MSC also asserts that the ESP 3 is more favorable in the aggregate than the expected results of an MRO from both a qualitative and quantitative perspective. MSC contends that the evidence in the record demonstrates that the ESP 3 provides over its duration, at a minimum, benefits to customers of $200.6 million based on compared differences between the present value amounts calculated on a year-to-year basis for the ESP 3 and MRO (Co. Ex. 4 at 7, 8). Further, MSC contends that there are substantial qualitative benefits of the ESP 3 that are not even reflected in the $200.6 million figure (Co. Ex. 3 at 15-16).

In contrast, OCC/CP contend that the ESP 3 is not more favorable in the aggregate than an MRO under a quantitative or qualitative analysis. Regarding the Companies' quantitative analysis, OCC/CP contend that the alleged RTEP benefit was improperly double-counted by the Companies and should be excluded from the analysis. Specifically, OCC/CP argue that the RTEP cost recovery forgiveness amount would remain the Companies' obligation under the ESP 2 and is not contingent upon the Commission's approval of the ESP 3 (Joint NOPEC/NOAC Ex. 1 at 5). Next, OCC/CP argue that Rider DCR cannot be considered a "wash" with a distribution rate case outcome. More specifically, OCC/CP contend that Rider DCR is more costly to customers because, according to FirstEnergy witness Ridmann, $29 million net cost is attributed to Rider DCR due to lag in distribution cost recovery (Co. Ex. 3 at 18). OCC/CP next argue that the FES offer of a six percent discount to PIPP customers should not be considered a benefit of the ESP 3, because it would not be a prohibited arrangement in an MRO (OCC Ex. 11 at 30-31). Further, OCC/CP point out that the Companies did not solicit bids from other suppliers besides FES to determine if there was interest in serving the PIPP load at an even greater discount. Next, OCC/CP contend that the alleged public benefits of the fuel funds ignore the benefit derived by FirstEnergy. OCC/CP explain that the $9 million in fuel fund monies is used for the payment of electric bills and, consequently, argue that this represents a benefit to the Companies because it ensures revenues. Finally, OCC/CP argue that the costs associated with the economic development provisions of the Stipulation are merely "transfers" of payments and should not be considered a benefit of the ESP 3. OCC/CP specify that the economic development provisions contain dollar amounts and non-bypassable discounts given to certain entities, which are ultimately recovered from other customers (OCC Ex. 11 at 33).

Next, OCC/CP argue that the ESP 3 is not more favorable in the aggregate than an MRO under a qualitative analysis. First, OCC/CP claim that the benefits of the Companies' bid of demand response and energy efficiency resources into the base residual auction were underwhelming. OCC/CP specify that the Companies bid 36 MW of energy efficiency into the PJM base residual auction on May 7, 2012, which was well below the 65 MW that the Companies could have bid. OCC/CP note that Sierra Club witness Neme estimated that this missed opportunity created a loss ranging from $22 to $39 million to FirstEnergy's customers (Sierra Club Ex. 5 at 13). Next, OCC/CP contend that modification of the bid schedule to accommodate a three-year auction product does not constitute a qualitative benefit. More specifically, OCC/CP state that uncertainties resulting from upcoming plant retirements and transmission restraints in the ATSI zone cast doubt that a three-year product is appropriate (Tr. II at 263-264). OCC/CP propose that a one or two-year generation product as recommended by OCC witness Wilson will mitigate the impact of generation costs on customer bills and eliminate the need for alternative energy resource rider deferrals, which would incur carrying costs. Next, OCC/CP argue that the distribution rate freeze cannot be considered a benefit of the ESP 3 because, under the Stipulation, FirstEnergy would be allowed to receive costs associated with investments in enhanced distribution service through Rider DCR up to $405 million through the term of the ESP 3. OCC/CP argue that it is disingenuous for the Companies to argue that this is a benefit when that Stipulation provides for such a significant collection for distribution-related investment. Finally, OCC/CP repeat their arguments from their quantitative analysis that the RTEP cost recovery forgiveness was a benefit of the ESP 2 and should not be counted as a benefit of the ESP 3.

Similar to OCC/CP's arguments, NOPEC/NOAC contend that FirstEnergy has failed to demonstrate that the ESP 3 is more favorable in the aggregate than the expected results of an MRO. Specifically, NOPEC/NOAC argue that FirstEnergy's analysis wrongly seeks to double-count the RTEP cost recovery forgiveness benefits for purposes of the ESP v. MRO test, although that obligation was incurred as part of the ESP 2 (NOPEC/NOAC Joint Ex. 1 at 5). NOPEC/NOAC argue that, when this quantitative benefit is removed, the ESP 3 value becomes $7 million less favorable than an MRO (*Id.* at 6). Additionally, NOPEC/NOAC argue that FirstEnergy improperly included in its analysis an assumed Commission-approved distribution rate increase of $376 million under an MRO in order to offset the $405 million to be collected from Rider DCR under the ESP 3 (Co. Ex. 3, Att. WRR-1). NOPEC/NOAC contend that the $376 million assumption is unrealistic and speculative, given that FirstEnergy was only awarded a distribution rate increase of $137.6 million in 2007. NOPEC/NOAC argue that a more accurate estimate of a distribution rate increase would make the proposed ESP 3 less favorable than the MRO by several hundred million dollars.

NOPEC/NOAC next contend that, if the Commission desires to adopt an ESP over an MRO, the Commission should also adopt NOPEC/NOAC's recommendations so that the ESP 3 proposal can satisfy the ESP v. MRO test. NOPEC/NOAC recommend that the Commission include the following modifications to the proposed ESP 3 (1) elimination of the continuation of Rider DCR after May 31, 2014, and replacement with a separately filed distribution rate case; (2) elimination of FirstEnergy's proposal to exclude income it receives from deferred charges from the SEET calculation; (3) requirement that the Companies bid all of their eligible demand response and energy efficiency resources into all future PJM capacity auctions; and (4) holding of the proposed energy auctions in October 2012 and January 2013 in accordance with the terms of the Combined Stipulation.

OSC similarly contends that, when the Companies' proposal is viewed in light of the evidence presented in this case, the Companies have failed to demonstrate that the ESP 3 is more favorable in the aggregate than the expected results of an MRO. Specifically, OSC claims that the evidence presented at hearing shows that, quantitatively, the ESP 3 proposal will cost consumers more than the expected results of an MRO because the ESP 3 proposal will allow FirstEnergy to continue Rider DCR after May 31, 2014, to recover up to $405 million in distribution improvement expenditures. (Tr. I at 129.)

AEP Retail also contends that the Companies' proposed ESP 3 fails the ESP v. MRO test quantitatively. Specifically, AEP Retail contends that the $293.7 million in RTEP costs should not be included in the analysis because this benefit was a result of the Commission's decision in the *ESP 2 Case* and would not be a benefit of the ESP 3 (Staff Ex. 3 at 2). AEP Retail also argues that the claimed qualitative benefits are suspect because the Companies were unable to secure any benefit by bidding demand response resources into the 2015-2016 base residual auction, because the benefits of a six percent PIPP discount are unknown and violate Section 4928.02, Revised Code, because the extension of the recovery period for REC costs is not a benefit, because the distribution "stay out" period and Rider DCR are an illusory benefit, and because any benefit of the three-year blending proposal is impossible to assess. (Tr. IV at 23; OCC Ex. 9 at 8-9; OCC Ex. 11 at 32; Tr. I at 250-257.)

In its reply, FirstEnergy first addresses the other parties' arguments that the foregoing of legacy RTEP cost recovery should not be considered as a quantitative benefit of the ESP 3. FirstEnergy argues that, as part of the ESP 3, the parties were free to negotiate a completely new framework, which could have included modifying the ESP 2 agreement provision regarding legacy RTEP cost recovery. Consequently, FirstEnergy maintains that the foregoing of legacy RTEP cost recovery is a benefit of the ESP 3.

Regarding Rider DCR, the Companies reply to other parties' arguments that the recovery of any dollars in a rate case is speculative, especially when compared to the amounts that the Companies recovered in their last distribution rate case. The Companies contend that, if they are able to make a proper showing to obtain recovery of distribution infrastructure costs under Rider DCR, there is no reason to believe that they would be unable to make a similar showing to obtain recovery in a rate case. Further, the Companies argue, in response to OCC/CP, NOPEC/NOAC, and OSC's arguments that recovery could be up to $405 million, that the caps established in Rider DCR are just caps—and that there is no guarantee to what the Companies may recover under Rider DCR.

As to other parties' arguments regarding the six percent discount for PIPP customers, the Companies reply that this is a benefit of the ESP 3 because the potential burden to pay is lessened for PIPP customers who may become PIPP-ineligible and responsible for arrearages, and for other customers who might be required to pay arrearages accrued in PIPP accounts.

Next, the Companies reply to OCC/CP's contention that the Companies' contributions to fuel funds should not be considered a benefit. The Companies argue that OCC/CP are wrong to argue that the Companies benefit from having low-income customers pay their bills, because other customers, not the Companies, would bear the burden of unpaid bills through the uncollectible expense riders and the Universal Service Fund riders. Similarly, the Companies challenge OCC/CP's argument that the economic development provisions of ESP 3 should not be considered a benefit on the basis that the Commission rejected the same argument regarding economic development in the *ESP 2 Case*. *ESP 2 Case*, Opinion and Order (Aug. 25, 2010) at 39.

Additionally, in its reply brief, the Companies respond to other parties' arguments that the qualitative benefits of the ESP 3 are not more favorable than an MRO. First, the Companies contend that use of a three-year product is an appropriate risk mitigation strategy that benefits customers, stating that the "undue uncertainty" expressed by OCC/CP just enforces FirstEnergy's plan to hedge the uncertainty with a multi-year, multi-event, multi-product CBP.

Next, the Companies rebut OCC/CP and AEP Retail's arguments that the Companies' agreement not to seek a base distribution rate increase is not a benefit. The Companies point out that a rate case would involve the recovery of costs beyond those permitted to be recovered under Rider DCR. Further, the Companies point out that the

Commission has already held that a base distribution rate freeze provides a benefit that makes an ESP more favorable in the aggregate than an MRO in the *ESP 2 Case*. Finally, the Companies note that they cannot recover any monies unless they can show that the plant is in service, and that Rider DCR is subject to quarterly reconciliations and an annual audit. *ESP 2 Case*, Opinion and Order (Aug. 25, 2010) at 44.

The Companies also argue in response to OCC/CP, AEP Retail, and RESA's contentions that the ESP 3's proposed extension of the time to recover alternative energy costs under Rider AER is not a benefit. The Companies argue that they have included the estimated impact of the lower Rider AER charge in their supplemental filing, that OCC/CP have offered no analysis to support their conclusion that the extension of the recovery of Rider AER would be counterbalanced by the effect of increased costs from the CBPs, that CRES providers are free to seek extended recovery periods for alternative energy costs, and that the current Rider AER is artificially high, as more customers are shopping, resulting in less SSO load over which to spread the recovery.

The Companies also reemphasize that the ESP 3 promotes shopping in response to RESA's argument that a large percentage of the residential customers shopping do so through governmental aggregation. The Companies respond that, although these customers may shop through governmental aggregation, they are nevertheless shopping.

In its reply, Staff reiterates that the Companies have met their criteria regarding Rider DCR. Staff contends that it examined the reliability of the Companies' system and found that the Companies were in compliance with the applicable standards (Staff Ex. 2 at 5-6). Staff states that compliance with the standards means that customers are getting the level of reliability that they want.

In their reply brief, OCC/CP respond that the Companies are unrealistic in assuming that, if they collected $405 million through Rider DCR, they would likely recover that same amount of costs through a distribution rate case. OCC/CP point out that, in the last distribution rate case, the Companies requested $340 million, but that the Commission reduced the amount to $137 million in annual rate increases. *Distribution Rate Case*, Case No. 07-551-EL-AIR, Opinion and Order (January 21, 2009) at 48. Further, OCC/CP contend that they are not advocating for a decrease in service quality, but do not want the Companies to "gold plate" their distribution systems.

OCC/CP also contend that FirstEnergy's and other parties' arguments that no other suppliers have committed to serve the PIPP load at a below-market price are unfair because no supplier—other than FES—has been given the opportunity through an open bid, request for proposal, or auction arrangement to demonstrate a willingness to serve that load. OCC/CP contend that, even if the Commission does not reject the Stipulation, the Commission should provide for the PIPP load to be auctioned separately with a six percent discount as a floor.

OCC/CP also reply to FirstEnergy's arguments regarding qualitative benefits, contending that the qualitative benefits identified by the Companies will not elevate the ESP proposal to be more favorable in the aggregate than an MRO for customers. Specifically, OCC/CP argue that the credits for large customers, credits for large automaker facilities, and financial support for the Cleveland Clinic are ultimately collected from other customers, which should not be considered a benefit of the ESP 3.

NOPEC/NOAC contend that the Companies' arguments have placed virtually sole reliance on the Commission's approval of the ESP 2 in order to support its claims. Additionally, NOPEC/NOAC contend that Staff witness Fortney is incorrect that Rider DCR and a distribution rate case would be a wash in the ESP v. MRO analysis. NOPEC/NOAC emphasize that Staff witness Fortney testified that Rider DCR and a distribution rate case would be a wash *over time*, which NOPEC/NOAC argues does not comport with the ESP v. MRO test. Further, NOPEC/NOAC contend that FirstEnergy has ignored other parties' contentions that a distribution rate increase would afford all parties and the Commission an extensive period to review any rate increase request.

b. Commission Decision

The Commission finds that the record in these proceedings demonstrates that the proposed ESP 3 is, in fact, more favorable in the aggregate than the expected results under Section 4928.142, Revised Code. Under the proposed ESP 3, the rates to be charged customers will be established through a competitive bid process; therefore, the rates in the ESP 3 should be equivalent to the results which would be obtained under Section 4928.142, Revised Code. However, the evidence in the record demonstrates that there are additional benefits contained in the Stipulation that make the proposed ESP 3 more favorable in the aggregate than the expected results under Section 4928.142, Revised Code.

Initially, the Commission finds that the proposed ESP 3 is more favorable quantitatively than an MRO. Although the Companies' witness Ridmann testified that a credit reflecting the estimated RTEP costs that will not be recovered from customers should be reflected as a quantitative benefit of the ESP 3, the Commission agrees with Staff witness Fortney, OCC/CP, NOPEC/NOAC, and AEP Retail that the benefit of this credit was a result of the Commission's decision in the *ESP 2 Case* and cannot be considered a benefit of the ESP 3 to be reflected in the ESP v. MRO analysis (Staff Ex. 3 at 2). Nevertheless, the Commission also notes that Staff witness Fortney testified that costs to consumers of Rider DCR, which are included in FirstEnergy witness Ridmann's ESP analysis, and the costs of a distribution rate case, which are included in FirstEnergy witness Ridmann's MRO analysis, would simply be a wash (Staff Ex. 3 at 4-5). The

Commission agrees with Staff witness Fortney that these costs should be considered substantially equal and removed from the ESP v. MRO analysis. Upon the removal of these costs, as well as the RTEP credit, the Commission finds that, quantitatively, the ESP 3 is better in the aggregate than an MRO by $21.4 million (Staff Ex. 3 at 5).

Further, the Commission finds that the proposed ESP 3 is more favorable qualitatively than an MRO. The Commission finds that the additional qualitative benefits of an ESP, which would not be provided for in an MRO, include (1) modification of the bid schedule to provide for a three-year product in order to capture current lower market-based generation prices and blend them with potentially higher prices in order to provide rate stability; (2) continuation of the distribution rate increase "stay-out" for an additional two years to provide rate certainty, predictability, and stability for customers; (3) continuation of multiple rate options and programs to preserve and enhance rate options for various customers provided in the ESP 2; and (4) flexibility that offers significant advantages for the Companies, ratepayers, and the public. (Staff Ex. 3 at 3-4.) More specifically, the Commission emphasizes its opinion in its discussion of the three-part test that laddering of products and continuation of the distribution rate increase freeze will smooth generation prices and mitigate the risk of volatility, which is a benefit to customers. Further, the Commission finds that the additional benefits provided via the Stipulation to interruptible industrial customers, schools, and municipalities, as well as shareholder funding for assistance to low-income customers, also make the proposed ESP 3 more favorable qualitatively than an MRO (Co. Ex. 3 at 12-13). Additionally, the Commission notes in response to OCC/CP's arguments that the six percent discount for PIPP customers is not a benefit and that FES should not have been given the sole opportunity to bid on this load, that the Commission previously rejected these arguments in the *ESP 2 Case*. *ESP 2 Case*, Opinion and Order (Aug. 25, 2010) at 33. Further, as in the *ESP 2 Case*, the Commission notes that ODOD continues to retain its authority to competitively shop the aggregated PIPP load if a better price can be obtained. Section 4928.54, Revised Code. Thus, as in the ESP 2, the six percent discount to be provided to PIPP customers represents the minimum discount during the proposed ESP 3, and a better price may be obtained by ODOD through a competitive bid.

The Commission also notes that the proposed ESP 3 is consistent with policy guidelines in Ohio. Specifically, the proposed ESP 3 supports competition and aggregation by avoiding standby charges, supports reliable service through the continuation of the DCR mechanism, supports business owners' energy efficiency efforts, protects at-risk populations, and supports industry in order to support Ohio's effectiveness in the global economy (Co. Ex. 3 at 11-12).

Therefore, based upon the evidence in the record in this proceeding, the Commission finds that the ESP 3, including its pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, is more favorable in the aggregate as compared to the expected results that would otherwise apply under Section 4928.142, Revised Code. Accordingly, we find that the Stipulation, as modified, should be adopted. The Commission also notes that our finding in this section that the ESP 3 is more favorable in the aggregate than the expected results that would otherwise apply under an MRO also resolves the arguments by several parties that the settlement package violates important regulatory principles by failing the ESP v. MRO test.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

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

(2) On April 13, 2012, FirstEnergy filed an application for an SSO in accordance with Section 4928.141, Revised Code. A stipulation was included with the application.

(3) The signatory parties to the Stipulation are FirstEnergy, Staff, OEG, OMA, IEU-Ohio, OPAE, AICUO, OHA, Nucor, COSE, MSC, Citizens' Coalition, FES, Akron, and Morgan Stanley. Additionally, Kroger, GEXA, EnerNoc, Duke Retail, and Duke Commercial signed the Stipulation as non-opposing parties.

(4) The evidentiary hearing in this proceeding was held on June 4, 2012, through June 8, 2012.

(5) Pursuant to published notice, public hearings were held in Akron on June 4, 2012; in Toledo on June 7, 2012; and in Cleveland on June 12, 2012.

(6) The Companies' application was filed pursuant to Section 4928.143, Revised Code, which authorizes the electric utilities to file an ESP as their SSO.

(7) The Commission finds that the Stipulation, as modified, meets the three criteria for adoption of stipulations, is reasonable, and should be adopted.

(8) The proposed ESP, including its pricing and all other terms and conditions, including deferrals and future recovery of deferrals, is more favorable in the aggregate as compared to the expected results that would otherwise apply under Section 4928.142, Revised Code.

ORDER:

It is, therefore,

ORDERED, That the Stipulation, as modified by the Commission, be adopted and approved. It is, further,

ORDERED, That the Companies file proposed tariffs consistent with the Stipulation as modified. It is, further,

ORDERED, That the Companies take all steps necessary to implement the Stipulation. It is, further,

ORDERED, That a copy of this Opinion and Order be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Todd A. Snitchler, Chairman

Steven D. Lesser

Andre T. Porter

Cheryl L. Roberto

Lynn Slaby

MLW/GAP/sc

Entered in the Journal
JUL 18 2012

Barcy F. McNeal
Barcy F. McNeal
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan.	)))))))	Case No. 12-1230-EL-SSO

DISSENTING OPINION OF COMMISSIONER CHERYL L. ROBERTO

Because I find the proposed ESP 3 is not superior to an MRO and it does not benefit ratepayers and/or violates important regulatory principles or practices, in at least the various ways detailed below, I reject the proposed ESP 3 and thereby dissent from the majority opinion.

I. The ESP 3 is not superior to an MRO

The burden of proof in this proceeding is on the Companies to establish that the ESP 3, including its pricing and all other terms and conditions is more favorable in the aggregate as compared to the expected results that would otherwise apply under Section 4928.142, Revised Code. Section 4928.143(C)(1), Revised Code. The Companies have not met this burden.

A. RTEP Value Absent

The Companies represent that the ESP 3 is largely a continuation of the ESP 2 that the Commission adopted less than two years ago on August 25, 2010, and which remains under its current terms and conditions in effect until May 31, 2014. The ESP 2 provided for a standard service offer based upon competitive bidding that would yield pricing results similar to an MRO. Thus, a principle reason identified by this Commission for adopting the ESP 2 was the additional term or condition that resolved questions of charges and fees related to the Companies' decision to transfer from MISO to PJM including RTEP and MTEP charges, MISO exit fees, and PJM integration charges. That reason is absent here. I agree with the majority that the ESP 3 provides no benefit relating to MISO/PJM transition charges and fees.

B. Benefits of 'Laddering' Too Ambiguous To Value

The Companies propose to amend the procurement schedule in the ESP 2 to shift bids that are to occur in October 2012 and January 2013 from one-year products to three-year products. The Companies propose that this is a benefit because it may provide an opportunity to capture historically lower generation prices for a longer period of time that would then be blended with potentially higher prices occurring over the life of the ESP 3 thereby smoothing out generation prices and mitigating volatility for customers. As I have in the past, I agree that staggered procurement is a valuable technique to mitigate the risks of market volatility. In this instance, however, customers will enjoy whatever the prices are during the period prior to May 31, 2014, under the current terms of the ESP 2. Any benefit proposed by the ESP 3 requires the assumption that as opposed to customers enjoying those lower prices initially - as they are now entitled to do - we should ask them to relinquish them. To achieve any benefit, we must assume that a bidder for a three-year product will capture all of the benefit of the prices provided by the one-year product and offer them back to the customers and, in addition, offer a lower price than they would otherwise for the product covering years two and three. There is nothing in the record to suggest that this will be true. In fact, the only suggested benefit is averaging the lower prices (which customers would already receive) with the anticipated higher prices - in essence simply paying ahead for the ability to experience less of a price change on June 1, 2014. This proposal would then merely re-create the same phenomenon on June 1, 2016, at which time customers will again face a period in time when the products procured do not overlap. I find that this proposal provides too ambiguous of a benefit, if any benefit exists at all, to value. Additionally, to the extent that this Commission is concerned that prices after May 31, 2014, will increase such as to provide a rate shock to customers (something for which there is no evidence in this record), it always has the authority granted in Section 4928.143(B)(2)(f)(i), Revised Code, to phase in and securitize a utility's standard service offer price.

II. <u>The ESP 3 does not benefit ratepayers or the public interest and violates important regulatory principles or practices</u>

A. <u>Contracting with an affiliated company for an un-bid contract to serve PIPP customers provides ambiguous benefits to ratepayers, is not in the public interest, and undermines market development.</u>

The ESP 3 provides that PIPP customers will be served by the Companies' sister company, FES, through a bi-lateral contract at a rate 6 percent below the auction rate. There is no record that FES is the only or best means of providing PIPP customers with discounted service. Such a provision removes the PIPP load from the market competition. While the potential size of the PIPP load was not explored in the record, customers are eligible when total household income is at or below 150 percent of the federal poverty level. Rule 122:5-3-02, O.A.C. "The State of Poverty in Ohio: Building a Foundation for Prosperity" prepared by Community Research Partners for the Ohio Association of Community Action Agencies and issued in January 2010 reports that 30.5 percent of residents of Cleveland are living at or below the poverty rate (100 percent of poverty - not the 150 percent level for PIPP eligibility), 24.7 percent of Toledo residents are living in poverty, and 22.5 percent of Akron residents are living in poverty. Thus, this potential load is not insignificant. There is no reason that the PIPP load could not be part of the auction so that all suppliers have an opportunity to compete for this load. The majority notes that the Ohio Department of Development is authorized to bid out this load - as it has been for more than a decade but has not exercised this authority. Relying on the Department of Development to inject competition when the remainder of the load is going to auction is nonsensical. This solution adds a layer of complexity on an agency which has no reason to have expertise in running electricity auctions. Contracting with an affiliated company for an un-bid contract to serve PIPP customers provides ambiguous benefits to ratepayers, is not in the public interest, and undermines market development.

B. <u>Paying above-market rates for demand response doesn't benefit customers or the public interest and undermines market development</u>

The ESP 3 provides for continued above-market payments to a limited body of customers though Riders OLR and ELR for demand response. The revenue shortfall resulting from these above-market payments would be recovered from all non-interruptible customers as part of the non-bypassable demand side management and energy efficiency rider (Rider DSE). The Companies contend that this provision benefits all customers because suppliers will take into account the ability to reduce load at peak pricing in their CBP bids, which may promote lower prices resulting from the CBP. Other parties contend that it may reduce capacity costs for customers.

While I agree that demand response is valuable, may promote lower CBP pricing, and could reduce capacity costs for customers, this mechanism provides less benefit at a higher cost than simply permitting the PJM demand response market to operate --- and customers must a pay a premium for this less beneficial, higher-cost demand response program. The time has come to allow this above-market program to expire. To be clear, there is no evidence that it is necessary to pay above-market rates to find participants for demand response programs. Thus, the same demand response could be available at the market price—without the need for customer subsidy. Additionally, demand response through the PJM market is visible to PJM such that it will be used to plan for reliability and as a result will *directly* reduce capacity costs for customers. Under the proposed mechanism we can only hope that demand response paid for at the above-market rates will find its way into the RPM market. Finally, providing an above-market payment for demand response can only suppress the development of a true demand response market. As is evidenced by the recent RPM auction results, demand response plays an important and valuable role in reducing capacity costs—but only when it is bid into the RPM market. An ESP provision requiring customers to pay above-market rates for demand response that may or may not actually find its way into the RPM process doesn't benefit customers or the public interest and undermines market development.

C. Gifting stipulation signatories with obligation-free energy efficiency dollars does not benefit customers or the public interest and violates cost-effective rule requirements

The Companies are required to develop a portfolio of energy efficiency programs that is cost-effective. Rule 4901:1-39-04(B) O.A.C. In general, each program proposed within a portfolio must also be cost-effective. *Id.* However, an electric utility may include a program within its portfolio that is not cost-effective when that program provides substantial nonenergy benefits. *Id.* The Companies submit a request for recovery of the costs of these programs within the portfolio proposal. Rule 4901:1-39-07, O.A.C. The Companies' current cost recovery mechanism for these programs is Rider DSE.

The ESP 3 provides the following stipulation signatories with obligation-free payments from Rider DSE:

- COSE: $25,000 in 2014, $50,000 in 2015, and $25,000 in 2016;
- AICUO: $41,333 in 2014, $21,000 in 2015, and $21,000 in 2016;
- OHA: $25,000 in 2014, $50,000 in 2015, and $25,000 in 2016;
- OMA: $100,000 in 2014, $100,000 in 2015, and $50,000 in 2016;
- City of Akron: $100,000 in 2014, and $100,000 in 2015;
- Lucas County: $100,000 in 2014, and $100,000 in 2015; and

None of these recipients is under any obligation to demonstrate that these funds will be used to deploy cost-effective energy efficiency. The funds from Rider DSE are paid by all customers in order to obtain cost-effective energy efficiency. These payments do not provide this benefit and are not consistent with the requirements of Chapter 4901:1-39, O.A.C.

D. Continuation of Rider DCR: utility and customer expectations are not aligned; without alignment utility gains additional revenues without produces additional customer value

Rider DCR is proposed pursuant to Section 4928.143(B)(2)(h), Revised Code, which authorizes an ESP to include:

> Provisions regarding the utility's distribution service, including, without limitation and notwithstanding any provision of Title XLIX of the Revised Code to the contrary, provisions regarding single issue ratemaking … provisions regarding distribution infrastructure and modernization incentives for the electric distribution utility. The latter may include … any plan providing for the utility's recovery of costs … a

just and reasonable rate of return on such infrastructure modernization. As part of its determination as to whether to allow in an electric distribution utility's electric security plan inclusion of any provision described in division (B)(2)(h) of this section, the commission shall examine the reliability of the electric distribution utility's distribution system and ensure that customers' and the electric distribution utility's expectations are aligned and that the electric distribution utility is placing sufficient emphasis on and dedicating sufficient resources to the reliability of its distribution system.

In order for Rider DCR to be included appropriately within the ESP 3, the Companies have the burden to demonstrate that the Companies' and customers' expectations are aligned and the Companies are dedicating sufficient resources to reliability. Additionally, this provision must be judged as part of the aggregate terms and conditions of an ESP; e.g. if a similar or better result is achievable through an MRO, then it calls into question whether the ESP is beneficial.

The Sierra Club notes that despite ample notice of the 2015/2016 RPM auction and the likely consequences for the Companies' customers, the Companies failed to take any steps to prepare for the RPM auction. These actions could have included bidding in energy efficiency and demand response. Accordingly, the Sierra Club argues that the Companies should be held accountable for the financial harm caused to its customers. I agree with the majority that this proceeding was not opened to investigate the Companies' bidding behavior. It is not a complaint case. The majority notes that "the record does not support a finding that the Companies' actions in preparation for bidding into the 2015/2016 base residual auction were unreasonable." If this were a complaint case, a standard of reasonableness would be appropriate. See Section 4905.26, Revised Code. In this instance, however, the burden is upon the Companies to demonstrate that its actions are aligned with both its own interests and those of its customers and that it is dedicating sufficient resources to reliability. The Companies may only avail themselves of the benefits of single-issue rate-making pursuant to Section 4928.143, Revised Code, after they have successfully made this demonstration. The information in our record is insufficient to find that the Companies dedicated sufficient resources to reliability, particularly in the form of participation in the base residual auctions whose very purpose is reliability. For this reason, I find that continuation of Rider DCR is not supported by this record.

Finally, the Companies have a remedy for cost recovery for prudent distribution system investments in the form of a distribution rate case. If the Companies require additional resources, they may file requests under traditional rate-making processes.

E. Lost Revenue Recovery mechanism has out-lived its value to customers and should be permitted to expire

The ESP 3 provides that during its term, the Companies shall be entitled to receive lost distribution revenue for all energy efficiency and peak demand reduction programs approved by the Commission, except for historic mercantile self-directed projects. In adopting the Companies' energy efficiency portfolio on March 23, 2011, Chairman Snitchler penned a concurring opinion that I joined then and find worth repeating a portion of that now:

> I strongly encourage the Companies, the other electric utilities in this state, and all other stakeholders to provide the Commission, in both that docket and in future rate proceedings, with proposals for innovative rate designs that promote both energy efficiency as well as the state policies enumerated in Section 4928.02, Revised Code.

The lost revenue mechanism should be permitted to expire under the terms of the ESP 2. It has out-lived its value to customers.

F. Adequacy of the Companies' current corporate separation is a legitimate question worthy of Commission consideration

The ESP 3 proposes that the Companies' corporate separation plan approved in *In re FirstEnergy,* Case No. 09-462-EL-UNC, would remain approved and in effect as filed.

The combination of recent discretionary utility decisions by separate generation, transmission, and distribution affiliates within the Companies' corporate family have seemingly produced enhanced investor value without an increase in consumer value but added consumer costs in the nature of significantly higher capacity charges. The specific discretionary decisions I reference include the FES decision to close two generation plants two years earlier than any environmental new requirement was to be imposed resulting in a capacity constraint; FES' continuance nonetheless operating these plants at above-market rates under must-run contracts; ATSI's advocacy of its solution to the constraint of approximately $900 million dollars in additional infrastructure to be built at cost plus; the apparent absence of effort by the Companies to use cost-effective means to control the shape and size of its native load; and the proposal in the ESP 3 for un-bid purchase by the Companies from its sister affiliate FES of the PIPP customer load. By itemizing these observations, I am not suggesting that the Companies or any other member of the Companies' family has taken an action that is unauthorized or outside of any existing authority in any manner. By highlighting them, however, I am suggesting that the Commission should not be eager to re-approve and extend the Companies' current corporate separation plan without a more deliberative review.

G. The timing of this matter and bundling of disparate issues does not benefit customers or the public interest

While I agree with the majority that the Commission cannot find that parties were denied the opportunity for thorough and adequate participation in this proceeding, the urgency that seemed to accompany this matter seems out of proportion to any real need to act. The ESP 2 is in effect until May 31, 2014. The Commission has up to 275 days after an application is filed to act. Section 4928.143(C)(1), Revised Code. This timing leaves a significant window for a deliberative review of any proposal for the Companies next timely ESP. Yet this case was filed on April 13th – just three months ago – and is now before us for final resolution. Customers and the public interest would benefit from the matters included within the ESP 3 relating to distribution improvements and energy efficiency programs to be considered within appropriate separate dockets. This is particularly true in light of the strain on available resources, including those within the significantly down-sized Office of Consumers' Counsel, resulting from the pendency of AEP SSO and Capacity cases during the past three months as well. While the alacrity of this case does not mean that parties did not have an adequate opportunity to participate, I believe that a superior public interest result would be attained by using the time and regulatory frameworks available to us for a disciplined review of the distribution and energy efficiency/demand response portions of this matter in separate dockets.

For the above reasons, which do not represent an exhaustive list, I find that the Companies have not met their burden and, therefore, I would reject the ESP.

Cheryl L. Roberto

Cheryl L. Roberto

CLR\sc

Entered in the Journal

JUL 1 8 2012

Barcy F. McNeal

Barcy F. McNeal
Secretary

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company to Provide for Authority to Provide for a Standard Service Offer Pursuant to R.C. § 4928.143 in the Form of an Electric Security Plan.	))))))	Case No. 12-1230-EL-SSO

APPLICATION FOR REHEARING BY THE NORTHEAST OHIO PUBLIC ENERGY COUNCIL

Pursuant to Ohio Revised Code Section 4903.10, and Ohio Administrative Code Rule 4901-1-35, the Northeast Ohio Public Energy Council respectfully submits this Application for Rehearing of the Public Utilities Commission of Ohio's Opinion and Order issued in the above-captioned case on July 18, 2012 (the "Order"). The Order is unreasonable and unlawful in the following respects:

1. The ESP 3 Stipulation approved by the Commission is not "more favorable in the aggregate as compared to the expected results that otherwise apply under [an MRO]," in violation of R.C. 4928.143(C)(1);

2. The Commission erred in concluding that the Commission would award FirstEnergy a $405 million distribution rate increase during the two-year period of the ESP 3 Proposal for purposes of the MRO portion of the statutory ESP vs. MRO test without any evidentiary support;

3. The Commission erred in developing non-existent qualitative benefits associated with the ESP 3 Proposal to satisfy the statutory ESP vs. MRO test under R.C. 4928.143(C)(1);

4. The Commission erred in concluding that the ESP 3 Stipulation satisfies the Commission's three-part test for determining the reasonableness of a stipulation;

5. The Commission erred in concluding that the ESP 3 Stipulation is the product of serious bargaining because the three primary residential customer advocates, including NOPEC, were effectively excluded from the bargaining process;

6. The Commission erred in approving the ESP 3 Stipulation because the terms in the ESP 3 Stipulation violate important regulatory principles and practices, including but not limited to allowing the collection of deferred carrying charges to be excluded from the Significantly Excessive Earnings Test ("SEET") calculation;

7. The Commission violated the due process rights of NOPEC and other non-signatory parties when it unreasonably forced the ESP 3 case to a decision without affording the non-signatory parties adequate time to prepare for the case;

8. The Commission violated the due process rights of NOPEC and other non-signatory parties when it unlawfully took administrative notice of portions of the record from the MRO Case and the ESP 2 Case despite the fact that NOPEC and other non-signatory parties to the ESP 3 Stipulation did not have knowledge of and/or an opportunity to explain and rebut the facts administratively noticed;

9. The Commission erred by approving FirstEnergy's corporate separation plan as part of the ESP 3 Stipulation without a formal, detailed review of said corporate separation plan as required by R.C. 4928.17 and OAC Chapter 4901:1-37;

10. The Commission's approval of Rider DCR as part of the ESP 3 Proposal violates R.C. 4928.143(B)(2)(h); and

11. The Commission's approval of the ESP 3 Proposal violates R.C. 4905.22 by approving unjust and unreasonable rates.

NOPEC respectfully requests that the Commission grant this Application for Rehearing, and modify the Order as set forth in greater detail in the attached Memorandum in Support.

Respectfully submitted,

Matthew W. Warnock

Glenn S. Krassen
Bricker & Eckler LLP
1001 Lakeside Avenue, Suite 1350
Cleveland, OH 44114
Telephone: (216) 523-5405
gkrassen@bricker.com

Matthew W. Warnock
Bricker & Eckler LLP
100 South Third Street
Columbus, Ohio 43215
Telephone: (614) 227-2300
mwarnock@bricker.com

Attorneys for the Northeast Ohio Public

Energy Council
TABLE OF CONTENTS

Page

TABLE OF CONTENTS iii

I. INTRODUCTION 1

II. LEGAL ARGUMENT 3

A. The ESP 3 Stipulation is not "more favorable in the aggregate as compared to the expected results that otherwise apply under [an MRO]," thereby failing the ESP vs. MRO test in R.C. 4928.143(C)(1) 3

1. FirstEnergy's ESP 3 Stipulation fails a quantitative analysis under R.C. 4928.143(C)(1) 3

a. The Commission appropriately removed any benefits associated with the ESP 2 RTEP obligation from the MRO vs. ESP analysis in this case, but then failed to accurately complete its math 4

b. The Commission unlawfully and unreasonably ignored the evidence to conclude that the estimated results of a distribution rate case (on the MRO side of a calculation) and the proposed amounts to be recovered through Rider DCR (on the ESP side of the calculation) would result in a "wash" for Ohio ratepayers 5

2. Any alleged qualitative benefits associated with the ESP 3 Stipulation cannot overcome the failure of FirstEnergy to satisfy the quantitative ESP vs. MRO test 7

a. Any alleged qualitative benefit associated with the three year auction product in the ESP 3 Proposal is outweighed by the uncertainty in the energy market 7

b. Other alleged qualitative benefits relied upon by the Commission are insufficient and unreasonable under Ohio law 8

B. The Commission erred in concluding that the ESP 3 Stipulation satisfies the Commission's three-part test for determining the reasonableness of a stipulation 9

1. The ESP 3 Stipulation was not the product of serious bargaining 9

2. The ESP 3 Stipulation does not, as a package, benefit ratepayers and the public interest. 11

3. The ESP 3 Stipulation violates important regulatory principles and practices. 12

a. The Commission unlawfully and unreasonably modified the terms of a Commission-approved stipulation by changing the one year auction product approved in the ESP 2 Case to a three year product in the ESP 3 Case, without justification. 12

b. The SEET provisions in the Stipulation violate R.C. 4928.143(E), the Commission's regulatory precedent and common sense. 13

c. The Commission's support of FirstEnergy's "rush to judgment" violates the statutory requirement that each ESP be adjudicated independently. 14

C. The Commission erred when it took administrative notice of portions of the record from the MRO Case and the ESP 2 Case. 15

D. The ESP 3 Stipulation is not the proper forum for approval of FirstEnergy's corporate separation plan. 24

E. The Commission's approval of Rider DCR as part of the ESP 3 Proposal violates R.C. 4928.143(B)(2)(h). 25

F. The Commission's approval of the ESP 3 Proposal violates R.C. 4905.22 by approving unjust and unreasonable rates. 26

III. CONCLUSION 27

CERTIFICATE OF SERVICE 29

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company For Authority to Establish a Standard Service Offer Pursuant to R.C. § 4928.143 in the Form of an Electric Security Plan	))))))	Case No. 12-1230-EL-SSO

MEMORANDUM IN SUPPORT OF THE
THE NORTHEAST OHIO PUBLIC ENERGY COUNCIL'S
APPLICATION FOR REHEARING

I. INTRODUCTION

On April 13, 2012, Ohio Edison Company ("OE"), The Cleveland Electric Illuminating Company ("CEI") and Toledo Edison Company ("TE") (collectively, "FirstEnergy," or the "Companies") filed an application for approval of its third electric security plan ("ESP") in the form of a Stipulation and Recommendation (the "ESP 3 Stipulation," and the entire filing hereinafter referred to as the "ESP 3 Proposal"). Despite strong opposition from the Northeast Ohio Public Energy Council ("NOPEC"), the Office of the Ohio Consumers' Counsel ("OCC"), Northwest Ohio Aggregation Coalition ("NOAC") and other intervening parties, and a serious lack of evidence supporting the ESP 3 Proposal, the Public Utilities Commission of Ohio (the "Commission") approved it in an Opinion and Order issued on July 18, 2012 (the "Order"). The Commission's decision is unreasonable and unlawful.

NOPEC is not opposed to a new ESP plan taking shape after the completion of the existing ESP on May 31, 2014. In fact, NOPEC supported the second supplemental stipulation in Case No. 10-388-EL-SSO (the "ESP 2 Case"). This ESP 3 Proposal approved by the Commission, however: (i) fails the ESP vs. MRO test under R.C. 4928.143(C)(1); (ii) fails the

Commission's own three-prong test for determining the reasonableness of a stipulation; (iii) lacks the support of residential customer representatives, including NOPEC, OCC and NOAC; (iv) encouraged a constitutionally-deficient process whereby NOPEC and other intervening parties were denied fundamental due process rights, including the right to critically examine the ESP 3 Proposal; (v) is supported by a ruling on administrative notice that violates Ohio law, and general principles of due process and fairness; (vi) includes terms and conditions that violate R.C. 4928.17, R.C. 4928.143, and R.C. 4905.22.

When the ESP 3 Proposal is analyzed in light of the lack of evidence before the Commission, and serious due process concerns raised by the parties, the Commission's decision to reject the ESP 3 Proposal should have been easy. The Commission, however, ignored these fatal flaws in FirstEnergy's ESP 3 Proposal. For these reasons, and those set forth below, NOPEC respectfully requests that the Commission grant this Application for Rehearing and reject FirstEnergy's ESP 3 Stipulation. In the alternative, NOPEC respectfully requests that the Commission modify the ESP 3 Proposal as follows:

(a) Eliminate the continuation of the DCR Rider after May 31, 2014, and require any distribution-related investments to be accounted for in a separately filed distribution rate case;

(b) Eliminate FirstEnergy's proposal to exclude deferrals from the SEET calculation;

(c) Require FirstEnergy to bid all of its eligible demand response and energy efficiency resources into all future PJM capacity auctions;

(d) Continue to hold the proposed energy auctions in October 2012 and January 2013 in accordance with the terms of the combined stipulation from the ESP 2 Case (the use of a one-year auction product covering the final year of the current ESP from June 1, 2013 through May 31, 2014), while modifying the ESP 3 Proposal to provide for a second auction product covering the two-year time period of the ESP 3 Proposal (June 1, 2014 through May 31, 2016); and

(e) Require FirstEnergy to comply with the corporate separation requirements in R.C. 4928.17, and order a detailed review of its existing corporate separation plan to determine whether it complies with Ohio law.

II. LEGAL ARGUMENT

A. The ESP 3 Stipulation is not "more favorable in the aggregate as compared to the expected results that otherwise apply under [an MRO]," thereby failing the ESP vs. MRO test in R.C. 4928.143(C)(1).

In the Order, Commissioner Roberto's dissenting opinion correctly states that "[t]he burden of proof in this proceeding is on the Companies to establish that the ESP 3, including its pricing and all other terms and conditions is more favorable in the aggregate as compared to the expected results that would otherwise apply under Section 4928.142, Revised Code. Section 4928.143(C)(1), Revised Code. **The Companies have not met this burden**."[1] (Emphasis added). Plainly stated, the ESP 3 Proposal does not satisfy the statutory ESP vs. MRO test and the Commission's decision to the contrary is unreasonable and unlawful.

1. FirstEnergy's ESP 3 Stipulation fails a quantitative analysis under R.C. 4928.143(C)(1).

For purposes of the quantitative ESP vs. MRO analysis, the inputs FirstEnergy used for the ESP side of the calculation (which can be found in Attachment WRR-1 to FirstEnergy Exhibit 3)[2] included: "(1) estimated Rider DCR revenues from June 1, 2014 through May 31, 2016; (2) estimated PIPP generation revenues for the period of the ESP 3, reflecting the 6% discount provided by the Companies; (3) economic development funds and fuel fund commitments that the Companies' shareholders, not customers, will contribute; and (4) estimated RTEP costs that will not be recovered from customers."[3] The inputs FirstEnergy used on the MRO side of the calculation (also from Attachment WRR-1 to FirstEnergy Exhibit 3) included:

---

[1] Order, Commissioner Roberto's Dissenting Opinion (hereinafter "Dissenting Opinion") at p. 1.

[2] FirstEnergy Exhibit 3 is the Prefiled Direct Testimony of William R. Ridmann.

[3] Dissenting Opinion at p. 1.

"(1) estimated revenue from base distribution rate increases based on the proposed Rider DCR revenue caps; and (2) generation revenue from PIPP customers excluding the 6% discount."[4]

Rather than utilizing the agreed upon numerical inputs, and completing a simple mathematical exercise, the Commission unlawfully and unreasonably ignored the evidence and *sua sponte* manipulated the math to the sole advantage of FirstEnergy. A correct quantitative analysis demonstrates that the ESP 3 Proposal fails the ESP vs. MRO test under R.C. 4928.143(C)(1).

a. The Commission appropriately removed any benefits associated with the ESP 2 RTEP obligation from the MRO vs. ESP analysis in this case, but then failed to accurately complete its math.

As part of FirstEnergy's existing stipulation from the ESP 2 Case, FirstEnergy agreed not to recover "Legacy RTEP Costs for the longer of: (1) the five year period from June 1, 2011 through May 31, 2016 or (2) when a total of $360 million of Legacy RTEP Costs has been paid for by the Companies."[5] This obligation exists regardless of whether the ESP 3 Stipulation is accepted, modified or rejected by the Commission. As a result, the only thing unanimously agreed upon in the Order is that "the benefit of this [RTEP] credit was a result of the Commission's decision in the ESP 2 Case and cannot be considered a benefit of the ESP 3 to be reflected in the ESP v. MRO analysis."[6] Doing so results in the ESP 3 Proposal failing the quantitative ESP vs. MRO analysis by more than $7 million.[7] This fact was confirmed by

---

[4] *Id.* at pp. 24-25.

[5] Second Supplemental Stipulation, Case No. 10-388-EL-SSO (June 22, 2010) ¶6.

[6] Order at p. 55. See also Dissenting Opinion at p. 1.

[7] Joint NOPEC/NOAC Ex. 1 at p. 6.

FirstEnergy witness Ridmann,[8] and Commission Staff witness Fortney,[9] yet the Commission unreasonably ignored this undisputed evidence.

b. The Commission unlawfully and unreasonably ignored the evidence to conclude that the estimated results of a distribution rate case (on the MRO side of the calculation) and the proposed amounts to be recovered through Rider DCR (on the ESP side of the calculation) would result in a "wash" for Ohio ratepayers.

After removing the non-existent RTEP benefit from the ESP vs. MRO analysis, however, the Commission ignored the remaining evidence before it (namely the MRO vs. ESP calculation provided by FirstEnergy on Attachment WRR-1). In doing so, the Commission unlawfully "adjusted" the distribution portion of the ESP vs. MRO analysis in FirstEnergy's favor by approximately $29 million to allow the ESP 3 Proposal to "satisfy" a quantitative ESP vs. MRO analysis. Such a manipulated analysis for the sole purpose of allowing FirstEnergy to satisfy the quantitative analysis must be rejected because it is not supported by any evidence in this record.

Specifically, the Commission, without record support, concluded that the amounts proposed to be recovered through Rider DCR on the ESP side of the calculation (which the evidence demonstrated to be $405 million), and the estimated results of a Commission-approved distribution rate case on the MRO side of the calculation (which the evidence estimated to be $376 million) would be "substantially equal," and simply should be "removed from the ESP v. MRO analysis."[10]

[8] Tr. Vol. I, p. 129, lines 10-19.

[9] Prefiled Testimony of Robert B. Fortney ("Staff Ex. 1") at pp. 2-3.

[10] Order at p. 55.

This conclusion not only ignores the evidence, but actually allows the Commission to, after-the-fact, create evidence to support its unlawful and unreasonable decision.

From a practical standpoint, the Commission's decision gratuitously (and without evidentiary support) added $29 million to the MRO side of the quantitative analysis (increasing the estimated return under a Commission-approved distribution rate case from $376 million to $405 million). This is illogical, unreasonable and unlawful.[11] In reality, the evidence demonstrates that, at most, the distribution portion of the ESP vs. MRO analysis results in the MRO being more favorable than the ESP 3 Proposal by $29 million. When this amount is combined with the removal of the RTEP obligation, the ESP 3 Proposal fails the statutory test by at least $36 million (not adjusted for net present value).

Perhaps more importantly, the Commission unreasonably, unlawfully and without record evidence accepted the $376 million assumption in the distribution piece of Mr. Ridmann's ESP vs. MRO analysis. The assumption that the Commission would award a $376 million distribution rate increase during the two year period of the ESP 3 Proposal is outlandish, speculative and wholly unsupported.[12] As NOPEC emphasized in its initial brief, the $376 million assumption is unreasonable because: (1) "[w]hile the Companies could certainly request a distribution rate increase in those planning years there is no evidence or guarantee that the Commission would award such an increase;"[13] (2) "[e]ven if the Commission were to approve an

[11] As OCC correctly noted in its initial brief, the "ESP vs. MRO test is not an 'over the long run' analysis." Joint Initial Brief by the Office of the Ohio Consumers' Counsel and Citizen Power ("OCC Brief"), p. 54. The ESP 3 Proposal is for a period of two years. That two year period (not some unidentified period of time in the future) is the only time frame to be analyzed for purposes of the statutory ESP vs. MRO analysis. Within this two year time frame, it is apparent that Rider DCR is not a "wash" when compared to the results of an expected distribution rate case. Further, the statutory ESP vs MRO analysis nowhere provides for quantitative provisions to be removed from the calculation simply because they might constitute a "wash" at some point in the future

[12] Mr. Ridmann's assumption estimated that FirstEnergy would receive a Commission-approved $376 million increase in a future distribution rate case for the two year ESP 3 time period.

[13] Joint NOPEC/NOAC Ex. 1 at p. 5. The amounts for each of the three companies were $108,598,923 for CEI, $70,539,796 for TE, and $160,762,886 for OE.

increase in the Companies' distribution rates at that time, there is no indication that the Commission would award an increase of $376 million over two years;"[14] and (3) the $376 million assumption is nearly $40 million more than FirstEnergy even asked for in its most recent rate case—Case No. 07-551-EL-AIR (the "2007 Rate Case")—and more than two and one-half (2 ½) times the amount approved by the Commission in the 2007 Rate Case.[15] A more accurate MRO calculation, with a significantly reduced amount for a distribution rate increase, would result in an even greater failure of the quantitative ESP vs. MRO analysis. (Emphasis added).

2. Any alleged qualitative benefits associated with the ESP 3 Stipulation cannot overcome the failure of FirstEnergy to satisfy the quantitative ESP vs. MRO test.

As noted above, FirstEnergy's ESP 3 Proposal fails a quantitative analysis of the ESP vs. MRO test. Despite this fact, the Commission unreasonably and unlawfully claims that a series of amorphous, qualitative (non-monetary) benefits overcome the substantial failure of the quantitative ESP vs. MRO analysis. Such an argument is unpersuasive and not expressly provided for under the statute..

a. Any alleged qualitative benefits associated with the three year auction product in the ESP 3 Proposal are outweighed by the uncertainty in the energy market.

As Commissioner Roberto aptly explained in her dissenting opinion:

> In this instance, however, customers will enjoy whatever the prices are during the period prior to May 31, 2014, under the current terms of the ESP 2. Any benefit proposed by the ESP 3 requires the assumption that as opposed to customers enjoying those lower prices initially - as they are now entitled to do - we should ask them to relinquish them. To achieve any benefit, we must assume that a bidder for a three-year product will capture all of the benefit of the prices provided by the one-year product and offer them back to the customers and, in addition, offer a lower price than they would otherwise for the product covering years two and three. There is nothing in the record to suggest that this will be true. In fact, the

[14] *Id.*

[15] See NOPEC/NOAC Brief at pp. 9-10.

> only suggested benefit is averaging the lower prices (which customers would already receive) with the anticipated higher prices – in essence simply paying ahead for the ability to experience less of a price change on June 1, 2014. This proposal would then merely re-create the same phenomenon on June 1, 2016, at which time customers will again face a period in time when the products procured do not overlap. I find that this proposal provides too ambiguous of a benefit, if any benefit exists at all, to value.[16]

Amidst such uncertainty, there is no certain or provable benefit associated with the move from a one-year to a three-year auction product. In fact, the move to a three-year auction product is just as likely to prove disadvantageous to consumers as advantageous.

b. Other alleged qualitative benefits relied upon by the Commission are insufficient and unreasonable under Ohio law.

Commissioner Roberto's dissenting opinion in the Order demonstrates the unreasonableness of the other qualitative benefits thrown out by the Commission. For example, Commissioner Roberto concluded that:

- Allowing FirstEnergy to contract with its competitive affiliate, FirstEnergy Solutions ("FES"), for an un-bid contract to serve all PIPP customers in Ohio provides ambiguous benefits to ratepayers and undermines market development.[17]
- Paying above-market rates for demand response through Riders ELR and OLR provides less benefit at a higher cost than simply allowing the PJM demand response market to operate as intended.[18]
- Gifting obligation-free energy efficiency dollars to signatory parties to the ESP 3 Stipulation violates OAC Rule 4901:1-39-04(B) because FirstEnergy is required to develop a portfolio of energy efficiency programs that are cost-effective.[19] Yet, none of the recipients of the stipulation dollars (which are recovered under Rider DSE) is under any

[16] Dissenting Opinion at p. 2.

[17] *Id.*

[18] *Id.* at p. 7.

[19] *Id.* at p. 4.

obligation to demonstrate that the funds will be used to deploy cost-effective energy efficiency measures.[20]

- FirstEnergy failed to satisfy its burden of demonstrating that both customers and FirstEnergy's own expectations are aligned with respect to the Rider DCR.[21] It should be noted that this failure violates R.C. 4928.143(C)(1).

- FirstEnergy's lost revenue recovery mechanism has out-lived its value to customers.[22]

For these reasons, there are no qualitative benefits that would allow the ESP 3 Proposal to satisfy either a quantitative or qualitative analysis under R.C. 4928.143(C)(1).

B. The Commission erred in concluding that the ESP 3 Stipulation satisfies the Commission's three-part test for determining the reasonableness of a stipulation.

In addition to failing the statutory ESP vs. MRO test, the Commission unlawfully and unreasonably concluded that FirstEnergy satisfied the Commission's three-part test for determining the reasonableness of a stipulation.[23]

1. The ESP 3 Stipulation was not the product of serious bargaining.

The Commission, in particular Commissioner Roberto, previously recognized the "asymmetrical bargaining positions of the parties" in the ESP context."[24] As Commissioner Roberto explained in a concurring/dissenting opinion from FirstEnergy's first ESP case:

> I have no reservation that the parties are indeed capable and knowledgeable but, because of the utility's ability to withdraw, the

[20] *Id.*

[21] *Id.* at pp. 4-5.

[22] *Id.* at p. 6.

[23] See *Office of Consumers' Counsel v. PUCO* (2005), 111 Ohio St.3d 300, 319.

[24] OCC Brief at p. 9.

remaining parties certainly do not possess equal bargaining power in an ESP action before the Commission.[25]

Most importantly, Commissioner Roberto noted that "[i]n light of the Commission's fundamental lack of authority in the context of an ESP application to serve as the binding arbiter of what is reasonable, a party's willingness to agree with an electric distribution utility application can not be afforded the same weight due as when a agreement arises within the context of other regulatory frameworks."[26] Ignoring these words (which are directly applicable to this case), the Commission unreasonably concluded that the ESP 3 Stipulation is somehow the product of serious bargaining.

First, and foremost, the ESP 3 Stipulation includes virtually no residential customer representation. The Commission mistakenly identifies OPAE and the Citizens Coalition as representatives of low and moderate income residential customers.[27] In reality, OPAE and the Citizens' Coalition are geographically limited and/or primarily focused on programs rather than utility rates (e.g., OPAE's weatherization program). Unlike NOPEC, OCC and NOAC, these signatory parties' limited interests simply are not focused on the electric rates of the nearly two million residential customers served by FirstEnergy.

Although the Commission refuses to adopt a bright-line rule requiring that OCC (or other residential customer representatives) be a signatory party to a stipulation prior to Commission approval,[28] the lack of support from NOPEC, NOAC, and/or OCC is telling. Without them, an entire customer class representing nearly two million residential customers served by

---

[25] *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company to Provide for Authority to Provide for a Standard Service Offer Pursuant to R.C. § 4928.143 in the Form of an Electric Security Plan*, Case No. 08-935-EL-SSO, (Second Finding and Order dated March 25, 2009, Concurring in Part and Dissenting in Part Decision of Commissioner Cheryl Roberto) at pp. 1-2.

[26] *Id.* at p. 2.

[27] Order at p. 26.

[28] *Id.* at p. 27.

FirstEnergy has been consciously omitted from the bargaining process—strong evidence that the bargaining process was anything but serious, transparent or fair.

In addition, and unlike FirstEnergy's prior SSO proceedings—including Case No. 08-935-EL-SSO (FirstEnergy's first SSO case following the enactment of Senate Bill 221), the MRO Case, and/or the ESP 2 Case—FirstEnergy chose not to conduct comprehensive settlement meetings with all interested parties. Instead, FirstEnergy held individualized and compartmentalized negotiations with certain parties from the ESP 2 Case. Although NOPEC was approached by FirstEnergy in the week or two immediately prior to the filing of the ESP 3 Proposal, NOPEC did not have an appropriate amount of time to review the proposal, conduct discovery, provide comments and requests for substantive changes to the proposal, or otherwise seriously bargain with FirstEnergy. There simply cannot be serious bargaining when one side intentionally ignores the representatives of the nearly two million residential customers (NOPEC, NOAC and OCC), and they are not provided with the opportunity to bargain.

Based on the foregoing, the Commission erred by finding that the ESP 3 Stipulation was the product of serious bargaining.

2. The ESP 3 Stipulation does not, as a package, benefit ratepayers and the public interest.

Simply stated, FirstEnergy's ESP 3 Stipulation does not benefit ratepayers. In addition to failing the ESP vs. MRO test in R.C. 4928.143(C)(1), any alleged "qualitative" benefits relied upon by the Commission are a fiction. For the convenience of the Commission, NOPEC simply incorporates by reference the arguments raised in Section II.A.2 above.

3. The ESP 3 Stipulation violates important regulatory principles and practices.

a. The Commission unlawfully and unreasonably modified the terms of a Commission-approved stipulation by changing the one year auction product approved in the ESP 2 Case to a three year product in the ESP 3 Case, without justification.

As a signatory party to the stipulation in the ESP 2 Case, NOPEC actively participated in, and negotiated the terms of, the combined stipulation ultimately approved by the Commission. One component of the stipulation in the ESP 2 Case was the inclusion of a one-year product in the auctions currently scheduled for October 2012 and January 2013. Rather than seek approval from all (not just some) of the signatory parties to the stipulation in the ESP 2 Case, the Commission approved the changing of the bid product from a one-year product to a three-year product, without any justification. This clearly is not the deal struck by the signatory parties to the stipulation in the ESP 2 Case, including NOPEC.

The Commission, however, states that it "is well-established that the Commission may change or modify previous orders as long as it justifies the changes."[29] The Commission, however, did not (and cannot) justify such a change. In fact, the Commission's own Staff testified that: "Much ink will be spilled concerning the question of whether the use of single year products or multi-year laddering would result in overall lower prices. The debate is pointless. There is no objective answer."[30] Without any possible justification for modifying the stipulation from the ESP 2 Case, the Commission violated Ohio law in doing so anyway.

[29] Order at p. 45.

[30] Staff Post Hearing Brief at p. 5.

b. The SEET provisions in the Stipulation violate R.C. 4928.143(E), the Commission's regulatory precedent and common sense.

The Commission abused its discretion by accepting FirstEnergy's claim that the provision in the ESP 3 Stipulation allowing for the exclusion of deferred carrying charges from the SEET calculation is permissible.[31] The exclusion of deferred carrying charges from the SEET calculation violates: (i) R.C. 4928.143(E); and (ii) the Commission's precedent in Case No. 10-1261-EL-UNC (the "AEP SEET Case"),[32] which even the Commission acknowledges as standing for the proposition that "deferrals, including carrying charges, generally should not be excluded from SEET."[33] There is no reason to treat the deferrals in this case any differently than they were in the AEP SEET Case.

Further, the Commission confusingly and inaccurately states that the exclusion of the deferred charges are justified because they are somehow tied to distribution investments provided under Rider DCR.[34] In reality, the treatment of Rider DCR is entirely unrelated to the treatment of deferred carrying charges in the context of the SEET analysis. Page 23 of the ESP 3 Stipulation reads as such: "Any charges billed through Rider DCR will be included as revenue in the return on equity calculation for purposes of SEET and will be considered an adjustment eligible for refund. For each year during the period of this ESP, adjustments will be made to

---

[31] Initial Post-Hearing Brief of Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company ("FirstEnergy Brief") at p. 53.

[32] *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Administration of the Significantly Excessive Earnings Test under Section 4928.143(F), Revised Code, and Rule 4901:1-35-10, Ohio Administrative Code*, Case No. 10-1261-EL-UNC (*Opinion and Order* dated January 11, 2011) at p. 31.

[33] Order at p. 48.

[34] Page 48 of the Order states: "Section 4928.143(F), Revised Code, specifically requires that consideration 'be given to the capital requirements of future committed investments in this state.' Rider DCR will recover investments in distribution, subtransmission, and general and intangible plant. Therefore, the Commission finds that, in order to give full effect to this statutory requirement, we may exclude deferred carrying charges from the SEET where, as in the instant proceeding, such deferred carrying charges are related to capital investments in this state and where the Commission has determined that such deferrals benefit ratepayers and the public interest."

exclude the impact: (i) of a reduction in equity resulting from any write-off of goodwill, (ii) of deferred carrying charges, and (iii) associated with any additional liability or write-off of regulatory assets due to implementing this ESP 3 or the ESP in Case No. 10-388-EL-SSO." The deferred carrying charges are not tied to Rider DCR under the ESP 3 Stipulation's express provisions. Therefore, the Commission's alleged justification for excluding the deferred carrying charges from the SEET analysis is without merit and unlawful.

c. The Commission's support of FirstEnergy's "rush to judgment" violates the statutory requirement that each ESP be adjudicated independently.

FirstEnergy's "rush to judgment" in this case violates the statutory requirement that each ESP be adjudicated independently. OCC accurately noted in its brief that the "General Assembly's ESP framework is for plans to be established for time periods."[35] As a separate ESP filing, the ESP 3 Stipulation should be judged exclusively on its own merits. When compared to the stipulation in the ESP 2 Case, the ESP 3 Stipulation seeks Commission approval of a new ESP involving new substantive provisions, and covering a new two-year time period (from June 1, 2014 through May 31, 2016).[36] The ESP 3 Stipulation is subject to a separate and independent stand-alone analysis as to whether it satisfies: (i) the statutory ESP vs. MRO test set forth in R.C. 4928.143(C)(1); and (ii) the Commission's three-prong test for considering the reasonableness of stipulations. The Commission's attempt to do otherwise runs contrary to Ohio law.

Commissioner Roberto's dissenting opinion in the Order notes that, "the urgency that seemed to accompany this matter seems out of proportion to any real need to act. The ESP 2 is in effect until May 31, 2014. The Commission has up to 275 days after an application is filed to

[35] OCC Brief at p. 7.

[36] See generally FirstEnergy Ex. 1 (ESP 3 application, ESP 3 Stipulation, and accompanying exhibits).

act."[37] Commissioner Roberto's statement is correct and the Commission should have taken more time to critically evaluate FirstEnergy's ESP 3 Stipulation—a simple decision that protects the public interest.

C. The Commission erred when it took administrative notice of portions of the record from the MRO Case and the ESP 2 Case.

The Attorney Examiners unreasonably and unlawfully took administrative notice of piecemeal portions of the record from two entirely separate proceedings to allow FirstEnergy (with the assistance of Nucor) to try to satisfy its burden of proof.[38] The Commission's approval of this decision by the Attorney Examiners not only violates Ohio law, but sets a dangerous precedent in future Commission proceedings.

1. The Commission's version of the facts is insufficient.

On page 19 of the Order, the Commission stated:

> In this proceeding, the Companies requested in the application filed on April 13, 2012, that administrative notice be taken of the full record of FirstEnergy's last SSO proceeding, the ESP 2 Case. In the ESP 2 Case, the Commission had taken administrative notice of an earlier proceeding, In re FirstEnergy, Case No. 09-906-EL-SSO (MRO Case); thus, the record of the ESP 2 Case includes the full record of the MRO Case. No party filed a memorandum contra or any other pleading in opposition to the request in the application in this case. At the hearing, the attorney examiners requested that the Companies provide a list of the specific documents for which administrative notice was sought (Tr. I at 29). The Companies complied with the attorney examiners' request (Tr. III at 11-12), and Nucor moved for administrative notice to be taken of one document (Tr. III at 19). Subsequently, the examiners took administrative notice of the enumerated documents (Tr. III at 171).

This version of the facts, however, provides only a part of the whole story, and is entirely insufficient for purposes of the administrative notice analysis.

---

[37] Dissenting Opinion at p. 7.

[38] See NOPEC/NOAC Initial Brief at 19-24; OCC Brief at pp. 77-87; AEP Retail Energy Partners LLC's Initial Post-Hearing Brief ("AEP Retail Brief") at pp. 17-20.

When the ESP 3 Proposal was filed on April 13, 2012, FirstEnergy did add a brief statement at the end of its lengthy ESP 3 filing asking that the "Commission take administrative notice of the evidentiary record established in the current ESP, Case No. 10-388-EL-SSO, and thereby incorporate by reference that record for the purposes of and use in this proceeding."[39] There was not a specific request from FirstEnergy to incorporate the entire record from the MRO Case.[40]

The Commission then makes the irrelevant statement that "[n]o party filed a memorandum contra or any other pleading in opposition to the request." Technically, the Commission is correct because no party filed a specific pleading challenging the administrative notice request. Instead, NOPEC and other intervening parties filed a number of pleadings objecting to the **entire** ESP 3 Proposal and the due process concerns in the case.[41] The specific challenge to the administrative notice issue was raised by NOPEC and others only after its attempts to slow down the steamroller process (and provide the parties with an adequate opportunity to review the ESP 3 Proposal) were denied. Suggesting that NOPEC and others somehow approved the request (or waived the opportunity to contest it) is disingenuous.

Perhaps most importantly, FirstEnergy renewed its request that the entire ESP 2 Case be incorporated into the record of this proceeding on the first day of the evidentiary hearing. The Attorney Examiner properly rejected this request, stating: "I am uncomfortable incorporating

---

[39] FirstEnergy Ex. 1 (the ESP 3 application) at p. 5. Notably, the ESP 2 Case dealt with establishing the form of SSO for an entirely different three-year time period, and involved different parties from those in this case.

[40] As discussed in greater detail below, the fact that the attorney examiners in the ESP 2 Case chose to incorporate the record from the MRO Case has no bearing on this case. Two incorrect legal decisions do not somehow render the conclusion sufficient.

[41] See e.g., Joint Consumer Advocates' Interlocutory Appeal from the June 6, 2012 Attorney Examiner's Ruling Regarding Administrative Notice filed June 11, 2012.

wholesale the entire record from 10-388. If you have a document-by-document request for administrative notice of matters in 10-388, please make it then."[42]

It was another two days after FirstEnergy's request to incorporate the entire record was denied (and on the third day of the evidentiary hearing) that FirstEnergy finally provided a "List of Documents for Administrative Notice" to the parties. The "List of Documents for Administrative Notice" included: (i) FirstEnergy's application for a market rate offer in the MRO Case (more than 600 pages); (ii) two specific pages out of a total of approximately 830 pages from six separate volumes of testimony from the evidentiary hearing in the MRO Case;[43] (iii) FirstEnergy's application in the ESP 2 Case (including approximately 290 pages of exhibits and testimony); (iv) five specific pages out of a total of approximately 941 total pages from four separate volumes of testimony from the evidentiary hearing in the ESP 2 Case; (v) the prefiled testimony of three witnesses who did not testify or otherwise participate in the ESP 3 case (Hisham Choueiki, Tamara Turkenton, and John D'Angelo); and (vi) the prefiled testimony of FirstEnergy witness Ridmann and Commission Staff witness Fortney from the ESP 2 Case.[44] Contrary to the statement on page 20 of the Order, this was not a "small number of documents."

Despite numerous objections from the non-signatory parties to the ESP 3 Stipulation, including those of NOPEC, NOAC and OCC,[45] the Attorney Examiner took administrative notice of all of the documents identified in FirstEnergy's "List of Documents for Administrative

---

[42] Tr. Vol. I at p. 29.

[43] It should be noted that the MRO Case dealt with different statutory requirements, and a different form of SSO that was never actually ruled upon by the Commission.

[44] See Tr. Vol. III at pp. 10-12.

[45] Other non-signatory parties which objected to the Companies' request for administrative notice at the hearing included AEP Retail, the Environmental Law and Policy Center, Sierra Club, and the Retail Energy Supply Association.

Notice." This ruling took place on the very same day FirstEnergy provided NOPEC/NOAC with the "List of Documents for Administrative Notice."[46]

Compounding matters, counsel for Nucor Steel Marion ("Nucor") also asked the Attorney Examiners to take administrative notice of the direct prefiled testimony of Nucor witness Dennis Goins from the MRO Case,[47] despite Nucor's conscious decision not to present testimony in this case.[48] Over the objections of NOPEC, NOAC, OCC and other parties, the Attorney Examiner took administrative notice of Mr. Goins' testimony as well.[49]

The effect of FirstEnergy's tactic, and the rulings of the Attorney Examiner and Commission, prevented the non-signatory parties in this case from having an adequate opportunity to review and rebut such "evidence." The United States and Ohio constitutions, Ohio law and the Commission's rules demand a more orderly and fair process.

2. NOPEC did not have knowledge of and/or an opportunity to explain and rebut the facts administratively noticed.

In affirming the ruling on administrative notice, the Commission initially relied upon the May 10, 2010 Entry on Rehearing from the ESP 2 Case. This ruling, however, is based on the incorrect legal conclusion that the taking of administrative notice of random portions of prior Commission proceedings satisfies Ohio law. This incorrect assumption (and the improper legal analysis and conclusion in the Entry on Rehearing) cannot justify the same improper legal analysis and conclusion in this case.

---

[46] Tr. Vol. III at. pp. 170-173.

[47] *Id.* at p. 19.

[48] As a signatory part to the ESP 3 Stipulation, Nucor had every opportunity to participate in this case and present testimony. Nucor, however, chose not to present testimony. Instead, without notice to FirstEnergy, the Commission, NOPEC, NOAC, or any other interested parties, Nucor sprung the request for administrative notice on the parties on the third day of the evidentiary hearing in this case, thereby denying all of the parties the opportunity to review such testimony and cross-examine the unavailable witness. Further, the testimony of the unavailable Mr. Goins involved a separate case (the MRO Case), and a different form of SSO.

[49] Tr. Vol. III at p. 171.

Next, the Commission turns to Ohio Supreme Court decisions on the issue of administrative notice in Commission proceedings.[50] Together, those cases establish that certain factors should be reviewed in determining whether administrative notice is proper, including: "whether the complaining party had prior knowledge of, and had an opportunity to explain and rebut, the facts administratively noticed."[51] In this case, however, NOPEC did not have prior knowledge of the facts administratively noticed, and were not (and still have not) been provided with the opportunity to explain and rebut those facts.

In fact, NOPEC did not have knowledge of the documents to be administratively noticed until the close of the evidentiary hearing on June 6, 2012,[52] and the Attorney Examiner did not take administrative notice of the documents until the end of the hearing that same day.[53] FirstEnergy did ask to incorporate the record through a brief statement at the end of its ESP 3 application,[54] but such a far-reaching request was not ruled upon by the Commission <u>before</u> the hearing. At the evidentiary hearing, Attorney Examiner Price specifically rejected the incorporation of the entire record in the ESP 2 Case; instead, asking FirstEnergy to submit a specific list of documents.[55] Thus, it was only at the close of the third day of the evidentiary hearing that the Attorney Examiner finally ruled on FirstEnergy's request (and that of Nucor, for which NOPEC had absolutely no notice), and provided NOPEC with knowledge of the facts to be administratively noticed.

[50] See *Canton Storage and Transfer Co. v. PUCO* (1995), 72 Ohio St.3d 1; and *Allen v. PUCO* (1988), 40 Ohio St.3d 184).

[51] *Canton Storage and Transfer* at p. 8.

[52] Tr. Vol. III at pp. 10-12.

[53] *Id.* at pp. 170-173.

[54] FirstEnergy Ex. 1 at p. 5.

[55] Tr. Vol. I at p. 29 (explaining "I am uncomfortable incorporating wholesale the entire record from 10-388").

Since NOPEC and others did not have knowledge of the documents to be administratively noticed until the close of the evidentiary hearing on June 6, 2012, they had no opportunity to explain and/or rebut such facts. The reason is simple: until the Attorney Examiner took administrative notice on June 6, 2012, there were not any facts administratively noticed, and therefore no opportunity to explain or rebut them existed. Moreover, there has been no opportunity granted to the parties after June 6, 2012 to explain or rebut the facts administratively noticed.

The Commission, however, unreasonably claims that NOPEC had ample opportunity to explain or rebut the evidence because: (i) the "parties had the opportunity to conduct further discovery on FirstEnergy and any other party regarding any evidence presented in the ESP 2 Case or the MRO Case;"[56] (ii) the "parties had the opportunity to request a subpoena to compel witnesses from the ESP 2 Case or the MRO Case to appear for further cross-examination;" and (iii) the "parties had the opportunity to present testimony at hearing in this proceeding to explain or rebut any evidence in the record of the ESP 2 Case or the MRO Case."

Generally, the Commission ignores the fact that, as a separate ESP filing, the ESP 3 Proposal must be judged solely on its own merits. The ESP 3 Proposal involves a new ESP with new substantive provisions, and covering a new two-year time period (from June 1, 2014 through May 31, 2016).[57] The ESP 3 Proposal is subject to a separate and independent stand-alone analysis. Requiring the intervening parties to analyze thousands of pages of documents from two prior cases with no bearing on the outcome of this case is entirely unreasonable. The burden of proof remained solely with FirstEnergy, and the Commission cannot and should not authorize a

---

[56] Order at p. 20.

[57] See generally the ESP 3 Application, ESP 3 Stipulation, and accompanying exhibits ("FirstEnergy Ex. 1").

process reducing FirstEnergy's burden of proof, while seemingly shifting that burden to the intervening parties.

Further, the Commission's statements that the parties had ample opportunity to conduct discovery, subpoena witnesses, and present testimony on "evidence" from the ESP 2 Case and MRO Case are ridiculous. As explained above, none of the parties (including FirstEnergy) had notice of the facts administratively noticed until the third day of the evidentiary hearing. Prior to this date, there were no administratively noticed facts to ask about in discovery or even on cross-examination at the evidentiary hearing. By the time NOPEC and others learned of the ruling on administrative notice, the Commission's rules for discovery and subpoenas were no longer applicable, and the deadlines for serving discovery requests and filing testimony had long expired. For these reasons, the Commission's arguments are unreasonable and unlawful.

3. The Commission erroneously claims that the parties were not prejudiced by the administrative notice ruling.

The Order baldly states that the "parties have not demonstrated that they were prejudiced by the taking of administrative notice,"[58] and that "all claims of prejudice have been vague and overly broad."[59] Nothing could be further from the truth.

First, and foremost, NOPEC and other intervening parties have contested the administrative notice ruling since the first day of the evidentiary hearing in this case. In addition to raising lengthy oral objections at the hearing, NOPEC and others joined together in filing a request for an interlocutory appeal on the issue. NOPEC subsequently featured the argument in both its initial and reply briefs.

[58] Order at p. 20.

[59] *Id.* at p. 21.

Second, the administrative notice ruling wasted valuable resources of NOPEC and other parties throughout the evidentiary hearing. Rather than focusing on the issues presented in the ESP 3 Proposal (and actually in evidence), NOPEC was left scrambling to review thousands of pages of documents after the pertinent FirstEnergy witness (Bill Ridmann) had completed his cross-examination.

Third, the Commission took administrative notice of the prefiled testimony of three witnesses who did not testify or otherwise participate in the ESP 3 case (Hisham Choueiki, Tamara Turkenton, and John D'Angelo). Such a ruling runs contrary to the due process protections afforded under the 14th Amendment of the United States' Constitution and Article I, Section 16 of the Ohio Constitution, as NOPEC and other parties were not presented with any opportunity whatsoever to cross-examine these witnesses or present contrary evidence at the evidentiary hearing.

Finally, the Commission engages in a dangerous game that establishes a far-reaching and troublesome precedent—namely that applications, stipulations, transcript testimony, and prefiled testimony from unrelated prior proceedings can freely serve as evidence in a subsequent proceeding. What will prevent FirstEnergy from filing an application in 2016 for a new ESP based solely on the "evidence" from its three prior ESP proceedings? Based on the ruling in this case, that will not only be acceptable, but seemingly encouraged.

4. The Commission erred by taking administrative notice of more than undisputed adjudicative facts.

The Commission's ruling on administrative notice completely ignores the fundamental requirement of judicial or administrative notice is that the notice relates to an adjudicative fact "not subject to reasonable dispute in that it is either (i) generally known within the territorial jurisdiction of the trial court or (ii) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Ohio Evid. R. 201(B). Expanding on this rule, the Staff Notes to Ohio Evid. R. 201(B) explains:

> Rule 201(B)(1) applies to adjudicative facts generally known within the territorial jurisdiction. This category relates to the type of fact that any person would reasonably know or ought to know without prompting within the jurisdiction of the court and includes an infinite variety of data from location of towns within a county to the fact that lawyers as a group enjoy a good reputation in the community. A second class of facts subject to judicial notice is provided by Rule 201(B)(2). These are facts capable of accurate and ready determination. . . . The type of fact contemplated by 201(B)(2) includes scientific, historical and statistical data which can be verified and is beyond reasonable dispute.

The alleged "facts" for which administrative notice was granted are (and were) reasonably disputed in both the MRO Case and ESP 2 Case. Introduction of these administratively noticed documents also were subject to strong objections from numerous interested parties at the evidentiary hearing in this case.

Further, the information in a complex multi-billion dollar utility proceeding before the Commission assuredly is not the "type of fact that any person would reasonably know or ought to know," and therefore falls outside the scope of Ohio Evid. R. 201(B)(1).

Finally, the information included in the administratively noticed documents is neither "capable of accurate and ready determination," nor "scientific, historical and statistical data which can be verified and is beyond reasonable dispute," as required by Ohio Evid. R. 201(B)(1). Instead, the vast majority of the documents include opinions and testimony disputed and debated in the MRO Case, the ESP 2 Case and this proceeding.[60]

For these reasons, the "facts" subject to administrative notice are entirely outside the scope of the type of facts appropriate for administrative notice. Indeed, the scope of what was

[60] The Attorney Examiner stated: "All the documents that are listed we've taken administrative notice, whether it's facts or opinion. I think we – the rationale that I explained applies equally to facts as – to opinion as it would to facts." Tr. Vol. III at p. 172.

noticed goes far beyond the mere undisputed facts that can be considered for administrative notice.

D. The ESP 3 Stipulation is not the proper forum for approval of FirstEnergy's corporate separation plan.

The Commission erred by approving FirstEnergy's corporate separation plan as part of the ESP 3 Proposal, which still has not been reviewed in detail by the Commission or interested parties.[61] As Commissioner Roberto aptly stated in the Order, "the Commission should not be eager to re-approve and extend the Companies' current corporate separation plan without a more deliberate review."[62]

Initially adopted in 1999 as part of Senate Bill 3, R.C. 4928.17 required each electric distribution utility in Ohio to implement and operate under a corporate separation plan.[63] As such, FirstEnergy submitted an interim corporate separation plan in 1999, which was approved by the Commission as part of FirstEnergy's electric transition plan proceeding (Case No. 99-1212-EL-ETP) in 2000. For the next nine (9) years, FirstEnergy operated under this *interim* corporate separation plan.

Following the enactment of Senate Bill 221, however, the Commission updated and revised its corporate separation rules, and required each electric distribution to file an application for approval of a new corporate separation plan. On June 1, 2009, FirstEnergy filed its new corporate separation plan in Case No. 09-462-EL-UNC. To date, there has been no in-depth review or analysis of FirstEnergy's corporate separation plan because it has received a rubber-stamped approval as part of FirstEnergy's prior ESP proceedings.

---

[61] Order at p. 15.

[62] Dissenting Opinion at p. 6.

[63] R.C. 4928.17(A).

At the current time, however, FirstEnergy's corporate separation plan is due for a full-scale review by the Commission and interested parties, as there are significant concerns about whether the existing plan satisfies R.C. 4928.17(A)(2) and/or (3). Accordingly, the Commission erred by automatically re-approving FirstEnergy's corporate separation plan.

As a result, and pursuant to R.C. 4928.17(D), the Commission should reject the approval of FirstEnergy's corporate separation plan, and establish a separate procedural schedule to provide NOPEC and other interested parties with the opportunity to raise specific objections and proposed modifications to the corporate separation plan in order to ensure compliance with R.C. 4928.17 and the Commission's rules.

E. The Commission's approval of Rider DCR as part of the ESP 3 Proposal violates R.C. 4928.143(B)(2)(h).

The Commission's approval of Rider DCR as part of the ESP 3 Proposal violates R.C. 4928.143(B)(2)(h), which requires that the Commission, prior to approval of such a provision, "examine the reliability of the electric distribution utility's distribution system and ensure that customers' and the electric distribution utility's expectations are aligned and that the electric distribution utility is placing sufficient emphasis on and dedicating sufficient resources to the reliability of its distribution system." As Commissioner Roberto explained in her dissenting opinion:

> In order for Rider DCR to be included appropriately within the ESP 3, the Companies have the burden to demonstrate that the Companies' and customers' expectations are aligned and the Companies are dedicating sufficient resources to reliability. Additionally, this provision must be judged as part of the aggregate terms and conditions of an ESP; e.g. if a similar or better result is achievable through an MRO, then it calls into question whether the ESP is beneficial.[64]

[64] Dissenting Opinion at p. 5.

Continuing on, Commissioner Roberto explained that the "record is insufficient to find that the Companies dedicated sufficient resources to reliability, particularly in the form of participation in the base residual auction whose very purpose is reliability. For this reason, I find that continuation of Rider DCR is not supported by this record."[65] For these reasons, the Commission's approval of the continuation of Rider DCR violates R.C. 4928.143(B)(2)(h).

F. The Commission's approval of the ESP 3 Proposal violates R.C. 4905.22 by approving unjust and unreasonable rates.

Ohio law requires the Commission to assure that public utilities' charges for service are just and reasonable. R.C. 4905.22 states:

> Every public utility shall furnish necessary and adequate service and facilities, and every public utility shall furnish and provide with respect to its business such instrumentalities and facilities, as are adequate and in all respects just and reasonable. All charges made or demanded for any service rendered, or to be rendered, shall be just, reasonable, and not more than the charges allowed by law or by order of the public utilities commission, and no unjust or unreasonable charge shall be made or demanded for, or in connection with, any service, or in excess of that allowed by law or by order of the commission.

By approving the ESP 3 Proposal, the Commission violated R.C. 4905.22 by authorizing FirstEnergy to implement charges that are unjust and unreasonable, specifically the higher rates expected to be charged as a result of the switch from a one-year to a three-year auction product, as well as the charges to be recovered through Rider DCR.

Commissioner Roberto discussed the disadvantages of switching from a one-year auction product to a three-year auction product in her dissenting opinion:

> we must assume that a bidder for a three-year product will capture all of the benefit of the prices provided by the one-year product and offer them back to the customers and, in addition, offer a lower price than they would otherwise for the product covering years two and three. There is nothing in the record to suggest that this will be true. In fact, the only suggested benefit is averaging the lower prices (which customers would already

[65] *Id.*

receive) with the anticipated higher prices – in essence simply paying ahead for the ability to experience less of a price change on June 1, 2014.[66]

It is unjust and unreasonable for the Commission to require customers to pay the higher costs of electricity associated with the two year ESP 3 time period (2015 and 2016) now. The only just and reasonable decision would be allowing customers to take advantage of the benefit of their bargain in the ESP 2 Case—namely the low generation rates in today's electric market (and associated with the one-year auction product approved in the ESP 2 Case).

For the reasons set forth above in Section II.E, the amounts proposed to be recovered through Rider DCR are unjust and unreasonable.

III. CONCLUSION

For the foregoing reasons, NOPEC respectfully requests that the Commission grant this Application for Rehearing and reject FirstEnergy's ESP 3 Stipulation. In the alternative, NOPEC respectfully requests that the Commission modify the ESP 3 Proposal as follows:

(a) Eliminate the continuation of the DCR Rider after May 31, 2014, and require any distribution-related investments to be accounted for in a separately filed distribution rate case;

(b) Eliminate FirstEnergy's proposal to exclude deferrals from the SEET calculation;

(c) Require FirstEnergy to bid all of its eligible demand response and energy efficiency resources into all future PJM capacity auctions;

(d) Continue to hold the proposed energy auctions in October 2012 and January 2013 in accordance with the terms of the combined stipulation from the ESP 2 Case (the use of a one-year auction product covering the final year of the current ESP from June 1, 2013 through May 31, 2014), while modifying the ESP 3 Proposal to provide for a second auction product covering the two-year time period of the ESP 3 Proposal (June 1, 2014 through May 31, 2016); and

---

[66] Dissenting Opinion at p. 2.

(e) Require FirstEnergy to comply with the corporate separation requirements in R.C. 4928.17, and order a detailed review of its existing corporate separation plan to determine whether it complies with Ohio law.

Respectfully submitted,

Matthew W. Warnock

Glenn S. Krassen
Bricker & Eckler LLP
1001 Lakeside Avenue, Suite 1350
Cleveland, OH 44114
Telephone: (216) 523-5405
gkrassen@bricker.com

Matthew W. Warnock
Bricker & Eckler LLP
100 South Third Street
Columbus, Ohio 43215
Telephone: (614) 227-2300
mwarnock@bricker.com
Attorneys for the Northeast Ohio Public Energy Council

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon the following parties of record, by electronic mail, this 17th day of August 2012.

Matthew W. Warnock

haydenm@firstenergycorp.com
korkosza@firstenergycorp.com
burkj@firstenergycorp.com
Amy.Spiller@Duke-Energy.com
cynthia.brady@constellation.com
dakutik@JonesDay.com
dane.stinson@baileycavalieri.com
david.fein@constellation.com
DBoehm@bkllawfirm.com
drinebolt@ohiopartners.org
Garrett.Stone@bbrslaw.com
gregory.dunn@icemiller.com
jbowser@mwncmh.com
mhpetricoff@vorys.com
Mike.Lavanga@bbrslaw.com
MKurtz@bkllawfirm.com
mparke@firstenergycorp.com
trent@theOEC.org
jpmeissn@lasclev.org
Ccunningham@Akronohio.Gov;
rkelter@elpc.org
joliker@mwncmh.com
dsullivan@nrdc.org
callwein@wamenergylaw.com
matt@matthewcoxlaw.com;
greg.lawrence@cwt.com;
cathy@theoec.org
robinson@citizenpower.com;
myurick@taftlaw.com
nolan@theOEC.org
sam@mwncmh.com
smhoward@vorys.com
steven.huhman@morganstanley.com
Thomas.McNamee@puc.state.oh.us
jmclark@vectren.com
gpoulos@enernoc.com
cmooney2@columbus.rr.com

RHorvath@city.cleveland.oh.us
christopher.miller@icemiller.com
asim.haque@icemiller.com
vparisi@igsenergy.com
sauer@occ.state.oh.us
etter@occ.state.oh.us
yost@occ.state.oh.us
leslie.kovacik@toledo.oh.gov
trhayslaw@gmail.com
Judi.sobecki@dplinc.com
Randall.Griffin@dplinc.com
Jkyler@bkllawfirm.com
tsiwo@bricker.com
jeanne.kingery@duke-energy.com
dorothy.corbett@duke-energy.com
jejadwin@aep.com
mdortch@kravitzllc.com
mjsatterwhite@aep.com
stnourse@aep.com
sandy.grace@exeloncorp.com
stephen.bennett@exeloncorp.com
lkalepsclark@vorys.com
wttpmlc@aol.com
BarthRoyer@aol.com

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan.	Case No. 12-1230-EL-SSO

SECOND ENTRY ON REHEARING

The Commission finds:

(1) Ohio Edison Company (OE), The Cleveland Electric Illuminating Company (CEI), and the Toledo Edison Company (TE) (collectively, FirstEnergy or 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) On April 13, 2012, FirstEnergy filed an application pursuant to Section 4928.141, Revised Code, to provide for a standard service offer (SSO) ending May 31, 2016 (Co. Ex. 10). The application is for an electric security plan (ESP), in accordance with Section 4928.143, Revised Code, and the application included a stipulation and recommendation (Stipulation) agreed to by various parties regarding the terms of the proposed ESP (ESP 3).

(3) The hearing in this proceeding commenced on June 4, 2012, and concluded on June 8, 2012.

(4) On July 18, 2012, the Commission issued its Opinion and Order in this proceeding, adopting the Stipulation and approving the ESP 3.

(5) 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.

(6) On August 17, 2012, applications for rehearing were filed by the Northeast Ohio Public Energy Council (NOPEC), Sierra Club, the Environmental Law and Policy Center (ELPC), and Interstate Gas Supply, Inc. (IGS). Moreover, joint applications for rehearing were filed by OCC and Citizen Power (OCC/CP) and by the Retail Energy Supply Association, Direct Energy Services, LLC, and Direct Energy Business, LLC (Suppliers).

(7) On August 27, 2012, FirstEnergy and Nucor Steel Marion, Inc., (Nucor) each filed memoranda contra the applications for rehearing.

(8) On September 12, 2012, the Commission granted rehearing for the purpose of further considering the matters raised in the applications for rehearing.

(9) Moreover, on July 31, 2012, the Ohio Consumers' Counsel (OCC) filed a motion to take administrative notice of certain documents filed by the Companies in *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of their Energy Efficiency and Peak Demand Reduction Program Portfolio Plans for 2013 through 2015*, Case Nos. 12-2190-EL-POR, et al. (*Portfolio Cases*). Further, in their joint application for rehearing, OCC/CP request that the Commission take administrative notice of the audit reports filed in *In the Matter of the Review of the Alternative Energy Rider Contained in the Tariffs of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*, Case No. 11-5201-EL-RDR (*AER Case*).

(10) In support of its request that administrative notice be taken of documents filed in the *Portfolio Cases*, OCC argues that FirstEnergy filed these documents with the Commission; thus, the documents are not subject to reasonable dispute. OCC claims that the documents would allow the Commission to approximate the incremental lost distribution revenue the Companies seek to collect from customers for the years 2013 through 2015. Further, OCC claims that the information in these documents is responsive to discovery served upon FirstEnergy and that

the Companies failed to supplement their responses to that discovery as required by Rule 4901-1-16(D)(3), Ohio Administrative Code (O.A.C.).

(11) On August 27, 2012, the Companies filed a memorandum contra the motions to take administrative notice. On August 30, 2012, OCC/CP filed a motion to strike the memorandum contra, contending that the filing was not timely pursuant to the procedural schedule established by the attorney examiner on April 19, 2012. FirstEnergy filed a memorandum contra the motion to strike on September 4, 2012. OCC/CP filed a reply to the memorandum contra the motion to strike on September 7, 2012. The Commission finds that the memorandum contra was not filed in the time period established by the attorney examiner for this proceeding. Entry (April 19, 2012) at 3. Therefore, the motion to strike should be granted.

(12) The Commission notes that the Supreme Court of Ohio has held that there is neither an absolute right for nor a prohibition against the Commission's taking administrative notice of facts outside the record in a case. Instead, each case should be resolved on its facts. The Court further held that the Commission may take administrative notice of facts if the complaining parties have had an opportunity to prepare and respond to the evidence and they are not prejudiced by its introduction. *Canton Storage and Transfer Co. v. Pub. Util. Comm.*, 72 Ohio St.3d 1, 8, 647 N.E.2d 136 (1995) (citing *Allen v. Pub. Util. Comm.*, 40 Ohio St.3d 184, 186, 532 N.E.2d 1307 (1988)).

(13) With respect to the requests of OCC/CP for administrative notice of documents in the record of the *Portfolio Cases* and the *AER Case*, the Commission finds that FirstEnergy has not had an opportunity prepare for, explain or rebut the evidence for which OCC seeks administrative notice. Likewise, the other signatory parties to the Stipulation filed in this proceeding have not had an opportunity to prepare for, explain or rebut this evidence. The record of the instant proceeding has closed; OCC's requests for administrative notice were made on July 31, 2012, and August 17, 2012, after the completion of the hearing on June 8, 2012, and after the issuance of the Opinion and

Order in this proceeding on July 18, 2012. Moreover, the hearing in the *AER Case* has even not commenced. Thus, no witness has sponsored the documents for which OCC/CP seek administrative notice, no corrections, if necessary, have been made to the documents, no foundation has been laid for their admission, and the documents have not been admitted into the record of the *AER Case*.

Further, the Commission finds that FirstEnergy and the signatory parties to the Stipulation would be prejudiced by the taking of administrative notice of these documents. The Commission has already issued its Opinion and Order in this proceeding. OCC/CP ask the Commission to reject or modify FirstEnergy's approved ESP 3, based at least in part on these documents. It would be unfair for the Commission to reject or modify the ESP 3 based upon evidence that FirstEnergy and the signatory parties have not had an opportunity to prepare for, explain or rebut. On the other hand, OCC/CP will not be prejudiced if the Commission does not take administrative notice of these documents. The hearing has been held in the *Portfolio Cases* and scheduled in the *AER Case*. OCC/CP was free to raise any relevant issues in the *Portfolio Cases* and will be free to raise any issues regarding these documents that are relevant to the *AER Case*.

Further, the Commission notes that Attachment 1 to OCC/CP's application for rehearing appears to be derived from the documents from the *Portfolio Cases* for which OCC/CP sought administrative notice. Because we have declined to take administrative notice of the documents from which Attachment 1 was derived and because Attachment 1 has not been admitted into evidence in this proceeding, Attachment 1 will be disregarded by the Commission.

(14) In its application for rehearing, NOPEC claims in its seventh assignment of error that the Commission violated the due process rights of NOPEC and other non-signatory parties when it failed to afford the parties adequate time to prepare for the case. OCC/CP claim, in their fifth assignment of error, that the Commission erred by

violating the due process rights of the non-signatory parties in this case. In support of this assignment of error, OCC/CP claim that the timeline for this case was inadequate and prejudiced the non-signatory parties. OCC/CP claim in their application for rehearing that the Companies requested a waiver from their obligation to provide notice of their application through newspaper publication and that the Commission granted this waiver and did not order FirstEnergy to publish a newspaper notice. OCC/CP also allege that the Commission's rulings affected intervention in contravention of the law. Further, OCC/CP claim that the Commission erred by taking administrative notice of information contained in the Companies' previous standard service offer cases.

Likewise, NOPEC claims in its eighth assignment of error that the Commission violated the due process rights of NOPEC and other non-signatory parties when the Commission unlawfully took administrative notice of portions of the record in the Companies' previous standard service offer cases despite the fact that the parties did not have knowledge of, or an opportunity to explain and rebut the facts administratively noticed. ELPC also claims, in its second assignment of error, that the Opinion and Order improperly affirmed the attorney examiners' ruling taking administrative notice of evidence from the previous standard service offer cases.

(15) In its memorandum contra, FirstEnergy argues that the procedural schedule did not deny the parties the opportunity for thorough and adequate participation in the proceeding. For example, the Companies claim that the procedural schedule permitted OCC to serve six rounds of discovery and present testimony for three witnesses, including an outside consultant. FirstEnergy also denies that the procedural schedule affected the intervention of parties in this proceeding, noting that no party was denied intervention.

Further, FirstEnergy and Nucor claim that the Commission properly affirmed the ruling of the attorney examiner granting administrative notice at the hearing. FirstEnergy argues that parties were placed on notice that the

Companies sought administrative notice seven weeks prior to the hearing. FirstEnergy also claims that OCC/CP, NOPEC and ELPC all had the opportunity to seek in discovery the specific documents that FirstEnergy intended to rely upon and that the parties failed to do so.

Nucor argues that the Commission properly took administrative notice of portions of the record from the prior standard service offer cases. Nucor represents that ESP 3 is, in large part, an extension of the Companies current ESP. Further, Nucor notes that the request to take administrative notice was contained in both the application and the Stipulation, both of which were filed on April 13, 2012, and that no party raised any objection or concern about the request until after the hearing commenced. Nucor claims that NOPEC and OCC/CP knew, or should have none, from the beginning of this proceeding, that FirstEnergy and other parties were seeking incorporation of parts of the record from the prior cases into the record of the current proceeding since the request was included in both the application and the Stipulation.

(16) With respect to the allegations regarding a lack of due process in this proceeding, the Commission thoroughly addressed these issues in the Opinion and Order in this proceeding. Opinion and Order at 21-23, 46-47. The only new issue raised is the issue of published notice. OCC/CP claim that the Companies requested a waiver from their obligation to provide notice of their application through newspaper publication and that the Commission granted this waiver and did not order FirstEnergy to publish a newspaper notice. These claims are misleading. The Companies requested a waiver from the requirement that they provide a *proposed* notice for publication as part of their application contained in Rule 4901:1-35-04(B), O.AC. Entry (April 25, 2012) at 6. Although this waiver was granted, the Commission subsequently ordered FirstEnergy to publish notice of the application and the three public hearings held in this proceeding. Entry (May 9, 2012) at 2-3. Further, at the evidentiary hearing, the proofs of publication of the newspaper notice were admitted into the record (Tr. II at 271; Co. Ex. 5). Thus, the Commission finds that OCC/CP's allegations that

published notice was not provided are misleading and have no merit.

Regarding the claims that the Commission unlawfully affirmed the ruling of the attorney examiners to take administrative notice of a limited set of documents, we find that no new issues have been raised on rehearing and that the Commission fully addressed all issues in the Opinion and Order in this proceeding. Opinion and Order at 19-21.

Accordingly, rehearing on these assignments of error should be denied.

(17) In its first assignment of error, ELPC argues that the Opinion and Order in this proceeding improperly finds that the Companies filed a complete application pursuant to Rule 4901:1-35-03, O.A.C. Specifically, ELPC contends that the Companies failed to include in their application a complete description of the ESP and testimony explaining and supporting each aspect of the ESP as required by Rule 4901:1-35-03(C)(1), O.A.C. ELPC acknowledges that the Commission approved several waivers of the filing requirements but notes that provision (C)(1) was not included in the approved waivers.

(18) The Commission finds that rehearing on this assignment of error should be denied. The Commission finds that the application (Co. Ex. 1), including both the Stipulation and the accompanying testimony, met the minimum requirements of Rule 4901:1-35-03(C)(1), O.A.C. The Stipulation contains a full and detailed description of all terms and conditions of the ESP 3. Moreover, ELPC had the opportunity in discovery to seek any additional explanation of the provisions of the ESP 3 necessary for its understanding of the application, and ELPC had the opportunity, at hearing, to cross examine FirstEnergy's witness Ridmann on the application but did not take advantage of that opportunity. Finally, the Commission notes that our approval of the ESP 3 was based upon the entire record in this proceeding, including all testimony and exhibits admitted into evidence, rather than only the information contained in the application.

(19) NOPEC claims, in its fourth assignment of error, that the Commission erred in concluding that the Stipulation satisfies the three-part test for determining the reasonableness of a Stipulation and, in its fifth assignment of error, that the Commission erred in concluding that the Stipulation is the product of serious bargaining because three primary residential customer advocates were effectively excluded from the bargaining process. Similarly, in their first assignment of error, OCC/CP claim that the Commission erred by finding the Stipulation to be reasonable under the three-prong test for the consideration of settlements. Specifically, OCC/CP claim that the Commission erred, as a matter of law, in adopting a Stipulation that lacked the necessary diversity of interests among those signing the Stipulation.

OCC/CP argue that the Commission should have ascertained the motivations of Ohio Partners for Affordable Energy and the Cleveland Housing Network, the Empowerment Center and the Consumer Protection Association in signing the Stipulation. OCC/CP claim that these parties' interests can be determined solely by the benefits these parties received under the Stipulation. Moreover, OCC/CP claim that these parties conducted no discovery prior to signing the Stipulation, did not cross-examine a single witness and did not file briefs in this proceeding. OCC/CP contend that the failure to conduct discovery or submit evidence allows the Commission to infer the parties' motivations in signing the Stipulation.

(20) FirstEnergy responds that the Stipulation was the product of serious bargaining among capable, knowledgeable parties because it was supported by parties representing diverse interests and was developed as part of a settlement process that excluded no one. FirstEnergy notes that the parties to the Stipulation represent customers from every class, municipalities and generation suppliers. Moreover, FirstEnergy claims that all parties participating in the previous ESP proceeding were given an opportunity to review a draft of the Stipulation and discuss it with the Companies before the Stipulation was filed (Co. Ex. 3 at 9-10, 13-14; Tr. III at 26).

(21) The Commission finds that rehearing on these assignments of error should be denied. OCC/CP's arguments in support of their assignment of error lack any evidentiary or legal support. The Commission notes that OCC/CP make allegations regarding the motivations of signatory parties in signing the Stipulation without citing to any testimony or other evidence in support of their allegations. OCC/CP claim that signatory parties conducted no discovery prior to signing the Stipulation but cite to no record evidence in support of this claim. Further, OCC/CP do not explain why it was necessary for these parties to conduct discovery if the parties were satisfied with the draft Stipulation. The Commission notes that counsel for CP also did not make an appearance at the hearing in this proceeding, did not present any witnesses, and did not cross-examine any witnesses. Therefore, we find that a party's motivations in a proceeding cannot be inferred based simply on the extent of the party's participation in the hearing.

Likewise, although OCC/CP claim that the Commission erred, *as a matter of law*, in adopting a Stipulation that lacked the necessary diversity of interests among those signing the Stipulation, the arguments raised by OCC/CP are bereft of legal authority. OCC/CP cite to no statutes, no Supreme Court rulings, and no Commission decisions in support of their arguments. In fact, the Commission already has rejected arguments that any one party, including OCC, must agree to a Stipulation in order to meet the first prong of the three-part test for the consideration of stipulations. *Dominion Retail v. Dayton Power & Light Co.*, Case No. 03-2405-EL-CSS, Opinion and Order (February 2, 2005) at 18; Entry on Rehearing (March 23, 2005) at 7. With respect to the arguments raised by NOPEC, the Commission finds that NOPEC has raised no new arguments in support of its assignment of error. All of the arguments raised by NOPEC were considered, and rejected, by the Commission in our Opinion and Order. Opinion and Order at 24-27.

(22) In support of its first assignment of error, OCC/CP also claim that the Commission erred when it determined that the Stipulation, as a package, benefits ratepayers and the public interest, as such determination is in violation of the

State policy set forth in Section 4928.02(A), Revised Code, mandating the availability of reasonably priced electric service. OCC/CP claim that the three-year auction process will not result in reasonably priced retail electric service. OCC/CP cite to the testimony of OCC witness Wilson that uncertainty regarding future prices creates risks that will result in expected risk premiums for market participants, which in turn raises costs to be paid by FirstEnergy customers (OCC Ex. 9 at 17).

OCC/CP further contend that the Commission erred when it disregarded distribution ratemaking and reliability in approving the ESP 3. OCC/CP contend that there is a significant disconnect between the timing of the reliability study performed by Staff witness Baker and the commencement of the ESP 3 on June 1, 2014. OCC/CP also claim that there must be a nexus between the annual audits and the Companies' annual performance reviews in order to ensure that the Companies are not dedicating excessive resources collected through Rider DCR to enhance distribution service.

OCC/CP also claim that the Commission's use of deferrals and carrying charges to extend the period for recovery of the costs of renewable energy credits results in unreasonably priced retail electric service and that the Commission erred by failing to require a reduction in the deferred charges for renewable energy credits to reflect that FirstEnergy has paid unreasonably high prices for renewable energy credits. OCC/CP claim that extending recovery of the costs of renewable energy credits over three years, as approved by the Commission in the ESP 3, will result in carrying charges of $680,000 for year 2011 (OCC Ex. 5) and that such carrying charges will continue, at different amounts, from 2012 through 2016. OCC/CP further claim that the Commission should grant rehearing in light of the auditors' reports filed in the *AER Case*, to ensure that the Companies only recover prudently incurred costs.

Moreover, OCC/CP claim that the energy efficiency and peak demand reduction charges result in customers paying unreasonably priced retail electric service in violation of

Section 4928.02(A), Revised Code. Specifically, OCC/CP claim the Commission erred by deciding that the costs of economic load response and optional load response programs should be collected from all customer classes instead of only from non-residential customers. OCC/CP cite to OCC witness Gonzalez's testimony that these program costs should be assigned to the respective non-residential customer classes whose customers are eligible to participate in the programs (OCC Ex. 11 at 41-42).

OCC/CP also allege that the Commission erred in its treatment of the lost distribution revenues that customers pay to the Companies because the Opinion and Order is not supported by the facts in the record and the collection of lost distribution revenue will lead to unreasonably priced retail electric service. OCC/CP raise concerns that, if the collection of lost distribution revenue is not capped by either a dollar amount or a time period, the balances can grow quite large. OCC/CP acknowledge that the collection of lost distribution revenue is only authorized through the term of the ESP 3 but argue that the Commission may, at some point in the future, authorize further collection of lost distribution revenue in the Companies' next standard service offer proceeding.

(23) FirstEnergy replies that the ESP 3 Stipulation benefits ratepayers and the public. FirstEnergy claims that laddered procurement strategy in ESP 3 employs a recognized risk mitigation strategy that will reduce rate volatility and enhance stability in the cost of electricity (Co. Ex. 14 at 14, 17-18). The Companies also argue that Rider DCR benefits customers and fosters reliable service by balancing the interests of all parties. FirstEnergy notes that the ESP 3 Stipulation merely extends Rider DCR and that, through the investments funded by Rider DCR and its predecessor, the Companies have been able to meet all of their reliability standards (Staff Ex. 2 at 5-6).

FirstEnergy also argues that spreading out the recovery of renewable energy costs benefits customers. The Companies claim that the unrebutted evidence at hearing demonstrates that the charges for the recovery of renewable energy will be lower due to ESP 3 (Co. Ex. 3 at

15). Further, FirstEnergy contends that its energy efficiency and demand reduction programs are reasonable. In response to OCC/CP's claim that residential customers should not pay for credits provided to interruptible customers, FirstEnergy notes that OCC's expert witness admitted that all customers, including residential customers, benefit from the interruptible programs (Tr. III at 99).

In its memorandum contra, Nucor agrees that extension of the interruptible programs provides substantial benefits. Nucor argues that the record demonstrates that the costs of the economic load rider credits are below the market price for capacity in the short term. Moreover, Nucor argues that the interruptible programs provide considerable benefits beyond capacity, claiming that the programs assist in achieving the statutory peak demand reduction benchmarks and provide significant economic development and job retention benefits.

In addition, the Companies argue that the Commission's approval of the recovery of lost distribution revenue was reasonable. The Companies claim that the recovery of lost distribution revenue simply keeps the Companies whole for the period of ESP 3 that distribution rates are frozen. The Companies also note that the authority to recover lost distribution is not unlimited but terminates with the end of ESP 3.

(24) The Commission finds that rehearing should be denied with respect to OCC/CP's first assignment of error. OCC/CP rely solely upon the testimony of OCC witness Wilson in support of the allegation that the three-year auction product will not result in reasonably priced electric service. However, the Commission was not persuaded by this testimony. The record establishes that a laddered approach is a reasonable form of risk management (Co. Ex. 14 at 3). Even OCC witness Wilson conceded that the staggering or laddering of auction products is an acceptable method to manage risks and that laddering will provide more stable prices than buying on a year-by-year basis (OCC Ex. 9 at 19; Tr. II at 137, 138-139, 154, 164). NOPEC witness Frye also agreed that laddering of auction

products is a reasonable method of minimizing risk and volatility (Tr. III at 49).

However, OCC witness Wilson also testified that, although a three-year auction product will smooth out generation costs, the "extraordinary uncertainty" or "extraordinary risk" in the market today will cause suppliers to include larger risk premiums in their bids, resulting in higher prices in the auction (OCC Ex. 9 at 23-24; Tr. II at 116, 146, 161). The record also reflects that Mr. Wilson previously testified in the *MRO Case* that the period before the proposed auction in that case was a period of "substantial uncertainty" and "extraordinary uncertainty" (Tr. II at 150-153, 158-159, 160-161). Moreover, Company witness Stoddard testified that many of the risk factors raised by Mr. Wilson are not extraordinary (Co. Ex. 14 at 13-14). We find that the OCC witness Wilson's repeated invocations of "extraordinary uncertainty" at different times and in response to different applications by the Companies undermines his testimony that the generally appropriate approach of including a three-year product with other products on a staggered basis should not apply in this particular case. Therefore, the Commission concludes that OCC/CP have cited to no credible evidence that the ESP 3 will not result in reasonably priced electric service.

Further, we find that OCC/CP's claim of a disconnect between the timing of the reliability study performed by Staff witness Baker and the commencement of the ESP 3 to be unconvincing. The record reflects that Staff witness Baker based his recommendation on reliability data from calendar year 2011 (Tr. II at 221-222). This data represents the most recent calendar year data available at the time of the hearing in this proceeding. Reliance upon the most recent data available does not create a disconnect and certainly does not violate the statutory requirements of Section 4928.143(B)(2)(h), Revised Code. With respect to OCC/CP's concerns that the Companies are dedicating excessive resources to enhanced distribution service, OCC/CP are free to raise that issue at the time of the annual audits on the Rider DCR. However, the Commission notes that the first annual review of the Rider DCR has been completed, and that no concerns regarding excessive spending by the Companies were raised. *In the Matter of the Review of the Delivery Capital Recovery Rider Contained in the Tariffs of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company*, Case No. 11-5428-EL-RDR, Finding and Order (August 22, 2012).

With respect to the arguments concerning the recovery of the costs of renewable energy resources, the Commission notes that we have opened a review of these costs in the *AER Case* and that a procedural schedule and hearing date for the issues raised in the audit reports have been established. *AER Case*, Entry (October 31, 2012). OCC/CP are free to raise any issues regarding excessive costs of renewable energy resources in that proceeding. The only issue decided in this proceeding was to allow the Companies to spread the costs over three years due to the sharp declines in standard service offer load due to increased customer shopping demonstrated in the record of this proceeding (Tr. I at 257-258).

Regarding OCC/CP's claim that the costs of economic load response and optional load response programs should be collected from non-residential customers rather than all customer classes, the Commission notes that OCC witness Gonzalez agreed that the existence of the interruptible load as part of the standard service offer load may lead to lower SSO generation prices (Tr. III at 99-100). Mr. Gonzalez also acknowledged that the economic load response and optional load response programs have an economic development component in order to promote manufacturing in this state (Tr. III at 166). The Commission finds that, since the evidence reflects that these programs tend to lower SSO generation prices as well as promote both economic development and compliance with the peak demand reduction provisions of Section 4928.66, Revised Code, all customers, including residential customers, benefit from these programs. Accordingly, the Commission affirms our conclusion that the costs of these programs should be recovered from all customers.

With respect to lost distribution revenue, the Commission has opened a proceeding to explore new rate designs which promote energy efficiency and properly align the interests of electric utilities with their customers. *In the matter of Aligning Electric Distribution Utility Rate Structure with Ohio's Public Policies to Promote Competition, Energy Efficiency, and Distributed Generation*, Case No. 10-3126-EL-UNC, Entry, (December 29, 2010). Further, pursuant to this investigation, the Commission has approved, on a pilot basis, new rate designs where the utility, customers and other interested stakeholders have been able to reach agreement. *In re Columbus Southern Power Company and Ohio Power Company*, Case Nos. 11-351-EL-AIR et al., Opinion and Order (December 14, 2011) at 7, 9-10; *In re Duke Energy Ohio*, Case Nos. 11-3549-EL-SSO, Opinion and Order (November 22, 2011) at 34. Moreover, the Commission may, with the Companies' concurrence, institute a modified, revenue neutral rate design during the term of the ESP 3. Opinion and Order at 40. However, the Commission notes that lost distribution revenue, which is based upon measurable and verifiable energy savings, is directly related to the statutory mandates for energy efficiency savings contained in Section 4928.66, Revised Code. There is no basis in the record of this case for instituting an arbitrary cap on lost distribution revenue, as proposed by OCC/CP, while the statutory mandates for energy efficiency savings increase every year.

(25) In its first assignment of error, Sierra Club argues that the Commission erred by applying the wrong standard for evaluating the Companies' approach to the PJM 2015/2016 base residual auction. Sierra Club contends that, under Section 4928.143(B)(2)(h), Revised Code, the Commission must examine whether the customers' and the utility's interests are aligned. Sierra Club claims that, in the Opinion and Order, the Commission improperly shifted the burden of proof onto the parties opposed to the Stipulation. Further, Sierra Club claims in its second assignment of error that the record before the Commission establishes that FirstEnergy's approach to the 2015/2016 base residual auction did not serve customer interests. In addition, in its third assignment of error, Sierra Club contends that the Commission erred by not addressing FirstEnergy's conduct with respect to customer interests and the Companies' profits. In addition, OCC/CP allege

that the Commission erred by finding that the Companies' actions bidding energy efficiency and peak demand response resources into PJM's 2015/2016 base residual auction were reasonable.

(26) FirstEnergy responds that these assignments of error simply repeat arguments previously rejected by the Commission in the Opinion and Order. FirstEnergy notes that claims regarding its conduct in the 2015/2016 base residual auction are not at issue in this case but are more properly addressed in three other cases pending before the Commission. Further, FirstEnergy claims that the record demonstrates that the Companies' concerns over the ownership of energy efficiency savings were legitimate (Tr. I at 287-289). The Companies further allege that Sierra Club's witness made no specific recommendations and was unable to quantify, with certainty, the impact of the Companies' bidding strategy (Tr. I at 357-358).

(27) With respect to the arguments raised by OCC/CP and Sierra Club regarding the Companies' participation in the 2015/2016 base residual auction, the Commission reiterates that this proceeding was opened to consider the Companies' application to establish an electric security plan pursuant to Section 4928.143, Revised Code, rather than to investigate the Companies' participation in the base residual auction. The Commission has opened a proceeding to investigate the Companies' participation in the 2015/2016 base residual auction. *In the Matter of the Commission's Review of the Participation of The Cleveland Electric Illuminating Company in the May 2012 PJM Reliability Pricing Model Auction*, Case No. 12-814-EL-UNC. The only nexus claimed by OCC/CP and Sierra Club between the base residual auction and this case was the Companies' proposal to bid certain demand response resources into the base residual auction. However, even this tenuous link was severed because the procedural schedule did not permit approval of the proposed ESP 3 prior to the base residual auction.

Moreover, Sierra Club's reliance upon Section 4928.143(B)(2)(h), Revised Code, with respect to this assignment of error, is misplaced. Section

4928.143(B)(2)(h), Revised Code, explicitly relates to "distribution service" and Sierra Club has not demonstrated that the base residual auction, which establishes prices for generation capacity, has any nexus with distribution service. Further, Sierra Club incorrectly claims that the Commission placed the burden of proof upon intervenors and applied the standard of review from Section 4905.26, Revised Code, to this proceeding. Consistent with Section 4928.143(C)(1), Revised Code, FirstEnergy bore the burden of proof in this proceeding and nowhere did the Commission apply the standard for review from Section 4905.26, Revised Code. In addition, the Commission notes that OCC/CP misrepresent the Commission's ruling in the Opinion and Order, claiming that the Commission found that the Companies' actions were "reasonable." However, the Commission only determined that the limited record in this proceeding, which was not initiated to investigate the Companies' actions in the base residual auction, did not demonstrate that the Companies' actions were unreasonable.

Moreover, the Commission finds that all of the remaining arguments raised by Sierra Club and by OCC/CP in support of these assignments of error were considered by the Commission and rejected in the Opinion and Order. Opinion and Order at 38. Accordingly, rehearing on these assignments of error should be denied.

(28) NOPEC, in its sixth assignment of error, claims that the Commission erred in approving the Stipulation because the terms in the Stipulation violate important regulatory principles and practices, including allowing the collection of deferred carrying charges to be excluded from the SEET calculation. Similarly, OCC/CP claim that the Commission erred in concluding that the Stipulation did not violate any regulatory principles. Specifically, OCC/CP claim that that the exclusion of deferred carrying charges from the SEET calculation violates an important regulatory principle because it deviates from the Commission precedent set in *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Administration of the Significantly Excessive Earnings Test*, Case No. 10-1261-EL-UNC, Opinion and Order (January 11, 2011) (*AEP-Ohio*

SEET Case). OCC/CP also claim that the Commission erred in its approval of the SEET calculation because the Opinion and Order is not supported by the facts in the record and therefore violates Section 4903.09, Revised Code.

(29) In its memorandum contra, FirstEnergy replies that the Commission appropriately determined that certain deferrals should be excluded from the SEET calculation. FirstEnergy contends that this exclusion was consistent with Commission practice and that the Commission approved a similar exclusion in ESP 2. FirstEnergy claims that the Commission has determined that the treatment of deferrals should be determined on a case-by-case basis in SEET proceedings. *In the Matter of the Investigation into Development of the Significantly Excessive Earnings Test Pursuant to Amended Substitute Senate Bill 221 for Electric Utilities*, Case No. 09-786-EL-UNC, Finding and Order (June 20, 2010) at 16.

(30) The Commission finds that rehearing on these assignments of error should be denied. As FirstEnergy points out, prior to the *AEP-Ohio SEET Case*, the Commission ruled that the treatment of deferrals, for purposes of SEET, should be determined on a case-by-case basis. In the Opinion and Order, the Commission explained that our ruling in the *AEP-Ohio SEET Case* was not applicable to the instant proceeding. Opinion and Order at 48. Accordingly, we find that there is no violation of an important regulatory principle by the Stipulation and that the Commission fulfilled its obligations under Section 4903.09, Revised Code.

(31) In its first assignment of error, NOPEC claims that the ESP 3 is not "more favorable in the aggregate as compared to the expected results that would otherwise apply under section 4928.142 of the Revised Code" (ESP v. MRO Test), thereby failing the ESP v. MRO Test in Section 4928.143(C)(1), Revised Code. Similarly, NOPEC claims in its second assignment of error that the Commission erred in concluding, without evidentiary support, that it would award FirstEnergy a $405 million rate increase during the two-year period of the ESP 3 for purposes of the ESP v.

MRO Test. In its third assignment of error, NOPEC claims that the Commission erred in developing non-existent qualitative benefits within the ESP 3 to satisfy the ESP v. MRO Test.

Likewise, in their second assignment of error, OCC/CP claim that the Commission erred in deciding that the proposed ESP 3 was more favorable in the aggregate as compared to the expected results that would otherwise apply under Section 4928.142, Revised Code, in violation of Section 4928.143(C)(1), Revised Code.

In support of its assignments of error, NOPEC claims that the proposed ESP 3 fails a quantitative analysis under Section 4928.143(C)(1), Revised Code. NOPEC commends the Commission for correctly removing any benefits associated with the RTEP obligation from the *ESP 2 Case* but contends the Commission failed to complete the quantitative analysis. NOPEC further contends that the Commission ignored the evidence to conclude that the estimated results of a distribution rate case and the proposed amounts to be recovered through Rider DCR would result in a wash for Ohio ratepayers. NOPEC claims that any alleged qualitative benefits associated with the three-year auction product in the ESP 3 are outweighed by uncertainty in the energy market and that other qualitative benefits are insufficient and unreasonable.

In support of their second assignment of error, OCC/CP claim that the Commission erred in finding that the ESP 3 met the ESP v. MRO Test. OCC/CP claim that the Commission erred by concluding that the costs of Rider DCR and the costs of a distribution rate case are a wash for customers.

OCC/CP further claim that the Commission erred by concluding that the PIPP auction benefits support the ESP over an MRO. OCC/CP contends that the Companies had ample time to bid the PIPP load out through a competitive process and the likelihood that the Ohio Department of Development (ODOD) will exercise its authority under Section 4928.54, Revised Code, to aggregate the PIPP for a competitive bid load is extremely remote.

Moreover, OCC/CP argue that the Commission erred by not recognizing that the low-income fuel funds provide an indirect benefit for FirstEnergy by assisting customer in paying their bills and should be excluded as a quantitative benefit of ESP 3. OCC/CP also contend that the Commission erred by concluding that shareholder funding for assistance to low-income customers should be considered as a qualitative benefit of the ESP 3.

OCC/CP also claim that the Commission erred by concluding that the ESP is more favorable in the aggregate for customers than an MRO under a qualitative analysis. OCC/CP argue that it was unreasonable for the Commission to modify the bid schedule for a three-year product in order to capture current lower generation prices and blend those with potentially higher prices in order to provide rate stability for customers as a purported benefit. OCC alleges that, in light of the approval of Rider DCR, it was unreasonable for the Commission to consider the extension of the distribution rate case "stay out" for two additional years as a benefit for customers.

In addition, OCC/CP contend that the Commission erred in its determination that the extension of the economic load response program was a qualitative benefit of the ESP 3. OCC/CP further allege that it was unreasonable for the Commission to consider the additional benefits provided by the Stipulation to interruptible industrial customers, schools, and municipalities as a benefit to the ESP.

(32) FirstEnergy responds that ESP 3 provides at least $21.4 million more in quantifiable benefits compared to an MRO. The Companies claim that the Commission correctly determined that the cost of Rider DCR was a "wash" when compared to a rate case. The Companies deny NOPEC's contention that the Commission's finding was without record support; the Companies note that both Company Witness Ridmann and Staff Witness Fortney testified at length on this issue (Tr. I at 125-130; Staff Ex. 3 at 4). Further, the Companies assert that there is no reason to believe that, if the Companies' costs are recoverable under Rider DCR, those same costs would not be recoverable in a distribution rate case.

Further, the Companies assert that ESP 3 provides a quantifiable benefit to PIPP customers. FirstEnergy rejects OCC/CP's claim that the PIPP discount benefits its affiliate; instead, the Companies claim that PIPP customers benefit through the six percent discount and that other customers may benefit if the discount reduces Universal Service Rider charges. Moreover, the Companies claim that the record does not support OCC/CP's claim that other generation suppliers were prepared to participate in an auction to serve the PIPP load (Tr. III at 134). Further, the Companies claim that the ESP 3 benefits low income customers through grants to fuel funds. FirstEnergy disputes OCC/CP's claim that the Companies receive an indirect benefit by helping at-risk customers pay their bills; FirstEnergy notes that the Companies recover bad debts from all customers through uncollectible riders. Therefore, the Companies' financial position is not improved simply because at-risk customers can pay their bills.

Moreover, FirstEnergy claims that the Commission properly considered the qualitative benefits provided by ESP 3. FirstEnergy notes that NOPEC witness Frye acknowledged that the Commission could consider qualitative benefits in the ESP v. MRO Test and that the Commission could approve an ESP even where the ESP's proposed generation prices were greater than market-based prices (Tr. III at 36).

In response to claims that potential prices in the ESP 3 are too uncertain to know whether customers will receive any benefits, the Companies claim that OCC/CP miss the point. Risk and volatility mitigation strategies are most prudently employed during times of the greatest uncertainty, and all witnesses who addressed this issue during the hearing agreed that a laddered procurement strategy is a widely accepted and reasonable strategy to mitigate risk and volatility (Tr. II at 139; Tr. III at 49; Tr. III at 141; Tr. I at 172; Co. Ex. 4 at 5).

In addition, the Companies argue that the Commission has previously rejected OCC/CP's claim that the distribution rate freeze provision in the ESP has been negated by Rider DCR. Opinion and Order at 56; *In re FirstEnergy*, Case No.

10-388-EL-SSO, Opinion and Order (August 25, 2010) (*ESP 2 Case*) at 36. Moreover, the Companies claim that, while changes in net plant may be equivalent between Rider DCR and a rate case, Rider DCR does not permit recovery of any other increased costs of the Companies, which would be permitted in a rate case. Further, OCC witness Gonzalez admitted that Rider DCR provides a number of benefits over a rate case, including quarterly reconciliation and annual audits (Tr. III at 139-141).

Finally, with respect to the interruptible programs, the Companies note that OCC witness Gonzalez testified that the interruptible program provides a benefit to all customers by assisting the Companies in meeting statutory demand reduction requirements (Tr. III at 99, 102). Moreover, the demand response resources may be bid into future base residual auctions, potentially reducing capacity prices and generating revenue to offset the costs of the interruptible programs (Co. Ex. 4 at 3-5).

(33) With respect to the arguments raised regarding Rider DCR, the Commission notes that NOPEC and OCC/CP misrepresent the fundamental nature of Rider DCR. Under the Stipulation, Rider DCR allows the Companies to "earn a return on and of plant in service associated with distribution, subtransmission, and general and intangible plant" not included in the rate base of the Companies' last distribution case (Co. Ex. 1, Stip. at 19; Tr. III at 39). In a distribution rate case, the Commission is required to determine the valuation, as of the date certain, of property used and useful in rendering public utility service. Section 4909.15, Revised Code. Therefore, to the extent that the Companies have made capital investments since the last distribution rate case, those investments will be recovered to an equal extent, through either Rider DCR or distribution rates, provided that the property is used and useful in the provision of distribution service. For this reason, Staff witness Fortney testified that, over the long term, the Companies will recover the equivalent of the same costs, and that, for purposes of the ESP v. MRO Test, the costs of the proposed Rider DCR and that the costs of a potential distribution rate case should be considered equal (Staff Ex. 3 at 4-5). The Commission notes that both the

Companies and consumers benefit from distribution mechanisms authorized by Section 4928.143(B)(2)(h), Revised Code, such as Rider DCR. The Companies benefit from the mitigation of regulatory lag in their distribution rates. Consumers benefit from caps in rate increases in the short term and more gradual rate increases in the future (Tr. III at 141).

The Commission further notes that OCC/CP have cited to no testimony or other evidence to explain how the shareholder-funded contributions to the fuel funds constitute an indirect benefit for the Companies in light of the riders in place which recover uncollectible expenses from other ratepayers. Similarly, OCC/CP have cited to no testimony or other evidence in the record in support of their assertion that the likelihood is extremely remote that ODOD will exercise its authority under Section 4928.54, Revised Code, to procure a competitive bid for the PIPP load. However, the Commission will reiterate that nothing in ESP 3 precludes ODOD from acting under Section 4928.54, Revised Code. Therefore, the six percent discount for the PIPP load provided for under ESP 3 is a minimum discount, and, if a better price can be obtained by ODOD through a competitive bid, that competitive bid will prevail over the provisions of ESP 3.

Moreover, NOPEC wholly fails to cite to any testimony or evidence in the record explaining why the qualitative benefits of ESP 3 are insufficient or unreasonable. As a preliminary matter, the record indicates widespread agreement with respect to the need to examine both qualitative and quantitative benefits under the ESP v. MRO Test. Staff witness Fortney opined that the ESP 3 contained qualitative benefits which the Commission should consider (Staff Ex. 3 at 3-4). NOPEC's witness Frye agreed that the Commission may approve an ESP under the ESP v. MRO Test even if the ESP included rates higher than market rates (Tr. III at 36); likewise, OCC expert Gonzalez agreed that the Commission can consider both quantitative and qualitative benefits in the ESP v. MRO Test (Tr. III at 135).

Further, the record fully supports our finding that the ESP 3 provides a qualitative benefit for customers by smoothing generation prices and mitigating the risk of volatility. Opinion and Order at 56. NOPEC's witness Frye and OCC expert Gonzalez both concurred that laddering auction products is a reasonable approach to minimize risks and volatility (Tr. III at 49; Tr. III at 141-142). Mr. Gonzalez further opined that gradual increases in rates are consistent with the ratemaking principle of gradualism (Tr. III at 141). Further, OCC witness Wilson agreed that the laddering or blending of auction products will result in less volatility of rates (Tr. II at 154). Staff witness Fortney testified that the blending of auction products will provide rate stability and that the distribution rate case "stay out" provision will provide rate certainty, predictability and stability for customers (Staff Ex. 3 at 3).

Finally, the Commission finds that the remaining arguments in support of the assignments of error raised by NOPEC and OCC/CP were fully considered and rejected by the Commission in the Opinion and Order. Opinion and Order at 48-57.

(34) In its ninth assignment of error, NOPEC claims that the Commission erred by approving FirstEnergy's corporate separation plan as part of the Stipulation without a formal, detailed review of the plan. Likewise, OCC/CP claim in their fourth assignment of error that the Commission erred by approving FirstEnergy's corporate separation plan.

(35) FirstEnergy responds that the Commission appropriately approved the Companies' corporate separation plan. The Companies claim that ESP 3 contained a provision that simply sought to maintain the preexisting Commission approval to the Companies' corporate separation plan, which was unchanged since the Commission approved the plan as part of the current ESP. *ESP 2 Case* at 16.

(36) The Commission notes that the corporate separation plan filed in Case No. 09-462-EL-UNC and approved by the Commission in the *ESP 2 Case* was incorporated by reference into the application and Stipulation filed in this proceeding. Therefore, the corporate separation plan is, by definition, unchanged since our approval of the *ESP 2 Case*.

Further, the Commission notes that, even if there were changes to the corporate separation plan, such changes do not necessitate a formal, detailed review as claimed by NOPEC. Rule 4901:1-37-06, O.A.C., provides that proposed changes to a corporate separation plan are approved automatically unless the Commission orders otherwise within 60 days of the filing or the proposed change or unless the proposed change relates to the sale or transfer of generation assets. Moreover, the Commission finds NOPEC's claims that the corporate separation plan was approved in the *ESP 2 Case* without an in-depth review to be disingenuous. NOPEC was a signatory party to the combined stipulations in the *ESP 2 Case*, which provided for approval of the corporate separation plan filed in Case No. 09-462-EL-UNC; as a signatory party to the combined stipulations, NOPEC recommended their approval by the Commission. Finally, the Commission notes that neither NOPEC nor OCC/CP cite to any testimony or other evidence in the record of this case substantiating their objections to the unchanged corporate separation plan. Although the Companies bear the burden of proof in this proceeding, NOPEC and OCC/CP have failed to identify any evidence in the record of this case in support of their claims.

(37) In its tenth assignment of error, NOPEC contends that the Commission's approval of Rider DCR as part of the ESP 3 violates Section 4928.143(B)(2)(h), Revised Code. NOPEC contends that the failure of the Companies to bid more resources into the 2015/2016 base residual auction demonstrates that the Companies have not dedicated sufficient resources to reliability.

(38) The Commission finds that rehearing on this assignment of error should be denied. The definition of "retail electric service" in Section 4928.01(A)(27), Revised Code, clearly distinguishes the "generation service" component from the "distribution service" component. As discussed above, Section 4928.143(B)(2)(h), Revised Code, explicitly relates to "distribution service" and requires the Commission to examine the "reliability of the distribution system." NOPEC has not demonstrated in the record of this case that the base residual auction, which establishes prices for

generation capacity as part of "generation service," has any nexus with distribution service.

(39) NOPEC claims, in its eleventh assignment of error, that the Commission's approval of the ESP 3 violates Section 4905.22, Revised Code, by approving unjust and unreasonable rates. Similarly, in their fourth assignment of error, OCC/CP claim that the Commission erred by approving the Companies' unjust and unreasonable standard service offer proposal in violation of Section 4905.22, Revised Code.

(40) The Commission finds that rehearing on this assignment of error should be denied. NOPEC and OCC/CP have not demonstrated that Section 4905.22, Revised Code, is applicable to SSOs by electric utilities. Section 4928.05(A)(1), Revised Code, states, in relevant part:

> a competitive retail electric service supplied by an electric utility . . . shall not be subject to supervision and regulation . . . by the public utilities commission under Chapters 4901. to 4909., 4933., 4935., and 4963. of the Revised Code, except sections 4905.10 and 4905.31, division (B) of section 4905.33, and sections 4905.35 and 4933.81 to 4933.90; except sections 4905.06, 4935.03, 4963.40, and 4963.41 of the Revised Code only to the extent related to service reliability and public safety; and except as otherwise provided in this chapter.

Section 4905.22, Revised Code, is not one of the enumerated exceptions to this statute. The Commission notes that Division (A)(1) of Section 4928.05, Revised Code, also states that "[n]othing in this division shall be construed to limit the commission's authority under sections 4928.141 to 4928.144 of the Revised Code." However, NOPEC and OCC/CP have failed to make any argument that this provision incorporates Section 4905.22, Revised Code, into Sections 4928.141 through 4928.143, Revised Code.

(41) In their first assignment of error, the Suppliers argue that the Commission unreasonably and unlawfully adopted Rider AER, which distorts price signals and defers unnecessary carrying costs. The Suppliers argue that the modification of Rider AER will artificially depress the cost of Rider AER to customers in the near term to between 56 percent and 64 percent of what it would otherwise have been. The Suppliers allege that this skews the price signals for shopping customers and subjects nonshopping customers to unnecessary carrying costs. The Suppliers further claim that this provision of the Stipulation divides cost causation from cost responsibility.

(42) FirstEnergy responds that the current Rider AER charge is artificially high due to the use of a historic three-year baseline. The need for the deferrals is created because nonshopping customers are required to pay for renewable energy costs for customers that are currently shopping but were not shopping during the three-year baseline period. Moreover, the Companies contend that the record does not support the Suppliers' claim that competitive generation suppliers cannot spread their renewable energy costs over time (Tr. III at 83).

Nucor argues in its memorandum contra the applications for rehearing that the Commission reasonably approved the revision to Rider AER allowing the recovery of Rider AER costs to be spread over a longer period of time. Nucor states that spreading out these costs would have a significant benefit to current SSO customers, reducing Rider AER charges by between 56 percent and 64 percent. Therefore, the Commission had a reasonable basis to determine that the price smoothing impact of the change to Rider AER outweighed the effect of potential carrying costs.

(43) The Commission finds that the Suppliers have raised no new arguments on rehearing and that the Commission thoroughly considered and addressed the Suppliers' arguments in the Opinion and Order. Opinion and Order at 34-35.

(44) In their second assignment of error, the Suppliers claim that the Commission unreasonably and unlawfully adopted the provision of the Stipulation allowing the Companies to award a wholesale bilateral contract to provide power to PIPP customers outside of the public contract. The Suppliers contend that awarding a non-bid wholesale contract for PIPP customers is at odds with a competitive marketplace and runs contrary to Ohio's energy policies.

(45) The Commission finds that rehearing on this assignment of error should be denied. The Commission is required to balance the various state policies set forth in Section 4928.02, Revised Code, including the policy to protect at-risk populations. The Stipulation adopted by the Commission in this proceeding provides a guaranteed, minimum six percent discount for PIPP customers to assist these customers in paying their bills. In addition, other customers benefit as lower prices for PIPP customers should result in lower PIPP arrearages to be collected from all customers. Moreover, as discussed above, nothing in ESP 3 precludes ODOD from exercising its authority under Section 4928.54, Revised Code. Therefore, the six percent discount for the PIPP load provided for under ESP 3 is a minimum discount, and, if a better price can be obtained by ODOD through a competitive bid, that competitive bid will prevail over the provisions of ESP 3.

(46) The Suppliers argue in their third assignment of error that the Commission unreasonably and unlawfully failed to confirm the electronic data interchange (EDI) enhancements agreed to by FirstEnergy and did not address the additional recommendations for additional enhancements to the Companies' EDI system.

(47) FirstEnergy claims that the Commission has already thoroughly considered and rejected the Suppliers' arguments. The Companies claim that the Suppliers have not presented any evidence demonstrating that the EDI system impedes competitive retail electric service (CRES) providers from entering the market or raises costs to CRES providers.

(48) The Commission will clarify that the application for ESP 3 was adopted as modified by FirstEnergy by agreeing to the terms of the Fein letter (Co. Ex. 7). With respect to the remaining recommended enhancements to FirstEnergy, the Commission finds that the testimony in the record does not support the adoption of the recommendations at this time. However, the Commission notes that a working group has been reconvened to consider issues related to EDI, and we urge the Suppliers to pursue their recommendations through that collaborative forum rather than through litigation.

(49) In their fourth assignment of error, the Suppliers claim that the Commission unreasonably and unlawfully concluded that there was no record in this proceeding demonstrating that the absence of the purchase of receivables (POR) has inhibited competition. The Suppliers argue that the Commission should determine whether the proposed POR program is consistent with the policy objective "to ensure the availability of unbundled and comparable retail electric service that provides consumers with the supplier, price, terms, conditions, and quality options they elect to meet their respective need." Section 4928.02(B), Revised Code. The Suppliers claim that the Commission has a duty to adopt and promote policies that promote competition. The Suppliers further argue that state policy requires more than just shopping; it requires that customers be provided with real choices. The Suppliers note that, for residential customers, government aggregation represents 96 percent of all shopping and that one supplier serves all but one of those aggregations.

In their fifth assignment of error, the Suppliers claim that the Commission unreasonably and unlawfully concluded that there is no evidence that circumstances have changed since the adoption of the stipulation in *WPS Energy Services, Inc., and Green Mountain Energy Company v. FirstEnergy Corp., et al.*, Case No. 02-1944-EL-CSS (*WPS Energy*) to justify abrogating that stipulation.

(50) IGS contends, in its first assignment of error, that the Commission's finding that there is no record in this proceeding demonstrating that the absence of the purchase

of receivables has inhibited competition is contrary to the manifest weight of the evidence and is inconsistent with the Commission's prior findings.

In its second assignment of error, IGS claims that the Commission's finding that there is no record in this proceeding that the Companies are under any legal obligation to purchase receivables misstates the standard for evaluating a term of an ESP and subjected the POR program proposed by IGS to a test that was not applied to any term of the ESP.

Further, IGS alleges in its third assignment of error that the Commission's finding that there is no record that circumstances have changed since the adoption of the stipulation in *WPS Energy* to justify abrogating the stipulation is contrary to the manifest weight of the evidence and is inconsistent with the Commission's instruction to investigate this matter in the Commission review of Chapter 4901:1-10, O.A.C., initiated in *In the Matter of the Commission's Review of Chapter 4901:1-10, Ohio Administrative Code, Regarding Electric Companies,* Case No. 12-2050-EL-ORD (*Rule Review Case*).

Finally, in its fourth assignment of error, IGS claims that the Commission's failure to provide for this case to remain open to accommodate the results of the Staff investigation is unreasonable and may serve to prevent the implementation of Staff's recommendations in the *Rule Review Case.*

(51) The Companies respond that a POR program would increase costs for nonshopping customers (Tr. III at 68-70, 90). FirstEnergy notes that uncollectible expenses for CRES providers are generally higher than the Companies' uncollectible expenses (Tr. II at 189). Therefore, a POR program represents a potential increase in rates because the Companies would either absorb these higher costs or recover the higher costs from all customers. The Companies claim that shopping is flourishing in their service territories and the shopping levels in the Companies' service territories are the highest in the state (Tr. II at 19; Tr. III at 29-30). The Companies further note

that the fact that shopping may be accomplished through government aggregation does not mean that the contracts are not competitive and that state policy encourages shopping through government aggregations. Section 4928.20(K), Revised Code.

The Companies dispute IGS' and the Suppliers' claims that the Commission erred in noting that the Companies had no legal obligation to purchase marketers' receivables. The Companies claim that the absence of a legal obligation to purchase receivables is the distinguishing factor between the Companies and utilities with POR programs in Ohio cited by IGS and the Suppliers, representing that all of those programs were adopted by stipulation. The Companies further claim that IGS and the Suppliers fail to demonstrate that the Commission has the statutory authority to compel the Companies to adopt a POR program. In fact, FirstEnergy claims that the Commission's decision is consistent with Section 4928.02(H), Revised Code, which calls for the avoidance of anticompetitive subsidies.

Further, the Companies contend that the record supports the Commission's finding that circumstances have not changed since the adoption of the stipulation in *WPS Energy*. The Companies note that IGS witness Parisi acknowledged that circumstances have not changed (Tr. II at 213-214).

(52) The Commission finds that rehearing on these assignments of error should be denied. The Suppliers and IGS seek Commission modification of the proposed ESP to require FirstEnergy to implement a POR program. The Suppliers and IGS argue that the testimony of their witnesses demonstrates that a POR program would "promote" competition and that the Commission is required to promote competition pursuant to Section 4928.02(B), Revised Code. However, neither the Suppliers nor IGS have demonstrated that the absence of a POR program is a barrier to competition which precludes "the availability of unbundled and comparable retail electric service that provides consumers with the supplier, price, terms,

conditions, and quality options they elect to meet their respective needs." Section 4928.02, Revised Code.

In addition, the Commission notes that, although IGS and the Suppliers cite anecdotally to successful POR programs in Duke's electric service territory and to Ohio gas utilities, their witnesses simply ignored competition in the other electric utility service territories. There is no evidence in the record of any study which systematically compares any measure of competition between electric utilities which offer POR programs and those that do not, in Ohio or otherwise. However, the Commission notes that we have opened a separate investigation to determine whether there are any barriers to competition in the retail electric service market in this state. *In the Matter of the Commission's Investigation of Ohio Retail Electric Service Market*, Case No. 12-3151-EL-COI.

Moreover, as the Commission determined in the Opinion and Order, neither the Suppliers nor IGS have demonstrated that FirstEnergy is under any legal obligation to implement a POR program. Opinion and Order at 26. As we noted, in adopting the stipulation in *WPS Energy*, the Commission approved a waiver of any obligation of the Companies to purchase accounts receivable. As FirstEnergy points out, the absence of a legal obligation to purchase accounts receivable is a distinguishing factor between the Companies and the gas and electric utilities cited by the Suppliers and IGS.

Moreover, the Suppliers have not demonstrated that the stipulation in *WPS Energy* should be set aside. The Suppliers and IGS claim that the Commission erred in finding that there was no evidence that circumstances have changed since the adoption of the stipulation in *WPS Energy*. However, in claiming that this determination was against the manifest weight of the evidence, IGS elides the testimony of its own witness Parisi, who testified that no circumstances have changed (Tr. II at 213-214). Moreover, the testimony of Supplier witness Ringenbach cited by the Suppliers does not relate to how circumstances have changed in the market since the adoption of the stipulation; the testimony simply outlines Suppliers' concerns with the current system (RESA Ex. 3 at 8-12). The fact that Suppliers may no longer be satisfied with the remedy adopted in *WPS Energy* does not constitute a change in circumstances in the market.

In any event, the Commission fully considered the testimony of Ms. Ringenbach, concluded that the issues raised in her testimony should be addressed in a workshop in a separate docket, and directed Staff to determine, in that docket, whether additional steps are necessary to address the implementation of the stipulation. Opinion and Order at 42. IGS wrongly concludes that by directing the Staff to address these issues in the workshop, the Commission acknowledged that circumstances have changed since the adoption of the stipulation. However, in reaching this conclusion, IGS simply ignores our explicit direction that the workshop address the narrow issues "regarding the implementation of the stipulation in *WPS Energy with respect to customers on deferred payment plans*" rather than whether a POR should be adopted by FirstEnergy. *Id.*

With respect to IGS' argument that this proceeding should remain open in order to implement Staff's recommendations in the *Rule Review Case*, the Commission finds that this step is unnecessary. The Commission expects that FirstEnergy, and every other Ohio electric utility, will expeditiously implement all directives of the Commission and amendments to Chapter 4901:1-10, O.A.C., resulting from the *Rule Review Case*, including appropriate tariff revisions if necessary. There is no need to keep this docket open to address such changes. Rehearing on this assignment of error should be denied.

(53) Finally, the Suppliers argue that the Commission failed to address their recommendation that FirstEnergy be ordered to file a report in a new docket regarding the steps necessary to implement supplier consolidated billing with shut-off capability.

(54) The Commission notes that, in the *Rule Review Case*, the Suppliers will have an opportunity to propose amendments to our rules to implement supplier consolidated billing and to demonstrate to the Commission

that the proposed shutoff provisions are consistent with our statutory mandate to adopt rules providing for a "prohibition against blocking, or authorizing the blocking of, customer access to a noncompetitive retail electric service when a customer is delinquent in payments to the electric utility or electric services company for a competitive retail electric service." Section 4928.10(D)(3), Revised Code. Accordingly, rehearing on this assignment of error should be denied.

It is, therefore,

ORDERED, That the applications for rehearing be denied as set forth above. It is, further,

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

THE PUBLIC UTILITIES COMMISSION OF OHIO

Todd A. Snitchler

Todd A. Snitchler, Chairman

Steven D. Lesser

Andre T. Porter

Lynn Slaby

GAP/MLW/sc

Entered in the Journal

JAN 30 2013

Barcy F. McNeal

Barcy F. McNeal
Secretary