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Public Utilities Commission of Ohio
PUCO Docketing
180 E. Broad Street, 10th Floor
Columbus, Ohio 43215

In re: Case No. 08-935-EL-SSO

Dear Sir/Madam:

Please find enclosed an original and twenty (20) copies of the *Initial Post Hearing Brief of the Northeast Ohio Public Energy Council and Northwest Ohio Aggregation Coalition Regarding FirstEnergy's Electric Security Plan* to be filed in the above-captioned proceeding. Copies have also been served on all parties of record in this case.

Respectfully yours,

E. Brett Breitschwerdt

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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Authority To Establish A Standard Service Offer Pursuant to R.C. § 4928.143 In the Form Of An Electric Security Plan	))))))	Case No. 08-935-EL-SSO

INITIAL POST HEARING BRIEF OF THE NORTHEAST OHIO PUBLIC ENERGY COUNCIL AND NORTHWEST OHIO AGGREGATION COALITION REGARDING FIRSTENERGY'S ELECTRIC SECURITY PLAN

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EXECUTIVE SUMMARY

The Northeast Ohio Public Energy Council ("NOPEC") and the Northwest Ohio Aggregation Coalition ("NOAC") (collectively the "Large-Scale Governmental Aggregations") intervened in this proceeding to represent their unique interests and ensure the benefits of large-scale governmental aggregation will be available to the approximately 750,000 combined residential and small commercial electric customers located within their governmental boundaries. NOPEC, specifically, also intervened in this proceeding to apprise the Commission of the Letter of Intent NOPEC signed with Florida Energy Power Marketing, Inc. ("FPLE" or "PMI") on August 29, 2008. This Letter of Intent provides, subject to two key conditions precedent (elimination or modification of the deferral and the MDS Rider in an approved ESP) that NOPEC and FPLE intend to enter into a full requirements contract for firm, retail electric service at a material discount to NOPEC's 600,000 customers starting in early 2009. If the Commission modifies the ESP, as proposed by the Large-Scale Governmental Aggregations in this brief, NOPEC (and NOAC) are ready, willing, and able to provide the benefits of lower-priced, competitive third-party supply to their consumers.

To do so, three modifications to the ESP *will* be necessary: modification or elimination of the proposed generation deferral; nonbypassable Minimum Default Service Rider, and nonbypassable Non-Distribution Uncollectibles Rider. The Companies' Electric Security Plan ("ESP"), as proposed, would have extremely negative and likely fatal effects on large-scale governmental aggregations because these three provisions inhibit the governmental aggregation's ability to obtain competitive third-party supply. The proposed ESP is constructed to eliminate the economic incentive for large-scale governmental aggregation customers to obtain alternate competitive generation service. As proposed, the ESP is virtually certain to destroy large-scale governmental aggregation electricity programs in the Companies' service territories. The net result would be that all of NOPEC's and NOAC's customers will continue to be captive customers of the FirstEnergy Companies under the proposed ESP.

SB 221 includes provisions expressly intended to incentivize large-scale governmental aggregation, while also explicitly requiring the Commission to ensure that a proposed ESP is not approved that would disincentivize consumer participation in large-scale governmental aggregation. Specifically, subsection's (I), (J), and (K) of O.R.C. 4928.20 legislate the Governor's and Legislature's support for customer participation in large-scale governmental aggregations, while the statutory construction of O.R.C. 4928.143(B) ensures that these provisions trump any provisions of an ESP that would otherwise disincentivize large-scale governmental aggregation through limitations on shopping. Importantly, O.R.C. 4928.20(K) provides that the Commission, through its rules, should "encourage" and "promote" large-scale governmental aggregation, and "further" should review and consider the impact of any nonbypassable generation charges on large-scale governmental aggregations. When combined with O.R.C. 4928.143(B), Section 4928.20(K) legislates that limitations on shopping should not apply to large-scale governmental aggregations as they would disincentivize, or as proposed by the Companies, completely eliminate the economic opportunity for customer participation.

The Large-Scale Governmental Aggregations request that the Commission carry out the mandates of SB 221, and make the following modifications to the Companies' ESP to ensure the benefits of large-scale governmental aggregations are available to customers after January 1, 2009:

Generation Deferrals

Option 1: Eliminate the Proposed Deferral as Recommended by Staff.

The most direct way to eliminate the anti-competitive effects of the deferral-created GPI credit is to simply eliminate the underlying deferrals. Not a single intervening party has advocated retaining the deferrals, and Staff has stated its opposition to including generation deferrals in an approved ESP. Elimination of the deferrals would avoid an undesirable and unwanted intergenerational cost shift, prevent the significant administrative difficulties that deferrals have been shown to create, and most importantly, eliminate the market "distortion" they otherwise create, allowing the Large-Scale Governmental Aggregations to compete against the full SSO price instead of only a masked portion of the price artificially constructed through collection timing mechanisms.

Option 2: Eliminate the Anti-Competitive Effects of the Deferral for Large-Scale Governmental Aggregations through the GAGC Mechanism.

If generation deferrals are retained by the Commission within the ESP, then the Governmental Aggregation Generation Credit ("GAGC") also should be included in the approved Plan to ameliorate the anti-competitive distortion created by the deferrals. The GAGC would provide the full benefits to large-scale governmental aggregation customers of the deferrals through a credit equal to the Generation Phase-In credit, while allowing the Companies to fully recover the deferral with carrying costs, and eliminate a barrier to competition for large-scale governmental aggregations. The GAGC also would be simple to administer and consistent with SB 221's policy eliminating the anti-competitive nature of deferrals for large-scale governmental aggregations as set forth in Sections 4928.20(I) and (K).

The Minimum Default Service Rider Charge

Option 1: Eliminate or make the MDS Rider Fully Bypassable for Large-Scale Governmental Aggregations.

The Companies' utterly failed to carry their burden of proof regarding the MDS Rider. They have provided no quantitative analysis or substantive justification for the charge, and the record shows the MDS is nothing more than a $1.731 *Billion* exit fee proposed to eliminate competition. The MDS is nothing more than compensation for FirstEnergy to stand ready to sell generation at 160% times the current market prices. It is also unlawful as it is a nonbypassable, generation-related disincentive intended to destroy both Large-Scale Governmental Aggregation and shopping generally. The Commission should either eliminate the MDS Rider or make it fully bypassable for large-scale governmental aggregations as intended by SB 221.

Option 2: Establish a 150 day Notice Window for Large-Scale Governmental Aggregations to Fully Bypass the MDS Rider.

In the alternative, the Commission should provide large-scale governmental aggregations with a 150 day notice period after the Commission's order in this case during which large-scale governmental aggregations could provide written notice to the Companies that they have contracted to take third-party CRES supply to fully bypass the MDS Rider. This option is fair to the Companies since the Companies have no FE-FES supply agreement in place currently, and timely notification that Applicants need not secure power for the large-scale governmental aggregation participants would allow the operating companies to structure their supply agreement with FES to avoid all the perceived costs and risks they contend justify collection of this charge from such departing customers.

The Non-Distribution Uncollectibles Rider

Option I: Establish Purchase of 100 percent CRES Receivables Program Modeled on the Successful Program in Ohio's Natural Gas Industry.

If FirstEnergy insists on imposing Rider NDU as a non-bypassable charge, the Companies should be required to provide a purchase of 100 percent CRES receivables program similar to the programs approved by the Commission in Ohio's natural gas industry. Under this approach, disparate treatment and subsidization are eliminated and all consumers bear the socialized cost of all uncollectible bad debt. This preferred modification also would eliminate the anti-competitive effects of this non-bypassable charge for large-scale governmental aggregation customers in a manner consistent with SB 221's direction to incentivize large-scale governmental aggregation.

Option II: Rider NDU should be bypassable for Large-Scale Governmental Aggregation Customers, as proposed by Staff.

In the alternative, Rider NDU should be bypassable for large-scale governmental aggregation customers as proposed by Staff for all shopping customers. This alternative approach also is consistent with Section 4928.20's direction to incentivize large-scale governmental aggregation, and would eliminate the subsidy of shopping customers paying a generation-related cost.

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I. INTRODUCTION

A. NOPEC and NOAC: Ohio's Large-Scale Governmental Aggregations

The Northeast Ohio Public Energy Council ("NOPEC") and the Northwest Ohio Aggregation Coalition ("NOAC") (collectively the "Large-Scale Governmental Aggregations") intervened in this proceeding to represent their unique interests and ensure the benefits of large-scale governmental aggregation will be available to the approximately 750,000 combined residential and small commercial electric customers who currently would be eligible to benefit from their efforts to obtain lower cost, competitively supplied electricity in the Ohio Edison Company ("OE"), The Cleveland Electric Illuminating Company ("CEI"), and the Toledo Edison Company ("TE") (collectively "FirstEnergy" and/or the "Companies) service territories. Currently, all of these 750,000 customers are captive customers of the Companies.

NOPEC is a regional council of governments established under Chapter 167 of the Revised Code and comprised of 126 communities in the nine northeast Ohio counties of Ashtabula, Lake, Geauga, Cuyahoga, Summit, Lorain, Medina, Trumbull and Portage Counties. NOPEC has served or is serving approximately 450,000 electric customers in those counties in the service territories of Ohio Edison and The Cleveland Electric Illuminating Company. NOPEC currently has approximately 600,000 eligible electric customers on the OE and the CEI systems.[1]

NOAC is comprised of the communities of Maumee, Northwood, Oregon, Perrysburg, Sylvania, Toledo, Holland, Lake Township in Wood County and the Board of County Commissioners of Lucas County (on behalf of the Unincorporated Townships of Lucas County), and has served in the past or is currently serving approximately 150,000 residential and small

[1] *See* NOPEC/NOAC Joint Exhibit 1, Testimony of Mark Frye, at 3.

commercial electric customers on the Toledo Edison system within Lucas and northern Wood Counties.[2]

Critical to the Commission's decision in this case is the fact that on August 29, 2008, NOPEC and FPL Energy Power Marketing ("PMI" or "FPLE") entered into a Letter of Intent for FPLE to supply all of NOPEC's customers' generation for the three year ESP period. NOPEC's LOI with FPLE is subject to two key conditions precedent, namely, elimination or modification of the generation deferral and the MDS Rider proposed by the Companies in this case. NOPEC and FPLE are ready, willing, and able to provide firm, competitive retail electric service to NOPEC's 600,000 residential and small commercial customers starting in early 2009.

B. Background and Statement of the Case

On July 31, 2008, the Companies filed their "Application to Establish a Standard Service Offer Pursuant to R.C. §4928.143 in the Form of an Electric Security Plan" as required by Amended Substitute Senate Bill 221 ("SB 221"). NOAC filed a Motion to Intervene in the Case on August 25, 2008, and NOPEC similarly requested intervention on September 3, 2008. Both NOPEC and NOAC were granted intervention in this proceeding on October 2, 2008 by Entry of Attorney Examiner Gregory A. Price. Evidentiary hearings were held in the case from October 16, 2008 through October 31, 2008. The Large-Scale Governmental Aggregations actively participated in the evidentiary hearing. During the hearing, NOPEC and NOAC jointly presented the testimony of one expert witness, Mr. Mark Frye, President of Palmer Energy.[3] Mr. Frye's testimony explains in detail the barriers to large-scale governmental aggregation proposed in the Companies' Electric Security Plan and then proposes specific revisions or modifications that would provide the Large-Scale Governmental Aggregations and their Competitive Retail

[2] *Id.*, t 2-3.
[3] *See Generally* NOPEC/NOAC Joint Exhibit 1, Testimony of Mark Frye.

Electric Service ("CRES") suppliers an even playing field upon which to provide benefits to customers through lower priced generation supply.

The Large-Scale Governmental Aggregations also entered NOPEC/NOAC Joint Exhibits two through five into the record during the hearing. NOPEC/NOAC Joint Exhibit 2 is an Ohio Energy Group ("OEG") discovery request in which the Companies respond that they cannot provide a cost justification for the Minimum Default Service Charge ("MDS") because it is not cost-based.[4] NOPEC/NOAC Joint Exhibit 3 is a response to an Ohio Consumers' Council ("OCC") discovery request in which the Companies state that they cannot provide a cost justification for the Standby Charge ("SBC") because it is not cost-based.[5] NOPEC/NOAC Joint Exhibit 4 is the Exhibit 3 to the testimony of Company witness Scott T. Jones, which shows the inferior load shapes and higher costs of service of the residential and commercial customer classes.[6] The Large-Scale Governmental Aggregations also took administrative notice of O.R.C. 4928.20, which was substantially expanded through SB 221 in order to incentivize large-scale governmental aggregation in the State.[7]

C. The Purpose of Large-Scale Governmental Aggregations

Large-scale governmental aggregations exist to provide Ohio's residential and small commercial electricity customers with an alternative, lower-priced generation option to the incumbent electric distribution utility's ("EDU") Standard Service Offer ("SSO"). When the State chose to deregulate the electric industry and create a competitive electric marketplace in 1999, large-scale governmental aggregation was created in Senate Bill 3 as the structure to bring retail competition to the small electricity users, specifically residential and smaller commercial

[4] *See Generally* NOPEC/NOAC Joint Exhibit 2.
[5] *See Generally* NOPEC/NOAC Joint Exhibit 3.
[6] *See Generally* NOPEC/NOAC Joint Exhibit 4.
[7] *See Generally* NOPEC/NOAC Joint Exhibit 5.

customers. Large-scale governmental aggregations provide for scalability of customer load, which, in turn, reduces administrative and transactional costs allowing third-party competitive suppliers to provide these customers individually with the benefit of lower priced generation.

If the Large-Scale Governmental Aggregations cannot provide customers with a lower total generation price than the EDU's SSO, then there will be no economic incentive for customers to take service from the Large-Scale Governmental Aggregations. As in all market-based transactions, customer action is induced by the perceived benefit they will receive; in this case, a lower price for their electricity. The economic feasibility of contracting with a competitive supplier to provide customers with this benefit is a precondition to the existence of the Large-Scale Governmental Aggregations as organizations.[8] This precondition to large-scale governmental aggregation's existence is well understood by the Companies, and was recognized by Company Witness David Blank during the hearing:

> A. Well, as I see this – this process that the Companies' proposal in [the] ESP effectively sets up a price to beat. And to the extent that a third-party supplier can beat the price -- can provide cost to – or power supply to [customers at a] lower price than that price to beat, those customers would be -- would be economically advantaged.[9]

The opportunity for the Large-Scale Governmental Aggregations to provide benefits to consumers hinges on the ability to obtain a generation price lower than what is established by the

[8] Tr. Vol. VII, at p. 64. (Examination of Mr. Blank).

Q. If Customers can['t] shop – if the governmental aggregation provides -- is limited to electric service and [the] ESP would prevent a customer from shopping for electric service, would that governmental aggregation entity survive as an electricity providing governmental aggregation?
A. I don't know.
[Skip Q & A]
Q. . . . .If the customers -- if the governmental aggregation can't provide electric service to a customer, what can the governmental aggregation do?
A. Maybe it has no services to offer.

[9] Tr. Vol. VII, at p. 29.

Companies' ESP as the price to beat.[10] Contrary to the Companies' Application, which suggests that large-scale governmental aggregations are not negatively or disproportionately impacted by the ESP's proposed nonavoidable charges, these proposed charges clearly have a substantial and disproportionate impact on large-scale governmental aggregations because they inhibit the ability to obtain competitive third-party supply.[11] Recognition of the material impact that proposed non-bypassable, generation-related charges will have on the price to beat is critical to the future of the Large-Scale Governmental Aggregations, and their purpose of benefiting customers through lower priced electricity.

D. SB 221 Incentivizes the Opportunity for Customer Participation in Large-Scale Governmental Aggregation

SB 221 reaffirmed and strengthened the Governor's and General Assembly's support for consumer participation in large-scale governmental aggregation in the State. Importantly, the State's landmark electricity legislation includes a number of provisions expressly intended to favor large-scale governmental aggregation, and explicitly requiring the Commission to ensure that a proposed ESP is not approved that would disincentivize consumer participation in large-scale governmental aggregation.[12]

One way SB 221 incentivizes customer participation in large-scale governmental aggregation is by allowing a participating customer to avoid a surcharge proposed to recover deferred generation costs unless that customer took SSO service and benefited from the deferral

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[10] The Companies' Application is constructed, with little quantitative analysis or substantive justification, to establish a price to beat or "shopping credit" for the year 2009 of either $42.50 per Megawatt-hour ("MWh") if the large-scale governmental aggregation chooses to pay Rider SBC or $57.50 per MWh if the large-scale governmental aggregation chooses not to pay Rider SBC, but, in this case, would require customers returning to the SSO to pay 160 percent times the then-applicable market cost of generation. *See* Competitive Suppliers Exhibit 2, Testimony Michael M. Schnitzer, at 7-8.

[11] *See* Companies Exhibit 9A, Application, at 39.

[12] *See* O.R.C. 4928.20(I), (J), (K); *See also* O.R.C. 4928.143(B) (The Companies' own market rate expert, Scott T. Jones, recognized that SB 221 is structured to create a heightened incentive for customers to participate in large-scale governmental aggregation programs, and that SB 221 does not intend to restrict the opportunity of Ohio consumers to shop and participate in large-scale governmental aggregation. *See* Tr. Vol. III, at pp. 63-64, 70.

of generation.[13] While the FirstEnergy EDUs would still receive full recovery of the deferred generation surcharge from SSO and other competitive supplier customers, this provision of SB 221 allows large-scale governmental aggregation customers to avoid this otherwise non-bypassable generation charge. The net result of this incentive is a reduction in the overall price to beat necessary for the large-scale governmental aggregation to provide a benefit to consumers.[14]

Another way SB 221 incentivizes customer participation in large-scale governmental aggregation is by allowing the large-scale governmental aggregation to elect not to take standby, provider of last resort ("POLR") service from the EDUs in exchange for agreeing that customers who choose to return to SSO service would return at the market price of power.[15] The ability to avoid the substantial standby charge proposed by the Companies provides the Large-Scale Governmental Aggregations with the option and the responsibility to choose whether paying the standby charge as part of the price to beat can provide customers with greater benefits than the risk of customers returning at market pricing.

Finally, and most importantly, SB 221 established O.R.C. 4928.20(K), which provides explicit guidance to the Commission that the Governor and General Assembly are supportive of the opportunity for consumer participation in large-scale governmental aggregation. This

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[13] *See* O.R.C. 4928.20(I).

[14] The Companies did not deem it necessary to incorporate provisions within their ESP to carry out this provision because the Companies' do not expect Large-Scale Governmental Aggregations to serve customer under the ESP starting on January 1, 2009. *See* Tr. Vol. VII, at p. 38.

Q. Mr. Blank, the companies intend to implement this provision, is that correct?
A. Assuming it is necessary, yes, we do.
Q. Could you explain what you mean by "assuming it is necessary?"
A. If there are, in fact, customers served by large-scale governmental[aggregations] [Sic], then we will have to figure out how to implement this provision.

[15] O.R.C. 4928.20(J).

provision requires the Commission to further incentivize large-scale governmental aggregation in two additional ways:

> (K) The commission shall adopt rules to encourage and promote large-scale governmental aggregation in this state. For that purpose, the commission shall conduct an immediate review of any rules it has adopted for the purpose of this section that are in effect on the effective date of the amendment of this section by S.B. 221 of the 127th general assembly, July 31, 2008. Further, within the context of an electric security plan under section 4928.143 [4928.14.4] of the Revised Code, the commission shall consider the effect on large-scale governmental aggregation of any nonbypassable generation charges, however collected, that would be established under that plan, except any nonbypassable generation charges that relate to any cost incurred by the electric distribution utility, the deferral of which has been authorized by the commission prior to the effective date of the amendment of this section by S.B. 221 of the 127th general assembly, July 31, 2008.[16]

The words "encourage" and "promote" are strong, active words individually and create an even stronger mandate when combined together. While this directive to encourage and promote large-scale governmental aggregation makes reference to a review of the Commission's rules, the Legislature also included Commission consideration of the effect of an ESP's proposed non-bypassable generation charges on large-scale governmental aggregations within Section (K). Consciously including this second mandate or directive within Section (K) suggests that the Legislature intended for the Commission to "[f]urther," encourage and promote large-scale governmental aggregation through its consideration of the effect of nonbypassable generation charges on large-scale governmental aggregation's ability to provide benefits to consumers.

It is clear that provisions of SB 221 seek to incentivize, to the extent of legislating encouragement and promotion, large-scale governmental aggregation. Non-bypassable charges in an ESP, which disincentivize consumer participation in large-scale governmental aggregation are contrary to the language and legislative intent of SB 221, and must be modified or eliminated in order to carry out the mandates of the Statute.

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[16] O.R.C. 4928.20(K).

E. SB 221's Provisions Incentivizing Large-Scale Governmental Aggregation Trump Provisions of an ESP that Disincentivize Customer Shopping

SB 221's guidance to the EDUs in O.R.C. 4928.143 regarding the provisions an ESP "shall" or "may" include is explicitly trumped by a statutory requirement to comply with the provisions in O.R.C. 4928.20 incentivizing large-scale governmental aggregation. Statutory construction inarguably mandates that the Commission ensure the provisions of an ESP will not disincentivize participation in large-scale governmental aggregation, nor contradict Sections (I), (J), and (K) of Section 4928.20. The net result of SB 221's provisions is that large-scale governmental aggregations receive favored legal status under the law.

Specifically, the statute is constructed as follows. Subsection (B)(1) states that an ESP "*shall include provisions relating to the supply and pricing of electric generation service.*"[17] Similarly, Subsection (B)(2) states that a plan "may provide for or include, without limitation, any of the following:" which, among a number of other provisions potentially could include "(d) Terms, conditions, or charges relating to limitations on customer shopping . . ."[18] However, prerequisite to and preempting both Subsections (B)(1) and (B)(2) is Section (B). It states:

> (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:[19] (emphasis added)

The purpose and effect of Section (B) is to both un-tether the ESP from Title XLIX, while also explicitly limiting its provisions so that the Plan's provisions will not violate the key safeguards established within SB 221.[20] Divisions (I), (J), and (K) of section 4928.20, as discussed above, are incentives designed to ensure the opportunity exists for customers to benefit

[17] O.R.C. 4928.143(B)(1).
[18] O.R.C. 4928.143(B)(2); (B)(2)(d).
[19] O.R.C. 4928.143(B).
[20] O.R.C. 4928.143(B); *See also* Companies Exhibit 9A, Application, at 4 fn 4. (The Companies' Application similarly recognizes that the preceding language in O.R.C. 4928.143(B) is a "mark of legislative intent . . ."

from large-scale governmental aggregation. Similarly division (E) of Section 4928.64 is designed to ensure that the State's commitment to renewable energy cannot be used by the EDUs to disincentivize competition.[21] Section 4928.69 seeks to similarly protect customers of municipal utilities returning to the EDU's SSO from any charges or fees.[22]

Section (B) of O.R.C. 4928.143 is constructed to ensure that the State's commitment to large-scale governmental aggregation, among others, would not be limited or disincentivized by limitations on customer shopping proposed in an electric security plan. While Subsection (B)(2) allows the EDUs to incorporate a deferral mechanism[23] or limit shopping or provide for standby or default service,[24] all of these potential terms and conditions are explicitly trumped by the sections of O.R.C. 4928.20 incentivizing large-scale governmental aggregation. Reading Section (B) of Section 4928.143 and Section (K) of 4928.20 together, SB 221 recognizes that non-bypassable, generation related charges is the tactic that the EDUs have used in the past,[25] and, are again attempting to use to destroy competition from the large-scale governmental aggregation. SB 221, therefore, expressly directs the Commission to ensure that the opportunity for customers to benefit from large-scale governmental aggregations should exist after January 1, 2009.

F. Large-Scale Governmental Aggregations are Ready, Willing, and *Able* to Provide Benefits to Customers after January 1, 2009 *if* the ESP's Barriers to Competition are Removed.

As discussed above, SB 221 recognizes the opportunity for customers to benefit from large-scale governmental aggregation, and directs the Commission to review the ESP to ensure

[21] *See* O.R.C. 4928.64(E).
[22] *See* O.R.C. 4928.64(E); O.R.C. 4928.69.
[23] *See* O.R.C. 4928.143(B)(2)(c).
[24] *See* O.R.C. 4928.143(B)(2)(d).
[25] *See* Competitive Suppliers Ex. 3, Direct Testimony of Teresa L. Ringenbach, at 6-7. (explaining that non-bypassable, generation-related charges approved by the Commission on December 31, 2005 as part of the Companies' Rate Stabilization Plan "put an end to governmental aggregation programs."

its provisions will not disincetivize large-scale governmental aggregation. As discussed in greater detail below, the Companies' ESP, as proposed, not only disincentivizes but attempts to destroy competition from the Large-Scale Governmental Aggregations. If these barriers to competition are eliminated for the Large-Scale Governmental Aggregations, both NOPEC and NOAC will be ready, willing and able to seek competitively priced generation in the market that can provide a net savings to consumers.

NOPEC has already made substantial headway towards obtaining a full-requirements generation supply starting in 2009. On August 29, 2008, NOPEC and FPLE executed a Letter of Intent ("LOI") to enter into a full requirements firm power supply agreement, pursuant to which PMI would supply retail power directly to NOPEC's electric customers as a PUCO-certified competitive retail supplier ("Certified Retail Electric Supplier" or "CRES").[26] The LOI is expressly conditioned on the elimination or modification of certain anti-competitive provisions of FirstEnergy's ESP, specifically the deferral and MDS Rider.[27] PMI has also intervened in this proceeding to advise the Commission that "FPLE is very interested in providing competitive retail generation service in Ohio."[28] In his direct testimony, FPLE Witness Robert M. Garvin explains the opportunity FPLE sees to benefit NOPEC's customers, as well as the potential concerns stemming from the ESP as proposed. Mr. Garvin explains:

> We share the same desire as any other competitive retail service provider who has intervened in this proceeding—to be given a fair opportunity to compete with First Energy's Standard Service Offer ("SSO"). FPLE has a strong interest in entering the Ohio market, as evidenced by our LOI, to provide electricity supply to the over 600,000 eligible electric consumers that reside in the nine counties and 126 communities that make up NOPEC. We also share the same and immediate concern of our prospective customer—NOPEC—in this proceeding—that the barriers to competition that are proposed in the First Energy ESP, if adopted by the Commission in this proceeding,

[26] *See* FPLE Exhibit 1, Direct Testimony of Robert M. Garvin, at 4-5.
[27] *See* FPLE Exhibit 1, Direct Testimony of Robert M. Garvin, Attachment A, at 3.
[28] *See* FPLE Exhibit 1, Direct Testimony of Robert M. Garvin, at 4.

would render futile our efforts to compete for customers served by large-scale Governmental aggregators.[29]

As anticipated in the potential NOPEC-FPLE supply arrangement, the NOAC communities also have successfully achieved discounts for their consumers in the past and expect to negotiate with third-party suppliers for competitively priced generation going forward. Based on the testimony of other intervenors in this case, NOAC is confident that should the Commission appropriately eliminate the Companies' proposed barriers to large-scale governmental aggregation, third-party suppliers will again seek to provide the benefit of lower cost, competitively-priced generation to their consumers, and particularly to large-scale governmental aggregations.[30]

Whether there is an opportunity for the Large-Scale Governmental Aggregations to provide the benefit of lower cost, competitively-priced generation to consumers depends entirely on the Commission's decision in this proceeding. The Large-Scale Governmental Aggregations respectfully request the Commission follow the legal mandates of SB 221 recognizing their favored legal status, establish a fair and even playing field between the utilities and the potential competitive suppliers of the Large-Scale Governmental Aggregations, and allow them the opportunity to provide our governmental aggregation customers with a lower cost alternative to the Companies' SSO.

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[29] *Id.* at 5.

[30] *See* Competitive Suppliers Ex. 3, Direct Testimony of Teresa L. Ringenbach, at 6. *See also* Competitive Suppliers Ex. 1, *Direct Testimony of David I. Fein, at 3. (Stating* "The decision that the Commission makes in this proceeding will determine whether retail competition is viable in the FirstEnergy Service Territories and whether CRES providers like CNE and wholesale providers like CCG have an opportunity to provide customers with an alternative to service with FirstEnergy.)

II. BURDEN OF PROOF AND COMMISSION REVIEW

The burden of proof is solely on the Applicants, as Electric Distribution Utilities, to present a plan to the Commission that conforms to the provisions set forth in O.R.C. 4928.143(B)(1) and (2).[31]

Section 4928.141 of the Revised Code places absolute authority in the Commission to authorize an SSO under either Section 4928.142 or Section 4928.143.[32] The Applicants must demonstrate that the ESP, as proposed, including its pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, is more favorable in the aggregate than the expected results of a Market Rate Offer ("MRO") alternative.[33]

As discussed in detail below, the ESP, as proposed, without any modifications, is wholly contrary to the legislative intent to incentivize large-scale governmental aggregation. The Companies' proposal creates substantial barriers to competition, effectively eliminating any opportunity for the Large-Scale Governmental Aggregations to provide service to their customers. Importantly, SB 221 also provides the Commission with the specific legal authority to modify an ESP application if the Commission finds that the ESP, **as modified**, would be more favorable in the aggregate as compared to the expected results of an MRO.[34] The Large-Scale Governmental Aggregations request the Commission do just that – modify the Plan.

In its review of how the ESP should be modified, the Commission should take into account the favored legal status of the Large-Scale Governmental Aggregations generally and the specific directive to the Commission in O.R.C. 4928.20(K). As discussed above, SB 221 explicitly requires the Commission to consider the impact of a proposed ESP on large-scale

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[31] O.R.C. 4928.143(C)(1).
[32] O.R.C. 4928.141(A).
[33] O.R.C. 4928.143(C)(1).
[34] O.R.C. 4928.143(C)(1).

governmental aggregation, both in terms of how the plan is constructed as well as "the effect on large-scale governmental aggregation of any nonbypassable generation charges, however collected, that would be established under that plan, except" certain previously approved deferrals.[35]

The Large-Scale Governmental Aggregations respectfully submit that the Commission must modify the ESP, as set forth in Section IV below, to eliminate the barriers to large-scale governmental aggregation and provide an opportunity for lower cost, competitively-priced generation to be made available to consumers within their governmental boundaries after January 1, 2009, as intended by SB 221.

III. FIRSTENERGY'S PROPOSED ESP RAISES SIGNIFICANT POLICY CONCERNS FOR OHIO'S ENERGY FUTURE AND EVISCERATES LARGE-SCALE GOVERNMENTAL AGGREGATION

A. FirstEnergy's ESP Contorts SB 221 for the Companies' Benefit, to the detriment of Consumers, while effectively negating Commission review

SB 221 established in Section 4928.141 the primary mandate of the legislation, the creation of a new SSO for customers either based on the market or constructed by the Companies in a manner fair to consumers.[36] Subject to the limitations in Section 4928.143(B) discussed above, there is little mandatory direction to the EDUs on how the ESP must be constructed. This is especially the case as the Commission's rules regarding construction of an ESP have not yet taken effect.[37]

The terms and conditions proposed in the ESP show that FirstEnergy's management took the discretion allowed by the statute and contorted the legislative intent and directions of SB 221 for the Companies' benefit, to the detriment of consumers. The ESP, as proposed, ignores the

[35] O.R.C. 4928.20(K).
[36] O.R.C. 4928.141(A).
[37] *See* case no. 08-777-EL-ORD. On November 10, 2008, the Commission approved the "Applications for Rehearing" filed by various parties in Case No. 08-777-EL-ORD to the rules previously approved by the Commission in that case on September 17, 2008.

safeguards and limitations imposed in Section 4928.143(B), maximizes FirstEnergy and its affiliate's revenues, eliminates the opportunity for competition to develop, and minimizes the potential for substantive Commission review of its provisions.

One of the most troubling aspects of the Companies' Application is that the FirstEnergy Companies are demanding the Commission apply SB 221's statutory test for the first time in an application and record devoid of quantitative analysis or substantive justification by the Companies.

The Companies' Application proposes a nearly $14 *Billion* transaction with its affiliate, FirstEnergy Solutions ("FES"), without a contract in place between these two separate corporate entities.[38] The Companies' only justification for the price of its generation rate to customers is the understanding that SB 221 required an ESP to be "less than a market rate offer and offer stability to customers."[39] None of the witnesses proffered by the Companies professed any involvement in or knowledge of the FirstEnergy EDU – FES transaction, but assumed on the stand that it would be an arms-length transaction.[40] However, numerous risks currently borne by FES are proposed to be borne by all customers through nonbypassable charges such as the MDS prior to an arms-length contract even being negotiated.[41] There is nothing in the Companies' Application or the record that shows that the generation price is the best price that could be negotiated either with FES or other suppliers on behalf of customers. Nor would any Company witness agree that the uncontroverted 22 percent decrease in wholesale market prices since July

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[38] *See* Tr. Vol. I, at pp. 172-173.
[39] *Id.*
[40] *See* Tr. Vol. I, at p. 66; *See also* Competitive Suppliers Exhibit 2, Direct Testimony of Michael M. Schnitzer, at 11. (Stating the "Commission can have **no confidence** that the transfer price that the FE Companies would be paying to FES for the supply contract under the ESP would be fairly priced.") (emphasis added).
[41] Tr. Vol. I, at pp. 30-33.

15, 2008 should be factored into the contract supposedly being negotiated between the EDUs and FES.[42]

Without a contract in place, the only safe assumption of the ESP seems to be that the risks that would be borne by suppliers under an MRO are intended to be borne not by FES but by the customers.[43] Specifically, the EDUs and FES have placed the burden of shopping risk, transmission costs, incremental capacity costs, potential fuel transportation costs and environmental costs, and certain future fuel costs on customers under the ESP, costs which would all be borne by an MRO supplier.[44] Importantly, the issue of whether the proposed ESP's generation rate and other provisions are actually better for customers than what could be obtained through an MRO or even a fair comparison based on the risks forced onto customers is also an issue in serious dispute.[45]

Perhaps even more troubling than the actual generation rate itself is the complete lack of quantitative analysis or substantive justification the Companies' proposal provides to the Commission for review other than "management judgment." The generation rate is solely based on management judgment without any quantitative analysis or study that could be reviewed by the Commission.[46] The MDS Rider is solely based on management judgement, is not the product of any quantitative or substantive analysis, and it became painfully apparent during the hearing that the Companies' management had not even estimated the costs to be recovered or the

[42] *See* Tr. Vol. I, at pp. 194-195; Tr. Vol. VIII, at pp. 85-87; *See also* OEG Exhibit 2-A, Updated Exhibits of Lane Kollen.
[43] *See* Competitive Suppliers Exhibit 2, Direct Testimony of Michael M. Schnitzer, at 9.
[44] *See* Competitive Suppliers Exhibit 2, Direct Testimony of Michael M. Schnitzer, at 9-10.
[45] *See* Competitive Suppliers Exhibit 2, Direct Testimony of Michael M. Schnitzer, at 33 (Stating that "the ESP is actually $200 million to $800 million more expensive for customers than the MRO using Mr. Blank's own aggregate cost-benefit formulation."); *See also* OEG Exhibit 2, Direct Testimony of Lane Kollen, at 13 (stating that "MRO revenues are less than ESP revenues by $1,693.6 million on a net present value basis, meaning that the MRO option is significantly lower cost to ratepayers than the Companies' proposed ESP.")
[46] Tr. Vol. I, at pp. 26-27.

$1.731 *Billion* in revenues to be generated by the charge over the three-year ESP.[47] As proposed, NOPEC's customers alone would pay $234 million to the Companies over the next three years even while taking third party generation supply.[48] Nor is there any cost basis or quantitative justification for the proposed standby charge, Rider SBC, also a charge solely based on management judgment.[49]

FirstEnergy demands that the Commission apply SB 221's statutory test for the first time in an application and record devoid of quantitative analysis or substantive justification for the details of its proposal. The decision the Commission makes in this case will have long-term ramifications for Ohio's energy future establishing what is "appropriate" to file in an ESP application, and how the statutory, "more favorable in the aggregate" test should be interpreted. Also apparent, based on the Rules recently approved in Case No. 08-777-EL-ORD, is that the Commission supports transparency and quantitative justification for unavoidable charges to inform its review of a proposed ESP.[50] While these rules are not final, their intent and expectation should be considered in applying SB 221's statutory test. The policies of the state, as set forth in O.R.C. 4928.02, also require the Commission to vigorously review the provisions of the ESP, not only as to its impact on the future of large-scale governmental aggregation, but as to its impact on all customers both for its three-year term, and for Ohio's long-term energy future.

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[47] Tr. Vol. I, at pp. 76-78, 138-140.
[48] Tr. Vol. I, at pp. 143-144.
[49] Tr. Vol. I, at pp. 51, 146-147.
[50] *See Pending* O.A.C. 4901:1-35-03(C)(9)(c)(i)-(iii), Case No. 08-777-EL-ORD.

B. FirstEnergy has Constructed its ESP in Order to Destroy Large-Scale Governmental Aggregation, Eliminate Shopping and Ensure a Continued Captive Customer Base.

The Large-Scale Governmental Aggregations allege that the underlying reason for the lack of quantitative analysis or substantive justification for the ESP's provisions is because the ESP plan was constructed to effectively destroy large-scale governmental aggregation, eliminate shopping, and ensure the FirstEnergy Companies a continued captive customer base.[51] As explained in detail in the testimony of numerous witnesses in this case,[52] and discussed in further detail below, the combination of the proposed generation deferral, nonbypassable MDS Rider and standby charge, create substantial, insurmountable barriers to the ability of CRES suppliers to compete with FirstEnergy's SSO. Essentially, the ESP is constructed to substantially inhibit customer shopping through reductions or distortions in the "shopping credit" allowed to large-scale governmental aggregation and other shopping customers to a level well below FirstEnergy's own commodity charge.[53]

Constellation witness Michael M. Schnitzer provides an excellent summary and analysis describing how these distortions substantially limit the economic opportunity for customers to switch to retail CRES suppliers resulting in customers being economically "captive customers" to FirstEnergy's SSO.[54] For example, in 2009, the effects of the GPI (-$7.5 MWH) and MDS (-$10 MWH) alone reduce the avoidable cost to compare from $75 MWH to $57.50 MWH -- a reduction of almost 25%. Large-scale governmental aggregations then must consider whether to

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[51] NOPEC has filed a Motion to Intervene and Protest in FERC Docket Nos. ER09-134-000, ER09-135-000, ER09-136-000, and ER09-137-000 alleging that the Companies' ESP results in all customers in FirstEnergy's service territory continuing to be captive customers of the Companies. NOPEC's Motion to Intervene and Protest is attached as Attachment A to this Brief.

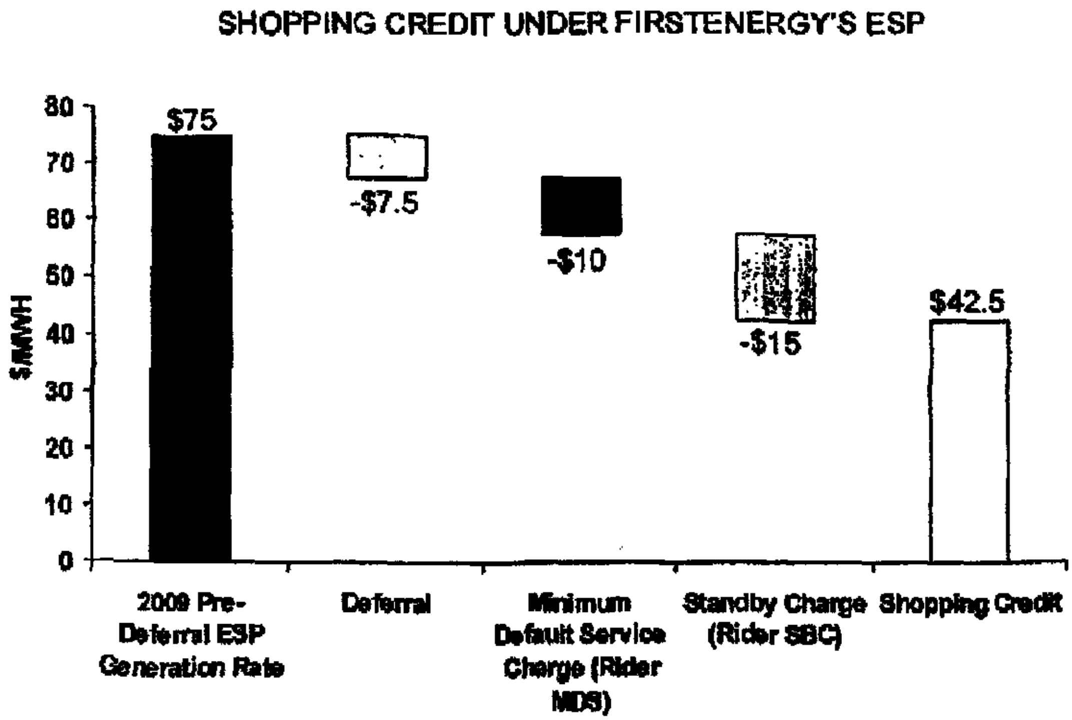
[52] *See* NOPEC/NOAC Joint Exhibit 1, Direct Testimony of Mark Frye, at 4; FPL Exhibit 1, Direct Testimony of Robert M. Garvin, at 5; Competitive Suppliers Exhibit 1, Direct Testimony of David I. Fein, at 7-8; Competitive Suppliers Exhibit 2, Direct Testimony of Michael M. Schnitzer, at 6-11; Competitive Suppliers Exhibit 3, Direct Testimony of Teresa L. Ringenbach, at 4-6.

[53] Competitive Suppliers Exhibit 2, Direct Testimony of Michael M. Schnitzer, at 6-8.

[54] Competitive Suppliers Exhibit 2, Direct Testimony of Michael M. Schnitzer, at 6-8.

subject their customers to the risk of potentially returning to the Companies' SSO at 160 percent of current market prices or to further reduce the shopping credit by paying the SBC charge (-$15 MWH). The result, as illustrated by Mr. Schnitzer's Figure 1 below, is that "under the ESP SSO customers are effectively captive customers."[55]

Figure 1



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It is irrefutable that increased levels of shopping are detrimental to the FirstEnergy Companies' economic interests. One of the Company's two market-rate expert witness, Dr. Scott T. Jones, agreed to as much during the hearing accepting his previous statement that "[I]deally it goes without saying FirstEnergy would like no customers to leave their service and shop" because it is a "general business principle that any supplier, whether they are an electricity

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[55] Competitive Suppliers Exhibit 2, Direct Testimony of Michael M. Schnitzer, at 8.
[56] Competitive Suppliers Exhibit 2, Direct Testimony of Michael M. Schnitzer, at 7 (Figure 1).

supplier or a tomato supplier would rather have a large market than a smaller market."[57] Dr. Jones also stated that historically the "propensity of customers to shop tended to increase with their opportunity to shop" and that the "choice to shop is a decision at the margin."[58] FirstEnergy has constructed its ESP to eliminate the propensity for customers to shop by eliminating the economic opportunity at the margin which potentially would otherwise incentivize a customer to shop. The practical reality of this result from the ESP, as proposed, was surmised by FirstEnergy's other market rate expert, Mr. Frank Graves. During cross-examination at the hearing, Mr. Graves opined:

> Q. Just one more question. Based upon your analysis of the marketplace can you tell me whether a full-requirements product as we have just discussed it whether it's feasible to find this product in the – in the current electricity market for $57.50?
> A. Well, it is certainly inconsistent with my analysis that would be prevalent out there. At least as of the middle of the summer that would be an extraordinary price * * *.[59]

Even FirstEnergy's own market-rate experts cannot dispute that the net effect of the deferral and the ESP's non-bypassable charges will be to substantially limit if not completely eliminate the economic opportunity for customers to shop through participation in large-scale governmental aggregation under the ESP. Dr. Jones also agreed that the elimination of shopping would be in the best interests of the Company. Zero shopping, according to Companies witness Kevin T. Warvell, is actually what the Companies have forecasted in their 2009 load forecast.[60]

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[57] *See* Tr. Vol. III, at p. 76.
[58] *See* Tr. Vol. III, at pp. 71 and 34.
[59] Tr. Vol. III, at p.84.
[60] Tr. Vol. II, at pp. 145-146. (examination of Kevin T. Warvell)

> Q. And is there a current forecast for the year 2009 in place?
> A. That we've filed, we've filed a forecast.
> Q. Is there any expectation of shopping within that forecast?
> A. There was no shopping forecasted in that forecast.

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The Companies constructed an anti-competitive ESP without quantitative justification or substantive supporting analysis. The Large-Scale Governmental Aggregations propose just and reasonable modifications to the ESP to carry out the requirements of SB 221 to incentivize large-scale governmental aggregation.

IV. REQUESTED MODIFICATIONS TO THE ESP AS REQUIRED BY SB 221.

A. FirstEnergy's Proposed ESP Contains Three Significant, Unreasonable and Unlawful Barriers to Large Scale Governmental Aggregation's Survival which Must Be Eliminated Or Appropriately Modified.

Despite the public policy of SB 221 to incentivize large-scale governmental aggregation, FirstEnergy's proposed Electric Security Plan contains several provisions that, if not significantly modified or eliminated, will destroy large-scale governmental aggregation. The Direct Testimony of Mark Frye explains that:

> FirstEnergy's Plan creates barriers to competition, is anti-competitive, and creates subsidies that would flow from a customer who elects to participate in a large-scale governmental aggregation to other customers who remain with the Companies' SSO and the Companies themselves. If approved as filed, the Plan will make large scale governmental aggregation uneconomic and likely destroy NOAC's and NOPEC's large scale electric aggregation programs.[61]

Mr. Frye's assessment is shared by witnesses of other intervenors, including Integrys witness Teresa L. Ringenbach[62] and FPL witness Robert M. Garvin.[63] All three witnesses agree that "[t]he Plan's problems are found in three primary areas."[64] Mr. Frye briefly summarizes each of these problems in his testimony:

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[61] NOPEC/NOAC Joint Exhibit 1, Direct Testimony of Mark Frye, at 4.
[62] Competitive Suppliers Exhibit 3, Direct Testimony of Teresa L. Ringenbach, at 4. (Stating "The Commission should reject FirstEnergy's attempts to impose generation service related costs onto consumers that do not purchase generation supply from FirstEnergy. If the Commission fails to significantly alter FirstEnergy's proposal in this regard, retail competition and Governmental Aggregation will likely come to an end in Ohio.")
[63] FPL Exhibit 1, Direct Testimony of Robert M. Garvin, at 5. (Stating "We also share the same and immediate concern of our prospective customer— NOPEC— in this proceeding – that the barriers to competition that are proposed in the FirstEnergy ESP, if adopted by the Commission in this proceeding, would render futile our efforts to compete for customers served by large-scale governmental aggregators.")
[64] NOPEC/NOAC Joint Exhibit 1, Direct Testimony of Mark Frye, at 4.

First, the Plan provides a barrier to competition by deferring a portion of a customer's generation charges through the Generation Phase-In Rider if they remain with the Companies' SSO, while collecting it from them in the future with interest. Consumers who elect to participate in a large scale governmental aggregation are provided no deferral. Worse still, if a participating large scale governmental aggregation returns a consumer to the SSO after the ESP, that consumer would pay for a generation deferral that provided them no benefit. This is a patently unfair subsidy.

Second, the Plan would penalize consumers electing to participate in a governmental aggregation through the application of what FirstEnergy proposes to be a non-bypassable "Minimum Default Service" ("MDS") charge of 1 cent per kWh for costs that do not yet exist, may never exist, and have not been *justified* or even estimated in the Plan. This is clearly an anti-competitive charge that will ensure large scale governmental aggregation cannot compete.

Third, Rider NDU provides guaranteed generation receivables for the Companies' affiliated proposed generation supplier, FirstEnergy Solutions ("FES"), without providing a corresponding benefit to any large scale governmental aggregation generation supplier. This clearly provides a subsidy from customers who elect to participate in a large scale governmental aggregation to other customers that do not.[65]

The anti-competitive effects of the GPI and MDS are so significant and such a barrier to large-scale governmental aggregation that they are specifically addressed in the Letter of Intent signed by NOPEC and FPL.[66] While the Letter of Intent commits FPL to serve NOPEC customers at "indicative pricing for electricity supply for each year [2009-2011] that is meaningfully below the sum of FirstEnergy's base generation rate,"[67] such a commitment is explicitly conditioned on the modification of the ESP to remove the competitive barriers posed by the GPI and MDS. The NOPEC-FPL Letter of Intent states that supply is conditioned upon:

the PUCO allow[ing] large scale governmental aggregation groups such as NOPEC to be able to receive the full amount of the Generation Phase-In Credit Rider for 2009, 2010 and 2011, as proposed by FirstEnergy Corporation in the

[65] *NOPEC/NOAC Joint Exhibit 1, Direct Testimony of Mark Frye, at 4-5.*
[66] FPL Exhibit 1, Direct Testimony of Robert M. Garvin, Attachment A "Letter of Intent."
[67] FPL Exhibit 1, Direct Testimony of Robert M. Garvin, Attachment A "Letter of Intent," page 3 of 11.

ESP and allow[ing] the Minimum Default Service Rider contained in the ESP to be bypassed in full by large-scale governmental aggregation group customers.[68]

Indeed, as FPL witness Garvin stated, unless these two anti-competitive provisions are effectively eliminated or modified, "it will be impossible for FPLE to compete with the SSO pricing and enter the Ohio market to become NOPEC's supplier."[69]

If large-scale governmental aggregation is to survive under the ESP, elimination or modification of these two proposed provisions will be essential to level the competitive playing field and negate the anti-competitive effects that would otherwise disincentivize and destroy the Large-Scale Governmental Aggregations' electricity programs rather than incentivize them as required by SB 221.

The third anti-competitive problem identified in the proposed Plan is the non-bypassable Non-Distribution Service Uncollectible ("NDU") Rider. It proposes to allow FirstEnergy's three operating companies to charge all customers, even those receiving third-party supply through a large-scale governmental aggregation, a fee to cover uncollectible generation charges of SSO customers only. This "non-bypassable Rider NDU creates an unfair competitive subsidy for the Companies"[70] that "jeopardizes the continued vitality of governmental aggregation."[71] This proposed subsidy must be made competitive neutral by either making it avoidable for large-scale governmental aggregations or by providing CRES that supply large-scale governmental aggregations equal treatment through institution of a purchase of 100 percent of CRES receivables program similar to those in existence in Ohio's natural gas CHOICE programs.

[68] FPL Exhibit 1, Direct Testimony of Robert M. Garvin, Attachment A "Letter of Intent," page 3 of 11 at Paragraph I(B)(b).
[69] FPL Exhibit 1, Direct Testimony of Robert M. Garvin, at 6.
[70] NOPEC/NOAC Joint Exhibit 1, Direct Testimony of Mark Frye, at 20.
[71] FPL Exhibit 1, Direct Testimony of Robert M. Garvin, at 19.

Either approach would eliminate this aggregation-inhibiting feature proposed by FirstEnergy in its ESP *Application*.

Without modification, any of these three ESP features will result in the destruction of large-scale governmental aggregation in Ohio in direct conflict with the legal mandate to incentivize large-scale governmental aggregation in SB 221.

B. There Should Either Be No Generation Charge Deferrals Or The GPI Should Be Universally Available to Consumers of Large-Scale Governmental Aggregations Through A Governmental Aggregation Generation Credit ("GAGC")

While FirstEnergy's Electric Security Plan[72] proposes a Standard Service Offer with average base generation rates of 7.5 cents/kWh in 2009, 8.0 cents/kWh in 2010, and 8.5 cents/kWh in 2011, it also proposes to discount these rates by roughly 10% per year. The amounts deferred are proposed to be collected over a ten year period after the ESP, with interest at an initial rate of 8.4%. The discount would be accomplished through an up-front Generation Phase-In ("GPI") Credit, with the corresponding deferral to be collected through a back-end Deferred Generation Cost Recovery ("DGC") Rider. Under the Companies' proposal, ONLY customers taking SSO would receive the up-front GPI credit, while ALL customers, including those that shopped during the ESP and didn't receive the GPI credit, would be required to pay the back-end DGC Rider.

The anti-competitive effect of providing the GPI credit to only SSO customers will lead to the destruction of large-scale governmental aggregation. "To secure savings for a customer who elects to participate, a large-scale governmental aggregation must be able to purchase generation at a price lower than [the SSO] less any GPI credit."[73] "Since the credit represents approximately a 10% discount on the base generation price, any competitive provider * * *

[72] Application, at 9-19.
[73] NOPEC/NOAC Joint Exhibit 1, Direct Testimony of Mark Frye, at 6.

would be unable to beat or even match, such steeply discounted, phased-in SSO prices."[74] The GPI, as proposed, is "a significant barrier to competition"[75] that "would prevent large-scale governmental aggregations such as NOPEC [and NOAC] from obtaining competitively-priced alternative electric supplies for their constituents."[76]

1. Option 1: Eliminate the Proposed Generation Deferral as Recommended by Staff

The most direct way to eliminate the anti-competitive effects of this deferral-created GPI credit is to simply eliminate the underlying deferrals. It should be noted that not a single intervening party has advocated keeping the deferrals. In fact, many have suggested that they be entirely eliminated:

> [T]he general practice of deferring current generation expense for later recovery raises serious concerns with respect to intergenerational equity. Under FE's proposal, a portion of the generation expense incurred in 2009 conceivably would be recovered by customers as late as 2020. While this produces a near-term benefit for today's customers, I do not recommend designing a program in which customers as a whole would accumulate a very substantial unpaid debt owed, with interest, to FE.
> * * *
> I would recommend that the Commission not accept the generation deferral provisions of the ESP as proposed by FE.[77]

The Staff, too, has expressed its dislike for the difficulties and distortions that deferrals create and stated its position that there should be no generation deferrals in the approved ESP:

> The Staff is opposed to it and recommends against these deferrals. We recognize a desire to keep rates low and avoid rate shock, but, having long experience in dealing with the problems of deferrals in the RTCs, we think that deferrals present too many difficulties and distortions. We are not opposed to smoothing out the

[74] FPL Exhibit 1, Direct Testimony of Robert M. Garvin, at 10.
[75] NOPEC/NOAC Joint Exhibit 1, Direct Testimony of Mark Frye, at 6.
[76] FPL Exhibit 1, Direct Testimony of Robert M. Garvin, at 10.
[77] Kroger Exhibit 1, Direct Testimony of Kevin Higgins, at 8. See, *Elyria Foundry Company v. PUCO*, 114 Ohio St.3d 305, 2007 Ohio 4164, 871 N.E.2d 1176, *dissent, J. Pfeifer*: ("Although this practice may smooth out a utility's bottom line, the reality is that we are pushing expenses incurred today onto a later generation of ratepayers. It is a boon to people who leave the system, whose current rates are being subsidized by future ratepayers. * * * Providing rate certainty today does not justify the commission's decision to allow current costs to be deferred.").

> rate shock problem by some kind of levelization process within the ESP period, but we do not recommend a process which extends the collection through an unavoidable charge beyond the ESP period.[78]

Eliminating the deferrals, and the corresponding GPI credit, would avoid an undesirable and unwanted intergenerational cost shift, in this case, an amount over $1.3 *Billion*. Eliminating the deferrals also would prevent the significant administrative difficulties deferrals have been shown to create. Most importantly, eliminating the deferrals and the associated GPI credit eliminate the market "distortion" they otherwise create, allowing the Large-Scale Governmental Aggregations to compete against the <u>full</u> SSO price instead of only a masked portion of the price artificially constructed through collection timing mechanisms. The Large-Scale Governmental Aggregations join with other intervening parties and Staff to recommend the complete elimination of all generation deferrals.

2. Option II: In the Alternative, Eliminate the Anti-Competitive Effects of the Deferral for Large-Scale Governmental Aggregations through the GAGC Mechanism

If generation deferrals are retained to any degree in a final ESP, then the Large-Scale Governmental Aggregations' proposal of the Governmental Aggregation Generation Credit ("GAGC") should be included in an approved Plan to address the anti-competitive effects created by the deferrals. The Large-Scale Governmental Aggregations' proposal for the GAGC is set forth in the Direct Testimony of Mark Frye:

> The Commission should order the Companies to create a "Governmental Aggregation Generation Credit" ("GAGC") available to customers served by a large scale governmental aggregator that is equivalent to the GPI. Consumers who continue to be served by the Companies' Rider GEN would receive the GPI. Consumers who elect to participate with a large scale governmental aggregation would receive an equivalent credit called the GAGC. The generation costs deferred through both the GPI and the GAGC would be included in the Companies' proposed DGC Rider beginning in 2011. Establishing the GAGC at

[78] Staff Exhibit 6, Direct Testimony of Richard Cahaan, at 3.

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> a level equal to the GPI enhances large scale governmental aggregators' opportunity to compete by lowering one barrier to competition.[79]

The concept of the GAGC is simple and straightforward. Mr. Frye describes that:

> *For example, if a Rider GPI credit of $0.0075/kWh were* approved for Plan year 2009, by applying an identical credit through the GAGC on a large scale governmental aggregation participant's invoice, a level playing field in relation to this deferral would be assured. The total value of the credits provided to customers receiving the GAGC would be deferred, with carrying charges, and this amount (that is, the benefit received by the aggregation group participants) then would be subject to recovery from customers beginning in 2011.[80]

Importantly, the Large-Scale Governmental Aggregations are not asking for a subsidy. Rather, creation of a credit for large-scale governmental aggregation consumers equal to the GPI credit offered to SSO customers would be enjoyed and funded by both SSO and large-scale governmental aggregation customers equally. By definition, this would eliminate any and all anti-competitive effects of the GPI. On the front-end of the deferral credit process, the GAGC would ensure a level competitive playing field, allowing large scale governmental aggregations to compete against the full effective price SSO customers would pay. Neutralizing the effect of the GPI with a matching credit would improve the chances that the state policy of incentivizing large-scale governmental aggregation would not be impeded by FirstEnergy's ESP.

Moreover, on the back-end of the deferral recovery process, many of the problems surrounding the operation of the DGC Rider as it relates to large-scale governmental aggregation customers would be resolved: tracking issues would be greatly mitigated; potential subsidization of SSO customers by large-scale governmental aggregation customers eliminated; receipt of the full measure of the benefits of the generation rate phase-in process by large-scale governmental

[79] NOPEC/NOAC Exhibit 1, Direct Testimony of Mark Frye, at 9.
[80] NOPEC/NOAC Exhibit 1, Direct Testimony of Mark Frye, at 9.

aggregation customers assured; and recovery of all deferred amounts by the EDUs, with carrying costs provided.[81]

We proposed to replace the complexity and uncertainty surrounding the deferral mechanism as proposed by FirstEnergy with the simplicity and ease of the GPI-matching credit proposed by the Large-Scale Governmental Aggregations. This would comply with R.C. 4928.20(I) and (K) and remove the deferral as a barrier to large-scale governmental aggregation should a generation price phase-in be offered for customers by the Commission.

C. The Minimum Default Service Rider Should Be Made Bypassable Generally for Large-Scale Governmental Aggregations Or Bypassable Upon Prior Advance Notice by a Large-Scale Governmental Aggregation *that it will take* CRES from a Third-Party Supplier

Probably the most egregious of the proposed Plan's provisions is the newly proposed Minimum Default Service charge. FirstEnergy proposes a flat 1cent/kWh minimum default service charge to be paid by ALL customers. For SSO customers, the charge is embedded into

[81] In his Direct Testimony, Mark Frye pointed to several problems posed by FirstEnergy's proposed GPI credit-DGC Rider proposal as it relates to large scale governmental aggregation. FirstEnergy's DGC Rider contains language which states: "Customers that are part of a Governmental Aggregation Group shall be responsible only for a portion of the DGC charge that was proportionate to the benefit that the electrical load centers within the jurisdiction of the governmental aggregation as a group receive. In such event, the utility will file a proposed method for determining the proportion of the applicable DGC charge."

As is clear from the DGC Rider itself, FirstEnergy has no current proposal on how a large scale Governmental Aggregation's proportionate benefit under the DGC Rider is to be determined. This is likely in large part because FirstEnergy believes its carefully crafted ESP will eliminate all aggregation going forward, making such a proposal unnecessary. [*See* Tr. Vol. I, p. 167; Tr. Vol. VII, at p. 38.]. This incompleteness could result in large scale Governmental Aggregation consumers receiving back less than their "proportionate" share of the DGC Rider, as well as causing them to subsidize a portion of SSO customer's share of the DGC Rider costs.

Moreover, because the identity of large scale governmental aggregation consumers would have to be carefully tracked for purposes for determining who gets to avoid the DGC Rider starting in 2011 and to what extent, and because few if any of the obvious questions surrounding this process were not even considered by FirstEnergy, there is much room for misidentification of eligible customer, miscalculation of the benefits to which they are entitled and mischief by FirstEnergy in short changing customers entitled to avoid the DGC Rider for the entire prescribed ten year period of its proposed existence.

The GAGC proposal effectively deals with all these issues. As Mr. Frye states at pages 9-10 of his Direct Testimony: "Since the GAGC would be equivalent to GPI, consumers participating in a large scale Governmental Aggregation would benefit 100% and pay the entire DGC. The creation of the GAGC also eliminates the Companies' tracking challenges, as well as potential subsidies between large scale governmental aggregation participants and SSO customers." [NOPEC/NOAC Joint Exhibit 1, Direct Testimony of Mark Frye, at 6-8].

the generation rate. For customers who shop, it is proposed to be collected through a non-bypassable Minimum Default Service ("MDS") Rider.[82] This is a completely brand new charge proposed by the Companies.

The revenue FirstEnergy seeks to collect through these minimum default service provisions is very significant over the three year period of the ESP. Using a straight-forward methodology of "the Companies' total estimated kWh distributed multiplied by the 1 cent/kWh for each year of the Plan," Mark Frye projects the proposed revenue to be $1.731 *Billion* over the three years of the ESP.[83] FirstEnergy Witness Warvell confirmed that Mr. Frye's methodology and final estimate were accurate under cross-examination:

> Q. Based on the amount of the megawatt hour sales, would you agree that the MDS charge based on those sales levels would generate approximately 1.731 billion dollars in revenue over the three-year term of the ESP plan?
>
> A. If the Commission has guaranteed the three-year plan, yes, I would agree with that.[84]

Despite the huge revenues to be collected through the minimum default service charge, FirstEnergy provides no valid justification or documentary support for it whatsoever. Mr. Warvell described the minimum default service charge as designed to "recover, among other things, generation related administrative costs and hedging costs associated with the Companies' obligation to serve the entire load of their retail customers."[85] Under cross-examination, he testified that "the purpose of the rider is to account for shopping risk, opportunity costs, and some back office and front office administrative charges."[86] Yet he could point to no documentation that supports any of his testimony.

[82] Tr. Vol. I, at p.78.
[83] NOPEC/NOAC Exhibit 1, Direct Testimony of Mark Frye, at 12.
[84] Tr. Vol. I, at p.78.
[85] Applicant Exhibit V, Direct Testimony of Kevin T. Warvell, at 10.
[86] Tr. Vol. I, at p.28.

The following exchange between Hearing Examiner Price and Mr. Warvell fairly sums up the dearth of support Mr. Warvell pointed to in his attempts to justify the MDS:

> EXAMINER PRICE: Excuse me, Mr. Smith. This charge you state is necessary to recover generation weighted administrative costs and hedging costs; is that correct?
> THE WITNESS: Yes, hedging.
> EXAMINER PRICE: You estimated the hedging costs?
> THE WITNESS: No. What we have done is looked at what a put option may require in this process from brokers and also looked at the opportunity costs in relationship with a fixed product for a three-year and molded the shaping risks around a put option, which roughly at the time we looked at was about 7-1/2 cents.
> EXAMINER PRICE: And where in the application or the –
> THE WITNESS: I'm sorry, not 7-1/2, three-quarters of a cent.
> EXAMINER PRICE: That's okay. Where in the application is that calculation?
> THE WITNESS: There is no calculations. We talked to some brokers.
> EXAMINER PRICE: Have you estimated generation related administrative costs?
> THE WITNESS: We have not put any costs associated with that in the application or workpapers.
> EXAMINER PRICE: So you are asking the Commission to give you a rider to recover costs that you have not even estimated those costs at this point?
> THE WITNESS: As I said before, we looked at them as a group of costs and risks that exist in round, not only the administration but shopping and opportunity costs.[87]

Under cross-examination, Mr. Warvell testified repeatedly that no estimates of administrative costs were made.[88] He could not cite to any options or option pricing supporting his testimony.[89] No estimates of hedging costs were prepared.[90] No outside hedging experts were consulted, even though he admits the FirstEnergy operating companies have no expertise concerning hedging.[91] No estimates, projections, studies, or analyses on the number of shopping

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[87] Tr. Vol. I, at pp.77-78.
[88] Tr. Vol. I, at p.78.
[89] Tr. Vol. I, at p.123, ("Q. Can you show me where in your testimony or in your workpapers you have these figures you have just mentioned about options and option prices? A: They are not.")
[90] Tr. Vol. I, at p.77. (*"Examiner Price: You estimated the hedging costs? The Witness: No."*)
[91] Tr. Vol. I, at p.76, and p.124. ("Q. But does the operating companies have the expertise to hedge generation? A: Not at this time."): and ("Q. Did you attempt, sir, to go to any outside source to see whether or not this hedging could be provided by you or by some outside entity and that they would submit to this Commission as to either a

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customers expected under the ESP were performed.[92] In short, there is NOTHING in the application, workpapers or FirstEnergy discovery responses,[93] or elsewhere in the Record in this proceeding, that provides any quantitative analysis as to how FirstEnergy management developed their proposed MDS charge and MDS Rider.[94]

The naked truth revealed by Mr. Warvell's testimony is that the MDS charge and Rider were concocted during meetings of FirstEnergy management[95] and simply set at the rate of 1 cent/kWh.[96] There is nothing that Mr. Warvell or anyone else at FirstEnergy can point to as justification for the proposed 1 cent/kWh charge, because there's no documentation of these alleged management meetings[97] and, in Mr. Warvell's own words, "there's nothing adding up to a 1 cent charge."[98]

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cost for a market-based standard by which to judge the reasonableness... Did you make any such inquiry or attempt to make such a determination? A. To an outside source? Q. Yes. A. No.").

[92] Tr. Vol. I, at p.120, lines 16-19, and p.131, lines 3-8: ("Q. Okay. When the company designed the MDS charge, did you make any studies or any assumptions as to how many customers were going to shop? A. No, we didn't make any assumptions."); and ("Q. Other than looking at numbers did the companies complete any other estimates, projections, studies, or analyses examining the amount of customer shopping that potentially could occur or would occur under the ESP? A. No.").

[93] See Applicants Responses to Discovery Requests, marked as Nucor Exhibit 2, and NOPEC/NOAC Joint Exhibits 2-4. See, e.g., Response to Nucor Request 1-8(b): "There are no workpapers or calculations used to derive the minimum default service charge contained in proposed Rider GEN and Rider MDS."

[94] Tr. Vol. I, at p.139, line 21 to p.140, line 140: ("Q. Is it a correct statement, Mr. Warvell, there is nothing in this ESP application that provides a quantitative analysis as to how FirstEnergy management developed the MDS charge? A. No.").

[95] Tr. Vol. I, at p.138, lines 3-11:

Q. Just to follow-up a little bit on this, Mr. Warvell, is it a correct statement of your testimony that the development of rider MDS was solely based on management's judgment?

A. I would characterize it as experienced market individuals within our organization looked at a number of factors and developed that price, yes.

Q. So that would be management judgment?

A. Yes.

[96] Tr. Vol. I, at p.50, lines 4-10:

Q. The selection of the 1 cent per kilowatt hour as the POLR charge wasn't the result of any analytical study, was it?

A. Not a written analytical study, no. It was basically based on, as I talked about before, group of management employees with expertise in that area and developed in that manner.

[97] Tr. Vol. I, at p.138, lines 12-16:

Q. And there's no documentation of management meetings that arrived at this 1 cent charge? Telephone conversations with option brokers, no documentation whatsoever?

A. No. As I answered before, no.

[98] Tr. Vol. I, at p.139.

Try as FirstEnergy might to cast its MDS charge as a POLR charge that seeks to cover hedging and related costs, it is not. Hedging costs and related POLR expenses tied to returning customers are addressed through the proposed SBC Rider. As Integrys witness Teresa L. Ringenbach rightly notes:

> The minimum default service is a misnomer, for it does not appear to be a discreet service at all, just compensation for FirstEnergy to stand ready to sell generation at 160% times the current market prices."[99]

Ms. Ringenbach is correct in noting that the SBC Rider performs the POLR obligation under the proposed Plan. However, the MDS in fact does have a discrete, yet destructive, purpose: to destroy the Large-Scale Governmental Aggregations. As Mr. Warvell on more than one occasion in his testimony conceded, while the SBC Rider is a "return fee," the MDS is a naked "exit fee."[100] The purpose of this exit fee is simple: to prevent the loss of any of the $1.731 *Billion* in revenue represented by the MDS that could be lost through shopping. The surest way to guarantee revenues is simply to prevent shopping in the first place, in this case, by imposing a significant non-bypassable generation charge equal to 13% of the 2009 base generation rate as an exit fee. That the purpose of the MDS Rider is to secure revenue for FirstEnergy through the destruction of shopping, including through large-scale governmental aggregations, is also summarized by Mr. Frye:

> Q. Would the Minimum Default Service Charge have an effect on large scale Governmental Aggregation?
> A. Yes, it would have a serious and materially adverse effect. Any consumer who chooses to participate in a large scale Governmental Aggregation is directly subsidizing the Companies. Mr. Blank's testimony states as much when he says "The non-avoidable generation provisions, such as the default service charge, help

[99] Competitive Suppliers Exhibit 3, Direct Testimony of Teresa Ringenbach, at 9.
[100] Tr. Vol. I, at pp. 30, 38-40.
A. "Well, one risk for the minimum default service charge is for customers that are leaving.";
and
A. In general I would agree with your statement [that the minimum default is to compensate the company for the risk of customers leaving the system].

provide the risk mitigation arrangements that are essential for the Companies to have the financial capacity to propose the Plan in its present form for the benefit of all customers. Without such arrangements to provide ***financial resources*** [emphasis added] and mitigate the risk associated with the Plan, the Companies could not make available the pricing and other beneficial provisions of the Plan,…" [Blank Testimony, page 22, lines 19 – 24]. Providing financial resources is another way of saying this is a charge on consumers who choose third party generation supply without any corresponding or, at least, comparable benefits. A non-bypassable minimum default service charge would greatly impede, and likely destroy, large scale governmental aggregation. It is a direct barrier to competitive markets without any proven justification of cost or need.[101] The MDS Rider cannot be approved as proposed.

The MDS Rider cannot be approved as proposed. First, Applicants have failed to carry their burden of proof as to this provision being included in any approved ESP.[102] As Hearing Examiner Price noted with such complete acumen, FirstEnergy is asking for approval of a $1.731 *Billion* Rider to cover costs that FirstEnergy has not even estimated, can provide no supporting documentation for, and which is based solely upon the bald assertion of FirstEnergy's upper management.[103] Second, because the proposed MDS Rider would destroy shopping by large-scale governmental aggregations, it fails to meet the requirements set forth in SB 221 that large-scale governmental aggregations are not to be impeded, let alone destroyed, by non-bypassable generation related charges imbedded in Applicants' proposed ESP. Third, as discussed in more detail below, eliminating shopping through forced subsidization of the SSO rates is unlawful. Elimination of the MDS Rider or limitation of its effect as to large-scale governmental aggregations is, therefore, necessary. NOPEC and NOAC have proposed two alternate modifications.

[101] NOPEC/NOAC Joint Exhibit 1, Direct Testimony of Mark Frye, at 11-12.
[102] O.R.C. 4928.143(C)(1).
[103] See Tr. Vol. I, at pp.77-78.

1. Option I: Eliminate the MDS Rider Generally for Large-Scale Governmental Aggregations

The simplest of NOPEC and NOAC's two proposed modifications is to eliminate the MDS Rider or make it fully bypassable for large-scale governmental aggregations. This proposal is set forth in Mr. Frye's testimony:

> Q. What do you propose for the Minimum Default Service charge?
> A. Rider MDS should be eliminated. If the Companies want to take the position that Rider GEN includes a Minimum Default Service charge, that is fine, but any customer served by a large scale governmental aggregation's third party supplier should not be subject to any minimum default service charge.[104]

FPL Witness Garvin has similarly proposed the elimination of the MDS Rider for large-scale governmental aggregations:

> Q. *What do you propose with respect to this issue?*
> A. The MDS rider proposed to be applied to large-scale governmental aggregation customers is unjust, unreasonable and not justified by FirstEnergy's application or testimony and should be eliminated as part of the final ESP.[105]

Elimination of the MDS Rider for large-scale governmental aggregations would remove one of the most objectionable, baseless and illegal provisions contained in the proposed Plan. It would also eliminate the anti-competitive effect of the minimum default service charge as to governmental aggregations, and increase the possibility that large-scale governmental aggregations can provide their participants savings going forward. These positive effects can be achieved simply by the Commission's modification of the ESP as proposed by the Large-Scale Governmental Aggregations.

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[104] NOPEC/NOAC Joint Exhibit 1, Direct Testimony of Mark Frye, at 18.

[105] *FPL Exhibit 1, Direct Testimony of Robert Garvin, at 14. Specifically, see p.14, lines 18-21:* ("Q. What do you propose with respect to this issue? A. The MDS rider proposed to be applied to large-scale governmental aggregation customers is unjust, unreasonable and not justified by FirstEnergy's application or testimony and should be eliminated as part of the final ESP.").

2. Option II: In the Alternative, Establish a 150 day Notice Window for Large-Scale Governmental Aggregations to Bypass the MDS charge

The second alternate modification proposed by NOPEC and NOAC concerning the MDS Rider would be a notice period during which large-scale governmental aggregations could give notice to FirstEnergy's operating companies that they intended to shop their participants, and bypass the MDS Rider fully. This limited option is also set forth in Mr. Frye's testimony:

> Q. In the event the Commission chooses not to eliminate the MDS or make it bypassable, what modifications could the Commission order that would reduce its burden to consumers who choose to participate in a large scale governmental aggregation?
> A. In this event, there are a number of different modifications the Commission should order to reduce the burden of Minimum Default Service charge on third party supplies.
>
> The Commission should create a window of opportunity of 150 days between its final order approving the ESP and initiating any potential liability under Rider MDS. If a large scale governmental aggregator provides written notice to the Companies that it will supply its customers with third party generation supply and commences enrollment of such customers within 150 days of the PUCO's final order approving the ESP, such large scale governmental aggregator's customers would not be subject to the Rider MDS. This notice period would help prevent the Companies from having to sell power back to FES at a loss, while providing a large scale governmental aggregation the opportunity to secure its participants supplies in a reasonable fashion. It also would dramatically reduce the hedging liability, if any exists, the Companies would otherwise possibly encounter.
>
> To accommodate for the minor fluctuations experienced by governmental aggregations as customers move and refresh mailings occur, the Commission should also permit large scale governmental aggregators to establish a customer supply tolerance of ten percent (+/- ten percent) that would be based upon the consumption of the initial number of customers participating in the aggregation.[106]

This option also eliminates the minimum default service charge as applied to large-scale governmental aggregations, removes a critical competitive barrier, and provides large-scale governmental aggregations an opportunity to continue after the end of the current RSP/RCP period. Applicants should have little complaint about this proposal, since they have yet to

[106] NOPEC/NOAC Joint Exhibit 1, Direct Testimony of Mark Frye, at 19-20.

finalize a supply agreement with FirstEnergy Solutions.[107] Timely notification by a large-scale governmental aggregation that Applicants need not secure power for the governmental aggregation's participants allows the operating companies to structure their supply agreement with FES to avoid all the hedging, administrative, opportunity and other costs they contend justify collection of a non-bypassable minimum default service charge from such departing large-scale governmental aggregation customers. In his testimony, Mr. Warvell fully conceded the effectiveness of such a notification approach:

> Q. And my question is if you're considering the need to serve unanticipated load to go to the market to get that power, if you know, prior to the ESP going into effect that some customers – you will not be serving some customers, will there be a need to acquire power for those customers?
> A. There would not be a need to acquire power for those customers. But a shopping risk would still exist for the remaining customers.[108]

Thus, prior notification preserves both the large-scale governmental aggregation's ability to secure generation supply for their customers and the FirstEnergy EDU's ability to structure their supply agreement with FES to accurately request the Operating Companies' actual load. Such an approach has merit and, if full elimination of the MDS Rider for large-scale governmental aggregations is not adopted, then this notification alternative should be.[109]

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[107] Tr. Vol. I, p.103, and p.133. ("Q. Now I believe this morning you testified there was no agreement yet for FES to supply generation for the electric security plan that's offered in this application, but that such would be negotiated at an arm's length basis, is that correct, my memory correct? A. In general, yes."); and ("Q. So, right now, FES is not contractually obligated to serve the electric load of the operating companies after January 1, 2009; is that correct? A. That is correct. Q. And since there's been no contract finalized between the operating companies and FES, the operating companies similarly are not currently contractually obligated to purchase generation from FES to serve the operating companies' customer load after January 1, 2009; is that correct? A. Yes, that is correct.").

[108] Tr. Vol. I, p.167.

[109] It should be noted that OEG witness Stephen Barron makes a similar notification proposal. See, OEG Exhibit 1, Direct Testimony of Stephen Barron, at 26-28.

D. The Non-Distribution Services Uncollectible Rider Must Be Made Bypassable For Large-Scale Governmental Aggregations Or A Purchase of 100 percent CRES Receivables Arrangement Similar to those in Ohio's Natural Gas CHOICE Programs Should Be Instituted.

The third anti-competitive provision of the proposed Plan, which threatens large-scale governmental aggregation is the proposed non-bypassable Non-Distribution Services Uncollectible ("NDU") Rider. Through the NDU Rider, FirstEnergy proposes to allow its EDUs to "socialize" their uncollectible non-distribution costs of SSO customers by collecting them from all distribution customers, whether or not they take SSO service. Thus, "the Companies propose to charge a unit cost per kWh that would be non-bypassable for consumers choosing to participate in a large scale governmental aggregation, * * * [thereby] creating an unfair competitive subsidy for the Companies."[110]

The NDU Rider's anti-competitive effect on large-scale governmental is well summarized by FPL Witness Garvin. In his Direct Testimony, Mr. Garvin states:

> Customers served by competitive suppliers would be required to pay a portion of the utility's non-distribution bad debt, while competitive suppliers would be required to shoulder this expense themselves, and mark up their rates accordingly. The proposed rider effectively requires customers served by competitive suppliers, including Governmental Aggregation customers, to pay twice for bad debt expense. Further, it places the suppliers serving large-scale governmental aggregators at a competitive disadvantage and, thus, jeopardizes the continued viability of the Governmental Aggregation.[111]

The Companies provide little credible justification for designating the NDU Rider non-bypassable. The NDU Rider, as proposed, could force large-scale governmental aggregation customers to pay <u>twice</u> for bad debt expenses. The Companies argue that "the Companies uncollectible costs are very similar to PIPP costs" and that treating them in the same way "is the

[110] NOPEC/NOAC Joint Exhibit 1, Direct Testimony of Mark Frye, at 20.
[111] FPL Exhibit 1, Direct Testimony of Robert M. Garvin, at 19.

fairest way" to deal with them.[112] This "explanation" by FirstEnergy as to the NDU Rider's bypassability attempts to self-servingly advocate application of the policy of "protecting at-risk populations" [O.R.C. 4928.02(K)], while conveniently ignoring the SB 221's mandate to incentivize large-scale governmental aggregations and to carefully scrutinize any proposed "nonbypassable generation charges." [O.R.C. 4928.20(K)]. As to this latter policy, numerous intervenors' witnesses have testified that making the NDU Rider non-bypassable is patently unfair, improper and even debilitating to large-scale governmental aggregations.[113]

1. Option I: Establish a Purchase of 100 percent CRES Receivables Program Modeled on the Successful Program in Ohio's Natural Gas Industry

Not only does FirstEnergy selectively ignore the policy command set forth in O.R.C. 4928.20(K) when it comes to dealing with SSO uncollectible bad debt, it also conveniently ignores the newly developed approach concerning uncollectible bad debt being utilized by Ohio's major natural gas utilities. As FPL Witness Garvin has noted: "[m]ore recently, the PUCO has approved non-bypassable bad debt trackers [the same as proposed in the ESP] for natural gas utilities, and has approved the collection of competitive suppliers' uncollectibles through the utilities' uncollectible riders where the utility has agreed to purchase the suppliers' accounts receivables."[114] This approach, while retaining non-bypassability for the distribution gas utilities' bad debt, also makes sure that competitive retail CHOICE suppliers' uncollectible bad debt is collected in the same manner as the distribution utilities' uncollectibles. As such, it

[112] Applicants' Exhibit 4, Direct Testimony of Gregory Hussing, at 13.
[113] See FPL Exhibit 1, Direct Testimony of Robert M. Garvin, at 19 (Stating that the NDU Rider as proposed "jeopardizes the continued viability of the Governmental Aggregation."); *See, also*, NOPEC/NOAC Joint Exhibit 1, Direct Testimony of Mark Frye, at 20-21 (NDU Rider "creates an unfair subsidy for the Companies," and "offers no benefits to a consumer served by a large scale Governmental Aggregation."); and, Competitive Suppliers Exhibit 3, Direct Testimony of Teresa L Ringenbach, at 11 ("[i]t is a simple issue of fairness and proper ratemaking.")
[114] FPL Exhibit 1, Direct Testimony of Robert M. Garvin, at 19-20, citing *In the Matter of the Application of East Ohio Gas Company dba Dominion East Ohio, et al.*, PUCO Case No.03-1127-GA-UNC (Order, December 17, 2003).

effectively removes the anti-competitive effect caused by disparate treatment between the Distribution Utilities and the competitive suppliers.

With the collection of natural gas utilities' bad debt as a simple, effective and proven model to follow, the anti-competitive effects of First Energy's proposed bad debt collection approach could easily be eliminated. "If FirstEnergy insists on imposing this [NDU] rider as a non-bypassable charge, FirstEnergy should be required to provide a [purchase of receivables] program for CRES providers with a 0% discount rate similar to what is being done today in the Ohio natural gas industry."[115] Such a requirement would "eliminate the subsidy" and "align the risks of generation supply regardless of a consumers' sources of power supplies."[116] In fact, such an approach has many advantages as explained by Mr. Garvin:

> . . . (1) it creates uniformity among the practices in the natural gas and electric choice programs, creating an ease of administration for the PUCO, utilities, and competitive suppliers alike; (2) recognizes the historical policy that all customers in the utility's service territory bear the expense of uncollectibles; and (3) it encourages and promotes large-scale governmental aggregation by removing the unfair burdens on such aggregators, their suppliers, and customers . . .[117]

This approach advocated by both the Large-Scale Governmental Aggregations and others, harmonizes the various state policies at issue. It allows "protection of at risk populations," as claimed by FirstEnergy. It removes the anti-competitive effect on large-scale governmental aggregations, correcting the major flaw of FirstEnergy's proposal and thereby bringing this portion of the proposed ESP into alignment with the Legislature's command of incentivizing large-scale governmental aggregation. Under this approach, disparate treatment and subsidization are eliminated and all consumers bear the socialized cost of all uncollectible

[115] Competitive Suppliers Exhibit 3, Direct Testimony of Teresa L. Ringenbach, at 11.
[116] NOPEC/NOAC Joint Exhibit 1, Direct Testimony of Mark Frye, at 21.
[117] FPL Exhibit 1, Direct Testimony of Robert M. Garvin, at 20.

bad debt. This modification to correct the flaw in FirstEnergy's proposed plan relating to bad debt uncollectibles should be adopted by the Commission.

V. Option II: In the alternative, Rider NDU should be bypassable for Large-Scale Governmental Aggregation Customers, as proposed by Staff.

Should a purchase of 100 percent CRES receivables option as outlined above be rejected, then the NDU Rider should, at a minimum, be made bypassable for the large-scale governmental aggregation participants. For the reasons set forth above, retention of this charge's non-bypassability for large-scale governmental aggregation consumers would violate the express command of O.R.C. 4928.20(K) requiring that large-scale governmental aggregation be incentivized and that any proposed non-bypassable generation charges be rigorously scrutinized and modified to ensure compliance with this state-wide policy objective. Staff agrees. Making the NDU Rider bypassable for large-scale governmental aggregations would correct this problem and would be wholly consistent with the simple approach recommended by Staff Witness Robert Fortney:

> Q. What is your recommendation regarding the Non-Distribution Uncollectible Rider?
> A. While I agree that these are expenses the companies are entitled to recover, I recommend that the Rider be by-passable for customers who shop with a CRES provider for their generation service. A customer who is not receiving FE generation should not be responsible for generation-related costs.[118]

VI. FIRSTENERGY'S THREATS REGARDING COMMISSION MODIFICATION OF THE PROPOSED DISINCENTIVES TO LARGE-SCALE GOVERNMENTAL AGGREGATION ARE UNLAWFUL.

A. FirstEnergy's Threats of Going to Market or of higher Generation Prices Intended to Limit the Commission's Willingness to Modify the ESP.

Both FirstEnergy's Application and testimony address the contingency that the Commission determine it appropriate to modify provisions of their Plan. The Companies assert

[118] Staff Exhibit 4, Direct Testimony of Robert B. Fortney, at 8.

that the Commission should not modify the ESP, and that if the Commission does modify any of the proposed unavoidable charges then they will either consider rejecting the modification and go to market or the generation charges for all customers will be forced to be adjusted higher. In general, the Companies' Application suggests:

> It will not work for there to be picking and choosing, selecting only customer benefits without adequately providing the Companies the components required for them to be able to address the risks incurred in going forward. It should be understood that this Plan is not presented as if by each Company so that it may be approved with respect to one, but not another. It is presented on behalf of all three Companies collectively and must be accepted with respect to all of them.[119]

Specific to the Plan's nonavoidable charges impact on large-scale governmental aggregation, Company witness David Blank goes on to explain in his testimony that without the MDS and other charges, the generation rates and other charges to all customers would have to be higher. Mr. Blank explains:

> The nonavoidable generation provisions, such as the default service charge, help provide the risk mitigation arrangements that are essential for the Companies to have the financial capacity to propose the Plan in its present form for the benefit of all customers. Without such arrangements to provide financial resources and mitigate the risk associated with the Plan, the Companies could not make available the pricing and other beneficial provisions of the Plan, whether or not customer shop with third party suppliers and the cost and prices to all customers would be higher.[120]

Similarly, Company Witness Kevin T. Warvell states in his testimony that "Without [the non-bypassable MDS] charge, the base generation charges contained in the Plan would need to be adjusted higher."[121]

At the outset, SB 221 explicitly contemplates in O.R.C. 4928.143(C)(1) that the Commission shall have the authority to modify an ESP as it deems appropriate. While the construction of the statute then allows the Companies to decide whether the ESP, as modified,

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[119] Companies Exhibit 9A, Application, at 6, fn. 7.
[120] Companies Exhibit 1, Direct Testimony of David Blank, at 22-23.
[121] Companies Exhibit 5, Direct Testimony of Kevin T. Warvell, at 12.

would be acceptable or whether an MRO process should commence, the Commission should not be threatened by the Companies' foreboding assertions that modification to the ESP should not occur or else.[122] As succinctly explained in the *BRIEF OF OHIO ENERGY GROUP ON SHORT TERM ESP*, "FES needs the Ohio load just as much as the Ohio load needs FES generation" and "[w]hile Consumers would prefer a fixed generation option (but not above market pricing offered by FES), so would FES prefer the revenue stability of a known load and fixed pricing."[123] The Large-Scale Governmental Aggregations agree with OEG that the FirstEnergy EDUs and their affiliate FES are not ready to contradict the directives of Wall Street by demanding the uncertainties of market-based revenues. Thus, the Commission should be confident that the just and reasonable modifications proposed by the Large-Scale Governmental Aggregations will carry out the language and intent of SB 221 and will not force FirstEnergy's hand to go to market.

B. Providing Pricing Lower than Otherwise Possible Through the Elimination of Shopping and Destruction of the Opportunity for Large-Scale Governmental Aggregation is Contrary to Ohio Law.

Further, the Large-Scale Governmental Aggregations believe that Ohio Law expressly requires the Commission to revise the ESP plan for reasons in addition to its unlawful impact on large-scale governmental aggregation. As the Large-Scale Governmental Aggregations have detailed above, the record is conclusive in demonstrating that the purpose of the MDS is to destroy competition from large-scale governmental aggregations and their CRES suppliers and nothing else. It is also apparent from both the Application and testimony that the Companies have proposed the ESP at its proposed pricing through forcing shopping customers to subsidize the Companies' SSO by payment of these unavoidable charges. The record during the hearing

[122] *See* O.R.C. 4928.143(C)(2) – (C)(3).
[123] *See* Brief of Ohio Energy Group on Short Term ESP (October 31, 2008), at 9.

and the voluminous testimony discussed above show that the Companies' premised the ESP on the elimination of shopping in order to provide service to SSO customers at the Companies' proposed generation rates, which the Companies contend are less than would otherwise be feasible without the unjustified $1.731 *Billion* MDS surcharge on shopping.

The ESP's construction in this manner is unlawful under Ohio law. Section 4905.33(B) states that "No public utility shall furnish free service or service for less than the actual cost for the purpose of destroying competition."[124] As explained above, FirstEnergy is proposing to subsidize their SSO generation prices at a level that they otherwise could not provide without the non-bypassable charges that are specifically constructed to destroy shopping. While the Companies' actual generation cost is not known because they have not yet procured generation through a contract with FES or another supplier, their Application and testimony indisputably states that *only* through these non-bypassable charges can the Companies' provide the generation prices set forth in the plan.

The plan is clearly constructed to destroy competition. This Commission has previously held that "destroying competition occurs:

> . . . when there is a material risk that consumers will be denied access to a provider of a product or service that can be substituted for the utility service at issue. Destroying competition encompasses the concept of foreclosing or terminating access to a market that is broader than the point at which the actual competition occurs such that other consumers are denied any competitive choice or at least another competitive choice. Destroying competition does not require a showing that competition was actually foreclosed or terminated, i.e., the perpetrator succeeded, but only that an attempt to do so was actively pursued.
>
> Moreover, the Commission concludes, as noted above, that a purposeful intent to destroy competition may be presumed or inferred from below cost pricing conduct in circumstances where a material risk is present that other consumers in a relevant market may be denied access to the product or service of the competitor against whom the below cost pricing conduct was clearly directed and the utility

[124] O.R.C. 4905.33(B).

engaging in such conduct already provides service within such relevant market or probably would endeavor to do so in the near future..[125]

Similar to the Commission's discussion in *Youngstown Thermal v. Ohio Edison Company* above, FirstEnergy is proposing to subsidize their SSO generation prices at a level that they otherwise could not or would not provide without the non-bypassable charges that are specifically constructed to destroy shopping, and destroy competition from large-scale governmental aggregations and their CRES providers. The ESP's construction of the MDS Rider, as proposed is unlawful, and we request the Commission consider O.R.C. 4905.33 and the Commission's own interpretation of what it means to "destroy competition" when it applies SB 22's "more favorable in the aggregate" test.

[125] In the Matter of the Complaint of Youngstown Thermal v. Ohio Edison Company (1995), 1995 Ohio PUC LEXIS 765, at 92-93.

VII. CONCLUSION

For all of the foregoing reasons, and to ensure that large-scale governmental aggregation is incentivized as expressly required by SB 221, the Large-Scale Governmental Aggregations respectfully request that the Commission adopt the recommended modifications to the Companies' proposed ESP specifically outlined in this Initial Brief.

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ATTACHMENT A

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

FirstEnergy Solutions Corp.	)	**Docket Nos. ER09-134-000**
FirstEnergy Generation Corporation	)	**ER09-135-000**
FirstEnergy Nuclear Generation Corporation	)	**ER09-136-000**
FirstEnergy Generation Mansfield Unit 1 Corp.	)	**ER09-137-000**

MOTION TO INTERVENE AND PROTEST OF THE NORTHEAST OHIO PUBLIC ENERGY COUNCIL

Pursuant to Rules 211, 212, and 214 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (FERC or Commission)[1] and the Combined Notice of Filings issued on October 28, 2008, the Northeast Ohio Public Energy Council (NOPEC) hereby moves to intervene in the above-captioned proceedings and opposes the request filed by FirstEnergy Solutions Corp. (FirstEnergy Solutions), FirstEnergy Generation Corporation, First Energy Nuclear Generation Corporation, and FirstEnergy Generation Mansfield Unit 1 Corp. (collectively, Applicants) for a blanket waiver of the Commission's affiliate restrictions governing Applicants' relations with their affiliated franchised public utilities, The Cleveland Electric Illuminating Company (Cleveland Electric Illuminating), Ohio Edison Company, and The Toledo Edison Company (collectively, FirstEnergy Utilities).

Specifically, Applicants seek a waiver of the affiliate restrictions contained in sections 35.39, 35.44(a), and 35.44(b) of the Commission's regulations,[2] as well as a

[1] 18 C.F.R. §§ 385.211, 385.212, and 385.214 (2008).

[2] *Id.* §§ 35.39, 35.44(a), and 35.44(b).

determination that no prior Commission authorization is necessary for Applicants to sell power to the FirstEnergy Utilities after December 31, 2008, upon the expiration of the FERC-approved settlement currently authorizing FirstEnergy Solution's sales to the FirstEnergy Utilities (2006 Settlement).[3] Applicants erroneously contend that the waiver is "necessary to assure uninterrupted service"[4] to Ohio retail customers, because affiliate sales under the 2006 Settlement "cannot be continued beyond December 31, 2008 without this Commission's authorization."[5]

As explained below, Applicants' request for a blanket waiver of the affiliate restrictions is premature. Further, Applicants failed to demonstrate why their request is necessary at this time. Therefore, the Commission should deny Applicants' request for a blanket waiver, without prejudice to Applicants' future submission of an appropriate request regarding affiliate sales to the FirstEnergy Utilities (for waiver or prior authorization), only after the Public Utilities Commission of Ohio (PUCO) issues a final order approving a competitive, auction-based Market-Rate Offer (MRO) or a regulated Electric Security Plan (ESP) for the FirstEnergy Utilities. Alternatively, the Commission should suspend and subject to refund Applicants' tariff amendments, set for hearing the issue of whether the requested waiver is warranted, and hold the hearing in abeyance until the PUCO issues a final order authorizing an MRO or an ESP plan for the FirstEnergy Utilities.

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[3] *FirstEnergy Solutions Corp.*, 117 FERC ¶ 61,278 (2006) (approving joint offer of settlement).

[4] FirstEnergy Solutions Corp., *et al.*'s Amendments to Market-Based Rate Tariffs Waiving Affiliate Restrictions in Ohio at 2, Docket Nos. ER09-134-000, *et al.* (filed Oct. 24, 2008) (hereinafter, Waiver Application).

[5] *Id.*

I. COMMUNICATIONS

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II. MOTION TO INTERVENE

NOPEC is a regional council of governments established under Chapter 167 of the Ohio Revised Code and is comprised of 126 member counties, municipalities, and townships in nine counties in northeastern Ohio. NOPEC is a political subdivision of the State of Ohio, and a governmental aggregator certified by the PUCO to provide both electricity and natural gas services. As a governmental aggregator, NOPEC arranges for retail supply of power to its members' residents and small businesses.[6] NOPEC has

[6] Under Ohio law (Ohio Rev. Code Ann. § 4928.20), a municipal corporation, county or township may aggregate the retail electric loads within the boundaries of such political subdivision, and may enter into service agreements to facilitate for those loads the sale and purchase of electricity, which may be exercised jointly. NOPEC, on behalf of its members, exercises that authorization through "opt-out" aggregation, where the eligible

approximately 600,000 eligible electric customers in the service territories of Cleveland Electric Illuminating and Ohio Edison Company. NOPEC is the largest public retail energy aggregator in Ohio and the nation.

Currently, all of NOPEC's electric customers are taking Standard Service Offer (SSO) cost-based service from Cleveland Electric Illuminating and Ohio Edison Company and are therefore captive customers.[7] On August 29, 2008, NOPEC and FPL Energy Power Marketing, Inc. (PMI) executed a Letter of Intent (LOI) to enter into a full requirements firm power supply agreement, pursuant to which PMI would supply retail power directly to NOPEC's electric customers as a PUCO-certified competitive retail supplier (Certified Retail Electric Supplier or CRES). The LOI is expressly conditioned on the elimination or modification of certain anticompetitive provisions in the ESP that the FirstEnergy Utilities filed with the PUCO on July 31, 2008.

As the large-scale governmental aggregator for retail customers in the service territory of Cleveland Electric Illuminating and Ohio Edison Company, and a political subdivision of the State of Ohio, NOPEC has direct and independent interests in the proposed waiver of the Commission's safeguards governing the affiliate purchases of Cleveland Electric Illuminating and Ohio Edison Company. NOPEC's interests in this proceeding cannot be adequately represented by any other party. Therefore, NOPEC respectfully requests to be permitted to intervene and participate fully in this proceeding.

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retail customers are enrolled automatically in the aggregation unless they appropriately "opt-out." Typically, governmental aggregators such as NOPEC have not purchased power at wholesale for resale to their members, but rather have arranged for retail service, as agents for their members, from a PUCO-certified Certified Retail Electric Supplier.

[7] The Commission's regulations define "captive customers" as "any wholesale or retail electric energy customers served by a franchised public utility under cost-based regulation." 18 C.F.R. § 35.36(a)(6).

III. PROTEST

A. Background

1. Ohio Restructured Retail Markets

In 1999, Ohio adopted legislation intended to restructure retail electric markets in the state. The legislation introduced retail choice and required vertically integrated utilities to corporately separate their generation and become electric distribution utilities (EDUs) and providers of last resort (POLRs) for those retail customers that did not choose a CRES. The electric restructuring started with a five year market development period, from 2001 to 2005, during which utilities recovered their stranded investments, and rates for POLR service remained frozen.

With the end of the market development period and expiration of the rate freeze in 2005, the PUCO adopted rate stabilization plans to guarantee rate stability for POLR service for the period 2006-2008. In anticipation of the expiration of the rate stabilization plans at the end of 2008, Ohio adopted new legislation, which provides for EDUs to submit to the PUCO proposals for POLR service beginning on January 1, 2009 under either an MRO plan or an ESP plan. The PUCO is required, as an integral component of the legislation, to determine whether the MRO and ESP plans submitted by the EDUs are consistent with legislative requirements, otherwise protect retail ratepayers, and are in the public interest. If both plans are proposed, the PUCO is required to adopt the ESP if, taken as a whole, it is more favorable to customers than the results expected under the MRO. The FirstEnergy Utilities submitted their MRO and ESP plans to the PUCO on July 31, 2008.

Despite the adoption of legislation in 1999, competitive retail markets have not developed in Ohio. *While retail competition initially flourished between 2001 and 2005*, electricity shopping since 2005 has dramatically declined. Currently, electric shopping is non-existent. According to PUCO's most recent report, by December 2006, less than 7% of residential customers in Ohio were enrolled with an alternative electric supplier.[8] Even more significantly, as of December 2006, POLRs and their affiliates provided 99.63% of the electricity sold to retail customers, leaving independent CRES with a market share of 0.37%.[9] The Office of the Ohio Consumers' Counsel (OCC) similarly reported in 2007 that "individual shopping by residential customers is not occurring."[10] OCC concluded that:[11]

> [CRES] appear unable to make functionally equivalent or substitute services available at competitive prices, terms and conditions, largely because the regulatory construct has failed to create a level playing field since the dawning of deregulation. The incumbent utility companies continue to exercise market power due to regulatory decisions that have provided them with a competitive advantage.

Indeed, even Applicants have conceded in testimony submitted to this Commission that competitive electric retail markets have not developed in Ohio.[12]

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[8] Public Utilities Commission of Ohio, *The Ohio Retail Electric Choice Programs, Report of Market Activity, July 2005 - December 2006*, at 1, available at http://www.puco.ohio.gov/emplibrary/files/media/publications/2007%20electric%20report.pdf.

[9] *Id.* at 11, Figure 6. Specifically, the PUCO reports a market share of residential sector megawatt-hour (MWh) sales of 94.80% for EDUs, 4.83% for EDUs' affiliates, and 0.37% for CRES not affiliated with EDUs.

[10] The Office of the Ohio Consumers' Counsel, *Biennial Report on the State of Electric Restructuring*, revised April 2, 2007, at 6, available at http://www.pickocc.org/lservices/testimony/2007-04-02.pdf.

[11] *Id.* at 1.

[12] *See* FirstEnergy Solutions Corp.'s Power Supply Agreements for Sales to Affiliated Electric Utility Companies, Prepared Direct Testimony and Exhibits of William D. Byrd,

Currently, there are no CRES offering generation service to residential and small business customers served by the FirstEnergy Utilities. In fact, the PUCO's own website, which has "Apples to Apples Charts" comparing retail supply offers, confirms this fact. It states that "No Competitive Retail Electric Service providers are currently enrolling customers."[13] FirstEnergy Utilities' Ohio retail customers are captive.

FirstEnergy Utilities' witness Kevin Warvell's testimony in the ESP hearing before the PUCO confirms that no shopping in the FirstEnergy Utilities' service territory is expected in 2009 either. He stated that with regard to the FirstEnergy Utilities' load forecast for 2009, "[t]here was no shopping forecasted in that forecast.[14]

2. Prior FERC Review of FirstEnergy Utilities' Affiliate Transactions

On November 1, 2005, FirstEnergy Solutions filed with this Commission a request for authorization to sell to the FirstEnergy Utilities the power needed to meet POLR obligations, in connection with the PUCO-approved rate stabilization plan. FirstEnergy Solutions identified retail competition and Ohio customers' access to retail choice as one of the "additional factors" that FERC should consider in determining the issue of affiliate abuse.[15] However, FirstEnergy Solutions never suggested that the mere existence of retail choice programs eliminated any concerns about affiliate abuse or

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at 6, lines 9-12, Docket No. ER06-117-000 (filed Nov. 1, 2005) (hereinafter, FirstEnergy Solutions 2005 Application) ("Q. Has a competitive retail electric service market developed in Ohio? A. No. Virtually all major competitive retail electricity suppliers that entered the market at the beginning of the [market development period ended December 31, 2005] have exited or are in the process of exiting the Ohio market.").

[13] *See* www.puco.ohio.gov/PUCO/ApplestoApples/index.cfm.

[14] *See* PUCO Case No. 08-935-EL-SSO, Transcript Vol. II pages 145-46, available at http://dis.puc.state.oh.us/TiffToPDf/A1001001A08J31A84216G44497.pdf.

[15] FirstEnergy Solutions 2005 Application at 19, line 14 through 20, line 10.

otherwise rendered Commission prior approval unnecessary and unwarranted. In an order issued on December 29, 2005,[16] the Commission found that the bidding process underlying FirstEnergy Solutions' proposal was not consistent with the Commission's familiar standards for review of affiliate transactions set forth in *Edgar*[17] and *Allegheny*.[18] Therefore, the Commission set for hearing the justness and reasonableness of FirstEnergy Solutions' affiliate sales to the FirstEnergy Utilities. On December 8, 2006, the Commission approved the 2006 Settlement,[19] which resolved the issues set for hearing and set forth rates for affiliate sales to the FirstEnergy Utilities for 2006, 2007, and 2008. As noted above, since January 1, 2006, NOPEC's customers have purchased and currently purchase all of their power from the FirstEnergy Utilities, which procure the power from FirstEnergy Solutions under the 2006 Settlement.

3. Anticompetitive Features of FirstEnergy Utilities' ESP

As noted above, on July 31, 2008, the FirstEnergy Utilities submitted to the PUCO both an MRO plan and an ESP plan for POLR service starting January 1, 2009. The proposed MRO is "a standard service offer for generation services derived from a competitive solicitation process managed by an independent third party."[20] The ESP, instead, "is based upon supply of generation for POLR service pursuant to a wholesale

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[16] *FirstEnergy Solutions Corp.*, 113 FERC ¶ 61,338 (2005).

[17] *Boston Edison Co. Re: Edgar Elec. Energy Co.*, 55 FERC ¶ 61,382 (1991) (*Edgar*).

[18] *Allegheny Energy Supply Co.*, 108 FERC ¶ 61,082 (2004) (*Allegheny*). Specifically, the Commission found that the bidding process that FirstEnergy Solutions relied on was not consistent with *Allegheny*'s requirements regarding product definition, transparency, and evaluation.

[19] *FirstEnergy Solutions Corp.*, 117 FERC ¶ 61,278 (2006).

[20] Waiver Application at 9.

contract with [FirstEnergy Solutions], with the price for retail generation service determined by the PUCO as part of its review of the ESP."[21]

The FirstEnergy Utilities' ESP proposal includes several provisions that create barriers to competition and, if adopted, would permanently end Ohio's feeble retail competition, at least in FirstEnergy Utilities' POLR service territory. For instance, the ESP would allow FirstEnergy Utilities' customers to defer for three years payment of about 10% of the energy price under the so-called Generation Phase-In (GPI) credit, but would deny the same benefit to shopping customers who choose an alternative supplier.[22] The ESP would also impose on shopping customers a Minimum Default Service (MDS) charge of 1 cent per kWh (or $10 per MWh) for costs that, in fact, do not yet exist and may not exist.[23] In addition, the ESP would impose other non-bypassable charges that force shopping customers to pay twice—both to their CRES and to the FirstEnergy Utilities through the non-bypassable charges—for the same services and costs.

It is estimated that the cumulative effect of the GPI credit and the MDS charge would make the price that CRES can offer 26% more expensive than the price the FirstEnergy Utilities can offer for POLR service.[24] Under those conditions, retail customers such as NOPEC's "would have <u>**no choice**</u> but to return to FirstEnergy for

[21] *Id.* at 8-9.

[22] *See* PUCO Case No. 08-935-EL-SSO, Direct Testimony of Robert M. Garvin at 9, lines 11-16 (Sept. 29, 2008), available at http://dis.puc.state.oh.us/TiffToPDf/A1001001A08I29B64225H07175.pdf.

[23] *See* PUCO Case No. 08-935-EL-SSO, Direct Testimony of Mark Frye at 5, lines 3-9, available at http://dis.puc.state.oh.us/TiffToPDf/A1001001A08I29B54835G59949.pdf.

[24] See PUCO Case No. 08-935-EL-SSO, Direct Testimony of Robert M. Garvin at 15, lines 13-14, available at http://dis.puc.state.oh.us/TiffToPDf/A1001001A08I29B64225H07175.pdf.

electricity supply."[25] Indeed, modification or elimination of the GPI credit and the MDS charge are two key conditions precedent for PMI to agree to supply power to NOPEC's customers under the LOI.

B. Applicants' Request for a Blanket Waiver of the Affiliate Restrictions is Premature

The Commission should reject Applicants' waiver request as premature. Applicants contend that a waiver of the Commission's affiliate restrictions is "necessary to assure uninterrupted service" to the FirstEnergy Utilities' POLR customers after December 31, 2008. However, that assertion is contrary to Commission precedent and appears designed to artificially rush and constrain a Commission determination on the merits of the blanket waiver request. In light of the pending PUCO proceeding to determine whether the FirstEnergy Utilities' ESP plan as proposed protects retail competition, FERC action on Applicants' waiver request is premature.

As a preliminary matter, Applicants are incorrect in asserting that service cannot continue absent immediate Commission action on their waiver request. Under section 35.15 of the Commission's regulations,[26] when a rate schedule required to be on file with the Commission "is to terminate by its own terms and no new rate schedule or part thereof is to be filed in its place,"[27] each party required to file the schedule must notify the Commission of the proposed termination at least 60 days, but no more than 120 days prior to the date the termination is proposed to take effect. The Commission has clarified that, when a jurisdictional agreement on file with the Commission expires by its own

[25] *Id.* at 15, lines 21-22.

[26] 18 C.F.R. § 35.15.

[27] *Id.*

terms, its terms and conditions actually remain in effect if the parties do not act to terminate by filing the notices required by 18 C.F.R. § 35.15.[28] Here, the 2006 Settlement is on file with the Commission. Until a notice of termination is filed, its provisions remain in effect, notwithstanding the settlement's expiration by December 31, 2008.

Moreover, Applicants' waiver request is premature until the PUCO determines in a final order whether the FirstEnergy Utilities should procure power from their affiliates under an MRO or an ESP plan. This Commission needs to know how the FirstEnergy Utilities will engage in affiliate transactions, in order to assess the potential for affiliate abuse and determine whether a waiver of the safeguards against such abuse is warranted. Because the MRO represents a competitive bid process, if the PUCO opts for the MRO, FERC will essentially be able to review the underlying competitive bidding process under *Edgar* and *Allegheny*, and waiver of the Commission's affiliate standards regarding affiliate purchases would be unnecessary. Under *Edgar*, affiliates can demonstrate lack of affiliate abuse to ensure that captive ratepayers are protected if there is: (1) evidence of direct head-to-head competition between the affiliate and competing unaffiliated suppliers in a formal solicitation or informal negotiation process; (2) evidence of the prices non-affiliated buyers were willing to pay for similar services from the affiliate; or (3) benchmark evidence that shows the prices, terms, and conditions of sales made by non-affiliated sellers. In *Allegheny*, FERC indicated that a competitive solicitation

[28] In *Montana Power Co.*, 99 FERC ¶ 61,006 at 61,026 and 61,028 (2002), the Commission held that "under our regulations, transmission providers are required to continue to provide service past the stated expiration date of a service agreement, unless the parties notify the Commission that the agreement will terminate. . . . Our regulations thus contemplate that if the parties do not act to terminate a transmission contract, the terms and conditions of the contract will remain in effect."

process satisfies the *Edgar* criteria if: (1) it is transparent; (2) products are well-defined; (3) bids are evaluated comparably with no advantage to affiliates; and (4) it is designed and evaluated by an independent entity.

The Commission's analysis necessarily will be different if the PUCO chooses an ESP. Indeed, it is unclear how the no-bid contract proposed by the FirstEnergy Utilities to be entered into with FirstEnergy Solutions under the ESP could meet the requirements of *Edgar* and *Allegheny*, or how the ESP as currently proposed by the FirstEnergy Utilities could otherwise satisfy the Commissions' affiliate abuse protection requirements. Thus, while a waiver of the Commission's affiliate rules would be necessary to implement the proposed ESP, such a waiver certainly would be inappropriate before the PUCO has an opportunity to review and modify the ESP as appropriate. Clearly, without knowing which rate plan the PUCO will adopt, the Commission cannot engage in any meaningful review of the FirstEnergy Utilities' affiliate transactions entered into upon expiration of the 2006 Settlement. Therefore, the Commission cannot decide whether a blanket waiver should apply with respect to those transactions.

Applicants' request is also premature, because the Commission does not yet know what provisions of the ESP will be adopted, should the PUCO opt for the ESP. As noted above, several provisions of the FirstEnergy Utilities' proposed ESP construct tremendous barriers to competition and set up a structure to allow self-dealing and affiliate abuse. It is premature for the Commission to grant a blanket waiver, without knowing whether the affiliate sales whose prior authorization is waived will be conducted in the context of an anticompetitive ESP that will force FirstEnergy Utilities' retail customers to remain captive and expose them to the real possibility of affiliate abuse.

Moreover, the Ohio Legislature in April of this year specifically recognized the importance of large-scale governmental aggregators such as NOPEC in the Ohio electricity legislation. The legislation provided a large-scale governmental aggregator such as NOPEC the authority to elect on behalf of its customers not to receive standby service from the utility.[29] It required the PUCO to adopt rules to encourage and promote large-scale governmental aggregation in the State and, importantly, within the context of an ESP, required the PUCO to consider the effect on large-scale governmental aggregation of any non-bypassable generation charges, however collected, under an ESP.[30] The FirstEnergy Utilities' ESP contains provisions that are contrary to the Ohio Legislature's mandate encouraging large-scale governmental aggregation. The PUCO should be provided an opportunity to first consider the effect on NOPEC of the FirstEnergy Utilities' ESP and its proposed non-bypassable generation charges—a critical competitive issue—before the FERC acts on Applicants' request.

Pending PUCO action on their longer-term proposals, the FirstEnergy Utilities propose to implement a short-term ESP as of January 1, 2009. As noted, Applicants cannot sell power to the FirstEnergy Utilities pursuant to such a plan absent Commission waiver of the affiliate dealing restrictions. Therefore, if the Commission decides to act before the PUCO acts on the FirstEnergy Utilities' MRO and ESP proposals, this Commission would be required to make its own determinations regarding the absence of potential for affiliate abuse presented by the interim ESP plan. In such case, NOPEC

[29] Ohio Rev. Code Ann. § 4928.20(J).

[30] *Id.* § 4928.20(K).

urges the Commission to suspend Applicants' filing for the maximum suspension period, make the rates subject to refund, and set this matter for hearing.

C. Applicants Failed to Demonstrate Why a Blanket Waiver of the Affiliate Restrictions Applicable to the FirstEnergy Utilities is Warranted

The Commission also should deny the request for a blanket waiver of the affiliate restrictions applicable to the FirstEnergy Utilities, because Applicants offer no valid reason or argument in support of their request.

The "fundamental goal" of the Commission's regulation of affiliate relations "is to protect customers served by franchised public utilities from inappropriately subsidizing the market-regulated or non-utility affiliates of the franchised public utility or otherwise being financially harmed as a result of affiliate transactions and activities."[31] In 2005, FirstEnergy Solutions sought Commission authorization to engage in affiliate sales to the FirstEnergy Utilities. In order to adequately protect the FirstEnergy Utilities' customers, the Commission reviewed the proposed affiliate transactions under the standards adopted in *Edgar* and *Allegheny*. As a result of that scrutiny, the Commission set for hearing the issue of the justness and reasonableness of the proposed affiliate power sales.[32]

Applicants' request for waiver should not be granted, because those issues will continue to be relevant and material with respect to the FirstEnergy Utilities' affiliate transactions after December 31, 2008. In order to ensure that the interests of FirstEnergy Utilities' ratepayers are adequately protected, Commission review will still be necessary to ensure that the rates, terms, and conditions of those transactions are just and reasonable

[31] Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities, Order No. 697-A, FERC Stats. & Regs., Regs. Preambles ¶ 31,268 at P 198 (2008).

[32] *See FirstEnergy Solutions Corp.*, 113 FERC ¶ 61,338 (2005).

and that there is no potential for affiliate abuse. Depending on the terms and conditions of the FirstEnergy Utilities' affiliate sales after December 31, 2008, the issues that the Commission set for hearing in 2005 likely will exist in 2009.

Importantly, the new Ohio legislation contains a "significantly excess earnings" prohibition on the FirstEnergy Utilities.[33] Real potential exists for the captive customers of the FirstEnergy Utilities to subsidize the Applicants as a means for the FirstEnergy Utilities to circumvent the potential for experiencing "significantly excess earnings" under the new Ohio law. The ESP proposed by the FirstEnergy Utilities is silent about how the "to be executed" contract between FirstEnergy Solutions and the FirstEnergy

[33] *See* Ohio Rev. Code Ann. § 4928.143(f). It states as follows:

> 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.

Utilities would allocate and pass through the various elements of the generation costs, as well as other costs, to FES, and whether that contract will result in inappropriate subsidies flowing from the FirstEnergy Utilities to the market-regulated FirstEnergy affiliates.

Inappropriate subsidies are an issue not only with respect to compliance with Ohio's "significantly excess earnings" prohibition, but also compliance with FERC's rules on affiliate sales of non-power goods and services. FERC's rules prohibit the FirstEnergy Utilities from purchasing non-power goods and services from Applicants, or any other affiliate, "at a price above market."[34] Order No. 707 clarified that franchised public utilities may have to comply with both FERC's pricing standards and a state Commission's stricter pricing standards, as long as there is no conflict in complying with both.[35] Applicants now seek waiver from this more stringent requirement.

Applicants' contention that retail competition in Ohio is sufficient to warrant a blanket waiver[36] is unpersuasive. First, as noted above, retail competition in Ohio has not developed and residential customers as of 2007 still receive 94.80% of their electricity under POLR service. The PUCO's own website currently states that no CRES are offering retail electric service in Ohio. The FirstEnergy Utilities have forecasted no shopping in 2009 in forecasting their 2009 load. Indeed, it is surprising that Applicants

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[34] *See* 18 C.F.R. §§ 35.39(e)(2) and 35.44(b)(2).

[35] *See* Order No. 707, Cross-Subsidization Restrictions on Affiliate Transactions, FERC Stats. & Regs., Regs. Preambles ¶ 31,264 at P 71 (2008) ("If the state commission's pricing standards for a franchised public utility's purchases from an affiliate are stricter than the Commission's . . . then the stricter pricing standard would apply, as long as there is no conflict in complying with both the state's pricing standard and this Commission's pricing standard.").

[36] Waiver Application at 10-14.

justify their waiver request on the basis of retail competition, when the anticompetitive provisions of the ESP proposed by the FirstEnergy Utilities would put the final nail in the coffin of retail competition in their service territory by making it practically impossible.[37]

Indeed, as noted above, retail shopping legislation in Ohio is contingent on implementation of the legislative retail rate parameters by the PUCO. Under current Ohio law, there can be no effective retail choice program unless and until the PUCO approves either a competitively priced ESP plan that is favorable to retail ratepayers or an MRO plan that would essentially track this Commission's *Allegheny* standards. In contrast, Applicants would have this Commission act to eliminate affiliate abuse safeguards as a preemptive strike before the retail choice scheme mandated by the Ohio Legislature is in place.

More importantly, state retail choice programs were in existence when FirstEnergy Solutions sought Commission authorization in 2005 for its current affiliate sales.[38] Notwithstanding the existence of those programs, the Commission did not abdicate its statutory responsibility of protecting consumers.[39] Instead, FERC reviewed the proposed affiliate transactions and set for hearing the issue of their justness and

[37] *See* PUCO Case No. 08-0935-EL-SSO, Testimony of David I. Fein at 5, lines 2-7 (Sept. 29, 2008), available at http://dis.puc.state.oh.us/TiffToPDf/A1001001A08I29B64529B81394.pdf ("Unless significantly altered by the Commission, FirstEnergy's ESP will result in all FirstEnergy ratepayers being forced to take electric service from FirstEnergy. . . . FirstEnergy has asked the PUCO to essentially bring an end to retail choice, to the detriment of all consumers and to the benefit of FirstEnergy alone.").

[38] *See* FirstEnergy Solutions 2005 Application, Transmittal Letter at 2 ("retail electric service customers in [Ohio] have the choice of purchasing electricity either from the electric distribution company where they are located or from competing electric service providers").

[39] *See Pa. Water & Power Co. v. FPC*, 343 U.S. 414, 418 (1952) ("A major purpose of the whole [Federal Power] Act is to protect power consumers against excessive prices.").

reasonableness. Applicants offer no valid reason why the Commission should not similarly review the affiliate sales that Applicants will make after the expiration of the 2006 Settlement. The same concerns regarding affiliate abuse that led the Commission to establish a trial-type evidentiary hearing in 2005 remain valid after December 31, 2008. In fact, there are allegations before the PUCO that the ESP "is the product of self dealing and affiliate abuse."[40]

[40] *See* PUCO Case No. 08-0935-EL-SSO, Brief of Ohio Energy Group on Short Term ESP at 10 (Oct. 30, 2008), available at http://dis.puc.state.oh.us/TiffToPDf/A1001001A08K03A81922J12725.pdf (discussing the proposed Short Term ESP, which would be a five month plan with essentially the same features as the ESP).

IV. CONCLUSION

For the foregoing reasons, NOPEC respectfully requests that the Commission grant its intervention in this proceeding, provide NOPEC with full party status, and deny Applicants' request for a blanket waiver of the affiliate restrictions in Ohio. Alternatively, NOPEC respectfully requests that the Commission suspend and subject to refund Applicants' tariff amendments, set for hearing the issue of whether the requested waiver is warranted, and hold the hearing in abeyance until the PUCO issues a final order approving the MRO or the ESP plan for the FirstEnergy Utilities.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day caused to be served the foregoing document upon each person designated on the official service lists compiled by the Secretary in these dockets.

Dated at Washington, D.C., this 13th day of November, 2008.

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