

ORIGINAL

IN THE SUPREME COURT OF OHIO

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

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**MERIT BRIEF OF INTERVENING APPELLEES OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY AND THE TOLEDO EDISON COMPANY**

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Glen S. Krassen (Reg. No. 0007610)  
 BRICKER & ECKLER LLP  
 1001 Lakeside Avenue, Suite 1350  
 Cleveland, OH 44114  
 Telephone: (216) 523-5405  
 Facsimile: (614) 227-2390  
 gkrassen@bricker.com

Mathew W. Warnock (Reg. No. 0082368)  
 J. Thomas Siwo (Reg. No. 0088069)  
 BRICKER & ECKLER LLP  
 100 South Third Street  
 Columbus, OH 43215-4291  
 Telephone: (614) 227-2300  
 Facsimile: (614) 227-2390  
 mwarnock@bricker.com  
 tsiwo@bricker.com

Counsel for Appellant  
 Northeast Ohio Public Energy Council

James W. Burk (0043808)  
 Carrie M. Dunn (0076952)  
 FIRSTENERGY SERVICE COMPANY  
 76 South Main Street  
 Akron, OH 44308  
 (330) 384-5861  
 (330) 384-3875 (fax)  
 burkj@firstenergycorp.com  
 cdunn@firstenergycorp.com

David A. Kutik (0006418)  
 Counsel of Record  
 JONES DAY  
 901 Lakeside Avenue  
 Cleveland, OH 44114  
 (216) 586-3939  
 (216) 579-0212 (fax)  
 dakutik@jonesday.com

Attorneys for Intervening Appellees, Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company

**FILED**  
 AUG 20 2013  
 CLERK OF COURT  
 SUPREME COURT OF OHIO

Robert Kelter (admitted pro hac vice)  
(Counsel of Record)  
Justin Vickers (admitted pro hac vice)  
Nick McDaniel (0089817)  
ENVIRONMENTAL LAW AND POLICY  
CENTER  
1207 Grandview Avenue, Suite 201  
Columbus, OH 43212  
Telephone: (614) 488-3301  
rkelter@elpc.org  
jvickers@elpc.org  
nmcdaniel@elpc.com

Counsel for Appellant  
Environmental Law and Policy Center

Richard Michael DeWine  
(Reg. No. 0009181)  
Attorney General of Ohio  
William L. Wright (Reg. No. 0018010)  
Section Chief, Public Utilities Section  
Thomas McNamee (Reg. No. 0017352)  
Assistant Attorneys General  
PUBLIC UTILITIES COMMISSION OF  
OHIO  
180 East Broad Street, 6<sup>th</sup> Floor  
Columbus, OH 43215  
Telephone: (614) 466-4397  
Facsimile: (614) 644-8764  
william.wright@puc.state.oh.us  
thomas.mcnamee@puc.state.oh.us

Counsel for Appellee, Public Utilities  
Commission of Ohio

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## I. INTRODUCTION

On July 18, 2012, the Public Utilities Commission of Ohio (the “Commission”) approved the third Electric Security Plan (“ESP 3”) proposed by Intervening Appellees Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company (collectively, the “Companies”). ESP 3 was approved as part of the Commission’s review of a Stipulation agreed to by over nineteen parties representing a variety of interests. This case involves a review of that decision. As shown below, the Commission’s review and approval of ESP 3 and the Stipulation complied with the Commission’s statutory obligations, the Commission’s own procedures and this Court’s precedents. Accordingly, the Commission’s order approving ESP 3 should be affirmed by this Court.

As specified in Ohio Revised Code Section 4928.143, an ESP is one of two methods to provide a Standard Service Offer (“SSO”). Retail electric generation service is a competitive (*i.e.*, unregulated) service in Ohio. *See* R.C. § 4928.03, App. at 15.<sup>1</sup> An SSO provides the rates, terms and conditions for retail electric generation service provided by an electric distribution utility to the utility’s customers where the customers choose not to “shop” for this service with a competitive retail electric service (“CRES”) provider. As an alternative to an ESP, an electric distribution utility is permitted to provide SSO service through a Market Rate Offer (“MRO”). *See* R.C. § 4928.142, App. at 18-21. As the name implies, an MRO requires the electric distribution utility to procure generation and other services making up retail electric generation service through a market-based or competitive bidding process (“CBP”), such as an auction. An ESP may also include a CBP, and include other elements such as distribution service provisions

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<sup>1</sup> “App.” refers to the Companies’ Appendix and “Supp.” refers to the Companies’ Supplement. “Tr.” refers to the transcript for the Commission hearings for Case No. 12-1230-EL-SSO. The transcripts are cited by volume and page number.

and riders designed to recover certain types of costs. Of particular importance here, an ESP may only be approved if the Commission determines that the ESP is more favorable when considering all of its features in the aggregate than an MRO. *See* R.C. § 4928.143(C)(1), App. at 24.

Because the Companies had divested themselves of any generation facilities,<sup>2</sup> the Companies' first two ESPs featured CBPs to buy power to serve SSO load of customers. Because the prices obtained from purchasing generation in this way will necessarily reflect the market conditions at the time of the CBP, if the Companies purchased all generation to be delivered for a given period in one CBP, SSO customers would be forced to pay whatever the market price was at that time. Given that market prices fluctuate – sometimes in volatile fashion from year to year – an ESP that relied on a single CBP could subject customers to markedly volatile prices. To lessen the potential effect of market price volatility, the Companies proposed – and the Commission approved – a staggered schedule of CBPs to buy power to be delivered at different start dates (usually, in one year increments) over multiple years. Further, as part of any particular CBP, the Companies would offer suppliers the opportunity to bid on products of different lengths (*i.e.*, to commit to provide supply over different terms). By purchasing power over multiple CBPs through different products, the Companies can blend the different prices paid for power delivered at any time thereby smoothing out the effects of a volatile market. This results in more stable and predictable rates for customers over time.

This multiplicity of CBPs and product offering, used as a hedge against market price volatility, is called laddering. A laddered procurement strategy used in the Companies' second ESP (“ESP 2”) looked like this:

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<sup>2</sup> This was required under Ohio's initial electricity restructuring statute, S.B. 3. *See* R.C. § 4928.17, App. at 16.

### ESP 2 CBP Schedule

Procurement Date	Tranches Procured	DELIVERY PERIODS			
		June-11	June-12	June-13	June-14
October-10	17	12 month Jun 2011 thru May 2012			
	17	24 month Jun 2011 thru May 2013			
	16	36 month Jun 2011 thru May 2014			
January-11	17	12 month Jun 2011 thru May 2012			
	17	24 month Jun 2011 thru May 2013			
	16	36 month Jun 2011 thru May 2014			
October-11	17		2 year June 2012 thru May 2014		
January-12	17		2 year June 2012 thru May 2014		
October-12	17			1 year June 2013 thru May 2014	
January-13	17			1 year June 2013 thru May 2014	

The laddered procurement method had been approved in the Companies' prior ESPs with unquestionably successful – indeed, in the words of one party to this case, “great” – results. *See* Co. Ex. 13, Supp. at 114.

The Companies' ESP 3 was proposed essentially to be an extension of the terms and conditions of the Companies' highly successful ESP 2 (which included laddered CBPs), with two widely-applicable additional features. First, ESP 3 modified the CBP schedule in ESP 2 to allow for a three-year product. Because ESP 2 provided only for procuring generation for the term of that ESP (a period of three years ending May 31, 2014), later CBPs to supply power for the end of ESP 2 did not offer longer term products. Such products would have gone beyond ESP 2's term. As an effective extension of that provision of ESP 2, ESP 3 substituted some of the shorter product offerings in ESP 2's later CBPs for longer products that extended into ESP 3's term, smoothing out variations in market prices over a longer term.

Second, ESP 3 permitted the recovery of previously incurred renewable energy credit (“REC”) costs to be extended beyond ESP 2. This change will reduce rates to recover the cost of RECs and help levelize charges over ESP 3’s term.

The Commission’s approval of ESP 3 and the Stipulation was well reasoned and supported by the record. It was supported by nineteen different parties, representing a broad array of interests.<sup>3</sup> Nonetheless, Appellant Northeast Ohio Public Energy Council (“NOPEC”) complains that ESP 3 should not have been approved. NOPEC asserts that ESP 3 did not meet the statutory test for approving ESPs. Specifically, NOPEC asserts that ESP 3 was not more favorable in the aggregate than the expected results under an MRO. On this score, NOPEC presents two arguments. Neither has merit.

First, NOPEC contends that Section 4928.143(C) precludes any consideration of the qualitative benefits of an ESP relative to an MRO. NOPEC failed to raise this argument before the Commission and thus the argument may not be considered here.<sup>4</sup> In any event, NOPEC’s statutory argument is wrong because, among other reasons, it ignores certain words of the statute and thus violates a basic tenet of statutory construction. Further, this Court has previously held that the ESP v. MRO test set forth in Section 4928.143(C) does not require the Commission to consider quantitative factors – *i.e.*, price – alone.<sup>5</sup>

Second, NOPEC contends that the Commission erred by finding ESP 3 was quantitatively more favorable than an MRO. In essence, NOPEC disagrees with how the

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<sup>3</sup> See Case No. 12-1230-EL-SSO, Stipulation, signature pages (April 13, 2012) (“Stipulation”), NOPEC Supp. at 81-82. An additional seven parties to the proceeding agreed to not oppose the Stipulation.

<sup>4</sup> *Ohio Consumers’ Counsel v. Pub. Util. Comm.*, 114 Ohio St.3d 340, 2007-Ohio-4276, 872 N.E.2d 269, ¶ 39.

<sup>5</sup> *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 402, 2011-Ohio-958, 945 N.E.2d 501.

Commission weighed the evidence. But NOPEC's factual quibbles fall far short of demonstrating that the Commission's finding was against the manifest weight of the evidence.

Apart from the issue of whether ESP 3 passes the ESP v. MRO test, NOPEC also complains that the Commission committed two procedural errors. First, NOPEC says that the Commission should not have taken administrative notice of materials from the Companies' prior SSO cases.<sup>6</sup> NOPEC's admissions and inactions, however, effectively rebut this argument. For example, NOPEC admits that it had notice of the Companies' intent to seek administrative notice of the materials from the prior SSO cases -- materials that NOPEC was familiar with because of its participation in those cases. NOPEC also glides over that it failed to seek discovery regarding the Companies' plans to seek administrative notice. Indeed, NOPEC did not even request an opportunity to rebut these materials once they were admitted. Simply put, NOPEC had more than adequate notice that the Companies would take administrative notice of certain materials and had ample opportunity to rebut this evidence. Thus, NOPEC's complaints about administrative notice are without merit.

NOPEC's second procedural argument asserts that ESP 3 should not have been approved because the underlying Stipulation was not the product of serious bargaining. NOPEC contends the Stipulation was not signed by a party representing the "broad interests of the residential class" and that the Companies did not have a group meeting with all parties to negotiate the

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<sup>6</sup> The Companies' ESP 2 was approved in *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to R.C. § 4928.143 in the Form of an Electric Security Plan*, Case No. 10-388-EL-SSO. ("Case No. 10-388-EL-SSO"). The ESP 2 record also included the record from an earlier SSO case filed by the Companies, *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company for Approval of a Market Rate Offer to Conduct Competitive Bidding Process for Standard Service Offer Electric Generation Supply, Accounting Modifications Associated with Reconciliation Mechanism, and Tariffs for Generation Service*, Case No. 09-906-EL-SSO ("Case No. 09-906-EL-SSO").

Stipulation. But, as the Commission correctly held, NOPEC's arguments seek to impose requirements on Commission approvals of stipulations that are not supported by this Court's precedent. NOPEC, moreover, has no factual support for its contentions that the parties did not engage in serious bargaining. Indeed, NOPEC's own witness admitted that *NOPEC had the opportunity to participate in the settlement negotiations.*<sup>7</sup>

For its part, Appellant the Environmental Law and Policy Center ("ELPC") argues that the Commission's approval of ESP 3 is unlawful because the Commission improperly found that the Companies had fulfilled the Commission's rules for the requirements for ESP applications. ELPC fails to show that the Commission's application of its filing rule was inconsistent with the language of that rule. Nor could it. The rule at issue, Ohio Administrative Code Rule 4901:1-35-03(C)(1), does not require that the Companies' ESP Application include an encyclopedic treatise or minimum page count. Moreover, ELPC fails to identify any provision of ESP 3 that was not supported by the Companies' Application and supporting materials, the Stipulation, the record testimony and exhibits.

For all of these reasons and as set forth below, the Commission's approval of ESP 3 and the Stipulation was lawful and reasonable. As a result, this Court should affirm the Commission's Order approving ESP 3.

## **II. STATEMENT OF FACTS**

### **A. ESP 3 IS ESSENTIALLY AN EXTENSION OF THE TERMS AND CONDITIONS OF THE COMPANIES' SUCCESSFUL ESP 2.**

The success of the Companies' ESPs is undisputed. Not only was this the testimony of the Companies' witness (Direct Testimony of William R. Ridmann ("Ridmann Testimony") at 12, NOPEC Supp. at 105), but of witnesses for those parties opposing the Stipulation; namely,

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<sup>7</sup> Tr. Vol. III at 25-26, Supp. at 87-88.

witnesses for the Office of the Ohio Consumers' Counsel ("OCC") (Tr. Vol. III at 143, Supp. at 105 (cross-examination of OCC witness Wilson Gonzalez); Tr. Vol. II at 112, Supp. at 77 (cross-examination of OCC witness James Wilson)) and a witness for NOPEC (Tr. Vol. III at 49-50, Supp. at 91-92 (cross-examination of NOPEC witness Mark Frye)).

ESP 3 is essentially an extension of the terms and conditions of ESP 2 with two widely-applicable additional features. (Ridmann Testimony at 9, NOPEC Supp. at 102.) First, ESP 3 modifies the competitive bidding schedule previously approved in ESP 2 to replace shorter term products to be offered in CBPs at the end of ESP 2 with a three-year auction product that would extend into the term of ESP 3. (*Id.*) This modification allows the Companies to blend the current historically lower prices for generation services known as energy and capacity and the known higher capacity prices occurring over the life of ESP 3 (particularly for the period from June 2015 through May 2016). (*Id.* at 15, NOPEC Supp. at 108; Tr. Vol. I at 154-155, Supp. at 73-74.) Second, ESP 3 permits the extended recovery of renewable energy credit costs incurred to meet SB 221 requirements. Because ESP 3 would recover costs that the Companies already incurred for complying with renewable energy mandates<sup>8</sup> over a longer period, this change initially will reduce the rate charged to customers currently for the recovery of such costs and help levelize the customers' charges through ESP 3. (Ridmann Testimony at 15, NOPEC Supp. at 108.)

Importantly, ESP 3 continues the successful competitive procurement of SSO load through the use of a laddered system of multiple offerings for bid products at different lengths over a number of years. (*Id.*) It is undisputed that the laddering method of procuring generation services is a prudent method of procuring load to mitigate the risks associated with market

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<sup>8</sup> See Stipulation at 2-3, 11, NOPEC Supp. at 36-37.

uncertainties. Indeed, at the hearing, NOPEC's witness Mark Frye testified that laddering was a reasonable way to minimize risks and volatility. (Tr. Vol. III at 49, Supp. at 91.) OCC witness James Wilson testified that "[laddering] will provide more stable prices than buying on a year-by-year basis . . . because of the averaging." (Tr. Vol. II at 139, Supp. at 78.) The Companies' witness Robert Stoddard testified, "One reason why laddering is considered a normal and prudent risk management approach is that no utility can know whether risks will increase or decrease over time, nor whether a future risk will resolve itself so as to result in lower prices." (Rebuttal Testimony of Robert Stoddard ("Stoddard Rebuttal") at 14, Supp. at 30.)

**B. THE COMPANIES' NEGOTIATION PROCESS FOR ESP 3 WAS OPEN AND PROVIDED ALL PARTIES THE OPPORTUNITY TO PARTICIPATE.**

Because ESP 3, as proposed, contained mostly the same provisions as ESP 2, the Stipulation as initially proposed and then as ultimately agreed to, involved only a limited number of new issues compared to ESP 2. Indeed, almost all of the parties in this case were parties to the case approving ESP 2. (Ridmann Testimony at 11, NOPEC Supp. at 104; Tr. Vol. I at 35-36, Supp. at 60-61.) The negotiation process thus focused on the differences between ESP 3 and ESP 2.

The Companies began the negotiation process for ESP 3 in March 2012. The Companies reached out to all parties in the ESP 2 case to enter into discussions about the ESP 3 proposal. The Companies engaged with many of those parties in a broad range of ESP discussions. (Ridmann Testimony at 9, NOPEC Supp. at 102.) The Companies also provided all parties with a draft of the ESP 3 Stipulation that showed the limited changes from ESP 2. (Stipulation at 4, NOPEC Supp. at 38; Tr. Vol. I at 25, 26, 101, Supp. at 57, 58, 64.) And parties engaged in negotiations regarding the changes presented in ESP 3 from ESP 2. (Ridmann Testimony at 13-14, NOPEC Supp. at 106-107.) All parties had the opportunity to participate in negotiations.

(Ridmann Testimony at 9, 13-14, NOPEC Supp. at 102, 106-107.) Indeed, even NOPEC witness Frye acknowledged that NOPEC had the opportunity to review a draft of the Stipulation and provide comments. (Tr. Vol. III at 25, 26, 101, Supp. at 87, 88, 93.) Moreover, negotiations continued past the time of the filing of the Application and the Stipulation in this case. In fact, the Companies and Constellation NewEnergy, Inc. and Exelon Generation Company, LLC reached a supplemental agreement just prior to the hearing. (Tr. Vol. I at 41, Supp. at 62; Direct Testimony of David Fein, Attachment A, Supp. at 51; *see also* Co. Ex. 7, Supp. at 110.)

As a result of the negotiations, nineteen parties signed the Stipulation and seven additional parties did not oppose the Stipulation. The Signatory Parties to the Stipulation included the Commission's Staff and a large municipality (both of which represent the interests of all customers, including residential customers) (Tr. Vol. III at 29, Supp. at 89; *see also* Case No. 10-388-EL-SSO, Tr. Vol. III at 775, NOPEC Supp. at 326), along with representatives of low and moderate-income residential customers, manufacturers, industrial and commercial customers, hospitals, small businesses, schools of all levels and generation curtailment service providers. (*See* Stipulation (signature pages), NOPEC Supp. at 81-82; Ridmann Testimony at 10, NOPEC Supp. at 103; Tr. Vol. I at 59, Supp. at 63.) Indeed, the Commission has previously recognized in the ESP 2 case that these parties represent a broad perspective of interests. (Case No. 10-388-EL-SSO, Opinion and Order at 24 (Aug. 25, 2010), NOPEC App. at 176.)

**C. THE COMPANIES' APPLICATION AND SUPPORTING MATERIALS APPROPRIATELY EXPLAINED ESP 3.**

The Companies supported the proposed ESP 3 by filing the Application, the Stipulation and supporting testimony. In the Application, the Companies specifically asked the Commission to take administrative notice of the record in the ESP 2 case, which also included the record of one of the Companies' prior SSO applications, PUCO Case No. 09-906-EL-SSO ("Case No. 09-

906”).<sup>9</sup> (Application at 5, NOPEC Supp. at 29; Stipulation at 44, NOPEC Supp. at 78.) In addition, because of the similarity between ESP 2 and ESP 3, the Companies sought waivers of some of the Commission’s filing requirements. In its April 25, 2012 Entry, the Commission granted in part and denied in part that request for waivers. Specifically, the Commission found that “the Application and Stipulation filed in this proceeding appear on their face to extend for an additional two years, with modifications, the electric security plan originally modified and approved by the Commission in ESP 2.” (Case No. 12-1230-EL-SSO, Entry at 5 (April 25, 2012), ELPC App. at 51.) As a result, the Commission found that this extension provided good cause to waive some of the filing requirements under Ohio Administrative Code Rule 4901:1-35-03(C) (*Id.*) The Commission also required the Companies to submit additional information to support the differences between ESP 2 and ESP 3. (*Id.*) The Companies complied with that order and submitted supplemental testimony and materials. Indeed, one intervening party described those materials as “voluminous.” (Opinion and Order at 46, ELPC App. at 99.)

**D. THE COMMISSION’S APPROVAL OF ESP 3 AND THE STIPULATION**

After discovery and a hearing, the Commission approved ESP 3. The Commission found that, based on the evidence in the record in this case, the quantitative benefits of ESP 3 made it more favorable in the aggregate than the expected results under an MRO. The Commission went on to find that the qualitative benefits of ESP 3 were also more favorable than an MRO. (Opinion and Order at 55-56, NOPEC App. at 66-67.) Specifically, the Commission found that ESP 3 was quantitatively more favorable than an MRO by \$21 million. (Opinion and Order at

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<sup>9</sup> *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company for Approval of a Market Rate Offer to Conduct Competitive Bidding Process for Standard Service Offer Electric Generation Supply, Accounting Modifications Associated with Reconciliation Mechanism, and Tariffs for Generation Service*, Case No. 09-906-EL-SSO.

56, NOPEC App. at 67.) The Commission also found several additional qualitative benefits that would not be provided under an MRO. (*Id.*) These benefits included:

(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 ESP 2; and (4) flexibility that offers significant advantages for the Companies, ratepayers, and the public. [*Id.*]

The Commission further noted that ESP 3 was “consistent with policy guidelines in Ohio.” (*Id.*) The Commission observed that ESP 3 supported competition, reliable service, energy efficiency and the global competitiveness of Ohio industry, while protecting at risk populations. (*Id.*, citing Co. Ex. 3 at 11-12.)

In addition, the Commission found that the Stipulation, as modified, met the Commission’s three-part test for adoption of a settlement. In that regard, the Commission first found that the Stipulation was “the product of serious bargaining among capable, knowledge parties.” (*Id.* at 26, NOPEC App. at 37.) The Commission observed:

The signatory parties represent diverse interests including the Companies, a municipality, competitive suppliers, commercial customers, industrial customers, advocates for low and moderate-income customers, and Staff.

(*Id.*, citing Co. Ex. 3 at 10.) The Commission also expressly rejected arguments that: (a) the agreement of residential representatives (namely, OCC) was required before a stipulation could be approved; and (b) all parties were required to meet together to discuss the stipulation. (*Id.*)

The Commission next found that the Stipulation as a package benefitted ratepayers and was in the public interest. The Commission noted that it “provid[ed] for stable and predictable rates, established by a competitive procurement process and us[ed] . . . laddered auction products to lower the volatility of prices . . . .” (*Id.* at 42, NOPEC App. at 53.)

As for the third prong of the Commission's settlement approval test, the Commission determined that the Stipulation did not violate any important regulatory principle or practice. (*Id.* at 44-48, NOPEC App. at 55-59.) The Commission approved the Stipulation on July 18, 2012.

### III. STANDARD OF REVIEW

Section 4903.13 of the Ohio Revised Code provides that the Supreme Court may “reverse, vacate or modify final orders of the Public Utilities Commission only where, upon a consideration of the record, the order is unreasonable or unlawful.” *Office of Consumers' Counsel v. Pub. Util. Comm.*, 58 Ohio St.2d 108, 110, 388 N.E.2d 1370 (1979). The Commission's orders are presumed reasonable. Accordingly, an appellant challenging a Commission order bears the burden to upset that presumption. *In re Application of Columbus S. Power Co.*, 129 Ohio St.3d 271, 2011-Ohio-2638, 951 N.E.2d 751, ¶ 17.

This Court “will not reverse or modify a PUCO decision as to questions of fact” unless the decision is so “manifestly against the weight of the evidence and was so clearly unsupported by the record as to show misapprehension, mistake, or willful disregard of duty.” *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 121 Ohio St.3d 362, 2009-Ohio-604, 904 N.E.2d 853, ¶ 12. In addition, “this court will not reverse a commission order absent a showing by the appellant that it has been or will be harmed or prejudiced by the order.” *Id.*

While the Court reviews legal issues *de novo*, “this does not prevent the court from acknowledging and, in certain instances, utilizing the specialized expertise of an agency in interpreting the law.” *Office of Consumers' Counsel*, 58 Ohio St.2d at 110; *see also In re Application of Columbus S. Power Co.*, 134 Ohio St.3d 392, 2012-Ohio-5690, 983 N.E.2d 276, ¶ 36 (deferring to “the commission's reasonable interpretation” of a statute). Such circumstances “arise where there exists disparate competence between the respective tribunals in

dealing with highly specialized issues and where agency expertise would, therefore, be of assistance in discerning the presumed intent of our General Assembly.” *Ohio Consumers’ Counsel*, 58 Ohio St.2d at 110. Moreover, this Court has long held that it is “required to give deference to an administrative agency’s interpretation of its own rules and regulations.” *State ex rel. Kroger Co. v. Stover*, 31 Ohio St.3d 229, 235, 510 N.E.2d 356 (1987); *see also, State ex rel. Saunders v. Indus. Comm.*, 101 Ohio St.3d 125, 2004-Ohio-339, 802 N.E.2d 650, ¶ 41 (same).

#### IV. ARGUMENT

##### A. PROPOSITION OF LAW NO. 1: IN AN APPEAL FROM AN ORDER OF THE PUBLIC UTILITIES COMMISSION OF OHIO, THE OHIO SUPREME COURT LACKS JURISDICTION TO CONSIDER ISSUES NOT ARGUED IN A PARTY’S APPLICATION FOR REHEARING BEFORE THE COMMISSION.

This Court lacks jurisdiction to consider any issue that a party did not set forth “specifically” in its application for rehearing to the Commission. *Ohio Consumers’ Counsel v. Pub. Util. Comm.*, 114 Ohio St.3d 340, 2007-Ohio-4276, 872 N.E.2d 269, ¶ 40 (quoting R.C. § 4903.10). A party’s failure to raise arguments in its application on rehearing “deprive[s] the commission of an informed opportunity to set things right.” *In re Application of Columbus S. Power Co.*, 129 Ohio St.3d 271, 2011-Ohio-2638, 951 N.E.2d 751, ¶ 19.

Here, however, NOPEC attempts to do what this Court has repeatedly held that appellants cannot do: make an appeal based on an argument not raised before the Commission. The so called “crux” of NOPEC’s appeal – whether the Commission can consider qualitative benefits of a proposed ESP – is an argument that NOPEC did not raise in its Application for Rehearing. (*See* NOPEC Br. at 5.) NOPEC’s other statutory interpretation arguments – that, in the alternative, the Commission’s consideration of qualitative benefits should be limited by Ohio Revised Code Section 4928.143(B)(1) and (B)(2) and that the Commission’s analysis of the

“expected results” under an MRO as part of its analysis under Section 4928.143(C)(1) is limited to only generation costs – also are new to this appeal. (*See* NOPEC Br. at 22, 27-28.)

Similarly, NOPEC’s extensive recitation of “legislative history” of Section 4928.143 (NOPEC Br. at 5-11) was missing entirely in NOPEC’s briefing at the Commission. To be sure, NOPEC did state in two sentences of its Application for Rehearing as follows:

[T]he Commission unreasonably and unlawfully claims that a series of amorphous, qualitative (non-monetary) benefits overcome the substantial failure of the quantitative ESP vs. MRO analysis. Such an argument is unpersuasive and not expressly provided for under the statute.

(NOPEC Application for Rehearing at 7, NOPEC App. at 124.) But NOPEC’s application says nothing more. For example, NOPEC did not contend before the Commission (as it does in this appeal) that the language of Section 4928.143(C)(1) prohibits the Commission from considering qualitative benefits. It did not contend before the Commission (as it does in this appeal) that the Commission’s analysis of the expected results of an MRO under Section 4928.143 is limited to generation costs. It did not contend before the Commission (as it does in this appeal) that any qualitative benefits considered by the Commission are limited to those set forth under Section 4928.143(B)(1) and (B)(2). Instead, at the Commission, NOPEC merely argued that qualitative benefits that the Commission considered were ambiguous and that the Commission’s quantitative analysis was not supported by the record. (*Id.* at 5-9, NOPEC App. at 122-126.)

As a result, the Commission has not had an opportunity to consider the statutory interpretation arguments that NOPEC now raises. That opportunity is a prerequisite to this Court’s jurisdiction over these issues. Accordingly, this Court lacks jurisdiction to address NOPEC’s statutory interpretation arguments.

**B. PROPOSITION OF LAW NO. 2: WHEN DETERMINING WHETHER AN ELECTRIC SECURITY PLAN IS MORE FAVORABLE IN THE AGGREGATE THAN A MARKET RATE OFFER, THE COMMISSION MAY CONSIDER QUALITATIVE BENEFITS OF THE ELECTRIC SECURITY PLAN, AS PROVIDED IN THE RECORD EVIDENCE.**

Even disregarding the jurisdictional bar to considering NOPEC's arguments related to the Commission's consideration of qualitative benefits under Section 4928.143(C)(1), NOPEC is wrong to suggest that the Commission's consideration of qualitative benefits is unlawful. Section 4928.143(C)(1) does not, as NOPEC contends, limit the Commission's consideration of an ESP relative to an MRO based on its price and costs. Nor is it correct to say the Commission's consideration of benefits of an ESP versus an MRO is limited to those potential ESP provisions in Section 4928.143(B)(1) and (B)(2). These arguments are at odds with the plain language of Section 4928.143, this Court's precedent and NOPEC's witness' testimony.

As an initial matter, NOPEC's extensive reliance on the "legislative history" of Section 4928.143(C)(1) is wholly inappropriate. (NOPEC Br. at 5-15.) This Court has established that legislative history of a statute should not be considered unless the Court first determines that the statute is ambiguous. *Dunbar v. State*, Case No. 2012-0565, 2013-Ohio-2163, ¶ 16 (May 30, 2013) (Slip Op.) ("[I]nquiry into . . . legislative history . . . or any other factors identified in R.C. 1.49 is inappropriate absent an initial finding that the language of the statute is, itself, capable of bearing more than one meaning.") Here, NOPEC does not contend that the language in Section 4928.143(C)(1) is ambiguous. To the contrary, NOPEC contends that standard set forth in R.C. 4928.143(C)(1) is "*crystal clear*." (NOPEC Br. at 29 (emphasis added).) This clarity eliminates the need to refer to any "legislative history" regarding this statute.

What's more, the interpretation of Section 4928.143(C)(1) suggested by NOPEC conflicts with the plain language of the statute. NOPEC contends that the reference in Section 4928.143(C)(1) to "all other terms and conditions" "refers only to pricing and cost

considerations.” (NOPEC Br. at 12-13.) But the language of Section 4928.143 includes no such restriction. Section 4928.143(C)(1) provides that the Commission shall approve an ESP:

[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 24. By including the phrase “*and all other terms and conditions*,” the statute sets “all other terms and conditions” apart from and in addition to “pricing.” By so doing, the statute expressly instructs the Commission to consider issues *other* than price. Indeed, this Court has read Section 4928.143(C)(1) to say exactly that.

In *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 402, 2011-Ohio-958, 945 N.E.2d 501, ¶ 27, this Court rejected a party’s attempt to impose a limitation on the Commission’s analysis under Section 4928.143(C)(1). This Court held that comparing an ESP to an expected MRO “does not bind the commission to a strict price comparison.” *Id.* The Court observed, “in evaluating the favorability of a plan, the statute [Section 4928.143(C)(1)] instructs the commission to consider ‘pricing *and all other terms and conditions*.’” *Id.* (emphasis in original). As a result, this Court held that “the commission *must* consider more than price in determining whether an electric security plan should be modified.” *Id.* (emphasis in original).

Indeed, NOPEC’s proposed interpretation of Section 4928.143(C)(1) would read “all other terms and conditions” out of the statute. This conflicts with the rule of statutory construction that requires all words of a statute to have meaning. *State ex rel. Carna v. Teays Valley Local Sch. Dist. Bd. of Educ.*, 131 Ohio St.3d 478, 2012-Ohio-1484, 967 N.E.2d 193, ¶ 18 (“Venerable principles of statutory construction require that in construing statutes, we must give effect to every word and clause in the statute.”).

By directing the Commission to consider “price,” the statute, of course, mandates a weighing of the respective costs of an ESP versus an MRO. But by additionally directing the Commission to consider “all other terms and conditions,” the statute necessarily permits some consideration of non-quantitative – *i.e.*, qualitative – factors. Indeed, if the General Assembly had intended to limit the Commission’s analysis under Section 4928.143(C)(1) to costs, then it would have expressly said so. *Cf. MP Star Fin., Inc. v. Cleveland State Univ.*, 107 Ohio St.3d 176, 2005-Ohio-6183, 837 N.E.2d 758, ¶¶ 8–9 (“Had the General Assembly intended to make [the statute narrower] . . . it would have done so by adding qualifying language.”). Or the General Assembly could have used terms to describe the test as cost-focused. For example, the General Assembly could have said that the ESP must be “less costly” than an MRO. Or it could have said that an ESP must be “quantitatively more favorable” than an MRO. It did not. Instead, the General Assembly used the term “more favorable *in the aggregate*,” the plain meaning of which is “considered as a whole.” *Webster’s Third New International Dictionary* 41 (1986), Supp. at 327-328. A consideration of the pricing and terms and conditions as a whole stands in stark contrast to the limited analysis that NOPEC proposes. Accordingly, NOPEC’s proposed interpretation of Section 4928.143(C)(1) conflicts with the plain meaning of the statute.

Alternatively, NOPEC contends that “if the Commission has the authority to consider qualitative benefits, that authority must be derived from R.C. 4928.143(B)(1) or (B)(2).” (NOPEC Br. at 15.) Section 4928.143(C)(1) does not contain any limitation on the type of terms and conditions of an ESP that the Commission can consider.

NOPEC cites two Ohio Supreme Court cases to support its statutory interpretation arguments. (NOPEC Br. at 9 and 14, discussing *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655 (“*CSP IP*”) and *Ohio Consumers’ Counsel*

v. *Pub. Util. Comm.*(1981), 67 Ohio St.2d 153, 423 N.E.2d 820 (“*1981 Consumers’ Counsel*”).

Neither of these cases supports the limitation on the Commission’s analysis urged by NOPEC.

In *CSP II*, the Court held that the types of cost recovery riders allowed under an ESP were limited by the categories set forth in Section 4928.143(B)(2). The Court did not address the scope of the Commission’s analysis under Section 4928.143(C)(1). *CSP II*, 128 Ohio St.3d 512, ¶¶ 31-33. *CSP II* is not on point.

NOPEC also incorrectly relies on *1981 Consumers’ Counsel*. In that case, the Court held that the Commission erred by allowing a utility to recover “extraordinary” construction costs under Ohio Revised Code Section 4909.15.<sup>10</sup> The case had nothing to do with whether the Commission’s analysis of benefits under Section 4928.143(C)(1). Indeed, it would be hard to see how the case could have any relevance to Section 4928.143(C)(1) given that the case was decided over two decades before the enactment of the statute.

Even if the *1981 Consumers’ Counsel* case had relevance, which it does not, it does not support NOPEC’s position. Far from being “extraordinary,” the qualitative aspects of ESP 3 fit neatly within the statutory test. ESP 3’s non-quantitative benefits cited by the Commission did not become either extraordinary or exceptional simply due to their qualitative nature. The Commission, in taking such benefits into consideration, was not seeking to affect an exception to Section 4928.143(C). As this Court has recognized, “The statute does not provide a detailed mechanism for establishing rates under an ESP. Plans may contain any number of provisions within a variety of categories so long as the plan is ‘more favorable in the aggregate’ than the

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<sup>10</sup> Specifically, this Court held that the Commission could not include “extraordinary” costs under Section 4909.15 because to do so would “abrogate” the statute’s “ratemaking formula” regarding costs that could be included as part of the requisite “test year data . . . for ratemaking purposes.” *1981 Consumers’ Counsel*, 67 Ohio St.2d at 166.

expected results of a market-rate offer.” See *In re Application of Columbus S. Power Co.*, 134 Ohio St.3d 392, 2012-Ohio-5690, 983 N.E.2d 276, ¶ 4 (citation omitted).

NOPEC’s arguments also stand in contrast to the testimony of its own witness Mark Frye. Mr. Frye testified that the Commission may consider qualitative benefits. (Tr. Vol. III at 36, Supp. at 90.) In fact, Mr. Frye acknowledged that the Commission could approve an ESP where the ESP’s generation prices were higher than market-based prices. (*Id.*)

Mr. Frye’s testimony is not unique. As the Commission noted in its Second Entry on Rehearing, “the record indicates widespread agreement with respect to the need to examine both qualitative and quantitative benefits under the ESP v. MRO Test.” Case No. 12-1230-EL-SSO, Second Entry on Rehearing, p. 23 (Jan. 30, 2013) (citing Direct Testimony of Robert Fortney (“Fortney Testimony”), Staff Ex. 3, at 3-4), NOPEC Supp. at 102; Tr. Vol. III at 36, Supp. at 90 (Mr. Frye); Tr. Vol. III at 135, Supp. at 100 (OCC witness Gonzalez).) Indeed, there was no witness who testified that the qualitative benefits of an ESP could not be considered under Section 4928.143(C)(1).

In sum, NOPEC’s statutory interpretation arguments that the Commission somehow acted unlawfully by considering qualitative benefits in its approval of ESP 3 are unsupported. These arguments are at odds with the plain language of Section 4928.143, this Court’s precedent, NOPEC’s own witness’ testimony, and the record in this case. The Commission properly weighed the quantitative and qualitative benefits of ESP 3 versus an MRO. NOPEC’s arguments to the contrary should be rejected.

**C. PROPOSITION OF LAW NO. 3: THE COMMISSION PROPERLY APPROVES AN ELECTRIC SECURITY PLAN WHEN THE COMMISSION FINDS THAT THE RECORD SHOWS THAT THE BENEFITS OF THE ELECTRIC SECURITY PLAN ARE MORE FAVORABLE IN THE AGGREGATE THAN THE EXPECTED RESULTS UNDER A MARKET RATE OFFER.**

The Commission approved ESP 3 because the Commission found that the record showed that the quantitative benefits and the qualitative benefits of ESP 3 were each and both, in the aggregate, more favorable than an MRO. (Opinion and Order at 55-56, NOPEC App. at 66-67.)

The Commission also noted that “ESP 3 is consistent with policy guidelines.” (*Id.*) The Commission’s approval of ESP 3, under both a quantitative and qualitative analysis, was supported by the record and should be affirmed.

**1. The Commission’s Finding That ESP 3 Was Quantitatively More Favorable In The Aggregate Than The Expected Results Under An MRO Was Proper And Supported By The Record.**

**a. The Commission properly considered the costs recovered in a distribution rate case if the Companies had pursued an MRO.**

NOPEC contends that the Commission acted unlawfully by considering, as part of its analysis under Section 4928.143(C)(1), how a distribution rate case<sup>11</sup> would affect customers if an MRO was adopted. NOPEC failed to raise this argument in its Application for Rehearing. Therefore, NOPEC waived this argument and this Court may not consider it.

Nonetheless, even if this Court should decide to address NOPEC’s argument on the merits, NOPEC’s position must still be rejected. NOPEC baldly contends that “R.C. 4928.142 permits only consideration of the results that would be expected from a competitive bid process

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<sup>11</sup> Distribution rates are associated with distribution service, which constitutes the delivery of electricity at certain voltages. The rates for this service are regulated and set by the Commission. *See* R.C. § 4909.18, App. at 11.

for generation supply in developing an MRO.” (NOPEC Br. at 27.) But NOPEC fails to show that the Commission’s analysis under *Section 4928.143(C)(1)* is so limited.

In any event, NOPEC is plainly wrong. Section 4928.143(C)(1) allows the Commission to consider whether an ESP would be more favorable in the aggregate than the “expected results” that would otherwise apply under an MRO. *See* R.C. § 4928.143(C)(1), App. at 24. This language does not limit the Commission’s analysis to only the generation costs under an MRO. The statute directs the Commission to consider essentially whether a utility’s nonshopping customers would be better off under the proposed ESP or if a hypothetical MRO was in place. Given that Section 4928.143(B) permits an ESP to contain certain types of distribution charges, where an ESP contains such charges, it is fair to consider whether and how those distribution charges would be recovered without that ESP. The Commission’s consideration of how a distribution rate case would impact customers if the Commission approved an MRO fits within a consideration of the “expected results” that would otherwise apply if an MRO was in place. This Court should reject NOPEC’s argument that the Commission’s quantitative analysis was unlawful because it considered how distribution charges, proposed to be recovered in ESP 3, could be recovered in a situation where the Companies’ provided SSO service under an MRO.

**b. The Commission’s finding that the benefits of ESP 3 are quantitatively more favorable in the aggregate than the expected results of an MRO is supported by the record.**

NOPEC disputes the Commission’s factual finding that ESP 3 was quantitatively more favorable by \$21.4 million dollars than an MRO. (NOPEC Br. at 28.) The Commission’s approval was not “manifestly against the weight of the evidence” and “so clearly unsupported by the record as to show misapprehension, mistake, or willful disregard of duty.” *See Ohio Consumers’ Counsel v. Pub. Util. Comm.*, 121 Ohio St.3d 362, 2009-Ohio-604, 904 N.E.2d 853, ¶ 12. Thus, NOPEC’s challenge to the Commission’s weighing of the evidence is without merit.

The Commission's finding is well supported. Both Staff witness Robert Fortney and the Companies' witness William Ridmann testified at length on this issue. (Fortney Testimony at 4, NOPEC Supp. at 120; Tr. Vol. I at 125-130, Supp. at 65-70.) For example, Mr. Fortney testified that ESP 3 is better in the aggregate than an MRO – even without the Commission needing to consider ESP 3's "qualitative" benefits – by \$21.4 million. (Fortney Testimony at 4-5, NOPEC Supp. at 120-121.) Because ESP 3 proposed to procure generation services for SSO load through CBPs, ESP 3's cost of such services would be the same as the cost of procuring such services under an MRO. (As noted, the key feature of an MRO is procuring generation services for SSO through CBPs.) Thus, the relative costs of ESP 3 versus an MRO would be determined by comparing other types of charges.

A significant nongeneration charge proposed by ESP 3 was a continuation of the Delivery Capital Recovery Rider ("Rider DCR") that was initially approved as part of ESP 2.<sup>12</sup> Mr. Fortney testified that "the costs to consumers of the Delivery Capital Recovery (DCR) Rider, which are included in Mr. Ridmann's ESP analysis and the costs of a distribution case, which are included in Mr. Ridmann's MRO analysis" could be considered as a "wash":

If the companies do not recover those costs through the DCR, it is probable that they would file distribution rate cases . . . to recover those same costs. While there may be some variation in the amounts recovered due to the timing of rate cases and the concept of "date certain," in the long run, the companies would recover the equivalent of the same costs. (*Id.*)

(Fortney Testimony at 4-5, NOPEC Supp. at 120-121.)

The Companies' witness Ridmann initially presented a slightly different analysis. Mr. Ridmann's ESP v. MRO calculations mirrored the methodology that had been used to support

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<sup>12</sup> Rider DCR allows the Company to recover investments related to infrastructure costs associated with distribution, subtransmission, general, and intangible plant that was not included in the Companies' last base distribution rate case, Case No. 07-551-EL-AIR. These investments benefit customers by helping maintain the Company's delivery systems and service reliability.

ESP 2. (Ridmann Testimony at 16, WRR-Attachment 1, NOPEC Supp. at 109, 114.) This methodology had been previously approved by the Commission. (Case No. 10-388-EL-SSO, Opinion and Order at 44, NOPEC App. at 196.) Mr. Ridmann's analysis included as a benefit of ESP 3 the costs savings achieved by the Companies' agreement to forego recovery of certain transmission related costs. (Ridmann Testimony at 16, NOPEC Supp. at 109.)<sup>13</sup> As for the cost of the DCR, like he did in supporting ESP 2, Mr. Ridmann noted the equivalent recovery of dollars using a DCR under ESP 3 with the recovery of similar costs in a rate case. Mr. Ridmann noted the only difference was the timing of the recovery of those dollars, with the DCR providing quicker recovery. (*Id.* at 18; WRR-Attachment 1, NOPEC Supp. at 114.) Mr. Ridmann's ESP v. MRO analysis thus considered the potential timing difference of the recovery.

At the hearing, while supporting his analysis as consistent with the Commission-approved analysis of ESP 2, Mr. Ridmann acknowledged that Mr. Fortney's analysis of the effect of the DCR was consistent with more recent Commission precedent. (Tr. Vol. I at 129, Supp. at 69.) Indeed, as OCC witness Gonzalez acknowledged, since the approval of ESP 2, the Commission had determined in a case involving AEP Ohio that an AEP Ohio proposed ESP rider similar to the Companies' Rider DCR had been a "wash" for purposes of the ESP v. MRO test. (Tr. Vol. III at 131-132, Supp. at 98-99; *In the Matter of the Application of Columbus Southern Power Company and Ohio Power 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. 11-346-EL-SSO, 2011 Ohio PUC LEXIS 1325, Opinion and Order, \*69 (Dec.

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<sup>13</sup> Specifically, these costs are for Regional Transmission Expansion and Planning ("RTEP") charges that are billed by PJM for RTEP projects which were approved by the PJM Board before June 1, 2011. Stipulation, § C.2, NOPEC Supp. at 59.

14, 2011), Supp. at 279.) Here, the Commission followed its precedent established in the earlier AEP Ohio proceeding on this issue.

NOPEC disagrees with the Commission's determination that the costs of the Companies' Rider DCR that apply under ESP 3 and the distribution rate case costs that would otherwise apply to customers under an MRO would be a "wash." (Opinion and Order at 56-57, NOPEC App. at 66-67.) But the Commission's finding was correct as a matter of pure logic. If the Companies' costs were recoverable under the DCR, there is simply no reason to believe that the same costs would not be recoverable in a rate case. Thus, the Commission's finding that the recovery of capital-related expenses under Rider DCR or a rate case would be equal was correct.

NOPEC further contends that the Commission relied on the wrong standard because it found the costs under Rider DCR would be "substantially equal" to a distribution rate case under an MRO. (NOPEC Br. at 29-30.) NOPEC argues that this analysis conflicts with the standard under Section 4928.143(C)(1) that an ESP should be "more favorable in the aggregate" than an MRO. NOPEC misconstrues the Commission's analysis. The Commission did not find (as NOPEC suggests) that the quantitative benefits of *ESP 3* were "substantially equal" to an *MRO*. The Commission's determination that the costs of Rider *DCR* and a *distribution rate case* would be substantially equal was only *one* element of the Commission's quantitative analysis comparing ESP 3 with an MRO. (Opinion and Order at 55-56, NOPEC App. at 66-67.)

The record supports the Commission's finding that the quantitative benefits of ESP 3 were more favorable in the aggregate by \$21 million as compared to the expected results of an MRO. The Commission's finding also is consistent with its previous rulings. Thus, the Commission's finding should be affirmed.

**2. The Commission Properly Found That The Qualitative Benefits Of ESP 3 Make It More Favorable In The Aggregate Than The Expected Results Of An MRO.**

In the Order, the Commission properly detailed ESP 3's qualitative benefits that made ESP 3 more favorable in the aggregate than an MRO:

The Commission finds that the additional qualitative benefits of an ESP, which would not be provided for in an MRO, include (1) modification of the bid schedule to provide for a three-year product in order to capture current lower market-based generation prices and blend them with potentially higher prices in order to provide rate stability; (2) continuation of the distribution rate increase "stay-out" for an additional two years to provide rate certainty, predictability, and stability for customers; (3) continuation of multiple rate options and programs to preserve and enhance rate options for various customers provided in ESP 2; and (4) flexibility that offers significant advantages for the Companies, ratepayers, and the public.

(Order and Opinion at 56, NOPEC App. at 67.) In addition, the Commission emphasized that "laddering of products and continuation of the distribution rate increase freeze will smooth generation prices and mitigate the risk of volatility, which is a benefit to customers." (*Id.*) The Commission also found "the additional benefits provided via the Stipulation to interruptible industrial customers, schools, municipalities, as well as shareholder funding for assistance to low income customers also make the proposed ESP 3 more favorable qualitatively than an MRO." (*Id.*)

NOPEC waived its argument that the Commission cannot consider qualitative benefits. Thus, this Court may not consider this argument.

Nevertheless, to the extent NOPEC's complaints are considered, they are at best factual disputes regarding the Commission's finding of certain qualitative benefits. The Commission's findings are well supported by the record. NOPEC's disputes can be distilled to three complaints about the Commission's factual findings regarding specific qualitative benefits: (1) the benefits of blending different market prices through laddered CBPs; (2) the benefits of a continued freeze

of base distribution rates; and (3) the benefits of continuing discounts, rate increase caps and other rate options. But none of these arguments comes close to showing the Commission's findings were against the manifest weight of the evidence. Thus, none carry the day.

- a. **The Commission properly found that the modification of the CBP schedule to provide for a three-year product, capturing current lower market-based generation prices and blending them with potentially higher future prices, provides rate stability and was a qualitative benefit of ESP 3.**

The testimony in this case overwhelmingly shows that the modification of the three-year auction product in ESP 3 to adopt a laddered procurement for SSO generation services was good for customers. As the Commission observed, the three-year auction product would smooth out pricing and mitigate the risk of market price volatility. (Opinion and Order at 32, NOPEC App. at 43.) In its Second Entry on Rehearing, the Commission also correctly noted, "NOPEC's witness Frye and OCC expert Gonzalez [two witnesses sponsored by parties opposing the Stipulation] both concurred that laddering auction products is a reasonable approach to minimize risks and volatility." (Second Entry on Rehearing at 23-34, NOPEC App. at 102-113, citing Tr. Vol. III at 49; Tr. Vol. III at 141-42.) Indeed, all of the witnesses addressing this subject testified that a laddered procurement strategy is a widely accepted and reasonable strategy for such purposes. (Opinion and Order at 32, NOPEC App. at 43.)

NOPEC incorrectly argues that this plan simply replaces lower prices in the final year of ESP 2 with higher ones that are likely to incur later. (NOPEC Br. at 17.) NOPEC further wrongly contends that the Commission is trying to derive a benefit by comparing price between ESP 2 and ESP 3. (*Id.*) As the Commission stated, the specific prices that may be garnered by ESP 3's CBPs are uncertain, but that whatever future prices may be, ESP 3's laddering procurement strategy will minimize the effect of changing market prices, including the effect of any potential increases. (Order and Opinion at 32, NOPEC App. at 43.) Preventing steep

increases or changes in the price paid by SSO customers for generation services minimizes “rate shock” and allows for greater predictability for customers’ electricity charges. (*Id.*)<sup>14</sup>

NOPEC also argues that the potential prices to be paid under ESP 3 are too uncertain to know whether customers will receive any benefits. (NOPEC Br. at 17, n. 10.) NOPEC misses the point. As the record shows, and as the Commission also observed, it is in times of greatest uncertainty where risk and volatility mitigation strategies are most prudently employed. (Opinion and Order at 32, NOPEC App. at 43; Stoddard Rebuttal at 14, Supp. at 30.) It is undisputed – even by NOPEC’s witness – that laddering procurements is a widely accepted risk mitigation technique. (Tr. Vol. III at 49, Supp. at 91.) ESP 3’s laddered procurement strategy was thus properly determined to be a benefit of ESP 3 relative to an MRO.

**b. The Commission properly found that the continuation of the distribution rate increase “stay-out” for an additional two years provided rate certainty, predictability, and stability for customers and thus benefitted customers.**

ESP 3 also provides that the Companies will not implement a base distribution rate increase through a rate case for the term of the ESP, *i.e.*, through May 2016. (Ridmann Testimony at 12-13, NOPEC Supp. at 105-106.) This agreement to a distribution rate increase “stay out” continued the freeze in base distribution rates first agreed to in ESP 1 (*i.e.*, beginning in June 2011). (Case No. 10-388-EL-SSO, Opinion and Order at 36, NOPEC App. at 188; *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.

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<sup>14</sup> To be sure, the future price of some competitive generation is known. For example, capacity prices are expected to significantly rise for the June 2014-May 2015 period, and then rise again for the June 2015-May 2016 period. (AEPR Ex. 2, Supp. at 108.) Thus, to the extent that costs are expected to rise, ESP 3’s laddering of procurement and blending of prices will reduce the rate of an expected cost increase. (*Id.*; Tr. Vol. I at 154-155, Supp. at 73-74.)

08-935-EL-SSO, 2009 Ohio PUC LEXIS 279, Second Opinion and Order, \*21 (Mar. 25, 2009), Supp. at 311.)

The record supports the Commission's finding that the distribution rate increase "stay out" is a qualitative benefit of ESP 3. As the Companies' witness Ridmann testified, this provision will help stabilize customers' base distribution rates for another two years by continuing the rate freeze already in effect for several years. (Ridmann Testimony at 12-13, NOPEC Supp. at 105-106.)

Nonetheless, NOPEC contends that the benefit of a distribution rate freeze is "illusory at best." (NOPEC Br. at 18.) NOPEC contends that the presence of the Rider DCR effectively negates the base distribution rate freeze that has been and will continue to be in effect. (*Id.* at 18.) NOPEC overlooks that the scope of cost recovery in a rate case is broader than the scope of costs authorized to be recovered through Rider DCR. The record shows that only those capital costs that are determined to be reasonably incurred to support the maintenance and improvement of the Companies' distribution system may be recovered through Rider DCR. (Ridmann Testimony at 6, NOPEC Supp. at 99.)

What's more, Rider DCR provides a number of benefits over a rate case. As OCC witness Gonzalez admitted, under ESP 3, costs to be recovered under and revenues received through Rider DCR will be reconciled quarterly. This assures that Rider DCR's rates can be adjusted for any over recovery by the Companies. There is no such reconciliation for base distribution rates. Further, ESP 3 requires that Rider DCR costs and revenues be subject to annual audits in which parties like OCC can participate – and have participated. (Tr. Vol. III at 125-126, 139-142, Supp. at 96-97, 101-104.) There is no similar mechanism to audit base

distribution rates. Thus, the Commission's finding that the distribution rate freeze is a qualitative benefit of ESP 3 is well supported by the record.

**c. The Commission properly found that the continuation of the ESP 2 rate design options and programs are qualitative benefits of ESP 3.**

As part of the relative certainty and stability offered to customers by ESP 3, the Companies agreed to continue certain rate options and programs. The Companies' witness Ridmann testified as to three of these issues. First, bill credits, designed to help customers transition to market based price, would continue for non-standard residential customers, schools, interruptible customers and domestic automaker facilities. Second, rate increases for certain customers (lighting and transmission customers) would continue to be capped. Third, rate options, such as the Economic Load Response peak demand reduction rider and time-differentiated pricing riders, would continue. (Ridmann Testimony at 4-5, NOPEC Supp. at 97-98.) The Commission found that the continuation of the rate options under ESP 2 will benefit customers. (Opinion and Order at 56, NOPEC App. at 67.) This finding was supported by the record. For example, Staff witness Fortney testified that ESP 3 provided several "qualitative" benefits that the Commission should consider, including the continuation of the rate options provided in the current ESP. Gradualism (preventing abrupt changes in rates) has traditionally been recognized as a worthwhile objective in utility rate design. (Ridmann Testimony at 4, 12, NOPEC Supp. at 97, 105.) The Commission routinely adheres to this principle. *See, e.g., In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, The Toledo Edison Company for Approval of a New Rider and Revision of an Existing Rider*, Case No. 10-176-EL-ATA, 2011 Ohio PUC LEXIS 661, Opinion and Order, at \*42-49 (May 25, 2011) (applying principle of gradualism to protect customers from rate shock) (Supp. at 215-217); *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric*

*Illuminating Company, and The Toledo Edison Company for Authority to Increase Rates for Distribution Service, Modify Certain Accounting Practices*, Case No. 07-551-EL-AIR, 2009 Ohio PUC LEXIS 58, Opinion and Order, at \*61 (Jan. 21, 2009) (same) (Supp. at 243). In fact, it's hard to understand how continuing credits, caps and other rate design features designed to reduce customers' electricity charges could *not* be a benefit.

NOPEC contends that the Commission erred by finding that the continuation of rate options and programs from ESP 2 was a benefit. (NOPEC Br. at 19.) But NOPEC fails to cite any testimony or evidence in the record to dispute the Commission's finding. NOPEC merely contends that rate options and programs cannot serve as a benefit.

Alternatively, NOPEC asserts that these benefits are "concessions the Company made to these entities as a part of the negotiated stipulation process which financially incited these individual parties to join the Partial Stipulation." (NOPEC Br. at 21.) NOPEC is wrong for at least two reasons. First, there is no support in the record regarding the motivation for any party to sign the Stipulation. Indeed, NOPEC cites nothing to support its speculative argument.

Second, even if certain benefits were provided to "incent" certain parties to agree to the Stipulation, that doesn't negate the benefits being provided. As the Commission noted, "many signatory parties receive benefits under the Stipulation, but the Commission will not conclude that these benefits are the sole motivation of any party in supporting the Stipulation." (Opinion and Order at 27, NOPEC App. at 38.) The Commission found that it "expects that parties to a stipulation will bargain in support of their own interests in deciding whether to support that stipulation." (*Id.*) NOPEC's conjecture does not show that the Commission's finding that programs were, in fact, benefits was against the manifest weight of the evidence. The Commission's Order approving ESP 3 should be affirmed.

**3. The Commission Can Consider Whether An ESP Is Consistent With The Policy Guidelines In Ohio.**

In its Order, the Commission also noted that “ESP 3 is consistent with policy guidelines in Ohio.” (Opinion and Order at 56, NOPEC App. at 67.) NOPEC complains that the Commission erred by considering these policy guidelines because they are not in Section 4928.143(B). (NOPEC Br. at 22.) NOPEC’s argument fails for at least two reasons.

First, this argument is merely a reiteration of NOPEC’s position that the Commission is limited to considering only benefits listed under Section 4928.143(B)(1) and (B)(2). As noted, NOPEC waived that argument.

Second, NOPEC’s argument is a red herring. As noted, the Commission made its determination that ESP 3 was more favorable in the aggregate than an MRO. As even NOPEC recognizes, this was what Section 4928.143(C)(1) requires the Commission to do. That the Commission went on to address the fact of ESP 3’s consistency with certain state policies, as expressed in Ohio Revised Code Section 4928.02, is of no moment. At most, the policy-consistency provided by ESP 3 can be regarded as simply another set of benefits provided by ESP 3.<sup>15</sup> At least, the consistency of ESP 3 with state policy can be regarded as unnecessary to the Commission’s decision. Because the Commission’s analysis of ESP 3 was proper under Section 4928.143(C)(1) without any consideration of policy, NOPEC’s quibbles with the Commission’s policy discussion should be dismissed.

In sum, the Commission’s finding that ESP 3 provides quantitative and qualitative benefits that are more favorable in the aggregate than an MRO is well supported by the record. NOPEC’s disagreements with whether particular quantitative and qualitative benefits should be

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<sup>15</sup> Indeed the Commission’s rules require ESP applications to explain how the proposed ESP furthers the policies set forth in Ohio Revised Code Section 4928.02. *See* Ohio Adm. Code Rule 4901:1-35-03(C)(6)-(8), App. at 29.

considered do not show that the Commission's finding is against the manifest weight of the evidence. This Court should affirm the Commission's approval of ESP 3.

**D. PROPOSITION OF LAW NO. 4: THE COMMISSION MAY TAKE ADMINISTRATIVE NOTICE OF THE RECORD IN PRIOR CASES WHEN THE PARTIES HAD KNOWLEDGE OF THE NOTICE AND THE OPPORTUNITY TO EXPLAIN AND REBUT THE EVIDENCE.**

**1. The Commission May Take Administrative Notice Of Facts And Evidence From Prior Proceedings Where A Party Had A Prior Knowledge Of And An Adequate Opportunity To Explain Or Rebut The Administratively Noticed Facts.**

In *Allen v. Pub. Util. Comm.*, 40 Ohio St.3d 184, 532 N.E.2d 1307 (1988), this Court emphasized that it has repeatedly upheld the Commission's authority to take administrative notice of the records of prior and contemporaneous Commission hearings and investigations:

[I]n *Schuster v. Pub. Util. Comm.* (1942), 139 Ohio St. 458,.... we affirmed an order in which the commission stated that it would have been derelict in its duty to the public not to have taken judicial notice of its own records, and in *J.V. McNicholas Transfer Co. v. Pub. Util. Comm.* (1975), 44 Ohio St. 2d 23,....we held that administrative notice of a zone enlargement petition proceeding was reasonable. In *Canton v. Pub. Util. Comm.* (1980), 63 Ohio St. 2d 76,.... we held that the commission's reference to a prior commission case was not improper, and in *County Commrs. Assn. v. Pub. Util. Comm.* (1980), 63 Ohio St. 2d 243,.... we concluded that it was not a denial of due process of law for the commission to take administrative notice of an investigative case in the appellants' complaint case. [40 Ohio St.3d at 185-86.]

Whether administrative notice is properly taken depends upon whether "the complaining party had prior knowledge of, and an adequate opportunity to explain and rebut, the facts administratively noticed." *Id.* at 186. Further, "prejudice must be shown before we will reverse an order of the Commission." *Id.* In *Allen*, this Court affirmed the Commission's taking of administrative notice of the record in a prior proceeding and further held that it was "reasonable and lawful" for the Commission to base its order on the administratively noticed material. *Id.* at 185. Notably, because the *Allen* appellants were parties to the prior proceeding at issue, this

Court held that they “arguably had knowledge of, and an adequate opportunity to explain and rebut, the evidence.” *Id.* at 186.

**2. NOPEC Had Adequate Notice And Ample Opportunity To Respond To The Commission’s Taking of Administrative Notice Of Record Evidence From Prior Proceedings To Which NOPEC Was A Party.**

NOPEC had adequate notice and ample opportunity to respond to the Commission’s taking of administrative notice. Some seven weeks prior to the hearing, the Companies, in the ESP 3 Application, requested that the Commission take administrative notice of record evidence from the ESP 2 case (which contained the record of the Companies’ Case No. 09-906). (Case No. 12-1230-EL-SSO Application at 5, NOPEC Supp. at 29.) As the Commission observed in its Opinion and Order, having been on notice of this request of the Companies, NOPEC could have served discovery regarding this material and subpoenaed relevant witnesses. (Opinion and Order at 20; NOPEC App. at 31.) NOPEC did neither.

On the first day of the hearing, the Attorney Examiner advised the parties that if the Companies provided a list of specific documents from the prior proceedings, then, “I’m sure that administrative notice will be liberally taken.” (Tr. Vol. I at 29, Supp. at 59.) During the hearing, the Companies subsequently provided the Commission with a short list of the portions of the record from the Companies’ prior SSO cases for which the Companies sought, and the Commission granted, administrative notice. (Tr. Vol. III at 11-12, 171, Supp. at 83-84, 107.)

Further, and on point with the facts in *Allen*, NOPEC was a *full participant and party of record in the prior proceedings* subject to administrative notice. Indeed, NOPEC was a signatory party to the Stipulation in the ESP 2 case and participated in the creation of the record for that matter. (Case No. 10-388-EL-SSO, Second Supplemental Stipulation, Signature page, NOPEC Supp. at 278-279.) NOPEC thus had intimate familiarity with the administratively noticed material. Moreover, the fact that only select portions of the record from these prior

proceedings were subject to administrative notice further weakens NOPEC's claims here. (*See* Tr. Vol. III at 11-12, Supp. at 83-84.)

Moreover, NOPEC had ample opportunity to respond to and rebut the administratively noticed material. For example, NOPEC could have counter-designated portions of the record evidence at issue (about which it was quite knowledgeable), but chose not to do so. Similarly, NOPEC could have disputed the records of the prior proceedings of which it was a party, but again chose not to do so. NOPEC also failed to move the tribunal for additional time to present evidence. Thus, NOPEC cannot now complain that it had inadequate notice or lacked the opportunity to review and rebut the evidence that the Commission administratively noticed.

**3. NOPEC Was Not Prejudiced By The Commission's Taking Of Administrative Notice.**

As noted, NOPEC cannot demonstrate – and has not demonstrated – that the Commission's taking of administrative notice of a portion of the records in Companies' prior ESP cases prejudiced NOPEC in any way. Indeed, as the Commission rightly found:

[NOPEC] ha[s] had the opportunity to request FirstEnergy to specifically identify the evidence in the record of those proceedings that they intend to seek -- intend to rely upon in this proceeding. They had the ability to request a subpoena to compel witnesses from those proceedings to appear for further cross-examination of this hearing. They had the opportunity to cross-examine the witnesses at this hearing regarding any issues raised in those proceedings, and they had the opportunity to present testimony at this hearing to explain or rebut any of the evidence in the record of that proceeding.

(Tr. Vol. III at 171, Supp. at 107.)

NOPEC claims that it was unable to cross-examine various witnesses from the prior proceedings. Not so. NOPEC had that right to cross examine those witnesses when it participated in those proceedings. (Case No. 12-1230-EL-SSO, Opinion and Order, at 4, NOPEC App. at 15; Case No. 10-388-EL-SSO, Opinion and Order at 5, NOPEC App. at 157.)

In any event, NOPEC misses the point. Under *Allen*, the determinative issues are whether NOPEC had an opportunity to explain or rebut this evidence and whether it was prejudiced; not whether the testimony contained within the administratively noticed evidence is subject to cross-examination. See *Allen*, 40 Ohio St.3d at 185-86. NOPEC has failed to show that it was denied an opportunity to explain or rebut this evidence. Notably, NOPEC did not ask for more time to seek any discovery regarding the evidence. NOPEC did not ask for additional time to rebut the evidence. Instead, NOPEC merely objected to the Commission's order granting administrative notice. (Tr. Vol. III at 15-16, Supp. at 85-86.) Due to its own inaction throughout the discovery period and at hearing, NOPEC cannot now plausibly claim that it was somehow prejudiced by the Commission's taking of administrative notice.

**4. The Taking of Administrative Notice Did Not Lessen The Companies' Burden Of Proof.**

Relying on *Canton Storage and Transfer Co., Inc. v. Pub. Util. Comm.*, 72 Ohio St.3d 1, 647 N.E.2d 136 (1995), NOPEC contends that the Commission's action taking administrative notice of selected parts of the records from the Companies' prior ESP cases was improper because doing so lessened the Companies' burden of proof. (NOPEC Br. at 40.) This argument misses the mark for the simple reason that *Canton Storage* is inapplicable to this case. In that case, this Court held that the Commission improperly took administrative notice of testimony used to support the "applications of twenty-two motor carriers for authority to transport household goods throughout the state of Ohio." *Id.* at 1. Each application for a certificate of public convenience needed at least two supporting witnesses. *Id.* at 6.

The Commission claimed that it had taken administrative notice of the testimony of twenty witnesses and found this sufficient for approving all twenty-two applications on a "unified basis." *Id.* at 8. This Court rejected the Commission's approach for two reasons. First,

the Court held that the Commission “never expressly took administrative notice of any testimony below,” but simply relied upon all the testimony, as a whole, to support each individual application. *Id.* Second, because the two-witness rule per individual application was not met, the Court held that any use of administrative notice would have the effect of lessening the burden of proof for applicants who failed to submit two witnesses. *Id.* at 8-9.

This case is distinguishable from *Canton Storage*. Here, the Commission expressly took administrative notice of selected portions of the record evidence at issue. (Tr. Vol. III at 170-171, Supp. at 106-107.) In doing so, the Commission did not in any way reduce the Companies’ burden of proof. In *Canton Storage*, testimony from an inadequate number of witnesses to the same proceeding was being used to support multiple simultaneous applications from different parties. Further, taking administrative notice violated the requirement that applications be supported by two witnesses. Neither issue applies here. Instead, and in line with *Allen*, the Commission here administratively noticed record evidence from the Companies’ prior ESP 2 case that also directly supported the Companies’ ESP 3 application. This is consistent with ESP 3 being a slightly modified extension of ESP 2. Also, taking administrative notice violated no Commission requirement. Thus, NOPEC’s reliance on *Canton Storage* is misplaced.

**5. The Commission Is Not Obligated To Follow Or Adopt Rule 201 Of The Ohio Rules Of Evidence For Use In Commission Proceedings.**

NOPEC concedes that “the Commission is not stringently confined to the rules of evidence.” Nevertheless, NOPEC asks this Court to require the Commission to follow Rule 201 of the Ohio Rules of Evidence when determining whether to take administrative notice. (NOPEC Br. at 40-41.) NOPEC’s argument should be summarily discarded.

To begin, NOPEC incorrectly contends that Section 4903.22 of the Ohio Revised Code shows that “the Legislature has intended that the Ohio Rules of Evidence apply in Commission

Proceedings.” *Id.* This misreads the plain language of that statute. Section 4903.22 applies to “processes in actions and proceedings *in a court.*” R.C. § 4903.22, App. at 9 (emphasis added). As this Court has long held, “The public utilities commission is in no sense a court.” *Village of New Bremen v. Pub. Util. Comm.*, 103 Ohio St. 23, 30, 132 N.E. 162 (1921).

Moreover, NOPEC’s request conflicts with this Court’s repeatedly held view that the rules of evidence do not apply to administrative agencies. *See, e.g., Bd. of Educ. For Orange City Sch. Dist. v. Cuyahoga County Bd. of Revision*, 74 Ohio St.3d 415, 417, 659 N.E.2d 1223 (1996) (quoting Section 5(B), Article 4, Ohio Constitution) (“Evid.R. 101(A) does not mention administrative agencies as forums to which the Rules of Evidence apply. Indeed, the constitutional authority under which the rules were promulgated extends only to ‘rules governing practice and procedure in all courts of the state.’”). As NOPEC is also forced to acknowledge, this Court has specifically held that “the commission is not stringently confined by the Rules of Evidence.” *Greater Cleveland Welfare Rights Org., Inc. v. Pub. Util. Comm.*, 2 Ohio St.3d 62, 67-68, 442 N.E.2d 1288 (1982). *See also Cincinnati Bell Tel. Co. v. Public Util. Comm.*, 12 Ohio St.3d 280, 288, 466 N.E.2d 848 (1984)(same). This Court has also long held that the Commission, as with other administrative agencies, has wide discretion to fashion rules and procedures for its own proceedings. *See Weiss v. Pub. Util. Comm.*, 90 Ohio St.3d 15, 19, 734 N.E.2d 775 (2000) (“Under R.C. 4901.13 the commission has broad discretion in the conduct of its hearings” and that “the commission has the discretion to decide how, in light of its internal organization and docket considerations, it may best proceed to manage and expedite the orderly flow of its business, avoid undue delay and eliminate unnecessary duplication of effort.”).

The Commission was not – and should not be – required to follow the Ohio Rules of Evidence for purposes of taking administrative notice, or otherwise. NOPEC and all other

parties to this case had proper notice and an opportunity to explain or respond to the evidence that was administratively noticed. That was all that those parties were entitled to receive.

NOPEC's argument to the contrary is baseless.

**E. PROPOSITION OF LAW NO. 5: WHERE ALL PARTIES ARE GIVEN THE OPPORTUNITY TO PARTICIPATE IN SETTLEMENT DISCUSSIONS, THE RESULTING STIPULATION CAN BE FOUND TO BE THE PRODUCT OF SERIOUS BARGAINING.**

NOPEC contends that the Commission erred by approving the Stipulation because it was not the result of serious bargaining among capable, knowledgeable parties. (NOPEC Br. at 43.) To "support" its argument, NOPEC makes a series of unsupported claims. NOPEC says the Commission's approval of the Stipulation was unreasonable because "serious bargaining" requires that: (1) every customer class agree to a stipulation; and (2) group discussions be held. (NOPEC Br. at 46, 48.) NOPEC is wrong on both fronts.

**1. Ohio Law Does Not Require That Every Customer Class Agree To A Stipulation Or That Group Negotiations Be Held.**

The Commission's settlement approval test has never been an exercise in nose counting about who agreed to the settlement. The test does not require that all parties agree to a stipulation or that the parties participate in group discussions. Rather, the first part of the test – whether the settlement is the product of serious bargaining among capable, knowledgeable parties – focuses on *the process* and whether it was fair. This test does not depend on which parties ultimately supported the settlement.

To be sure, in *Time Warner AxS v. Pub. Util. Comm.*, 75 Ohio St.3d 229, 661 N.E.2d 1097 (1996), this Court expressed "grave concern" when it found intentional exclusion of an "entire customer class" from settlement negotiations. *Id.* at 233, n. 2. Yet, this Court observed, "[W]e would not create a requirement that all parties participate in all settlement meetings." *Id.*

In *Constellation NewEnergy, Inc. v. Pub. Util. Comm.*, 104 Ohio St.3d 530, 2004-Ohio-6767, 820 N.E.2d 885, this Court clarified its dicta in *Time Warner*. In that case, a party had been excluded from settlement talks. Nevertheless, this Court affirmed the Commission's approval of the stipulation and rejected an argument that the exclusion of a party ran afoul of *Time Warner*. *Id.* ¶ 24. This Court quoted the Commission, "[S]ince representatives on behalf of DP&L residential, commercial, and industrial customers all participated in the settlement process and signed the Stipulation, no entire customer class was excluded." *Id.* ¶ 22. Thus, this Court affirmed the Commission's finding that "[t]he factual predicate upon which the *Time Warner* admonition was premised is simply not presented in this case." *Id.*

The Commission correctly found that the same could be said here. (Opinion and Order at 27, NOPEC App. at 38.) Not only was no customer class excluded from participation in settlement negotiations, but no party was excluded. (*Id.*)<sup>16</sup>

Further, the Commission correctly found that there is no requirement for a group meeting for all parties to discuss a settlement. (Opinion and Order at 26, NOPEC App. at 37.) Indeed, the Commission pointed out the problems with imposing such a requirement. It noted that many parties are located out of state. (*Id.*) Given the advances in technology, settlement discussions can be quickly and easily shared with parties located in or out of the state. (*Id.*) Tellingly, NOPEC fails to mention that it never even requested such a meeting. Nor does NOPEC explain

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<sup>16</sup> Notably, even if the appropriate test for Commission approval of a stipulation was whether all customer classes supported it, the record shows that the Stipulation here would pass that test. The Stipulation was signed by, among others, the Commission Staff, Ohio Partners for Affordable Energy ("OPAЕ"), the Empowerment Center of Cleveland, the Consumers Protection Association, the Cleveland Housing Network and the City of Akron. (*See* Stipulation, signature pages, NOPEC Supp. at 81-82.) All of these parties indisputably represent the interests of residential customers. (*See* Tr. Vol. III at 113, Supp. at 95.) NOPEC fails to present a single shred of evidence to show that the interests of the customers represented by these parties differ in any way from the interests of any other residents with regard to the issues presented by ESP 3 or the Stipulation.

why, if NOPEC wanted to hear the views of other parties, NOPEC could not have talked to those parties. Thus, the Commission's approval of the Stipulation and the Commission's finding that the Stipulation was the product of serious bargaining by capable and knowledgeable parties was well supported by the record and by this Court's precedents.

**2. The Commission's Approval Of The Stipulation Process Was Supported By The Evidence.**

Apart from NOPEC's attack on the settlement process as legally deficient, NOPEC also attempts to challenge the factual sufficiency of that process. NOPEC states three things that, per NOPEC, suggest that the parties did not engage in serious bargaining. None has any support.

First, NOPEC contends that the signatory parties hastily signed the Stipulation because they "made a nearly \$300,000,000 mistake." (NOPEC Br. at 43.) Incredibly, NOPEC claims that this "mistake" was that the Companies were claiming their forbearance of recovering certain transmission costs as a quantitative benefit of ESP 3 versus an MRO. (*Id.* at 43-44.) This is utterly unsupported. Regardless of how NOPEC colors its speculation (whether claiming that "only one logical explanation remains" or that NOPEC has "no doubt" why the parties signed the stipulation) (NOPEC Br. at 44), NOPEC cannot point to a single fact that even remotely provides a factual basis for this claim.<sup>17</sup>

Second, NOPEC asserts that the Company engaged in selective negotiations with parties representing residential customers and ignored the "broad interests of the remainder." (NOPEC Br. at 46.) This is simply disingenuous. NOPEC witness Frye admitted that *NOPEC had an opportunity to review and comment on the draft Stipulation.* (Tr. Vol. III at 26, Supp. at 88.) NOPEC has no standing to make this argument.

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<sup>17</sup> Similarly, NOPEC falsely asserts that Staff witness Fortney's testimony was filed "to salvage the Partial Stipulation." (NOPEC Br. at 25.) There is no factual support for this claim.

NOPEC also is just plain wrong. The record supports the Commission's finding that "every party to the ESP 2 Case was contacted by FirstEnergy during the negotiations and that each party was given an opportunity to review and comment upon the draft stipulation before it was filed with the application in this proceeding." (Opinion and Order at 27 (citing Tr. Vol. III, p. 101), NOPEC App. at 38.) The record shows that the Companies provided all parties with a draft of the ESP 3 Stipulation. (Stipulation at 4, NOPEC Supp. at 38; Tr. Vol. I at 25, 26, 101, Supp. at 57, 68, 64.) And parties were involved in the negotiations regarding the changes presented in ESP 3 from the current ESP. (Ridmann Testimony at 13-14, NOPEC Supp. at 106-107.) In addition, negotiations continued past the time of the filing of the Application and Stipulation. (Tr. Vol. I at 41, Supp. at 62; Fein Testimony, Attachment A, Supp. at 51-53; *see also* Co. Ex. 7, Supp. at 110-113.)

Third, NOPEC alleges the "extent of bargaining, if any, could be that the Company's only accommodation to residential interests was to fund their low- and moderate-income projects." (NOPEC Br. at 47.) Again, NOPEC has no support for this allegation. Indeed, the inference that the participation of these parties in the Stipulation should be somehow discounted because they received benefits under the ESP also is improper. The Commission correctly found that "many signatory parties receive benefits under the Stipulation, but the Commission will not conclude that these benefits are the sole motivation of any party in supporting the Stipulation." (Opinion and Order at 27, NOPEC App. at 38.) Nor can NOPEC point to anything that shows that these parties were unable to assess the total character of the Stipulation to determine that the Stipulation overall represented a good deal for any party and the interests that it represents.

In sum, NOPEC utterly fails to show that the Commission's approval of the Stipulation was unreasonable or unlawful. NOPEC's arguments are contrary to the law and the record in

this case. NOPEC's factual disputes are unfounded. This Court should affirm the Commission's order approving the Stipulation process and ESP 3.

**F. PROPOSITION OF LAW NO. 6: AN ADMINISTRATIVE AGENCY'S INTERPRETATION OF ITS OWN REGULATIONS IS ENTITLED TO DEFERENCE AND ITS DETERMINATION THAT A PARTY COMPLIED WITH ITS REGULATIONS IS PROPER WHEN SUPPORTED BY RECORD EVIDENCE.**

ELPC raises one issue on appeal. ELPC contends that the Commission's approval of ESP 3 was unlawful because the Companies' Application did not comply with the format set forth in Ohio Administrative Code Rule 4901:1-35-03(C)(1). That rule is the Commission's rule governing the filing and contents of applications for approval of an ESP. It requires that an ESP application include, "a complete description of the ESP and testimony explaining and supporting each aspect of the ESP." ELPC argues that the improper form of the Companies' Application renders the Commission's order approving ESP 3 unlawful.

As an initial matter, ELPC's proposed standard of review is incomplete. To be sure, ELPC correctly points out that the Court "has complete and independent power of review" over questions of law. (ELPC Br. at 5-6, citing *Indus. Energy Consumers v. Public Util. Comm.*, 68 Ohio St.3d 559 (1994).) But this Court applies a deferential standard when it reviews an administrative agency's interpretation of its own rules or regulations. *State ex rel. Kroger Co. v. Stover*, 31 Ohio St.3d 229, 235, 510 N.E.2d 356 (1987). *See also, State ex rel. Saunders v. Indus. Comm.*, 101 Ohio St.3d 125, 2004-Ohio-339, 802 N.E.2d 650, ¶ 41. Because ELPC challenges how the Commission applied its own rule to the Companies' filing of ESP 3, this Court should apply a deferential standard of review.

Here, the Commission found that the Companies' Application complied with Rule 4901:1-35-03(C)(1). In its Order, the Commission found that "neither ELPC nor any other party has identified any specific provision of Chapter 4901:1-1-35, O.A.C., that the application fails to

meet where such provision has not been waived by the Commission.” (Opinion and Order at 46, ELPC App. at 99.) The Commission also rejected arguments regarding the length of the Companies’ application and found that Rule 4901:1-35-03(C)(1) has “no minimum length requirement for an application.” (*Id.*)

Importantly, the Commission also addressed the Companies’ compliance with Rule 4901:1-35-03 in its April 25, 2012 Entry in this case. In that Entry, the Commission responded to the Companies’ requests for waivers of some of the requirements in Rule 4901:1-35-03(C)(1). Specifically, in seeking waivers of certain of the filing requirements, the Companies stated that “the ESP proposed in the application is the result of a stipulation reflecting participation of numerous interested parties who have considerable familiarity with the subject matter and issues presented....” (Case No. 12-1230-EL-SSO, Entry at 2 (April 25, 2012), ELPC App. at 48.) The Companies also stressed that “ESP 3 essentially carries forward for an additional two years the provisions, schedules, and impacts of the existing ESP 2, for which workpapers were available and reviewed during the consideration of ESP 2.” (*Id.* at 3, ELPC App. at 49.)

In its April 25, 2012 Entry, the Commission found that “the application and stipulation filed in this proceeding appear on their face to extend for an additional two years, with modifications, the electric security plan originally modified and approved by the Commission in ESP 2.” (*Id.* at 5, ELPC App. at 51.) As a result, the Commission found that this extension provided good cause to waive some of the filing requirements under Rule 4901:1-35-03. (*Id.*)

The Commission also considered the objections of other parties (including ELPC) to the Companies’ request for waivers. With regard to information that addressed the areas of ESP 3 that differed from ESP 2, the Commission required the Companies to submit supplemental information. (*Id.*) There is no dispute that the Companies complied with that order and filed --

as OCC described – “voluminous additional materials.” (Opinion and Order at 46, ELPC App. at 99.) The Commission thus properly found that the Companies’ Application and supporting material complied with Rule 4901:1-35-03(C)(1).

Nonetheless, ELPC contends that the Commission did not properly apply its Rule 4901:1-35-03(C)(1). As it failed to do before the Commission, ELPC here again fails to explain how the Commission’s interpretation of its own Rule 4901:1-35-03(C)(1) is unlawful. ELPC does not contend that the Commission’s interpretation conflicts with the plain language of the rule or that it is wrong as a matter of law. ELPC’s arguments thus boil down to essentially three factual disputes over the Commission’s finding that the Companies’ Application and other filings met the requirements of Rule 4901:1-35-03(C)(1). None of these factual disputes shows that the Commission acted improperly, much less unlawfully.

First, ELPC contends that the Companies’ Application failed to contain testimony “explaining and supporting the aspects” of ESP 3. (ELPC Br. at 8.) ELPC’s argument lacks substance. ELPC does not dispute that the testimony filed by the Companies’ witness Ridmann specifically addressed those parts of ESP 3 that differed from ESP 2. As noted, the Application also specifically requested administrative notice of the materials that the Companies had filed in support of their prior ESPs in order to support the remainder of ESP 3’s provisions. Thus, ELPC’s problem with the completeness of the Companies’ filing appears to be that the Commission took administrative notice of part of a prior ESP record. (*Id.*)

ELPC’s argument that the Commission can’t use administratively noticed materials is absurd.<sup>18</sup> For example, in the ESP 2 case, the Commission already found that the materials

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<sup>18</sup> ELPC also wrongly claims that the Companies acknowledged deficiencies in their Application by requesting administrative notice. (ELPC Br. at 10.) Because the elements of ESP 3 supported by the administratively noticed material are unchanged from ESP 2, and have

administratively noticed from one of the Companies' prior SSO cases, were sufficient to meet the filing requirements of ESP 2. (Case No. 10-388-EL-SSO, Entry at 2-3 (April 6, 2010), Supp. at 116-117.) Thus, ELPC cannot show that finding that these materials supported the same provisions that were contained within ESP 3 was against the manifest weight of the evidence.

ELPC also points to four "examples" where it contends the Companies' Application only mentions provisions of the ESP and "does not describe or explain" the ESP. (ELPC Br. at 9-10.) But the Stipulation provisions to which ELPC points were supported in the administratively noticed materials from prior ESP cases. The testimony of witnesses in the prior SSO cases addresses and supports these issues, as shown below:

<b>ESP 3 Provisions Identified By ELPC As Lacking Record Support</b>	<b>Record Support</b>
"ESP 3 carries forward the seasonality factors that adjust rates for changes in how electricity is used throughout the year, but Mr. Ridmann's testimony does not describe or explain why." (ELPC Br. at 9.)	<i>See</i> Warvell Direct Testimony at 5-6; 16 (Oct. 20, 2009) (Case No. 09-906-EL-SSO) (Supp. at 167-168); Fanelli Direct Testimony at 4-5 (Oct. 20, 2009) (Case No. 09-906-EL-SSO) (Supp. at 194-195.)
"ESP 3 includes a flat rates structure for its residential rates, but Mr. Ridmann's testimony does not describe or explain why." (ELPC Br. at 9.)	<i>See</i> Ridmann Direct Testimony at 5 (March 31, 2010) (Case no. 10-388-EL-SSO) (Supp. at 126); Fortney Supplemental Testimony, <i>passim</i> (June 10, 2010) (Case No. 10-388-EL-SSO) (Supp. at 151-161.)
"Some customers purchase their power from a competitive provider rather than FirstEnergy. But these customers still use FirstEnergy for other services such as distribution. ESP 3 allows these customers to be exempt from the Generation Cost Reconciliation Rider up to a certain point, but Mr. Ridmann's testimony does not describe or explain why." (ELPC Br. at 9.)	<i>See</i> Turkenton Direct Testimony at 3 (April 17, 2010) (Case No. 10-388-EL-SSO) (NOPEC Supp. at 284-288.)

(continued...)

been previously litigated and approved and because ESP 3 is essentially an extension of the terms and conditions of ESP 2, there is no reason why the Companies, per the request in their ESP 3 Application, could not rely on the administratively noticed materials.

“ESP 3 allows for continuation of time-differentiated pricing concepts that were previously approved in January 2010, but Mr. Ridmann’s testimony only mentions that they exist without explaining or supporting them.” (ELPC Br. at 10.)

*See* Warvell Direct Testimony at 21 (Oct. 20, 2009) (Case No. 09-906-EL-SSO) (Supp. at 183); Fanelli Direct Testimony at 5-8 (Oct. 20, 2009) (Case No. 09-906-EL-SSO) (Supp. at 195-198.)

In any event, ELPC’s list of “examples” misses the point. Instead of disputing whether the Application and testimony support every detail of ESP 3, ELPC should address whether the Companies’ Application supported those aspects of ESP 3 that are different from ESP 2. The differences between ESP 3 and ESP 2 – the three-year bid product and the extended recovery of renewable energy credit costs incurred to meet its SB 221 alternative energy requirements costs – were well supported by the Companies’ Application. (Ridmann Testimony at 3-4, 8, 11-12, 15, NOPEC Supp. at 96, 97, 101, 104-108; Ridmann Supplemental Testimony at 5, Supp. at 6 (three-year product); Ridmann Testimony at 8; 15, NOPEC Supp. at 101, 108 (alternative energy cost recovery).) Second, ELPC complains about the length of testimony that the Companies filed. It claims that the Companies’ previous filings in support of its prior ESPs were longer. (ELPC Br. at 10-11.) This begs the question: so what? ELPC has no basis to contend that the Commission’s enforcement of Rule 4901:1-35-03(C)(1) is simply an exercise in page counting. Nor is there any statutory support for a minimum page requirement. ELPC does not contend that the ESP 3 Application, accompanying testimony and other materials filed by the Companies do not support or explain the differences between the provisions of ESP 3 and ESP 2. The Commission previously found that the materials filed in the prior ESP cases supported those plans. Thus, ELPC’s mindless call for more volume in the Companies’ filings is absurd.

Third, ELPC argues that the materials relied upon by the Companies – and particularly, the administratively noticed materials – do not reflect the current market. (ELPC Br. at 12.)

ELPC's "support" for this claim makes no sense. ELPC points out that OCC witness Wilson testified that there are uncertainties in the market and that "you just never know" what will happen in the auction markets. (ELPC Br. at 13 (quoting Tr. Vol. II at 151-153).) But the uncertainty in the markets simply does not have anything do with whether the materials that the Companies relied upon (including the administratively noticed materials) explain and support each aspect of the ESP. The Companies' last two ESPs (ESP 2 and now ESP 3) took market uncertainty as a given. Hence, the Companies proposed in both ESPs a laddered procurement strategy as an appropriate mitigation technique to deal with that very risk. The reason for the laddering strategy was explained in the ESP 2 record. (Case No. 10-388-EL-SSO, Opinion and Order at 8, 36, NOPEC App. at 160, 188), and by Companies' witness Ridmann here. (Ridmann Supplemental Testimony at 5-6, Supp. 6-7; Tr. Vol. I. at 172, Supp. at 75) Further, as the Companies' explained, to the extent prices during the ESP 3 were known (*i.e.*, the price for capacity), those were going to be increasing. (Tr. Vol. I at 154-155, Supp. at 73-74; AEPR Ex. 2, Supp. at 108-109) Thus, blending current lower prices with potentially higher future prices through laddering benefitted customers by smoothing out charges over time. (Ridmann Supplemental Testimony at 5-6, Supp. at 6-7; Tr. Vol. I at 172, Supp. at 75.)

To the extent that ELPC was concerned about the relevance of material from prior ESP cases, ELPC could have sought discovery or cross examined the Companies' witnesses at the hearing. As the Commission correctly pointed out, ELPC did not take advantage of that opportunity. (Second Order on Rehearing at 7, ELPC App. at 144.) ELPC thus has failed to show that the Companies failed to meet the filing requirements under Rule 4901:1-35-03(C)(1).

In sum, ELPC contends that the Commission must “rigidly” enforce its rules.<sup>19</sup> (ELPC Br. at 14.) But ELPC wants the Commission to enforce requirements that are not set forth in any rule. ELPC has wholly failed to show that the Commission did not follow Rule 4901:1-35-03(C)(1). Given this Court’s deference to the Commission’s interpretation of its own rules, ELPC could not meet this burden. The Commission’s Order should be affirmed.

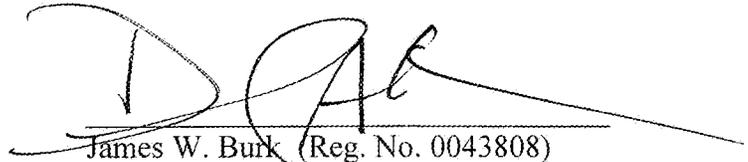
## V. CONCLUSION

For the foregoing reasons, the Commission’s Order approving ESP 3 should be affirmed.

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<sup>19</sup> ELPC cites to *Matz v. J. L. Curtis Cartage Co.*, 132 Ohio St. 271, 284, 7 N.E.2d 220 (1937), for the proposition that the “Commission must ‘rigidly enforce’ its rules.” (ELPC Br. at 14.) However, ELPC fails to provide the context in which *Matz* took place, a wrongful death action involving a common carrier. Indeed, the full quotation reads, “Not only the provisions of law, but the rules and regulations of the commission authorized by statute, *which are designed for the safety of the traveling public*, should be rigidly enforced by the commission.” 132 Ohio St. at 284 (citation omitted) (emphasis added). Hence, *Matz* has little, if anything, to do with the matter at hand.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'D A B', with a long horizontal line extending to the right from the end of the signature.

James W. Burk (Reg. No. 0043808)  
Carrie M. Dunn (Reg. No. 0076952)  
FIRSTENERGY SERVICE COMPANY  
76 South Main Street  
Akron, OH 44308  
(330) 384-5861  
(330) 384-3875 (fax)  
burkj@firstenergycorp.com  
cdunn@firstenergycorp.com

David A. Kutik (Reg. No. 0006418)  
(Counsel of Record)  
JONES DAY  
901 Lakeside Avenue  
Cleveland, OH 44114  
(216) 586-3939  
(216) 579-0212 (fax)  
dakutik@jonesday.com

Attorneys for Intervening Appellees, Ohio  
Edison Company, The Cleveland Electric  
Illuminating Company and The Toledo Edison  
Company

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Merit Brief and Appendix of Intervening Appellees Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company was delivered to the following by regular mail this 20th day of August, 2013:



David A. Kutik (Reg. No. 0006418)  
(Counsel of Record)

Robert Kelter (admitted pro hac vice)  
(Counsel of Record)  
Justin Vickers (admitted pro hac vice)  
Nick McDaniel (0089817)  
ENVIRONMENTAL LAW AND POLICY  
CENTER  
1207 Grandview Avenue, Suite 201  
Columbus, OH 43212  
Telephone: (614) 488-3301  
rkelter@elpc.org  
jvickers@elpc.org  
nmcDaniel@elpc.com

Counsel for Appellant  
Environmental Law and Policy Center

Glen S. Krassen (Reg. No. 0007610)  
BRICKER & ECKLER LLP  
1001 Lakeside Avenue, Suite 1350  
Cleveland, OH 44114  
Telephone: (216) 523-5405  
Facsimile: (216) 524-7101  
gkrassen@bricker.com

Richard Michael DeWine  
(Reg. No. 0009181)  
Attorney General of Ohio  
William L. Wright (Reg. No. 0018010)  
Section Chief, Public Utilities Section  
Thomas McNamee (Reg. No. 0017352)  
Assistant Attorneys General  
PUBLIC UTILITIES COMMISSION OF OHIO  
180 East Broad Street, 6th Floor  
Columbus, OH 43215  
Telephone: (614) 466-4397  
Facsimile: (614) 644-8764  
wlliam.wright@puc.state.oh.us  
thomas.mcnamee@puc.state.oh.us

Counsel for Appellee, Public Utility  
Commission of Ohio

Mathew W. Warnock (Reg. No. 0082368)  
J. Thomas Siwo (Reg. No. 0088069)  
BRICKER & ECKLER LLP  
100 South Third Street  
Columbus, OH 43215-4291  
Telephone: (614) 227-2300  
Facsimile: (614) 227-2390  
mwarnock@bricker.com  
tsiwo@bricker.com

Counsel for Appellant  
Northeast Ohio Public Energy Council

**IN THE SUPREME COURT OF OHIO**

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

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**APPENDIX TO  
MERIT BRIEF OF INTERVENING APPELLEES OHIO EDISON COMPANY, THE  
CLEVELAND ELECTRIC ILLUMINATING COMPANY AND  
THE TOLEDO EDISON COMPANY**

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Glen S. Krassen (Reg. No. 0007610)  
BRICKER & ECKLER LLP  
1001 Lakeside Avenue, Suite 1350  
Cleveland, OH 44114  
Telephone: (216) 523-5405  
Facsimile: (614) 227-2390  
gkrassen@bricker.com

Mathew W. Warnock (Reg. No. 0082368)  
J. Thomas Siwo (Reg. No. 0088069)  
BRICKER & ECKLER LLP  
100 South Third Street  
Columbus, OH 43215-4291  
Telephone: (614) 227-2300  
Facsimile: (614) 227-2390  
mwarnock@bricker.com  
tsiwo@bricker.com

Counsel for Appellant  
Northeast Ohio Public Energy Council

James W. Burk (0043808)  
Carrie M. Dunn (0076952)  
FIRSTENERGY SERVICE COMPANY  
76 South Main Street  
Akron, OH 44308  
(330) 384-5861  
(330) 384-3875 (fax)  
burkj@firstenergycorp.com  
cdunn@firstenergycorp.com

David A. Kutik (0006418)  
Counsel of Record  
JONES DAY  
901 Lakeside Avenue  
Cleveland, OH 44114  
(216) 586-3939  
(216) 579-0212 (fax)  
dakutik@jonesday.com

Attorneys for Intervening Appellees, Ohio  
Edison Company, The Cleveland Electric  
Illuminating Company and The Toledo Edison  
Company

Robert Kelter (admitted pro hac vice)  
(Counsel of Record)  
Justin Vickers (admitted pro hac vice)  
Nick McDaniel (0089817)  
ENVIRONMENTAL LAW AND POLICY  
CENTER  
1207 Grandview Avenue, Suite 201  
Columbus, OH 43212  
Telephone: (614) 488-3301  
rkelter@elpc.org  
jvickers@elpc.org  
nmcDaniel@elpc.com

Counsel for Appellant  
Environmental Law and Policy Center

Richard Michael DeWine  
(Reg. No. 0009181)  
Attorney General of Ohio  
William L. Wright (Reg. No. 0018010)  
Section Chief, Public Utilities Section  
Thomas McNamee (Reg. No. 0017352)  
Assistant Attorneys General  
PUBLIC UTILITIES COMMISSION OF  
OHIO  
180 East Broad Street, 6<sup>th</sup> Floor  
Columbus, OH 43215  
Telephone: (614) 466-4397  
Facsimile: (614) 644-8764  
william.wright@puc.state.oh.us  
thomas.mcNamee@puc.state.oh.us

Counsel for Appellee, Public Utilities  
Commission of Ohio

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BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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

ENTRY

The Commission finds:

- (1) Ohio Edison Company (OE), The Cleveland Electric Illuminating Company (CEI), and The Toledo Edison Company (TE) (collectively, FirstEnergy) are public utilities as defined in Section 4905.02, Revised Code, and, as such, are subject to the jurisdiction of this Commission.
- (2) On April 13, 2012, FirstEnergy filed an application, pursuant to Section 4928.141, Revised Code, to provide for a standard service offer (SSO) commencing as early as May 2, 2012, but no later than June 20, 2012, and ending May 31, 2016. The application is for an electric security plan (ESP), in accordance with Section 4928.143, Revised Code, and the application includes a stipulation agreed to by various parties regarding the terms of the proposed ESP (ESP 3). FirstEnergy states that the stipulation is the product of lengthy, serious bargaining among knowledgeable and capable parties in a cooperative process. Additionally, FirstEnergy states that it and numerous other parties have engaged in a wide range of discussions over a period of time related to the development of the ESP 3, which extends, with modifications, a stipulation and second supplemental stipulation modified and approved by the Commission in Case No. 10-388-EL-SSO (ESP 2) for an additional two years.
- (3) Further, on April 13, 2012, FirstEnergy filed a motion for waivers of certain procedural requirements for electric security plans contained in Rule 4901:1-35-03, Ohio Administrative Code (O.A.C.), as well as a request for expedited consideration.

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

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

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

Next, FirstEnergy seeks a waiver of Rule 4901:1-35-03(C)(6), O.A.C., stating that it will continue to maintain systems necessary to account for customer participation in governmental aggregation programs. Further, FirstEnergy

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

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

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

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

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

- (6) On April 18, 2012, Direct Energy Services, LLC, Direct Energy Business, LLC, and IGS Energy, Inc. (collectively, Direct and IGS), filed a joint memorandum contra FirstEnergy's motion for waivers. In their memorandum contra, Direct and IGS specifically dispute FirstEnergy's requests for waiver of Rule 4901:1-35-03(C)(2), O.A.C., requiring pro forma financial projections, and Rule 4901:1-35-06, O.A.C., governing hearings and interventions. Direct and IGS argue that granting of these waivers would not allow parties adequate time to evaluate the BSP or to make a decision whether to intervene in the ESP.
- (7) Additionally, on April 18, 2012, FirstEnergy filed a memorandum contra OCEA's motion to bifurcate issues as well as a reply to the memoranda contra filed by OCEA and Direct and IGS.
- (8) Moreover, on April 20, 2012, AEP Retail Energy Partners, LLC, filed a memorandum contra FirstEnergy's request for waivers.
- (9) Thereafter, on April 20, 2012, Direct and IGS filed a joint motion to partially strike FirstEnergy's reply to the memoranda contra filed by OCEA and Direct and IGS. In their joint motion, Direct and IGS point out that FirstEnergy filed its April 13, 2012, motion for waivers with a request for expedited

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

- (10) Initially, the Commission will consider the motion to partially strike FirstEnergy's reply to the memoranda contra filed by OCEA and Direct and IGS. The Commission finds that, pursuant to Rule 4901-1-12(C), O.A.C., the portions of FirstEnergy's April 18, 2012, filing that constitute a reply to the memoranda contra filed by OCEA and Direct and IGS are not permitted and are hereby stricken.
- (11) As to FirstEnergy's April 13, 2012, request for waivers, the Commission notes that Rule 4901:1-35-02(B), O.A.C., provides that the Commission may waive any requirement of Chapter 4901:1-35, O.A.C., other than a requirement mandated by statute, for good cause shown.

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

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

- (12) The Commission finds that the waiver of Rule 4901:1-35-04, O.A.C., which required FirstEnergy to include a proposed notice in its application, is granted. This is not the first SSO application filed by FirstEnergy, and, through the prior cases, the Commission has developed a consistent format for the published notice. The Commission anticipates that the notice in this proceeding will be consistent with the notice used in the prior SSO proceedings.
- (13) Finally, with respect to FirstEnergy's request for a waiver of Rule 4901:1-35-06, O.A.C., the Commission finds that this request is moot. The attorney examiner has established the deadline of April 30, 2012, for intervention, pursuant to Rule

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

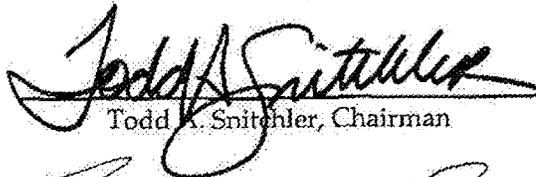
It is, therefore,

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

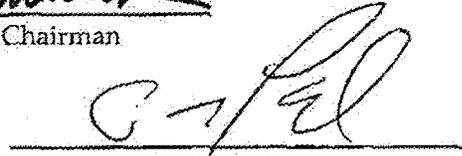
ORDERED, That FirstEnergy file supplemental information to its application, as set forth in Finding (11), within seven days. It is, further,

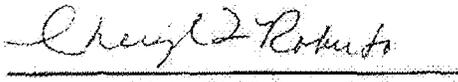
ORDERED, That a copy of this Entry be served upon all parties of record in this proceeding and all parties of record in Case No. 10-388-EL-SSO.

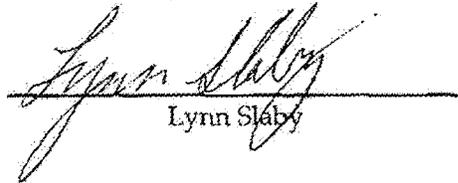
THE PUBLIC UTILITIES COMMISSION OF OHIO

  
Todd A. Snitchler, Chairman

  
Steven D. Lesser

  
Andre T. Porter

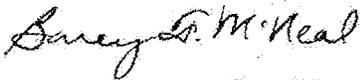
  
Cheryl L. Roberto

  
Lynn Slaby

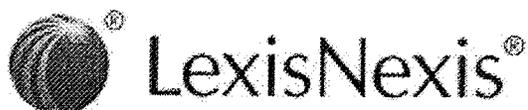
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Entered in the Journal

APR 25 2012

  
Barcy F. McNeal

Barcy F. McNeal  
Secretary



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TITLE 49. PUBLIC UTILITIES  
CHAPTER 4903. PUBLIC UTILITIES COMMISSION -- HEARINGS

**Go to the Ohio Code Archive Directory**

*ORC Ann. 4903.13 (2013)*

§ 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.

**HISTORY:**

GC §§ 544, 545; 103 v 804(815), §§ 33, 34; 116 v 104 (120), § 2; Bureau of Code Revision. Eff 10-1-53.

**NOTES:**

Related Statutes & Rules

Cross-References to Related Statutes

Forfeiture for violations; enforcement actions, *RC § 4905.83*.



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TITLE 49. PUBLIC UTILITIES  
CHAPTER 4903. PUBLIC UTILITIES COMMISSION -- HEARINGS

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[ORC Ann. 4903.22 \(2013\)](#)

§ 4903.22. Rules of practice

Except when otherwise provided by law, all processes in actions and proceedings in a court arising under Chapters 4901., 4903., 4905., 4906., 4907., 4909., 4921., 4923., and 4927. of the Revised Code shall be served, and the practice and rules of evidence in such actions and proceedings shall be the same, as in civil actions. A sheriff or other officer empowered to execute civil processes shall execute process issued under those chapters and receive compensation therefor as prescribed by law for like services.

**HISTORY:**

RS § 244-27; 98 v 352, § 17; GC § 552; Bureau of Code Revision, 10-1-53; 134 v S 397. Eff 10-23-72; 153 v S 162, § 1, eff. 9-13-10.

**NOTES:**

Section Notes

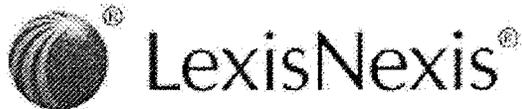
EFFECT OF AMENDMENTS

153 v S 162, effective September 13, 2010, corrected internal references and made stylistic changes.

Case Notes

OHIO RULES OF EVIDENCE.

The commission is not strictly bound by the Ohio Rules of Evidence: Greater Cleveland Welfare Rights Org., Inc. v. P.U.C., 2 Ohio St. 3d 62, 442 N.E.2d 1288 (1982).



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TITLE 49. PUBLIC UTILITIES  
CHAPTER 4909. PUBLIC UTILITIES COMMISSION -- FIXATION OF RATES

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GRC Ann. 4909.18 (2013)

§ 4909.18. Application for establishment or change in rate

Any public utility desiring to establish any rate, joint rate, toll, classification, charge, or rental, or to modify, amend, change, increase, or reduce any existing rate, joint rate, toll, classification, charge, or rental, or any regulation or practice affecting the same, shall file a written application with the public utilities commission. Except for actions under section 4909.16 of the Revised Code, no public utility may issue the notice of intent to file an application pursuant to division (B) of section 4909.43 of the Revised Code to increase any existing rate, joint rate, toll, classification, charge, or rental, until a final order under this section has been issued by the commission on any pending prior application to increase the same rate, joint rate, toll, classification, charge, or rental or until two hundred seventy-five days after filing such application, whichever is sooner. Such application shall be verified by the president or a vice-president and the secretary or treasurer of the applicant. Such application shall contain a schedule of the existing rate, joint rate, toll, classification, charge, or rental, or regulation or practice affecting the same, a schedule of the modification amendment, change, increase, or reduction sought to be established, and a statement of the facts and grounds upon which such application is based. If such application proposes a new service or the use of new equipment, or proposes the establishment or amendment of a regulation, the application shall fully describe the new service or equipment, or the regulation proposed to be established or amended, and shall explain how the proposed service or equipment differs from services or equipment presently offered or in use, or how the regulation proposed to be established or amended differs from regulations presently in effect. The application shall provide such additional information as the commission may require in its discretion. If the commission determines that such application is not for an increase in any rate, joint rate, toll, classification, charge, or rental, the commission may permit the filing of the schedule proposed in the application and fix the time when such schedule shall take effect. If it appears to the commission that the proposals in the application may be unjust or unreasonable, the commission shall set the matter for hearing and shall give notice of such hearing by sending written notice of the date set for the hearing to the public utility and publishing notice of the hearing one time in a newspaper of general circulation in each county in the service area affected by the application. At such hearing, the burden of proof to show that the proposals in the application are just and reasonable shall be upon the

public utility. After such hearing, the commission shall, where practicable, issue an appropriate order within six months from the date the application was filed.

If the commission determines that said application is for an increase in any rate, joint rate, toll, classification, charge, or rental there shall also, unless otherwise ordered by the commission, be filed with the application in duplicate the following exhibits:

(A) A report of its property 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 service referred to in such application, as provided in section 4909.05 of the Revised Code;

(B) A complete operating statement of its last fiscal year, showing in detail all its receipts, revenues, and incomes from all sources, all of its operating costs and other expenditures, and any analysis such public utility deems applicable to the matter referred to in said application;

(C) A statement of the income and expense anticipated under the application filed;

(D) A statement of financial condition summarizing assets, liabilities, and net worth;

(E) Such other information as the commission may require in its discretion.

#### HISTORY:

GC § 614.20; 102 v 549, § 22; 108 v PtII, 1094; 110 v 366; 113 v 16; 119 v 275; Bureau of Code Revision, 10-1-53; 136 v S 94 (Eff 9-1-76); 139 v S 378, Eff 1-11-83; 2011 HB 95, § 1, eff. Sept. 9, 2011; 2012 HB 379, § 1, eff. Mar. 27, 2013.

#### NOTES:

##### Section Notes

##### EFFECT OF AMENDMENTS

The 2012 amendment inserted "water-works, or sewage disposal system" in (A).

The 2011 amendment inserted "or, with respect to a natural gas company, projected to be used and useful as of the date certain" in (A); deleted (E) and redesignated former (F) and (E).

##### Related Statutes & Rules

##### Cross-References to Related Statutes

Alternative method of establishing rates and charges, RC § 4927.04.

Application for change in rate; approval, RC § 4909.17.

Approval of alternate rate plan, RC § 4929.05.



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TITLE 49. PUBLIC UTILITIES  
CHAPTER 4928. COMPETITIVE RETAIL ELECTRIC SERVICE

[Go to the Ohio Code Archive Directory](#)

*ORC Ann. 4928.02 (2013)*

§ 4928.02. State electric services 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.

#### **HISTORY:**

148 v S 3, Eff 10-5-99; 152 v S 221, § 1, eff. 7-31-08; 2012 SB 315, § 101.01, eff. Sept. 10, 2012.

#### **NOTES:**

#### Section Notes

##### **EFFECT OF AMENDMENTS**

The 2012 amendment inserted "waste energy recovery systems, smart grid programs" in (D).

152 v S 221, effective July 31, 2008, inserted (F), (J) through (M), and the last paragraph, and redesignated the remaining subsections accordingly; in the introductory paragraph, deleted "beginning on the starting date of competitive retail electric service" from the end; added the inclusion to the end of (D) and present (H); and, in (E), added "and the development of ... written in plain language" to the end and made related changes.

#### Related Statutes & Rules

#### Cross-References to Related Statutes



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TITLE 49. PUBLIC UTILITIES  
CHAPTER 4928. COMPETITIVE RETAIL ELECTRIC SERVICE

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ORC Ann. 4928.03 (2013)

§ 4928.03. Identification of competitive services access to noncompetitive services

Beginning on the starting date of competitive retail electric service, retail electric generation, aggregation, power marketing, and power brokerage services supplied to consumers within the certified territory of an electric utility are competitive retail electric services that the consumers may obtain subject to this chapter from any supplier or suppliers. In accordance with a filing under division (F) of section 4933.81 of the Revised Code, retail electric generation, aggregation, power marketing, or power brokerage services supplied to consumers within the certified territory of an electric cooperative that has made the filing are competitive retail electric services that the consumers may obtain subject to this chapter from any supplier or suppliers.

Beginning on the starting date of competitive retail electric service and notwithstanding any other provision of law, each consumer in this state and the suppliers to a consumer shall have comparable and nondiscriminatory access to noncompetitive retail electric services of an electric utility in this state within its certified territory for the purpose of satisfying the consumer's electricity requirements in keeping with the policy specified in section 4928.02 of the Revised Code.

**HISTORY:**

148 v S 3. Eff 10-5-99.

**Case Notes**

ANALYSIS Generally Public utility commission authority.

**GENERALLY.**



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TITLE 49. PUBLIC UTILITIES  
CHAPTER 4928. COMPETITIVE RETAIL ELECTRIC SERVICE  
STANDARD SERVICE OFFER

[Go to the Ohio Code Archive Directory](#)

ORC Ann. 4928.17 (2013)

§ 4928.17. Corporate separation plan

(A) Except as otherwise provided in sections 4928.142 or 4928.143 or 4928.31 to 4928.40 of the Revised Code and beginning on the starting date of competitive retail electric service, no electric utility shall engage in this state, either directly or through an affiliate, in the businesses of supplying a noncompetitive retail electric service and supplying a competitive retail electric service, or in the businesses of supplying a noncompetitive retail electric service and supplying a product or service other than retail electric service, unless the utility implements and operates under a corporate separation plan that is approved by the public utilities commission under this section, is consistent with the policy specified in section 4928.02 of the Revised Code, and achieves all of the following:

(1) The plan provides, at minimum, for the provision of the competitive retail electric service or the nonelectric product or service through a fully separated affiliate of the utility, and the plan includes separate accounting requirements, the code of conduct as ordered by the commission pursuant to a rule it shall adopt under division (A) of section 4928.06 of the Revised Code, and such other measures as are necessary to effectuate the policy specified in section 4928.02 of the Revised Code.

(2) The plan satisfies the public interest in preventing unfair competitive advantage and preventing the abuse of market power.

(3) The plan is sufficient to ensure that the utility will not extend any undue preference or advantage to any affiliate, division, or part of its own business engaged in the business of supplying the competitive retail electric service or nonelectric product or service, including, but not limited to, utility resources such as trucks, tools, office equipment, office space, supplies, customer and marketing information, advertising, billing and mailing systems, personnel, and training, without compensation based upon fully loaded embedded costs charged to the affiliate; and to ensure that any such affiliate, division, or part will not receive undue preference or advantage from any affiliate, division, or part of the

business engaged in business of supplying the noncompetitive retail electric service. No such utility, affiliate, division, or part shall extend such undue preference. Notwithstanding any other division of this section, a utility's obligation under division (A)(3) of this section shall be effective January 1, 2000.

(B) The commission may approve, modify and approve, or disapprove a corporate separation plan filed with the commission under division (A) of this section. As part of the code of conduct required under division (A)(1) of this section, the commission shall adopt rules pursuant to division (A) of section 4928.06 of the Revised Code regarding corporate separation and procedures for plan filing and approval. The rules shall include limitations on affiliate practices solely for the purpose of maintaining a separation of the affiliate's business from the business of the utility to prevent unfair competitive advantage by virtue of that relationship. The rules also shall include an opportunity for any person having a real and substantial interest in the corporate separation plan to file specific objections to the plan and propose specific responses to issues raised in the objections, which objections and responses the commission shall address in its final order. Prior to commission approval of the plan, the commission shall afford a hearing upon those aspects of the plan that the commission determines reasonably require a hearing. The commission may reject and require refile of a substantially inadequate plan under this section.

(C) The commission shall issue an order approving or modifying and approving a corporate separation plan under this section, to be effective on the date specified in the order, only upon findings that the plan reasonably complies with the requirements of division (A) of this section and will provide for ongoing compliance with the policy specified in section 4928.02 of the Revised Code. However, for good cause shown, the commission may issue an order approving or modifying and approving a corporate separation plan under this section that does not comply with division (A)(1) of this section but complies with such functional separation requirements as the commission authorizes to apply for an interim period prescribed in the order, upon a finding that such alternative plan will provide for ongoing compliance with the policy specified in section 4928.02 of the Revised Code.

(D) Any party may seek an amendment to a corporate separation plan approved under this section, and the commission, pursuant to a request from any party or on its own initiative, may order as it considers necessary the filing of an amended corporate separation plan to reflect changed circumstances.

(E) No electric distribution utility shall sell or transfer any generating asset it wholly or partly owns at any time without obtaining prior commission approval.

#### **HISTORY:**

148 v S 3, Eff 10-5-99; 152 v S 221, § 1, eff. 7-31-08.

#### **NOTES:**

##### Section Notes

##### EFFECT OF AMENDMENTS

152 v S 221, effective July 31, 2008, in (A), inserted "4928.142 or 4928.143 or"; and rewrote (E).

##### Related Statutes & Rules

##### Cross-References to Related Statutes



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TITLE 49. PUBLIC UTILITIES  
CHAPTER 4928. COMPETITIVE RETAIL ELECTRIC SERVICE  
STANDARD SERVICE OFFER

**Go to the Ohio Code Archive Directory**

ORC Ann. 4928.142 (2013)

§ 4928.142. Competitive bidding process for market-rate offer; commission approval process; transitional provisions

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

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

- (a) Open, fair, and transparent competitive solicitation;
- (b) Clear product definition;
- (c) Standardized bid evaluation criteria;
- (d) Oversight by an independent third party that shall design the solicitation, administer the bidding, and ensure that the criteria specified in division (A)(1)(a) to (c) of this section are met;
- (e) Evaluation of the submitted bids prior to the selection of the least-cost bid winner or winners.

No generation supplier shall be prohibited from participating in the bidding process.

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

(B) Prior to initiating a competitive bidding process for a market-rate offer under division (A) of this section, the electric distribution utility shall file an application with the commission. An electric distribution utility may file its application with the commission prior to the effective date of the commission rules required under division (A)(2) of this section, and, as the commission determines necessary, the utility shall immediately conform its filing to the rules upon their taking effect.

An application under this division shall detail the electric distribution utility's proposed compliance with the requirements of division (A)(1) of this section and with commission rules under division (A)(2) of this section and demonstrate that all of the following requirements are met:

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

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

(3) A published source of information is available publicly or through subscription that identifies pricing information for traded electricity on- and off-peak energy products that are contracts for delivery beginning at least two years from the date of the publication and is updated on a regular basis.

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

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

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

(2) There were four or more bidders.

(3) At least twenty-five per cent of the load is bid upon by one or more persons other than the electric distribution utility.

All costs incurred by the electric distribution utility as a result of or related to the competitive bidding process or to procuring generation service to provide the standard service offer, including the costs of energy and capacity and the costs of all other products and services procured as a result of the competitive bidding process, shall be timely recovered through the standard service offer price, and, for that purpose, the commission shall approve a reconciliation

mechanism, other recovery mechanism, or a combination of such mechanisms for the utility.

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

- (1) The electric distribution utility's prudently incurred cost of fuel used to produce electricity;
- (2) Its prudently incurred purchased power costs;
- (3) Its prudently incurred costs of satisfying the supply and demand portfolio requirements of this state, including, but not limited to, renewable energy resource and energy efficiency requirements;
- (4) Its costs prudently incurred to comply with environmental laws and regulations, with consideration of the derating of any facility associated with those costs.

In making any adjustment to the most recent standard service offer price on the basis of costs described in division (D) of this section, the commission shall include the benefits that may become available to the electric distribution utility as a result of or in connection with the costs included in the adjustment, including, but not limited to, the utility's receipt of emissions credits or its receipt of tax benefits or of other benefits, and, accordingly, the commission may impose such conditions on the adjustment to ensure that any such benefits are properly aligned with the associated cost responsibility. The commission shall also determine how such adjustments will affect the electric distribution utility's return on common equity that may be achieved by those adjustments. The commission shall not apply its consideration of the return on common equity to reduce any adjustments authorized under this division unless the adjustments will cause the electric distribution utility to earn a return on common equity that is significantly in excess of the return on common equity that is earned by publicly traded companies, including utilities, that face comparable business and financial risk, with such adjustments for capital structure as may be appropriate. The burden of proof for demonstrating that significantly excessive earnings will not occur shall be on the electric distribution utility.

Additionally, the commission may adjust the electric distribution utility's most recent standard service offer price by such just and reasonable amount that the commission determines necessary to address any emergency that threatens the utility's financial integrity or to ensure that the resulting revenue available to the utility for providing the standard service offer is not so inadequate as to result, directly or indirectly, in a taking of property without compensation pursuant to Section 19 of Article I, Ohio Constitution. The electric distribution utility has the burden of demonstrating that any adjustment to its most recent standard service offer price is proper in accordance with this division.

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

the approved market rate offer. Additionally, any such alteration shall be limited to an alteration affecting the prospective proportions used during the blending period and shall not affect any blending proportion previously approved and applied by the commission under this division.

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

**HISTORY:**

152 v S 221, § 1, eff. 7-31-08; 152 v H 562, § 101.01, eff. 9-23-08.

**NOTES:**

## Section Notes

**EFFECT OF AMENDMENTS**

152 v H 562, effective September 23, 2008, in the introductory language of (D), substituted "July 31, 2008" for "the effective date of this section" and "not more than twenty" for "and not less than twenty".



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Page's Ohio Revised Code Annotated:  
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Current through Legislation passed by the 130th Ohio General Assembly  
and filed with the Secretary of State through File 24  
\*\*\* Annotations current through April 22, 2013 \*\*\*

TITLE 49. PUBLIC UTILITIES  
CHAPTER 4928. COMPETITIVE RETAIL ELECTRIC SERVICE  
STANDARD SERVICE OFFER

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*ORC Ann. 4928.143 (2013)*

§ 4928.143. Application for approval of electric security plan

(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.

#### HISTORY:

152 v S 221, § 1, eff. 7-31-08; 2011 HB 364, § 1, eff. Mar. 22, 2012.

#### NOTES:

##### Section Notes

##### EFFECT OF AMENDMENTS

The 2011 amendment added the introductory language of (B)(2)(f); added the (B)(2)(f)(i) and (B)(2)(f)(ii) designations; and made stylistic changes.

##### Case Notes

ANALYSIS Constitutionality Application Electric service plans Excessive earnings determinations Factors Jurisdiction Rate setting

#### CONSTITUTIONALITY



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\*\*\* This document is current through the Ohio Register for the week of July 8, 2013 through July 12, 2013 \*\*\*

4901:1 Utilities  
Chapter 4901:1-35 Electric Distribution Utility (EDU)

OAC Ann. 4901:1-35-03 (2013)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(9) Specific information

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

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

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

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

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

from the customers taking service under the ESP.

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

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

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

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

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

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

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

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

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

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

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

(d) Division (B)(2)(e) of section 4928.143 of the Revised Code authorizes an electric utility to include provisions for automatic increases or decreases in any component of the standard service offer price. Pursuant to this

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

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

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

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

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

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

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

the plan will be measured.

(iii) A detailed description of the costs of the infrastructure modernization plan, including a breakdown of capital costs and operating and maintenance expenses net of any related savings, the revenue requirement, including recovery of stranded investment related to replacement of un-depreciated plant with new technology, the impact on customer bills, service disruptions associated with plan implementation, and description of (and dollar value of) equipment being made obsolete 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.

**History:** Replaces: 4901:1-35-03.

Effective: 05/07/2009.

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

Promulgated Under: 111.15.

Statutory Authority: 4928.06, 4928.141.

Rule Amplifies: 4928.14, 4928.141, 4928.142, 4928.143.

Prior Effective Dates: 5/27/04.

Baldwin's Ohio Revised Code Annotated  
Ohio Rules of Evidence (Refs & Annos)  
Article II. Judicial Notice

Evid. R. Rule 201

Evid R 201 Judicial notice of adjudicative facts

Currentness

**(A) Scope of rule**

This rule governs only judicial notice of adjudicative facts; i.e., the facts of the case.

**(B) Kinds of facts**

A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

**(C) When discretionary**

A court may take judicial notice, whether requested or not.

**(D) When mandatory**

A court shall take judicial notice if requested by a party and supplied with the necessary information.

**(E) Opportunity to be heard**

A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

**(F) Time of taking notice**

Judicial notice may be taken at any stage of the proceeding.

**(G) Instructing jury**

In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

**CREDIT(S)**

(Adopted eff. 7-1-80)

(Articles I to V)