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November 21, 2008

Via Hand Delivery

Ms. Renee Jenkins
Docketing Division
Public Utilities Commission of Ohio, 13th Floor
180 East Broad Street
Columbus, OH 43215-3793

Re: *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*

Dear Ms. Jenkins:

Please find enclosed for filing in the above captioned matter the original and twenty (20) copies of FPL Energy's Initial Brief. Please date stamp and return the additional copies enclosed herewith.

Very truly yours,

BAILEY CAVALIERI LLC

Dane Stinson

Enclosures

cc: Parties of Record (via electronic mail)

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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

FPL ENERGY'S INITIAL BRIEF

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FPL ENERGY'S INITIAL BRIEF

I. SUMMARY AND CONCLUSION

This proceeding is one of first impression for the Public Utilities Commission of Ohio ("Commission"), as it is being called upon for the first time to apply the new regulatory paradigm established by Amended Substitute Senate Bill 221 ("S.B. 221") to FirstEnergy's[1] proposed electric security plan ("ESP"). FPL Energy[2] has a substantial interest in this proceeding as it has executed a letter of intent to provide electric supply to the Northeast Ohio Public Energy Council ("NOPEC") during the term of FirstEnergy's ESP. See FPL Energy Ex. 1, Attachment A. NOPEC is a large-scale governmental aggregation in Northeastern Ohio with approximately 600,000 eligible customers in Ohio Edison's and Cleveland Electric Illuminating Company's service territories. Joint NOPEC/NOAC Ex. 1, at 3.

[1] The applicant electric distribution companies ("EDU") in this proceeding (Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company) collectively will be referred to as "FirstEnergy."

[2] FPL Energy, LLC's affiliates, FPL Energy Power Marketing, Inc. ("PMI"), and Gexa Energy Holdings, LLC ("Gexa"), are the entities that have intervened in this proceeding and are jointly referred to herein as FPL Energy.

A. FPL Energy is a Nationally Recognized Supplier of Electric Power that has the Wherewithal to Serve NOPEC's Approximately 600,000 Eligible Customers.

FPL Energy is a nationally recognized supplier of electric power. FPL Energy is a subsidiary of the FPL Group, a Fortune 500 company that is rated "A" both by Standard & Poors and Fitch Ratings, and operates approximately 40,000 MWs of generation assets in the United States. Its affiliates include:

- Florida Power & Light Company, the largest electric utility in the State of Florida;
- Gexa Energy Holdings, LLC ("Gexa"), whose subsidiaries are licensed to provide competitive retail electric service in most of the major deregulated electricity markets in the United States; and
- Gexa Energy Ohio, LLC ("Gexa Ohio"), a competitive retail electric service ("CRES") provider recently certified to provide CRES in this state.[3]

FPL Energy Ex. 1, at 3-4; Tr. V, at 124. Moreover, FPL Energy is the leading supplier of wind energy in the United States. It has an interest in developing wind resources in Ohio, having filed comments in the Ohio Power Siting Board's recent rulemaking on wind power.[4] At year end 2007, FPL Energy had approximately 5,000 MW in wind generation in operation. Its stated goal is to add at least 1,100 MW of new wind generation during 2008 as part of a growth strategy to add approximately 10,000 MW of new wind generation over the period 2007-2012. FPL Energy operates natural gas, wind, solar, hydroelectric and nuclear power plants in 25 states across the country. FPL Energy Ex. 1, at 3.

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[3] See, *In the Matter of the Application of Gexa Energy Ohio, LLC for Authority to Operation as a Competitive Retail Electric Service Provider*, PUCO Case No. 09-1081-EL-CRS (Certificate Issued October 20, 2008).

[4] See, *In the Matter of the Power Siting Board's Adoption of Chapter 4906-17, and the Amendment of Certain Rules in Chapters 4906-1, 4906-5 and Rule 4906-17*, OPSB Case No. 08-1024-EL-ORD (comments filed September 29, 2008).

B. Provisions in FirstEnergy's ESP are Anti-Competitive and Will Prevent FPL Energy from Entering FirstEnergy's Market and Serving NOPEC's Customers.

Unfortunately, FirstEnergy's ESP contains numerous anti-competitive provisions that would prevent CRES providers from entering the Ohio market and FPL Energy from serving NOPEC's customers.[5] Foremost among these competitive barriers are the generation phase-in credit ("GPIC") and minimum default service ("MDS") riders. The GPIC and MDS, as proposed, would create a significant disparity between the price that consumers would pay if they took SSO service and if they shopped with a large-scale governmental aggregation. The disparity is so large that shopping effectively would be prevented, as reflected in the following table. See, also, FPL Energy Ex. 1, at 15-16.

	SSO Customers $ / MWhr	**Gov't. Agg. Customers $ / MWhr**
2009 Base Generation Rate	$75.00	$75.00
GPIC Rider	($7.50)	
Net 2009 Base Generation Rate	$67.50	$75.00
MDS Rider		$10.00
Net Base Generation Rate	$67.50	$85.00
Gov't. Agg. Price Disadvantage		**$17.50 (~26 %)**

[5] The FirstEnergy affiliates also have substantial competitive interests in this proceeding, as the SSO will be supplied by the affiliate FirstEnergy Solutions ("FES").[5] Simply put, if the ESP prevents CRES providers from competing in FirstEnergy's markets, FES will serve the entire customer load.

C. Because the Effects of the GPIC and MDS Rides are So Onerous on Large-Scale Governmental Aggregation, the NOPEC Letter of Intent Conditions Execution of a Future Power Supply Agreement Upon Substantial Revisions to, or Elimination of, These Riders.

Because of the onerous effect of the GPIC and MDS, the NOPEC letter of intent contains two significant conditions precedent to FPL Energy's execution of a future power supply agreement with NOPEC: the electric security plan approved by the Commission must (1) extend the full amount of any GPIC to large-scale governmental aggregations, and (2) the MDS rider must be made bypassable for large-scale governmental aggregations. See FPL Energy Ex. 1, Attachment A, page 3 at paragraph b. The GPIC and MDS riders threaten not only FPL Energy's entry into the market to serve NOPEC, but also threaten the entry of any CRES provider in FirstEnergy's service territory and, ultimately, the future of customer choice in electric supply in this state.

D. To Protect the Pro-Competitive Policies of this State, S.B. 221 Requires that an ESP Encourage and Promote Large-Scale Governmental Aggregation.

It is the policy of this state that consumers have a choice among electric suppliers.[6] Anticipating potential threats to competition, S.B. 221 provides special protections to large-scale governmental aggregations – the organizations that have been the primary vehicle for furthering the Ohio's pro-competitive policies. Foremost among these protections is the requirement that the provisions of an ESP encourage and promote "large-scale governmental aggregation." See, sections 4828.143(B) and 4928.20(K),

[6] The State of Ohio's pro-competitive electric policies generally are contained in section 4928.02, Ohio Rev. Code. The specific pro-competitive policies designed to encourage and promote large-scale governmental aggregation are contained in sections 4928.143(B) and 4928.20(I), (J), and (K), Ohio Rev. Code. In the event of a conflict between these statutory provisions, the pro-competitive policies contained in sections 4928.143(B) and 4928.20(I), (J) and (K), control over the general polices contained in section 4928.02. See section 1.51, Ohio Rev. Code.

Ohio Rev. Code. Thus, in reviewing an ESP, the Commission must determine whether the ESP's provisions run afoul of this legislative policy. Provisions that run afoul of the policy are, by definition, unreasonable and unlawful, and must be modified or the ESP must be disapproved.

E. The GPIC and MDS, as Well as Other Provisions in FirstEnergy's ESP, Violate the Legislative Mandate to Promote and Encourage Large-Scale Governmental Aggregation, Requiring that They be Modified or the ESP Disapproved.

The GPIC and MDS violate the legislative mandate to promote and encourage large-scale governmental aggregation, as do FirstEnergy's proposals related to the capacity cost adjustment ("CCA") rider, the Non-Distribution Uncollectible ("NDU") rider, and the fuel transportation surcharge ("FTS"). These provisions are unreasonable and unlawful, and must be modified in the following respects, or the ESP must be disapproved.

- **Generation Phase-In Credit (GPIC):** The GPIC is unreasonable as it distorts the SSO "price to beat." It must be disallowed, as recommended by Staff witness Cahaan.
    - In the alternative, the GPIC and associated deferred generation charge ("DGC") must be made available to large-scale governmental aggregation customers in the same manner as applied to SSO customers.

- **Minimum Default Service (MDS) Rider:** The one cent/kWh MDS charge could generate over $1.73 BILLION in revenue over the 3 year ESP, but the costs it is meant to recover have not been quantified. The MDS rider must be disallowed as unreasonable and unlawful, or made bypassable to large-scale governmental aggregations.

- **Capacity Cost Adjustment (CCA) Rider:** FirstEnergy's CCA rider is unreasonable as it is nontransparent to customers seeking to shop, as well as to competitive suppliers seeking to enter First Energy's market. FirstEnergy must be required – through wholesale supply arrangements – to procure in the market MISO designated network resource ("DNR") capacity sufficient to satisfy planning reserve requirements for all customers in FirstEnergy's service territory for the term of the ESP.

FirstEnergy should be allowed to recover the associated expenses through a non-bypassable capacity cost recovery rider.

  - Alternatively, the Commission should require FirstEnergy to provide an estimate of the MISO DNR capacity it plans to make available to meet planning reserve requirements and a reasonable forecast of the capacity cost adjustment rider, in order to provide pricing transparency.

- **<u>Non-Distribution Uncollectible (NDU) Rider</u>:** The NDU is unreasonable and unlawful because it imposes an SSO generation-related charge on large-scale governmental aggregation customers. To create a level playing field between SSO customers and shopping customers and protect shopping customers from having to pay twice for the same cost, FirstEnergy must purchase, at no discount, the accounts receivable of CRES suppliers serving large-scale governmental aggregations, and be permitted to recover the uncollectible debt and associated expenses of such aggregation customers through the NDU rider.

  - Alternatively, the NDU rider should be made bypassable, as recommended by Staff witness Fortney.

- **<u>Fuel Transportation Surcharge (FTS)</u>:** The FTS is unreasonable as it is not supported by the record. It must be disallowed as recommended by Staff witness Turkenton.

  - Alternatively, FirstEnergy must provide an estimate of its fuel transportation charges by which to develop a transparent FTS charge, or the estimated price must be based on FirstEnergy's budgeted amounts presented to Staff.

II. STANDARDS OF REVIEW

A. The Commission Must Take Care Not to Confuse the Ultimate Standard of Review Used to Determine Whether an ESP Should be Selected Over an MRO, with the Separate Standard of Review Used to Determine Whether the ESP Promotes and Encourages Large-Scale Governmental Aggregation.

1. The Ultimate Standard of Review.

The standard for making the ultimate determination in approving an ESP is set forth in section 4928.143(C)(1), Ohio Rev. Code, which provides in part:

> ...the commission by order shall approve or modify and approve an application filed under division (A) of this section if it finds that the electric security plan so approved, including its pricing and all

> other terms and conditions, including any deferrals and any future recovery of deferrals, ***is more favorable in the aggregate as compared to the expected results that would otherwise apply under Section 4928.142 of the Revised Code.***

Emphasis supplied. Although the statute ultimately requires that an ESP be approved if it is more favorable in the aggregate than an MRO,[7] it does not permit the Commission to approve an ESP – even one more favorable than an MRO – if any component part of the ESP is unreasonable or unlawful. In this proceeding, FPL Energy has not taken a position on the benefits of the ESP versus the MRO, but has focused on the reasonableness and lawfulness of FirstEnergy's proposed ESP. Tr. V, at 135. FPL Energy particularly has focused on the lawfulness of the ESP's anti-competitive provisions that would harm large-scale governmental aggregation, to which the Ohio Legislature extended a special status and substantial protections.

2. S.B. 221 Affords Special Legal Status and Protections to Governmental and Large-Scale Governmental Aggregation.

The special legal status and protections that the Ohio Legislature chose to extend to governmental aggregation and to large-scale governmental aggregation in S.B. 221 are codified in sections 4928.20(I), (J), and (K), Ohio Revised Code; specifically:

- Section 4928.20(I), Ohio Rev. Code, exempts ***governmental aggregation customers*** from paying any deferred charges unless they received a benefit therefrom.

- Section 4928.20(J), Ohio Rev. Code, exempts ***governmental aggregation customers*** from paying a

[7] FPL Energy anticipates that FirstEnergy will argue, as it has in prior rulemaking proceedings, that an ESP may adversely affect shopping, as long as the ESP is more favorable in the aggregate than the MRO. See, *In the Matter of the Adoption of Rules for Standard Service Offer, Corporate Separation, Reasonable Arrangements, and Transmission Riders for Electric Utilities Pursuant to Sections 4928.14, 4928.17, and 4905.31, Revised Code, as amended by Amended Substitute Senate Bill No. 221,* PUCO Case No. 08-777-EL-ORD (FirstEnergy Application for Rehearing, October 17, 2008, at 8).

standby charge, upon the election of the legislative authority that formed the governmental aggregation.

- Section 4928.20(K), Ohio Rev. Code, requires the Commission to adopt rules to encourage and promote ***large-scale governmental aggregation*** and, further, requires consideration of the effects of any nonbypassable generation charge on ***large-scale governmental aggregation***.

3. The Protections Afforded Governmental and Large-Scale Governmental Aggregation Must be Included in FirstEnergy's ESP.

The standard for developing an ESP is contained section 4928.143(B), Ohio Rev. Code, which provides:

> (B) Notwithstanding any other provision of Title XLIX of the Revised Code to the contrary ***except*** division of this section, ***divisions (I), (J), and (K) of section 4928.20***, division (E) of section 4928.64, and section 4928.69 of the Revised Code:
>
> (1) An electric security plan shall include provisions relating to the supply and pricing of electric generation service.
>
> ***
>
> (2) The plan may provide for or include, without limitation, any of the following:
>
> ***

Emphasis supplied. Thus, although S.B. 221 provides EDUs with a considerable degree of discretion in developing their ESPs – even to the point of disregarding various provisions of Ohio Rev. Code Title 49 – it requires that the ESP adhere to the special protections extended to ***governmental aggregation customers*** by sections 4928.20(I) and (J), Ohio Rev. Code, and to ***large-scale governmental aggregation*** by section 4928.29(K).

FirstEnergy's Application follows the dictates of 4928.20(I), Ohio Rev. Code, by exempting governmental aggregation customers from deferral charges, at least for the time being;[8] and also follows the dictates of § 4928.20(J), Ohio Rev. Code, by exempting governmental aggregation customers from the standby charge, upon their election. However, FirstEnergy's application ignores that its ESP is required to encourage and promote large-scale governmental aggregation and, thus, has violated the dictates of § 4928.20(K), Ohio Rev. Code.

4. Section 4928.20(K), Ohio Rev. Code, Requires that the ESP Promote and Encourage Large-Scale Governmental Aggregation.

Critical to recognizing FirstEnergy's and this Commission's obligation with respect to large-scale governmental aggregation is the meaning of section 4928.20(K), Ohio Rev. Code, which provides in pertinent part:

> (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. ***Further, within the context of an electric security plan under section 4928.143 of the Revised Code, the commission shall consider the effect on large-scale governmental aggregation of any nonbypassable generation charges***, however collected...

Emphasis supplied.

[8] Section 4928.20(I), Ohio Rev. Code, provides that a deferred charge could be imposed on governmental aggregation customers if they receive a benefit from a rate phase-in. The issue as to what benefit and concomitant charge large-scale governmental aggregation customers should be subject to is discussed subsequently.

a. The Commission Must Adopt, and FirstEnergy Must Adhere to, Rules Encouraging and Promoting Large-Scale Governmental Aggregation.

The first sentence of section 4928.20(K), Ohio Rev. Code, is straightforward. The Commission must adopt "rules" that encourage and promote large-scale governmental aggregation. The type of rules are not specified, but may be general rules promulgated pursuant to chapter 119., Ohio Rev. Code, and also may be rules adopted in the adjudicatory proceeding reviewing each EDU's individual ESP, or in other proceedings. See, *e.g., Securities and Exchange Comm. v. Chenery Corp.* (1947), 332 U.S. 194, 91 L.Ed. 1995, 67 S.Ct. 1575; *Hamilton Cty. Bd. of Mental Retardation and Developmental Disabilities v. Professionals Guild of Ohio* (1989), 46 Ohio St. 3d 147, 545 N.E.2d 1260; *MarionOB/GYN, Inc. v. State Medical Board of Ohio* (2000), 137 Ohio App. 3d 522, 739 N.E.2d 15. Considering the broad latitude Ohio's EDUs have in proposing a multitude of provisions in their ESPs, the Commission's ability to issue rules in an adjudicatory proceeding to ensure that such provisions encourage and promote large-scale governmental aggregation is critical. See *Chenery*, supra, 332 U.S. at 203 (The United States Supreme Court observed that not all problems can be foreseen or captured within the boundaries of a general rule, and that, to be effective, an agency must have the power to deal with situations on a case-by-case basis.) Indeed, the Commission has followed this line of cases permitting rulemaking by adjudication. See *WPS Energy Services, Inc. and Green Mountain Energy Company v. First Energy Corp., et al.*, PUCO Case No. 02-1944-EL-CSS (Opinion and Order, August 6, 2003), in which the Commission approved partial payment priority rules applicable to FirstEnergy. Accordingly, upon the review of ESPs on a case-by-case basis, it is critical that the

Commission promulgate rules based upon provisions therein so as to encourage and promote large-scale governmental aggregation.

b. The Commission Must Review the Effect of Nonbypassable Generation Charges to Ensure that They Encourage and Promote Large-Scale Governmental Aggregation.

The last sentence of section 4928.20, Ohio Rev. Code, requires the Commission to "consider the effect on large-scale governmental aggregation of any nonbypassable generation charges." However, mere consideration of the nonbypassable generation charge cannot be an end unto itself – rather, the language begs the question as to the purpose for which the review is to be undertaken. Ohio's rules of statutory construction provide the appropriate guidance. Section 1.42, Ohio Rev. Code, requires that all words and phrases be read in context. The context of section 4928.20(K), Ohio Rev. Code, is made clear by its first, and primary, sentence: that large-scale governmental aggregation is to be encouraged and promoted. Further, if the language of the statute is considered to be ambiguous (which it is not), then the legislature's intent can be determined from the object sought to be attained. See § 1.40, Ohio Rev. Code. Again, the object sought to be obtained is the encouragement and promotion of large-scale governmental aggregation. It necessarily follows that the purpose of reviewing nonbypassable generation charges is to ensure that large-scale governmental aggregation is encouraged and promoted. If a nonbypassable generation charge in FirstEnergy's ESP violates the policy of encouraging and promoting large-scale governmental aggregation, the Commission must modify or disallow the provision.

i. <u>FirstEnergy has Misapplied the Standard of Review as to the Protections Afforded Large-Scale Governmental Aggregation</u>.

In addressing the standard of review applicable to large-scale governmental aggregations, FirstEnergy ignored the above statutory analysis and created its own standard. Instead of considering the effect nonbypassable generation charges have on encouraging and promoting large-scale governmental aggregation, FirstEnergy merely (and improperly) considered the charges' "overall" effect on "customers." FirstEnergy's standard of review finds no support in S.B. 221.

aa. The Standard of Review Related to Large-Scale Governmental Aggregation Does Not Examine the Overall Effect of Nonbypassable Charges, but Examines the Effect of Each Specific Charge.

Section 4928.20(K), Ohio Rev. Code, does not call upon FirstEnergy, or the Commission, to consider the "overall" effect of nonbypassable generation charges on large-scale governmental aggregation customers. Rather, its plain language clearly requires a determination of whether "**<u>any</u>** nonbybassable generation charges" affects the large-scale governmental aggregation. Emphasis supplied. By use of the word "any," the Legislature contemplated an analysis of each specific charge and not their aggregate effect.

bb. The Standard of Review Related to Large-Scale Governmental Aggregation Does Not Examine the Overall Effect of Nonbypassable Charges on Large-Scale Governmental Aggregation Customers, but on Large-Scale Governmental Aggregation Itself.

Although Sections 4928.20(I), (deferred generation charges) and 4928.20(J) (standby charges), focus on the charges to governmental aggregation "customers," Section 4928.20(K), is notably different. It doesn't focus on "governmental aggregation," but on "large-scale governmental aggregation." Nor does it focus on the charges to the "customer," but the effect of the charge on the large-scale aggregation itself. Had the Legislature wished to make the individual aggregation customers the focus of the review, it could have done so by inserting the word "customer" in the statute, as it did in Sections 4928.20(I) and (J). By not doing so, the Legislature's intent is clear that the standard of review applies to the effect of the nonbypassable charges on large-scale governmental aggregation itself. Obviously, the Legislature deemed the continued viability of large-scale governmental aggregation as essential to the continuation of its pro-competitive policies, as enunciated in Section 4928.02, Ohio Rev. Code, and to bringing the benefits of competition to the residents of this state.

5. The Commission's General Authority to Modify and Approve an ESP Requires that the ESP's Provisions be Reasonable.

The Ohio Legislature provided the Commission with broad authority to modify an ESP. Section 4928.143(C)(1) and (2)(a), Ohio Rev. Code. Because S.B. 221 provides no explicit standard under which modification is necessary; it contemplates a reasonableness standard of review. Thus, the Commission may modify any ESP provision that it deems to be unreasonable, including a provision of an ESP that is contrary to the policy to encourage and promote large-scale governmental aggregation.

The Commission must consider the following substantive issues under these standards of review.

IV. THE COMMISSION MUST MODIFY CRITICAL PROVISIONS IN FIRSTENERGY'S ESP IN ACCORDANCE WITH THE LEGISLATURE'S DIRECTIVE TO PROMOTE AND ENCOURAGE LARGE-SCALE GOVERNMENTAL AGGREGATION

A. The Generation Phase-In Credit/Deferred Generation Charge Riders

FirstEnergy proposes to establish base generation prices for SSO customers for each year of its ESP. The average base generation price as proposed in 2009 is 7.5 cents/kWh, 8.0 cents/kWh in 2010 and, if the plan is not terminated, the price will be 8.5 cents/kWh in 2011. In addition, SSO customers would receive a GPIC of ten percent or more in each plan year. In 2009, this overall credit will be 0.75 cents/kWh, in 2010 it will be 0.85 cents/kWh, and in 2011 it will be 0.95 cents/kWh. The amounts credited will be deferred and recovered with associated carrying charges through the deferred generation charge ("DGC") rider beginning in 2011 for a period not to exceed 10 years (or they may be securitized and recovered). FPL Energy Ex. 1, at 9; Application at 5, 10; Application Attachment A.

1. The GPIC is Unreasonable and Unlawful Because It Does Not Encourage or Promote Large-Scale Governmental Aggregation.

Unfortunately, Customers who participate in large-scale governmental aggregations will **<u>not</u>** receive the same benefit from the proposed GPIC to the detriment of large-scale governmental aggregation. Tr. I, at 126. As explained by FPL Energy witness Garvin – a former Commissioner of the Public Service Commission of Wisconsin

– the GPIC is anti-competitive. FPL Energy Ex. 1, at 10; see, also, Joint NOPEC/NOAC Ex. 1, at 6. Mr. Garvin explained that a competitive supplier serving a large-scale governmental aggregation must develop its retail pricing based on the full and actual cost of service. Such pricing must be lower than the ESP generation price less the GPIC in order for the competitive supplier to be able to compete. *Id.* Since the GPIC represents approximately a 10% discount on the base generation price, any competitive provider – including FPL Energy – would be unable to beat, or even match, such steeply discounted, phased-in SSO prices. *Id.* This disparity in pricing, if the GPIC were adopted by the Commission, would prevent large-scale governmental aggregators such as NOPEC from obtaining competitively-priced alternative electric supplies for their constituents and would prevent customers from shopping. *Id.* See, also, Staff Ex. 6, at 3; Tr. IX, at 163; Joint NOPEC/NOAC Ex. 1, at 6.

Indeed, FirstEnergy witness Blank admitted on cross-examination that the charge is an impediment to competition. He testified that customers who had a choice between purchasing a product at a discounted price or a non-discounted price would choose the discounted price. Tr. VII 56-57. He further admitted that if a provision of an ESP prevented customers from shopping, then the large-scale governmental aggregation providing electric service would cease to provide that service. Tr. VII, at 63-64. Applied to this proceeding, these admissions clearly demonstrate that customers offered a choice between the discounted SSO service and the fully-priced service from a large-scale governmental aggregation would choose the SSO service. More significantly, without customers to take its service, the large-scale governmental aggregation would cease to be a viable entity. The GPIC does not encourage and promote large-scale governmental aggregation, is unreasonable and unlawful, and must be disallowed or modified.

a. As a Threshold Matter, FPL Energy Supports Staff's Recommendation that the GPIC be Disallowed, or That a Competitively Neutral Levelized SSO be Developed for the Term of the ESP.

In his testimony, Staff witness Cahaan recommended that the GPIC be disallowed, stating that it caused too many difficulties and distortions (Staff Ex. 6, at 3), including the obvious distortions to the SSO price that affects marketers' ability to compete. Tr. IX, at 163. As an alternative, he recommended that the ESP be modified to provide a levelized SSO price during the term of the ESP, if developed in a manner in which marketers could compete. Staff Ex. 6, at 3; Tr. IX, at 163. Staff has not developed such a levelized SSO plan. Tr. IX, at 162. As stated previously, FPL Energy's interest in this proceeding is that it be given the opportunity to compete on a level playing field against the SSO in order to serve the NOPEC aggregation. The Commission's rejection of the GPIC would satisfy FPL Energy's interests, as would the development of a competitively neutral levelized SSO. Thus, as a threshold matter, FPL Energy supports Staff witness Cahaan's recommendation.

b. If the Commission Rejects Staff Witness Cahaan's Recommendation and Approves the GPIC, the Commission Must, by Rule, Require FirstEnergy to Make the Same Credit Available to Large-Scale Governmental Aggregation Customers.

Under no stretch of the imagination could FirstEnergy's GPIC be deemed to promote or encourage large-scale governmental aggregation. The evidence that it does not is overwhelming. See testimony of Staff witness Cahaan (Staff Ex. 6, at 3, Tr. IX, at 162-163); FPL Energy witness Garvin (FPL Energy Ex. 1, at 10); NOPEC/NOAC witness Frye (Joint NOPEC/NOAC Ex. 1, at 6); and even FirstEnergy witness Blank (Tr. VII 56-57, 63-64). Thus, if the Commission were to approve the GPIC, it must make the credit at least competitively neutral to large-scale governmental aggregation. Clearly, the Commission has the duty to promulgate rules that encourage and promote large-scale governmental aggregation under Section 4929.20(K), Ohio Rev. Code. Pursuant to this authority, the Commission should order FirstEnergy to submit proposed tariffed rules in this proceeding by which large-scale governmental aggregation customers will receive a credit to their bills in the same amount as the GPIC. In this vein, FPL Energy supports NOPEC/NOAC's proposal that FirstEnergy extend the credit to large-scale governmental aggregation customers.[9] See, Joint NOPEC/NOAC Ex. 1, at 9.

FPL Energy witness Garvin testified that there is no reason why customers served by large-scale governmental aggregation should not receive this same protection against rate shock during the ESP transitionary period. FPL Energy Exhibit 1, at 11. Indeed, the Maryland Public Service Commission acted similarly by approving a Rate Stabilization Plan that allowed residential customers, including customers served by a competitive retail electric suppliers, to choose an option that provides a gradual transition to market rates. The Maryland Commission's order provided for a deferral credit to be applied to the customers' distribution service which would then be managed and administered by the utility, Baltimore Gas & Electric. See *In the Matter of Baltimore Gas and Electric Company's Proposal to Implement a Rate Stabilization Plan Pursuant to Section 7-548 of*

[9] In its Application, FirstEnergy did not explain how the GPIC benefitted large-scale governmental aggregation or large-scale governmental aggregation customers. However, on cross-examination FirstEnergy witness Blank stated that the GPIC **indirectly** benefitted large-scale governmental aggregation customers by putting downward pressure on competitive supplier prices. Tr. VII, at 29, 55-56. If FirstEnergy truly is serious about extending the plan's benefits to all customers, it would accept FPL Energy's and NOPEC/NOAC's proposal to extend this credit to large-scale governmental aggregation customers.

the Public Utility Companies Article and the Commission's Inquiry Into Factors Impacting Wholesale Electricity Rates, Case No. 9099, Public Service Commission of Maryland, Order No. 81423, Issued May 23, 2007. See, also, FPL Energy Ex. 1, Attachment B (Fact Sheet on "Optional Rate Stabilization Plan for BGE's Residential Electric Customers," Case No. 9099, Public Service Commission of Maryland, Order 81423, May 23, 2007, Page 2).

c. *Section 4928.20(I), Ohio Rev. Code, Provides the Mechanism for the Recovery of the Credits from Large-Scale Governmental Aggregation Customers.*

The mechanism for recovery of the credits to be extended to large-scale governmental aggregation customers already is in place through section 4928.20(I), Ohio Rev. Code.[10] This statute contemplates that large-scale governmental aggregation customers will receive some benefit from the GPIC, and requires that large-scale governmental aggregation customers pay for the benefits they receive. Approval of the NOPEC/NOAC proposal would place these customers and the CRES providers that serve them on an equal footing, as the credits received and subsequent deferred charges would be identical after adjusting for carrying costs. In addition, adoption of this proposal would alleviate the issues that FirstEnergy, the Commission and large-scale governmental aggregations will be forced to wrestle with in the future when deciding

[10] Section 4928.29(I), Ohio Rev. Code, provides:

> (I) Customers that are part of a governmental aggregation under this section shall be responsible only for such portion of a surcharge under section 4928.144 of the Revised Code that is proportionate to the benefits, as determined by the commission, that electric load centers within the jurisdiction of the governmental aggregation as a group receive. The proportionate surcharge so established shall apply to each customer of the governmental aggregation while the customer is part of that aggregation. If a customer ceases being such a customer, the otherwise applicable surcharge shall apply. Nothing in this section shall result in less than full recovery by an electric distribution utility of any surcharge authorize under section 4928.144 of the Revised Code.

how to track and recover the benefits that individual large-scale governmental aggregation customer my receive from the GPIC. See Joint NOPEC/NOAC Ex. 1, at 7-8; Tr. VII, at 50-52.

B. The $1.73 BILLION Minimum Default Service Charge.

FirstEnergy proposes that a nonbypassable minimum default service ("MDS") charge of 1.0 cent/kWh be imposed on all customers. It asserts that the nonbypassable charge is necessary to recover generation-related administrative costs and hedging costs associated with FirstEnergy's obligation to serve the entire load of retail customers. It alleges that the charge recognizes the risk and costs of customers switching to competitive electric suppliers – when more customers shop than anticipated (the "Shopping Risk"), and when fewer customers shop than anticipated (the "Risk of Unanticipated Load.") Application at 14; FirstEnergy Ex. 5, at 10-11. The MDS will be imposed through a rider upon shopping customers, including large-scale governmental aggregation customers; while the charge is assumed to be embedded in SSO customers' base rates.[11] FirstEnergy Exhibit 5, (Warvell), at 11.

Over the 3-year term of the ESP, the 1.0 cent/kWh MDS charge could generate astronomical revenues of over **$1.73 BILLION** for FirstEnergy. Tr. I, at 143; Joint NOPEC/NOAC Ex. 1, at 12; OCC Ex. 3, at 34-35. Incredibly, this charge was not developed through a quantitative analysis of the risks and costs it is supposed to recover (Tr. I, at 122-123, 137-140); rather, it was based solely upon ill-defined "management judgment." Tr. I, at 138.

[11] FirstEnergy did not develop its proposed SSO rates based upon cost factors, but set the rate so as to be lower than the market rate option. Tr. I, 167-169.

1. The MDS Rider is Unreasonable and Unlawful.

a. FirstEnergy's Failure to Quantitatively Justify the MDS Charge Renders It Unlawful, Unless FirstEnergy Subsequently Conforms its Application by the Effective Date of the Commission's ESP Rules.

SB 221 permitted the Commission to promulgate rules detailing the contents of an ESP application, and also permitted an EDU to file its application before the rules become effective, provided the EDU conforms its application to the rules upon their effective date. Section 4928.143(A), Ohio Rev. Code. The Commission proposed draft rules prior to FirstEnergy filing its application.[12] FirstEnergy generally attempted to adhere to the initial draft of the rules; however, it ignored the provision that required it to provide a quantitative justification for the MDS rider. The Commission issued its Finding and Order approving the SSO rules on September 17, 2008; however, FirstEnergy has not yet conformed its application to the rules. The applicable SSO Rules are contained in Rule 4901:1-35-03(C), Ohio Admin. Code, and provide:

> (C) An SSO application that contains a proposal for an ESP shall comply with the requirements set forth below.
>
> ***
>
> (9) Specific Information
>
> ***
>
> (c) Division (B)(2)(d) of section 4928.143 of the Revised Code authorizes an electric utility to include terms, conditions, or

[12] See, *In the Matter of the Adoption of Rules for Standard Service Offer, Corporate Separation, Reasonable Arrangements, and Transmission Riders for Electric Utilities Pursuant to Sections 4928.14, 4928.17, and 4905.31, Revised Code, as amended by Amended Substitute Senate Bill No. 221*, PUCO Case No. 08-777-EL-ORD (Finding and Order, September 17, 2008) (hereafter, the "SSO Rules"). Although these rules have been forwarded to the Joint Committee on Agency Rule Review ("JCARR") for consideration, rehearing requests remain pending before the Commission. As of the date of this brief, an entry on rehearing has not been issued and JCARR has not approved the rules.

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

Emphasis supplied. Although the rule recognizes that a quantitative justification is not always possible, *e.g.*, for some terms and conditions that do not contain pricing, it has not been disputed that a quantitative analysis could be performed with respect to the MDS charge. It also is not disputed that FirstEnergy did not provide a quantitative justification for the charge in its application or workpapers supporting it. Tr. I, at 122-123, 137-140. Instead, FirstEnergy merely attempts to support the MDS upon the basis that it was developed as a matter of "management judgment." Tr. I, at 138. FirstEnergy's failure to provide cost justification for the MDS charge will render it unlawful unless FirstEnergy conforms its application to the rules upon their effective date.

b. FirstEnergy's Failure to Quantitatively Justify the MDS Charge Renders It Unreasonable, Even Absent the Effectiveness of Rule 4901:1-35-03(C), Ohio Admin. Code.

As stated previously, by providing the Commission with the broad power to modify ESPs (see section 4928.143(C)(1) and (2)(a), Ohio Rev. Code), the Legislature necessarily empowered the Commission to review the reasonableness of an ESP's various provisions. The primary yardstick by which any charge can be deemed reasonable is to undertake a review of the costs it seeks to recover. Because FirstEnergy has provided no documents justifying this charge, this analysis cannot be done upon this record and the MDS rider should be disallowed on this basis alone. FirstEnergy simply has not carried its burden on this issue. Section 4928.143(C)(1), Ohio Rev. Code.

Indeed, if anything, the record shows that the Shopping Risks which allegedly give rise to the MDS rider are risks that are faced by any supplier, and should be viewed as a normal business risk for which any supplier would plan. FPL Energy witness Garvin stated that while FirstEnergy may be free to impose such a cost on its SSO customers, there is no economic rationale for making such a charge unavoidable for shopping customers, including customers of large-scale governmental aggregations. FPL Energy Ex. 1, at 13.

Moreover, the basis of the MDS charge is so confused that even FirstEnergy witness Warvell was unsure as to whether the MDS rider or the standby charge ("SBC") rider captures the "Risk of Unanticipated Load." In his pre-filed direct testimony, Mr. Warvell identified this risk as when "fewer customers shop than anticipated, [FirstEnergy's] affiliates may find themselves short generation and be forced to go into the market to acquire power to serve the unanticipated load." FirstEnergy Ex. 5, at 11. On cross examination, after being quoted this language, Mr. Warvell stated that this "is not part of the risk that was associated with the MDS charge." Tr. I, at 165.

The failure to quantitatively justify the MDS charge blurs the distinctions between the unanticipated load needed to serve customers who were expected to shop and did not (which allegedly is recovered through the MDS), and the unanticipated load required to serve customers who had chosen to shop but returned to the SSO (which allegedly is recovered through the SBC). Without the underlying quantitative justification for the charge, the Commission will be unable to ascertain whether the MDS charge and the

SBC recover the same costs for the unanticipated load of returning customers. Indeed, City of Cleveland witness Courtney was unable to make this determination for the very reason that FirstEnergy had failed to provide quantitative justification for the charge. Tr. VII, at 119.

This is a crucial issue for large-scale governmental aggregations, as the costs of the unanticipated load to serve returning customers are to be recovered by the SBC rider, and the SBC rider is bypassable for large-scale governmental aggregation customers upon election. In other words, if the MDS rider is recovering charges that properly should be assigned to the SBC rider, and the large-scale governmental aggregation has elected to bypass the SBC, recovery of those charges through the MDS rider would be unlawful. The MDS must be quantitatively justified to prevent this unlawful application, or made bypassable as to large-scale governmental aggregations.

c. *The MDS Rider is Unlawful Because it Does Not Encourage or Promote Large-Scale Governmental Aggregation.*

As discussed previously, sections 4928.143(B) and 4928.20(K), Ohio Rev. Code, afford special protections to large-scale governmental aggregations. Specifically, they require that all nonbypassable generation charges, such as the MDS rider, be reviewed to ensure that the ESP encourages and promotes competition.

It is difficult to fathom how the proposed MDS charge could encourage or promote large-scale governmental aggregation. Incredibly, FirstEnergy will use proceeds from the MDS charge to reduce the SSO rates against which large-scale governmental aggregations must compete. FirstEnergy Ex. 1, at 22, Tr. I, at 119. Moreover, FirstEnergy admits that the shopping risk for large-scale governmental aggregations could be eliminated if they provided notice that they would not take the SSO. Tr. I, at 167. With no shopping risk, there is no need for the charge. Thus, FirstEnergy seeks a result in which large-scale governmental aggregation customers would be required to pay a quantitatively unjustified MDS, although they received no benefit therefrom, in order to reduce the competing SSO rate, which in turn will destroy large-scale governmental aggregation. Clearly, the MDS does not encourage or promote large-scale governmental aggregation.

Staff witness Turkenton recognized as much when she testified that the charge is an impediment to competition. Tr. IX, at 203. FPL Energy witness Garvin testified that the charge is unjustified and serves only to increase the price that shopping customers would pay for generation service, placing competitive suppliers serving the governmental aggregation at a significant competitive disadvantage. FPL Energy Ex. 1, at 14. FirstEnergy witness Blank corroborated Mr. Garvin's testimony when he agreed that if such surcharges were imposed on one of two identical products, shoppers would choose the product on which the surcharge was not applied, in this case the SSO. Tr. VII, at 61. He further admitted that if a provision of an ESP prevented customers from shopping, then the large-scale governmental aggregation providing electric service would cease to provide that service. Tr. VII, at 63-64. Applied to this proceeding, these admissions clearly demonstrate that customers would choose the SSO service if offered a choice between the SSO service and the service from a large-scale governmental aggregation to which the MDS rider would be added. More significantly, without customers to take its service, the large-scale governmental aggregator would cease to be a viable entity.

The MDS does not encourage and promote large-scale governmental aggregation and must be disallowed or made bypassable to large-scale governmental aggregations.

C. *The Effect of the GPIC and DGC Riders*

As stated previously, in order for competitive retail electric suppliers to compete against the SSO it is critical that the Commission approve ESPs that create a level playing field. FirstEnergy's ESP clearly does not, as shown through the above discussions regarding the GPIC and MDS riders.

FPL Energy witness Garvin quantified the effect of these riders on large-scale governmental aggregations. In analyzing the effect of the GPIC, Mr. Garvin assumed, solely for the sake of argument, that FirstEnergy's base generation of $75.00/MWhr for 2009 was market based and used it as the base rate for the SSO and competitive suppliers for purposes of his illustration.[13] When the 10% GPIC is applied to the SSO customers' base generation rate, SSO customers would be paying $7.50 less per MWhr ($67.50/MWhr) than shopping customers. Shopping customers would continue to pay $75.00/MWhr, because the artificial phase-in is not applied to their rates. FPL Energy Exhibit 1, at 15; Tr I, at 170-171.

Further, if the proposed nonbypassable MDS rider were imposed on shopping customers, such customers would be required to pay an additional $10/MWhr for their electricity – or $85/MWhr – compared to the $67.50/MWhr rate charged SSO customers. Therefore, competitive retail electric suppliers would face a net pricing disadvantage of $17.50/MWhr ($85-$67.50) or approximately 26%, as illustrated in the following table. FPL Energy Exhibit 1, at 15; Tr I, at 170-171.

[13] Mr. Garvin's assumption is only for purposes of discussing his illustration as FirstEnergy claims that its proposed base generation rate is priced below the market.

	SSO Customers $ / MWhr	**Gov't. Agg. Customers $ / MWhr**
2009 Base Generation Rate	$75.00	$75.00
GPIC Rider	($7.50)	
Net 2009 Base Generation Rate	$67.50	$75.00
MDS Rider		$10.00
Net Base Generation Rate	$67.50	$85.00
Gov't. Agg. Price Disadvantage		**$17.50 (~26 %)**

See, FPL Energy Ex. 1, at 16.

Mr. Garvin explained that it is a mathematical certainty that competitive suppliers such as FPL Energy who are interested in serving customers in large-scale governmental aggregation programs would be unable to overcome this significant price disadvantage even after considering any procurement efficiencies that they may be able to deliver. He concluded that, if the GPIC and MDS rider provisions of the ESP are accepted without modifications similar to those proposed by FPL Energy, customers in large-scale governmental aggregation programs would have no choice but to take electric service from FirstEnergy. FPL Energy Ex. 1, at 15. As a practical matter, the GPIC and MDS riders would make it impossible for FPL Energy to enter the Ohio market to serve NOPEC, as it would be impossible for FPL Energy to beat the SSO price, much less provide a discount of 5% or greater preferred by NOPEC under the terms of the LOI. As FPL Energy witness Garvin testified:

> Under the ESP, competitive suppliers cannot effectively compete against the SSO and will not enter FirstEnergy's markets to serve large-scale governmental aggregations. Without a competitive supply of electricity, large-scale governmental aggregations will be unable to serve their constituents, who will be denied the benefits of choice of electric service.

FPL Energy Ex. 1, at 22.

D. The Capacity Cost Adjustment (CCA) Rider.

FirstEnergy has proposed that generation capacity currently owned or controlled by FirstEnergy Solutions ("FES") located in MISO will be made available to meet MISO planning reserve requirements. In the event this capacity is insufficient to meet FirstEnergy's MISO planning reserve requirements, FES will procure the needed capacity for the period from May 1 through September 30 in years 2009, 2010 and 2011. The costs associated with procuring this needed capacity will be recovered by FirstEnergy pursuant to a separate charge through the CCA. FirstEnergy has not provided an estimate of its expected MISO summer generation capacity that will be made available to serve Ohio customers, an estimate of how much capacity it expects to be short in the summer months for the three year term of the ESP, or an estimate of the price of such capacity. FPL FirstEnergy Ex. 5, at 12-13Energy Ex. 1, at 16-17.

1. The CCA's Lack of Transparency is an Impediment to Shopping and Fails to Encourage and Promote Large-Scale Governmental Aggregation.

FirstEnergy's failure to provide an estimate of its expected MISO summer generation capacity, how much capacity it expects to be short in the summer months, or an estimate of the price of such capacity makes its SSO pricing nontransparent. Staff agrees, and further testified that the availability of such information would assist a customer's determination whether to shop. Tr. IX, at 196. Transparency in pricing is essential, not only for customers' decisions to shop, but also for competitive suppliers to ascertain the "price to beat." Without this information, competitive suppliers such as FPL Energy will be unable to ascertain whether they can enter FirstEnergy's markets, which will deny such suppliers the opportunity to compete. FPL Energy Ex. 1, at 17. Because it chills suppliers' market entry, the CCA also fails to encourage or promote large-scale governmental aggregation.

2. To Remedy the CCA's Lack of Transparency, the Commission Should Adopt FPL Energy's Recommendation that FirstEnergy Obtain Capacity in the Market Needed to Meet the Planning Reserve Requirements for All of FirstEnergy's Customers.

In order to ensure that there is a level economic playing field for competitive electric suppliers, FPLE proposes that FirstEnergy procure capacity in the market needed to meet planning reserve requirements for **all** customers in FirstEnergy's service territory for the **entire term** of the ESP and recover all associated costs through a **non-bypassable** capacity cost recovery rider. Such a capacity cost recovery rider would be non-discriminatory and transparent and is needed to preserve the competitive supply choices for large-scale governmental aggregation groups in Ohio. FPL Energy Ex. 1, at 17-18.

Although FPL Energy's recommendation is novel, no regulatory barriers exist to prevent its adoption as a transitionary arrangement for the term of the ESP. Tr. VII, at 67. FPL Energy witness Garvin testified that, unlike MISO energy markets or capacity markets in adjacent NEISO, PJM, and NYISO pools, the MISO DNR capacity market is immature, principally bilateral in nature, and subject to price volatility. During the transition, FirstEnergy's procurement of system-wide capacity would result in purchasing efficiency, a level playing field for competitive suppliers, and lower prices for Ohio customers. FPL Energy Ex. 1, at 18. Further FPL Energy's proposal will not impose any additional costs on FirstEnergy; in fact it may even benefit FirstEnergy, as it provides for full cost recovery to FirstEnergy for capacity dedicated by FES or procured in the market to satisfy MISO planning reserve requirements.

3. Alternatively, the Commission Should Require FirstEnergy to Provide an Estimate of MISO DNR Capacity that it Plans to Make Available to Meet Planning Reserve Requirements and a Reasonable Forecast of the CCA Rider.

Alternatively, if the Commission chooses not to require FirstEnergy to enter into a capacity procurement arrangement as described above, at a minimum the Commission should require FirstEnergy to provide an estimate of MISO DNR capacity that it plans to make available to meet planning reserve requirements and a reasonable forecast of the CCA rider. FPL Energy Ex. 1, at 18. Such price transparency is essential so that customers will have sufficient information to compare a competitive supplier's pricing against FirstEnergy's combined pricing for energy and capacity in determining whether to shop. It also is essential to competitive providers in determining whether to enter the market.

E. The Non-Distribution Uncollectible (NDU) Rider

FirstEnergy's ESP proposes to recover the uncollectible non-distribution expenses of SSO customers through the creation of the non-bypassable NDU rider, which tracks bad debt and is adjusted annually. The non-bypassable NDU socializes uncollectible costs across all customers in FirstEnergy's service territory, and guarantees that the utility will recover 100% of its uncollectible expenses attributable to SSO customers. Tr. IV, at 255. FirstEnergy justifies making this nonbypassable generation charge applicable to all customers, as being the fairest way to recover the costs, citing its obligation as the default provider. FirstEnergy Ex. IV, at 12-14.

1. As an Initial Matter, FirstEnergy's Position as the Default Provider Does Not Justify Imposing the NDU on Shopping Customers.

In claiming that its position as the default provider justifies making the NDU nonbypassable, FirstEnergy claims that, in contrast to FirstEnergy, CRES providers are better able to control uncollectible costs. FirstEnergy claims that CRES suppliers can select their customers, while SSO providers cannot; and that CRES providers can establish their own credit rules to minimize bad debt, while SSO providers cannot. FirstEnergy Ex. IV, at 13. However, on cross-examination, FirstEnergy witness Hussing conceded that both SSO and CRES providers have some degree of control over their customer selection by requiring the posting of deposits. Tr. V, 62-63. He also conceded that even customers who have established creditworthiness can default on their electric bills, causing the bad debt expense to arise. *Id.* Indeed, he conceded that it makes no difference whether large-scale governmental aggregation customers take the SSO service or service from a CRES provider – they will still create uncollectible expenses. Tr. V, at 49-50.

Mr. Hussing also attempted to distinguish FirstEnergy's obligations from CRES providers by claiming that EDUs must honor moratoria during which they cannot terminate a customer for nonpayment. However, he conceded that the imposition of a moratorium on disconnection for nonpayment does not create bad debt, as FirstEnergy makes a partial payment plans available to the customers. Tr. V, 64-65.

FirstEnergy's attempted distinctions between its obligations as an SSO provider and those of a CRES provider are flawed and do not support the application of the NDU rider to recover only SSO uncollectible expenses.

2. The NDU is Unlawful Because it Does Not Encourage or Promote Large-Scale Governmental Aggregation.

As discussed previously, sections 4928.143(B) and 4928.20(K), Ohio Rev. Code, afford special protections to large-scale governmental aggregations. Specifically, they require that all nonbypassable generation charges, such as the NDU rider, be reviewed to ensure that the ESP encourages and promotes competition. The NDU clearly does not.

The NDU will collect the uncollectible expenses of SSO customers. It will not collect the uncollectible expenses of CRES providers. Tr. V, at 49. Thus, customers served by competitive suppliers, including large-scale governmental aggregation customers, would be required to pay FirstEnergy's NDU rider and also would be required to pay the bad debt expense included in their supplier's rates. Tr. V, at 51-52. In effect, the shopping customers would be required to pay uncollectible expenses twice.

Staff witness Turkenton agrees that this nonbypassable generation charge impedes competition. Tr. IX, at 203. Indeed, there can be little doubt that these double payments would discourage customers from shopping, placing large-scale governmental aggregators at a competitive disadvantage. Thus, the NDU jeopardizes the continued viability of large-scale governmental aggregation. FPL Energy Ex. 1, at 18-19. Accordingly, the NDU must be modified or made bypassable to large-scale governmental aggregators.

3. The Commission Should Require FirstEnergy to Purchase CRES Providers' Accounts Receivables and Collect CRES Customers' Bad Debt Through the NDU.

The PUCO has approved bad debt trackers (as proposed in this ESP) for natural gas utilities[14] and, thereafter, has approved the collection of competitive suppliers' uncollectibles through the utilities' uncollectible riders where the utility has agreed to purchase the suppliers' accounts receivables.[15]

FPL Energy proposes that the PUCO require an electric utility that offers consolidated billing to purchase at no discount the receivables of a large-scale governmental aggregator, or the CRES supplying it, upon such aggregator's or CRES provider's request. The electric utility would recover any uncollectibles from these receivables and associated collection costs through the proposed non-bypassable NDU. FPL Energy Ex. 1, at 20.

The advantages of adopting the natural gas industry model are many, as it:

- creates uniformity among the practices in the natural gas and electric choice programs, creating an ease of administration for the Commission, utilities, and competitive suppliers alike;
- recognizes the historical policy that all customers in the utility's service territory bear the expense and benefits of uncollectible recovery, and
- encourages and promotes large-scale governmental aggregation by removing the unfair burdens on such aggregations, their suppliers, and customers.

See, FPL Energy Ex. 1, at 20.

[14] See, e.g., *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).

[15] See, *e.g.*, *In the Matter of the Application of the East Ohio Gas Company dba Dominion East Ohio for Approval of a Plan to Restructure its Commodity Service Function*, PUCO Case No. 05-474-GA-ATA (Opinion and Order, May 26, 2006), at 6.

Although FirstEnergy witness Hussing testified that the nonbypassable NDU was the fairest way to collect SSO uncollectible expense (FirstEnergy Ex. IV, at 14), it is clear that, if all customers are to pay the NDU rider, the fairest thing to do is to have the NDU recover the uncollectible expenses of all those who pay for it.

4. Alternatively, the Commission Should Adopt Staff Witness Fortney's Recommendation to Make the NDU Bypassable.

Staff witness Fortney correctly observed that the NDU is a nonbypassable generation charge, and that a customer who is not receiving its generation supply from FirstEnergy should not be responsible for generation-related costs. Accordingly, he recommends that the NDU be made bypassable for customers who shop with a CRES provider for their generation service. Staff Ex. 5, at 8. FPL Energy recommends that the Commission adopt Mr. Fortney's proposal in the event the Commission does not approve FPL Energy's recommendation that FirstEnergy purchase and collect CRES providers accounts receivables as currently practiced in the natural gas industry.

F. The Fuel Transportation Surcharge (FTS) Rider.

FirstEnergy has proposed to recover fuel transportation surcharge costs through the Fuel Transportation Surcharge and Environmental ("FTE") rider. The FTS charge would recover the surcharges[16] incurred by FES to move fuel (*e.g.*, coal) by train, truck, or barge to a particular FES generation unit. Tr. I, at 159. FirstEnergy seeks recovery of FTS charges in excess of certain baseline charges in the amount of $30 million, $20 million and $10 million in 2009, 2010 and 2011 respectively. FirstEnergy Ex. 5, at 13-14. The FTS charge will be updated and revised on a quarterly basis. See Application,

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[16] By way of example, if the cost of diesel fuel or crude oil is above a certain level provided for in FES's third party contracts, FES is assessed a surcharge which may then be billed to FirstEnergy. FPL Energy Ex. 1, at 21; Tr. I, at 159-160.

Attachment B. FirstEnergy has not provided an explanation of how the baseline amounts were estimated, the specific costs that are included in these amounts or the specific cost increases that could be recovered through the rider. Tr. I, at 162; Tr. IX, at 194; FPL Energy Ex. 1, at 21. Instead, FirstEnergy provided Staff only with a budgeted amount for these costs of $30 million per year, which is based upon the estimated future price of oil and the amount of transportation required to move the fuel. Id., Tr. I, at 162. Based upon the budgeted amounts, FirstEnergy would incur no FTS charges in 2009, $10 million in 2010, and $20 million in 2011. Tr. I, at 160.

1. Because the FTS Charge Lacks Transparency it is an Impediment to Shopping and Fails to Encourage and Promote Large-Scale Governmental Aggregation.

Neither Staff nor FirstEnergy disputes that the FTS lacks transparency. Each agrees that customers considering shopping on January 1, 2009, will not know what price they will be charged for the FTS (Tr. I., at 163; Tr. IX, at 196). Staff witness Turkenton testified that the availability of such information would assist a customer's determination whether to shop. Tr. IX, at 196. This lack of transparency disadvantages shopping customers because they do not have sufficient information to properly compare a competitive supplier's all-in pricing against the SSO. FPL Ex. 1, at 21-22. The lack of transparency also prevents competitive suppliers from being able to determine the utility's "price to beat" and would chill their market entry to serve large-scale governmental aggregations. FPL Energy Ex. 1, at 21-22. Thus, the nontransparent charge fails to encourage or promote large-scale governmental aggregation.

2. FPL Energy Supports Staff's Recommendation that the FTS Charge be Disallowed.

Noting that FirstEnergy has not supported the price of the FTS through specific forecasts or analyses, Staff recommends that the FTS be disallowed. FPL Energy supports Staff's recommendation for these same reasons.

In the alternative, Staff recommends that, if the FTS is approved, that FirstEnergy be required to subject the charges to an annual prudence review. Staff Ex. 8, at 6-7. However, the prudence reviews would not begin until early 2010 (Tr. IX, at 200), and would not resolve the transparency issues that affect customer shopping and CRES market entry.

3. Alternatively, the Commission Must Modify the ESP to Provide Estimated FTS Charges.

In order to ensure that there is a level economic playing field for competitive electric suppliers, a transparent charge to recover these fuel transportation surcharges must be developed. FPL Energy recommends that the Commission require FirstEnergy to prepare the necessary forecasts to estimate the charge, or that the charge be based upon the budget estimates it has provided to Staff.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of FPL Energy's Initial Brief was served by electronic mail this 21st day of November, 2008, upon the following.

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