

ORIGINAL

IN THE SUPREME COURT OF OHIO

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| In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to R.C. §4928.143 in the Form of an Electric Security Plan. |) | Case No. 2013-0513 |
| |) | On Appeal from the Public Utilities Commission of Ohio |
| |) | PUCO Case No. 12-1230-EL-SSO |

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I. INTRODUCTION

Appellant, Northeast Ohio Public Energy Council (“NOPEC”) is a regional council of governments established under R.C. Chapter 167, and is the largest governmental retail energy aggregator in the State of Ohio. Comprised of 162 communities in the ten (10) northeast Ohio counties of Ashtabula, Lake, Geauga, Cuyahoga, Summit, Lorain, Medina, Trumbull, Portage and Huron, NOPEC provides electric aggregation service to approximately 500,000 retail electric customers located in the service territories of The Cleveland Electric Illuminating Company and Ohio Edison Company. (NOPEC/NOAC Jt. Ex. 1, at 2-3 [Supp. at 2-3].)¹

The Northwest Ohio Aggregation Coalition’s (“NOAC”) present membership includes the cities of Toledo, Northwood, Maumee, Oregon, Perrysburg and Sylvania, the unincorporated townships in Lucas County as represented by the Board of Lucas County Commissioners, the villages of Holland and Ottawa Hills, and the townships of Lake and Perrysburg in Wood County. Each community is certified as an electric governmental aggregator and is currently serving approximately 160,000 residential and small commercial electric customers on The Toledo Edison Company system within Lucas and northern Wood Counties. Id.

NOPEC and NOAC (collectively “NOPEC/NOAC”) intervened in this proceeding to protect the interests of nearly 700,000 residential and small commercial electric customers served by large-scale NOPEC and NOAC governmental aggregation programs in all three FirstEnergy operating company’s service territories, The Cleveland Electric Illuminating Company, The Toledo Edison Company, and Ohio Edison Company (collectively, the “Company”).

¹ References to Appellant NOPEC’s Supplement to this Merit Brief will be designated by “Supp.” followed by the page reference in the Supplement.

NOPEC, NOAC, and the Office of the Ohio Consumers' Counsel ("OCC"), which represents Ohio's 1.9 million residential customers in the Company's service territories (OCC Ex. 11 at 18, Supp. at 145) did not sign the partial stipulation offered in this proceeding ("Partial Stipulation") and actively opposed it at hearing. Nevertheless, even without broad-based residential support, the Public Utilities Commission of Ohio ("Commission") approved the Partial Stipulation, based in part on the assumption that other signatory parties sufficiently represented the interests of the residential customer class.

This appeal raises issues of significant precedential value for the Commission and this Court, including:

- (1) whether it is lawful to consider "qualitative benefits" in a comparison of an electric security plan ("ESP") to a market rate offer ("MRO") under R.C. 4928.143 (C)(1), when the statutory framework and this Court's precedent provide only for a consideration of quantitative benefits;
- (2) whether it is lawful to take administrative notice of opinion testimony from one proceeding to support an applicant's burden in another proceeding; and
- (3) whether a partial stipulation is lawful when it is not supported by the broad interests of a customer class.

II. STATEMENT OF FACTS AND THE CASE

On August 25, 2010, the Commission approved the previous standard service offer ("SSO") for the Company in the form of an ESP, finding that it was more favorable in the aggregate than the alternative MRO available to the Company pursuant to R.C. 4928.142. *See In Re Ohio Edison Company, et al., for Authority to Establish a Standard Service Offer*, Pub. Util.

Comm. No. 10-388-EL-SSO, 2010 Ohio PUC LEXIS 862 (August 25, 2010) (“*ESP 2 Case*”) (App. Appx. at 153.)² The *ESP 2 Case* was to be in place from June 1, 2011 through May 31, 2014 (Id. at 8, App. Appx. at 160); however, the Company filed the current “application” for an ESP (“*ESP 3 Case*”) on April 13, 2012, ostensibly to extend the *ESP 2 Case* and its benefits for an additional two years, while attempting to capture additional benefits. (Co. Ex. 1 at 1, Supp. at 25.) The additional benefits sought were to “potentially” bid demand response and energy efficiency resources into the PJM 2015-2016 Base Residual Auction (to be held May 7, 2012), potentially decreasing its capacity costs; and to extend the *ESP 2 Case* bid schedule from a one year auction product to a three year auction product, allegedly to capture historically lower generation prices. (Co. Ex. 1, at 2; Supp. at 26).

Despite the 275-day legislative allotment to process ESP proceedings (R.C. 4928.143(C)(1) (App. Appx., at 215), and the fact the Company’s existing *ESP 2 Case* did not expire for over 2 years, the Company requested an onerous expedited procedural schedule seeking hearings to commence on April 23, 2012, and a Commission order to issue by May 2, 2012. (Co. Ex. 1 at 2, Supp. at 26.) Moreover, to facilitate its fast-track approval of the *ESP 3 Case*, the Company did not file a formal application with the Commission for the parties’ consideration, but distributed copies of a proposed stipulation to resolve the *ESP 3 Case* to the parties who also had participated in the *ESP 2 Case* and, thereafter, negotiated with the parties individually without facilitating settlement discussions among the parties. (Order at 27 [App. Appx. at 38]; OCC Ex. 11 at 7-8, [Supp. at 134-135]; Tr. Vol. I at 35-38 [Supp. at 189-192]). It subsequently filed its five-page application with the Commission, which incorporated the terms of the Partial Stipulation (Co. Ex. 1 [Supp. at 25]) it had cobbled together with some parties, and

² References to Appellant NOPEC’s Appendix to this Merit Brief will be designated by “App. Appx.” followed by the page reference in the Appendix.

asked the Commission to take administrative notice of the entire record in the *ESP 2 Case*³ to support the *ESP 3 Case*. (Co. Ex. 1 at 5, Supp. at 29.)

By Entry of April 19, 2012, the attorney examiner set hearing for May 21, 2012. Although, the opportunity to participate in the May 7, 2012 PJM auction had vanished, the Commission still pushed for an expedited resolution of this proceeding on the scant application provided, ordering that hearings commence on June 4, 2012. *ESP 3 Case*, Entry, May 2, 2012. (App. Appx. at 148.)

NOPEC did not join the Partial Stipulation, and actively contested its adoption at hearing, on brief, and rehearing. By Opinion and Order (“Order”) dated July 18, 2012, the Commission approved the Partial Stipulation. (App. Appx. at 12.) On August 12, 2012, and pursuant to R.C. 4903.10, NOPEC timely filed an Application for Rehearing from the Order dated July 18, 2012. (App. Appx. at 114.) NOPEC’s Application for Rehearing was denied with respect to the issues being raised in this appeal by a Second Entry on Rehearing dated January 30, 2013.⁴ (App. Appx. at 80.) This appeal is properly before this Court on these issues by NOPEC’s timely Notice of Appeal filed March 29, 2013. (App. Appx. at 1.)

III. LAW AND ARGUMENT

PROPOSITION OF LAW NO. 1: R.C. 4928.143(C)(1) REQUIRES THE COMMISSION TO COMBINE THE PRICE DETERMINED UNDER R.C. 4928.143(B)(1) WITH THE COSTS DETERMINED UNDER 4928.143(B)(2) AND COMPARE THAT RESULT TO

³ The Commission in the *ESP 2 Case* had taken administrative notice of the Company’s companion MRO proceeding. See *In Re Ohio Edison Company, et al., for Approval of a Market Rate Offer*, Pub. Util. Comm. 09-906-EL-SSO (“*MRO Case*”). The Company requested the Commission to take administrative notice of the *MRO Case* on the final day of hearing in this matter for this reason. (Tr. Vol. III at 10-11, Supp. at 202-203). [References to the transcript in this proceeding will be designed at “Tr.” followed by the Volume (“Vol.”) of the transcript and the page number.]

⁴ The first application for rehearing was issued on September 12, 2012, and merely provided the Commission with additional time to consider the issues herein. [App. Appx. at 77.]

THE MRO PRICE DERIVED UNDER R.C. 4928.142 IN DETERMINING WHETHER AN ESP IS MORE FAVORABLE IN THE AGGREGATE THAN AN MRO.

A. The Commission's Standard of Review in ESP Proceedings

R.C. 4928.141 provides that an electric distribution utility may seek approval of an ESP or MRO as its SSO. (App. Appx. at 208.) R.C. 4928.142 and 4928.143 specify the standards for ESPs and MROs. (App. Appx. at 210 and 213.) 4928.143(C)(1) sets forth the standard that the Commission must follow when approving an electric distribution utility's proposed ESP:

...the commission by order shall approve or modify and approve an application filed under division (A) of this section if it finds that the electric security plan so approved, including its *pricing and all other terms and conditions*, including any deferrals and any future recovery of deferrals, *is more favorable in the aggregate* as compared to *the expected results that would otherwise apply under [an MRO derived under] section 4928.142 of the Revised Code*. (Emphasis supplied.) [App. Appx. at 215.]

The meaning of this language is the crux of this appeal, and specifically whether the language "in the aggregate" permits the Commission to consider the qualitative (or non-quantifiable) benefits of a proposed ESP, in addition to its quantifiable costs. The legislative history of 2007 Am.Sub.S.B. 221, Effective July 31, 2008 ("SB 221"), and this Court's precedent show that the Commission is limited to considering quantifiable costs only.

1. The Legislative History of SB 221⁵

R.C. 4928.143(C)(1) was enacted as a part of SB 221, which underwent significant changes in the Ohio Senate and House after being introduced in the Senate on October 4, 2007.

⁵ NOPEC is aware that this Court has stated in the past that "no legislative history of statutes is maintained in Ohio." See *State v. Dickinson*, 28 Ohio St.2d 65, 67, 275 N.E.2d 599 (1971) ("*Dickinson*"). However, R.C. 1.49 specifically sanctions the Court's examination of "legislative history," and the Court has done so before and after *Dickinson*. See *Caldwell v. State*, 115 Ohio St. 458, 154 N.E. 792 (1926), and *Griffith v. Cleveland*, 128 Ohio St.3d 35, 2010-Ohio-4905, 941 N.E.2d 1157 (2010) (examining the documents maintained on the Ohio General Assembly's web site). Copies of the Senate and House versions of SB 221, and related bill analyses of the Legislative Service Commission are all linked on the Ohio General Assembly's website at http://www.legislature.state.oh.us/analyses.cfm?ID=127_SB_221&ACT=As%20Enrolled, and are contained in the Appendix to Appellant's Merit Brief.

a. As Introduced

As Introduced in the Senate, SB 221 provided the methods for developing an SSO as an ESP or MRO, and the standard for approving either:

1. ESP: The SSO as an ESP was to include the value of specific generating facilities and the cost of rendering generation service using those facilities. SB 221 as Introduced, Section 4928.14(B)(1) (App. Appx. at 233); Legislative Service Commission Bill Analysis, 127th General Assembly, SB 221: As Introduced (App. Appx. at 276) . Further, the ESP could recover additional “costs” related to environmental issues and construction of generating facilities. SB 221 as Introduced, Section 4928.14(B)(1)(a) and (b) (App. Appx. at 233); Legislative Service Commission Bill Analysis, 127th General Assembly, SB 221: As Introduced (App. Appx. at 276).

2. MRO: The SSO as an MRO was to be determined through an “open, competitive bidding process.” SB 221 as Introduced, Section 4928.14(B)(2) (App. Appx. at 234); Legislative Service Commission Bill Analysis, 127th General Assembly, SB 221: As Introduced (App. Appx. at 276).

3. Standard of Review: The Commission could approve either the ESP or the MRO as long as the prices were just and reasonable and complied with the state policies contained in R.C. 4928.02. SB 221 as Introduced, Section 4928.14(D)(1) (App. Appx. at 234); Legislative Service Commission Bill Analysis, 127th General Assembly, SB 221: As Introduced (App. Appx. at 276).

b. As Passed by the Senate

The version of SB 221 as Passed by the Senate (November 7, 2007) significantly revised the methods for developing an ESP, and the standard for approving an MRO:

1. ESP: The ESP passed by the Senate differed from the ESP as introduced, because the Senate no longer required that the SSO be based upon the valuation of the utilities' generating facilities, but adopted the existing SSO price as a starting point and permitted adjustments to that price based on changes in the costs the utility incurred to provide service. SB 221 as Passed in the Senate, Section 4928.14(D)(1) (App. Appx. at 240); Legislative Service Commission Bill Analysis, 127th General Assembly, SB 221: As Passed by the Senate (App. Appx. at 293-294). The following cost adjustments could be recovered in the ESP: environmental compliance costs; fuel costs; construction costs for new generation facilities; operating, maintenance and other costs, including taxes; costs to invest in generating facilities; and costs of providing standby and default services. SB 221 as Passed in the Senate, Section 4928.14(D)(1)(a)-(f) (App. Appx. at 241); Legislative Service Commission Bill Analysis, 127th General Assembly, SB 221: As Passed by the Senate (App. Appx. at 295).

2. MRO: Under the version of SB 221 as passed by Senate, the process to develop the MRO remained the same and was to be determined through an "open, competitive bidding process." SB 221 as Passed in the Senate, Section 4928.14(E)(1) (App. Appx. at 244); Legislative Service Commission Bill Analysis, 127th General Assembly, SB 221: As Passed by the Senate (App. Appx. at 296).

3. Standard of Review: As passed by the Senate, SB 221's standard of review remained the same for approving an ESP, e.g., the Commission could approve the ESP as long as the prices were just and reasonable and complied with the state policies contained in R.C. 4928.02. SB 221 as Passed in the Senate, Section 4928.14(D)(6)(a) (App. Appx. at 244); Legislative Service Commission Bill Analysis, 127th General Assembly, SB 221: As Passed by the Senate (App. Appx. at 296). However, the standard for approving an MRO changed significantly and required not only a finding that the offer and price were just and reasonable and compliant with R.C. 4928.02, but also that the price determined for each customer class under

the MRO was to be “more favorable than, *or at least comparable to,*” the price for each customer class under an ESP. (Emphasis supplied.) SB 221 as Passed in the Senate, Section 4928.14(E)(2)(d) (App. Appx. at 244-245); Legislative Service Commission Bill Analysis, 127th General Assembly, SB 221: As Passed by the Senate (App. Appx. at 296-297). In other words, the Senate intended the cost-based ESP to serve as a check on the market-based MRO price.

c. As Reported by the House Public Utilities Committee

The version of SB 221, as reported by the House Public Utilities Committee (April 15, 2008), significantly changed the Senate version, and serves as the basis for SB 221 as enacted.

1. ESP: The House version no longer required that the SSO offer be based on the utility’s valuation of facilities (as introduced in the Senate) or be based upon the existing SSO price (as passed in the Senate). Rather, the House version called for the ESP to provide a provision relating to the “pricing” of electric generating service, which would permit the utility to base its price upon the methodology of its choosing. SB 221 as Reported in the H. Public Utilities, Section 4928.143(B)(1) (App. Appx. at 249-250); Legislative Service Commission Bill Analysis, 127th General Assembly, SB 221: As Reported by the H. Public Utilities (App. Appx. at 322). However, the House version retained, and expanded, the other costs that could be recovered in the ESP, closely mirroring the costs contained in the enacted version of R.C. 4928.143(B)(2)(a)-(i). These additions included an allowance for construction work in progress; automatic increases to any component of the SSO price; provisions for newly constructed generating facilities; provisions for decommissioning a generating facility;⁶ provisions to securitize the phase-in of the SSO price; provisions related to transmission, ancillary, congestion or any related services; provisions for certain distribution services; provisions for economic

⁶ This provision was not retained in the version of R.C. 4928.143(B)(2) enacted. (App. Appx. at 213.)

development, job retention, and energy efficiency programs; and provisions related to limitations on customer shopping, bypassability, standby, back-up or supplemental power service, default service, carrying costs, amortization costs, and accounting or deferrals, including future recovery of such deferrals as would have the effect of stabilizing or providing certainty regarding retail electric service. SB 221 as Reported in the H. Public Utilities, Section 4928.143(B)(2) (App. Appx. at 250-253); Legislative Service Commission Bill Analysis, 127th General Assembly, SB 221: As Reported by the H. Public Utilities (App. Appx. at 322-325)⁷.

2. MRO: Under the House version of SB 221, the process to develop the MRO remained the same and was to be determined through a competitive bidding process. SB 221 as Reported in the H. Public Utilities, Section 4928.142 (App. Appx. at 248.2); Legislative Service Commission Bill Analysis, 127th General Assembly, SB 221: As Reported by the H. Public Utilities (App. Appx. at 319.)

3. Standard of Review: With the expansion of the provisions that could be included in the ESP for cost recovery (R.C. 4928.143(B)(2)), the standard of review also was changed. The standard for approving an ESP in the House version, as reported, became whether the ESP “including its pricing and all other terms and conditions, including deferrals and any future recovery of deferrals, is *favorable in the aggregate* as compared to the expected results that

⁷ The Legislative Service Commission’s analysis also opined that these enumerated items were non-exclusive; however, this Court found otherwise, considering the plain meaning of the statute. See *In Re Application of Columbus Southern Power Co., et al.*, 128 Ohio St. 3d 512, 2011-Ohio-1788 [¶ 34], 945 N.E.2d 655 (2011) (“The plain language of the statute controls, and this interpretation leads to a reasonable result. However, the [alternative] interpretation would remove any substantive limit to what an electric security plan may contain, a result we do not believe the General Assembly intended”).

would otherwise apply under section 4928.142 of the Revised Code [the MRO].”⁸ SB 221 as Reported in the H. Public Utilities, Section 4928.143(C)(1) (App. Appx. at 253) Legislative Service Commission Bill Analysis, 127th General Assembly, SB 221: As Reported by the H. Public Utilities (App. Appx. at 325). The standard further deleted any reference to the ESP being in compliance with the state policies of R.C. 4928.02. *Id.*

d. As Passed by the General Assembly

The processes for developing the MRO and ESP remained essentially the same in the version of SB 221 as Passed by the General Assembly, except that the standard of review importantly contained yet another significant consumer protection. The standard for approving an ESP became whether the ESP “including its pricing and all other terms and conditions, including deferrals and any future recovery of deferrals, is *more* favorable in the aggregate as compared to the expected results that would otherwise apply under [an MRO derived under] section 4928.142 of the Revised Code.” (emphasis supplied) SB 221 as Passed by the General Assembly, Section 4928.143(C)(1) (App. Appx. at 266); Legislative Service Commission Bill Analysis, 127th General Assembly, SB 221: As Passed by the General Assembly (App. Appx. at 364). Clearly, the Legislature intended that if the results of the comparative analysis between a proposed ESP and MRO were “comparable,” the ESP would fail.

e. Summary

In summary, the Legislature has consistently intended the SSO as an MRO to be a market-based price developed through a competitive bidding process, and that the SSO as an ESP be a cost-based price. The ESP price evolved over the various versions of SB 221 from a

⁸ This change logically afforded consumers protection against unreasonably priced ESPs. No longer was the traditional cost-based price of generation to be a check on the MRO price; rather, the MRO became a check on the ESP price.

traditional rate base/cost of service analysis based upon the valuation of its facilities and costs to provide service, to one that permits a utility to propose a pricing methodology, which price could be adjusted through additional specified costs to provide service. Considering the expanded costs that could be recovered through the ESP, the Legislature placed a check on the level of the ESP, as a consumer protection provision, such that it could not be greater than the price resulting from an MRO.

2. The Ohio Supreme Court's Precedent

This Court has had two opportunities to interpret the scope of items that could be considered in reviewing an ESP. First, it recognized that the nine provisions listed in R.C. 4928.143(B)(2)(a)-(i) require the Commission to make a quantitative determination. It recognized that eight of the items “implicitly require” the Commission to consider “certain costs.” *In Re Application of Columbus Southern Power Co., et al.*, 128 Ohio St. 3d 402, 2011-Ohio-958 [¶26], 945 N.E.2d 501 (hereinafter, “*CSP I*”). The ninth item (R.C. 4928.143(B)(2)(e) (App. Appx. at 214.) also requires a quantitative analysis because it permits an automatic increase in any component of the “price” of an ESP.⁹

⁹ To be clear, the Court in *CSP I*, at ¶ 27, stated:

Moreover, while it is true that the commission must approve an electric security plan if it is ‘more favorable in the aggregate’ than an expected market-rate offer...that fact does not bind the commission to a strict price comparison. On the contrary, in evaluating the favorability of a plan, the statute instructs the commission to consider ‘pricing and all other terms and conditions.’ Thus, the commission must consider more than price in determining whether an electric security plan should be modified.

This language cannot be construed to mean that the Commission may look at an unlimited number of factors in addition to “price.” Rather, as construed by *CSP II*, *infra*, it becomes clear that the Commission is limited in its analysis to consider the items listed in R.C. 4928.143(B)(1) and (2), e.g., the price contained in R.C. 4928.143(B)(1) and the cost factors listed in R.C. 4928.143(B)(2), as discussed subsequently. (App. Appx. at 213.)

In a later decided case, the Commission recognized that all nine of the R.C. 4928.143(B)(2) factors provided for “cost recovery” and limited the items to be considered by the Commission in approving an ESP only to those cost provisions specifically enumerated. *In Re Application of Columbus Southern Power Co., et al.*, 128 Ohio St. 3d 512, 2011-Ohio-1788 [¶¶ 31-35], 945 N.E.2d 655 (hereinafter, “*CSP II*”).

Considered together, the cases show that the Commission can modify the “price” in R.C. 4928.143(B)(1) by considering cost of service factors, if it so chooses. *CSP I*. The Commission also can modify the “costs” to be recovered in the ESP under R.C. 4928.143(B)(2)(a)-(i). What the Commission cannot do is add additional items to be considered in this quantitative analysis, including qualitative items. *CSP II*.

3. The Rules of Statutory Construction Require that R.C. 4928.143(C)(1) Be Construed Consistent with Legislative Intent. R.C. 1.49.

The Legislature intended, and this Court confirmed, that the Commission is limited, in reviewing an ESP, to considering the quantitative factors listed in R.C. 4928.143 (the “price” in R.C. 4928.143(B)(1) and the “costs” in R.C. 4928.143(B)(2)). (App. Appx. at 213.) Accordingly, R.C. 4928.143(C)(1), must be construed consistent with that intent. R.C. 1.49. (App. Appx. at 200.) R.C. 4928.143(C)(1) provides in part:

...the commission by order shall approve or modify and approve an application filed under division (A) of this section if it finds that the electric security plan so approved, including its *pricing and all other terms and conditions*, including any deferrals and any future recovery of deferrals, *is more favorable in the aggregate* as compared to *the expected results that would otherwise apply under [an MRO derived under] section 4928.142 of the Revised Code.* (Emphasis supplied.) [App. Appx. at 215.]

A review of this provision makes clear that the term “pricing” is a reference to the price to be proposed in R.C. 4928.143(B)(1), while the reference to “all other terms and conditions” refers to the specifically enumerated items for which cost recovery can be had under R.C.

4928.143(B)(2)(a)-(i), because no other items may be considered in reviewing an ESP. *CSP II*. The Commission's charge is then to consider whether the ESP price and costs, combined (i.e., "in the aggregate") are "more favorable" than the price developed through a competitive bidding process under the MRO provisions contained in R.C. 4928.142. (App. Appx. at 210.)

PROPOSITION OF LAW NO. 2: IT IS UNLAWFUL TO INCLUDE ITEMS IN AN ESP THROUGH THE CONSTRUCTION OF GENERAL LANGUAGE IN A STATUTE, WHEN THE SPECIFIC LANGUAGE OF THE STATUTE EXCLUDES THOSE ITEMS. OHIO CONSUMERS' COUNSEL v. PUB. UTIL. COMM., 67 OHIO ST.2d 153, 423 NE.2d 820 (1981).

In reviewing the ESP under R.C. 4928.143(C)(1), the Commission performed a three-part analysis. First, it combined or "aggregated" the price and costs in R.C. 4928.143(B)(1) and (2) and compared it to the price determined under R.C. 4928.142, as the statutes and this Court's precedent require, and found that "quantitatively, the ESP 3 is better in the aggregate than an MRO." (Order at 55-56, App. Appx. at 66-67.) The Commission's analysis (although flawed, as discussed subsequently) should have ended there. However, apparently concerned with the strength of its quantitative analysis, the Commission proceeded to consider other "qualitative" benefits of the ESP.

As the second prong of its inquiry, the Commission found that the proposed ESP contained qualitative benefits (that an MRO by statute could not provide) and, thus, the ESP was qualitatively more favorable than the MRO. (Order at 55-56, App. Appx. at 66-67.) As the third step, the Commission found that the ESP contained provisions that supported the state policy contained in R.C. 4928.02, apparently deeming them to be further qualitative benefits. *Id.* As stated previously, neither the legislative history nor the plain language of the statute point to qualitative factors to be considered. Moreover, the legislative history (discussed previously)

shows that the Legislature stripped from R.C. 4928.143 a requirement that the Commission consider the policies in R.C. 4928.02 in approving an ESP.

After considering all three steps, the Commission concluded that the ESP was more favorable in the aggregate than an MRO. (Order at 56-57, App. Appx. at 67-68.) In essence, the Commission considers that the language “in the aggregate” permits it to consider any provision contained in an ESP, regardless of whether it is contained in R.C. 4928.143(B)(1) or (2), in determining whether the ESP is more favorable than an MRO. This Court has rebuked the Commission’s similar attempts to unlawfully expand its authority.

In *Ohio Consumers’ Counsel v. Pub. Util. Comm.*, 67 Ohio St.2d 153, 423 NE.2d 820 (1981), the Commission was charged with applying the comprehensive ratemaking formula contained in R.C. 4909.15 in setting a utility’s rates. Upon review, the Court denied recovery of certain expenses that were not contemplated by the specific statutory provisions. In the alternative, the Commission argued that the expenses were recoverable under a general provision in R.C. 4909.15(D)(2) [currently R.C. 4909.15(E)(2) (App. Appx., at 202), which provided that the Commission, after determining the revenues to which the utility was entitled under the specific statutory formula, could fix rates “with due regard to all such other matters as are proper, according to the facts of each case.” *Id.*, 67 Ohio St. 3d, at 165. The Court rejected the Commission’s alternative argument—that expenses not recoverable under specific statutory provisions could be recovered under a general one—finding that “the General Assembly undoubtedly did not intend to build into its...ratemaking formula a means by which the commission may effortlessly abrogate that very formula.” *Id.*, 67 Ohio St. 3d, at 165. Accord: *Cols. Southern Power Co. v. Pub. Util. Comm.*, 67 Ohio St.3d 535, 620 N.E.2d 835 (1993).

Similarly, in this proceeding, with its authority limited to considering only the specific quantitative categories in R.C. 4928.143(B)(1) and (2) (see *CSP II*), the Commission cannot abrogate the specific statutory formula for developing ESPs by considering otherwise impermissible qualitative factors under a broad construction of the “in the aggregate” language of R.C. 4928.143(C)(1). To do so is beyond the Commission’s authority and is unlawful. See, e.g., *Cols. Southern Power Co. v. Pub. Util. Comm.*, 67 Ohio St.3d 535, 537, 620 N.E.2d 835 (1993). (The Commission, as a creature of statute, may exercise only that jurisdiction conferred upon it by the General Assembly.)

PROPOSITION OF LAW NO. 3: EVEN IF THE COMMISSION COULD CONSIDER QUALITATIVE FACTORS IN DETERMINING WHETHER AN ESP IS MORE FAVORABLE IN THE AGGREGATE THAN AN MRO, IT IS UNLAWFUL TO CONSIDER QUALITATIVE FACTORS THAT FALL OUTSIDE OF THE PROVISIONS OF R.C. 4928.143 (B)(1) AND (2). IN RE APPLICATION OF COLUMBUS SOUTHERN POWER CO., ET AL., 128 OHIO ST.3d 512, 2011-OHIO-1788, 945 N.E.2d 655 (2011)

The Commission found that the following provisions of the ESP constituted qualitative benefits that made the ESP qualitatively more favorable than the MRO: (1) modification of the *ESP 2 Case* bid schedule to provide for a three year product; (2) continuation of the *ESP 2 Case* distribution rate increase freeze for an additional two years; (3) continuation of the *ESP 2 Case* rate options and programs; (4) the flexibility an ESP provides over an MRO; (5) benefits provided through the Partial Stipulation to interruptible customers, schools and municipalities; and (6) compliance with certain state policies contained in R.C. 4928.02. (Order at 55 [App. Appx. at 66], Tr. II at 248-249 [Supp. 197-198].)

As stated previously, if the Commission has the authority to consider qualitative benefits, that authority must be derived from R.C. 4928.143(B)(1) or (B)(2). With respect to some, but not all, of the qualitative factors listed, the Commission appears to rely on R.C.

4928.143(B)(2)(d) for authority to consider qualitative items. This provision states that the Commission may consider:

Terms, conditions, or charges relating to limitations on customer shopping for retail electric generation service, bypassability, standby, back-up, or supplemental power service, default service, carrying costs, amortization periods, and accounting or deferrals, including future recovery of such deferrals, as would have the effect of stabilizing or providing certainty regarding retail electric service. [App. Appx. at 214.]

As a threshold matter, it should be noted that any “terms or conditions” related to these specific items necessarily have cost consequences, as the Court recognized in *CSP I* and *CSP II*, e.g., limitations on customer shopping (i.e., taking service with another supplier) will increase the Company’s revenues, as will making charges non-bypassable (i.e., requiring shopping and non-shopping customers to pay the charge); terms and conditions related to customers taking standby, back-up, or supplemental power service also will affect the revenues the company will receive, as will terms and conditions related to the Company’s obligation to provide default service; and terms and conditions related to carrying costs, amortizations, accounting and deferrals obviously have cost consequences. To re-iterate, these provisions require an analysis of cost only; no statutory basis exists to consider any qualitative benefits of these cost considerations.

Regardless, even if the items listed in R.C. 4928.143(B)(2)(a)-(i) permitted a consideration of qualitative factors, the qualitative factors the Commission relies on do not fall within these provisions.

A. Modification of the ESP 2 Bid Schedule to a Three Year Product.

Under the ESP 2, auctions were to be held in October 2012 and January 2013. These auctions were to secure electric supply for one year periods, through the term of the *ESP 2 Case*, which ended May 31, 2014. (Co. Ex. 3 at 15, Supp. at 108.) Under the *ESP 3 Case*, the October

2012 and January 2013 auctions would secure electric supply for a period of three years from June 1, 2012 through the term of the ESP 3, which ends May 31, 2016. (Co. Ex. 3 at 15 [Supp. at 108]; Staff Ex. 3 at 3 [Supp. at 119].) The Company's rationale was that the three year auction could capture *current* historically lower generation prices which would be blended with *potentially higher prices* to occur later in the three year period. *Id.* The Commission adopted the Company's rationale finding that this provision constituted a qualitative benefit because the blending of lower generation prices with potentially higher prices would provide rate stability, apparently a reference to R.C. 4928.143(B)(2)(d). (Order at 56, App. Appx. at 67.) In other words, the Commission found it beneficial for customers to pay more for electricity in the final year of the *ESP 2 Case* (and for the Company to receive more revenue earlier) to hedge against the mere possibility that generation prices would increase in the final two years of the ESP 3. The Commission's analysis is flawed.¹⁰

Changing the terms of the auction from a one year product to a three year product is a matter of "price" to be considered under R.C. 4928.143(B)(1). Indeed, the Commission correctly considered this pricing aspect and found that the pricing obtained under the proposed ESP 3 auction process also would be obtained under the MRO auction processes of R.C. 4928.142. (Order at 55, App. Appx. at 66.) The modification of the *ESP 2 Case* bid schedule provided absolutely no *quantitative* benefit to the *ESP 3 Case* vis-à-vis an MRO.

By acknowledging that the auction prices under the proposed *ESP 3 Case* and an MRO would be the same, the Commission actually is attempting to derive a qualitative benefit by comparing the pricing of the *ESP 2 Case* to that of the *ESP 3 Case*, i.e., the three year auction

¹⁰ The Commission's analysis is flawed not only on a statutory basis, as discussed subsequently, but also on a factual basis, as Staff witness Fortney admitted at hearing that it is unknown whether the market rate will be higher or lower in the future. (Tr. Vol. II at 263-26, Supp. at 199.1-199.2).

product under the *ESP 3 Case* will provide greater stability than the one year product under the *ESP 2 Case*. The Legislature’s objective in crafting the statutory scheme is to determine whether the proposed ESP is more favorable than an *MRO*, not a competing ESP. R.C. 4928.143(C)(1) (App. Appx. at 215); R.C. 1.49(A) (App. Appx. at 200). The modification of the ESP 2 bid schedule simply does not provide a qualitative benefit over the MRO and it was error for the Commission to so find.

B. Continuation of the *ESP 2 Case* Distribution Rate Increase Freeze

A provision of the *ESP 2 Case* was that the Company would not seek a distribution rate increase during the term of the ESP. The *ESP 3 Case* proposed to continue the rate freeze throughout its term. The Commission found that continuation of the rate freeze would provide “rate certainty, predictability, and stability for customers,” another apparent reference to R.C. 4928.143(B)(2)(d) . (Order at 56, App. Appx. at 67.)

As a threshold matter, this alleged “benefit” is illusory at best, considering that the Commission approved an extension of tariff Rider DCR in the *ESP 3 Case*, which will allow the Company to recover up to \$405 million in distribution related costs, thus obviating the need to file a rate case in the next few years.

Regardless, the distribution rate freeze cannot be considered under R.C. 4928.143(B)(2) (d), even if it were to permit qualitative benefits. To fall within this provision, the distribution rate freeze would have to relate to “limitations on customer shopping for retail electric generation service, bypassability, standby, back-up, or supplemental power service, default service, carrying costs, amortization periods, and accounting or deferrals, including future recovery of such deferrals.” R.C. 4928.143(B)(2)(d) (App. Appx. at 214). The distribution rate freeze provision relates solely to distribution service, not the generation service that is the subject of R.C. 4928.143(B)(2)(d) , and thus falls within none of these categories.

Nor does the distribution rate freeze falls within R.C. 4928.143(B)(2)(h), which permits inclusion in an ESP of:

(h) Provisions regarding the utility's distribution service, *including, without limitation* and notwithstanding any provision of Title XLIX of the Revised Code to the contrary, provisions regarding single issue ratemaking, a revenue decoupling mechanism or any other incentive ratemaking, and provisions regarding distribution infrastructure and modernization incentives for the electric distribution utility...(Emphasis supplied.) [App. Appx. at 214.]

In *CSP II*, this Court found that the phrase “including, without limitation” limited the matters to be included in an ESP to those specifically listed in the statutory provision. R.C. 4928.143 (B)(2)(h), does not provide for consideration of full scale distribution rate case issues, which otherwise are to be considered under R.C. 4909.15 (App. Appx. at 202), be it a freeze, increase or decrease. The Commission erred in considering the distribution rate freeze.

C. Continuation of the *ESP 2 Case Rate Case Options and Programs*

In its Order, the Commission found that it was a qualitative benefit that the *ESP 3 Case* continued “multiple rate options and programs to preserve and enhance rate options for various customers provided in the ESP.” (Order at 56, App. Appx. at 67.) The Commission does not elaborate on what rate options or programs have been retained, and the Company’s testimony provides only that, “The Signatory Parties [to the Partial Stipulation] have agreed to continue a number of rate design issues and programs which preserve and enhance the rate options and programs that the Companies offer to customers under a continuation of all riders approved in ESP 2.” (Co. Ex. 3 at 16, Supp. at 109.) Even a cursory review of R.C. 4928.143(B)(1) and (2) shows that the provision of multiple rate options to customers is not listed as a matter for consideration in an ESP. The Commission erred in considering this factor as a benefit.

D. The Flexibility an ESP Provides Over an MRO

The Commission also considered it a qualitative benefit that the ESP 3 provides “flexibility that offers significant advantages to the Companies, ratepayers and the public.” (Order, at 56, App. Appx. at 67.) Although the Commission does not elaborate, it is referring to the testimony of its Staff witness Fortney, in which he states it is Staff’s generally held belief that an ESP can offer significant advantages over an MRO, i.e., because it may include matters listed in R.C. 4928.143(B)(2), while an MRO cannot.¹¹ (Staff Ex. 3 at 4, Supp. at 120.) This finding is merely a conclusion that agrees with Staff’s policy opinion, and is not a factor listed and to be considered under R.C. 4928.143(B). The proper statutory analysis for the Commission to make (if qualitative factors are to be considered, which they are not) is to consider how the factors in R.C. 4928.143(B)(2) provide a benefit. Only after making that analysis may the Commission reach the conclusion that the “advantages” of this particular ESP are more favorable than an MRO.

Unfortunately, the Commission’s acceptance of Staff’s policy opinion shows a predilection for ESPs over MROs and a disregard of the statutory requirement to conduct a quantitative analysis of whether an ESP is more favorable than an MRO.¹² Under the Commission’s rationale, *any* ESP would be more favorable than an MRO because only the MRO can include the items listed in R.C. 4928.143(B)(2).

¹¹ The Commission’s acknowledgement lends further credence to unlawfulness of including distribution revenues in the cost of the MRO, as discussed subsequently.

¹² This predilection explains Staff witness Fortney’s attempt (discussed subsequently) to salvage the Partial Stipulation *after* it had been executed and filed with the Commission, and after Staff learned that the Regional Transmission Expansion Planning credit was not a benefit of the ESP 3 Case, making it less favorable than an MRO. (Staff Ex. 3 at 2-4, Supp. at 118-120.)

E. Benefits Provided Through the Stipulation to Interruptible Customers, Schools and Municipalities

The Commission's order also found that the Partial Stipulation entered in this case also provides additional qualitative benefits to interruptible industrial customers, schools, municipalities, and low-income customers, which also makes the ESP 3 more favorable qualitatively than an MRO. (Order at 56, App. Appx. at 67; see, also Co. Ex. 3 at 12-13 [Supp. at 105-106].) Specifically, the Partial Stipulation provides that (1) industrial customers will receive a credit if they take interruptible service, (2) schools (specifically, members of the Association of Independent Colleges and Universities of Ohio ("AICUO")) may elect to be treated as mercantile customers to take advantage of mercantile-sited energy efficiency projects under R.C. 4928.66; the City of Akron and Lucas County each will be given \$200,000 over two years to meet energy efficiency and sustainability goals; and (4) the Company will provide a fuel fund for low income customers.¹³

These "benefits" obviously are concessions the Company made to these entities as a part of the negotiated stipulation process which financially incited these individual parties to join the Partial Stipulation. None of these concessions are listed for consideration in an ESP in R.C. 4928.143(B), and the Commission erred in doing so.

The Commission's consideration of these factors (which it acknowledges are derived from the Partial Stipulation (Order at 56, App. Appx. at 67) illustrates the confused analysis the Commission has undertaken. The Commission has muddled the standards for approving partial stipulations (discussed subsequently), which provide for a consideration of whether the stipulation benefits the public interest, with the standards for approving an ESP. R.C.

¹³ The provision of a fuel fund was considered in the Company's quantitative analysis (as discussed subsequently) and should not be also listed as a qualitative benefit.

4928.143(C)(1) (App. Appx. at 215) contains no provisions for such a public benefit analysis and limit consideration to the factors specifically listed.

F. Compliance with Certain State Policies Contained in R.C. 4928.02

In finding that the ESP was more favorable than an MRO, the Commission also considered that the ESP met certain provisions of state policy contained 4928.02. (Order at 56, App. Appx. at 67.) None of these policies are contained in R.C. 4928.143(B). Indeed, NOPEC's previous discussion of the legislative history of SB 221 shows that consideration of compliance with the policies contained in R.C. 4928.02 was removed in evaluating the favorability of an ESP over an MRO. Again, the Commission has muddled the standards for approving a partial stipulation with the standard for approving an ESP. The Commission erred in considering these policy issues in approving the ESP 3.

PROPOSITION OF LAW NO. 4: AN ORDER OF THE PUBLIC UTILITIES COMMISSION OF OHIO IS UNLAWFUL IF IT APPROVES AN ESP THAT IS QUANTITATIVELY LESS FAVORABLE THAN THE EXPECTED RESULTS OF THE MARKET RATE OPTION PRICE DETERMINED UNDER R.C. 4928.142. R.C. 4928.143(C)(1).

As stated previously, the Commission's responsibility under R.C. 4928.143(C)(1) was to combine or "aggregate" the price and charges in R.C. 4928.143(B)(1) and (2) and compare the result to the price determined under R.C. 4928.142, as the statute and this Court's precedent require. The Commission did so as a part of its erroneous three part analysis, and found that "quantitatively, the ESP 3 is better in the aggregate than an MRO by \$21.4 million." (Order at 55-56, App. Appx. at 66-67.) The Commission erred in its quantitative analysis.

In its attempt to meet its burden of proof under R.C. 4928.143(C)(1), the Company submitted an application and pre-filed testimony that the ESP was quantitatively more favorable than the expected results of an MRO by a net present value of \$200.6 million. (Co. Ex. 3 at 16, WRR-Attachment 1 [Supp. at 114].) In reaching this conclusion, the Company selected, as its

pricing methodology for the ESP under R.C. 4928.143(B)(1), a competitive bid process—the same methodology under which the MRO is set. R.C. 4928.142. Thus, the Company considered that the price of generation for the ESP was comparable to the MRO price and did not include the generation price in its quantitative comparison. (Co. Ex. 3 at 18, Supp. at 111.) Rather, it analyzed only the following adjustments to be made to the ESP price under R.C. 4928.143(B)(2): revenues obtained through the Delivery Capital Recovery Rider (“Rider DCR”), revenues from the Percentage of Income Payment Plan (“PIPP”) customers, expenditures for the Economic Development Funds and Fuel Fund, and revenues foregone by not assessing charges for Regional Transmission Expansion Planning (“RTEP”).

Although R.C. 4928.142 does not contemplate adjustment to the MRO price, which is to be determined solely by competitive bidding, the Company nevertheless made adjustments by imputing the results of a hypothetical distribution rate case under R.C. Chapter 4909 to the MRO price, and also added revenues it would receive from PIPP customers.¹⁴

The following Table 1 illustrates the Company’s initial calculations:

¹⁴ As explained below, NOPEC strenuously objects to imputing distribution rate case revenues into the MRO generation price; however, NOPEC does not contest the inclusion of PIPP generation revenues for purposes of this proceeding. Under the terms of the ESP, PIPP customers are not included in the load to be bid in a competitive auction. Rather, PIPP load is served under a bilateral contact. (Order at 56, App. Appx. at 67). The default generation rate, as discounted for PIPP customers (by 6%), was included in the ESP generation price under R.C. 4928.143(B)(1), and the default generation rate was added to the MRO price. NOPEC will accept for this proceeding that inclusion of the PIPP generation revenues in the MRO would be the same as resulted from auction.

Table 1

| <u>ESP Provisions</u> | <u>Revenue</u> (\$ millions) |
|---|-------------------------------------|
| Rider DCR Revenues | \$ 405.0 |
| PIPP RS Generation Revenues | \$ 163.5 |
| Economic Development Funds | \$ (2.0) |
| Fuel Fund | \$ (9.0) |
| RTEP Estimates | \$ (293.7) |
| <i>Total Revenues</i> | \$ 263.8 |
| | |
| <u>MRO Provisions</u> | <u>Revenue</u> (\$ millions) |
| Distribution Rate Case | \$ 376.0 |
| PIPP RS Generation Revenue | \$ 173.9 |
| <i>Total Revenues</i> | \$ 549.9 |
| | |
| <u>Net Present Value</u> | <u>Revenue</u> (\$ millions) |
| NPV: ESP | \$ 285.8 |
| NPV: MRO | \$ 486.3 |
| <i>Benefits to Customers (MRO – ESP)</i> | \$200.6 |

Co. Ex. 3, WRR-Attachment 1 [Supp. at 114].

Staff, NOPEC/NOAC, OCC, and other parties opposed adjusting the ESP with the RTEP credit because the adjustment already had been approved in the *ESP 2 Case*. (Order at 51-52, App. Appx. at 62-63.) As illustrated in Table 2, removal of the RTEP (shaded) would make the ESP less favorable than the MRO by a net present value of approximately \$7 million, or \$7.6 million without considering net present value. (Staff Ex 3 at 3 [Supp. at 119]; Tr. Vol. II at 259 [Supp. at 199]; Tr. Vol. I at 129 [Supp. at 193].)

Table 2

| <u>ESP Provisions</u> | <u>Revenue</u> (\$ millions) |
|---|-------------------------------------|
| Rider DCR | \$ 405.0 |
| PIPP RS Generation Revenues | \$ 163.5 |
| Economic Development Funds | \$ (2.0) |
| Fuel Fund | \$ (9.0) |
| RTEP Estimates | \$ ----- |
| <i>Total Revenues</i> | \$ 557.5 |
| | |
| <u>MRO Provisions</u> | <u>Revenue</u> (\$ millions) |
| Distribution Rate Case | \$ 376.0 |
| PIPP RS Generation Revenue | \$ 173.9 |
| <i>Total Revenues</i> | \$ 549.9 |
| | |
| <u>Net Present Value</u> | <u>Revenue</u> (\$ millions) |
| NPV: ESP | \$ 493.3 |
| NPV: MRO | \$ 486.3 |
| <i>Benefits to Customers (MRO – ESP)</i> | \$ (7.0) |

NOPEC/NOAC Jt. Ex. 1, at Attachment MRF-5 [Supp. at 22].

Aware that the ESP would become less favorable than an MRO with the removal of the RTEP credit, Staff (consistent with its predilection for ESPs) attempted to salvage the Partial Stipulation at hearing by offering two different theories under which the ESP could be approved as more favorable than an MRO. First, Staff recommended that, although the ESP was quantitatively less favorable than the expected results of an MRO, the ESP should be approved because of the qualitative benefits provided by the Partial Stipulation. (Staff Ex. 3 at 4, Supp. at 120). Alternatively, even though the Company recognized in its application that customers would pay \$29 million less for Distribution Rate Case costs under an MRO than they would for Rider DCR costs under an ESP during the two year period of the ESP, Staff's witness considered the costs to be a "wash" over "the long run." (Staff Ex. 3 at 4-5 [Supp. at 120-121]; Tr. II at 266

[Supp. at 266].) Staff concluded that, if the Rider DCR expenses were removed from the ESP analysis and the Distribution Rate Case expenses were removed from the MRO analyses, the ESP would be more favorable than the ESP by \$21.4 million, not considering net present value. Id. The following Table 3 illustrates the Staff's revisions to the Company's initial analysis of the quantitative comparison.

Table 3

| <u>ESP Provisions</u> | <u>Revenue</u> (\$ millions) |
|---|-------------------------------------|
| Rider DCR | \$ ----- |
| PIPP RS Generation Revenues | \$ 163.5 |
| Economic Development Funds | \$ (2.0) |
| Fuel Fund | \$ (9.0) |
| RTEP Estimates | \$ ----- |
| <i>Total Revenues</i> | \$ 152.5 |
| <u>MRO Provisions</u> | |
| | <u>Revenue</u> (\$ millions) |
| Distribution Rate Case | \$ ----- |
| PIPP RS Generation Revenue | \$ 173.9 |
| <i>Total Revenues</i> | \$ 173.9 |
| <u>Value</u> | |
| | <u>Revenue</u> (\$ millions) |
| ESP | \$ 152.5 |
| MRO | \$ 173.9 |
| <i>Benefits to Customers (MRO – ESP)</i> | \$ 21.4 |

In its order and on rehearing, the Commission correctly adjusted the Company's quantitative analysis for the ESP by removing the RTEP credit, finding that the credit was a result of the Commission's decision in the *ESP 2 Case* and cannot be considered a benefit of the ESP 3. (Order at 55, App. Appx. at 66.) However, the Commission erroneously agreed that the costs represented by the DCR Rider and the Distribution Rate Case were "substantially equal" and should be removed from the analysis, ultimately agreeing with Staff that the ESP was

quantitatively more favorable than the expected results of the MRO by \$21.4 million. (Order at 56, App. Appx. at 67.)

It was unlawful for the Commission to impute Distribution Rate Case costs in the MRO, and to compound the unlawfulness further by deeming the distribution revenues recovered during the two year ESP period to be “substantially equal.”

A. It is Unlawful to Include Distribution Costs as a Part of an MRO’s Generation Costs. R.C. 4928.142

As stated previously, under the statutory scheme enacted by the Legislature, the Commission is to combine the ESP price developed under R.C. 4928.143(B)(1) with the cost adjustments made under R.C. 4928.143(B)(2), and compare the result to the expected results of a competitive bid process developed under R.C. 4928.142 for an MRO. The Commission was clearly within its authority to adjust the ESP with the revenues to be recovered for infrastructure improvements under Rider DCR. R.C. 4928.143(B)(2)(h). However, the Commission erred by adjusting the MRO with hypothetical Distribution Rate Case revenues. R.C. 4928.142 permits only the consideration of the results that would be expected from a competitive bid process for generation supply in developing an MRO. Development of the MRO concerns only the cost of generation, not distribution, and it was unlawful for the Commission to impute the Distribution Rate Case costs to the MRO.

Thus, under the appropriate statutory analysis, the \$405 million in DCR revenues should be used to adjust the ESP in accordance with R.C. 4928.143(B)(2)(h). However, no corresponding adjustment can be made to the MRO for distribution costs. As illustrated in Table 4, the result is that the ESP is quantitatively less favorable than the MRO by \$383.6 million, not considering net present value, requiring the Commission’s order to be reversed.

Table 4

| <u>ESP Provisions</u> | <u>Revenue</u> (\$ millions) |
|---|-------------------------------------|
| Rider DCR | \$ 405.0 |
| PIPP RS Generation Revenues | \$ 163.5 |
| Economic Development Funds | \$ (2.0) |
| Fuel Fund | \$ (9.0) |
| RTEP Estimates | \$ ----- |
| <i>Total Revenues</i> | \$ 557.5 |
| <u>MRO Provisions</u> | |
| <u>Revenue</u> (\$ millions) | |
| Distribution Rate Case | \$ ----- |
| PIPP RS Generation Revenue | \$ 173.9 |
| <i>Total Revenues</i> | \$ 173.9 |
| <u>Value</u> | |
| <u>Revenue</u> (\$ millions) | |
| ESP | \$ 557.5 |
| MRO | \$ 173.9 |
| <i>Benefits to Customers (MRO – ESP)</i> | \$ (383.6) |

- B. **Even if Distribution Costs Could be Included in the MRO’s Generation Costs, the Record Does Not Support that the Revenues to be Collected Under Rider DCR and the Distribution Rate Case Would be a “Wash.”** *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.*, 68 Ohio St.3d 547, 554, 629 N.E.2d 414 (1994) (a Commission decision unsupported by the record as to show misapprehension, mistake or willful disregard of duty must be reversed).

Neither the Company nor the Commission dispute that during the two-year ESP period under review (June 1, 2014 through May 31, 2016), customers will pay \$29 million more for distribution investments under the ESP than an MRO. Nevertheless, the Commission adopted its Staff’s conclusion that over a longer period the costs would be “substantially equal.” (Order at 55-56 [App. Appx. at 66-67]; Tr. Vol. II at 266 [Supp. at 200].) The difficulty with the Commission’s conclusion is that it assumes that the DCR mechanism will end at some point, after which distribution costs will be recovered only under R.C. Chapter 4909, causing the regulatory lag vis-à-vis Rider DCR eventually to end. (Tr. II, Vol. at 266 [Supp. at 200]).

However, R.C. 4928.143 places no restrictions on an electric distribution utility from filing successive ESPs in perpetuity for the recovery of infrastructure modernization costs under R.C. 4928.143(B)(2)(h).¹⁵ That the DCR Rider mechanism will end, or when it will end, is without record support, is speculative, and would require an act of the Legislature to change, not the fiat of the Commission or its Staff. The disparity between the recovery of distribution costs under the DCR Rider versus a rate distribution case could last years, decades, or forever – especially considering Staff’s and the Commission’s predilection for favoring ESPs over MROs. (Staff Ex. 3 at 4 [Supp. at 120]; Order at 56 [App. Appx. at 67].) The Commission’s decision on this issue is without such record support so as to show misapprehension, mistake, or a disregard of duty and must be reversed. *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.*, 68 Ohio St.3d 547, 554, 629 N.E.2d 414 (1994). Indeed, the Legislature intended to benefit electric utilities by permitting them to recover limited distribution costs under an ESP [R.C. 4928.143(B)(2)(h)] earlier than they would have under the traditional ratemaking processes of R.C. 4909.15(e.g., without the regulatory lag), which process must be used when operating under an MRO. (App. Appx. at 202.) To find that the recovery of such distribution costs under either an ESP (R.C. 4928.143) or an MRO (R.C. 4928.142) is substantially equal, flies in the face of legislative intent.

The standard of review set forth in R.C. 4928.143 (C)(1) is crystal clear: to approve an ESP over an MRO, the ESP must be *more favorable* than the results that would be obtained under the competitive bid process of R.C. 4928.142 for an MRO. The Commission violated this standard by finding that the costs recovered through the DCR Rider and a Distribution Rate Case would be “substantially equal.” The Legislature specifically rejected such standard when

¹⁵ See, R.C. 4928.142(F), which prevents an electric distribution utility only from filing an ESP after an MRO has been approved. (App. Appx. at 212.)

enacting SB 221 by stripping the “more favorable than, *or at least comparable to,*” language from SB 221 as Passed by the Senate. SB 221 as Passed in the Senate, Section 4928.14(E)(2)(d) (App. Appx. at 244-245); Legislative Service Commission Bill Analysis, 127th General Assembly, SB 221: As Passed by the Senate (App. Appx. at 296-297). Moreover, the Legislature amended the House version of SB 221 from requiring that the ESP be “favorable to” an MRO, to requiring that the ESP be “*more* favorable than” the MRO in the version of the bill as enacted. SB 221 as Reported in the H. Public Utilities, Section 4928.143(C)(1) (App. Appx. at 253); Legislative Service Commission Bill Analysis, 127th General Assembly, SB 221: As Reported by the H. Public Utilities (App. Appx. at 325). Thus, the Commission’s “substantially equal” standard violates the legislative intent, if not the plain meaning, of R.C. 4928.143(C)(1).

If the Court finds that distribution costs can be included in an MRO (which they cannot, as stated previously), NOPEC respectfully requests the Court to reverse the Commission on this issue and find that, in determining the recovery of costs under Rider DCR, the Commission must use the costs over the known two year period of time that the ESP is in effect, and similarly use the costs that would be recovered under a distribution rate case under the same two year time frame, as the Company had done in its application and pre-filed testimony. As demonstrated in the following Table 5, a reversal on this issue would reinstate the \$29 million benefit to the MRO and make the MRO \$7 million more favorable than the ESP on a net present value basis (or \$7.6 million more favorable without considering net present value), requiring a reversal of the Commission’s order.

Table 5

| <u>ESP Provisions</u> | <u>Revenue</u> (\$ millions) |
|---|-------------------------------------|
| Rider DCR | \$ 405.0 |
| PIPP RS Generation Revenues | \$ 163.5 |
| Economic Development Funds | \$ (2.0) |
| Fuel Fund | \$ (9.0) |
| RTEP Estimates | \$ ----- |
| <i>Total Revenues</i> | \$ 557.5 |
| <u>MRO Provisions</u> | |
| <u>Revenue</u> (\$ millions) | |
| Distribution Rate Case | \$ 376.0 |
| PIPP RS Generation Revenue | \$ 173.9 |
| <i>Total Revenues</i> | \$ 549.9 |
| <u>Net Present Value</u> | |
| <u>Revenue</u> (\$ millions) | |
| NPV: ESP | \$ 493.3 |
| NPV: MRO | \$ 486.3 |
| <i>Benefits to Customers (MRO – ESP)</i> | \$ (7.0) |

NOPEC/NOAC Jt. Ex. 1, at Attachment MRF-5 [Supp. at 22].

PROPOSITION OF LAW NO. 5: THE COMMISSION MAY NOT TAKE ADMINISTRATIVE NOTICE OF TESTIMONY OFFERED IN ONE PROCEEDING TO SUPPORT AN APPLICANT'S BURDEN OF GOING FORWARD WITH THE EVIDENCE AND ITS BURDEN OF PROOF IN ANOTHER PROCEEDING. CANTON STORAGE AND TRANSFER CO. v. PUB. UTIL. COMM., 72 OHIO ST.3d 1, 647 N.E.2d 136 (1995).

A. Introduction

This appeal presents a pivotal point in the Court's line of precedent construing the scope of documents of which the Commission may take administrative notice. In this proceeding the Commission took administrative notice of testimony from an earlier proceeding and, moreover, placed the burden on opposing parties to discern the specific testimony the applicant would use to support its case. Not only is the Commission's Order on this issue unlawful and prejudicial, but its misapplication of the standard for taking administrative notice in Commission

proceedings requires that the standard be revised, consistent with Ohio Evid.R. 201 (App. Appx. at 228), to ensure that only facts, not opinion testimony, are subject to administrative notice.

B. Background

The Company filed its *ESP 3 Case* application on April 13, 2012 and sought expedited review and approval just 19 days later, on May 2, 2012. (Co. Ex. 1 at 3, Supp. at 27.) Although the Legislature found it reasonable that ESP cases be processed in 275 days (approximately nine months) (R.C. 4928.143(C)(1)) the Commission ordered that hearing commence on May 21, 2012, just over a month from the time of filing. (Order at 4, App. Appx. at 15.)

FirstEnergy's support for the ESP 3 Proposal was limited to only: (i) a five-page application; (ii) the ESP 3 Partial Stipulation; (iii) the pre-filed direct and supplemental testimony of FirstEnergy witness William R. Ridmann; (iv) a supplemental information filing docketed on May 2, 2012 pursuant to Commission order; (v) the rebuttal testimony of Robert B. Stoddard, which was filed on June 7, 2012; and (vi) proposed revised tariffs.

The Company filed no other documents to support its application. Instead, the Company, requested the Commission to take administrative notice of the entire, massive records in the *ESP 2 Case* and *MRO Case*, including applications, pleadings, pre-filed expert opinion testimony, transcripts of cross examination, and exhibits introduced and admitted at hearing. (Tr. Vol. I 26-29, Supp. at 185-188.) NOPEC and the other non-signatory parties had insufficient time to prepare for hearing and twice requested an extension of the hearing schedule. By Entry of May 2, 2012, the Commission granted a short extension of the hearing to June 4, 2012. Another request for extension, made June 1, 2012, was denied the same day. (Order at 5, App. Appx. at 16.)

The attorney examiner did not rule on the Company's request to take administrative notice of the prior proceedings until the first day of hearing (June 4, 2012), denied it, and ordered

the Company to identify the specific documents to be noticed. The Company waited until the last day of the direct case (June 6, 2012) to provide a list of documents (*Id.*), and the attorney examiner did not grant this more limited request until *after* the close of the Company's case in chief and, indeed, after the close of NOPEC's and all other intervenors' direct testimony. (Tr. Vol. III at 170-173, Supp. at 206-209.)

In addition to the applications (which included the Company's pre-filed opinion testimony), the documents noticed included: (i) seven (7) specific pages of transcript testimony from the evidentiary hearing in the *ESP 2 Case*; and (ii) the prefiled testimony of four witnesses, three of whom who did not testify or otherwise participate in the *ESP 3 Case* (Staff witness Hisham Choueiki, Staff witness Tamara Turkenton, and Industrial Energy Users of Ohio ("IEU") witness John D'Angelo).¹⁶ (Tr. Vol. III at 10-12, Supp. at 202-204.)

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 (*Id.* at 19, Supp. at 205), who also did not testify or participate in the *ESP 3 Case*. Nucor made its request for administrative notice at the close of all direct testimony, thereby denying all of the parties the opportunity to review such testimony and cross-examine the unavailable witness. Over the objections of NOPEC and other parties, the Attorney Examiner took administrative notice of Mr. Goins' testimony as well. (*Id.* at 171, Supp. at 207), which the Commission affirmed. (Order at 20-21, App. Appx. at 31-32.)

C. The Commission's Administrative Notice of Testimony From a Separate, Earlier Proceeding was Unlawful Under the Traditional Standard for Taking Administrative Notice.

1. The Traditional Standard

¹⁶ The pre-filed testimony of Staff witness Fortney was the fourth noticed. Mr. Fortney was available for cross-examination at the *ESP 3* hearing.

The Court repeated the standard governing the Commission's ability to take administrative notice in *Canton Storage and Transfer Co. v. Pub. Util. Comm.*, 72 Ohio St.3d 1, 8, 647 N.E.2d 136 (1995) ("*Canton Storage*");

...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.

NOPEC did not have an opportunity to prepare and respond to the testimony noticed in the ESP 3 proceeding and was prejudiced.

2. Opportunity to Prepare and Respond

As stated previously, the attorney examiner initially denied the Company's motion to take administrative notice of the entire records in the *ESP 2 Case* and *MRO Case* on the first day of hearing as being overly broad. After the Company presented a specific list of documents to consider at the beginning of the last day of the parties' direct cases, the attorney examiner granted the amended motion to take notice of those documents after the Company's case in chief had ended and after all parties' testimony had concluded. (Tr. III 170-173, Supp. at 206-209.) NOPEC clearly did not have the opportunity to prepare or to respond to this specific evidence. By the time NOPEC had notice of the specific "facts" to be considered as evidence, the time for discovery had long passed and the opportunity to cross examine witnesses on the testimony that was noticed (to the extent they were even available for cross-examination) had ended. Moreover, because NOPEC's direct case had concluded, it was prevented from responding to the evidence noticed through its own witness's direct testimony.¹⁷

Apparently conceding that the attorney examiner's late ruling denied the parties notice of the specific documents on which notice would be taken, and thus prevented them from preparing

¹⁷ The testimony in the opposing parties' direct cases ended June 6, 2012; only the Company was permitted to present rebuttal testimony on June 8. (Tr. Vol. III at 173-176, Supp. at 209-209.3.)

and responding thereto, the Commission found that (1) parties to this proceeding who also were parties in the prior proceedings had ample opportunity, in the prior proceedings, to respond to the documents eventually noticed, (2) in any event, parties to the *ESP 3 Case* had the opportunity through discovery to the Company to discern the documents upon which the Company would rely to support its case, and (3) thereafter, could track down the expert witness whose testimony was to be noticed for further discovery and, if necessary, compel the witness's presence at hearing for cross examination through subpoena. (Order at 20, App. Appx. at 31.)

As shown below, none of these findings has merit.

3. NOPEC Did Not Have the Opportunity to Respond to the Evidence in the Prior ESP and MRO Proceedings.

In its Order, the Commission cites *Allen v. Pub. Util. Comm.*, 40 Ohio St.3d 184, 532 N.E.2d 1307 (1988) ("*Allen*") for the proposition that the parties to a prior proceeding of which administrative notice is taken, "presumably have full knowledge of, and an adequate opportunity to explain and rebut, the evidence" in that prior proceeding, including through the prior proceeding's rehearing process. (Order at 19, App. Appx. at 30.) *Allen* does not apply to this case.

In *Allen*, the Commission approved the unlimited availability of state-wide operating authority for common carriers transporting commodities requiring refrigeration. In doing so, the Commission admonished the applicants involved in the proceeding that they should not use their new authority to object to similar requests from future applicants. Three months later, the applicants in the prior proceeding ignored the Commission's admonition and objected to other applicants being granted the same authority. The Commission took administrative notice of the record in the prior proceeding to show that the objecting parties had the opportunity to contest its policy in the prior proceeding, including on rehearing, but failed to do so.

Although NOPEC was a party to the prior proceedings of which notice was taken, it did not have the opportunity to explain or rebut the evidence presented therein. NOPEC was a signatory party to the stipulation that resolved the *ESP 2 Case*. (*ESP 2 Case*, Joint Ex. 1 [Supp. at 210]; Tr. Vol. III at 12 [Supp. at 204].)¹⁸ The parties agreed that the stipulation did not represent positions they may have advanced unilaterally (*ESP 2 Case*, Joint Ex. 1 at 4 [Supp. at 213]), but nevertheless agreed to support the entirety of the stipulation before the Commission or on appeal, despite their individual positions. (*Id.* at 35, Supp. at 244.) Thus, NOPEC was legally bound not to rebut the provisions of the *ESP 2 Case* stipulation with which it disagreed.

4. Placing the Duty on Intervenors' to Discern the Particular Documents for Which an Applicant Seeks Administrative Notice Unfairly Relieves the Company of the Burden of Going Forward with the Evidence.

The Commission's order is contradictory. It found the Company's request to take administrative notice of the entirety of the two previous proceedings overly broad, *denied* it, and required the Company to provide a list of the specific documents to admit as evidence (albeit too late to provide opposing parties the opportunity to respond). On the other hand, the Commission found the Company's overly broad request (to which NOPEC and other parties strenuously objected) *sufficient* for purposes of providing notice of its intent to the intervenors in this case, but then imposed upon opposing parties the duty to discern through discovery the specific documents on which the Company would rely to support its burden. (Order at 20, App. Appx. at 31.) The Commission erred.

¹⁸ The *ESP 2 Case* stipulation was supplemented twice. The stipulation was initially filed with the Commission on March 23, 2012 (Supp. at 210), the supplement was filed on May 12, 2012 (Supp. at 258), and the second supplement was filed on July 22, 2012 (Supp. at 268). NOPEC signed the second supplement (Supp. at 268), agreeing to the terms of the stipulation and each of its supplements.

As the applicant bearing the burden of proof in this proceeding (R.C. 4928.143(C)(1)), the Company also bore the burden of going forward with the evidence. See, also, Ohio Adm. Code 4901:1-35-03(C)(1) (App. Appx. at 215.) By not requiring the Company to identify the specific documents upon which it was to rely to meet its burden of proof until after the close of all direct testimony, the Commission relieved the Company of its burden.

The Commission's order sets a dangerous precedent under which future applicants can seek to incorporate massive records from prior proceedings into their application, request (and receive) expedited review from the Commission, cause intervenors to spend invaluable time discovering from the company what evidence it actually will use to support its case, and require them to track down and depose potential adverse witnesses and, if necessary, compel them to submit to cross-examination by subpoena. Each ESP proceeding filed before the Commission is a stand-alone case, spanning different time periods and presenting different costs and comparisons (as discussed previously) on which the Company has the burden of proof. With that burden is the duty to provide the parties with the evidence it seeks to present to sustain its burden, and access to the witnesses relied on to do so. Indeed, in limiting the holding in *Allen* (discussed subsequently), this Court found it incumbent on applicants to make their own record in their own cases before the Commission, rather than to rely on the testimony admitted in other proceedings. *Canton Storage*. To impose the burden of time and expense on the intervenors to discern the documents and witnesses supporting the Company's case is unduly burdensome, prejudicial, and denies them due process.

5. NOPEC Did Not Have the Opportunity to Conduct Discovery of All the Experts of Whose Testimony the Commission Took Administrative Notice.

Of the four witnesses whose opinion testimony was noticed by the Commission, three were Staff members. Consider, for example, the testimony of Staff witness Turkenton, who cited

eleven qualitative benefits of the *ESP 2 Case* to support the stipulation in that proceeding (*ESP 2 Case*, Staff Ex. 2 at 3-8 [Supp. at 287-292].) These included the benefits of (1) the competitive bid process adopted, (2) the PIPP discount, (3) the bypassable GCR rider, (4) the distribution rate freeze, (5) the DCR rider, (6) the RTEP credit, (7) discounts for domestic automakers, (8) funding for the Cleveland Clinic, (9) funding for energy efficiency goals, (10) shareholder funding for economic development, and (11) aid to low income customers.¹⁹

Although the Commission ruled that NOPEC had the opportunity to discover from the Company that Staff witness Turkenton's testimony would be used to support its case, and that NOPEC had the right to conduct further discovery of the witness prior to hearing, NOPEC had no such opportunity because the Commission's rules do not permit the discovery or subpoena of Staff members. Ohio Adm. Code 4901-1-16(I) (App. Appx. at 217) and 4901-1-25(D) (App. Appx. at 219). Due to this prohibition, and the fact that Staff witness Turkenton was not presented as a witness and available for cross-examination at the hearing in this proceeding, NOPEC did not have the opportunity to rebut this testimony or even elicit a response from Staff witness Turkenton that she no longer agreed that these benefits still applied under the different facts of the pending *ESP 3 Case*. The improperly noticed testimony is, at best, misleading as an accurate representation of Staff's position, particularly when compared to Staff witness Fortney's testimony in the *ESP 3 Case* that only four benefits were present. (Staff Ex. 3 at 3-4 [Supp. at 119-120]; Tr. Vol. II at 247-248 [Supp. at 196-197].)

6. NOPEC Was Prejudiced by the Administrative Notice Taken.

¹⁹ Many of these benefits also were recited by Company witness Ridmann. (Co Ex. 3 at 3-8, Supp. at 96-101.) Funding for the Cleveland Clinic was not included as a specific benefit in Company witness Ridmann's testimony (Co. Ex. 3, Supp. at 93), but was included in the noticed opinion testimony of Staff witnesses Fortney (*ESP 2 Case*, Staff Ex. 3, Supp. at 299), and Turkenton (*ESP 2 Case*, Staff Ex. 2, at 5 [Supp. at 289]), as well as the opinion testimony of IEU witness D'Angelo (*ESP 2 Case*, IEU Ex. 2 [Supp. at 310]).

Although Staff witness Turkenton's noticed *ESP 2 Case* testimony was not an accurate recitation of Staff's position in this *ESP 3 Case*, the Commission relied on many of the benefits she cited in finding the stipulation satisfied the public interest:

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 of 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). [Order at 43, App. Appx. at 54.]²⁰

In addition to the noticed opinion testimony of Staff witness Turkenton, the Commission also took administrative notice of the testimony of Staff witness Fortney and IEU witness D'Angelo from the *ESP 2* proceeding, which provided that funding for the Cleveland Clinic was a benefit (see fn. 19). The Commission also noticed the 149-page pre-filed direct testimony of Nucor witness Goins, who testified as to the flaws in the competing MRO. *MRO Case*, Nucor Ex. 1. Also noticed was the testimony provided on cross-examination OCC witness Gonzales that the Commission examines the impact of a stipulation on behalf of residential customers. (*ESP 2 Case*, Tr. Vol. III at 775 [Supp. at 326].)

NOPEC argued in this proceeding that the *ESP* was not more favorable than the MRO and should have been given ample notice and the opportunity to cross examine Staff witness Turkenton, IEU witness D'Angelo, and Nucor witness Goins. Similarly, NOPEC argued that residential customers were effectively excluded from the stipulation process and should have been given ample notice and the opportunity to cross examine OCC witness Gonzalez.

²⁰ None of these benefits are contained in Staff witness Fortney's testimony. (Staff Ex. 3, Supp. at 116.)

The Company's obvious intent in seeking administrative notice was to supplement its case with the testimony of other parties to help meet its burden of proof. By taking administrative notice, the Commission necessarily reduced the Company's burden to NOPEC's prejudice (*Canton Storage*) requiring that this case be reversed and remanded. *Chesapeake & Ohio Ry. Co. v. Pub. Util. Comm.*, 163 Ohio St. 252, 126 N.E.2d 314 (1995) (when the record contains incompetent and competent evidence, and it is unclear the extent to which the Commission's order relied on competent evidence, the case must be remanded to the Commission to make that determination).

D. Considering the Commission's Misinterpretation of the "Opportunity to Prepare and Respond" Standard, the Court Should Revise its Standard For Administrative Notice Consistent with Ohio Evid. R. 201, Such that Only Facts are Subject to Administrative Notice.

In *Canton Storage*, the Court retreated from its finding in *Allen* that the Commission could take administrative notice in one case of the record made in another proceeding. As discussed previously, the Court in *Allen* took notice that the parties in the prior proceeding did not oppose the Commission's approval of unlimited availability of state-wide operating authority for all carriers transporting commodities requiring refrigeration. *Canton Storage* presented a different set of facts, in which the Commission noticed the testimony of witnesses in other proceedings to completely or partially sustain an applicant's burden of proof in its own proceeding. The Court found that the applicants were to make their own record in their own proceeding before the Commission. This is exactly the situation in the appeal before Court.

Considering that the *Canton Storage* Court already has found it improper to take notice of testimony from another proceeding, and also considering the highly prejudicial process the Commission has developed in this case for opposing parties to "explain or rebut" testimony for which an application seeks notice under the traditional standard of review, NOPEC urges the

Court to alter its standard for taking administrative notice before the Commission. NOPEC urges the Court to adopt Ohio Evid.R. 201.

NOPEC notes that the Legislature has intended that the Ohio Rules of Evidence apply in Commission proceedings. R.C. 4903.22, provides in part:

Except when otherwise provided by law, all processes in actions and proceedings in a court arising under Chapters 4901., 4903., 4905., 4906., 4907., 4909., 4921., 4923., and 4927. of the Revised Code shall be served, and the practice and rules of evidence in such actions and proceedings shall be the same, as in civil actions. . . [App. Appx. at 201.]

Evid.R. 201 “Judicial Notice of Adjudicative Facts” limits judicial notice to facts that are not subject to reasonable dispute:

- (A) Scope of rule. This rule governs only judicial notice of adjudicative facts; i.e., the facts of the case.
- (B) Kind of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. [App. Appx. at 228.]

The Staff Notes to Evid.R. 201(B) details the limited facts that should be noticed:

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. [App. Appx. at 228-229.]

NOPEC is aware of the Court’s findings that the Commission is not stringently confined to the rules of evidence (see, e.g., *Greater Cleveland Welfare Rights Org. v. Pub. Util. Comm.* 2 Ohio St.3d 62, 442 N.E.2d 1288 (1982) (“*Greater Cleveland*”); but, NOPEC is equally aware that the Commission’s discretion in applying the rules of evidence is not to be so unfettered as to

affect the parties' ability to assert or defend their rights. See, e.g., *Chesapeake & Ohio Ry. Co. v. Pub. Util. Comm.*, 163 Ohio St.252, 126 N.E.2d 314 (1955).

The Commission's misinterpretation of the "opportunity to prepare and respond" standard is so materially prejudicial to parties opposing an application, and so far removed from the Court's holding in *Canton Storage*, that the standard should be replaced by the clear standard the Legislature intended. This is not to say that the Court's precedent in *Greater Cleveland* is overruled. The Commission still would not be bound to follow Evid.R. 201 stringently, but any discretion afforded under the new standard would properly be limited to *facts* noticed and not extended to opinion testimony, as prohibited by *Canton Storage*.

PROPOSITION OF LAW NO. 6: AN APPLICANT FAILS IN ITS BURDEN OF PROOF IF IT FAILS TO SHOW THAT A PARTIAL STIPULATION REPRESENTS THE BROAD INTERESTS OF A CUSTOMER CLASS AND, THUS, IS THE RESULT OF SERIOUS BARGAINING AMONG THE PARTIES.

In approving partial stipulations offered to resolve proceedings before it, the Commission traditionally considers a three-prong analysis, which was endorsed by this Court in *Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, 592 N.E.2d 1370 (1992):

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?

R.C. 4928.143(C)(1) places the burden of proof in this proceeding upon the Company, which includes the burden of proving that the Partial Stipulation was the result of "serious bargaining among...the parties." To meet this burden, the Company contended (Co. Ex. 3 at 10-11, Supp. at 103-104), and the Commission found (Order at 26, App. Appx. at 37) that (1) the signatory parties have extensive experience in utility matters before the Commission and (2) they

represent diverse interests, including the interests of residential, commercial and industrial customers. The Commission erred.

A. Despite the Signatory Parties' Experience in Utility Matters Before the Commission, Serious Bargaining Did Not Occur in *This Proceeding*.

To support its position that the Partial Stipulation was the result of serious bargaining, the Company testified that the signatory parties have extensive experience in ESP and MRO proceedings before the Commission and that, indeed, they participated in the *ESP 2 Case* and were familiar with the issues in this proceeding, which the Company has consistently (but inappropriately) maintained is merely an extension of the *ESP 2 Case*. (Co. Ex. 3, at 10-11; Supp. at 103-104.) NOPEC has absolutely no doubt but that the Staff, the signatory parties, and their counsel are knowledgeable and capable; but, that knowledge and capability has no bearing on whether serious bargaining occurred *in this proceeding*.

The Court needs to consider only one, common sense fact to conclude that the Partial Stipulation filed in this proceeding was not the result of serious bargaining: in their rush to have an order issue from the Commission just 19 days after the Partial Stipulation was filed, the Staff and the signatory parties made a nearly \$300,000,000 mistake – the Company already had accounted for the RTEP credit in the *ESP 2 Case*, and was attempting to use the credit a second time in this proceeding to support its analysis that the ESP was quantitatively more favorable than an MRO. (Staff Ex. 3 at 2, Supp. at 118.) The signatory parties also participated in the *ESP 2 Case* (a prerequisite to being able to negotiate with the Company), and were aware that the RTEP credit had been taken then. (Co. Ex. 3, Supp. at 93.) Moreover, it weren't as if the Company had hidden the \$300,000,000 credit in a stack of data. The Company offered only one witness to support the Partial Stipulation, that witness offered only one exhibit to support the

Company’s quantification, and that exhibit made only five adjustments to the *ESP 3 Case* price, as restated in Table 1 above:

Table 1

| <u>ESP Provisions</u> | <u>Revenue</u> (\$ millions) |
|------------------------------|-------------------------------------|
| Rider DCR Revenues | \$ 405.0 |
| PIPP RS Generation Revenues | \$ 163.5 |
| Economic Development Funds | \$ (2.0) |
| Fuel Fund | \$ (9.0) |
| RTEP Estimates | \$ (293.7) |
| <i>Total Revenues</i> | \$ 263.8 |

Co. Ex. 3, WRR-Attachment 1 [Supp. at 114].

Because Staff, the signatory parties, and their counsel are knowledgeable and capable (as the Commission found (Order at 26, App. Appx. at 37), only one logical explanation remains as to why Staff and the signatory parties didn’t notice this mistake in plain view: in their haste to meet the Company’s self-imposed deadline, the signatory parties did not seriously bargain.²¹ This Court should so find.

B. The Partial Stipulation Does Not Represent the Interests of the Broad Residential Class.

In finding that the signatory parties represented diverse interests, the Commission noted that they included a municipality, competitive suppliers, commercial customers, industrial customers, advocates for low- and moderate-income residential customers, and Staff. (Order at 26, App. Appx. at 37.) Moreover, the Commission found that a municipality and low- and

²¹ Unfortunately, this haste led to other reversible error. As discussed previously, although Staff had signed the stipulation, Staff witness Fortney was required to testify that the RTEP credit had been double-counted, making the ESP less favorable than an MRO. (Staff Ex. 3 at 2, Supp. at 118.) However, rather than accept the result that the ESP was less favorable than an MRO, Staff offered alternatives to salvage the Partial Stipulation, i.e., by speculating that the revenues from Rider DCR and the Distribution Rate Case would be a “wash” over the long run, and by claiming that qualitative benefits can be considered in determining if an ESP is more favorable in the aggregate than an MRO.

moderate-income customer advocates were sufficient to represent the interests of the broad residential class of customers (*Id.*), despite the fact that NOPEC/NOAC (which represents almost 700,000 residential and small commercial customers), and OCC (which is statutorily charged to represent Ohio's 1.9 million residential customers) did not join the Stipulation, primarily because the Stipulation would lead to higher rates for the broad class of residential customers. (NOPEC/NOAC Jt. Ex. 1 at 2-3, Supp. at 2-3.)

1. The Significance of a Stipulation Representing the Broad Interests of Each Customer Class

The Court has considered whether stipulations were the result of “serious bargaining among...the parties” in two cases. In the first case, the Court in dicta expressed “grave concerns” with the Commission’s interpretation of the standard’s first prong, when it permitted the exclusion of parties with a significant stake in the proceeding from “the settlement table.” *Time Warner AxS v. Pub. Util. Comm.*, 75 Ohio St.3d 229, fn. 2, 661 N.E.2d 1097 (1996) (“*Time Warner*”). Specifically, in *Time Warner*, a telephone company was setting its rates under new alternative regulation statutes and the company excluded from negotiations all of its competitors who had intervened in the proceeding. In the second case, *Constellation Newenergy v. Pub. Util. Comm.*, 104 Ohio St.3d 530, 2004-Ohio-6767, 820 N.E.2d 885 (“*Constellation*”), the Court distinguished *Time Warner* and found that the “serious bargaining” standard was not violated because (1) only some of the utility’s competitors were, for undetermined reasons, (2) not invited to two sessions of settlement discussions with the other parties to the case. In making its distinction, the Court remarked that the “factual predicate” of an entire customer class’s exclusion from negotiations was not present in *Constellation*. *Id.* 104 Ohio St.3d at 535.

Thus, the Commission currently views *Time Warner* and *Constellation* as standing for the proposition that the “serious bargaining among...the parties” standard is not violated as long as

not all members of a customer class are excluded from negotiations. (Order at 26-27, App. Appx. at 37-38.) By extension, the Commission's rationale is that a partial stipulation is the product of serious bargaining among the parties if some members of a customer class support it.²² Id.

The Commission's practice of extending *Time Warner* and *Constellation* is unreasonable and, if affirmed in this case, will set a dangerous precedent whereby the broad interests of a customer class can be ignored if an applicant, as here, selectively negotiates with parties with more limited interests. Thus, it is incumbent upon an applicant to show, and the Commission to find, that the stipulating parties represent the broad interests of their customer class. The Company failed to do so, and failed to sustain its burden of proof.

2. The Company's Selective Negotiation Process Prevents a Finding of Serious Bargaining Among the Parties.

In most cases before the Commission, a utility files an application, parties intervene to protect their interests, and then enter into negotiations to resolve the case based upon objections to the application. However, in this case, the Company circulated a draft stipulation to the parties in the ESP 2 case for their review and comment, and the Company then began confidential, individual negotiations with them. (OCC Ex. 11 at 7-8 [Supp. at 134-135]; Tr. Vol. I at 35-38 [Supp. at 189-192]; Order at 27 [App. Appx. at 38].) The result was that, as to the residential customer class, the Company could satisfy the limited interests of a few members of the class and simply ignore the broad interests of the remainder—and claim under the Commission's precedent that the stipulation was the product of serious bargaining among the parties because at least some members of the residential class joined the stipulation. What's

²² *Time Warner* and *Constellation* are distinguishable from this proceeding. Neither considered the degree to which a signatory party to a partial stipulation must represent the relevant customer class for a partial stipulation to be considered the product of serious negotiations among the parties.

more, the Company never filed an application for its ESP, as it was originally proposed to the parties; rather, it submitted an application that merely incorporated the content of the executed Partial Stipulation (Co. Ex. 1, Supp. at 25), which effectively shields from review the extent of revisions to the initial application proposed and, thus, the extent to which negotiations were seriously undertaken.

Consider, for example, the special interest provisions of the Partial Stipulation where money was given by the Company to parties claiming to have a residential interest:

| PARTY(IES) | STIPULATED SPECIAL INTEREST |
|--|---|
| City of Akron | Funding of \$100,000 in 2014 and \$100,000 in 2015 for energy efficiency programs of Akron residents. The funds are recovered from all customers through rider DSE. Order at 14, Partial Stipulation, at 32 (App. Appx. at 25). |
| Ohio Partners for Affordable Energy (“OPAE”) | Funding of \$500,000 in 2015 and \$500,000 in 2016 for OPAE’s fuel program. Order at 16, Partial Stipulation at 40-41 (App. Appx. at 27). |
| Consumer Protection Association, Empowerment Council of Greater Cleveland, Cleveland Housing Network (collectively, “Citizens’ Coalition”) | Funding of \$4 million in 2015 and \$4 million in 2016, apportioned among the parties for low-income fuel fund programs. Order at 16, Partial Stipulation at 41 (App. Appx. at 27). |

Conceivably, the extent of the bargaining, if any, could be that the Company’s only accommodation to residential interests was to fund their low- and moderate-income projects.²³ OPAE mainly provides weatherization and energy efficiency to low- and moderate-income customers. (OCC Ex. 11 at 10, fn. 7 [Supp. at 137].) The Citizens Coalition intervened solely on behalf of low-income customers. (Order at 26, App. Appx. at 37.) Without additional evidence, the record shows that, based upon the funding they received for their own special projects, OPAE, Citizens’ Coalition and Akron did not represent the broad interests of the nearly

²³ The City of Akron’s contribution to the settlement process is de minimus, considering its restricted geographic application and that the funds provided for its energy efficiency programs are subsidized by ratepayers at large, rather than as a negotiated concession of the Company from its *ESP 3 Case* application.

2 million member residential class of the Company. Absent evidence that the broad interests of the class were represented by the stipulation, the Commission erred in finding that it was the result of serious bargaining among the parties.

The “serious bargaining among...the parties” standard requires more. The Company must provide some evidence that the parties claiming to represent residential interests represent the broad interests of the residential class and engaged in serious bargaining. At a minimum, the Company should be required to file an application as originally proposed to the parties as the basis of negotiations, and provide the opportunity for the parties to meet or otherwise collectively review the other parties’ suggested revisions to the draft stipulation.

3. The Serious Bargaining Standard Requires, at a Minimum, a Process in Which Negotiations Take Place Among the Parties.

Interestingly, the concern in *Time Warner* was that parties with significant interests in a proceeding were not given a seat at the “settlement table.” *Time Warner*, 75 Ohio St.3d, fn 2. The Company’s conduct in this proceeding was even more egregious because it took away the settlement table altogether. The parties to the *ESP 2 Case* did not meet or otherwise collectively review the other parties’ suggested revisions to the draft stipulation. (OCC Ex. 11 at 7-8 [Supp. at 134-135]; Tr. Vol. I at 35-38 [Supp. at 189-192].) The Commission rejected that the Company’s process of individual negotiations was improper, finding it sufficient that “every party to the *ESP 2 Case* was contacted by the Company during the negotiations and that each party was given an opportunity to review and comment upon the draft stipulation before it was filed in this proceeding.” (Order at 27 [App. Appx. at 38]; Second Entry on Rehearing at 8-9 [App. Appx. at 87-88].) The Commission’s finding sets a dangerous precedent that would condone the selective negotiations in which the Company engaged in this proceeding, and which are contrary to the intent of the serious bargaining standard.

The partial stipulation standard requires more. By conducting the individualized negotiations on the parties compartmentalized issues, the Company prevented the parties from

engaging in the give and take essential to multi-party negotiations. Parties were unable to share their positions or learn how their positions or proposals affected other parties' interests or the reasonableness of the Stipulation in general. The Company simply prevented negotiations "among" the parties, in violation of partial stipulation standard's first prong.

For all of these reasons, the Partial Stipulation was not the result of "serious bargaining among...the parties," requiring the Commission's Order be reversed.

IV. CONCLUSION

Appellant respectfully submits that the Commission's July 18, 2012 Opinion and Order and 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,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Merit Brief of Appellant Northeast Ohio Public Energy Council* was served upon the parties of record this 1st day of July 2013, via electronic transmission and regular mail.



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IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

*

Case No.: Case No. 2013-0109

Plaintiff-Appellant,

*

On appeal from the
Lucas County Court of

v.

*

Appeals, Sixth Appellate
District, Case No. L-10-1194

THOMAS CAINE WHITE,

*

Defendant-Appellee.

*

STIPULATED EXTENSION OF TIME TO FILE MERIT BRIEF OF APPELLEE

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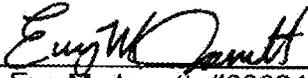
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STIPULATED EXTENSION OF TIME TO FILE MERIT BRIEF OF APPELLEE

Pursuant to S.Ct.Prac.R. 3.03(B)(2), counsel for appellant and counsel for appellee hereby stipulate to an extension of time for filing the Merit Brief of Appellant which is due on July 22, 2013, for a period of 20 days. The new filing date for the Merit Brief of Appellant is August 12, 2013.

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CERTIFICATION

I certify that a copy of the foregoing was sent via ordinary U.S. Mail this 1st day of July, 2013, to Peter Galyardt, Assistant State Public Defender, 250 East Broad Street - Suite 1400, Columbus, Ohio 43215, Counsel for Defendant-Appellee, Thomas Caine White.



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Sent: Monday, July 01, 2013 1:17 PM
To: Filing
Cc: Evy Jarrett
Subject: STIPULATED EXTENSION OF TIME TO FILE MERIT BRIEF OF APPELLEE (STATE OF OHIO) FOR S.C.T. CASE NO. 2013-0109 - STATE OF OHIO V. THOMAS CAINE WHITE
Attachments: image.pdf

ATTACHED PLEASE FIND FOR FILING THE ABOVE-REFERENCED STIPULATED EXTENSION OF TIME TO FILE MERIT FOR S.C.T. 2013-0109 - STATE OF OHIO V. THOMAS CAINE WHITE. THANK YOU.

DIANNE GEMPEL
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