



**Robert Kelter** (*pro hac vice*)

Counsel of Record

**Justin Vickers** (*pro hac vice*)

**Nicholas McDaniel** (0089817)

Environmental Law and Policy Center

1207 Grandview Avenue, Suite 201

Columbus, OH 43212

614.488.3301 (telephone)

614.487.7510 (fax)

[rkelter@elpc.org](mailto:rkelter@elpc.org)

[jvickers@elpc.org](mailto:jvickers@elpc.org)

[nmcdaniel@elpc.org](mailto:nmcdaniel@elpc.org)

**Counsel for Appellant,**

**Environmental Law and Policy Center**

**David A. Kutik** (0006418)

Counsel of Record

Jones Day

901 Lakeside Avenue

Cleveland, OH 44114

216.586.3939 (telephone)

216.579.0212 (fax)

[dakutick@jonesday.com](mailto:dakutick@jonesday.com)

**James W. Burk** (0043808)

**Carrie M. Dunn** (0076952)

FirstEnergy Service Company

76 South Main Street

Akron, OH 44308

330.384.5861 (telephone)

330.384.3875 (fax)

[burkj@firstenergycorp.com](mailto:burkj@firstenergycorp.com)

[cdunn@firstenergycorp.com](mailto:cdunn@firstenergycorp.com)

**Counsel for Intervening Appellees,  
Ohio Edison Company, The Cleveland  
Electric Illuminating Company, and the  
Toledo Edison Company**

**TABLE OF CONTENTS**

	<b>Page</b>
TABLE OF AUTHORITIES .....	iv
INTRODUCTION.....	1
STATEMENT OF THE FACTS AND CASE.....	2
STANDARD OF REVIEW .....	5
ARGUMENT .....	6

Proposition of Law No. I:

As a matter of fact, FirstEnergy complied with Ohio Adm. Code 4901:1-35-03(C) and this Court should not reverse or modify a decision of the Commission where, as here, there is sufficient probative evidence to show that the Commission’s decision is not against the manifest weight of the evidence and is not so clearly unsupported by the record as to show misapprehension, mistake, or willful disregard of duty. *Elyria Foundry Co. v. Pub. Util. Comm.*, 118 Ohio St.3d 269, 2008-Ohio-2230, ¶ 12; *MCI Telecommunications Corp. v. Pub. Util. Comm.*, 38 Ohio St.3d 266, 268, 527 N.E.2d 777(1988). .... 6

Proposition of Law No. II:

“[T]he 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.” R.C. 4928.143(C)(1), App. at 12-13. .... 10

## TABLE OF CONTENTS (cont'd)

Page

### Proposition of Law No. III:

The Court will not reverse fact determinations where the record contains sufficient probative evidence to support those findings. The Court neither reweighs the evidence nor substitutes its opinion or judgment for that of the Commission on factual, evidentiary matters. <i>Discount Cellular v. Pub. Util. Comm.</i> , 112 Ohio St.3d 360, 2007-Ohio-53, ¶ 13; <i>Payphone Ass'n v. Pub. Util. Comm.</i> , 109 Ohio St.3d 453, 2006-Ohio-2988, ¶ 16. ....	14
A. Quantitative and Qualitative factors .....	15
B. The ESP is quantitatively more favorable in the aggregate than the MRO. ....	16
C. Qualitative matters show the ESP is even more favorable. ....	19
D. Summary .....	21

### Proposition of Law No. IV:

The Commission applies sound discretion when, in the course of taking administrative notice of evidence from prior proceedings, it assures itself that the parties have prior knowledge of this evidence and affords them an opportunity to rebut it. <i>Canton Storage and Transfer Co. v. Pub. Util. Comm.</i> , 72 Ohio St.3d 1, 4, 647 N.E.2d 136 (1995); <i>Allen v. Pub. Util. Comm.</i> , 40 Ohio St.3d 184, 185, 532 N.E.2d 1307 (1988). ....	21
---	----

### Proposition of Law No. V:

A stipulation is the product of serious bargaining where settlement negotiations do not exclude an entire customer class. <i>Consumers' Counsel v. Pub. Util. Comm.</i> , 64 Ohio St.3d 123, 126, 592 N.E.2d 1370 (1992). ....	28
CONCLUSION .....	33
PROOF OF SERVICE .....	35

## TABLE OF CONTENTS (cont'd)

	<b>Page</b>
APPENDIX	PAGE
R.C. 1.49.....	1
R.C. 4903.13.....	1
R.C. 4909.15.....	1
R.C. 4928.02.....	5
R.C. 4928.06.....	7
R.C. 4928.141.....	9
R.C. 4928.143.....	10
R.C. 4929.02.....	15
Ohio Adm. Code 4901-1-16.....	16
Ohio Adm. Code 4901:1-35-02.....	17
Ohio Adm. Code 4901:1-35-03.....	18

## TABLE OF AUTHORITIES

	Page(s)
<b>Cases</b>	
<i>Allen v. Pub. Util. Comm.</i> , 40 Ohio St.3d 184, 532 N.E.2d 1307 (1988).....	21, 22, 24, 27
<i>Canton Storage and Transfer Co. v. Pub. Util. Comm.</i> , 72 Ohio St.3d 1, 647 N.E.2d 136 (1995) .....	<i>passim</i>
<i>Cincinnati Bell Tel. Co. v. Pub. Util. Comm.</i> , 12 Ohio St.3d 280, 466 N.E.2d 848 (1984) .....	26
<i>Cincinnati v. Pub. Util. Comm.</i> , 151 Ohio St. 353, 86 N.E. 2d 10 (1949).....	9
<i>City of Reynoldsburg v. Pub. Util. Comm.</i> , 134 Ohio St.3d 29, 2012-Ohio- 5270 .....	5, 6
<i>Constellation NewEnergy, Inc. v. Pub. Util. Comm.</i> , 104 Ohio St.3d 530, 2004-Ohio-6767 .....	30
<i>Consumers Counsel v. Pub. Util. Comm.</i> , 67 Ohio St.2d 153, 423 N.E.2d 820 (1981).....	13
<i>Consumers' Counsel v. Pub. Util. Comm.</i> , 125 Ohio St.3d 57, 2020-Ohio- 134, 926 N.E.2d 261 .....	10
<i>Consumers' Counsel v. Pub. Util. Comm.</i> , 58 Ohio St.2d 108, 388 N.E.2d 1370 (1979) .....	6
<i>Consumers' Counsel v. Pub. Util. Comm.</i> , 64 Ohio St.3d 123, 592 N.E.2d 1370 (1992) .....	28
<i>Discount Cellular v. Pub. Util. Comm.</i> , 112 Ohio St.3d 360, 2007-Ohio-53, 859 N.E.2d 957.....	14, 15, 18
<i>East Ohio Gas Co. v. Pub. Util. Comm.</i> , 39 Ohio St.3d 295, 530 N.E. 2d 875 (1988).....	9
<i>Elyria Foundry Co. v. Pub. Util. Comm.</i> , 114 Ohio St.3d 305, 2007-Ohio- 4164 .....	10
<i>Elyria Foundry Co. v. Pub. Util. Comm.</i> , 118 Ohio St. 3d 269, 2008-Ohio- 2230, 888 N.E.2d 1055.....	6, 7

## TABLE OF AUTHORITIES (cont'd)

**Page(s)**

<i>Greater Cleveland Welfare Rights Org., Inc. v. Pub. Util. Comm.</i> , 2 Ohio St.3d 62, 442 N.E.2d 1288 (1982).....	25, 26
<i>Holladay Corp. v. Pub. Util. Comm.</i> , 61 Ohio St.2d 335, 402 N.E.2d 1175 (1980).....	9
<i>In re Columbus Southern Power Co.</i> , 128 Ohio St.3d 402, 945 N.E.2d 501, 2011-Ohio-958 .....	11, 16
<i>In re Columbus Southern Power Co.</i> , 128 Ohio St.3d 512, 947 N.E.2d 512, 2011-Ohio-1788 .....	11
<i>In re Columbus Southern Power Co.</i> , 129 Ohio St.3d 46, 2011-Ohio-2382 .....	28
<i>Lake County Bd. of Mental Retardation &amp; Dev. Disabilities v. Prof. Assn. for the Teaching of the Mentally Retarded</i> , 71 Ohio St.3d 15, 641 N.E.2d 180 (1994).....	32
<i>MCI Telecommunications Corp. v. Pub. Util. Comm.</i> , 38 Ohio St. 3d 266, 527 N.E.2d 777 (1988) .....	6, 7
<i>Ohio Apt. Assn. v. Levin</i> , 127 Ohio St.3d 76, 2010-Ohio-4414 .....	26
<i>Ohio Bell Tel. Co. v. Pub. Util. Comm.</i> , 14 Ohio St.3d 49, 471 N.E.2d 475 (1984).....	26
<i>Ohio Bell Tel. Co. v. Pub. Util. Comm.</i> , 302 U.S. 292 (1937).....	22
<i>Payphone Ass'n v. Pub. Util. Comm.</i> , 109 Ohio St.3d 453, 2006-Ohio-2988, 849 N.E.2d 4.....	14, 15, 18
<i>State ex rel. Beacon Journal Publishing Co. v. Akron</i> , 104 Ohio St.3d 399, 2004-Ohio-6557 .....	22
<i>Time Warner AxS v. Pub. Util. Comm.</i> , 75 Ohio St.3d 229, 661 N.E.2d 1097 (1996) .....	30
<i>Westfield Ins. Co. v. Galatis</i> , 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256.....	26

## TABLE OF AUTHORITIES (cont'd)

Page(s)

### Statutes

R.C. 1.49.....	10
R.C. 4903.13.....	5
R.C. 4909.15.....	13
R.C. 4928.02.....	11, 12, 13, 19
R.C. 4928.06.....	21
R.C. 4928.141.....	2
R.C. 4928.142.....	2, 5, 10, 15
R.C. 4928.143.....	<i>passim</i>
R.C. 4929.02.....	21

### Other Authorities

<i>In the Matter of the Application for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan, Case No. 12-1230-EL-SSO (Opinion and Order) (Jul. 18, 2012)</i> .....	<i>passim</i>
<i>In the Matter of the Application for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan, Case No. 12-1230-EL-SSO (Second Entry on Rehearing) (Jan. 30, 2013)</i> .....	16
<i>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 Section 4928.143, Revised Code, in the Form of an Electric Security Plan, Case No. 10-388-EL-SSO (Opinion and Order) (Aug. 25, 2010)</i> .....	3

### Rules

Ohio Adm. Code 4901:1-35-02.....	8, 9
Ohio Adm. Code 4901:1-35-03.....	6, 7, 8, 9

**TABLE OF AUTHORITIES (cont'd)**

**Page(s)**

Ohio Adm. Code 4901-1-16..... 25

Ohio Evid. R. 201..... 26, 27

**In The  
SUPREME COURT OF OHIO**

<b>Northeast Ohio Public Energy Council,</b>	:	Case No. 13-513
	:	
and	:	On appeal from the Public Utilities Commission of Ohio, Case No. 12- 1230-EL-SSO, <i>In the Matter of the Application for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan.</i>
<b>Environmental Law and Policy Center,</b>	:	
Appellants,	:	
v.	:	
<b>The Public Utilities Commission of Ohio,</b>	:	
Appellee.	:	

---

**MERIT BRIEF  
SUBMITTED ON BEHALF OF APPELLEE,  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

---

**INTRODUCTION**

Every electric distribution utility in Ohio must have a standard service offer in the form of either a market rate offer (“MRO”) or an electric security plan (“ESP”). First-Energy had an ESP and it was very successful. So successful in fact that it applied to the Commission to extend its terms for two additional years. Nearly all parties agreed. The Commission opened a proceeding to consider this proposal. It took evidence as the statute requires, and considered whether this extension of the existing ESP would be more favorable than an MRO would have been. The evidence showed, and the Commis-

sion found, that the proposal was more favorable. Having made that factual finding, the Commission was obligated to approve the extension of the plan and it did so. The Commission has done exactly what the law requires in the way the law requires it. Its order should be affirmed.

### STATEMENT OF THE FACTS AND CASE

R.C. 4928.141(A) requires an electric distribution utility to provide a standard service offer (“SSO”) to all consumers located within its certified territory. The electric distribution utility’s SSO can take the form of an MRO under R.C. 4928.142 or it can take the form of ESP under R.C. 4928.143. Here, FirstEnergy<sup>1</sup> opted for the latter and filed an application with the Commission on April 13, 2012 seeking approval to establish its third ESP, namely *ESP 3*. *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan*, Case No. 12-1230-EL-SSO (Application) (Apr. 13, 2012), NOPEC Vol. I Supp. at 25.

The terms of *ESP 3* were not created in a vacuum. At its core, *ESP 3* sought to capture and extend for an additional two years the benefits from FirstEnergy’s earlier Commission-approved ESP, namely, *ESP 2* (*In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison*

---

<sup>1</sup> The term “FirstEnergy” collectively denotes the Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company.

*Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan, Case No. 10-388-EL-SSO*). The features embedded in the *ESP 2* arose out of a stipulation agreed to by a diverse array of parties. The signatory parties there included the Commission’s Staff as well as the interests of: the industrial sector; the healthcare sector; low-income residents; the educational sector; municipalities; the manufacturing sector; and the financial services sector. Notably, the Northeast Ohio Public Energy Council (“NOPEC”) was a signatory party as well. The Commission eventually approved, with modifications, the *ESP 2* stipulation. *ESP 2* (Opinion and Order) (Aug. 25, 2010), NOPEC App. at 153-199.<sup>2</sup>

Here, though largely mirroring the framework from *ESP 2*, the *ESP 3* added two modifications. First, *ESP 3* tweaked the competitive bidding process by enabling FirstEnergy to procure some of its SSO load for a three-year period rather than a one-year period. Second, *ESP 3* extended the recovery period for renewable energy credit costs. In its application to establish *ESP 3*, FirstEnergy included a stipulation and recommendation signed by a multitude of parties – many of whom signed the stipulation from *ESP 2* –

---

<sup>2</sup> References to appellees appendix are denoted “App. at \_\_\_\_;” references to appellants’ appendices are denoted “NOPEC App. at \_\_\_\_” and “ELPC App. at \_\_\_\_;” references to NOPEC’s supplement are denoted “NOPEC Vol. I (or II) Supp. at \_\_\_\_.”

which urged the Commission to approve the application. The signatory parties<sup>3</sup> affirmed, among other things, that the stipulation:

- was “supported by adequate data and information”;
- “represent[ed] a just and reasonable resolution” of contested issues;
- “violate[d] no regulatory principle or precedent”; and
- “was the product of lengthy, serious bargaining among knowledgeable and capable” parties.

After a four day evidentiary hearing<sup>4</sup> in which numerous witnesses testified both for and against the *ESP 3* stipulation, the Commission issued an order adopting, with modifications, the stipulation. *ESP 3* (Opinion and Order) (Jul. 18, 2012), NOPEC App. at 12. The Commission found that the stipulation met this Court’s three-part inquiry for assessing the reasonableness of the stipulation. Additionally, the Commission found that the proposed *ESP 3* passed muster under R.C. 4928.143(C)(1), which requires that an ESP, inclusive of pricing and all other terms and conditions, as well as any deferrals and

---

<sup>3</sup> The signatory parties to the *ESP 3* stipulation were: First Energy; the Commission’s Staff; Ohio Energy Group; Ohio Manufacturers Assn.; IEU-Ohio; Ohio Partners for Affordable Energy; Assn. of Independent Colleges and Universities of Ohio; Ohio Hospital Assn.; Nucor Steel Marion; Council of Smaller Enterprises; Material Sciences Corp.; Empowerment Center of Greater Cleveland; Consumer Protection Assn.; Cleveland Housing Network; FirstEnergy Solutions; the City of Akron; and Morgan Stanley Capital Group. Signing as non-opposing parties were: Kroger; GEXA-Energy Ohio; EnerNoc; Duke Energy Retail Sales; and Duke Energy Commercial Asset Mgt.

<sup>4</sup> In addition to the evidentiary hearing, public hearings were also held in Akron, Toledo, and Cleveland.

future recovery of deferrals, be more favorable in the aggregate as compared to the expected results that would flow from an MRO authorized by R.C. 4928.142.

The Commission's opinion and order prompted several non-signatory parties to file applications for rehearing. After due consideration, the Commission issued a second entry on rehearing upholding its original opinion and order. *ESP 3* (Second Entry on Rehearing) (Jan. 30, 2013), NOPEC App. at 80. NOPEC and the Environmental Law and Policy Center ("ELPC") have appealed to this Court. Any further facts will be referenced directly in the argument section.

### **STANDARD OF REVIEW**

Under R.C. 4903.13, "[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 Commission's factual findings will be sustained "if the record contains sufficient probative evidence to show that the commission's decision was not manifestly against the weight of the evidence and was not so clearly unsupported by the record as to show misapprehension, mistake, or willful disregard of duty." *City of Reynoldsburg v. Pub. Util. Comm.*, 134 Ohio St.3d 29, 2012-Ohio-5270, ¶ 18. While the Court retains plenary authority over questions of law, it "may rely on the expertise of a state agency in interpreting a law where 'highly specialized issues' are involved and 'where agency expertise would, therefore, be of assistance in discerning the presumed intent of our General

Assembly.’” *Id.* at ¶ 19 (quoting *Consumers’ Counsel v. Pub. Util. Comm.*, 58 Ohio St.2d 108, 110, 388 N.E.2d 1370 (1979)).

## ARGUMENT

### Proposition of Law No. I:

**As a matter of fact, FirstEnergy complied with Ohio Adm. Code 4901:1-35-03(C) and this Court should not reverse or modify a decision of the Commission where, as here, there is sufficient probative evidence to show that the Commission’s decision is not against the manifest weight of the evidence and is not so clearly unsupported by the record as to show misapprehension, mistake, or willful disregard of duty. *Elyria Foundry Co. v. Pub. Util. Comm.*, 118 Ohio St.3d 269, 2008-Ohio-2230, ¶ 12; *MCI Telecommunications Corp. v. Pub. Util. Comm.*, 38 Ohio St.3d 266, 268, 527 N.E.2d 777(1988).**

ELPC makes at least four fatal errors in its single proposition of law. Any one of which is sufficient to reject its argument *in toto*.

First, ELPC claims that FirstEnergy did not comply with Ohio Adm. Code 4901:1-35-03(C). The fact of the matter is just the opposite. The Commission found that FirstEnergy did comply with the rule:

The Commission finds that the application, 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.

*ESP 3* (Second Entry on Rehearing at 7, ¶ 18) (Jan. 30, 2013), NOPEC App. at 86, ELPC App. at 19. This finding could not be more clear. It is supported by the application, the stipulation (that was filed at the same time) and the testimony of witness Ridmann.

ELPC mistakes quantity for quality. There was no need for the filing in the case below to be as lengthy as others have been. The proposal was much simpler than in other cases. FirstEnergy simply sought to extend its existing plan, which was previously deemed reasonable by the Commission and numerous parties, with a few minor modifications. The modifications were explained in detail but there was no need to explain the unchanged aspects of the plan to the Commission. The Commission understood those perfectly well. It ordered them. As the Commission's finding is supported by substantial evidence, it should be affirmed. *Elyria Foundry Co. v. Pub. Util. Comm.*, 118 Ohio St. 3d 269, 2008-Ohio-2230, ¶ 12; *MCI Telecommunications Corp. v. Pub. Util. Comm.*, 38 Ohio St. 3d 266, 268, 527 N.E.2d 777(1988).

The tacit assumption underlying ELPC's argument is that the Commission cannot proceed without an applicant making a "full"<sup>5</sup> filing. This assumption must remain tacit because it has no legal basis. In fact, the law is just the opposite. Clearly the Commission can proceed with consideration of an ESP application without a "full" filing because the Commission has the ability to waive all or any portion of Ohio Adm. Code 4901:1-35-03(C). The rule provides:

---

<sup>5</sup> Apparently ELPC also believes it should be the arbiter of what constitutes "full."

The commission may, upon an application or a motion filed by a party, waive any requirement of this chapter, other than a requirement mandated by statute, for good cause shown.

Ohio Adm. Code 4901:1-35-02(B), App. at 18. Thus, even if there were a shortcoming in FirstEnergy's filing (none has been shown), the Commission retains the ability to consider the case, it merely need waive the requirement. Indeed the statute requires the Commission to act on the application if it makes the requisite finding. The statute provides:

... 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...is more favorable in the aggregate as compared to the expected results that would otherwise apply under section 4928.142 of the Revised Code.

R.C. 4928.143(C)(1), App. at 12-13. The Commission made such a finding here and therefore *had* to modify regardless of Ohio Adm. Code 4901:1-35-03(C).

Thus, FirstEnergy complied with the requirements of Ohio Adm. Code 4901:1-35-03(C) as a matter of fact but, even if this were not the situation, Ohio Adm. Code 4901:1-35-02(B) and R.C. 4928.143(C)(1) show that the Commission retains the ability to consider the case in any event.

There is yet a fourth tier of error in ELPC's argument. It is simply not harmed as a result of the Commission's finding that Ohio Adm. Code 4901:1-35-03(C) has been met. The Court has spoken to this many times. The Court will not reverse an order of the Commission because of an error if the error did not prejudice the party seeking reversal. *Holladay Corp. v. Pub. Util. Comm.*, 61 Ohio St.2d 335, 402 N.E.2d 1175

(1980) (syllabus); *Cincinnati v. Pub. Util. Comm.*, 151 Ohio St. 353, 86 N.E. 2d 10

(1949) (syllabus at 6); This Court will not consider an appeal unless the party's present, immediate, and pecuniary interest is at stake. *East Ohio Gas Co. v. Pub. Util. Comm.*, 39 Ohio St.3d 295, 298, 530 N.E. 2d 875 (1988).

ELPC has not demonstrated harm and indeed it cannot. It was not harmed in any procedural sense. Discovery was provided and a full hearing was held. ELPC had every opportunity to present its view of the issues in the case, it simply did not prevail. Certainly there could be no claim of pecuniary harm as the Commission's reasonable determination that O.A.C. 4901:1-35-03(C) had been complied with has no pecuniary effect. A pecuniary effect could only be occasioned by the final order approving the plan, but ELPC's appeal does not contest this. Without harm, there is no appeal.

In sum, FirstEnergy complied with Ohio Adm. Code 4901:1-35-03(C). The record supports this and this Court should defer to that factual determination. Even if this were not true, the court still proceeds because Ohio Adm. Code 4901:1-35-02(B) permits the waiver of Ohio Adm. Code 4901:1-35-03(C) *in toto*. Further, R.C. 4928.143(C)(1) *requires* the Commission to act when it makes the requisite findings. Even if all of this were not the case, ELPC has not shown or even alleged harm flowing from the finding. No matter what perspective is taken, the Commission should be affirmed.

**Proposition of Law No. II:**

**“[T]he 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.” R.C. 4928.143(C)(1), App. at 12-13.**

When the Commission is faced with an application for an ESP, it must perform a complex but clear analysis. There is no ambiguity.<sup>6</sup> First the Commission must consider pricing. This is the only mandatory component of an ESP. R.C. 4928.143(B)(1), App. at 10. Additionally the Commission must consider the other components of the plan. These are optional and include items of the sort listed in R.C. 4928.143(B)(2) (a) through (i).

The analysis does not stop there. R.C. 4928.06(A) provides, in part:

Beginning on the starting date of competitive retail electric service, the public utilities commission shall ensure that the policy specified in section 4928.02 of the Revised Code is effectuated.

R.C. 4928.06(A), App. at 7. In every order the Commission makes under Chapter 4928 it must weigh the fourteen different, and sometimes conflicting, policy mandates set by the General Assembly. Indeed, R.C. 4928.06 requires it. This Court has done exactly this under the predecessor statute to R.C. 4928.143. *Elyria Foundry Co. v. Pub. Util. Comm.*, 114 Ohio St.3d 305, 2007-Ohio-4164, ¶ 48-55.<sup>7</sup> While reviewing an argument that a

---

<sup>6</sup> Hence R.C. 1.49 has no application.

<sup>7</sup> It is also similar to the Court’s view of the policy provisions governing gas alternative regulation under Chapter 4929. *See Consumers’ Counsel v. Pub. Util. Comm.*, 125 Ohio St.3d 57, 2020-Ohio-134, ¶ 39.

Commission decision should be reversed for failure to consider a R.C. 4928.02 policy provision when reaching its decision on an ESP proposal, this Court soundly rejected the argument saying:

As we have held, such policy statements are “guideline[s] for the commission to weigh” in evaluating utility proposals to further state policy goals, and it has been “left \* \* \* to the commission to determine how best to carry [them] out.” *Ohio Consumers’ Counsel v. Pub. Util. Comm.*, 125 Ohio St.3d 57, 2010 Ohio 134, 926 N.E.2d 261, ¶39-40. The commission plainly weighed this policy consideration in reviewing the programs. That alone is grounds to reject IEU’s argument.

*In re Columbus Southern Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, ¶ 62. Additionally, this Court has observed:

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

*In re Columbus Southern Power Co.*, 128 Ohio St.3d 402, 2011-Ohio-958, ¶ 27 (emphasis added).

This is exactly as it should be. The General Assembly has enumerated important policy goals embodied in R.C. 4928.02 and it is only sensible to review any action taken under Chapter 4928 through the lens of R.C. 4928.02. Indeed, the General Assembly has made such a requirement specific. R.C. 4928.06(A), App. at 7. So when the General Assembly used the term “more favorable in the aggregate” it meant that the ESP must be

a better way to further the goals set out in the policy statute as compared with what an MRO would have realized.

This can be seen through the logical interrelationship between those goals and the components of an ESP. Distribution modernization plans, permitted by R.C. 4928.143(B)(2)(h), further the goal of ensuring reliable service required by R.C. 4928.02(A). Rate decoupling, permitted by R.C. 4928.143(B)(2)(h), furthers the goal of implementing flexible regulatory treatment required by R.C. 4928.02(G). Economic development programs, permitted by R.C. 4928.143(B)(2)(i), further the state's effectiveness in the global economy under R.C. 4928.02(N). An ESP may include 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, as provided in R.C. 4928.143 (B)(2)(d), furthers the goals of R.C. Sections 4928.02(A), (B), and (C). The list simply goes on and on.

Appellant NOPEC takes a contrary, and wrong, view. It advocates a mechanistic process, essentially add two columns of numbers, compare the totals, and the lower number wins.<sup>8</sup> Essentially NOPEC would read the “more favorable in the aggregate” language to mean “lowest cost of energy in the short run”. The argument ignores the statutory language and this Court's analysis. Lowest short run cost of electricity is not

---

<sup>8</sup> Interestingly, as will be explained later, even if this approach is used, the ESP was still, as a factual matter, cheaper than an MRO and so would pass even NOPEC's incorrect test. *ESP 3* (Second Entry on Rehearing at 7, ¶¶ 17-19) (Jan. 30, 2013), NOPEC App. at 86, ELPC App. at 19.

even one of the General Assembly's goals.<sup>9</sup> Rather the General Assembly intends a more sophisticated result, a sustainable, efficient market. This will benefit all participants over the long term.

NOPEC's approach suffers from a "forest for the trees" problem. It says that when reviewing an ESP the Commission may only look at the "trees"--the component parts of the plan. The Commission can count them but it cannot consider what sort of forest they make. The General Assembly's charge is actually just the opposite. It told the Commission to look at the trees and determine whether they make the right kind of forest. The forest is, after all, the point of the exercise. The policy statute defines the goals to be attained while the component parts that NOPEC wishes to limit the examination to, R.C. 4928.143(B)(1) and (2), are merely the tools provided to try to reach those goals. Indeed the approval of an ESP is the primary task that occurs under Chapter 4928. The test under R.C. 4928.143(C)(1) is the most important thing to which the policy provision *could* apply.

Further NOPEC is confused about the nature of the process that the General Assembly has established. It cites the cancelled plant decision, *Consumers Counsel v. Pub. Util. Comm.*, 67 Ohio St.2d 153, 423 N.E.2d 820 (1981) for the proposition that the Commission cannot alter a statutory ratemaking formula. This simply has no application to this case. *Consumers Counsel* was decided under the traditional ratemaking statute, R.C. 4909.15. That style of ratemaking was indeed a formulaic approach. The Commis-

---

<sup>9</sup> Rather a statutory goal, among many others, is "reasonably priced" electricity. R.C. 4928.02(A).

sion had to determine a rate base value, a rate of return, and the operating expenses during a test year. These were then used in the ratemaking formula: (rate base X rate of return) + operating expenses = revenue requirement. The statute provided quite literally a formula. R.C. 4928.143 does nothing of the sort. There is no formula, rather the Commission is charged to weigh the relative efficacy of the MRO and the ESP as vehicles to further the policies laid out by the legislature. The policies are the guidelines for the Commission to weigh in evaluating the proposal. *In re Columbus Southern Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, ¶ 62. There is no formula.

In sum, the General Assembly provided two means to provide a standard service offer, an ESP or an MRO. When faced with an application for the approval of an ESP, the General Assembly directed the Commission to compare that ESP with an MRO and determine which would better accomplish the mandatory statutory policies it had set out. The Commission did so below and its decision should be affirmed.

### **Proposition of Law No. III:**

**The Court will not reverse fact determinations where the record contains sufficient probative evidence to support those findings. The Court neither reweighs the evidence nor substitutes its opinion or judgment for that of the Commission on factual, evidentiary matters. *Discount Cellular v. Pub. Util. Comm.*, 112 Ohio St.3d 360, 2007-Ohio-53, ¶ 13; *Payphone Ass'n v. Pub. Util. Comm.*, 109 Ohio St.3d 453, 2006-Ohio-2988, ¶ 16.**

When the Commission is considering an application for an ESP it must approve  
“... 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.” R.C. 4928.143(C)(1), App. at 12-13. As previously discussed, “more favorable in the aggregate” means that the ESP must accomplish the policy directives of the General Assembly better than an MRO would. An ESP is either better at furthering the General Assembly’s goals than an MRO or it is not. This is a factual, discretionary decision. This Court does not substitute its judgment for that of the Commission in such matters. *Discount Cellular v. Pub. Util. Comm.*, 112 Ohio St.3d 360, 2007-Ohio-53 ¶ 13; *Payphone Ass’n v. Pub. Util. Comm.*, 109 Ohio St.3d 453, 2006-Ohio-2988 ¶ 16. The Commission examined the record in the case below and determined that the ESP, as modified by the Commission, was more favorable in the aggregate than an MRO, both quantitatively and qualitatively. This factual determination, being supported by the record, should be affirmed.

**A. Quantitative and Qualitative factors**

When measuring the favorability of the ESP and MRO, some factors are easy to count while others are not readily reduced to numeric values. Those that are easy to count are termed quantitative while those that aren’t are termed qualitative. Both are important. An analogy can be drawn to buying a house. One would compare the offered price of different houses and even compare those prices with others in the different neighborhoods. One might compare property tax rates as well. These would be quantitative factors. One would also be interested in proximity to schools or parks or shopping or churches. Is there a community “feel?” Are there sidewalks and street lights? These

are qualitative factors. Both are important. No one would buy a home simply because the offered price was the lowest per square foot. This Court has noted as much observing “[t]hus, the commission must consider more than price in determining whether an electric security plan should be modified.” *In re Columbus Southern Power Co.*, 128 Ohio St.3d 402, 2011-Ohio-958, ¶ 27.

**B. The ESP is quantitatively more favorable in the aggregate than the MRO.**

As its first step in comparing the ESP and the MRO the Commission examined simply the quantitative costs of the ESP and the MRO. It began this analysis with the testimony of a company witness, Mr. Ridmann, who provided a simple estimate of the cost associated with the two approaches, totaled them and took the difference. First-Energy Ex. 3 (Direct Testimony of William Ridmann) at WRR Attachment 1, NOPEC Vol. I Supp. at 114. His comparison showed the ESP being less expensive by \$280 million. The Commission did not entirely agree with Mr. Ridmann. Rather it relied on the testimony of a Staff witness, Mr. Fortney, who recommended that the Ridmann analysis be adjusted for two items, Regional Transmission Expansion and Planning (“RTEP”) and Delivery Capital Recovery (“DCR”). Staff Ex. 3 (Prefiled Testimony of Robert B. Fortney), NOPEC Vol. I Supp. at 118-121. These adjustments require explanation.

The applicants below previously were members of the Midwest Independent System Operator (“MISO”). This is a federally regulated entity which controls the dispatch operations of all its member utilities and co-ordinates the expansion of members’ transmission facilities. When the applicants chose to leave the MISO they were still

responsible for paying certain costs of constructing transmission facilities in MISO even though they would no longer be part of that group. These legacy costs refer to what are discussed as RTEP costs in the Commission order. In the previous ESP case for the applicants (which resulted in the ESP plan whose term was extended below), the applicants agreed to absorb a large portion of the federally-imposed costs rather than pass them on to consumers. Mr. Ridmann wanted to count the value of this agreement to absorb the RTEP costs as a benefit of this case. Based on Mr. Fortney's testimony, the Commission rightly rejected this, finding that the RTEP concession was a benefit of the prior case and not this one. *ESP 3* (Opinion and Order at 55) (Jul. 18, 2012), ELPC App. at 108, NOPEC App. at 66. The Commission therefore reduced the value of the ESP as calculated by Mr. Ridmann.

The second adjustment was to the DCR. This DCR is a rider which will allow the utilities to obtain recovery for investments in new distribution plant facilities more quickly than would otherwise be the case.<sup>10</sup> Mr. Ridmann included it as an additional cost associated with the ESP. Company Ex. 3 (Direct Testimony of William Ridmann) at WRR Attachment 1, Supp. at 114. The Staff witness rejected this, reasoning quite directly that the utilities obtain the same amounts through rate increase applications if there were no DCR. Staff Ex. 3 (Prefiled Testimony of Robert Fortney), NOPEC Vol. I Supp. at 118-120. The rate applications and the DCR would simply wash. As consumers

---

<sup>10</sup> NOPEC makes a curious argument that this DCR may last for an indeterminate period. It is wrong. All components of the ESP approved in the case below end with the plan. What happens after the current ESP ends is unknown and unknowable now. It depends on decisions not yet made on applications not yet filed.

would pay the same amount whether or not the DCR was approved, the DCR was not a differential cost between the ESP and the MRO and it was irrelevant to the test. The Commission agreed and eliminated the DCR as a cost. *ESP 3* (Opinion and Order at 55) (Jul. 18, 2013), ELPC App. at 108, NOPEC App. at 66.

NOPEC argues at length that this adjustment was illegal; that it is improper to add a cost to the MRO option in performing the ESP v. MRO comparison. Of course that is not what the Commission did in any event; rather, it actually removed the DCR as a cost associated with the ESP. What is salient however is why the Commission made the adjustment. As noted, as a factual matter, the costs to be collected through the DCR would be collected even if there were an MRO. It simply doesn't matter which way the decision goes, customers will pay the same for these matters. Being the same on each side of the scale, it cannot affect the test and was correctly eliminated.

In sum, the Commission, as the first step in its analysis, looked at each component of the ESP and valued it. It compared this with the result of the MRO and found, as a factual matter, the ESP was cheaper by over \$21 million. *ESP 3* (Opinion and Order at 55) (Jul. 18, 2013), ELPC App. at 108, NOPEC App. at 66. Although NOPEC disagrees with the adjustments that the Commission made, this is the sort of analysis NOPEC advocates. The disagreements are factual determinations based on the record and this Court does not substitute its judgment for that of the Commission in such matters. *Discount Cellular v. Pub. Util. Comm.*, 112 Ohio St.3d 360, 2007-Ohio-53, ¶ 13; *Payphone Ass'n v. Pub. Util. Comm.*, 109 Ohio St.3d 453, 2006-Ohio-2988, ¶ 16.

**C. Qualitative matters show the ESP is even more favorable.**

As discussed, the General Assembly requires that the Commission, when making any decision under Chapter 4928, weigh the policy provisions of R.C. 4928.02. It did so. These are the qualitative factors discussed:

(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.

*ESP 3* (Opinion and Order at 56) (Jul. 18, 2013), ELPC App. at 109, NOPEC App. at 67.

Each of these items furthers a significant policy provision. The first two items provide stability and predictability, furthering the goals of R.C. 4928.02(A). The third item ensures the availability to customers of the options they want, furthering the goal of R.C. 4928.02(B). The fourth item provides the flexibility required by R.C. 4928.02(G).

Lest there be any doubt about the analysis, the Commission found:

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.

*ESP 3* (Opinion and Order at 56) (Jul. 18, 2013), ELPC App. at 109, NOPEC App. at 67.

The Commission made the only conclusion that it could. It found that the ESP was more favorable in the aggregate than an MRO.

Even if the Court were to take the view that the Commission could only consider those items which are included in R.C. 4928.143(B), that is to say, adopt NOPEC's alternative argument, these items are included in that section. The modification of the bid schedule is pivotal to pricing and pricing is a mandatory factor under R.C. 4928.143(B)(1). The DCR mechanism pays the utility for investment in new plant and therefore the existence of the distribution increase "stay out" provision is important to assure that the customers' and utility's interests are aligned as required by R.C. 4928.143(B)(2)(h). The rate options and programs that the Commission referred to are a variety of energy efficiency programs, some for industrials, others for schools and cities. They are a continuation of programs which would otherwise have lapsed at the end of the previous ESP and are discussed in the Commission's Opinion and Order (*ESP 3* (Opinion and Order at 56) (Jul. 18, 2013), ELPC App. at 82, NOPEC App. at 40) and also in Company Exhibit 1, *See ESP 3* (Stipulation and Recommendation at 34-38) (Apr. 13, 2012), NOPEC Vol. I Supp. at 68-72).<sup>11</sup> Thus, even if the Commission were limited to mere consideration of enumerated items under R.C. 4928.143(B), and could

---

<sup>11</sup> Strangely, NOPEC claims that these programs are not identified by the Commission. The references are perfectly clear.

not consider R.C. 4929.02 (although required by R.C. 4928.06 and this Court's prior reasoning), the Commission's order should still be affirmed. The factors it weighed in making its decision -- that the ESP is more favorable in the aggregate than an MRO would have been -- *are* encompassed in R.C. 4928.143(B), and are supported by evidence. The Commission's order should be affirmed.

#### **D. Summary**

The ESP is more favorable in the aggregate than an MRO as a matter of fact. The Commission made this determination based on the record in the case. This determination is true regardless of whether one applies the absurdly narrow view of NOPEC or the correct legal standard. This Court will not second-guess a factual determination based on record evidence and, therefore, the order should be affirmed.

#### **Proposition of Law No. IV:**

**The Commission applies sound discretion when, in the course of taking administrative notice of evidence from prior proceedings, it assures itself that the parties have prior knowledge of this evidence and affords them an opportunity to rebut it. *Canton Storage and Transfer Co. v. Pub. Util. Comm.*, 72 Ohio St.3d 1, 4, 647 N.E.2d 136 (1995); *Allen v. Pub. Util. Comm.*, 40 Ohio St.3d 184, 185, 532 N.E.2d 1307 (1988).**

The taking of administrative notice is an established procedural device that promotes economy of litigation and administrative economy. Given the enormous complexity that often surrounds utility proceedings, it is imperative that the Commission enjoy some latitude when it comes to administratively noticing documents, lest its proceedings become mired in interminable evidentiary delay. Here, after assuring itself that no party

was prejudiced, the Commission spared everyone the time-consuming need to rehash the evidence from the *ESP 2* proceeding and administratively noticed certain documents from *ESP 2* into this record. Paradoxically, though NOPEC was a signatory party to the *ESP 2* stipulation and presumably had no problems with the evidence then, it now objects to the Commission's decision to notice some of these *ESP 2* documents. NOPEC's arguments threaten to needlessly complicate and prolong what is already a highly-involved process and should be rejected.

The Commission's decision to take administrative notice of a particular document is subject to an abuse of discretion review. *Canton Storage and Transfer Co. v. Pub. Util. Comm.*, 72 Ohio St.3d 1, 4, 647 N.E.2d 136 (1995). "An abuse of discretion means an unreasonable, arbitrary, or unconscionable action." *State ex rel. Beacon Journal Publishing Co. v. Akron*, 104 Ohio St.3d 399, 2004-Ohio-6557, ¶ 59. When a tribunal takes administrative notice "[i]t does not mean that the opponent is prevented from disputing the matter by evidence if he believes it disputable." *Ohio Bell Tel. Co. v. Pub. Util. Comm.*, 302 U.S. 292, 301-302 (1937). This Court has stated that there is "neither an absolute right to nor prohibition against the commission's authority to take administrative notice." *Allen v. Pub. Util. Comm.*, 40 Ohio St.3d 184, 185, 532 N.E.2d 1307 (1988). The propriety of taking administrative notice turns on the unique circumstances of each case. *Id.* The inquiry entails whether the complainant "had prior knowledge of, and had an adequate opportunity to explain and rebut, the facts administratively noticed." *Id.* at 186. Unless the complainant can establish prejudice from the taking of administrative notice, the Court will affirm. *Id.*

The Commission stayed within the bounds of its discretion when it took administrative notice of certain filings from the *ESP 2* case. FirstEnergy along with the other signatory parties provided fair warning of their intentions to seek administrative notice of certain documents from the *ESP 2* case at the outset of this litigation. Indeed, the signatory parties could not have provided notice any earlier. The request for administrative notice was contained in the very first document filed in the docket, which was the stipulation filed on April 13, 2012. *See ESP 3* (Stipulation and Recommendation at 44) (April 13, 2012), NOPEC Vol. I Supp. at 78 (“The Signatory Parties request that the Commission take administrative notice of the record established in Case No. 10-388-EL-SSO.”). And on the first day of the hearing, FirstEnergy renewed its request to have the record from the *ESP 2* case administratively noticed. Tr. I at 26, NOPEC Vol. I Supp. at 185. In response, the attorney examiner instructed FirstEnergy to specify which particular documents it intended to have administratively noticed. Tr. I at 29, NOPEC Vol. I Supp. at 188. Two days later FirstEnergy presented the attorney examiner with a particularized list of the documents it sought to have noticed. Tr. III at 11-12, NOPEC App. at 203-204. At that time, Nucor Steel Marion also moved to have a document administratively noticed. Tr. III at 19, NOPEC App. at 205. After due consideration, the attorney examiner administratively noticed the documents into the record, which the Commission eventually upheld.

The Commission’s ruling should be affirmed. NOPEC was given fair warning of the signatory parties’ intention to have the *ESP 2* case administratively noticed by virtue of the request made in the stipulation filed on April 13, 2012. Despite ample warning,

NOPEC neither filed a motion opposing the request for administrative notice nor performed any discovery on the issue. NOPEC could have issued subpoenas compelling witnesses from the *ESP 2* case to offer testimony in this proceeding. But it didn't do this either. NOPEC also had the opportunity to call its own witnesses, put on its own evidence, and cross-examine adverse witnesses in an effort to rebut any contestable issues from the *ESP 2* case. The assertion from NOPEC that it "did not have the opportunity to prepare or to respond to this specific evidence" is thus mistaken. NOPEC "had prior knowledge of, and had an adequate opportunity to explain and rebut, the facts administratively noticed." *Allen*, 40 Ohio St.3d at 186. This is all that is required.

The Commission's decision to administratively notice certain documents did not lessen FirstEnergy's burden of proof nor its burden of going forward with the evidence. This is not a situation like, in *Canton Storage*, where the Court held that the Commission unlawfully lowered the burden of proof for a group of motor carriers seeking authority to transport goods intrastate. Of critical importance to the Court's decision there, the Commission "never took administrative notice of any testimony below." 72 Ohio St.3d at 8. Moreover, the Commission eschewed reliance on individual, particularized testimony relative to each motor carrier's application in favor of testimony as a whole to support all of the carriers' applications. *Id.* Neither of these factors is present here. First, the attorney examiner expressly took administrative notice while on the record, and limited the notice to a particularized list of documents, not the record as a whole. Second, FirstEnergy's request to notice parts of the record from the *ESP 2* proceeding was not used in

furtherance of another's utility's application pending before the Commission. *Canton Storage* does not apply.

NOPEC complains that due to the Commission's rule prohibiting discovery of Staff<sup>12</sup> it was not able in this proceeding to cross-examine Staff witness Turkenton who testified in the *ESP 2* proceeding. True, but irrelevant. It bears emphasizing that NOPEC was a signatory party to the stipulation filed in the *ESP 2* proceeding in which Staff witness Turkenton offered supporting testimony. It is therefore puzzling as to why NOPEC would object to the admission of this testimony here when it had no problem with this testimony from the *ESP 2* proceeding. NOPEC counters that it wanted to evaluate whether Turkenton's assessment of the benefits from the *ESP 2* proceeding still held true for this proceeding. This too is a puzzling argument. In Commission proceedings, Turkenton speaks in her capacity as a member of Staff, not in her individual capacity. It is therefore of no moment that Turkenton did not appear to testify for the *ESP 3* proceeding because another Staff member, Robert Fortney, did. Thus, NOPEC's complaint about not being able to cross-examine Turkenton evaporates given the opportunity it was afforded to cross Staff member Fortney.

Though it purports to have more modest goals in mind, NOPEC seeks to overturn this Court's long-line of cases which have repeatedly held that Commission proceedings are not rigorously bound by the rules of evidence. *See Greater Cleveland Welfare Rights Org., Inc. v. Pub. Util. Comm.*, 2 Ohio St.3d 62, 68, 442 N.E.2d 1288 (1982). *See also*

---

<sup>12</sup> See Ohio Adm. Code 4901-1-16(I), App. at 17.

*Ohio Bell Tel. Co. v. Pub. Util. Comm.*, 14 Ohio St.3d 49, 50, 471 N.E.2d 475 (1984) (same); *Cincinnati Bell Tel. Co. v. Pub. Util. Comm.*, 12 Ohio St.3d 280, 288, 466 N.E.2d 848 (1984) (same). On the one hand, NOPEC urges the Court to “alter its standard for taking administrative notice” by grafting Ohio Evid. R. 201 onto Commission proceedings. On the other hand, NOPEC claims that the Court could fashion this result without overruling *Greater Cleveland Welfare Rights Org.*

The tension between these two statements is irreconcilable. Either the Court overrules *Greater Cleveland Welfare Rights Org.* and grafts Ohio Evid. R. 201 onto Commission proceedings, or it declines NOPEC’s invitation and continues to apply *Greater Cleveland Welfare Rights Org.* going forward. There is no middle way. Under principles of *stare decisis*, the Commission urges the Court to follow the teaching of *Greater Cleveland Welfare Rights Org.* and afford the Commission flexibility in the conduct of its proceedings. Moreover, this Court has previously explained that it will not, at the request of a party, overrule prior precedent unless the party performs the three-part *Galatis* test. See *Ohio Apt. Assn. v. Levin*, 127 Ohio St.3d 76, 2010-Ohio-4414, ¶ 29-31 (citing *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849). NOPEC has not performed the requisite *Galatis* analysis<sup>13</sup>, and thus its request to undo the principles from *Greater Cleveland Welfare Rights Org.* should be rejected.

---

<sup>13</sup> In *Galatis* the Court explained that: “A prior decision of the Supreme Court may be overruled where (1) the decision was wrongly decided at that time, or changes in circumstances no longer justify continued adherence to the decision, (2) the decision defies practical workability, and (3) abandoning the precedent would not create an undue hardship for those who have relied upon it.” 2003-Ohio-5849, syllabus at ¶ 1.

The standards for administratively noticing evidence, which were espoused in *Allen* and *Canton Storage*, have worked and continue to work – there is no need to import Ohio Evid. R. 201 into Commission proceedings. These standards foster economy of litigation and judicial economy by permitting the record from prior proceedings to be administratively noticed without the need for a complex evidentiary presentation. To be sure, the interest in streamlining proceedings cannot trump the fundamental guarantees of fairness that attach to proceedings such as this. But the *Allen* and *Canton Storage* standards ensure this fairness by requiring that the parties have prior knowledge of and an opportunity to rebut the administratively noticed evidence. Whereas *Allen* and *Canton Storage* strike the right balance between promoting administrative economy and ensuring fairness, NOPEC seeks to topple this balance with a standard that would only plunge the parties even further into cumbersome evidentiary presentations.

Finally, even if NOPEC could demonstrate that the Commission improperly took administrative notice, it still must show prejudice to warrant reversal. *Allen*, 40 Ohio St.3d at 186. NOPEC cannot make this showing. As previously mentioned, NOPEC was a signatory party to the *ESP 2* proceeding. And by joining as a signatory party, NOPEC signaled its consent (tacitly or otherwise) to the admission of the evidence marshaled to support *ESP 2*'s approval. The suggestion that, now, it was somehow prejudiced by the admission of that evidence in this proceeding, which is principally a continuation of *ESP 2*, is difficult to take seriously. The Commission's decision to take administrative notice should be affirmed.

**Proposition of Law No. V:**

**A stipulation is the product of serious bargaining where settlement negotiations do not exclude an entire customer class. *Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, 126, 592 N.E.2d 1370 (1992).**

The *ESP 3* stipulation is largely a continuation of the *ESP 2* stipulation which the Commission previously approved and which NOPEC signed on as a signatory party. The Commission's approval of the *ESP 3* stipulation meets this Court's three-part test for assessing the reasonableness of a stipulation. Under this test, the Court asks: (1) is the stipulation a product of serious bargaining among capable, knowledgeable parties; (2) does the stipulation, as a package, benefit ratepayers and the public interest; and (3) does the stipulation package violate any important regulatory principle or practice. *Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, 126, 592 N.E.2d 1370 (1992). The Commission is authorized to place "substantial weight" on the stipulation, though it still must assure itself that the stipulation is supported by evidence in the record. *In re Columbus Southern Power Co.*, 129 Ohio St.3d 46, 2011-Ohio-2382, ¶ 19.

In a misguided effort to manufacture an argument that serious bargaining did not occur, NOPEC leads off with the allegation that the signatory parties, in their haste to get the stipulation approved, made a \$300 million "mistake." NOPEC Merit Brief at 43-44. Given the sheer magnitude of this assertion, one would expect NOPEC to support it with evidence and accurately recount what transpired below. But NOPEC ignores this route and instead presents the Court with a false history of these proceedings.

NOPEC ties this alleged \$300 million “mistake” to the treatment of the regional transmission expansion planning credit (“RTEP credit”).<sup>14</sup> The impact of the RTEP credit was first recognized and taken into account by the Commission in the *ESP 2* proceeding. Here, FirstEnergy witness Ridmann testified in favor of recognizing the impact of this RTEP credit in his quantitative analysis of *ESP 3*. NOPEC claims that the other signatory parties were either oblivious or willfully ignorant of Ridmann’s attempt to incorporate the RTEP credit into the *ESP 3*, but this is patently false. At hearing, Staff witness Fortney expressly stated that Staff disagreed with Ridmann’s treatment of the RTEP credit and “that the benefit of this credit was a result of the Commission’s decisions in Case No. 10-388-EL-SSO (*ESP 2*) and is not a direct benefit of *ESP 3* \* \* \* .” NOPEC Vol. I Supp. at 118. Fortney then explained how Ridmann’s analysis should be modified by removing the RTEP credit. NOPEC Vol. I. Supp. at 118-120.

This testimony from Fortney thus belies NOPEC’s spurious claim. Everyone was keenly aware of how the RTEP credit impacted these proceedings and of the differences of opinion regarding the treatment of this credit. The only “mistake” here rests with NOPEC’s decision to present the Court with a false history of the proceedings.

The signatory parties – many of whom were the same signatory parties to the earlier *ESP 2* stipulation – are capable and knowledgeable utility law practitioners. As the Commission found, they have significant expertise and experience in representing their clients before the Commission in complex utility proceedings. *ESP 3* (Opinion and Order

---

<sup>14</sup> The technical aspects of the RTEP credit were previously discussed at pages 16-18.

at 26) (Jul. 18, 2012), NOPEC App. at 37, ELPC App. at 79. The signatory parties represent a diverse range of interests, consisting of: “the Companies, a municipality, competitive suppliers, commercial customers, industrial consumers, advocates for low and moderate-income customers, and Staff.” *Id.* The Commission need not belabor the point any further. Indeed, NOPEC concedes “that the Staff, the signatory parties, and their counsel are knowledgeable and capable \* \* \* .” NOPEC Merit Brief at 43. NOPEC’s issue is that even though the signatory parties are knowledgeable and capable, the stipulation is unreasonable because the broad interests of residential customers were excluded. This is factually incorrect.

Settlement discussions that exclude an entire class of customers are viewed with disfavor by the Court. *Time Warner AxS v. Pub. Util. Comm.*, 75 Ohio St.3d 229, fn. 2, 661 N.E.2d 1097 (1996). The Court will not, however, second-guess a stipulation where the interests of all customer classes are afforded a seat at the bargaining table. *Constellation NewEnergy, Inc. v. Pub. Util. Comm.*, 104 Ohio St.3d 530, 2004-Ohio-6767, ¶ 22-24. Contrary to NOPEC’s claim, the interests of residential customers were not excluded from the settlement process. In fact, these interests signed the stipulation.

The presence of the following signatory parties to the stipulation illustrates the point. Ohio Partners for Affordable Energy, the Empowerment Center of Greater Cleveland, and the Cleveland Housing Network represent the interests of low and moderate income residential customers. Speaking more broadly, the City of Akron represents the interests of all its residential customers, regardless of income bracket. More broadly still, the Commission’s Staff took into account the interests of residential customers,

among other interests, throughout FirstEnergy's service territory in deciding whether or not to commit itself to the stipulation. The presence of these parties who advocate with the interests of residential customers in mind renders groundless the notion that the interests of residential customers were not given a seat at the bargaining table. And the Commission so held, explaining that "there is no evidence in the record that an entire customer class was excluded from the settlement negotiations, which was the factual predicate in *Time Warner*." *ESP 3* (Opinion and Order at 27) (Jul. 18, 2012), NOPEC App. at 38, ELPC App. at 80.

NOPEC is especially dismissive of the participation of Ohio Partners for Affordable Energy, the Empowerment Center of Greater Cleveland, and the Cleveland Housing Network, pejoratively describing them as "special interests" tied to the parochial needs of low-to-moderate income customers. It is inconceivable, in NOPEC's eyes, that these parties could represent the interests of FirstEnergy's two-million member residential class. This is a perplexing statement to say the least. Any residential customer, regardless of his or her income bracket, has an interest, a strong interest, in receiving reliable and reasonably priced electric service. And it's fair to say that low to moderate income customers have an even stronger interest in receiving reliable and reasonably priced electric service than those residing in the upper tiers of the income bracket. Aside from offering conclusory assertions about the lack of residential customer representation, NOPEC does not explain what value would have been realized by the addition of yet another representative of residential customer interests to this proceeding.

NOPEC also takes aim at the form and manner in which the settlement discussions were held, but this argument misses the mark too. Here, the parties did not meet as a group to discuss settlement. NOPEC offers this as a reason for finding the settlement unreasonable, but it is unclear why this matters. Settlement is a voluntary process and, consistent with the public policy favoring settlement, the parties should be afforded maximum flexibility in the form and manner by which settlement discussions occur. *See Lake County Bd. of Mental Retardation & Dev. Disabilities v. Prof. Assn. for the Teaching of the Mentally Retarded*, 71 Ohio St.3d 15, 17, 641 N.E.2d 180 (1994) (noting “strong public policy favoring private settlement of grievances”). On these facts, the signatory parties evidently decided that the costs of an in-person, roundtable discussion did not exceed the benefits of the streamlined approach taken here in which FirstEnergy circulated a draft of the stipulation, followed by individual negotiations among the parties. If NOPEC thought that an in-person, roundtable discussion was necessary to elicit the views of the other parties, it certainly had the opportunity to make such a request. Tellingly, NOPEC’s brief offers nothing to suggest that it made such a request, or that FirstEnergy (or anyone else) sought to derail such a request.

Further, given that many of the parties to this proceeding also were parties to the *ESP 2* proceeding, it is dubious that an in-person, roundtable discussion would have been beneficial. The parties were eminently familiar with the issues here, having already seen them once before in the *ESP 2* case. Asking them to sit down and plow the same ground again would have been an imprudent use of their time. And the notion that an in-person, roundtable discussion was unnecessary is not some fanciful musing by the Commission.

The fact that many of the same signatory parties from *ESP 2* joined in for *ESP 3* confirms that an all-inclusive discussion was not needed.

Ultimately, NOPEC must face the reality that, just like there is more than one way to skin a cat, there is more than one way to negotiate a settlement. Mindful of this reality, the Commission rightly refused to shackle future proceedings with NOPEC's everyone-must-meet-once rule and opted instead to allow the parties to tailor their discussions according to their individual needs. As the Commission observed, there is no reason to impose an everyone-must-meet-once rule given the advances in technology, where "settlement proposals can be easily and quickly shared among parties located in or out of this state." *ESP 3* (Opinion and Order at 26) (Jul. 18, 2012), NOPEC App. at 37, ELPC App. at 79. In sum, there was serious bargaining here and no customer class – not even residential customers – was excluded.

## CONCLUSION

Stripped to its essentials, this is a very straightforward case. FirstEnergy had a rate plan that was popular. It asked the Commission to extend that plan for two more years. Many customers agreed and submitted a stipulation saying so. The Commission opened a proceeding, allowed discovery, and took evidence. Parties submitted their evidence for and against along with briefs. The Commission examined the evidence presented and reached its decision based on that record. Appellants disagree. In particular appellant NOPEC, although it tries to dress its arguments up in legal terms, just disagrees

with the factual determinations the Commission made. The Commission is the fact finder, its determination was based on the evidence, and its decision should be affirmed.

Respectfully submitted,

**Michael DeWine** (0009181)  
Ohio Attorney General

**William L. Wright** (0018010)  
Section Chief



---

**Thomas W. McNamee** (0017352)  
Counsel of Record

**Ryan P. O'Rourke** (0082651)  
Assistant Attorneys General  
Public Utilities Section  
180 East Broad Street, 6<sup>th</sup> Fl  
Columbus, OH 43215-3793  
614.466.4397 (telephone)  
614.644.8764 (fax)  
[thomas.mcnamee@puc.state.oh.us](mailto:thomas.mcnamee@puc.state.oh.us)  
[ryan.o'rourke@puc.state.oh.us](mailto:ryan.o'rourke@puc.state.oh.us)

**Counsel for Appellee,  
The Public Utilities Commission of Ohio**

## PROOF OF SERVICE

I hereby certify that a true copy of the foregoing Merit Brief, submitted on behalf of appellee, the Public Utilities Commission of Ohio, was served by regular U.S. mail, postage prepaid, or hand-delivered, upon the following parties of record, this 19<sup>th</sup> day of August, 2013.



---

**Thomas W. McNamee**  
Assistant Attorney General

### Parties of Record:

**Glenn S. Krassen**  
Bricker & Eckler  
1001 Lakeside Avenue, Suite 1350  
Cleveland, OH 44114

**David A. Kutik**  
Jones Day  
901 Lakeside Avenue  
Cleveland, OH 44114

**Dane Stinson**  
**Matthew W. Warnock**  
**J. Thomas Siwo**  
Bricker & Eckler  
100 South Third Street  
Columbus, OH 43215-4291

**James W. Burk**  
**Carrie M. Dunn**  
FirstEnergy Service Company  
76 South Main Street  
Akron, OH 44308

**Robert Kelter**  
**Justin Vickers**  
**Nicholas McDaniel**  
Environmental Law and Policy Center  
1207 Grandview Avenue, Suite 201  
Columbus, OH 43212

# **APPENDIX**

**APPENDIX  
TABLE OF CONTENTS**

**Page**

R.C. 1.49.....	1
R.C. 4903.13.....	1
R.C. 4909.15.....	1
R.C. 4928.02.....	6
R.C. 4928.06.....	7
R.C. 4928.141.....	9
R.C. 4928.143.....	10
R.C. 4929.02.....	15
Ohio Adm. Code 4901-1-16.....	16
Ohio Adm. Code 4901:1-35-02.....	17
Ohio Adm. Code 4901:1-35-03.....	18

### **1.49. Determining legislative intent**

If a statute is ambiguous, the court, in determining the intention of the legislature, may consider among other matters:

- (A) The object sought to be attained;
- (B) The circumstances under which the statute was enacted;
- (C) The legislative history;
- (D) The common law or former statutory provisions, including laws upon the same or similar subjects;
- (E) The consequences of a particular construction;
- (F) The administrative construction of the statute.

### **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.

### **4909.15 Fixation of reasonable rate.**

- (A) The public utilities commission, when fixing and determining just and reasonable rates, fares, tolls, rentals, and charges, shall determine:
  - (1) The valuation as of the date certain of the property of the public utility used and useful or, with respect to a natural gas, water-works, or sewage disposal system company, projected to be used and useful as of the date certain, in rendering the public utility service for which rates are to be fixed and determined. The valuation so determined shall be the total value as set forth in division (C)(8) of section 4909.05 of the Revised Code, and a reasonable allowance for materials and supplies and cash working capital as determined by the commission.

The commission, in its discretion, may include in the valuation a reasonable allowance for construction work in progress but, in no event, may such an allowance be made by the commission until it has determined that the particular construction project is at least seventy-five per cent complete.

In determining the percentage completion of a particular construction project, the commission shall consider, among other relevant criteria, the per cent of time elapsed in construction; the per cent of construction funds, excluding allowance for funds used during construction, expended, or obligated to such construction funds budgeted where all such funds are adjusted to reflect current purchasing power; and any physical inspection performed by or on behalf of any party, including the commission's staff.

A reasonable allowance for construction work in progress shall not exceed ten per cent of the total valuation as stated in this division, not including such allowance for construction work in progress.

Where the commission permits an allowance for construction work in progress, the dollar value of the project or portion thereof included in the valuation as construction work in progress shall not be included in the valuation as plant in service until such time as the total revenue effect of the construction work in progress allowance is offset by the total revenue effect of the plant in service exclusion. Carrying charges calculated in a manner similar to allowance for funds used during construction shall accrue on that portion of the project in service but not reflected in rates as plant in service, and such accrued carrying charges shall be included in the valuation of the property at the conclusion of the offset period for purposes of division (C)(8) of section 4909.05 of the Revised Code.

From and after April 10, 1985, no allowance for construction work in progress as it relates to a particular construction project shall be reflected in rates for a period exceeding forty-eight consecutive months commencing on the date the initial rates reflecting such allowance become effective, except as otherwise provided in this division.

The applicable maximum period in rates for an allowance for construction work in progress as it relates to a particular construction project shall be tolled if, and to the extent, a delay in the in-service date of the project is caused by the action or inaction of any federal, state, county, or municipal agency having jurisdiction, where such action or inaction relates to a change in a rule, standard, or approval of such agency, and where such action or inaction is not the result of the failure of the utility to reasonably endeavor to comply with any rule, standard, or approval prior to such change.

In the event that such period expires before the project goes into service, the commission shall exclude, from the date of expiration, the allowance for the project as construction work in progress from rates, except that the commission may extend the expiration date up to twelve months for good cause shown.

In the event that a utility has permanently canceled, abandoned, or terminated construction of a project for which it was previously permitted a construction work in progress allowance, the commission immediately shall exclude the allowance for the project from the valuation.

In the event that a construction work in progress project previously included in the valuation is removed from the valuation pursuant to this division, any revenues collected by the utility from its customers after April 10, 1985, that resulted from such prior inclusion shall be offset against future revenues over the same period of time as the project was included in the valuation as construction work in progress. The total revenue effect of such offset shall not exceed the total revenues previously collected.

In no event shall the total revenue effect of any offset or offsets provided under division (A)(1) of this section exceed the total revenue effect of any construction work in progress allowance.

(2) A fair and reasonable rate of return to the utility on the valuation as determined in division (A)(1) of this section;

(3) The dollar annual return to which the utility is entitled by applying the fair and reasonable rate of return as determined under division (A)(2) of this section to the valuation of the utility determined under division (A)(1) of this section;

(4) The cost to the utility of rendering the public utility service for the test period used for the determination under division (C)(1) of this section, less the total of any interest on cash or credit refunds paid, pursuant to section 4909.42 of the Revised Code, by the utility during the test period.

(a) Federal, state, and local taxes imposed on or measured by net income may, in the discretion of the commission, be computed by the normalization method of accounting, provided the utility maintains accounting reserves that reflect differences between taxes actually payable and taxes on a normalized basis, provided that no determination as to the treatment in the rate-making process of such taxes shall be made that will result in loss of any tax depreciation or other tax benefit to which the utility would otherwise be entitled, and further provided that such tax benefit as redounds to the utility as a result of such a computation may not be retained by the company, used to fund any dividend or distribution, or utilized for any purpose other than the defrayal of the operating expenses of the utility and the defrayal of the expenses of the utility in connection with construction work.

(b) The amount of any tax credits granted to an electric light company under section 5727.391 of the Revised Code for Ohio coal burned prior to January 1, 2000, shall not be retained by the company, used to fund any dividend or distribution, or utilized for any

purposes other than the defrayal of the allowable operating expenses of the company and the defrayal of the allowable expenses of the company in connection with the installation, acquisition, construction, or use of a compliance facility. The amount of the tax credits granted to an electric light company under that section for Ohio coal burned prior to January 1, 2000, shall be returned to its customers within three years after initially claiming the credit through an offset to the company's rates or fuel component, as determined by the commission, as set forth in schedules filed by the company under section 4905.30 of the Revised Code. As used in division (A)(4)(b) of this section, "compliance facility" has the same meaning as in section 5727.391 of the Revised Code.

(B) The commission shall compute the gross annual revenues to which the utility is entitled by adding the dollar amount of return under division (A)(3) of this section to the cost, for the test period used for the determination under division (C)(1) of this section, of rendering the public utility service under division (A)(4) of this section.

(C)

(1) Except as provided in division (D) of this section, the revenues and expenses of the utility shall be determined during a test period. The utility may propose a test period for this determination that is any twelve-month period beginning not more than six months prior to the date the application is filed and ending not more than nine months subsequent to that date. The test period for determining revenues and expenses of the utility shall be the test period proposed by the utility, unless otherwise ordered by the commission.

(2) The date certain shall be not later than the date of filing, except that it shall be, for a natural gas, water-works, or sewage disposal system company, not later than the end of the test period.

(D) A natural gas, water-works, or sewage disposal system company may propose adjustments to the revenues and expenses to be determined under division (C)(1) of this section for any changes that are, during the test period or the twelve-month period immediately following the test period, reasonably expected to occur. The natural gas, water-works, or sewage disposal system company shall identify and quantify, individually, any proposed adjustments. The commission shall incorporate the proposed adjustments into the determination if the adjustments are just and reasonable.

(E) When the commission is of the opinion, after hearing and after making the determinations under divisions (A) and (B) of this section, that any rate, fare, charge, toll, rental, schedule, classification, or service, or any joint rate, fare, charge, toll, rental, schedule, classification, or service rendered, charged, demanded, exacted, or proposed to be rendered, charged, demanded, or exacted, is, or will be, unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law, that the service is, or will be, inadequate, or that the maximum rates, charges, tolls, or rentals chargeable by any such

public utility are insufficient to yield reasonable compensation for the service rendered, and are unjust and unreasonable, the commission shall:

(1) With due regard among other things to the value of all property of the public utility actually used and useful for the convenience of the public as determined under division (A)(1) of this section, excluding from such value the value of any franchise or right to own, operate, or enjoy the same in excess of the amount, exclusive of any tax or annual charge, actually paid to any political subdivision of the state or county, as the consideration for the grant of such franchise or right, and excluding any value added to such property by reason of a monopoly or merger, with due regard in determining the dollar annual return under division (A)(3) of this section to the necessity of making reservation out of the income for surplus, depreciation, and contingencies, and;

(2) With due regard to all such other matters as are proper, according to the facts in each case,

(a) Including a fair and reasonable rate of return determined by the commission with reference to a cost of debt equal to the actual embedded cost of debt of such public utility,

(b) But not including the portion of any periodic rental or use payments representing that cost of property that is included in the valuation report under divisions (C)(4) and (5) of section 4909.05 of the Revised Code, fix and determine the just and reasonable rate, fare, charge, toll, rental, or service to be rendered, charged, demanded, exacted, or collected for the performance or rendition of the service that will provide the public utility the allowable gross annual revenues under division (B) of this section, and order such just and reasonable rate, fare, charge, toll, rental, or service to be substituted for the existing one. After such determination and order no change in the rate, fare, toll, charge, rental, schedule, classification, or service shall be made, rendered, charged, demanded, exacted, or changed by such public utility without the order of the commission, and any other rate, fare, toll, charge, rental, classification, or service is prohibited.

(F) Upon application of any person or any public utility, and after notice to the parties in interest and opportunity to be heard as provided in Chapters 4901., 4903., 4905., 4907., 4909., 4921., and 4923. of the Revised Code for other hearings, has been given, the commission may rescind, alter, or amend an order fixing any rate, fare, toll, charge, rental, classification, or service, or any other order made by the commission. Certified copies of such orders shall be served and take effect as provided for original orders.

## **4928.02 State policy.**

It is the policy of this state to do the following throughout this state:

- (A) Ensure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service;
- (B) 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 needs;
- (C) Ensure diversity of electricity supplies and suppliers, by giving consumers effective choices over the selection of those supplies and suppliers and by encouraging the development of distributed and small generation facilities;
- (D) Encourage innovation and market access for cost-effective supply- and demand-side retail electric service including, but not limited to, demand-side management, time-differentiated pricing, waste energy recovery systems, smart grid programs, and implementation of advanced metering infrastructure;
- (E) Encourage cost-effective and efficient access to information regarding the operation of the transmission and distribution systems of electric utilities in order to promote both effective customer choice of retail electric service and the development of performance standards and targets for service quality for all consumers, including annual achievement reports written in plain language;
- (F) Ensure that an electric utility's transmission and distribution systems are available to a customer-generator or owner of distributed generation, so that the customer-generator or owner can market and deliver the electricity it produces;
- (G) Recognize the continuing emergence of competitive electricity markets through the development and implementation of flexible regulatory treatment;
- (H) Ensure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa, including by prohibiting the recovery of any generation-related costs through distribution or transmission rates;
- (I) Ensure retail electric service consumers protection against unreasonable sales practices, market deficiencies, and market power;
- (J) Provide coherent, transparent means of giving appropriate incentives to technologies that can adapt successfully to potential environmental mandates;

(K) Encourage implementation of distributed generation across customer classes through regular review and updating of administrative rules governing critical issues such as, but not limited to, interconnection standards, standby charges, and net metering;

(L) Protect at-risk populations, including, but not limited to, when considering the implementation of any new advanced energy or renewable energy resource;

(M) Encourage the education of small business owners in this state regarding the use of, and encourage the use of, energy efficiency programs and alternative energy resources in their businesses;

(N) Facilitate the state's effectiveness in the global economy.

In carrying out this policy, the commission shall consider rules as they apply to the costs of electric distribution infrastructure, including, but not limited to, line extensions, for the purpose of development in this state.

#### **4928.06 Commission to ensure competitive retail electric service.**

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

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

(C) In addition to its authority under section 4928.04 of the Revised Code and divisions (A) and (B) of this section, the commission, on an ongoing basis, shall monitor and evaluate the provision of retail electric service in this state for the purpose of discerning any noncompetitive retail electric service that should be available on a competitive basis on or after the starting date of competitive retail electric service pursuant to a declaration in the Revised Code, and for the purpose of discerning any competitive retail electric service that is no longer subject to effective competition on or after that date. Upon such evaluation, the commission periodically shall report its findings and any recommenda-

tions for legislation to the standing committees of both houses of the general assembly that have primary jurisdiction regarding public utility legislation. Until 2008, the commission and the consumer's counsel also shall provide biennial reports to those standing committees, regarding the effectiveness of competition in the supply of competitive retail electric services in this state. In addition, until the end of all market development periods as determined by the commission under section 4928.40 of the Revised Code, those standing committees shall meet at least biennially to consider the effect on this state of electric service restructuring and to receive reports from the commission, consumers' counsel, and director of development.

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

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

(E)

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

(2) In addition to the commission's authority under division (E)(1) of this section, the commission, beginning the first year after the market development period of a particular electric utility and after reasonable notice and opportunity for hearing, may take such measures within a transmission constrained area in the utility's certified territory as are necessary to ensure that retail electric generation service is provided at reasonable rates within that area. The commission may exercise this authority only upon findings that an electric utility is or has engaged in the abuse of market power and that that abuse is not

adequately mitigated by rules and practices of any independent transmission entity controlling the transmission facilities. Any such measure shall be taken only to the extent necessary to protect customers in the area from the particular abuse of market power and to the extent the commission's authority is not preempted by federal law. The measure shall remain the commission, after reasonable notice and opportunity for hearing, determines that the particular abuse of market power has been mitigated.

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

#### **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 util-

ity 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.

#### **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.

**4929.02 Policy of state as to natural gas services and goods.**

(A) It is the policy of this state to, throughout this state:

- (1) Promote the availability to consumers of adequate, reliable, and reasonably priced natural gas services and goods;
- (2) Promote the availability of unbundled and comparable natural gas services and goods that provide wholesale and retail consumers with the supplier, price, terms, conditions, and quality options they elect to meet their respective needs;
- (3) Promote diversity of natural gas supplies and suppliers, by giving consumers effective choices over the selection of those supplies and suppliers;
- (4) Encourage innovation and market access for cost-effective supply- and demand-side natural gas services and goods;
- (5) Encourage cost-effective and efficient access to information regarding the operation of the distribution systems of natural gas companies in order to promote effective customer choice of natural gas services and goods;
- (6) Recognize the continuing emergence of competitive natural gas markets through the development and implementation of flexible regulatory treatment;
- (7) Promote an expeditious transition to the provision of natural gas services and goods in a manner that achieves effective competition and transactions between willing buyers and willing sellers to reduce or eliminate the need for regulation of natural gas services and goods under Chapters 4905. and 4909. of the Revised Code;
- (8) Promote effective competition in the provision of natural gas services and goods by avoiding subsidies flowing to or from regulated natural gas services and goods;
- (9) Ensure that the risks and rewards of a natural gas company's offering of nonjurisdictional and exempt services and goods do not affect the rates, prices, terms, or conditions of nonexempt, regulated services and goods of a natural gas company and do not affect the financial capability of a natural gas company to comply with the policy of this state specified in this section;
- (10) Facilitate the state's competitiveness in the global economy;
- (11) Facilitate additional choices for the supply of natural gas for residential consumers, including aggregation;

(12) Promote an alignment of natural gas company interests with consumer interest in energy efficiency and energy conservation.

(B) The public utilities commission and the office of the consumers' counsel shall follow the policy specified in this section in exercising their respective authorities relative to sections 4929.03 to 4929.30 of the Revised Code.

(C) Nothing in Chapter 4929. of the Revised Code shall be construed to alter the public utilities commission's construction or application of division (E) of section 4905.03 of the Revised Code.

**4901-1-16 General provisions and scope of discovery.**

(A) The purpose of rules 4901-1-16 to 4901-1-24 of the Administrative Code is to encourage the prompt and expeditious use of prehearing discovery in order to facilitate thorough and adequate preparation for participation in commission proceedings. These rules are also intended to minimize commission intervention in the discovery process.

(B) Except as otherwise provided in paragraphs (G) and (I) of this rule, any party to a commission proceeding may obtain discovery of any matter, not privileged, which is relevant to the subject matter of the proceeding. It is not a ground for objection that the information sought would be inadmissible at the hearing, if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. Discovery may be obtained through interrogatories, requests for the production of documents and things or permission to enter upon land or other property, depositions, and requests for admission. The frequency of using these discovery methods is not limited unless the commission orders otherwise under rule 4901-1-24 of the Administrative Code.

(C) Any party may, through interrogatories, require any other party to identify each expert witness expected to testify at the hearing and to state the subject matter on which the expert is expected to testify. Thereafter, any party may discover from the expert or other party facts or data known or opinions held by the expert which are relevant to the stated subject matter. A party who has retained or specially employed an expert may, with the approval of the commission, require the party conducting discovery to pay the expert a reasonable fee for the time spent responding to discovery requests.

(D) Discovery responses which are complete when made need not be supplemented with subsequently acquired information except in the following situations:

(1) The response identified each expert witness expected to testify at the hearing or stated the subject matter upon which each expert was expected to testify.

- (2) The responding party later learned that the response was incorrect or otherwise materially deficient.
- (3) The response indicated that the information sought was unknown or nonexistent and such information subsequently became known or existent.
- (4) An order of the commission or agreement of the parties provides for the supplementation of responses.
- (5) Requests for the supplementation of responses are submitted prior to the commencement of the hearing.
- (6) The response addressed the identity and location of persons having knowledge of discoverable matters.
- (E) The supplementation of responses required under paragraphs (D)(1) to (D)(3) and (D)(6) of this rule shall be provided within five business days of discovery of the new information.
- (F) Nothing in rules 4901-1-16 to 4901-1-24 of the Administrative Code precludes parties from conducting informal discovery by mutually agreeable methods or by stipulation.
- (G) A discovery request under rules 4901-1-19 to 4901-1-22 of the Administrative Code may not seek information from any party which is available in prefiled testimony, pre-hearing data submissions, or other documents which that party has filed with the commission in the pending proceeding. Before serving any discovery request, a party must first make a reasonable effort to determine whether the information sought is available from such sources.
- (H) For purposes of rules 4901-1-16 to 4901-1-24 of the Administrative Code, the term "party" includes any person who has filed a motion to intervene which is pending at the time a discovery request or motion is to be served or filed.
- (I) Rules 4901-1-16 to 4901-1-24 of the Administrative Code do not apply to the commission staff.

**4901:1-35-02 Purpose and scope.**

(A) Pursuant to division (A) of section 4928.141 of the Revised Code, beginning January 1, 2009, each electric utility in this state shall provide consumers, on a comparable and nondiscriminatory basis within its certified territory, a standard service offer (SSO) of all competitive retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service. Pursuant to this chapter,

an electric utility shall file an application for commission approval of an SSO. Such application shall be in the form of an electric security plan or market rate offer pursuant to sections 4928.142 and 4928.143 of the Revised Code. The purpose of this chapter is to establish rules for the form and process under which an electric utility shall file an application for an SSO and the commission's review of that application.

(B) The commission may, upon an application or a motion filed by a party, waive any requirement of this chapter, other than a requirement mandated by statute, for good cause shown.

#### **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 par-

ticipant 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 facil-

ity 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.