IN THE SUPREME COURT OF OHIO

Environmental Law and Policy Center *Appellant*,	)	Case No. 2013-0513
v.	)	On Appeal from the Public Utilities Commission of Ohio
The Public Utilities Commission of Ohio *Appellees*.	)	Case No. 12-1230-EL-SSO

MERIT BRIEF OF APPELLANT ENVIRONMENTAL LAW AND POLICY CENTER

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MERIT BRIEF OF APPELLANT
ENVIRONMENTAL LAW AND POLICY CENTER

I. INTRODUCTION

This appeal by the Environmental Law and Policy Center ("ELPC") concerns the Public Utilities Commission of Ohio's ("PUCO" or "Commission") approval of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison's (collectively, "FirstEnergy" or "Companies") application ("Application"), PUCO Case No. 12-1230-EL-SSO, FirstEnergy, Application (April 13, 2012), to provide a standard service offer ("SSO") through an electric security plan ("ESP") pursuant to R.C. 4928.141 and R.C. 4928.143. FirstEnergy had met its obligation to provide a standard service offer in previous years with a market rate offer. *See* PUCO Case No. 09-0906-EL-SSO. Ohio Admin. Code 4901:1-35-03(C)(1) requires utilities seeking approval of a proposed ESP to file an application that includes a "complete description of the ESP and testimony explaining and supporting each aspect of the ESP." In the proceeding below, FirstEnergy failed to meet this requirement and instead relied on an incomplete application, which the Commission then unlawfully approved. The effect of the Commission's unlawful and unreasonable decision is to exempt FirstEnergy from complying with the Commission's rules. As described in more detail below, the Court should reverse the Commission's decision and remand the proceeding to the Commission with instructions to require FirstEnergy to file a complete application in accordance with Ohio law.

II. STATEMENT OF FACTS

A. Background on Standard Service Offers

In Ohio, electric distribution utilities are responsible for providing their customers with electricity. These utilities, however, no longer own their own generation. Electric distribution companies such as FirstEnergy, therefore, must purchase wholesale power from generators or third-party power marketers re-selling wholesale power. They typically do this through a bidding process. The distribution utilities then pass the cost of this electricity on to their customers in the form of rates, which also include the other costs of running a utility.

Ohio law requires FirstEnergy and other electric distribution utilities to use what is called a standard service offer to determine how they will procure the electricity that they will then sell to their customers. R.C. 4928.141(A). A standard service offer can take the form of either a market-rate offer ("MRO") or an electric security plan ("ESP"). *Id.*

An MRO provides for the procurement of supply by an EDU through a competitive bidding process specified in R.C. 4928.142. The winning price for supply through an MRO has a substantial impact on the prices that customers pay for their electricity.

Similarly, an ESP is used to determine the process by which an EDU procures supply for its customers. Unlike for an MRO, however, the law "does not provide a detailed mechanism for establishing rates under an ESP." *In re Columbus S. Power Co.*, 134 Ohio St. 3d 392, 393 (Ohio 2012). Instead, an ESP "may contain any number of provisions within a variety of categories so long as the plan is 'more favorable in the aggregate' than the expected results of a market-rate offer." *Id.* at 3 (citing R.C. 4928.143(C)(1)). In addition to the quantitative benefits that accrue to customers through a competitive bidding process, an ESP can also provide qualitative benefits to customers that would make it more beneficial than an MRO. For example, FirstEnergy alleges that its ESP 3 benefits customers by smoothing prices over three years, thereby mitigating sudden changes in the cost of electricity even if it means a potentially higher total cost. Stipulation at 2.

B. <u>FirstEnergy's Application and procedural history</u>

On April 13, 2012, FirstEnergy filed its Application pursuant to R.C. 4928.141 and R.C. 4928.143 to provide for a standard service offer in the form of ESP 3 commencing as early as May 2, 2012, and ending May 31, 2016. *Id.* at 6. The Application included a Stipulation containing the substance of ESP 3, which was signed by some of the parties in the case. ELPC did not sign the Stipulation.

FirstEnergy supported its Application with only the 20-page testimony of FirstEnergy Service Company Vice President of Rates and Regulatory Affairs William R. Ridmann and four attachments, including redlined tariffs. The testimony briefly summarized the components of the plan, but gave limited detail or support for most aspects of ESP 3. The emphasis of Mr. Ridmann's testimony was on the process for arriving at the Stipulation and FirstEnergy's justification for why it believes ESP 3 is preferable to a market rate offer. As Mr. Ridmann explained, his testimony was "not all inclusive" and only provided an "overview of a number of features of the Stipulation." 12-1230-EL-SSO, FirstEnergy Exhibit 3, Direct Testimony of Mr. Ridmann, 3. In addition to Mr. Ridmann's testimony, FirstEnergy included a single sentence in the Application requesting that "the Commission take administrative notice of the evidentiary record established in the Companies' current ESP, PUCO Case No. 10-0388-EL-SSO ("ESP 2"), and thereby incorporate by reference that record for the purposes of and use in this proceeding." Application at 5. The Attorney Examiner did not rule on this and FirstEnergy did not raise this request again until the start of the hearing. Per the Commission's April 25, 2012 Entry, FirstEnergy filed additional materials, which consisted mostly of financial information and some descriptions of the proposed ESP 3, but included no additional testimony. PUCO Case No. 12-1230-EL-SSO, Entry, 5-6 (April 25, 2012).

Then, on the third day of the hearing, the Attorney Examiner took administrative notice of specific documents, testimony, and excerpts from the transcripts of ESP 2 and PUCO Case No. 09-0906-EL-SSO ("MRO Case"), a standard service offer case from 2009 whose record had been incorporated into ESP 2. PUCO Case No. 12-1230-EL-SSO, Entry, 5-6 (April 25, 2012). This Administrative notice added thirteen pieces of testimony, seven pages of examination from transcripts, and hundreds of pages of documents to the record of this case on the last day of hearings before FirstEnergy filed rebuttal testimony.

The Commission issued its Opinion and Order on July 18, 2012. On August 17, 2012, ELPC filed its Application for Rehearing, arguing that the Commission erred in finding FirstEnergy's Application complete per Ohio Admin. Code 4901:1-35-03(C)(1) and in finding that the Attorney Examiners properly allowed FirstEnergy to enter information, including testimony, from the MRO Case and ESP 2 into the record. The Commission denied this Application for Rehearing on January 30, 2013. ELPC filed a Notice of Appeal with this Court and the Commission on April 1, 2013.

III. THE STANDARD OF REVIEW

R.C. 4903.13 contains the standard of review this court must employ when considering appeals from the Commission. R.C. 4903.13 provides that "[a] final order made by the public utilities commission shall be reversed, vacated, or modified by the supreme court on appeal, if, upon consideration of the record, such court is of the opinion that such order was unlawful or unreasonable." This court has generally applied this "unlawful and unreasonable" standard of review in two parts. With regard to questions of fact, the Ohio Supreme Court has held that it "will not reverse or modify a PUCO decision as to questions of fact where the record contains sufficient probative evidence to show the PUCO's determination is not manifestly against the weight of the evidence and is not so clearly unsupported by the record as to show misapprehension, mistake or willful disregard of duty." *AT&T Communications of Ohio, Inc. v. Pub. Util. Comm.*, 88 Ohio St.3d 549, 555 (2000) (citing *MCI Telecommunications Corp. v. Pub. Util. Comm.*, 38 Ohio St.3d 266 (1988)).

When reviewing questions of law in the context of an appeal from a Commission ruling, however, the Ohio Supreme Court has made it clear that it possesses "complete and independent power of review." *Ohio Edison Co. v. Pub. Util. Comm.*, 78 Ohio St.3d 466, 469 (1977). As the Ohio Supreme Court has stated, "Legal issues are, therefore, subjected to a more intensive examination than are factual questions." *MCI Telecommunications Corp.*, 38 Ohio St.3d at 268.

The question to be decided in this proceeding is a question of law. ELPC does not argue that ESP 3 is a bad ESP and does not ask this court to make a determination about the quality of ESP 3. Rather, this court must interpret the Ohio Admin. Code 4901:1-35-03(C)(1) requirement that electric distribution utilities such as FirstEnergy include in their applications under R.C. 4928.143 testimony "explaining and supporting each aspect of the ESP." While it will be necessary for the Court to consider what testimony FirstEnergy filed in order to render its decision, as the Ohio Supreme Court held in *State v. Williams*, "[T]he fact that a question of law involves a consideration of the facts or the evidence does not turn it into a question of fact." 134 Ohio St.3d 482, 488 (2012) (citing *O'Day v. Webb*, 29 Ohio St.2d 215, 219 (1972)).

In *Indus. Energy Consumers v. Pub. Utils. Comm'n*, the Supreme Court of Ohio examined the question of whether or not the Commission had properly established the cost for coal purchased from affiliates. 68 Ohio St.3d 559, 563 (1994). R.C. 4905.01(F) required the Commission to determine that the cost of coal purchased from an affiliate was reasonable only after comparing it to the cost of coal "purchased from all independent like mining operations."

Id. at 563 (R.C. 4905.01 was changed 1999 Ohio HB 640, 1 to remove (F) defining "acquisition cost"). To decide whether or not the Commission acted lawfully, the Court had to analyze R.C. 4905.01(F) to determine whether or not the Commission had examined the proper non-affiliate coal prices. Though questions of fact clearly played a role in determining whether or not the Commission acted lawfully, the crux of the issue was a question of law to determine whether or not the Commission had looked at the proper material, and therefore the Court applied a more intensive examination than it would to questions of fact. *Id.*

This case is analogous to *Indus. Energy Consumers* in that the Court must determine whether or not the Commission complied with a requirement specifying which minimal evidence must be considered. Here, the Commission must find that FirstEnergy complied with the Commission rule requiring applications to include testimony explaining "each aspect of the ESP" before it can move on to consider the merits of ESP 3. The Court, therefore, should apply the same standard for a question of law in this case as in *Indus. Energy Consumers* to determine whether or not the Commission complied with Ohio Admin Code 4901:1-35-03(C)(1).

As noted above, this case involves a Stipulation signed by some, but not all, of the parties in the Commission proceeding. For the purposes of this case, however, the Court should ignore the fact that FirstEnergy filed its Application with a Stipulation. The Ohio Supreme Court has held, in a case in which the Commission argued that its burden was reduced because it was assessing a stipulation, that "the requirement that [the Commission's] findings be based on record evidence" is not lessened "when the Commission is reviewing a stipulation." *In re Application of Columbus S. Power Co.*, 129 Ohio St.3d 46, 49 (2011). As the Ohio Supreme Court has held, even stipulations at the Commission "must be supported by the evidence of the record." *Indus. Energy Consumers*, 68 Ohio St.3d at 563.

The Commission erred as a matter of law in declaring that FirstEnergy complied with the minimum requirements of Ohio Admin. Code 4901:1-35-03(C)(1). This Court should overturn the Commission's decision to approve ESP 3 and direct the Commission to require FirstEnergy to submit an application supported by proper testimony.

IV. ARGUMENT

Proposition of Law 1: The Commission's approval of ESP 3 is unlawful and unreasonable because it improperly holds that FirstEnergy's Application complies with Ohio Admin. Code 4901:1-35-03(C)(1), requiring applications to include a "complete description of the ESP and testimony explaining and supporting each aspect of the ESP."

Ohio law places the burden in proceedings for approval of ESPs on EDUs, R.C. 4928.143(C)(1), and requires the EDUs to comply with any rules the Commission promulgates regarding an ESP application. R.C. 4928.143(A). Ohio Admin. Code 4901:1-35-03(C)(1) requires any EDU seeking approval of an ESP to include an application with a "complete description of the ESP and testimony explaining and supporting each aspect of the ESP." FirstEnergy failed to provide sufficient testimony in support of ESP 3. As FirstEnergy witness Mr. Ridmann himself stated, the testimony filed by the Companies was "not all inclusive." 12-1230-EL-SSO, FirstEnergy Exhibit 3, Direct Testimony of Mr. Ridmann, 3 (April 13, 2012). Review of the testimony indicates FirstEnergy failed to explain and support each as aspect of ESP 3. While the Attorney Examiner took notice of additional information and testimony from previous cases, that information did not complete FirstEnergy's Application because, as explained in detail below, the changing economic and regulatory environment made it irrelevant as applied to ESP 3.

In its denial of ELPC's request for rehearing, the Commission held that FirstEnergy's Application – i.e., the Stipulation and accompanying testimony by Mr. Ridmann, and potentially the testimony from the MRO Case and ESP 2 – met the minimum requirements of Ohio Admin. Code 4901:1-35-03(C)(1). PUCO Case No. 12-1230-EL-SSO, Second Entry on Rehearing, 7 (January 30, 2013). As demonstrated below, however, the Commission improperly found that FirstEnergy's Applications meets the minimum requirements of the Commission's rules.

The Commission erred in declaring FirstEnergy's Application complete and therefore should not have approved ESP 3. This Court should overturn the Commission's decision to approve ESP 3 and direct the Commission to require FirstEnergy to submit a complete application.

A. <u>FirstEnergy's Application did not comply with the requirement of Ohio Admin. Code 4901:1-35-03(C)(1) that it file testimony "explaining and supporting each aspect" of ESP 3</u>

FirstEnergy provided very little support for proposed ESP 3, having provided initial and supplemental testimony from only one witness. Mr. Ridmann's testimony falls short of the Ohio Admin. Code 4901:1-35-03(C)(1) requirement that FirstEnergy include with its Application "testimony explaining and supporting each aspect of the ESP." Mr. Ridmann explicitly states that his initial testimony is "not all inclusive" and only provides an "overview of a number of features of the Stipulation." 12-1230-EL-SSO, FirstEnergy Exhibit 3, Direct Testimony of Mr. Ridmann, 3. This would be acceptable if FirstEnergy had included additional testimony explaining and supporting the aspects of ESP 3 that Mr. Ridmann chose not to address, but it filed only Mr. Ridmann's initial testimony followed by his supplemental testimony. Mr. Ridmann's supplemental testimony merely bolsters the limited information and aspects of ESP 3 provided in his initial testimony, expanding his explanation of the benefits of bidding energy efficiency into the PJM Base Residual Auction, which sets the price for electric capacity paid by FirstEnergy and other utilities, the qualitative benefits of the three-year blending process, and the alleged benefits of the WRR Attachment 1. 12-1230-EL-SSO, FirstEnergy Exhibit 4, Supplemental Testimony of Mr. Ridmann, 1. Review of ESP 3, however, reveals that there are many aspects of the ESP not addressed by Mr. Ridmann's initial or supplemental testimony. The Application, therefore, fails to satisfy the requirement that the Companies file testimony that explains and supports "each aspect of the ESP."

In its July 18, 2012 Order and Opinion, the Commission lists thirty-eight provisions of the Stipulation and notes that this list is not complete. PUCO Case No. 12-1230-EL-SSO, Opinion and Order, 6-16 (July 18, 2012). Yet even limiting inspection to those thirty-eight provisions and their subparts, the testimony filed by the Companies touches on only a handful, often mentioning merely that the provisions exist rather than "explaining and supporting" each one. For example:

- ESP 3 carries forward the seasonality factors that adjust rates for changes in how electricity is used throughout the year, but Mr. Ridmann's testimony does not describe or explain why. *See id.* at 8.
- ESP 3 includes a flat rates structure for its residential rates, but Mr. Ridmann's testimony does not describe or explain why. *See id.*
- Some customers purchase their power from a competitive provider rather than FirstEnergy. But these customers still use FirstEnergy for other services such as distribution. ESP 3 allows these customers to be exempt from the Generation Cost Reconciliation Rider up to a certain point, but Mr. Ridmann's testimony does not describe or explain why. *See id.* at 9.

- ESP 3 allows for continuation of time-differentiated pricing concepts that were previously approved in January 2010, but Mr. Ridmann's testimony only mentions that they exist without explaining or supporting them. *See id.* at 16.

The above are only a few examples of the aspects of ESP 3 that are not explained or supported in the brief testimony filed by the Companies.

FirstEnergy acknowledged the Application's deficiencies when it requested administrative notice of evidence from the MRO Case and ESP 2. FirstEnergy's counsel explicitly stated in his motion for administrative notice of portions of the MRO Case and ESP 2 that the records in those cases "contain, among other things, the various competitive bid process supporting documents, the master service supply agreement, communication protocols, and the credit requirements and other things that are *basic nut and bolts* of what will go into what – what is widely regarded as a highly successful process." PUCO Case No. 12-1230-EL-SSO, Tr. Vol. 3, 18 (June 6, 2012) (emphasis added). FirstEnergy failed to include basic components of the proposed ESP 3 in the Application, and instead of relying on this Application, sought to justify its proposal using, as demonstrated below, outdated materials from cases over two years old, including testimony by thirteen witnesses, most of whom did not submit testimony in this case.

To put FirstEnergy's failure to properly support its Application in perspective, on July 31, 2008, FirstEnergy filed a substantial application in PUCO Case No. 08-0935-EL-SSO. Along with its application in that case, FirstEnergy filed three volumes of attachments, rate impacts, testimony, and schedules, including over 250 pages of testimony by eight witnesses. On October 20, 2009, FirstEnergy filed the MRO Case pursuant to R.C. 4928.142. In that case, FirstEnergy's application contained multiple volumes, including over 100 pages of testimony by six witnesses.

FirstEnergy's previous applications are not unique for providing substantial testimony in multiple volumes to support proposed SSOs. On March 30, 2012, two weeks before FirstEnergy filed its Application, Dayton Power and Light Company filed an application for an MRO. PUCO Case No. 12-0426-EL-SSO ("Dayton MRO"). As in the above FirstEnergy SSO applications, the Dayton MRO application included several volumes, including over 150 pages of testimony by eight witnesses. Additionally, in PUCO Case No. 11-3549-EL-SSO, Duke Energy Ohio filed an application for an ESP on June 20, 2011 that included over 1000 pages of documents detailing every aspect of its plan, including 17 witnesses. Several other examples exist from just the past few years. *See, e.g.*, PUCO Case. 11-0348-EL-SSO (ESP by Columbus Southern Power Company and Ohio Power Company); PUCO Case No. 10-2586-EL-SSO (MRO by Duke Energy Ohio); PUCO Case No. 08-1094-EL-SSO (ESP by Dayton Power and Light Company). FirstEnergy's minimalist filing is not the norm for SSO applications. While ELPC does not suggest that there is some minimum number of pages or pieces of testimony that must be filed in each SSO case, the testimony at hand is completely out of balance with precedent in terms of quantity and quality.

B. Administrative notice of the irrelevant MRO Case and ESP 2 documents and testimony does not cure the deficiencies in FirstEnergy's Application with regard to Ohio Admin. Code 4901:1-35-03(C)(1)

Though the Commission allowed FirstEnergy, over objections by ELPC and other parties, to rely on documents and testimony from its previous MRO and ESP 2 cases, these additional materials do not bring FirstEnergy into compliance with the requirement that it provide "testimony explaining and supporting each aspect of the ESP." FirstEnergy argued for the inclusion of this additional information, including testimony, by insisting that ESP 3 is simply an extension of ESP 2 and therefore it can rely on the hundreds of pages of testimony from the MRO Case and ESP 2 to support its Application. *See* PUCO Case No. 12-1230-EL-SSO, FirstEnergy Exhibit 3, Ridmann Direct Testimony, 9, 11-13; PUCO Case No. 12-1230-EL-SSO, FirstEnergy Exhibit 14, Stoddard Rebuttal Testimony, 2-3. ESP 3, however, is a new proposed ESP meant to replace an ESP 2 that does not expire until 2014, two years after FirstEnergy filed its ESP 3 Application. ESP 3 would go into effect in 2014 under, as detailed below, very different economic and regulatory circumstances than those surrounding the MRO Case and ESP 2 in 2009 and 2010, making the testimony inapplicable to this case.

The Companies based their request for administrative notice of portions of the proceedings in the MRO Case and ESP 2 on the claim that "nearly all of the terms and conditions contained in the ESP 3 Stipulation have already been considered and approved by the Commission as part of the Companies' existing ESP." Application at 4-5. Counsel for FirstEnergy elaborated on the need during the hearing, stating:

> Your Honor, as noted, this ESP is an extension, in essence, of the last ESP. The bases for this ESP are the benefits that it provided are not only demonstrated in this record, but, your Honor, we think it's supplemented by the benefits and the costs that were discussed in the prior record, and that's the basis for our motion.

PUCO Case No. 12-1230-EL-SSO, Tr. Vol. 1, 28 (June 4, 2012). ELPC does not dispute that much of the language in ESP 3 was addressed in the previous cases, but context is everything, and the market conditions under which the MRO Case and ESP 3 were litigated has changed dramatically since late 2009 and early 2010. Inclusion of testimony from the MRO Case and ESP 2 does not bring FirstEnergy's Application into compliance with Ohio law. The facts surrounding the MRO Case and ESP 2 are largely irrelevant to ESP 3 due to the drastically different markets of 2012/2013 compared to 2009/2010 and the uncertainty of the markets going forward through 2014 and beyond. As FirstEnergy Counsel Mr. Kutik pointed out in his cross-examination of Ohio Consumers Counsel Witness Mr. Wilson, the uncertainties faced by bidders of generation in 2009 were so different from those uncertainties they face in 2012 that "you just never know" what to expect going forward. PUCO Case No. 12-1230-EL-SSO, Tr. Vol. 2, 151-53 (June 5, 2012); *see also*, PUCO Case No. 12-1230-EL-SSO, Tr. Vol. 2, 148 (June 5, 2012) (Mr. Kutik asking Mr. Wilson, "And perhaps we could say that a certainty about uncertainty is uncertainty, correct?"). It is precisely these differences that make it impossible for FirstEnergy to rely on old testimony to explain and support each aspect of ESP 3.

Things change quickly in the world of electricity markets and getting the best deal for ratepayers requires careful examination of the facts today, not reliance on facts from two and a half years ago. For example:

- While it was generally assumed by experts that gas prices would rise from 2009-2012, they have in fact fallen. *See* PUCO Case No. 12-1230-EL-SSO, Tr. Vol. 2,156-157 (June 5, 2012).
- In late 2009 FirstEnergy was a member of the Midwest ISO, which handled the transmission operations of FirstEnergy of transmission arm. *See* PUCO Case No. 12-1230-EL-SSO, Ohio Consumers Counsel Exhibit 9, Direct Testimony of Joseph F. Wilson, 4. Now it not only has joined PJM, but has infrastructure problems that cause prices to be almost double in northern Ohio what they are in the rest of the PJM footprint.[1] *See* PUCO Case No. 12-1230-EL-SSO, FirstEnergy Exhibit 6. This has direct impacts on the cost of electricity for FirstEnergy's ratepayers.

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[1] MISO and PJM are regional transmission organizations that manage the wholesale electricity markets and transmission growth for large parts of the Midwest and Eastern United States.

- Environmental regulations have dramatically impacted the energy market in Ohio and in FirstEnergy's territory in particular, with FirstEnergy Solutions closing coal plants when confronted with the possibility of required retrofits. *See* PUCO Case No. 12-1230-EL-SSO, Tr. Vol. 2, at pages 49-50 (June 5, 2012). These changes will also impact ratepayers.

The above examples of changes in the electricity markets between late 2009 and early 2012 are not an exhaustive list, but are merely examples of how much the world has changed since the MRO Case and ESP 2. While it may have been reasonable for the Commission to consider the facts of the MRO Case when deciding the closely related ESP 2, it does not follow that stale facts should be considered in this case simply because there are only a few language changes between ESP 2 and ESP 3. By law, the Commission must concern itself with whether or not ESP 3 is preferable to a market rate offer today, not in early 2010. FirstEnergy must support each element of the ESP 3 with testimony, and it failed to meet that requirement. The Commission erred in relying on testimony from previous, outdated cases to find that FirstEnergy met the requirement that it include testimony explaining each aspect of the ESP.

C. <u>The Commission must enforce Ohio Admin. Code 4901:1-35-03(C)(1), which is binding on the Commission until it follows the proper procedures to overturn the rule</u>

Ohio Admin. Code 4901:1-35-03(C)(1) requires electric distribution utilities such as FirstEnergy to file "testimony explaining and supporting each aspect of the ESP." This is a threshold requirement for consideration of an ESP application. The Commission cannot waive its own binding regulations without following the proper procedure simply because it is compelled by the evidence presented during hearings. The Supreme Court of Ohio has long held that the Commission must "rigidly" enforce its rules. *See Matz v. J. L. Curtis Cartage Co.*, 132 Ohio St.

271, 284 (Ohio 1937) (citing *Midwestern Motor Transit, Inc. v. Public Utilities Com.*, 126 Ohio St. 317, 321 (Ohio 1933)). The Court held, in *State ex rel. Cuyahoga Cnty. Hosp. v. Ohio Bureau of Workers' Comp.*, that "[a]dministrative regulations issued pursuant to statutory authority have the force and effect of law; consequently, administrative agencies are bound by their own rules until those rules are duly changed." 27 Ohio St. 3d 25, 28 (1986). The Supreme Court of Ohio has also made it clear that rules such as this one are "in full force and effect until the [Commission] rescinds [them] or a court specifically declares [them] invalid as being contrary to statute or otherwise unreasonable." *Lyden Co. v. Tracy*, 76 Ohio St. 3d 66, at page 69 (1996). Ohio Admin. Code 4901:1-35-03(C)(1) is binding on the Commission and FirstEnergy until the Commission follows the proper procedure to change or rescind it.

With the exception of Mr. Ridmann's initial testimony and supplemental testimony, which expanded on topics already addressed in his initial testimony, FirstEnergy did not file any supplemental testimony explaining its proposed ESP3. These two pieces of testimony were insufficient to meet the Commission rules. Nor, for reasons detailed above, can FirstEnergy rely on a single sentence incantation of two dockets worth of irrelevant testimony to meet its burden. The Commission cannot avoid its own binding regulation simply because it believes that in this case FirstEnergy's ESP 3 is a good proposal.

V. CONCLUSION

FirstEnergy failed to comply with Ohio Admin. Code 4901:1-35-03(C)(1). Without testimony explaining and supporting each aspect of ESP 3, the Commission cannot approve FirstEnergy's Application. For the reasons set forth above, ELPC respectfully requests that this Court reverse the Commission's approval of ESP 3 and require the Commission to order FirstEnergy to submit a complete application in compliance with 4901:1-35-03(C)(1).

July 1, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing *Merit Brief of Appellant Environmental Law & Policy Center* was served by electronic mail to all parties to the proceedings, this 1st day of July, 2013.

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Appendix to Merit Brief of Appellant Environmental Law & Policy Center

Ohio Supreme Court Case No. 2013-0513

ORIGINAL

IN THE SUPREME COURT OF OHIO

Environmental Law and Policy Center *Appellant*,	)	On Appeal from the Public Utilities Commission of Ohio
v.	)	
	)	Case No. 12-1230-EL-SSO
The Public Utilities Commission of Ohio *Appellees*.	)	13-0513

NOTICE OF APPEAL OF APPELLANT ENVIRONMENTAL LAW AND POLICY CENTER

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FILED
APR 01 2013
CLERK OF COURT
SUPREME COURT OF OHIO

<u>Notice of Appeal of Appellant Environmental Law and Policy Center</u>

Appellant, Environmental Law and Policy Center, hereby gives notice of its appeal, pursuant to Ohio Revised Code §§ 4903.11 and 4903.13, to the Supreme Court of Ohio from an Entry of the Public Utilities Commission of Ohio ("PUCO" or "Appellee"), entered January 30, 2013, in PUCO Case No. 12-1230-EL-SSO. The Entry is attached hereto and fully incorporated as **<u>Exhibit A</u>**.

Appellant was and is a party of record in PUCO Case No. 12-1230-EL-SSO, and timely filed its Application for Rehearing to Appellee's July 18, 2012 Opinion and Order in accordance with Ohio Revised Code § 4903.10. Appellant's Application for Rehearing was denied with respect to the issue on appeal herein by the January 30, 2013 Entry.

The Appellant complains and alleges that Appellee's July 18, 2012 Opinion and Order and January 30, 2013 Second Entry on Rehearing in PUCO Case No. 12-1230-EL-SSO are unlawful, unjust, and unreasonable in finding that Ohio Edison, The Cleveland Electric Illuminating Company, and The Toledo Edison Company filed a complete application for an electric security plan pursuant to Ohio Administrative Code 4901:1-35-03(C)(1).

WHEREFORE, Appellant respectfully submits that Appellee's July 18, 2012 Opinion and Order and January 30, 2013 Second Entry on Rehearing in PUCO Case No. 12-1230-EL-SSO are unlawful, unjust, and unreasonable and should be reversed. The case should be remanded to the PUCO with instructions to correct the error complained of herein.

Respectfully submitted,

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CERTIFICATE OF FILING

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

Nicholas McDaniel

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing *Notice of Appeal* submitted on behalf of the Environmental Law & Policy Center was served by a combination of electronic and paper mail to all parties to the proceedings before the Public Utilities Commission and pursuant to section 4903.13 of the Ohio Revised Code, this 1st day of April, 2013.

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Exhibit A

Second Entry on Rehearing in PUCO Case No. 12-1230

January 30, 2013

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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

SECOND ENTRY ON REHEARING

The Commission finds:

(1) Ohio Edison Company (OE), The Cleveland Electric Illuminating Company (CEI), and the Toledo Edison Company (TE) (collectively, FirstEnergy or the Companies) are public utilities as defined in Section 4905.02, Revised Code, and, as such, are subject to the jurisdiction of this Commission.

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

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

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

(5) Section 4903.10, Revised Code, states that any party to a Commission proceeding may apply for rehearing with respect to any matters determined by the Commission within 30 days of the entry of the order upon the Commission's journal.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

It is, therefore,

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

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

THE PUBLIC UTILITIES COMMISSION OF OHIO

Todd A. Snitchler

Todd A. Snitchler, Chairman

Steven D. Lesser

Andre T. Porter

Lynn Slaby

GAP/MLW/sc

Entered in the Journal

JAN 3 0 2013

Barcy F. McNeal

Barcy F. McNeal
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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

ENTRY

The Commission finds:

(1) Ohio Edison Company (OE), The Cleveland Electric Illuminating Company (CEI), and The Toledo Edison Company (TE) (collectively, FirstEnergy) are public utilities as defined in Section 4905.02, Revised Code, and, as such, are subject to the jurisdiction of this Commission.

(2) On April 13, 2012, FirstEnergy filed an application, pursuant to Section 4928.141, Revised Code, to provide for a standard service offer (SSO) commencing as early as May 2, 2012, but no later than June 20, 2012, and ending May 31, 2016. The application is for an electric security plan (ESP), in accordance with Section 4928.143, Revised Code, and the application includes a stipulation agreed to by various parties regarding the terms of the proposed ESP (ESP 3). FirstEnergy states that the stipulation is the product of lengthy, serious bargaining among knowledgeable and capable parties in a cooperative process. Additionally, FirstEnergy states that it and numerous other parties have engaged in a wide range of discussions over a period of time related to the development of the ESP 3, which extends, with modifications, a stipulation and second supplemental stipulation modified and approved by the Commission in Case No. 10-388-EL-SSO (ESP 2) for an additional two years.

(3) Further, on April 13, 2012, FirstEnergy filed a motion for waivers of certain procedural requirements for electric security plans contained in Rule 4901:1-35-03, Ohio Administrative Code (O.A.C.), as well as a request for expedited consideration.

Specifically, FirstEnergy seeks waivers of the filing requirements contained in paragraphs (C)(2), (C)(3), (C)(4), (C)(5), (C)(6), (C)(7), (C)(8), (C)(9), (C)(10), (F), and (G), of Rule 4901:1-35-03, O.A.C., as well as Rules 4901:1-35-04 and 4901:1-35-06, O.A.C.

(4) In support of its motion, FirstEnergy states that the Companies have made a good faith effort to conform their application to the substantive requirements of the Commission's procedural rules, but that the waivers are necessary for the expedited consideration and approval of the application. FirstEnergy also contends that a waiver of the rules is appropriate because the ESP proposed in the application is the result of a stipulation reflecting participation of numerous interested parties who have considerable familiarity with the subject matter and issues presented and that the waiver will not present undue prejudice.

FirstEnergy specifically states that it is unable, upon the filing of its application, to provide pro forma financial projections regarding the effect of the implementation of the ESP in accordance with Rule 4901:1-35-03(C)(2), O.A.C. Additionally, FirstEnergy states that it would be of little value to provide projected rate impacts in accordance with Rule 4901:1-35-03(C)(3), O.A.C., because, with limited exceptions, the rate schedules under the ESP 3 carry forward the existing rate schedules and, further, that future generation auction prices are an unknown factor. FirstEnergy also seeks a waivers from Rules 4901:1-35-03(C)(4) and 4901:1-35-03(F), O.A.C., requiring a description of the Companies' corporate separation plan, on the basis that the Commission approved the current corporate separation plan in the ESP 2, which continues to be in effect and in compliance with applicable statutes and rules. Similarly, FirstEnergy seeks a waiver of Rule 4901:1-35-03(C)(5), O.A.C., requiring filing of an operational support plan, on the basis that the Companies' operational support plan was approved in the ESP 2, and there are no outstanding problems with its implementation.

Next, FirstEnergy seeks a waiver of Rule 4901:1-35-03(C)(6), O.A.C., stating that it will continue to maintain systems necessary to account for customer participation in governmental aggregation programs. Further, FirstEnergy seeks a waiver of Rule 4901:1-35-03(C)(7), O.A.C., which requires a description of the effect on large-scale governmental aggregation of any unavoidable generation charge proposed to be established in the ESP. In support of this request, FirstEnergy states that the overall effect of the nonavoidable charge of the ESP 3 is beneficial to customers served by large-scale aggregation groups and all customers. FirstEnergy next seeks a waiver of Rule 4901:1-35-03(C)(8), O.A.C., which requires a discussion as to how state policy is advanced by the ESP, on the basis that the Commission previously determined that the ESP 2 was consistent with state policy, and the ESP 3 largely mirrors the ESP 2.

FirstEnergy also seeks waivers of Rules 4901:1-35-03(C)(9) and 4901:1-35-03(C)(10), O.A.C., to the extent that these provisions requiring additional information may be applicable to the ESP 3 and not otherwise provided for in the Companies' application, stipulation, or supporting testimony. Additionally, FirstEnergy requests waiver of Rule 4901:1-35-03(G), O.A.C., which requires a complete set of work papers to be filed with the application. FirstEnergy stresses again that the ESP 3 essentially carries forward for an additional two years the provisions, schedules, and impacts of the existing ESP 2, for which workpapers were available and reviewed during consideration of the ESP 2.

Finally, FirstEnergy requests a waiver of Rules 4901:1-35-04 and 4901:1-35-06, O.A.C., which require a proposed notice for newspaper publication and provide for a 45-day intervention period, respectively.

(5) On April 17, 2012, the Ohio Consumers' Counsel, Environmental Law and Policy Center, Natural Resources Defense Council, Northeast Ohio Public Energy Council, and Northwest Ohio Aggregation Coalition (Ohio Consumer and Environmental Advocates or OCEA) filed a joint motion to bifurcate issues and a joint memorandum contra FirstEnergy's motion for waivers. OCEA argues that FirstEnergy has not demonstrated "good cause" for the waivers. Specifically, OCEA urges the Commission to consider whether the information that is the subject of the waiver requests is necessary for an effective and efficient review of the application. Based upon this standard, OCEA claims that

FirstEnergy has not demonstrated good cause for the proposed waivers. OCEA requests that the Commission deny all broadly-stated waiver requests, arguing that the Commission has previously rejected "gap-filling, non-specific requests for waivers." *In re FirstEnergy*, Case No. 03-2144-EL-ATA, Opinion and Order (June 9, 2004) at 40. Specifically, OCEA argues that FirstEnergy's request for a waiver of the pro forma financial projections under Rule 4901:1-35-03(C)(2), O.A.C., is not supported by good cause because FirstEnergy has merely stated that this information is not available upon the filing of the application and that this information would be useful in assessing the effect of rate collections. Additionally, OCEA opposes FirstEnergy's request for waivers of Rules 4901:1-35-03(C)(6), 4901:1-35-03(C)(8), 4901:1-35-03(C)(9), 4901:1-35-03(C)(10), and 4901:1-35-03(G), O.A.C., on the basis that these requests are not supported by good cause. Further, OCEA states that FirstEnergy has failed to set forth good cause for waivers of Rules 4901:1-35-04 and 4901:1-35-06, O.A.C.

(6) On April 18, 2012, Direct Energy Services, LLC, Direct Energy Business, LLC, and IGS Energy, Inc. (collectively, Direct and IGS), filed a joint memorandum contra FirstEnergy's motion for waivers. In their memorandum contra, Direct and IGS specifically dispute FirstEnergy's requests for waiver of Rule 4901:1-35-03(C)(2), O.A.C., requiring pro forma financial projections, and Rule 4901:1-35-06, O.A.C., governing hearings and interventions. Direct and IGS argue that granting of these waivers would not allow parties adequate time to evaluate the ESP or to make a decision whether to intervene in the ESP.

(7) Additionally, on April 18, 2012, FirstEnergy filed a memorandum contra OCEA's motion to bifurcate issues as well as a reply to the memoranda contra filed by OCEA and Direct and IGS.

(8) Moreover, on April 20, 2012, AEP Retail Energy Partners, LLC, filed a memorandum contra FirstEnergy's request for waivers.

(9) Thereafter, on April 20, 2012, Direct and IGS filed a joint motion to partially strike FirstEnergy's reply to the memoranda contra filed by OCEA and Direct and IGS. In their joint motion, Direct and IGS point out that FirstEnergy filed its April 13, 2012, motion for waivers with a request for expedited

consideration, pursuant to Rule 4901-1-12(C), O.A.C. Direct and IGS contend that Rule 4901-1-12(C), O.A.C., governing requests for expedited rulings, prohibits reply memoranda unless specifically requested by the Commission or attorney examiner. Here, neither the Commission nor the attorney examiner requested reply memoranda. Consequently, Direct and IGS argue that the portions of FirstEnergy's April 18, 2012, filing that constitute a reply to the memoranda contra filed by OCEA and Direct and IGS should be stricken. A similar motion to strike FirstEnergy's reply to the memoranda contra as inconsistent with Rule 4901-1-12(C), O.A.C., was filed by OCEA on April 23, 2012.

(10) Initially, the Commission will consider the motion to partially strike FirstEnergy's reply to the memoranda contra filed by OCEA and Direct and IGS. The Commission finds that, pursuant to Rule 4901-1-12(C), O.A.C., the portions of FirstEnergy's April 18, 2012, filing that constitute a reply to the memoranda contra filed by OCEA and Direct and IGS are not permitted and are hereby stricken.

(11) As to FirstEnergy's April 13, 2012, request for waivers, the Commission notes that Rule 4901:1-35-02(B), O.A.C., provides that the Commission may waive any requirement of Chapter 4901:1-35, O.A.C., other than a requirement mandated by statute, for good cause shown.

Here, the Commission finds that the request for waivers should be granted, in part, and denied, in part. The Commission notes that the application and stipulation filed in this proceeding appear on their face to extend for an additional two years, with modifications, the electric security plan originally modified and approved by the Commission in the ESP 2. Therefore, the Commission finds that FirstEnergy has demonstrated good cause for a waiver of the filing requirements contained in Rules 4901:1-35-03(C)(4), 4901:1-35-03(C)(9)(a), 4901:1-35-03(C)(9)(b), 4901:1-35-03(C)(9)(d), 4901:1-35-03(C)(9)(e), 4901:1-35-03(C)(9)(f), 4901:1-35-03(C)(10), 4901:1-35-03(F), and 4901:1-35-03(G), O.A.C. The Commission notes specifically as to Rule 4901:1-35-03(G), O.A.C., that, despite the waiver of this section, workpapers are discoverable and must be made available to Staff upon request.

However, as the Commission noted in its previous finding in the ESP 2, the financial projections provided for in Rule 4901:1-35-03(C)(2), O.A.C., are necessary to our consideration of this type of application and stipulation and in the public interest. Similarly, the Commission finds that the information on projected rate impacts required by Rule 4901:1-35-03(C)(3), O.A.C.; information regarding the operational support plan required by Rule 4901:1-35-03(C)(5), O.A.C.; information relating to governmental aggregation programs required by Rules 4901:1-35-03(C)(6) and 4901:1-35-03(C)(7), O.A.C.; statement regarding state policy required by Rule 4901:1-35-03(C)(8), O.A.C.; information regarding retail shopping required by Rule 4901:1-35-03(C)(9)(c), O.A.C.; information on alternative regulation mechanisms or programs relating to distribution service required by Rule 4901:1-35-03(C)(9)(g), O.A.C.; and, information concerning provisions for economic development, job retention, and energy efficiency programs required by Rule 4901:1-35-03(C)(9)(h), O.A.C., are necessary for our consideration of the application and stipulation. Additionally, some of these filing requirements may involve information that differs from the information utilized in the ESP 2. Consequently, the Commission denies FirstEnergy's request for a waiver of Rules 4901:1-35-03(C)(2), 4901:1-35-03(C)(3), 4901:1-35-03(C)(5), 4901:1-35-03(C)(6), 4901:1-35-03(C)(7), 4901:1-35-03(C)(8), 4901:1-35-03(C)(9)(c), 4901:1-35-03(C)(9)(g), and 4901:1-35-03(C)(9)(h), O.A.C. FirstEnergy is directed to supplement its application with this information within seven days unless otherwise ordered by the Commission or the attorney examiner.

(12) The Commission finds that the waiver of Rule 4901:1-35-04, O.A.C., which required FirstEnergy to include a proposed notice in its application, is granted. This is not the first SSO application filed by FirstEnergy, and, through the prior cases, the Commission has developed a consistent format for the published notice. The Commission anticipates that the notice in this proceeding will be consistent with the notice used in the prior SSO proceedings.

(13) Finally, with respect to FirstEnergy's request for a waiver of Rule 4901:1-35-06, O.A.C., the Commission finds that this request is moot. The attorney examiner has established the deadline of April 30, 2012, for intervention, pursuant to Rule

4901:1-35-06(B), O.A.C. Further, the Commission notes that the attorney examiner has already granted intervention to all parties who participated as intervenors in the ESP 2 without the necessity of filing motions to intervene.

It is, therefore,

ORDERED, That FirstEnergy's motion for waivers be granted, in part, and denied, in part, as set forth in Findings (11) through (13). It is, further,

ORDERED, That FirstEnergy file supplemental information to its application, as set forth in Finding (11), within seven days. It is, further,

ORDERED, That a copy of this Entry be served upon all parties of record in this proceeding and all parties of record in Case No. 10-388-EL-SSO.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Todd A. Snitchler

Todd A. Snitchler, Chairman

Steven D. Lesser

Andre T. Porter

Cheryl L. Roberto

Cheryl L. Roberto

Lynn Slaby

Lynn Slaby

MLW/sc

Entered in the Journal

APR 25 2012

Barcy F. McNeal

Barcy F. McNeal
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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

OPINION AND ORDER

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

APPEARANCES:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

OPINION:

I. HISTORY OF THE PROCEEDINGS

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

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

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

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

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

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

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

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

II. DISCUSSION

A. Applicable Law

Chapter 4928 of the Revised Code provides an integrated system of regulation in which specific provisions were designed to advance state policies of ensuring access to adequate, reliable, and reasonably priced electric service in the context of significant economic and environmental challenges. In considering these cases, the Commission is cognizant of the challenges facing Ohioans and the electric power industry and is guided by the policies of the state as established by the General Assembly in Section 4928.02, Revised Code, as amended by Amended Substitute Senate Bill 221 (S.B. 221).

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

B. Summary of the Stipulation

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

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

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

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

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

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

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

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

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

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

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

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

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

(*Id.* at 12-13.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(*Id.* at 29-30.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Procedural Issues

1. Waiver of Filing Requirements

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

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

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

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

2. Administrative Notice

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. Procedural Schedule

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

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

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

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

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

4. Admission of AEPR Exhibit 6

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

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

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

D. Consideration of the Combined Stipulation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. <u>Does the settlement, as a package, benefit ratepayers and the public interest?</u>

a. General Arguments

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

b. Competitive Bid Process

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

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

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

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

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

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

c. Distribution Rate Freeze and Rider DCR

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

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

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

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

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

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

d. Renewable Energy Credit Recovery Period

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

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

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

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

e. Energy Efficiency/Peak Demand Reduction

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

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

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

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

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

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

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

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

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

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

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

f. Lost Distribution Revenue

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

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

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

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

g. Purchase of Receivables Program

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

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

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

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

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

h. Commission Decision.

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

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

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

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

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

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

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

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

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

3. <u>Does the settlement package violate any important regulatory principle or practice?</u>

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

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

a. Proposed Modification of ESP 2 Auction Product

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

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

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

b. Transparency and Public Participation

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

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

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

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

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

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

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

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

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

c. Deferred Carrying Charges

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

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

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

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

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

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

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

a. Summary of the Parties' Arguments

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

b. Commission Decision

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

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

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

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

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

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

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

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

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

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

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

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

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

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

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

ORDER:

It is, therefore,

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

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

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

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

THE PUBLIC UTILITIES COMMISSION OF OHIO

Todd A. Snitchler

Todd A. Snitchler, Chairman

Steven D. Lesser

Andre T. Porter

Cheryl L. Roberto

Lynn Slaby

Lynn Slaby

MLW/GAP/sc

Entered in the Journal
JUL 18 2012

Barcy F. McNeal

Barcy F. McNeal
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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

DISSENTING OPINION OF COMMISSIONER CHERYL L. ROBERTO

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

I. The ESP 3 is not superior to an MRO

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

A. RTEP Value Absent

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

B. Benefits of 'Laddering' Too Ambiguous To Value

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Cheryl L. Roberto

Cheryl L. Roberto

CLR\sc

Entered in the Journal

JUL 18 2012

Barcy F. McNeal

Barcy F. McNeal
Secretary

BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

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

PETITION FOR REHEARING OF THE ENVIRONMENTAL LAW AND POLICY CENTER

Pursuant to Ohio Revised Code § 4903.10 and Ohio Administrative Code Chapter 4901:1-35, the Environmental Law and Policy Center hereby applies for rehearing of the Opinion and Order issued in the above-captioned case on July 18, 2012 ("Order"). As explained in more detail in the attached Memorandum in Support, the Order in this case is unreasonable and unlawful on the following grounds:

A. The Order improperly finds that Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, "Companies") filed a complete application pursuant to Ohio Administrative Code 4901:1-35-03(C)(1).

B. The Order improperly finds that the attorney examiners were correct in taking administrative notice of evidence from prior market rate offer and electric security plan cases.

For the foregoing reasons, as demonstrated in the Memorandum in Support of this Application, attached hereto, the Commission should grant this Application for Rehearing.

Respectfully submitted,

/s/ Justin Vickers

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BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

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

MEMORANDUM IN SUPPORT OF APPLICATION OF REHEARING OF THE ENVIRONMENTAL LAW AND POLICY CENTER

I. INTRODUCTION

The Commission erred in approving the April 13, 2012 application ("Application") of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, "FirstEnergy" or "Companies") for regulatory authority to provide a standard service offer ("SSO") in the form of an electric security plan ("ESP 3"). The Companies failed to meet the requirement of Ohio Administrative Code ("OAC") Chapter 4901:1-35-03(C)(1) that they include with their Application a "complete description of the ESP and testimony explaining and supporting each aspect of the ESP." The Application is therefore incomplete and invalid. The Commission erred in approving with modification FirstEnergy's Stipulation and Recommendation ("Stipulation") without first requiring the Companies to complete their Application.

The Commission also erred in upholding the attorney examiners' decision to take administrative notice of specific evidence from the Companies' current ESP, Case No. 10-0388-EL-SSO [hereinafter "ESP 2"] and Case No. 09-0906-EL-SSO [hereinafter "MRO Case"], an

SSO case from 2009. The Commission did not give administrative notice of the evidence until after all testimony was filed and most of the witnesses had been cross-examined. Without notice of what evidence would be recognized by the Commission, parties were not in a position to prepare testimony rebutting the evidence or cross-examine witnesses from the prior cases. It is unreasonable for the Commission to expect intervening parties to rebut evidence from prior cases before the Commission takes notice.

The Commission's approval of ESP 3 without FirstEnergy filing a proper application sets a dangerous precedent and subjects ratepayers to an SSO that was approved based on an incomplete record. Further, the Commission's administrative notice of testimony from prior cases without providing opposing parties an appropriate opportunity to rebut or even cross-examine witnesses further denies ratepayers a full vetting of the Application and Stipulation and sets a bad precedent for future cases. The Environmental Law and Policy Center ("ELPC") respectfully requests a rehearing of the Opinion and Order.

II. ARGUMENT

A. The Order improperly finds that FirstEnergy filed a complete Application pursuant to OAC 4901:1-35-03(C)(1).

The Commission erroneously states that ELPC has not identified any provision of OAC 4901:1-35 that the application fails to meet where such provision was not already waived by the Commission. Order at 46. In both its Initial Post-Hearing Brief and its Reply Brief, ELPC argued that FirstEnergy has not filed a proper application because it failed to include in its Application a "complete description of the ESP and testimony explaining and supporting each aspect of the ESP" pursuant to OAC 4901:1-35-03(C)(1). *See e.g.,* ELPC Initial Post-Hearing Brief at 2, 4; ELPC Reply Brief at 4. While the Commission waived several requirements of OAC 4901:1-35-

03(C), provision (C)(1) was not one of them. By failing to meet this requirement, the Companies failed to file a proper application and therefore the Commission should not have approved the proposed ESP 3.

FirstEnergy submitted with its Application brief testimony by only one witness, Mr. Ridmann, who stated that his testimony is "not all inclusive" and only provides an "overview of a number of features of the Stipulation." Direct Testimony of Mr. Ridmann, at page 3 at lines 16-17. Though ELPC does not suggest that there is some minimum length for an ESP application, the limited testimony filed by the Companies cannot meet the requirement to provide "testimony explaining and supporting each aspect of the ESP." The Companies are under an obligation to explain each aspect of the ESP, and to date they have not done so.

In its Order, the Commission lists thirty-eight provisions of the Stipulation and notes that this list is not complete. Order at 6-16. Yet even limiting inspection to those thirty-eight provisions and their subparts, the testimony filed by the Companies touches on only a handful, often mentioning merely that the provisions exist rather than "explaining and supporting" each one. For example:

- Mr. Ridmann's testimony makes no mention of the seasonality factors identified by the Commission on page 8 of the Order.
- Mr. Ridmann's testimony makes no mention of the flat rate structure of rate schedule RS identified by the Commission on page 8 of the Order.
- Mr. Ridmann's testimony does not explain why the Generation Cost Reconciliation Rider will be avoidable by some customers, a feature noted by the Commission on page 9 of the Order.

- Mr. Ridmann's testimony states the existence of time-differentiated pricing concepts in ESP 3, an aspect of the Stipulation noted by the Commission on page 16 of the Order, but does nothing to support them.

The above are only a few examples of the dozens of aspects of ESP 3 that are not explained or supported in the brief testimony filed by the Companies.

The OAC places the burden on FirstEnergy to explain and support each aspect of the ESP, not just some of them. The Commission erred by allowing FirstEnergy to rely on the fact that "most of the provisions of the proposed ESP 3 are similar to the provisions in the current ESP 2, and, thus, are known to the parties in this proceeding." Order at 46. While it is true that the text of ESP 3 is similar to that of ESP 2, this fact does not allow the Companies to ignore the requirements of OAC 4901:1-35-03(C)(1). The state of the world today differs significantly from the state of the world in 2009 and 2010, when the evidence in the MRO Case and ESP 2 was first litigated. As Mr. Kutik pointed out in his cross-examination of Mr. Wilson, the uncertainties faced by bidders of generation in 2009 were so different from those uncertainties they face in 2012 that "you just never know" what to expect going forward. Tr. Vol. 2, at pages 151-53 (June 5, 2012); see also Tr. Vol. 2, at page 148:22-23 (June 5, 2012) (Mr. Kutik asking Mr. Wilson, "And perhaps we could say that a certainty about uncertainty is uncertainty, correct?"). The Commission cannot simply point to the similarities between the texts of the two ESPs and assume that justifications for ESP 2 continue to be relevant to ESP 3. The OAC explicitly requires explanation of each provision of an ESP, and the Companies have not provided explanations for the majority of provisions in ESP 3. The Commission erred by finding that FirstEnergy filed a complete Application.

B. The Order improperly finds that the attorney examiners properly took administrative notice of evidence from the MRO Case and ESP 2 case.

While it is true that FirstEnergy included in its Application one sentence requesting administrative notice of the entire evidentiary record of ESP 2, Application at 5, the attorney examiners did not rule on the request until after the hearing began, well after testimony was due. Further, that broad request is separate from the administrative notice of specific documents from ESP 2 and the MRO Case granted by the attorney examiners on June 6, 2012. It is unreasonable for the Commission to require intervening parties to file testimony, take depositions, and prepare witnesses rebutting evidence before it has been noticed by the Commission and before the Companies have even revealed which evidence they seek recognition of by the Commission.

On June 4, 2012, the first day of the ESP 3 evidentiary hearing, Attorney Examiner Price, in the face of objections by opposing parties, denied FirstEnergy's request for administrative notice of the ESP 2 record in its entirety, stating that he was "uncomfortable incorporating wholesale the entire record of [ESP 2]." Tr. Vol. 1, at page 29 (June 4, 2012). Attorney Examiner Price went on to explain that the examiners would be willing to entertain document-by-document requests if the Companies chose to make them. Id. On June 6, 2012, FirstEnergy moved for administrative notice of specific evidence from not only the ESP 2 docket, but also from the MRO Case. FirstEnergy did not circulate in advance to parties the list of documents for the Commission to notice in this new motion. Parties had no opportunity to prepare rebuttal testimony or to secure cross-examination of the witnesses from the prior cases. The attorney examiners granted FirstEnergy's motion over objections by ELPC and other parties.

The Commission erred in finding that the attorney examiners' decision meets the two-factor test from Canton Storage and Transfer Co. v. PUCO, 72 Ohio St.3d 1 (Ohio 1995). In

Canton, the Court held that administrative notice of a prior docket is not proper unless "the complaining party had prior knowledge of, and had an opportunity to explain and rebut, the facts administratively noticed." 72 Ohio St.3d at 8. As described above, parties had neither knowledge of which facts were to be noticed nor the opportunity to rebut those facts once the Commission took notice on day three of the hearing. Opposing parties appropriately and successfully objected to FirstEnergy's wholesale request for notice of the entire record of ESP 2 and should have been given an opportunity to rebut the specific pieces of evidence noticed by the Commission through the opportunity to file more testimony and cross-examine witnesses in another round of hearings.

In addition to prejudicing parties in this case, the Commission's finding creates a dangerous precedent for future PUCO proceedings. In the wake of the Commission's Order, whenever a party seeks wholesale admission of evidence from multiple prior cases, opposing parties are under an obligation to explain and rebut every piece of evidence, even during an already expedited schedule. This will result in a waste of resources by all parties. It should be incumbent upon the party seeking notice to specify within a reasonable period of time in advance of the deadline for filing testimony which pieces of evidence it seeks to have in the record so that opposing parties can devote appropriate resources to prepare appropriate rebuttal. The Commission erred in granting administrative notice of evidence from ESP 2 and the MRO Case.

III. Conclusion

For the reasons set forth above, ELPC respectfully requests that the Commission grant rehearing.

August 17, 2012

Respectfully submitted,

/s/ Justin Vickers

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Petition for Rehearing submitted on behalf of the Environmental Law & Policy Center of the Midwest, was served by electronic mail, upon the following Parties of Record, this 17th day of August, 2012.

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BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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

ENTRY ON REHEARING

The Commission finds:

(1) Ohio Edison Company (OE), The Cleveland Electric Illuminating Company (CEI), and the Toledo Edison Company (TE) (collectively, FirstEnergy or the Companies) are public utilities as defined in Section 4905.02, Revised Code, and, as such, are subject to the jurisdiction of this Commission.

(2) On April 13, 2012, FirstEnergy filed an application, pursuant to Section 4928.141, Revised Code, to provide for a standard service offer (SSO) commencing as early as May 2, 2012, but no later than June 20, 2012, and ending May 31, 2016. The application is for an electric security plan (ESP), in accordance with Section 4928.143, Revised Code, and the application includes a stipulation and recommendation (Stipulation) agreed to by various parties regarding the terms of the proposed ESP (ESP 3).

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

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

(5) Section 4903.10, Revised Code, states that any party to a Commission proceeding may apply for rehearing with respect to any matters determined by the Commission within 30 days of the entry of the order upon the Commission's journal.

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

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

(8) The Commission grants the applications for rehearing filed by NOPEC, Sierra Club, ELPC, IGS, OCC/CP, and the Suppliers. We believe that sufficient reason has been set forth to warrant further consideration of the matters specified in the applications for rehearing.

It is, therefore,

ORDERED, That the applications for rehearing be granted for further consideration of the matters specified in the applications for rehearing. It is, further, ORDERED, That a copy of this Entry on Rehearing be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Todd A. Snitchler, Chairman

Steven D. Lesser

Andre T. Porter

Cheryl L. Roberto

Lynn Slaby

GAP/sc

Entered in the Journal
SEP 12 2012

Barcy F. McNeal
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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

SECOND ENTRY ON REHEARING

The Commission finds:

(1) Ohio Edison Company (OE), The Cleveland Electric Illuminating Company (CEI), and the Toledo Edison Company (TE) (collectively, FirstEnergy or the Companies) are public utilities as defined in Section 4905.02, Revised Code, and, as such, are subject to the jurisdiction of this Commission.

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

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

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

(5) Section 4903.10, Revised Code, states that any party to a Commission proceeding may apply for rehearing with respect to any matters determined by the Commission within 30 days of the entry of the order upon the Commission's journal.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

It is, therefore,

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

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

THE PUBLIC UTILITIES COMMISSION OF OHIO

Todd A. Snitchler

Todd A. Snitchler, Chairman

Steven D. Lesser

Andre T. Porter

Lynn Slaby

GAP/MLW/sc

Entered in the Journal

JAN 3 0 2013

Barcy F. McNeal

Barcy F. McNeal
Secretary

4903.13 Reversal of final order - notice of appeal.

A final order made by the public utilities commission shall be reversed, vacated, or modified by the supreme court on appeal, if, upon consideration of the record, such court is of the opinion that such order was unlawful or unreasonable. The proceeding to obtain such reversal, vacation, or modification shall be by notice of appeal, filed with the public utilities commission by any party to the proceeding before it, against the commission, setting forth the order appealed from and the errors complained of. The notice of appeal shall be served, unless waived, upon the chairman of the commission, or, in the event of his absence, upon any public utilities commissioner, or by leaving a copy at the office of the commission at Columbus. The court may permit any interested party to intervene by cross-appeal.

Effective Date: 10-01-1953

4928.141 Distribution utility to provide standard service offer.

(A) Beginning January 1, 2009, an electric distribution utility shall provide consumers, on a comparable and nondiscriminatory basis within its certified territory, a standard service offer of all competitive retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service. To that end, the electric distribution utility shall apply to the public utilities commission to establish the standard service offer in accordance with section 4928.142 or 4928.143 of the Revised Code and, at its discretion, may apply simultaneously under both sections, except that the utility's first standard service offer application at minimum shall include a filing under section 4928.143 of the Revised Code. Only a standard service offer authorized in accordance with section 4928.142 or 4928.143 of the Revised Code, shall serve as the utility's standard service offer for the purpose of compliance with this section; and that standard service offer shall serve as the utility's default standard service offer for the purpose of section 4928.14 of the Revised Code. Notwithstanding the foregoing provision, the rate plan of an electric distribution utility shall continue for the purpose of the utility's compliance with this division until a standard service offer is first authorized under section 4928.142 or 4928.143 of the Revised Code, and, as applicable, pursuant to division (D) of section 4928.143 of the Revised Code, any rate plan that extends beyond December 31, 2008, shall continue to be in effect for the subject electric distribution utility for the duration of the plan's term. A standard service offer under section 4928.142 or 4928.143 of the Revised Code shall exclude any previously authorized allowances for transition costs, with such exclusion being effective on and after the date that the allowance is scheduled to end under the utility's rate plan.

(B) The commission shall set the time for hearing of a filing under section 4928.142 or 4928.143 of the Revised Code, send written notice of the hearing to the electric distribution utility, and publish notice in a newspaper of general circulation in each county in the utility's certified territory. The commission shall adopt rules regarding filings under those sections.

Effective Date: 2008 SB221 07-31-2008

4928.142 Standard generation service offer price - competitive bidding.

(A) For the purpose of complying with section 4928.141 of the Revised Code and subject to division (D) of this section and, as applicable, subject to the rate plan requirement of division (A) of section 4928.141 of the Revised Code, an electric distribution utility may establish a standard service offer price for retail electric generation service that is delivered to the utility under a market-rate offer.

(1) The market-rate offer shall be determined through a competitive bidding process that provides for all of the following:

(a) Open, fair, and transparent competitive solicitation;

(b) Clear product definition;

(c) Standardized bid evaluation criteria;

(d) Oversight by an independent third party that shall design the solicitation, administer the bidding, and ensure that the criteria specified in division (A)(1)(a) to (c) of this section are met;

(e) Evaluation of the submitted bids prior to the selection of the least-cost bid winner or winners. No generation supplier shall be prohibited from participating in the bidding process.

(2) The public utilities commission shall modify rules, or adopt new rules as necessary, concerning the conduct of the competitive bidding process and the qualifications of bidders, which rules shall foster supplier participation in the bidding process and shall be consistent with the requirements of division (A)(1) of this section.

(B) Prior to initiating a competitive bidding process for a market-rate offer under division (A) of this section, the electric distribution utility shall file an application with the commission. An electric distribution utility may file its application with the commission prior to the effective date of the commission rules required under division (A)(2) of this section, and, as the commission determines necessary, the utility shall immediately conform its filing to the rules upon their taking effect. An application under this division shall detail the electric distribution utility's proposed compliance with the requirements of division (A)(1) of this section and with commission rules under division (A)(2) of this section and demonstrate that all of the following requirements are met:

(1) The electric distribution utility or its transmission service affiliate belongs to at least one regional transmission organization that has been approved by the federal energy regulatory commission; or there otherwise is comparable and nondiscriminatory access to the electric transmission grid.

(2) Any such regional transmission organization has a market-monitor function and the ability to take actions to identify and mitigate market power or the electric distribution utility's market conduct; or a similar market monitoring function exists with commensurate ability to identify and monitor market conditions and mitigate conduct associated with the exercise of market power.

(3) A published source of information is available publicly or through subscription that identifies pricing information for traded electricity on- and off-peak energy products that are contracts for delivery beginning at least two years from the date of the publication and is updated on a regular basis. The commission shall initiate a proceeding and, within ninety days after the application's filing date, shall

determine by order whether the electric distribution utility and its market-rate offer meet all of the foregoing requirements. If the finding is positive, the electric distribution utility may initiate its competitive bidding process. If the finding is negative as to one or more requirements, the commission in the order shall direct the electric distribution utility regarding how any deficiency may be remedied in a timely manner to the commission's satisfaction; otherwise, the electric distribution utility shall withdraw the application. However, if such remedy is made and the subsequent finding is positive and also if the electric distribution utility made a simultaneous filing under this section and section 4928.143 of the Revised Code, the utility shall not initiate its competitive bid until at least one hundred fifty days after the filing date of those applications.

(C) Upon the completion of the competitive bidding process authorized by divisions (A) and (B) of this section, including for the purpose of division (D) of this section, the commission shall select the least-cost bid winner or winners of that process, and such selected bid or bids, as prescribed as retail rates by the commission, shall be the electric distribution utility's standard service offer unless the commission, by order issued before the third calendar day following the conclusion of the competitive bidding process for the market rate offer, determines that one or more of the following criteria were not met:

(1) Each portion of the bidding process was oversubscribed, such that the amount of supply bid upon was greater than the amount of the load bid out.

(2) There were four or more bidders.

(3) At least twenty-five per cent of the load is bid upon by one or more persons other than the electric distribution utility. All costs incurred by the electric distribution utility as a result of or related to the competitive bidding process or to procuring generation service to provide the standard service offer, including the costs of energy and capacity and the costs of all other products and services procured as a result of the competitive bidding process, shall be timely recovered through the standard service offer price, and, for that purpose, the commission shall approve a reconciliation mechanism, other recovery mechanism, or a combination of such mechanisms for the utility.

(D) The first application filed under this section by an electric distribution utility that, as of July 31, 2008, directly owns, in whole or in part, operating electric generating facilities that had been used and useful in this state shall require that a portion of that utility's standard service offer load for the first five years of the market rate offer be competitively bid under division (A) of this section as follows: ten per cent of the load in year one, not more than twenty per cent in year two, thirty per cent in year three, forty per cent in year four, and fifty per cent in year five. Consistent with those percentages, the commission shall determine the actual percentages for each year of years one through five. The standard service offer price for retail electric generation service under this first application shall be a proportionate blend of the bid price and the generation service price for the remaining standard service offer load, which latter price shall be equal to the electric distribution utility's most recent standard service offer price, adjusted upward or downward as the commission determines reasonable, relative to the jurisdictional portion of any known and measurable changes from the level of any one or more of the following costs as reflected in that most recent standard service offer price:

(1) The electric distribution utility's prudently incurred cost of fuel used to produce electricity;

(2) Its prudently incurred purchased power costs;

(3) Its prudently incurred costs of satisfying the supply and demand portfolio requirements of this state, including, but not limited to, renewable energy resource and energy efficiency requirements;

(4) Its costs prudently incurred to comply with environmental laws and regulations, with consideration of the derating of any facility associated with those costs. In making any adjustment to the most recent standard service offer price on the basis of costs described in division (D) of this section, the commission shall include the benefits that may become available to the electric distribution utility as a result of or in connection with the costs included in the adjustment, including, but not limited to, the utility's receipt of emissions credits or its receipt of tax benefits or of other benefits, and, accordingly, the commission may impose such conditions on the adjustment to ensure that any such benefits are properly aligned with the associated cost responsibility. The commission shall also determine how such adjustments will affect the electric distribution utility's return on common equity that may be achieved by those adjustments. The commission shall not apply its consideration of the return on common equity to reduce any adjustments authorized under this division unless the adjustments will cause the electric distribution utility to earn a return on common equity that is significantly in excess of the return on common equity that is earned by publicly traded companies, including utilities, that face comparable business and financial risk, with such adjustments for capital structure as may be appropriate. The burden of proof for demonstrating that significantly excessive earnings will not occur shall be on the electric distribution utility. Additionally, the commission may adjust the electric distribution utility's most recent standard service offer price by such just and reasonable amount that the commission determines necessary to address any emergency that threatens the utility's financial integrity or to ensure that the resulting revenue available to the utility for providing the standard service offer is not so inadequate as to result, directly or indirectly, in a taking of property without compensation pursuant to Section 19 of Article I, Ohio Constitution. The electric distribution utility has the burden of demonstrating that any adjustment to its most recent standard service offer price is proper in accordance with this division.

(E) Beginning in the second year of a blended price under division (D) of this section and notwithstanding any other requirement of this section, the commission may alter prospectively the proportions specified in that division to mitigate any effect of an abrupt or significant change in the electric distribution utility's standard service offer price that would otherwise result in general or with respect to any rate group or rate schedule but for such alteration. Any such alteration shall be made not more often than annually, and the commission shall not, by altering those proportions and in any event, including because of the length of time, as authorized under division (C) of this section, taken to approve the market rate offer, cause the duration of the blending period to exceed ten years as counted from the effective date of the approved market rate offer. Additionally, any such alteration shall be limited to an alteration affecting the prospective proportions used during the blending period and shall not affect any blending proportion previously approved and applied by the commission under this division.

(F) An electric distribution utility that has received commission approval of its first application under division (C) of this section shall not, nor ever shall be authorized or required by the commission to, file an application under section 4928.143 of the Revised Code.

Effective Date: 2008 SB221 07-31-2008; 2008 HB562 09-22-2008

4928.143 Application for approval of electric security plan - testing.

(A) For the purpose of complying with section 4928.141 of the Revised Code, an electric distribution utility may file an application for public utilities commission approval of an electric security plan as prescribed under division (B) of this section. The utility may file that application prior to the effective date of any rules the commission may adopt for the purpose of this section, and, as the commission determines necessary, the utility immediately shall conform its filing to those rules upon their taking effect.

(B) Notwithstanding any other provision of Title XLIX of the Revised Code to the contrary except division (D) of this section, divisions (I), (J), and (K) of section 4928.20, division (E) of section 4928.64, and section 4928.69 of the Revised Code:

(1) An electric security plan shall include provisions relating to the supply and pricing of electric generation service. In addition, if the proposed electric security plan has a term longer than three years, it may include provisions in the plan to permit the commission to test the plan pursuant to division (E) of this section and any transitional conditions that should be adopted by the commission if the commission terminates the plan as authorized under that division.

(2) The plan may provide for or include, without limitation, any of the following:

(a) Automatic recovery of any of the following costs of the electric distribution utility, provided the cost is prudently incurred: the cost of fuel used to generate the electricity supplied under the offer; the cost of purchased power supplied under the offer, including the cost of energy and capacity, and including purchased power acquired from an affiliate; the cost of emission allowances; and the cost of federally mandated carbon or energy taxes;

(b) A reasonable allowance for construction work in progress for any of the electric distribution utility's cost of constructing an electric generating facility or for an environmental expenditure for any electric generating facility of the electric distribution utility, provided the cost is incurred or the expenditure occurs on or after January 1, 2009. Any such allowance shall be subject to the construction work in progress allowance limitations of division (A) of section 4909.15 of the Revised Code, except that the commission may authorize such an allowance upon the incurrence of the cost or occurrence of the expenditure. No such allowance for generating facility construction shall be authorized, however, unless the commission first determines in the proceeding that there is need for the facility based on resource planning projections submitted by the electric distribution utility. Further, no such allowance shall be authorized unless the facility's construction was sourced through a competitive bid process, regarding which process the commission may adopt rules. An allowance approved under division (B)(2)(b) of this section shall be established as a nonbypassable surcharge for the life of the facility.

(c) The establishment of a nonbypassable surcharge for the life of an electric generating facility that is owned or operated by the electric distribution utility, was sourced through a competitive bid process subject to any such rules as the commission adopts under division (B)(2)(b) of this section, and is newly used and useful on or after January 1, 2009, which surcharge shall cover all costs of the utility specified in the application, excluding costs recovered through a surcharge under division (B)(2)(b) of this section. However, no surcharge shall be authorized unless the commission first determines in the proceeding that there is need for the facility based on resource planning projections submitted by the electric distribution utility. Additionally, if a surcharge is authorized for a facility pursuant to plan approval under division (C) of this section and as a condition of the continuation of the surcharge, the electric distribution utility shall dedicate to Ohio consumers the capacity and energy and the rate associated with the cost of that facility. Before the commission authorizes any surcharge pursuant to this division, it may consider, as applicable, the effects of any decommissioning, deratings, and retirements.

(d) 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;

(e) Automatic increases or decreases in any component of the standard service offer price;

(f) Consistent with sections 4928.23 to 4928.2318 of the Revised Code, both of the following:

(i) Provisions for the electric distribution utility to securitize any phase-in, inclusive of carrying charges, of the utility's standard service offer price, which phase-in is authorized in accordance with section 4928.144 of the Revised Code;

(ii) Provisions for the recovery of the utility's cost of securitization.

(g) Provisions relating to transmission, ancillary, congestion, or any related service required for the standard service offer, including provisions for the recovery of any cost of such service that the electric distribution utility incurs on or after that date pursuant to the standard service offer;

(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. The latter may include a long-term energy delivery infrastructure modernization plan for that utility or any plan providing for the utility's recovery of costs, including lost revenue, shared savings, and avoided costs, and a just and reasonable rate of return on such infrastructure modernization. As part of its determination as to whether to allow in an electric distribution utility's electric security plan inclusion of any provision described in division (B)(2)(h) of this section, the commission shall examine the reliability of the electric distribution utility's distribution system and ensure that customers' and the electric distribution utility's expectations are aligned and that the electric distribution utility is placing sufficient emphasis on and dedicating sufficient resources to the reliability of its distribution system.

(i) Provisions under which the electric distribution utility may implement economic development, job retention, and energy efficiency programs, which provisions may allocate program costs across all classes of customers of the utility and those of electric distribution utilities in the same holding company system.

(C)

(1) The burden of proof in the proceeding shall be on the electric distribution utility. The commission shall issue an order under this division for an initial application under this section not later than one hundred fifty days after the application's filing date and, for any subsequent application by the utility

under this section, not later than two hundred seventy-five days after the application's filing date. Subject to division (D) of this section, 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 section 4928.142 of the Revised Code. Additionally, if the commission so approves an application that contains a surcharge under division (B)(2)(b) or (c) of this section, the commission shall ensure that the benefits derived for any purpose for which the surcharge is established are reserved and made available to those that bear the surcharge. Otherwise, the commission by order shall disapprove the application.

(2)

(a) If the commission modifies and approves an application under division (C)(1) of this section, the electric distribution utility may withdraw the application, thereby terminating it, and may file a new standard service offer under this section or a standard service offer under section 4928.142 of the Revised Code.

(b) If the utility terminates an application pursuant to division (C)(2)(a) of this section or if the commission disapproves an application under division (C)(1) of this section, the commission shall issue such order as is necessary to continue the provisions, terms, and conditions of the utility's most recent standard service offer, along with any expected increases or decreases in fuel costs from those contained in that offer, until a subsequent offer is authorized pursuant to this section or section 4928.142 of the Revised Code, respectively.

(D) Regarding the rate plan requirement of division (A) of section 4928.141 of the Revised Code, if an electric distribution utility that has a rate plan that extends beyond December 31, 2008, files an application under this section for the purpose of its compliance with division (A) of section 4928.141 of the Revised Code, that rate plan and its terms and conditions are hereby incorporated into its proposed electric security plan and shall continue in effect until the date scheduled under the rate plan for its expiration, and that portion of the electric security plan shall not be subject to commission approval or disapproval under division (C) of this section, and the earnings test provided for in division (F) of this section shall not apply until after the expiration of the rate plan. However, that utility may include in its electric security plan under this section, and the commission may approve, modify and approve, or disapprove subject to division (C) of this section, provisions for the incremental recovery or the deferral of any costs that are not being recovered under the rate plan and that the utility incurs during that continuation period to comply with section 4928.141, division (B) of section 4928.64, or division (A) of section 4928.66 of the Revised Code.

(E) If an electric security plan approved under division (C) of this section, except one withdrawn by the utility as authorized under that division, has a term, exclusive of phase-ins or deferrals, that exceeds three years from the effective date of the plan, the commission shall test the plan in the fourth year, and if applicable, every fourth year thereafter, to determine whether the plan, including its then-existing pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, continues to be more favorable in the aggregate and during the remaining term of the plan as compared to the expected results that would otherwise apply under section 4928.142 of the Revised Code. The commission shall also determine the prospective effect of the electric security plan to determine if that effect is substantially likely to provide the electric distribution utility with a return on common equity that is significantly in excess of the return on common equity that is likely to be earned by publicly traded companies, including utilities, that face comparable business and financial risk, with such adjustments for capital structure as may be appropriate. The burden of proof for demonstrating that significantly excessive earnings will not occur shall be on the electric distribution utility. If the test results are in the negative or the commission finds that continuation of the electric security plan will result in a return on equity that is significantly in excess of the return on common equity that is likely to be earned by publicly traded companies, including utilities, that will face comparable business and financial risk, with such adjustments for capital structure as may be appropriate, during the balance of the plan, the commission may terminate the electric security plan, but not until it shall have provided interested parties with notice and an opportunity to be heard. The commission may impose such conditions on the plan's termination as it considers reasonable and necessary to accommodate the transition from an approved plan to the more advantageous alternative. In the event of an electric security plan's termination pursuant to this division, the commission shall permit the continued deferral and phase-in of any amounts that occurred prior to that termination and the recovery of those amounts as contemplated under that electric security plan.

(F) With regard to the provisions that are included in an electric security plan under this section, the commission shall consider, following the end of each annual period of the plan, if any such adjustments resulted in excessive earnings as measured by whether the earned return on common equity of the electric distribution utility is significantly in excess of the return on common equity that was earned during the same period by publicly traded companies, including utilities, that face comparable business and financial risk, with such adjustments for capital structure as may be appropriate. Consideration also shall be given to the capital requirements of future committed investments in this state. The burden of proof for demonstrating that significantly excessive earnings did not occur shall be on the electric distribution utility. If the commission finds that such adjustments, in the aggregate, did result in significantly excessive earnings, it shall require the electric distribution utility to return to consumers the amount of the excess by prospective adjustments; provided that, upon making such prospective adjustments, the electric distribution utility shall have the right to terminate the plan and immediately file an application pursuant to section 4928.142 of the Revised Code. Upon termination of a plan under this division, rates shall be set on the same basis as specified in division (C)(2)(b) of this section, and the commission shall permit the continued deferral and phase-in of any amounts that occurred prior to that termination and the recovery of those amounts as contemplated under that electric security plan. In making its determination of significantly excessive earnings under this division, the commission shall not consider, directly or indirectly, the revenue, expenses, or earnings of any affiliate or parent company.

Amended by 129th General AssemblyFile No.61,HB 364, §1, eff. 3/22/2012.

Effective Date: 2008 SB221 07-31-2008

4901:1-35-03 Filing and contents of applications.

Each electric utility in this state filing an application for a standard service offer (SSO) in the form of an electric security plan (ESP), a market-rate offer (MRO), or both, shall comply with the requirements set forth in this rule.

(A) SSO applications shall be case captioned as (XX-XXX-EL-SSO). Twenty copies plus an original of the application shall be filed. The application must include a complete set of direct testimony of the electric utility personnel or other expert witnesses. This testimony shall be in question and answer format and shall be in support of the electric utility's proposed application. This testimony shall fully support all schedules and significant issues identified by the electric utility.

(B) An SSO application that contains a proposal for an MRO shall comply with the requirements set forth below.

(1) The following electric utility requirements are to be demonstrated in a separate section of the standard service offer SSO application proposing a market-rate offer MRO:

(a) The electric utility shall establish one of the following: that it, or its transmission affiliate, belongs to at least one regional transmission organization (RTO) that has been approved by the federal energy regulatory commission; or, if the electric utility or its transmission affiliate does not belong to an RTO, then the electric utility shall demonstrate that alternative conditions exist with regard to the transmission system, which include non-pancaked rates, open access by generation suppliers, and full interconnection with the distribution grid.

(b) The electric utility shall establish one of the following: its RTO retains an independent market-monitor function and has the ability to identify any potential for a market participant or the electric utility to exercise market power in any energy, capacity, and/or ancillary service markets by virtue of access to the RTO and the market participant's data and personnel and has the ability to effectively mitigate the conduct of the market participants so as to prevent or preclude the exercise of such market power by any market participant or the electric utility; or the electric utility shall demonstrate that an equivalent function exists which can monitor, identify, and mitigate conduct associated with the exercise of such market power.

(c) The electric utility shall demonstrate that an independent and reliable source of electricity pricing information for any energy product or service necessary for a winning bidder to fulfill the contractual obligations resulting from the competitive bidding process (CBP) is publicly available. The information may be offered through a pay subscription service, but the pay subscription service shall be available under standard pricing, terms, and conditions to any person requesting a subscription. The published information shall be representative of prices and changes in prices in the electric utility's electricity market, and shall identify pricing of on-peak and off-peak energy products that represent contracts for delivery, encompassing a time frame beginning at least two years from the date of the publication. The published information shall be updated on at least a monthly basis.

(2) Prior to establishing an MRO under division (A) of section 4928.142 of the Revised Code, an electric utility shall file a plan for a CBP with the commission. The electric utility shall provide justification of its proposed CBP plan, considering alternative possible methods of procurement. Each CBP plan that is to be used to establish an MRO shall include the following:

(a) A complete description of the CBP plan and testimony explaining and supporting each aspect of the CBP plan. The description shall include a discussion of any relationship between the wholesale procurement process and the retail rate design that may be proposed in the CBP plan. The description shall include a discussion of alternative methods of procurement that were considered and the rationale for selection of the CBP plan being presented. The description shall also include an explanation of every proposed non-avoidable charge, if any, and why the charge is proposed to be non-avoidable.

(b) Pro forma financial projections of the effect of the CBP plan's implementation, including implementation of division (D) of section 4928.142 of the Revised Code, upon generation, transmission, and distribution of the electric utility, for the duration of the CBP plan.

(c) Projected generation, transmission, and distribution rate impacts by customer class and rate schedules for the duration of the CBP plan. The electric utility shall clearly indicate how projected bid clearing prices used for this purpose were derived.

(d) Detailed descriptions of how the CBP plan ensures an open, fair, and transparent competitive solicitation that is consistent with and advances the policy of this state as delineated in divisions (A) to (N) of section 4928.02 of the Revised Code.

(e) Detailed descriptions of the customer load(s) to be served by the winning bidder(s), and any known factors that may affect such customer loads. The descriptions shall include, but not be limited to, load subdivisions defined for bidding purposes, load and rate class descriptions, customer load profiles that include historical hourly load data for each load and rate class for at least the two most recent years, applicable tariffs, historical shopping data, and plans for meeting targets pertaining to load reductions, energy efficiency, renewable energy, advanced energy, and advanced energy technologies. If customers will be served pursuant to time-differentiated or dynamic pricing, the descriptions shall include a summary of available data regarding the price elasticity of the load. Any fixed load provides to be served by winning bidder(s) shall be described.

(f) Detailed descriptions of the generation and related services that are to be provided by the winning bidder(s). The descriptions shall include, at a minimum, capacity, energy, transmission, ancillary and resource adequacy services, and the term during which generation and related services are to be provided. The descriptions shall clearly indicate which services are to be provided by the winning bidder(s) and which services are to be provided by the electric utility.

(g) Draft copies of all forms, contracts, or agreements that must be executed during or upon completion of the CBP.

(h) A clear description of the proposed methodology by which all bids would be evaluated, in sufficient detail so that bidders and other observers can ascertain the evaluated result of any bids or potential bids.

(i) The CBP plan shall include a discussion of time-differentiated pricing, dynamic retail pricing, and other alternative retail rate options that were considered in the development of the CBP plan. A clear description of the rate structure ultimately chosen by the electric utility, the electric utility's rationale for selection of the chosen rate structure, and the methodology by which the electric utility proposes to convert the winning bid(s) to retail rates of the electric utility shall be included in the CBP plan.

(j) The first application for a market rate offer by an electric utility that, as of July 31, 2008, directly owned, in whole or in part, operating electric generation facilities that had been used and useful in this state shall include a description of the electric utility's proposed blending of the CBP rates for the first five years of the market rate offer pursuant to division (D) of section 4928.142 of the Revised Code. The proposed blending shall show the generation service price(s) that will be blended with the CBP determined rates, and any descriptions, formulas, and/or tables necessary to show how the blending will be accomplished. The proposed blending shall show all adjustments, to be made on a quarterly basis, included in the generation service price(s) that the electric utility proposes for changes in costs of fuel, purchased power, portfolio requirements, and environmental compliance incurred during the blending period. The electric utility shall provide its best current estimate of anticipated adjustment amounts for the duration of the blending period, and compare the projected adjusted generation service prices under the CBP plan to the projected adjusted generation service prices under its proposed electric security plan.

(k) The electric utility's application to establish a CBP shall include such information as necessary to demonstrate whether or not, as of July 31, 2008, the electric utility directly owned, in whole or in part, operating electric generation facilities that had been used and useful in the state of Ohio.

(l) The CBP plan shall provide for funding of a consultant that may be selected by the commission to assess and report to the commission on the design of the solicitation, the oversight of the bidding process, the clarity of the product definition, the fairness, openness, and transparency of the solicitation and bidding process, the market factors that could affect the solicitation, and other relevant criteria as directed by the commission. Recovery of the cost of such consultant(s) may be included by the electric utility in its CBP plan.

(m) The CBP plan shall include a discussion of generation service procurement options that were considered in development of the CBP plan, including but not limited to, portfolio approaches, staggered procurement, forward procurement, electric utility participation in day-ahead and/or real-time balancing markets, and spot market purchases and sales. The CBP plan shall also include the rationale for selection of any or all of the procurement options.

(n) The electric utility shall show, as a part of its CBP plan, any relationship between the CBP plan and the electric utility's plans to comply with alternative energy portfolio requirements of section 4928.64 of the Revised Code, and energy efficiency requirements and peak demand reduction requirements of section 4928.66 of the Revised Code. The initial filing of a CBP plan shall include a detailed account of how the plan is consistent with and advances the policy of this state as delineated in divisions (A) to (N) of section 4928.02 of the Revised Code. Following the initial filing, subsequent filings shall include a discussion of how the state policy continues to be advanced by the plan.

(o) An explanation of known and anticipated obstacles that may create difficulties or barriers for the adoption of the proposed bidding process.

(3) The electric utility shall provide a description of its corporate separation plan, adopted pursuant to section 4928.17 of the Revised Code, including but not limited to, the current status of the corporate separation plan, a detailed list of all waivers previously issued by the commission to the electric utility regarding its corporate separation plan, and a timeline of any anticipated revisions or amendments to its current corporate separation plan on file with the commission pursuant to Chapter 4901:1-37 of the Administrative Code.

(4) A description of how the electric utility proposes to address governmental aggregation programs and implementation of divisions (I) and (K) of section 4928.20 of the Revised Code.

(C) An SSO application that contains a proposal for an ESP shall comply with the requirements set forth below.

(1) A complete description of the ESP and testimony explaining and supporting each aspect of the ESP.

(2) Pro forma financial projections of the effect of the ESP's implementation upon the electric utility for the duration of the ESP, together with testimony and work papers sufficient to provide an understanding of the assumptions made and methodologies used in deriving the pro forma projections.

(3) Projected rate impacts by customer class/rate schedules for the duration of the ESP, including post-ESP impacts of deferrals, if any.

(4) The electric utility shall provide a description of its corporate separation plan, adopted pursuant to section 4928.17 of the Revised Code, including, but not limited to, the current status of the corporate separation plan, a detailed list of all waivers previously issued by the commission to the electric utility regarding its corporate separation plan, and a timeline of any anticipated revisions or amendments to its current corporate separation plan on file with the commission pursuant to Chapter 4901:1-37 of the Administrative Code.

(5) Division (A)(3) of section 4928.31 of the Revised Code required each electric utility to file an operational support plan as a part of its electric transition plan. Each electric utility shall provide a statement as to whether its operational support plan has been implemented and whether there are any outstanding problems with the implementation.

(6) A description of how the electric utility proposes to address governmental aggregation programs and implementation of divisions (I), (J), and (K) of section 4928.20 of the Revised Code.

(7) A description of the effect on large-scale governmental aggregation of any unavoidable generation charge proposed to be established in the ESP.

(8) The initial filing for an ESP shall include a detailed account of how the ESP is consistent with and advances the policy of this state as delineated in divisions (A) to (N) of section 4928.02 of the Revised Code. Following the initial filing, subsequent filings shall include how the state policy is advanced by the ESP.

(9) Specific information

Division (B)(2) of section 4928.143 of the Revised Code authorizes the provision or inclusion in an ESP of a number of features or mechanisms. To the extent that an electric utility includes any of these features in its ESP, it shall file the corresponding information in its application.

(a) Division (B)(2)(a) of section 4928.143 of the Revised Code authorizes an electric utility to include provisions for the automatic recovery of fuel, purchased power, and certain other specified costs. An application including such provisions shall include, at a minimum, the information described below:

(i) The type of cost the electric utility is seeking recovery for under division (B)(2) of section 4928.143 of the Revised Code including a summary and detailed description of such cost. The description shall include the plant(s) that the cost pertains to as well as a narrative pertaining to the electric utility's procurement policies and procedures regarding such cost.

(ii) The electric utility shall include in the application any benefits available to the electric utility as a result of or in connection with such costs including but not limited to profits from emission allowance sales and profits from resold coal contracts.

(iii) The specific means by which these costs will be recovered by the electric utility. In this specification, the electric utility must clearly distinguish whether these costs are to be recovered from all distribution customers or only from the customers taking service under the ESP.

(iv) A complete set of work papers supporting the cost must be filed with the application. Work papers must include, but are not limited to, all pertinent documents prepared by the electric utility for the application and a narrative and other support of assumptions made in completing the work papers.

(b) Divisions (B)(2)(b) and (B)(2)(c) of section 4928.143 of the Revised Code, authorize an electric utility to include unavoidable surcharges for construction, generation, or environmental expenditures for electric generation facilities owned or operated by the electric utility. Any plan which seeks to impose surcharge under these provisions shall include the following sections, as appropriate:

(i) The application must include a description of the projected costs of the proposed facility. The need for the proposed facility must have already been reviewed and determined by the commission through an integrated resource planning process filed pursuant to rule 4901:5-5-05 of the Administrative Code.

(ii) The application must also include a proposed process, subject to modification and approval by the commission, for the competitive bidding of the construction of the facility unless the commission has previously approved a process for competitive bidding, which would be applicable to that specific facility.

(iii) An application which provides for the recovery of a reasonable allowance for construction work in progress shall include a detailed description of the actual costs as of a date certain for which the applicant seeks recovery, a detailed description of the impact upon rates of the proposed surcharge, and a demonstration that such a construction work in progress allowance is consistent with the applicable limitations of division (A) of section 4909.15 of the Revised Code.

(iv) An application which provides recovery of a surcharge for an electric generation facility shall include a detailed description of the actual costs, as of a date certain, for which the applicant seeks recovery and a detailed description of the impact upon rates of the proposed surcharge.

(v) An application which provides for recovery of a surcharge for an electric generation facility shall include the proposed terms for the capacity, energy, and associated rates for the life of the facility.

(c) Division (B)(2)(d) of section 4928.143 of the Revised Code authorizes an electric utility to include terms, conditions, or charges related to retail shopping by customers. Any application which includes such terms, conditions or charges, shall include, at a minimum, the following information:

(i) A listing of all components of the ESP which would have the effect of preventing, limiting, inhibiting, or promoting customer shopping for retail electric generation service. Such components would include, but are not limited to, terms and conditions relating to shopping or to returning to the standard service offer and any unavoidable charges. For each such component, an explanation of the component and a descriptive rationale and, to the extent possible, a quantitative justification shall be provided.

(ii) A description and quantification or estimation of any charges, other than those associated with generation expansion or environmental investment under divisions (B)(2)(b) and (B)(2)(c) of section 4928.143 of the Revised Code, which will be deferred for future recovery, together with the carrying costs, amortization periods, and avoidability of such charges.

(iii) A listing, description, and quantitative justification of any unavoidable charges for standby, back-up, or supplemental power.

(d) Division (B)(2)(e) of section 4928.143 of the Revised Code authorizes an electric utility to include provisions for automatic increases or decreases in any component of the standard service offer price. Pursuant to this authority, if the ESP proposes automatic increases or decreases to be implemented during the life of the plan for any component of the standard service offer, other than those covered by division (B)(2)(a) of section 4928.143 of the Revised Code, the electric utility must provide in its application a description of the component, the proposed means for changing the component, and the proposed means for verifying the reasonableness of the change.

(e) Division (B)(2)(f) of section 4928.143 of the Revised Code authorizes an electric utility to include provisions for the securitization of authorized phase-in recovery of the standard service offer price. If a phase-in deferred asset is proposed to be securitized, the electric utility shall provide, at the time of an application for securitization, a description of the securitization instrument and an accounting of that securitization, including the deferred cash flow due to the phase-in, carrying charges, and the incremental cost of the securitization. The electric utility will also describe any efforts to minimize the incremental cost of the securitization. The electric utility shall provide all documentation associated with securitization, including but not limited to, a summary sheet of terms and conditions. The electric utility shall also provide a comparison of costs associated with securitization with the costs associated with other forms of financing to demonstrate that securitization is the least cost strategy.

(f) Division (B)(2)(g) of section 4928.143 of the Revised Code authorizes an electric utility to include provisions relating to transmission and other specified related services. Moreover, division (A)(2) of section 4928.05 of the Revised Code states that, notwithstanding Chapters 4905. and 4909. of the Revised Code, commission authority under this chapter shall include the authority to provide for the recovery, through a reconcilable rider on an electric distribution utility's distribution rates, of all transmission and transmission-related costs (net of transmission related revenues), including ancillary and net congestion costs, imposed on or charged to the utility by the federal energy regulatory commission or a regional transmission organization, independent transmission operator, or similar organization approved by the federal energy regulatory commission.

Any utility which seeks to create or modify its transmission cost recovery rider in its ESP shall file the rider in accordance with the requirements delineated in Chapter 4901:1-36 of the Administrative Code.

(g) Division (B)(2)(h) of section 4928.143 of the Revised Code authorizes an electric utility to include provisions for alternative regulation mechanisms or programs, including infrastructure and modernization incentives, relating to distribution service as part of an ESP. While a number of mechanisms may be combined within a plan, for each specific mechanism or program, the electric utility shall provide a detailed description, with supporting data and information, to allow appropriate evaluation of each proposal, including how the proposal addresses any cost savings to the electric utility, avoids duplicative cost recovery, and aligns electric utility and consumer interests. In general, and to the extent applicable, the electric utility shall also include, for each separate mechanism or program, quantification of the estimated impact on rates over the term of any proposed modernization plan. Any application for an infrastructure modernization plan shall include the following specific requirements:

(i) A description of the infrastructure modernization plan, including but not limited to, the electric utility's existing infrastructure, its existing asset management system and related capabilities, the type of technology and reason chosen, the portion of service territory affected, the percentage of customers directly impacted (non-rate impact), and the implementation schedule by geographic location and/or type of activity. A description of any communication infrastructure included in the infrastructure modernization plan and any metering, distribution automation, or other applications that may be supported by this communication infrastructure also shall be included.

(ii) A description of the benefits of the infrastructure modernization plan (in total and by activity or type), including but not limited to the following as they may apply to the plan: the impacts on current reliability, the number of circuits impacted, the number of customers impacted, the timing of impacts, whether the impact is on the frequency or duration of outages, whether the infrastructure modernization plan addresses primary outage causes, what problems are addressed by the infrastructure modernization plan, the resulting dollar savings and additional costs, the activities affected and related accounts, the timing of savings, other customer benefits, and societal benefits. Through metrics and milestones, the infrastructure modernization plan shall include a description of how the performance and outcomes of the plan will be measured.

(iii) A detailed description of the costs of the infrastructure modernization plan, including a breakdown of capital costs and operating and maintenance expenses net of any related savings, the revenue requirement, including recovery of stranded investment related to replacement of un-depreciated plant with new technology, the impact on customer bills, service disruptions associated with plan implementation, and description of (and dollar value of) equipment being made obsolescent by the plan and reason for early plant retirement. The infrastructure modernization plan shall also include a description of efforts made to mitigate such stranded investment.

(iv) A detailed description of any proposed cost recovery mechanism, including the components of any regulatory asset created by the infrastructure modernization plan, the reporting structure and schedule, and the proposed process for approval of cost recovery and increase in rates.

(v) A detailed explanation of how the infrastructure modernization plan aligns customer and electric utility reliability and power quality expectations by customer class.

(h) Division (B)(2)(i) of section 4928.143 of the Revised Code authorizes an electric utility to include provisions for economic development, job retention, and energy efficiency programs. Pursuant to this section, the electric utility shall provide a complete description of the proposal, together with cost-benefit analysis or other quantitative justification, and quantification of the program's projected impact on rates.

(10) Additional required information

Divisions (E) and (F) of section 4928.143 of the Revised Code provide for tests of the ESP with respect to significantly excessive earnings. Division (E) of section 4928.143 of the Revised Code is applicable only if an ESP has a term exceeding three years, and would require an earnings determination to be made in the fourth year. Division (F) of section 4928.143 of the Revised Code applies to any ESP and examines earnings after each year. In each case, the burden of proof for demonstrating that the return on equity is not significantly excessive is borne by the electric utility.

(a) For the annual review pursuant to division (F) of section 4928.143 of the Revised Code, the electric utility shall provide testimony and analysis demonstrating the return on equity that was earned during the year and the returns on equity earned during the same period by publicly traded companies that face comparable business and financial risks as the electric utility. In addition, the electric utility shall provide the following information:

(i) The federal energy regulatory commission form 1 (FERC form 1) in its entirety for the annual period under review. The electric utility may seek protection of any confidential or proprietary data if necessary. If the FERC form 1 is not available, the electric utility shall provide balance sheet and income statement information of at least the level of detail as required by FERC form 1.

(ii) The latest securities and exchange commission form 10-K in its entirety. The electric utility may seek protection of any confidential or proprietary data if necessary.

(iii) Capital budget requirements for future committed investments in Ohio for each annual period remaining in the ESP.

(b) For demonstration under division (E) of section 4928.143 of the Revised Code, the electric utility shall also provide, in addition to the requirements under division (F) of section 4928.143 of the Revised Code, calculations of its projected return on equity for each remaining year of the ESP. The electric utility shall support these calculations by providing projected balance sheet and income statement information for the remainder of the ESP, together with testimony and work papers detailing the methodologies, adjustments, and assumptions used in making these projections.

(D) The first application for an SSO filed after the effective date of section 4928.141 of the Revised Code by each electric utility shall include an ESP and shall be filed at least one hundred fifty days before the electric utility proposes to have such SSO in effect. The first application may also include a proposal for an MRO. First applications that are filed with the commission prior to the initial effective date of this rule and that are determined by the commission to be not in substantive compliance with this rule shall be amended or refiled at the direction of the commission. The commission shall endeavor to make a determination on an amended or refiled ESP application, which substantively conforms to the requirements of this rule, within one hundred fifty days of the filing of the amended or refiled application.

(E) Subsequent applications for an SSO may include an ESP and/or MRO; however, an ESP may not be proposed once the electric utility has implemented an MRO approved by the commission.

(F) The SSO application shall include a section demonstrating that its current corporate separation plan is in compliance with section 4928.17 of the Revised Code, Chapter 4901:1-37 of the Administrative Code, and consistent with the policy of the state as delineated in divisions (A) to (N) of section 4928.02 of the Revised Code. If any waivers of the corporate separation plan have been granted and are to be continued, the applicant shall justify the continued need for those waivers.

(G) A complete set of work papers must be filed with the application. Work papers must include, but are not limited to, all pertinent documents prepared by the electric utility for the application and a narrative or other support of assumptions made in the work papers. Work papers shall be marked, organized, and indexed according to schedules to which they relate. Data contained in the work papers should be footnoted so as to identify the source document used.

(H) All schedules, tariff sheets, and work papers prepared by, or at the direction of, the electric utility for the application and included in the application must be available in spreadsheet, word processing, or an electronic non-image-based format, with formulas intact, compatible with personal computers.

The electronic form does not have to be filed with the application but must be made available within two business days to staff and any intervening party that requests it.

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