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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

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REPLY BRIEF OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY

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INTRODUCTION

In their Initial Brief, Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company (the "Companies") established that their proposed Electric Security Plan (the "Plan")[1] satisfies the single, specific test for the Commission to apply in determining whether to approve an ESP: whether the ESP is more favorable, in the aggregate, than the expected results from a Market Rate Offer ("MRO"). In fact, the Companies established that on price alone, the Plan is more favorable than the expected result of an MRO. The Companies further demonstrated how, in addition to providing customers with price stability for the totality of retail electric service over the Plan's three-year term, the Plan also includes other valuable benefits, including programs to enhance service reliability; commitments to promote energy efficiency, load management, economic development and job retention; incentives to add new capacity; and environmental benefits.

Remarkably, few Intervenors took a position on the sole and determinative issue before the Commission – whether the Plan is more favorable in the aggregate than the expected results of an MRO – and chose instead to criticize various aspects of the Plan that they believed could better advance their parochial interests. The Intervenors filing post-hearing briefs but not offering an opinion on whether the Plan is more favorable include: Commercial Group, FPL Energy, Industrial Energy Users-Ohio ("IEU"),[2] Kroger, NOPEC/NOAC, Nucor Steel Marion, Ohio Manufacturers Association ("OMA"), OmniSource Corporation, and Ohio Schools Council ("OSC").[3] These Intervenors ignore that the Plan as proposed is carefully balanced to offer

[1] For purposes of this Reply Brief, the Companies use the abbreviation "ESP" to refer generally to the electric security plans authorized by R.C. § 4928.143 and use "Plan" to refer specifically to the Companies' proposed ESP.

[2] IEU generally favors an ESP over an MRO (IEU Br., p. 11), but criticizes particular parts of the Plan without taking a position on whether the Plan is more favorable in the aggregate than the expected results of an MRO.

[3] OSC argues that the Plan is not favorable to the schools because it will result in rate increases (OSC Br., p. 5), but OSC does not argue that the Plan is not more favorable in the aggregate than the expected results of an MRO.

considerable benefits to customers while affording the Companies the opportunity to manage their risks during the Plan term. These Intervenors also ignore that there is no statutory requirement for approval of a "better" ESP, because the General Assembly has determined that state policy is satisfied precisely by the fact of an ESP being more favorable in the aggregate than the expected results of an MRO. The Commission's rejection of the Plan likely results in a period of risk and uncertainty combined with imposition of market-based generation rates, first via the filed-rate doctrine's mandate that the Companies must be able to recover their wholesale energy costs, and later potentially via an MRO, thereby precluding the prospect of any future ESP. *See Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 963 (1986); R.C. § 4928.142(F). Because the Plan is more favorable in the aggregate, such uncertainty and limitation of future options should be avoided.

Importantly, Staff has determined that the Plan does meet the "more favorable" test of R.C. § 4928.143(C), but then argues that the Commission should modify the Plan anyway to make it even more "reasonable." Staff Br., pp. 5-6. The Companies submit that Staff, together with Intervenors who argue that the Plan is not more favorable in the aggregate than the expected results of an MRO, all suffer from a traditional, cost-based tunnel vision that finds no support in R.C. § 4928.143 and, thus, is unreasonable and unlawful. There is no requirement in the governing statute that the Commission make an explicit finding in its Order approving an ESP that the Plan is just, reasonable or prudent. Indeed, the version of S.B. 221 initially approved by the Ohio Senate contained the exact test for an ESP that Staff and other Intervenors promote now, by requiring that the Commission find that "[t]he offer and the prices it establishes are just and reasonable as to each customer class and are consistent with the policy specified in section 4928.02 of the Revised Code." S.B. 221, passed Oct. 31, 2007 (proposed R.C. § 4928.14(D)(6)).

The General Assembly stripped this test from Am. Sub. S.B. 221 prior to its enactment and substituted in its place the "more favorable" test in R.C. § 4928.143(C). The Commission must now apply the test the General Assembly enacted, not the one it abandoned.

Applying the correct test inevitably must result in a Commission finding approving the Plan as more favorable in the aggregate than the expected results of an MRO. The Companies and Staff have both provided credible, probative evidence demonstrating that the Plan will result in the Companies' customers realizing well in excess of a billion dollars of savings over an MRO on a net present value basis, including over a half billion dollars just in waived CEI RTC charges. Testimony proffered by the few Intervenors that addressed this question is riddled with errors, ignores the impact of factors that must be incorporated into wholesale price estimates, and simply is not credible or reliable. As only one example, parties opining on the expected results of an MRO simplistically focus on a single round-the-clock wholesale energy cost component that declined during part of this year, while completely ignoring the business and financial risks affecting MRO pricing, which have exponentially increased. Thus, as required by R.C. § 4928.143(C), the Plan is more favorable than an MRO and should be approved.

Criticisms lodged by governmental aggregation groups and their proxies must fail because nonbypassable generation charges, phase-ins and deferrals, and shopping limitations are all expressly permitted under R.C. §§ 4928.143 and 4928.144. Although S.B. 221 did include provisions to encourage large-scale government aggregation, those provisions are not as broad as some Intervenors suggest. Indeed, S.B. 221 does not require protectionism for suppliers or shopping incentives where an ESP is deemed more favorable because it is less expensive for customers than the MRO alternative. Riders addressing POLR load risk and other non-

bypassable riders that recover costs that are properly borne by all customers may be included in an ESP under the statute.

The Plan's generation pricing provisions, and its rate design, also contribute to the conclusion that the Plan satisfies the "more favorable" test. Rider GEN and Rider GPI/DGC effectuate the General Assembly's goal of stabilizing rates and mitigating rate increases through phase-in and deferral mechanisms expressly authorized by the General Assembly. *See* R.C. § 4928.143(b)(2)(f) and 4928.144. The Plan's rate design more closely aligns rate classifications with the Companies' statutorily-required need to acquire wholesale power to satisfy its POLR obligation, while also providing seasonal, voltage-adjusted rates with time-of-day and beneficial interruptible service options. Additional generation, transmission, and distribution-related provisions of the Plan also contribute to the Plan's aggregate benefit while at the same time balancing the Companies' need to manage their risks at a time when liquidity and access to capital markets on reasonable terms have never been more important.

While the Plan includes sections addressing requirements or concerns related to alternative energy, energy efficiency, demand-side management, economic development and the environment, there is no requirement in S.B. 221 that alternative energy, energy efficiency or peak demand programs be specifically defined in an ESP. To the contrary, both the General Assembly and the Commission in its own proposed rules have provided for on-going, long-term review of these programs in separate proceedings. *See* R.C. §§ 4928.64, 4928.66; draft O.A.C. 4901:1-39 in Case No. 08-888-EL-ORD. However, the Companies have included in their Plan specific spending commitments, such as the commitment to spend up to $5 million annually for energy efficiency and demand side management activities over five years, which will not be

recovered from customers. Because these commitments lack an equivalent in the expected results of an MRO, they contribute to the net benefit of the Plan as compared to an MRO.

Lastly, the parties fail to credibly challenge the Significantly Excessive Earnings ("SEE") test proposed by the Companies. The record supports the Commission adopting Dr. Vilbert's SEE test as part of its order approving the Plan, and it should do so.

In summary, the record evidence before the Commission convincingly demonstrates that the Companies' Plan is more favorable in the aggregate than the expected results of an MRO. Thus, as provided by R.C. § 4928.143(C), an order must be issued on or before December 28, 2008 and because the Plan passes the statutory test, it should be approved.

I. PROCEDURAL MATTERS

A. The Commission Should Disregard Evidence Improperly Attached To Intervenor Briefs That Is Not Record Evidence.

The parties presented evidence in response to the Companies' Application over the course of 12 days of hearings in late October 2008. Despite these lengthy proceedings in which over 30 witnesses and numerous exhibits were introduced into evidence and subjected to examination, Intervenors OEG, OCC, and OMA submitted Initial Briefs attaching wholly new "evidence" that is improper and that the Commission should strike. The Commission has long recognized that these back-door tactics improperly limit parties' rights to cross-examination and rebuttal. "[D]ocuments that are not a part of the record in a proceeding cannot be attached to a post-hearing brief and be thereby made a part of the record . . . [because] the documents in question would not be supported by testimony and the opposing party would have no opportunity to cross-examine regarding the documents or to rebut the arguments related thereto." *In the Matter of the Complaint of Wendell and Juanita Thompson v. Columbia Gas of Ohio, Inc.*, 2005 Ohio PUC LEXIS 274, *52, Case No. 04-22-GA-CSS (June 1, 2005) (striking evidence attached

to the Complainant's post-hearing brief that was not admitted as evidence in the hearing); *see In the Matter of the Application of Cincinnati Bell Tel. Co.*, 1985 Ohio PUC LEXIS 1492, ¶ 5-7, Case No. 84-1272-TP-AIR (December 17, 1985) (granting motion to strike exhibits included in an application for re-hearing because they were not part of the record and were not legal authority in support of the arguments).

Based on the foregoing, the Commission should strike the following evidence:

- OEG: Appendices A, B, C, and D; Br., pp. 6-7.

  OEG attaches four documents, identified as Appendices A-D. Appendix A is a one-page print-out from SNL Financial, LLC ("SNL") and it purports to reflect "Average ISO Market Price." Appendix B is a similar one-page print-out from SNL that purports to reflect "Average ISO Market Price/Load." Both Appendices A and B note that the data was provided by Nrgstream, which "distributes this information without responsibility for accuracy." *See* Appx. A, B. Appendix C is only the Executive Summary of a "2008-2009 Winter Reliability Assessment" from MISO. Appendix D purports to be a print-out from SNL showing "NYMEX Natural Gas Futures" for December 2008 through December 2010.

- OMA: Appendix A; Br., pp. 4-5, 11, n.15.

  OMA requests that the Commission take administrative notice of FirstEnergy's Second and Third Quarter Earnings Reports, a November 2008 presentation made by Anthony Alexander (both of which are attached as Appendix A), and "the continuing FERC-regulated market prices for generation."

Neither OEG nor OMA introduced any of these documents into evidence at the hearing, which, if properly admitted, would have provided the Companies an opportunity to cross-examine any witnesses, or to explain or rebut the evidence. Although the Hearing Examiners stated at the end of the 12-day hearing that the record would be kept open, they also indicated due process would nonetheless apply. Hearing Tr., Vol. XII, p. 75. Accordingly, Intervenors cannot be permitted to submit additional evidence for Commission consideration of which the

Companies had no knowledge and no opportunity to explain or rebut. As such, the Commission should strike the OMA and OEG exhibits referenced in this section.[4]

B. The Commission's Role Is To Review The Companies' Proposal And, If Deemed Necessary, Propose Modifications.

A substantial distinction between traditional regulation and the new regulatory paradigm here is that the Commission *cannot require*, as urged by several Intervenors in their briefs, the Companies to accept a *different* ESP than the one proposed. A traditional rate case begins with a company request in its application, but ends up with a Commission order having a result, generally different than the request, which a utility *must* then implement. In contrast here, while the Commission may modify the terms of a proposed ESP, the Companies are not required to accept those modifications. R.C. § 4928.143(C)(2)(a). If the Companies do not consent to the proposed modifications, they may withdraw the application, "thereby terminating it." *Id.* So, while some Intervenors seem to suggest that the Companies should be forced to file a "better" ESP (which actually means a plan advancing that particular Intervenor's interests, typically at the expense of other parties' interests), there is no statutory basis for such a requirement. S.B. 221's limitations on the Commission's authority is law and not a "threat" or empty belief of the Companies, as suggested by Intervenors. *See* NOPEC Br., pp. 39-41; OCC Br., p. 93; OMA Br., p. 2. The Companies do not own generation. They will not as of December 31, 2008, have a contract for power with their generation affiliate. That means that as of January 1, 2009, the Companies, absent an accepted ESP, will be buying power in the wholesale market. Federal law will then govern the price that customers pay for power.

[4] Additionally, this evidence has no probative value to the Commission and should be stricken upon that ground as well.

C. The Plan Is Proposed Over A Three-year Term And There Is No Short Term Option Available To The Commission.

Staff and some Intervenors suggest that the Commission should institute an interim ESP rather than approve the Plan at this junction. OMA recommends a one-year ESP (OMA Br., pp. 10-11), and OCC seeks one lasting 270 days (OCC Br., pp. 99-103). *See also* Staff Br., p. 42 (recommending approval of undefined short-term ESP). But, the Commission has no authority to institute a short-term ESP absent it being a proposal of the Companies or a Commission modification of the Plan to which the Companies have agreed. S.B. 221 includes no grant of authority for the Commission to create such option under any other circumstances. *See, generally,* R.C. § 4928.143.[5]

OMA's, OCC's, and Staff's recommendations for such an option, therefore, should be rejected out of hand. The Commission must review and issue its findings on the longer-term Plan only.[6]

II. SUBSTANTIVE MATTERS

The Plan Is More Favorable In The Aggregate Than An MRO And Should Be Approved.

A. The Relevant Test For The Plan Is Set Forth Within The Language Of R.C. § 4928.143.

Many of the parties have misstated, misconstrued, and misapplied the statutory test for an ESP. They attempt to place extraneous requirements on the Companies and establish incorrect

[5] The Companies' Application did provide an option for a short-term ESP, set forth in ¶ A.8.a. *et seq.* of the Application (the "Short-term Plan"), which was the subject of briefing already submitted to and reviewed by the Commission. However, that option expired on November 14, 2008, after the Commission passed up the opportunity to institute the Companies' Short-term Plan. *See* Minutes of Commission Meeting, Nov. 12, 2008 (striking from the agenda consideration of the Short-term Plan). In determining to forego a short-term option, the Commission stated that it would review the Companies' Plan in accordance with the statute and, thus, implied that it did not require any additional time to review the Plan.

[6] IEU argues that the three-year term is not enough and, while the Companies are sensitive to IEU's frustrations with the near-constant regulatory procedures that arise from extended Commission reviews and decisions, and the desire to prolong the stability offered by the Plan in light of the current economic uncertainty (*see* IEU Br., pp. 13-15), the Plan's pricing provisions were crafted based on the three-year period anticipated by S.B. 221 and is limited in length thereto.

standards for the Commission's review. The test, however, is explicit, and nothing outside of its language is properly considered in a review of the Plan.

1. **The Plan "shall be" approved if it is "more favorable in the aggregate" than the expected results of an MRO.**

R.C. § 4928.143 unambiguously provides that:

> 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.

R.C. § 4928.143(C)(1) (emphasis added). Although unstated in the statute, this determination should be considered from the perspective of customers. Accordingly, the Companies presented evidence that established that the Plan has a positive net present value to customers when compared to the expected results of an MRO.[7]

When the terms of a statute are clear and unambiguous, any further speculation or projection of the General Assembly's intent is inappropriate. *Roxane Laboratories, Inc. v. Tracy*, 75 Ohio St. 3d 125, 127 (1996) ("The principles of statutory construction require courts to first look at the specific language contained in the statute, and, if the language is unambiguous, to then apply the clear meaning of the words used.") *citing Provident Bank v. Wood*, 36 Ohio St. 2d 101, 105-106 (1973) (where a statute's meaning is "clear, unequivocal and definite, . . . the interpretative effort is at an end"). Here, the Commission need look no further than the language

[7] Competitive Suppliers states that the Companies proposed an ESP without assessing the benefits to customers – a statement that is simply wrong. *See* Comp. Suppliers' Br., p. 4. Even a cursory review of the Companies' Application, supporting testimony, and Initial Brief reveals the Companies' focus on the Plan's quantitative and qualitative benefits to their customers. *See* Application, pp. 4 (S.B. 221 confers authority on the Commission to approve an ESP if it "is deemed more favorable to *customers*" than an MRO), 6 ("[T]he Plan is more favorable to *customers* than would be the MRO alternative."); Blank Testimony, p. 2 (his testimony "explain[s] the advantages to *consumers* under the Plan, and why, in aggregate, the terms and conditions of the Plan are more favorable to *customers* than the MRO."); Companies' Br., p. 7 ("The Plan represents significant net present value savings to *customers* over the expected results of an MRO."). (All emphases added.)

of the statute to derive the General Assembly's intent in establishing that the authority of the Commission is to approve, or modify and approve, an ESP simply if the ESP is "more favorable in the aggregate" than the expected results of an MRO. As a result, OSC's suggestion that modifications are needed to moderate rate increases in excess of the standard set forth in S.B. 221 does not make the Plan a "reasonable proxy for what the Legislature intended" (*see* OSC Br., p. 4), but, in fact, would represent an unlawful extension of the Commission's authority in reviewing the Plan. Contrary to basic rules of statutory construction, OPAE asserts that the Companies are "narcissistic" to suggest that the "more favorable in the aggregate" test is the lone test. OPAE Br., p. 3. Staff acknowledges that the Plan "could meet this minimal test for approval," but then goes on to suggest that passing the statute's clear, singular test is necessary for approval of an ESP but is "not a sufficient condition" on its own for approval. Staff Br., p. 7. The parties, however, cannot create their own tests for the Plan. The General Assembly's intent is expressed *within* the clear language of R.C. § 4928.143 and is manifested in the singular "more favorable in the aggregate" test.

(a) The legal standard to approve an ESP is <u>not</u> whether the rates are just and reasonable.

The "more favorable in the aggregate" standard under R.C. § 4928.143 applies to ESPs notwithstanding the "just [and] reasonable" standard in R.C. § 4905.22. The latter standard is applicable only in the context of traditional ratemaking. Despite the clear change in law, Citizens Coalition argues that the Commission should use "whatever mechanism, whether an MRO or an ESP, that produces . . . just and fair rates." Citizens Coalition Br., p. 11. All such arguments fail because they apply the incorrect standard to the Plan.

(b) The legal standard to approve an ESP is <u>not</u> whether costs are prudently incurred or whether the ESP's provisions are cost-based.

As the Commission is well aware, under a "traditional" rate case, a utility filed an application to increase rates, each aspect of which is reviewed with the Commission ultimately making findings regarding the costs of rendering service, the amount of rate base, and a fair and reasonable rate of return. In contrast, S.B. 221 redirected the Commission's focus to the impact on customers in the aggregate – the quantitative and qualitative customer benefits and burdens – resulting from an ESP as compared to what would be expected from an MRO. The General Assembly has instructed the Commission to leave behind any requirement for a cost-basis justification for the provisions of an ESP.

Claims that the Plan should be rejected because its provisions contain "no support" is simply an alternative statement of a misguided view that the Plan's provisions must be cost based. *See, e.g.,* FPL Br., pp. 20-23 (Rider MDS should be disallowed because its underlying costs have not been quantified); Kroger Br., p. 13 (DSI Rider should be eliminated because it has no connection with recovery of actual incurred or future costs); NOPEC Br., p. 28 (Rider MDS should be disallowed because the Companies "provide[] no valid justification or documentary support for it"); OCC Br., pp. 11, 36 (re Rider MDS and DSI Rider). But, there is no such requirement. If the General Assembly sought to extend a cost-basis or prudently incurred standard to the Plan as a whole, it could have done so. Instead, the General Assembly set up the specific "more favorable in the aggregate" standard to evaluate an ESP in lieu of these other requirements.

R.C. § 4928.143 does refer to "prudently incurred" costs, but only in reference to a specific type of ESP provision, not to the entire Plan, as suggested by Intervenors. R.C. § 4928.143(B)(2)(a) provides that ESPs "may" include provisions for:

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

(Emphasis added.) Here the Plan contains no "automatic recovery" provisions. Thus, as discussed below, arguments regarding Rider GEN (or generation rates broadly) relying on a prudent cost standard are inapposite.[8] Admittedly, the Application includes provisions seeking to recover certain costs (*e.g.*, Riders FTE, FCA, and CCA), which allow for a review and audit process by Staff of the costs defined therein. *See* Companies' Br., pp. 29 (Rider FTE), 31 (Rider CCA). Therefore, even though not specifically triggered, the Plan satisfies the limited statutory requirement for prudently incurred costs.

(c) The legal standard to approve an ESP is <u>not</u> whether each provision of the ESP is more favorable.

S.B. 221's test expressly focuses the Commission's review on the "aggregate" benefits of an ESP. The statute does not require that each provision of the Plan individually must be judged in comparison to the expected result of an MRO. Further, the statute does not require the Commission's assessment of the Plan's aggregate benefits from the perspective of any particular group or groups of customers. *See* OSC Br., pp. iii-iv (arguing that the Plan is not more favorable because it does not directly consider or mitigate rate increases for schools). Thus, the Commission must determine if the Plan provides "aggregate" benefits across the Companies as

[8] OEG argues for its own, totally unsupported version of a cost-based standard, proposing that the Plan's provisions for generation pricing should be modified to require a "least-cost portfolio of generation products." OEG states that the prudently incurred standard (which is not even applicable to the Plan's generation prices because those prices are not charged on an automatic recovery basis) "necessarily encompasses" purchasing power on a least-cost basis. OEG Br., pp. 8-11. Similarly, NOPEC argues that the Plan should be rejected because the Rider GEN prices are not the "best price." NOPEC Br., p. 14. Nowhere in the statute, however, are such requirements incorporated. Further, such standards would render the express MRO comparison moot.

compared to an MRO. So, to the extent any Intervenors complain about perceived disparate impacts on certain customer groups, any such complaints can only be considered in the context of whether the Plan in the aggregate is more favorable than an MRO.

(d) An ESP may be approved even if it may adversely affect governmental aggregation.

The large-scale governmental aggregator intervenors and parties aligned with them argue that an ESP must be rejected if the ESP – or any part of it – does not benefit governmental aggregation. Indeed, what these parties really suggest is that no ESP should be approved unless they like it. These parties contend that S.B. 221 contains "special protections" (FPL Br., p. 8) or confers "favored legal status" on large-scale government aggregations (NOPEC Br., p. 12). These parties rely upon two apparent bases for this position that all other parties should be discriminated against in favor of governmental aggregation groups. First, they point to R.C. §§ 4928.20(I), (J) and (K). The first two divisions (i.e., divisions (I) and (J)) admittedly provide certain potential benefits to aggregation customers by allowing these customers to avoid certain charges, specifically, deferrals of phase-ins allowed under R.C. § 4928.143 (partially) and standby charges allowed under R.C. § 4928.143(B)(2)(d). The third division (division (K)) authorizes the Commission to develop rules to encourage and promote such aggregations. Further, division (K) provides that the Commission is to "consider the effect on large-scale governmental aggregation of any nonbypassable generation charges."

The second basis for the alleged elevation of large-scale governmental aggregation over other factors is the beginning of R.C. § 4928.143(B). That section begins, "[n]otwithstanding any other provisions 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 . . . ." According to the governmental aggregation Intervenors and their allies, this language (specifically, "Notwithstanding any other

provisions of Title XLIX...") initially "untethers" rates developed under S.B. 221 from traditional ratemaking, but then excepts the three governmental aggregation-related provisions from the exception of statutory provisions to be considered under S.B. 221 ratemaking. These parties argue that this exception means that an ESP must adhere to the special protections. *See* FPL Br., pp. 7-11. Further, they contend that because of these special protections, the review required under subsection (K) is to ensure that large-scale governmental aggregation is encouraged and promoted. *Id.* From this, they conclude that if a nonbypassable generation charge violates the policy of encouraging and promoting large-scale governmental aggregations, then the Commission must modify or disallow the charge. *Id.*; NOPEC Br., pp. 5-6.

The primary problem with these arguments is the language of the statute. R.C. § 4928.143(B)(2)(d) specifically allows "[t]erms, conditions, or charges relating to *limitations* on customer shopping." (Emphasis added.) The statute allows shopping to be limited, despite the potentially adverse effect on governmental aggregations and the interests of such parties. The parties have no adequate response. Notably, FPL ignores entirely the shopping limitation language in R.C. § 4928.143(B)(2)(d). NOPEC/NOAC, for their part, baldly assert that this language is "trumped" by the "statutory requirement" to comply with the provisions of R.C. § 4928.20 "incentivizing" large-scale government aggregation. NOPEC Br., p. 8. Aside from providing no support for this position, these Intervenors violate the well-recognized rule of statutory construction that all words of a statute must be given meaning. *See* R.C. § 1.47.

A more appropriate reading, consistent with the rules of construction and the words of the statute is that in reviewing an ESP, the Commission should: (a) assure that large-scale governmental aggregations and their customers receive the benefits provided in R.C. § 4928.20(I) and (J), (b) promulgate rules to promote such aggregations, and (c) review

nonbypassable charges in an ESP to *consider* the effect on these aggregations. But nothing in the statute requires that charges or other parts of an ESP must be rejected simply because they may adversely affect large scale governmental aggregation. "Consider" does not equate to "reject all aspects of an ESP that large scale governmental aggregations think could have an undesirable impact on customer switching from their perspective." Instead, all terms (even those that have the potential to adversely affect large scale governmental aggregation) must be viewed as a whole and weighed against the expected results of an MRO to determine if the ESP in the aggregate is more beneficial.

In fact, even the witnesses cited by these parties acknowledged that governmental aggregation could suffer as part of an appropriately approved ESP without violating S.B. 221. For example, Competitive Suppliers' witness Ringenbach acknowledged that nothing in S.B. 221 guaranteed shopping. Hearing Tr., Vol. VII, p. 167. Similarly, Staff witness Turkenton admitted that there is nothing in S.B. 221 that requires that an ESP promote or encourage large scale governmental aggregation. Hearing Tr., Vol. IX, p. 212. Further, she observed that nonbypassable charges will always have some inhibiting effect on shopping. *Id.* at 205; *see also* OHA Br., p. 15 (discussing OEG witness Goins); IEU Br., p. 23 ("There is no bypassable charge that will not negatively affect 'shopping.'").

Given that S.B. 221 unquestionably allows nonbypassable charges, and such charges have been upheld by the Supreme Court of Ohio, and given that such charges will "adversely affect" governmental aggregation programs, the position of the governmental aggregation Intervenors and their supporters just doesn't hold water. *See OCC v. Pub. Util. Comm.*, 111 Ohio St. 3d 300 (2006).

(e) An ESP cannot be subject to rules that are not yet in effect.

Intervenor FPL Energy ("FPL") argues that Rider MDS will be "unlawful" if the Companies do not conform the Application regarding Rider MDS to Rule 4901:1-35-03(C)(9)(c)(i). FPL Br., pp. 20-21 (Companies "have not yet conformed [their] application to the rules"). First, the Commission has not yet ruled on the applications for rehearing that were filed regarding the cited rule. Second, as FPL itself noted, the rules are not yet effective. *See id.* Ohio law requires an established series of procedures in order to effectuate proposed rules. *See* R.C. § 119.01 *et seq.* (establishing procedures for instituting administrative rules, including review by the Joint Commission on Agency Rule Review ("JCARR"), which procedures if not complied with will invalidate the proposed rules). In fact, JCARR has not reviewed the proposed rules, and there is uncertainty whether the rules as ultimately adopted will be identical to the proposed version. To impose a requirement to comply with rules that are not yet effective and that could well change prior to being effective, is unsupported by law.

2. R.C. § 4928.02 does not impart <u>requirements</u> on an ESP.

Intervenors also assert that the Plan should be modified or rejected because it does not satisfy State policies. *See* OPAE Br., pp. 8-9 (Plan fails to protect at-risk populations as "require[d]" by R.C. § 4928.02(L)); OEG Br., pp. 1-2 (alleging that the Companies failed to meet their "burden of proving that [the Plan] . . . conforms to the policy requirements" in R.C. § 4928.02(A) and (N)); *see also* Comm. Group Br., pp. 6-7; IEU Br., p. 23. Nothing in R.C. § 4928.143, however, imposes such a requirement on ESPs, and the "more favorable in the aggregate" test does not include any reference to the State's policies set forth in R.C. § 4928.02. The Commission must apply the review criteria set forth in R.C. § 4928.143 and has no authority to expand upon that criteria. *See Tongren v. Pub. Util. Comm.*, 85 Ohio St. 3d 87, 88 (1999)

(Commission is a creature of statute whose authority arises therefrom); *Columbus Southern Power Co. v. Pub. Util. Comm.*, 67 Ohio St. 3d 535, 537 (1993). Indeed, the Commission cannot exercise powers beyond those granted by the General Assembly and any attempts to do so are ineffective. *Gardner v. Ewing*, 88 F. Supp. 315 (S.D. Ohio 1950), *aff'd*, 185 F.2d 781 (6th Cir. 1950), *reversed on other grounds*, 341 U.S. 321 (1951). Thus, the Commission cannot impose additional standards beyond the express criteria of R.C. § 4928.143 upon the Plan, even if such additional standards have as their purported basis other sections of Title 49. *See Columbus Southern Power*, 67 Ohio St. 3d at 537, 540 (finding that the Commission could not rely on general State policy to vary from the ratemaking formula set forth in R.C. § 4909.15).

In support of the notion that the Commission can impose the policy goals of R.C. § 4928.02 on the review and approval of the Plan under § 4928.143, several Intervenors rely on *Elyria Foundry v. Pub. Util. Comm.*, 114 Ohio St. 3d 305 (2007). That case, however, is clearly distinguishable. In *Elyria Foundry*, the Ohio Supreme Court held that the Commission could not approve recovery of generation-related charges through distribution rates in that their inclusion comprised an anti-competitive cross-subsidization that violated an express prohibition against such subsidizations in what was then R.C. § 4928.02(G). The General Assembly codified the *Elyria Foundry* holding as State policy – now in division (H) of R.C. § 4928.02 – as the <u>only</u> express prohibition within R.C. § 4928.02's enumerated policies. *See, generally*, R.C. § 4928.02. In contrast, the remaining policies set out in R.C. § 4928.02 are framed more generally as goals to be pursued. *Compare, e.g., id.* at (D) ("*encourage* innovation and market access"), (B) ("*ensure* the availability of unbundled and comparable retail electric service"), (N) ("*facilitate* the state's effectiveness in the global economy") *with* (H) ("*prohibit[]* the recovery of any generation-related costs through distribution or transmission rates"). (All emphases added.)

The inclusion of requirements for an ESP such as the Plan from R.C. § 4928.02 would, in fact, violate clear principles of statutory construction. When the General Assembly lists criteria to be applied or considered, the intent is that any other criteria shall not be applied or considered. *Vincent v. Civil Service Com'n*, 54 Ohio St. 3d 30, 33 (1990) (the expression of one thing is the exclusion of another); *see also Office of Consumers' Counsel v. Pub. Util. Comm.*, 67 Ohio St. 2d 153, 157 (1981) (Commission's discretion is limited by specific criteria enumerated by statute). Here, the General Assembly determined that ESPs are subject to a single test:

> The Commission by order shall approve or modify and approve an application filed under Division (A) of [R.C. § 4928.143] <u>if it finds that the electric security plan so approved</u>, including its pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, <u>is more favorable in the aggregate</u> as compared to the expected results that would otherwise apply under [R.C. § 4928.142].

R.C. § 4928.143(C)(1) (emphasis added). Additional criteria, even if arguably related to other statutory provisions, are not permitted.

More precisely, the policies set forth in R.C. § 4928.02 cannot be used to impose additional requirements on the Companies' Plan because their imputation cannot be squared with the specific criteria expressly set out in § 4928.143. Importantly, the policies as stated in R.C. § 4928.02 are, to a certain extent, inconsistent among themselves and incapable of reconciliation. For example, an ESP inherently cannot promote markets to the extent that other traditional rate plans may be able to. *See* R.C. § 4928.02(C) (policy to ensure diversity in electricity suppliers and encouraging development of distributed and small generation facilities). By definition, an ESP should be expected to be preferable to market prices. *See* R.C. § 4928.143 (requiring ESPs to be approved if they are more favorable in the aggregate than the expected results under an

MRO). Thus, an ESP inherently may limit participation of some potential market players as they may not be able to offer a product more valuable than that offered in the Plan.

B. As Required By R.C. § 4928.143, The Companies' Evidence Shows That The Plan Has A Positive Net Present Value To Customers When Compared To An MRO.

1. The Companies' expert witnesses properly and conservatively estimated market prices expected to result from an MRO.

(a) Current wholesale energy prices do not necessarily reflect the expected outcome of an MRO.

Several Intervenors suggest that estimates provided by the Companies' two expert witnesses do not reflect the likely outcomes of an MRO because the experts incorporated July 15, 2008 prices. *See* Material Sciences Br., p. 6; Staff Br., p. 8; Comp. Suppliers Br., pp. 10, 14; OEG Br., pp. 5, 9; Dominion Br., p. 4; OCC Br., p. 8. The crux of their argument is that because prices have fallen since that date, those July 15, 2008 prices are irrelevant. However, current wholesale market prices will not remain constant and, in any event, the preparation of an estimate of prices resulting from an MRO for delivery of power in future periods is not solely based on then-current market-price forwards. As IEU and Staff recognized, the market is by its very nature uncertain. *See* Staff Br., p. 8 ("[I]t is obvious that current low, short-run prices may not last."); IEU Br., p. 11. So, while current wholesale prices may have decreased since July 2008, they may just as easily and quickly increase at any point(s) during in the three-year period during which, in contrast, the Plan provides stable and certain prices.

As the Companies noted in their Initial Brief, the recent decline in wholesale power prices has not led to lower prices in competitive bids conducted in Maryland and Pennsylvania. In both of those recent examples, the resulting bid prices were higher than expected due, in part, to additional premiums included by suppliers that had not previously been experienced – in large measure due to the turmoil in the credit markets and the heightened uncertainty caused by the

invalidation of the CAIR Rule. *See* Companies' Br., pp. 16-20. Thus, Intervenors over-simplify the process by wrongly suggesting that the estimates of the expected results of an MRO can appropriately be adjusted simply by changing the round-the-clock wholesale energy cost component, while blithely ignoring all other significant factors that have occurred that affect retail electric suppliers' prices.

OEG misleadingly suggests that Dr. Jones agreed that data from a time period closer to the date of the Commission's decision is more accurate than that incorporated by the Companies in their estimate. *See* OEG Br., p. 5. Dr. Jones, in fact, testified that while the energy component of a current market price may provide a better representation of that price at the time of an actual MRO, other factors which must be considered may also have changed so that simply using a more current price does not necessary result in a more accurate estimate of the expected outcome of an MRO:

> Well, first of all, it was my understanding the question being asked had to do with the energy component of the ultimate price. And other things equal, the energy component taken at a date nearer the point in time when the MRO would actually take place would most likely be -- it's not certain -- but most likely would be a better representation of then-prevailing energy prices at the time the MRO was executed, but the assumption is other things equal, meaning that from the point of view of the price a participant in the MRO would bid, you would have to take into account all those other risks that I talked about on a number of occasions this morning which have gone up in my opinion, so that there's not necessarily a correspondence between what I would estimate the MRO price to be and the trend energy price, not to mention the fact even if we do it today, there is a chance the energy price component would be higher today, other things equal.

Hearing Tr., Vol. III, pp. 136-137.

As heard repeatedly during the hearing, the recent decline in wholesale energy prices is occurring at the same time as significant international and national economic crises – instability

that underscores the value of the certainty offered by the Plan. IEU recognized these issues in its brief, which, in part, leads IEU to support an ESP:

> As extensively discussed during the hearing, there has been turmoil in the financial markets that has negatively affected firms that have heretofore had excellent credit ratings and has affected at least the short-term electricity prices. The uncertainty resulting from disorder in the financial markets has likely increased both the risk and the cost of doing business for both customers and FirstEnergy.

IEU Br., p. 11-12; *see also* Cleveland Br., p. 6 (recognizing that the Commission must consider the volatility of the market). OCC's anecdotal and oblique analogy of gas prices at the pump as reflective of MRO costs completely misses the point. *See* OCC Br., p. 2. OCC's failure to consider all of the necessary aspects of the provision of retail generation service renders its analogy useless.

(b) Wholesale market prices are not the only factor constituting an estimated MRO price, and Dr. Jones' estimate properly accounts for additional factors incorporated into an MRO price.

OCC also makes unsupported arguments questioning the accuracy of the estimate prepared by Dr. Jones, one of the Companies' experts, based on the testimony of OCC witness Yankel, who lacks the education, experience, and knowledge to credibly rebut Dr. Jones' testimony. OCC argues that Dr. Jones relied on incorrect data for the locational cost adjustment. OCC Br., pp. 8-9. Locational cost adjustments are necessary because transmission congestion between the Cinergy Hub and the Companies' load zones results in different prevailing prices at the two locations. *See* Companies' Br., p. 12, n.15; Jones Testimony, p. 7. In his calculation, Dr. Jones used historical LMP data that was contemporaneous with the load data used in his estimate. *See* Jones Testimony, p. 8. On the other hand, Mr. Yankel uses load data culled from a different time than his LMP data. Jones Testimony, p. 8, Yankel Testimony, pp. 6-7; Hearing Tr., Vol. VI, pp. 167-168. Mr. Yankel even acknowledged on cross-examination that

contemporaneous data, such as that used by Dr. Jones is indeed proper, thereby rebutting OCC's own argument on brief. Hearing Tr., Vol. VI, p. 167. OCC's arguments that Dr. Jones relied on incorrect data ring hollow.

Just as hollow are OCC's arguments (and Mr. Yankel's supporting testimony) regarding Dr. Jones' inclusion of capacity and margin adjustments. *See* OCC Br., p. 9. Dr. Jones properly accounted for capacity requirements and adjusted for risk/margins because forward wholesale energy prices do not include these elements of market price. *See* Cos. Exh. 14, p. 15 (Platts Methodology and Specifications Guide states that the product for both the Cinergy and FirstEnergy Hubs is "physical power, energy only"). Suppliers understand the resource adequacy requirements as they presently exist in MISO and they further understand that they would be required to procure enough capacity to comply with the current requirements as well as the requirements of MISO's formal program when adopted. Jones Testimony, pp. 10-13; Companies' Br., p. 12, n. 17. Dr. Jones estimates that suppliers would need to provide 113.5% of projected annual peak load, and he properly makes this adjustment to his market price estimate. *See* Jones Testimony, pp. 10-13. (Of course, suppliers of full-requirements service also bear risk associated with the uncertainty of whether MISO's capacity requirements will be greater than expected.)

Dr. Jones's inclusion of a "margin" is also proper to reflect the risk premium that a bidder would require for accepting the risks of providing full requirements service at fixed prices for the Companies' SSO, which were calculated on a weighted-average basis to reflect different margins for customer groups with different shopping risks. *See* Companies' Br., pp. 11-13. He also properly accounts for the risks to which suppliers would be exposed, including risks associated

with the need to make significant capital commitments; the delay between expenses and revenues; shopping risk; load and price variability risks; regulatory risk; and bidding risk. *Id.*

OCC's (and Mr. Yankel's) criticisms of Dr. Jones' calculation are unpersuasive. Mr. Yankel lacks the expertise to make such calculations himself. He has no formal training as an economist and does not hold himself out to be an expert in forecasting. Hearing Tr., Vol. VI, p. 192. His background stands in sharp contrast to those of the Companies' two experts, Dr. Jones and Mr. Graves, who each have years of experience and training to make such estimates. *See* Jones Testimony, pp. 1-2 (Dr. Jones holds a Ph.D. in economics and has over 30 years of experience in forecasting and market-price determination in the energy industry); Graves Testimony, pp. 2-3 (Mr. Graves has degrees in mathematics and finance, and has worked for over 20 years in the energy industry, including assisting utilities in price forecasting, risk management, financial simulation, and valuation assessments).

It is not surprising, therefore, based on Mr. Yankel's limited knowledge regarding forward prices, that OCC's projection of market prices, through Mr. Yankel's testimony, is inaccurate. Mr. Yankel's estimate is calculated simply by reducing Dr. Jones's prices by 10%: "He had given some numbers and I basically just came up with the 10 percent on my own." Hearing Tr., Vol. VI, pp. 185-186. In fact, Mr. Yankel did no analysis or independent study to corroborate his 10% multiplier. *Id.* at pp. 186, 190-191. As such, Mr. Yankel's testimony should be disregarded, along with OCC's criticisms of Dr. Jones' estimate.

2. S.B. 221's statutory test requires the comparison of two different products: an ESP and an MRO.

Intervenors, led by Competitive Suppliers and OEG, assert that a valid comparison between the Plan and an MRO can only be done on an "apples to apples" basis. *See* Comp. Suppliers Br., p. 3; OEG Br., p. 7. However, the law includes no such requirement and, to the

contrary, sets up an apples to oranges test. *See* R.C. § 4928.143 (Commission required to assess whether an ESP is more favorable in the aggregate than an MRO). Such a comparison is possible if the value of the two products is calculated accurately to reflect the impact on consumers. Competitive Suppliers' witness Schnitzer acknowledged that such a comparison is possible:

> Q. On line 20 you talk about a comparison ESP and the MRO on an apples-to-apples basis .... Now, you would agree that a valid comparison can be drawn between two products or services if the value of each of them is calculated accurately, don't you?
>
> A. Well, first of all, I agree in effect that you are asking the right question about a valid comparison as opposed to some other, and I think that's right, and then to the extent that that comparison is a quantitative comparison, the analysis should be structured so that the comparison is meaningful, is appropriate . . . .
>
> Q. . . . [I]f you calculate the value of each product accurately, do you believe there can be a comparison made between the two?
>
> A. Oh, yes . . . .

Hearing Tr., Vol. VI, pp. 134-135 (and suggesting changes to Mr. Blank's analysis to allow for such a comparison). As explained by Mr. Graves, one of the Companies' experts, the Commission must and can weigh the prices and benefits of the two products.

> Q. Would you agree that in evaluating whether an ESP is more favorable in the aggregate than a market rate offer, that actually pricing that ESP product would provide the best comparison between those two options?
>
> A. If the problem at hand were to decide if the ESP is a bargain on its own terms, then understanding it component by component might be very useful, but I understand the problem to be a bit different, which is to compare a fixed price MRO with its risk and procurement characteristics to an ESP with different service characteristics and decide whether the difference in prices is offset by differences in benefits.

Hearing Tr., Vol. III, pp. 153-54. Because such a comparison is possible, as Mr. Schnitzer acknowledged, OEG's argument that there is some mismatch between the Plan and the MRO

because retail margin is included in the MRO prices fails. *See* OEG Br., p. 7. So, too, does Competitive Suppliers' argument that the Companies failed to meet their burden of proof because they did not compare the Plan to a competitively priced "ESP-like" product containing risk. *See* Comp. Suppliers Br., p. 11. S.B. 221 does not call for the Companies to make such a comparison. Instead, the proper comparable is an MRO, which is exactly what the Companies' witnesses prepared. *See* Jones Testimony, p. 2; Hearing Tr., Vol. III, pp. 30-32.

3. The exclusion of certain Riders in the Companies' calculation of the Plan's net present value is proper because their costs would be experienced under the Plan or an MRO.

Several Intervenors assert that the Companies' estimate of the Plan's value used in comparing the aggregate benefits to the expected results of an MRO is flawed because the calculation does not incorporate certain riders. *See* OEG Br., p. 8; OMA Br., p. 5. It is true that Riders FTE, DTC, CCA, DFC, MDS, and SDE were not included in Mr. Blank's calculation. However, these riders reflect the recovery of costs that, should they arise, would be incurred and recovered under either the Plan or an MRO. Accordingly, they were intentionally, and properly, excluded from the ESP and MRO calculations for the purposes of comparison.

C. The Plan's Proposed Generation Charges Are Reasonable.

The Companies' proposed Plan contains two primary features to develop a charge for generation service: Rider GEN and the credit and deferral of a certain part of those charges through Rider GPI and Rider DGC, respectively. The criticism of these riders demonstrates only that the critics fail to understand (or simply choose to misstate) that generation charges under S.B. 221 need not be cost based. Yet, the criticisms of the proposed level of charges in Rider GEN mostly reflect the view that the Companies are required to provide some cost support for

these rates. As for the proposed deferrals, the criticisms are wholly unsupported with anything but opinion *ipse dixit*.

1. The rates in Rider GEN need not be cost-based.

Most of the parties criticizing the proposed rates in Rider GEN complain that the Companies should have provided support showing the cost to provide generation service. For example, Nucor complains that the only justification of the amount of the charges is that they are less than would be available in the market. Nucor Br., p. 53; *see also* OEG Br., pp. 11-12; NOPEC Br., p. 15. But, the relation of charges to market-based rates is the only guide provided by S.B. 221, and by definition if the charges under the Plan are less than otherwise available in the market, the Plan is more favorable than an MRO, thereby meeting the statutory test.

Other parties contend that because the Companies have yet to negotiate a contract with their proposed supplier (FES), the Commission cannot know if the generation costs incurred by the Companies are prudently incurred (*see* OEG Br., p. 9). The suggestion that the Companies need to undertake a prudence review is wrong. As noted above, the Companies are not seeking a dollar-for-dollar pass-through of incurred costs through an automatic recovery mechanism or otherwise. Therefore, the prudence test contained in R.C. 4928.143(B)(2)(a) does not apply. NOPEC/NOAC expresses the concern that the Commission cannot know if the Companies have obtained the best price that can be negotiated.[9] NOPEC Br., p. 14. Because S.B. 221 only measures the retail rates in an ESP against potential market-based retail rates resulting from an MRO, however, the statute dictates that if ESP retail rates are better than those expected from an

[9] OHA also contends that the potential contract between the Companies and FES is "a sham." OHA Br., pp. 10-11. The only thing OHA can point to, however, is that there was no contract as of the time of the hearing. *Id.* It is difficult to understand how that single fact leads to the conclusion that the proposed contract is a sham, especially when the record evidence shows that all discussions have been or will be at arm's length and the contract will be pursuant to a FERC-approved tariff. Hearing Tr., Vol. I, p. 67.

MRO, then the ESP containing those rates must be accepted, even without considering other qualitative benefits of the Plan and notwithstanding the specifics of a wholesale contract.

Staff, too, attempts to revert to traditional ratemaking, observing that the proposed generation rates are "compensatory," but that lower generation rates might also meet that criterion (although it is "unclear ... exactly how much lower" rates should be). Staff Br., pp. 8-9. Staff suggests that the proposed rates should be lowered with a "true up mechanism to annually or semi-annually correct the price charged to reflect the actual cost of power acquisition." *Id.* We need only look to the testimony of one of Staff's key witnesses to undercut this proposal. Mr. Fortney explains that "[t]his is not your traditional rate case." Fortney Testimony, p. 9. If the Commission determines that the Plan, with the proposed rates, is more beneficial than the expected results of an MRO, then no further inquiry or reductions are necessary to meet the statutory test.

Other criticisms center around the fact that wholesale market prices have dropped. Nucor Br., p. 53; OHA Br., p. 11. As noted above, however, wholesale prices are but one component of a retail generation rate. Given the crisis in the credit and financial markets, the increased business risks attendant in large financial transactions these days may more than offset any reduction in the commodity price of power. Indeed, the evidence of record shows that this may have already happened as the results of the recent Pennsylvania and Maryland bids for retail electric service have not declined. *See* Section II.B.1.a, *supra*.

2. Criticisms of the proposed generation deferrals are unsupported.

There are three main arguments made by those parties opposing the proposed Rider GPI credit and Rider DGC deferral recovery. First, several parties cite Staff witness Cahaan's testimony to the effect that these deferrals should be rejected because they present too many

distortions and difficulties in implementation. Comm. Group Br., p. 9; FPL Br., p. 16; OHA Br., p. 15 (all citing Staff Ex. 6, p. 3). However, nowhere in Mr. Cahaan's testimony – or anywhere else in the record, for that matter – does anyone explain exactly what the difficulties and distortions are. In fact, the record shows that the Commission has had a long history of approving deferrals of the type proposed here. *See* Hearing Tr., Vol. IX, p. 207.

Second, some parties attempt to attack the deferrals as too costly.[10] The Competitive Supplier Intervenors argue that the interest charges proposed are greater than the Companies provide to customers for their deposits and exceed today's market interest rates.[11] Comp. Suppliers Br., p. 26. As an initial matter, these parties never say what today's market interest rates are. Even if they did, today's interest rates are irrelevant given that the recovery of deferrals will take place potentially over ten years commencing in 2011. *See* Application, ¶ ¶ A.2.b. Moreover, interest rates for customer deposits are set by rule and do not fluctuate to reflect current market conditions. *See, e.g.,* OAC 4901:1-10-14(J) (requiring an interest rate of 3% for customer deposits). As the Companies' witness Wagner testified, the proposed interest rate is a very favorable one – a rate that is below the Companies' cost of capital. Hearing Tr., Vol. II, p. 306. Thus, the fact that the Companies offer different rates for customer deposits is irrelevant.

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[10] OCC alone argues that the deferrals should be rejected because they are evidence that the rates in Rider GEN are allegedly unreasonable. Specifically, OCC argues that if deferrals are needed to make the rate increases gradual, the rates are too high. OCC Br., p. 17. OCC cites no support for this argument. Nor could it in light of Commission precedent approving deferrals to implement rate increases gradually. Case No. 99-1212-EL-ETP (Electric Transition Plan); Case No. 03-2144-EL-ATA (Rate Stabilization Plan); Case No. 05-1125-EL-ATA (Rate Certainty Plan). Further, R.C. § 4928.144 specifically authorizes the phase-in, deferral, and nonbypassable recovery of an electric distribution utility's costs. This is just another instance where OCC is at odds with the law.

[11] These Intervenors hyperbolically try to liken the deferrals to the "irresponsible lending practices" that led to the "financial crisis facing our country today." Comp. Suppliers Br., p. 4. Like many points in their brief, these parties provide no support for their position. They never say exactly how recovering deferred costs with interest is "irresponsible," especially given the Commission's history of approving such deferrals and the Companies' ability to recover these deferrals without issue. Nor do these parties say exactly how utility rates have had any effect on the financial crisis. The only thing that is irresponsible is this type of argument. If anything, this contention lays bare the lack of any foundation for legitimate criticism of the Companies' deferral proposal.

Third, some parties claim that the credits and deferrals are anti-competitive. This criticism, in turn, has two parts. First, some parties assert that shopping customers will never get the benefit of the deferrals. *See* FPL Br., p. 14; NOPEC Br., p. 21. These parties ignore the nature of competition and shopping. If a customer shops, even with the deferral in place, the likely reason that the customer shopped is that the customer is receiving a lower price from a CRES supplier. Thus, if a CRES supplier beats the SSO price including the credit, the customer has received the benefit of the Rider GPI credit through the establishment of a lower price to beat.

Next, certain parties say that the credit and deferrals prevent shopping and erect barriers to competition because CRES suppliers will be unable to meet a ten percent credit. FPL Br., p. 15; NOPEC Br., pp. 23-24. But in fact, there is nothing stopping a competitive supplier from offering a similar credit to customers that would then be collected later from customers. FPL could offer the same credit, which essentially is a loan to customers. Equally important, there is no analysis or study to support FPL's assertion that CRES suppliers will be unable to meet a ten percent credit. FPL's brief is particularly instructive. FPL states that the evidence that Rider GPI does not encourage or promote governmental aggregation is "overwhelming." FPL Br., pp. 16-17. To support this pronouncement, FPL cites:

- Mr Cahaan's testimony (Staff Ex. 6, p. 3) where he opines, without detail or explanation, that the proposed deferrals would cause difficulties and distortions. Mr. Cahaan never addresses anything about competition or competitive suppliers.

- The testimony of FPL witness Garvin (FPL ex. 1, p. 10), who makes no reference to any study nor expresses any knowledge of the cost structure of any CRES supplier (much less of FPL's retail supply affiliate).[12]

[12] Indeed, Mr. Garvin admitted that he had almost no dealings with FPL's retail supply affiliate GEXA, other than helping out on a legislative matter following Hurricane Katrina. Hearing Tr., Vol. V, p. 123. He admitted that he did not know what GEXA charged for retail generation supply and had no responsibilities for developing GEXA's pricing. *Id.* Nor did he know how any other CRES supplier set its prices. *Id.* at 124.

- The testimony of NOPEC/NOAC joint witness Mark Frye (Jt. NOPEC Ex. 1, p. 6), who also failed to discuss any study that he made or reviewed regarding CRES supplier pricing or costs. Mr. Frye admitted that he has never worked for any electric supplier on wholesale prices. Hearing Tr., Vol. V, pp. 167-168.

- The testimony of the Companies' witness Blank who agreed with the unremarkable proposition that customers are disposed to take advantage of lower prices (Hearing Tr., Vol. VII, pp. 56-57) and who didn't know what would happen to large-scale governmental aggregations if the Commission somehow said that customers couldn't shop (*id.* at pp. 63-64).

None of this testimony, to the extent that it is relevant at all about what competitive suppliers could do when faced with having to beat a ten percent discount, shows in any way that those suppliers could not, in fact, do so. None of the testimony is supported by any analysis of any supplier or comes from anyone who has any responsibility or knowledge of the prices charged and costs incurred by any supplier.

Faced with no ability to show that suppliers cannot meet the proposed GPI credit, some parties seek to engage in revisionist history. Specifically, citing the testimony of Competitive Suppliers' witness Ringenbach, these parties contend that deferrals (along with nonbypassable charges) led to the demise of shopping in 2005. *See* Comp. Suppliers Br., p. 15 (citing Comp. Supp. Ex. 3, pp. 6-7). Yet, Ms. Ringenbach could not and did not account for a number of other factors that occurred in 2005 and 2006. For example, Ms. Ringenbach did not know what the trend of wholesale power prices was from 2001 through 2006 and could not say what the relationship of those prices was with regard to retail prices. Hearing Tr., Vol. VII, pp. 171-173. Thus, she couldn't evaluate whether shopping declined because market-based prices increased relative to the Companies' rates.

Similarly, she admitted that transmission costs had increased within MISO during this time and that at least one prominent CRES supplier left Ohio for that reason. Hearing Tr., Vol. VII, pp. 174-175. She also admitted that Market-Support Generation ("MSG"), a program that

provided a relatively cheap source of power for CRES suppliers in Ohio, terminated at the end of 2005. *Id.* at 177. Yet, Ms. Ringenbach somehow overlooked all of these other explanations for the decline of shopping at the end of 2005.

In supporting an alternate proposal, several parties revealed their true motives for criticizing the proposed Rider GPI credit and Rider DGC deferral recovery – they simply want higher prices for customers to achieve higher profits for suppliers. Generally, these parties advocate that the Commission establish a separate credit and deferral program for customers of large-scale governmental aggregations. NOPEC Br., pp. 25-26; FPL Br., pp. 16-18. On cross-examination, Mr. Frye explained the proposal. Under this proposal, a shopping customer would get a credit off of the bill and pay deferrals. Hearing Tr., Vol. V, pp. 174-175. The Companies would pay the CRES supplier the full amount of the bill (with the credit added back in) so that the Companies would effectively be financing the credit received by the governmental aggregation customer. *Id.* at 175. What is most revealing about the proposal is that it does not seek to help the *customer*. As noted above, and as proposed by the Companies, if a CRES supplier beats the SSO price with a credit, the customer has benefited by getting a lower price from the CRES supplier. NOPEC/NOAC's proposal contains no such customer benefit. Thus, the true purpose of the proposal is to provide additional income to the CRES suppliers so that they would not have to lower their prices in response to the Companies' Rider GPI discount, which would, in turn, benefit customers.[13]

The witnesses supporting Mr. Frye's proposal attempted to argue that their proposal for a government aggregation credit was adopted in Maryland for Baltimore Gas & Electric ("BG&E"), an affiliate of Constellation. FPL witness Garvin testified that the BG&E program

[13] In fact, the proposal put forward by Competitive Suppliers' witness Fein is even more blatant. He proposes letting shopping customers get credits and having the deferrals of the credits on the CRES suppliers' bills be paid only by non-shopping customers. Hearing Tr., Vol. V, p. 111.

allowed all customers – those taking service through BG&E and those taking service through another supplier – to choose whether to pay market-based rates or receive some discount from those rates. Hearing Tr., Vol. V, pp. 137-138. According to Mr. Garvin, if that latter option was chosen, then the credit would be paid by all customers. *Id.* at 138. Mr. Fein, who should know about the BG&E program (since it involves a Constellation affiliate) described the program differently. According to Mr. Fein, only non-shopping customers of BG&E could get a credit and only non-shopping customers of BG&E would pay the deferrals. *Id.* at 111.

In any event, both the deferral criticisms and the proposal for a governmental aggregation credit suffer from the same defect: they ignore Ohio law, and specifically, S.B. 221. R.C. § 4928.144 expressly allows phase-ins and the deferrals of those phase-ins, and provides that the recovery of such deferrals is nonbypassable. Thus, given that the statute allows these deferrals and phase-ins, it cannot be credibly argued that the deferral is somehow unlawful or even contrary to public policy. On the other hand, there is no authority for the Commission to compel the Companies to finance phase-ins for CRES supplier charges. R.C. § 4928.144 refers to a "phase-in of any electric distribution utility charges" and deferrals of those incurred costs. As FPL's Mr. Garvin admitted, his proposed credits and deferrals proposal could not be characterized as a phase-in of any electric distribution utility. Hearing Tr., Vol. V, p. 138. Therefore, CRES suppliers do not have the right to seek to get credits and deferrals paid for by the Companies and their customers. Any order establishing such a program would be beyond the Commission's authority.

D. The Plan Provides Appropriate Protections For The Risks Associated With Being The Provider Of Last Resort.

The Plan contains a number of provisions that deal with the risks associated with the Companies' obligation to be providers of last resort ("POLR"). These provisions include Rider

MDS, Rider SBC, Rider NDU and Rider CCA. As demonstrated below, none of the criticisms of these riders is supported by credible evidence; all are without merit.

1. Rider MDS provides protection for shopping and other risks.

A POLR supplier faces real risks associated with the fact that customers may shop. These risks include: (a) committing power for POLR supply for customers who shop and then selling that power at lower prices on the open market; and (b) losing the opportunity to sell power committed for POLR supply at higher market prices. Warvell Testimony, pp. 10-12; Hearing Tr., Vol. V, pp. 146-147. POLR suppliers also face the risk of overestimating the level of shopping and being forced to obtain supply at market prices when customers who were expected to shop don't. Warvell Testimony, pp. 10-12. Rider MDS is a proposed charge that seeks to recover the risk that a supplier would associate with these shopping factors. *Id.*

The predominant criticism of Rider MDS is that the Companies did not provide specific costs to support the proposed Rider MDS charge. *See, e.g.,* FPL Br., pp. 20-21; IEU Br., pp. 24-25; Nucor Br., pp. 52-53; NOPEC Br., pp. 15-16, 29. This criticism misunderstands the applicable standards and misconstrues the evidence. FPL, for example, argues that the Commission's proposed rule 4901:1-35-03(C) requires that the Companies provide quantitative support for the Rider MDS charge.[14] FPL Br., pp. 20- 21. Yet, FPL acknowledges that the rules are not yet in effect, as discussed *supra*, and that the rules recognize that quantification is not required in all instances. Indeed, there is no record evidence that the risks sought to be addressed by Rider MDS, in fact, are quantifiable. While some witnesses agreed that there was a dollar value that could be associated with these risks (Hearing Tr., Vol. VIII, p. 164; Hearing Tr., Vol.

[14] FPL also asserted that cost justification was otherwise required, citing the views of its witness Mr. Garvin. FPL Brief, pp. 21-22 citing FPL Ex. 1, p. 13. But Mr. Garvin is hardly a reliable witness for opining on the proper standard of review for the approval of an ESP. On cross-examination, he admitted that he believed (wrongly) that the proper standard for approving an ESP under S.B. 221 was that it be cost-based. Hearing Tr., Vol. V, pp. 132-136.

V, p. 117), no Intervenor-sponsored witness provided any suggested methodology regarding how these risks could be precisely monetized. As Staff witness Fortney recognized, the costs associated with shopping risks are unquantifiable.[15] Hearing Tr., Vol. VIII, p. 164.

The critics of Rider MDS also attempt to portray the Companies' evidence as merely Mr. Warvell saying (apparently over and over again) that the proposed Rider MDS charge was determined by "management judgment" (as if "management judgment" was something inherently not to be believed or relied upon). *See, e.g.,* NOPEC Br., pp. 15-16, 29; Nucor Br., pp. 52-53. This mischaracterizes what the Companies did and what Mr. Warvell said. Specifically, Mr. Warvell testified about the process that the Companies undertook to develop the proposal:

> 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 it was about 7-1/2 cents [sic, later corrected to three-quarters of a cent].

Hearing Tr., Vol. I, p. 77. Further, Mr. Warvell stated that "experienced market individuals within our organization" were involved in this process. *Id.* at p. 138.[16]

Administrative costs are also part of the charge. Certain parties contend that the Companies made no estimate of these charges. *See* IEU Br., pp. 24-25. Yet, the only evidence on this point is a colloquy between Mr. Warvell and Attorney Examiner Price. In that discussion, Mr. Warvell admitted that no estimate of those costs appeared in the Application or workpapers. Hearing Tr., Vol. I, pp. 77-78. He went on to testify: "As I said before, we looked

[15] OHA takes issue with the testimony of Mr. Blank who states that it would not be possible to base the MDS charge on actual, prudently incurred costs. OHA Br., pp. 12-13 (citing Hearing Tr., Vol. VI, p. 251). But Mr. Fortney agreed with Mr. Blank's views on this matter. OHA offered no testimony on the issue.

[16] While the Companies do not have hedging experience, personnel with market experience are employed by FirstEnergy Service Company, therefore NOPEC/NOAC's observation is of little consequence. NOPEC Br., p. 29, n. 91.

at them as a group of costs and risks that exist in round, not only the administration but shopping and opportunity costs." *Id.*, p. 78.

Not content to mischaracterize the record about what the Companies did to determine the level of the Rider MDS charge, the Intervenors also erroneously claim that the record does not support the need for the charge. Cleveland Br., p. 11; Comp. Suppliers' Br., pp. 19-20; OHA Br., pp. 14-15. OHA, for example, says that there is no shopping risk because the Companies have forecasted that no shopping will occur. OCC Br., p. 12; OHA Br., pp. 14-15 (citing Hearing Tr., Vol. I, p. 122). OHA's position has at least two problems. First, it's wrong. While it is true that the Companies assumed certain sales levels in the development of certain charges, the Companies provided no forecast of shopping as a part of its ESP filing. Hearing Tr., Vol. I, p. 167. Intervenors simply misunderstand the Companies' filing and testimony. Second, even if the Companies had forecasted no shopping, such a forecast in and of itself would not cause the risk of shopping to disappear, as suggested by the Intervenors. Shopping risk remains, along with all the attendant costs, regardless of any alleged forecasts by the Companies.

OCC and the Competitive Suppliers contend that because all of generation will be purchased from FES, the Companies have no shopping risk. OCC Br., p. 12; Comp. Suppliers' Br., p 19. Frankly, one has nothing to do with the other. The identity of the wholesale supplier to the Companies will not impact shopping risk. Shopping risk exists. The wholesale supplier or the Companies will bear that risk and all the costs that go along with it, and compensation, therefore, must be provided whether the wholesale supplier is FES or another entity.

Other parties attempt to portray the MDS charge as covering something different than described by the Companies or as simply duplicative of the proposed standby service charge in Rider SBC. FPL asserts that Mr. Warvell testified that the risk of unanticipated load of

customers who were forecasted to shop but who did not shop was not to be covered by Rider MDS. FPL Br., p. 22 (citing Hearing Tr., Vol. I, p. 165). FPL omits Mr. Warvell's testimony where he makes the point that if customers who were expected to shop but didn't, then the Companies would have to go into the market to buy power to serve those customers at a time when market prices are high. Warvell Testimony, p. 11. Further, on redirect examination Mr. Warvell clarified his remarks:

> From a perspective of the Company forecast shopping to occur and that shopping did not occur, the Companies or FES would have a POLR requirement to serve those customers and thus, that would be a risk that would be anticipated as part of the MDS charge.

Hearing Tr., Vol. II, p. 128.

NOPEC/NOAC confusingly and wrongly argues that: (a) the Companies' position that Rider MDS will cover hedging costs is wrong because such costs are tied to returning customers; and then (b) Rider MDS is an "exit fee." NOPEC Br., p. 31 (citing Hearing Tr., Vol. I, pp. 30, 38-40, which refers to customers "leaving"). FPL blames the confusion of certain witnesses, like Cleveland witness Courtney, about what Rider MDS covers on the Companies, asserting that the confusion exists because the Companies did not provide any quantification to support the charge. FPL Br., pp. 22-23.

But the real or imagined confusion of these parties is belied by the briefs of other parties which indicate a clear understanding of Rider MDS and why it is needed. OEG, for one, provides a concise, albeit partial, summary of Rider MDS:

> In particular, if the Companies procure generation for ESP load and a portion of this load elects to shop during the ESP (presumably due to lower market prices), the Companies could face excess capacity for which they would receive insufficient revenues. Alternatively, if more customers take POLR service than expected due to higher market prices, the Companies would be required to make market purchases at higher prices. To mitigate

> this market risk, according to Mr. Warvell, the Companies must purchase hedges.

OEG Br., p. 20 (footnote omitted).

Several parties argue that Rider MDS will create a "massive windfall" and cite figures as high as $1.73 billion. *See, e.g.,* FPL Br., p. 19; NOPEC Br., pp. 15-16; Nucor Bri., pp. 52-53. The record shows, however, that the risks sought to be addressed by Rider MDS are recognized risks and that such risks represent costs. Hearing Tr., Vol. V, pp. 143-144. Further, the figures quoted by these parties take the proposed 1¢/kWh charge and apply it to all forecasted sales. Hearing Tr., Vol. I, pp. 121-122. Because Rider MDS would only apply to shopping customers, the figures used by those inflating the effect of this rider assume that all customers will shop. The Companies will only receive revenue from Rider MDS to the extent that customers actually shop.

The Competitive Suppliers concede this point, but assert that, if all customers shopped, the Companies could receive revenues under Rider MDS and still sell the power that they had committed to supply POLR service. Comp. Suppliers Br., pp. 19-20. But, that is exactly the point. As OEG points out, if customers are shopping, it is likely because market prices are lower than the SSO price. OEG Br., p. 20. The Companies and their supplier will have committed to obtain power for POLR load with the expectation of selling it at SSO prices. Without a POLR load, the Companies and their supplier would be forced to sell the power into the market which will have lower prices. This potential loss is one element of what Rider MDS seeks to cover. The flip side of the coin is that fewer customers will shop than anticipated, thereby causing the Companies to go into the market to acquire power for those customers at a time when market prices are high. Warvell Testimony, p. 11.

As they did with Riders GPI and DGC, the governmental aggregation parties and various competitive suppliers attack Rider MDS on the grounds that it is anti-competitive. But, as was the case with the criticisms of Riders GPI and DGC, there is no support in the record other than the say-so opinion testimony of unqualified witnesses. Similar to what they argued regarding Riders GPI and DGC, the aggregators and the suppliers contend that Rider MDS is unfair because shopping customers should not have to pay the charge and because suppliers will be unable to meet the price to beat with the Rider MDS charge added to the CRES price. Neither argument is true or supported by the record. Even if such allegations were true or supported by the record, S.B. 221 anticipated the need for such charges and the potential impact they may have on shopping, and expressly permitted such a provision as a part of an ESP. R.C. § 4928.143(A)(2)(d).

NOPEC/NOAC says that the rider is unfair because the charge provides no benefit to shopping customers. NOPEC Br., p, 32. This misses the point. The charge is assessed to shopping customers because they participated in the risk for which the rider compensates the Companies. Simply put, regardless of whether customers shop, there is always a shopping risk if the law permits customers to shop.

The cited record support for the view that Rider MDS is anti-competitive comes mainly from FPL witness Garvin, NOPEC/NOAC witness Frye and Competitive Suppliers' witness Fein.[17] To the extent that these witnesses contend that suppliers would not be able to match the "price to beat" with the addition of the Rider MDS charge, their assertions are utterly unsupported and their opinions are incompetent. As noted, neither Messrs. Frye or Garvin have any experience or knowledge about how suppliers set prices or suppliers' cost structures.

[17] Notably, the one outlier among the Competitive Suppliers' witnesses is Ms. Ringenbach, who candidly admitted that she could not say what Integrys would do if the riders proposed were approved. Hearing Tr., Vol. VII, p. 189.

Further, none of these witnesses provided any analysis or quantitative study to show that the Rider MDS charges would be an insurmountable burden to suppliers. The absence of such evidence is notable, given the strident criticism expressed by these same parties concerning the absence of such evidence by the Companies to support the charge. Although the lack of analyses or quantitative studies is appropriate for the Companies, it is not for these Intervenors. As noted, the risks involved are not susceptible to quantification. No witness testified otherwise. In contrast, a study to determine the ability of suppliers to meet the SSO price with the MDS charge should be relatively easy to do. The suppliers have cost and other market data to determine the extent of supplier margins in comparison to any discount that would have to take place with the presence of the Rider MDS charge. There is nothing that prevented these parties from doing and presenting such a study.

In addition, the Companies' process to develop their position was undertaken by individuals with experience in the market. Thus, their opinions presented through Mr. Warvell should have weight. In contrast, the suppliers' and aggregators' witnesses expressed no qualifications or knowledge about the specific subject upon which they have attempted to opine.

FPL and NOPEC/NOAC point to the letter of intent between NOPEC/NOAC and FPL as evidence of how Rider MDS constitutes a barrier to competition. FPL Br., p. 4; NOPEC Br., pp. 9-11. The letter of intent gives FPL the right not to pursue a deal with NOPEC if certain nonbypassable riders remain in the ESP proposal. *Id.* As an initial matter, there was no competent evidence offered about the letter of intent. Neither of the witnesses who attempted to discuss it were involved in the drafting or negotiation of that document. Hearing Tr., Vol. V, pp. 125, 180. Thus, any record discussion is incompetent and any attempt to use that document is

unfair, since the Companies had no opportunity to cross-examine anyone with any knowledge about the document or the discussions that led up to its execution.

Moreover, any attempt to use the letter of intent as evidence of the alleged anti-competitive effect of Rider MDS is self-serving. The "no riders" provision of the letter of intent is nothing more than an attempt to manufacture an argument. The parties to that document simply decided to target provisions of the Plan that they did not like. That's a far cry from being evidence of any anti-competitive effect of any ESP provision. Parties should not be able to create evidence of their own potential adverse circumstances.

The only other support cited by the parties critical of Rider MDS on the subject of the competitive effect of that charge is equally unavailing. For example, as it did regarding Riders GPI and DGC, FPL cites Mr. Blank's testimony for the proposition that customers will choose a lower price, if given a choice. FPL Br., pp. 24 (citing Hearing Tr., Vol. VII, p. 61). FPL also cites Staff witness Turkenton's testimony in which she stated that "[a]ny nonbypassable charge is probably going to inhibit shopping." *Id.* (citing Hearing Tr., Vol. IX, p. 203).[18] It is one thing to say that a nonbypassable charge will probably inhibit shopping, and another to prove that such "inhibition" cannot be adequately met by a supplier attempting to provide a service alternative to the SSO.

As an alternative, some parties suggest that the Commission provide customers the option of declaring that they either: (a) will not shop; or (b) will agree to pay market-based rates if they shop and then return. FPL Br., pp. 23-24; Nucor Br., p. 53; OEG Br., p. 20. NOPEC/NOAC offers that governmental aggregations should be given 150 days to provide notice about whether their customers intend to shop. NOPEC Br., pp. 34-35. There are two problems with these proposals. First, as Mr. Warvell explained, they do not eliminate shopping and other risks

[18] Nucor witness Goins testified to the same effect. OHA Br., p. 15.

associated with POLR supply obligation. Hearing Tr., Vol. I, p. 167. Second, these proposals are administratively burdensome, and certainly impossible to do before the end of this year. As of January 1, 2009, the Companies' supplier will have to commit power for POLR load. Therefore, there will be a risk immediately upon the effective date of the Plan, which has already been incurred in the case of FES due to keeping its generation available to serve the Companies' load under the Plan, and not otherwise previously committing it to other loads or markets.

As demonstrated above, Rider MDS is a necessary and appropriate element of the Companies' Plan and should be adopted.

2. Rider SBC is a reasonable standby charge.

Rider SBC is a proposed standby charge to compensate the Companies for the risks and costs of having to serve customers who shop and then return. Warvell Testimony, p. 21. S.B. 221 specifically contemplates that such charges can be included in an ESP. R.C. § 4928.143(A)(2)(d). There are three main criticisms of the proposed rider. First, some parties say that the level of the charge is unsupported and was the product of (apparently pejoratively viewed) "management judgment." IEU Br., p. 25; NOPEC Br., p. 16. As they did with Rider MDS, these parties misstate the evidence regarding Rider SBC. First, Mr. Warvell discussed the standby service charge, Rider SBC, setting forth the basis for the charge, stating that the charge as necessary to compensate the Companies for the risk of returning customers, and describing the charge as bypassable by customers. Warvell Testimony, pp. 20-22. Mr. Warvell also candidly discussed the basis for the proposed charge during examination:

> Q. ... Isn't it also true that that was not the result of any analytical study?
>
> A. Well, not an analytical study, but we did go and look at in the money call options in regards to the ability for us to supply

> customers returning. We also looked at load shape, shopping, and took in those risks.
>
> And when I say "in the money call options," it's the ability for us to buy power in the future at the standard service offer price and then shape that product in regards to customers coming back, and those type of risks were looked at and contemplated in coming up with that number.

Hearing Tr., Vol. I, p. 51. He also stated that the charge was not designed to cover solely hedging costs, but included other risks. *Id.* at p. 91. He further testified:

> Q. Is it your testimony that there was no cost basis for the standby charge proposed by the company?
>
> A. I believe, as we have talked about before, we did start by talking with some brokers as far as what call options would be, overall building up of a cost, adding up pieces and parts to an overall cost charge, that is correct.

Id. at pp. 146-147. Thus, Mr. Warvell provided the total basis for the proposed rider. As was the case with Rider MDS, no witness testified about what a "quantitative analysis" would look like, or even if one was possible.

Second, the critics of Rider SBC contend that the price for returning customers who waive the standby fee is not justified. *See* Comp. Suppliers Br., pp. 21-22; OCC Br., pp. 14-15. Notably, no party – and particularly none of the witnesses sponsored by these parties – opined what the proper charge should be. For example, Competitive Suppliers' witness Ringenbach could not testify about what the relationship between wholesale and retail electric prices have been. Hearing Tr., Vol. VII, pp. 170-73; *see also* Hearing Tr., Vol. VI, p. 121 (Comp. Suppliers' witness Fein also could not opine on this issue). And, Companies' witness Warvell explained that the price paid by returning customers who did not pay the standby charge would be a market price and would need to be adjusted to add costs included in a retail rate, but not reflected in wholesale prices. Hearing Tr., Vol. I, p. 123; *see* Graves Testimony, p. 11. For customers

returning from a governmental aggregation group, the basis for market price to be paid is set out in R.C. § 4928.20(J).

OCC contends that because FES will have a full requirements contract, FES should not have to go out into the market to buy power for returning customers. OCC Br., p. 14. This is a *non sequitur*. Having a full requirements contract has nothing to do with the potential source of the power to fulfill FES' obligations under that contract. As Companies' witness Blank noted, a supplier is not going to arrange to buy or otherwise acquire power for a customer that the supplier doesn't have. Hearing Tr., Vol. I, p. 167. Thus, the obligation to serve a returning customer only springs when that customer returns and the procurement of power for that customer will not take place until that time.

Third, OCC contends that there should be no risk involved with returning customers, thereby implying that the fee is unnecessary. Specifically, OCC asserts that if the Companies are correct that the ESP is better than an MRO, customers will not leave and therefore will not return. OCC Br., p. 14. Such a simplistic conclusion misuses the statutory test. The determination that the Commission must make is that the Plan as an overall package, including all of its terms and conditions, quantitative and qualitative, must be more favorable than the expected results of an MRO. Such a conclusion by the Commission certainly does not mandate, nor could it, that every customer's individual retail generation price under every circumstance over the term of the Plan would always be less than a price available from competitive suppliers. The Plan contains many favorable terms and conditions, not all of which directly impact the price an individual customer pays for retail generation service, but OCC's conclusion appears to wrongly assume that it does.

3. Rider NDU is a proper vehicle to recover uncollectible expenses.

The Companies have proposed Rider NDU to collect non-distribution uncollectible expenses. Rider NDU is nonbypassable for many of the same reasons the costs associated with the Percentage of Income Payment Plan Rider are nonbypassable. Hussing Testimony, p. 13. Specifically, as the Companies demonstrated in their Initial Brief, the uncollectible costs recovered by the rider, (a) result from the societal and State policy benefits associated with the Companies' role as default service providers – benefits which are enjoyed, and should be borne, by all, and (b) are not limited to non-shopping customers. *See* Companies' Br., p. 52.

The parties opposing this Rider attempt to show that other suppliers are no different than the Companies and thus, the Companies should not be able to have a special rider. Comp. Suppliers Br., pp. 17-18; FPL Br., pp. 29-33. Yet every argument that attempts to show the alleged equivalence of the Companies and suppliers merely shows how different they are. For example, FPL contends that both types of companies have some control over their customer selection by requiring deposits. FPL Brief, p. 30. But as many witnesses conceded, there are no rules relating to CRES customer deposits. Hearing Tr., Vol. VII, pp. 181-182. There are rules relating to the Companies' ability to impose deposits, collect for service and the criteria for establishing service. *See* OAC 4901:1-10-14; 4901:1-10-17; 4901:1-18. Competitive suppliers can pick and choose the customers they serve; the Companies cannot. FPL similarly argues that the Companies' reliance on shutoff moratoria is without merit because the Companies offer partial payment plans. FPL Br., p. 30. But as Mr. Hussing observed, those customers who are reconnected or who establish continued service under a partial payment plan still have arrearages that the Companies must carry. Hearing Tr., Vol. V, pp. 64-65.

The real problem with the arguments of those suppliers who oppose Rider NDU is their failure to admit that they get paid first, and that this significantly reduces any uncollectibles they may incur. None of these parties' briefs acknowledge that competitive suppliers receive a benefit through a modification of the partial payment posting priority rules for the Companies. As Competitive Suppliers' witness Ringenbach admitted, CRES suppliers arrearages receive the highest priority and therefore are paid first. Hearing Tr., Vol. VII, p. 186; *see* Cos. Ex. 16; Case No. 02-1944-EL-CSS. In fact, this arrangement was so beneficial to suppliers that a supplier representative testified that such an arrangement was better than having the Companies purchase receivables. Hearing Tr., Vol. VII, p. 187. If that is the case, then there is a real question as to whether CRES suppliers have any uncollectible expenses at all. Notably, no witness testified that these suppliers, in fact, had such expenses. Thus, the contention by some that Rider NDU requires shopping customers to "pay twice" (Comp. Suppliers Br., pp. 17-18; FPL Br., p. 31; OCC Br., pp. 12-13; NOPEC Br., p. 36) is not only wrong as a matter of fact,[19] but is, at most, not supported by any evidence whatsoever.

NOPEC/NOAC remark that the Companies "self-servingly advocate the application of the policy of 'protecting at risk populations' [O.R.C. 4928.02(K)], while conveniently ignoring the S.B. 221's [sic] mandate to incentivize large-scale governmental aggregations and to carefully scrutinize [sic] any proposed 'nonbypassable generation charges.'" NOPEC Brief, p. 37. As noted above, these parties are wrong in their view that the policy promoting governmental aggregation trumps all others. And nowhere does S.B. 221 mandate additional incentives for large-scale governmental aggregations. On the other hand, the Companies are correct in noting that Rider NDU furthers that policy of protecting at risk populations.

[19] Several witnesses admitted that any arrearages of the Companies would not be the same as the arrearages of any supplier. *See* Hearing Tr., Vol. V, p. 188.

NOPEC/NOAC also argues that Rider NDU represents a subsidy from shopping customers to non-shopping customers. NOPEC Br., p. 21. But any uncollectible expense rider represents a subsidy from one group of customers (those who pay) to another (those who don't). The Commission has recognized the benefit of such riders, and has allowed recovery of these types of expenses outside of traditional rate cases. Rider NDU is no different in that regard.[20]

Some suggest as an alternative or in addition to Rider NDU, that the Companies be required to purchase all of the CRES suppliers receivables at no discount. *See* FPL Br., p. 32; OCC Br., p. 13. None of these parties recognize, however, that competitive suppliers already receive a substantial benefit through the modified partial payment posting priority rules applicable to the Companies. As noted, this benefit has been deemed to be better for suppliers than the purchase or receivables. Given that fact, additional support for these suppliers hardly seems appropriate and is not demonstrated as being worthy of any serious consideration.

4. Rider DRR allows the Companies to recoup foregone revenue from special contracts, as they are authorized to.

R.C. § 4905.31(E) expressly authorizes electric distribution utilities to "recover costs incurred in conjunction with any economic development and job retention program of the utility within its certified territory, including recovery of revenue foregone as a result of any such program." The Plan effects the Companies' authority by instituting Rider DRR to recover delta revenue arising from special contracts / reasonable arrangements. Despite their clear authority to recover this lost revenue, OCC asserts a number of baseless arguments that misrepresent the purpose and function of Rider DRR. This, unfortunately, is not surprising given OCC's umbrella conclusion that the Companies' obligation to provide electric service to customers as an electric

[20] These parties further argue that Rider NDU is anti-competitive, citing the NOPEC-FPL letter of intent. For reasons stated above with regard to Rider MDS, that argument lacks merit.

distribution utility has given way to a new "obligation to keep businesses alive in Northern Ohio." *Id.* at p. 68.

First, OCC argues that Rider DRR will result in the Companies receiving a "windfall" (or double recovery) at customers' expense because Rider DRR allows the Companies to receive all of the delta revenue and because the Companies otherwise benefit from special contracts. OCC Br., pp. 63-68. OCC alleges that the benefits were established by OCC witness Gonzalez and that the Companies did "not refute[]" Mr. Gonzalez's testimony. OCC Br., pp. 65-66. However, Rider DRR recovers *lost* revenue, not *additional* profits for the Companies. The Companies seek only to be made whole through Rider DRR. Further, Mr. Gonzalez's conclusions regarding the "benefits" realized by the Companies were indeed challenged by the Companies. Companies' witness Blank testified that new customers represent the minority of the Companies' special contracts; rather, the bulk of delta revenue contracts arise from existing customers. Blank Rebuttal, pp. 16-17. So, OCC's allegations of a "windfall" of additional distribution revenue are false. Also, Companies' witness Hussing explained that without the recovery of delta revenue, the Companies are in the financially unviable situation in which they are selling electric service at a loss. Hearing Tr., Vol. IV, pp. 150-151. Under certain scenarios, the distribution revenue of such customers can fall to almost zero without the recovery of delta revenue. *See* Companies' Br., pp. 53-54. Thus, even if new customers were attracted into the Companies' territory, the Companies would not experience a benefit if they were required to sell electric service to the new (or retained) customers at a loss. *Id.* at p. 155.

OCC witness Gonzalez refers to a CEI rate case, Case No. 95-299, as authority for the proposition that the Companies should not recover delta revenues or if they do, they should only recover 50% of the delta revenue. Hearing Tr., Vol. IX, pp. 42-43. But, the Commission's

decision in that case made clear that it did not intend to set precedent by issuing an order for CEI's recovery of 50% of such revenue. "We agree that the Staff has properly treated the amount of delta revenues in this case." Opinion and Order, Case No. 95-299-EL-AIR, p. 18, April 11, 1996 (emphasis added). And, in any event, there is no support in the Commission's decision for the Companies' inability to recover any delta revenues as Mr. Gonzalez recommends.[21] Further, that Order was issued at a time when the Companies were fully integrated utilities that owned, and made a profit through rates, on generation. This is the case no longer, and the General Assembly recognized that fact, even if OCC has not. Importantly, OCC *ignored* the amendment to R.C. § 4905.31(E) that specifically authorizes the recovery of delta revenues. Moreover, the Commission has recently confirmed that 100% of delta revenues are recoverable under that section, particularly for contracts that were entered into before the passage of S.B. 221, and that a utility may properly seek to institute a recovery mechanism for delta revenues in applications made pursuant to R.C. § 4928.141. *See In the Matter of the Application for Approval of a Contract for Electric Service Between Columbus Southern Power Company and Solsil, Inc.*, Case No, 08-883-EL-AEC *et al.*, Opinion and Order of July 31, 2008, p. 4.

OCC also makes much of the fact that the Companies negotiate the special contracts with interested and eligible customers, and that residential customers are not involved in the negotiations. *See* OCC Br., p. 63. However, concerns of any nefarious negotiations OCC's

[21] Mr. Gonzalez's credibility is also questioned as he believes it is appropriate for the distribution utility to recover the losses it incurs in providing generation service to special contracts through any profits it may make in the provision of distribution service. Hearing Tr., Vol. IX, p. 45. However, such a system is contrary to the Supreme Court's holding in *Elyria Foundry Co. v. Public Util. Comm.*, 114 Ohio St. 3d 305 (2007), in which the Court held that generation costs should be recovered in generation rates, and not in distribution rates.

arguments suggest are mooted because all special contracts have been and will continue to be reviewed and approved by the Commission. Hearing Tr., Vol. IX, p. 43; *see* R.C. § 4905.31.

OCC further argues that the Companies have failed to justify their need for the additional revenue recovery and point to prior rate plans that recovered 50% of delta revenue. OCC Br., pp. 66-68. As discussed above, the Companies the 50/50 sharing of delta revenues arose during a time when the Companies owned and profited from generation. Further, as Companies' witness Hussing explained, the Companies have no other source from which to absorb the revenue lost in reasonable arrangements or special contracts. Hussing Testimony, p. 11. At hearing, Mr. Hussing also provided a helpful example – set forth in the Companies' Initial Brief – of the calculation that would result in significant reductions in the distribution revenue. Companies' Br., pp. 53-54 (citing Hearing Tr., Vol. IV, p. 146).

Rider DRR recovers lost revenue arising from reasonable arrangements, which are effected, in part, through the Plan's Rider RAR. Only Material Sciences raised any issues regarding RAR. It argues that the Rider is unreasonable because it allows the Companies to terminate the rider when the Commission's actions result in un-recovered delta revenue without notice to customers and opportunities to respond. Material Sciences Br., p. 17. However, this is precisely the mechanism contained in R.C. § 4905.31 relating to the recovery of delta revenues. Such a mechanism is necessary for the Companies to recover delta revenue, in line with Rider DRR's provisions. Finally, Material Sciences argues that the Companies must conform Rider RAR to "rules approved" in OAC 4901:1-38. Material Sciences Br., p. 17. However, as noted in Section II.A.1.e *supra*, those rules are not yet effective and, thus, do not place requirements on the Plan or the Commission's review.

5. Rider TAS is an appropriate mechanism to recover transmission-related costs.

Intervenors provide no real challenge to Rider TAS and, indeed, Staff recommends that Rider TAS be approved. Staff Br., pp. 16-17. IEU argues that the costs and charges for the Rider be auditable (IEU Br., pp. 26-27), but the Companies have already made clear that these costs will be subject to the current procedures for review and audit by Staff (Hearing Tr., Vol. I, pp. 59-60). Rider TAS is a proper component of the Plan.[22]

6. The Companies' commits to provide additional capacity to the system.

In one sentence with no citation to record evidence, Competitive Suppliers assert that the Plan's commitment, through its supplier (FES), to add 1000 MW of capacity does not constitute a benefit to customers because such capacity is necessary for compliance with MISO requirements. Comp. Suppliers' Br., p. 26. However, Competitive Suppliers miss the true benefit of this commitment: this commitment of additional capacity addresses the concern expressed during the S.B. 221 legislative process regarding the lack of construction of generating capacity.

E. The Plan's Other Generation-Related Riders Are Reasonable.

Intervenors and Staff are critical of four other generation-related riders: Rider CCA; Rider FTE, Rider FCA and Rider DFC. As shown below, none of these criticisms have any merit.

1. Rider CCA

Rider CCA has been proposed to recover any costs to meet MISO's yet to be determined formal planning reserve requirements. Although FES has committed its facilities within MISO

[22] To the extent that OCC's reference to a "Transmission Charge Rider" on page 20 of its brief is used to reference TAS, it's arguments therein are simply incorrect. OCC's argues that Rider TAS should be rejected as an anti-competitive non-bypassable rider (OCC Br., p. 20) – but Rider TAS is bypassable. *See* Application, ¶ A.5.b.

to the Companies' supply, this rider seeks to recover any costs that may be necessary to comply with the capacity requirements above and beyond that commitment for the summer months of May through September. Hearing Tr., Vol. I, pp. 80-81. There are three criticisms of Rider CCA. First, OCC contends that there is no need for this rider since any capacity costs should be part of the generation rates charged by FES. OCC Br., p. 15. To a large degree, such capacity costs are included as part of generation rates because only a fraction of the costs incurred will be recovered through Rider CCA, *i.e.* only the amount above the level of capacity committed by FES and only during the months of May through September. Warvell Testimony, pp. 12-13. But, because the MISO requirements are currently unknown, FES cannot know what it must do to comply with such mandates and how much it will cost to comply. Consequently, any costs that may be incurred to comply with these capacity requirements above and beyond that committed to by FES either will be charged separately. The Companies have proposed that any costs be included as a separate rider, Rider CCA, and collected under the limited circumstances described above. Hearing Tr., Vol. I, pp. 80-81.

Second, FPL contends that the rider should be rejected because it is not "transparent." FPL Br., pp. 27-29. As demonstrated in the Companies' Initial Brief, FPL's real problem is not driven by any desire to help consumers; its problem is that it may have to set its prices too low. *See* Companies' Br., p. 28 (discussing FPL's similar concerns regarding Rider FTE). In fact, any claim that the rider lacks transparency misunderstands the process contemplated under the rider. Estimates of costs will be made before the any charges are includes in the rider. These cost estimates and the actual costs subsequently incurred will be reviewed and approved by the Commission. Companies' Br., p. 31. In short, customers will know what they are going to be

charged under the rider before they are charged, thus ensuring that Rider CCA is quite transparent.

FPL's suggested replacement for Rider CCA is unworkable and only benefits suppliers other than FES. FPL would have FES provide all of the planning reserves (FPL Br., pp. 28-29) leaving FPL free to offer service without having to incur the cost of such reserves. Although FPL contends that there are no regulatory barriers to adoption of its proposal (*id.*, pp. 28-29), its witness, Mr. Garvin, did not know of any place where this type of program had been implemented successfully. Hearing Tr., Vol. V, pp. 152-153. In fact, FPL failed to provide any evidence that its proposal could ever work. FPL contends that its proposal will result in lower prices for Ohio customers (FPL Br. pp. 28-29), but it presents no evidence to suggest (much less demonstrate) that this would be the case.

Third, Nucor and OEG contend that this rider should not apply to interruptible customers. Nucor Br., p. 54; OEG Br., p. 24. As OEG witness Baron conceded, however, interruptible customer still have firm load and that firm load will be part of the capacity requirements for the Companies or FES. Hearing Tr., Vol. VI, p. 59. Further, the interruptible riders – Riders ELR and OLR – are designed to give interruptible customers a credit for the cost of capacity. It is thus appropriate that such customers' costs reflect the full amount of capacity from which the credit is subtracted. Nucor and OEG, by attempting to get a full credit without paying the full cost, want to have their cake and eat it, too.

2. Rider FTE

Rider FTE seeks to recover future fuel transportation surcharge and certain environmental costs. These costs are not currently known. The rider would only charge customers to the extent that these costs exceeded specified threshold amounts. FPL and Staff

urge that this rider be rejected. FPL asserts that, like Rider CCA, it is not transparent. FPL Br., p. 34. FPL is wrong about Rider FTE for the same reasons that it is wrong about Rider CCA.

Staff recommends the approval of the "E" portion of the rider only. Staff states that because the Companies did not provide a forecast of fuel transportation surcharges, the level of those surcharges is uncertain and thus the portion of the rider dealing with those costs should not be approved. Staff Br., 20. As demonstrated in the Companies' Initial Brief, the Companies provided a budget and historical information for such costs. In short, Staff had the same information that the Companies had regarding the possible level of these surcharges. Further, Staff's position on this rider is internally inconsistent. The potential environmental costs potentially are as uncertain (if not more uncertain) than the potential level of fuel transportation surcharges, yet Staff supports the "E" component of the rider. Thus, the fact that a charge may be uncertain is not a basis to reject the rider. This is especially so when the Commission will review all costs that may be included for recovery in Rider FTE. Hearing Tr., Vol. II, p. 126.

3. Rider FCA

Rider FCA seeks to recover those fuel costs incurred in 2011 that exceed the level of costs incurred in 2010. Warvell Testimony, pp. 15-16. Staff recommends that the rider not be approved. Staff's rationale is the same as above, that these costs are uncertain. Staff Br., 19. Staff's recommendation should be rejected for the same reason that its recommendation regarding the "FT" portion of Rider FTE should be rejected: uncertainty is not a proper basis to reject a rider when the costs potentially recoverable under the rider will be subject to Commission review.

4. Rider DFC

Rider DFC is designed to recover the deferred fuel costs, and associated carrying charges, as previously authorized in the Companies' RCP case, Case No. 05-1125-EL-ATA. It is proper for the Companies to collect these costs on a nonbypassable basis. These are costs that were incurred for fuel back in 2006 and 2007. The fuel was used to provide electricity to customers during those years. So while customers have benefited from the fuel, they have not paid for it. And because the costs were incurred in the past, the Companies cannot avoid them if customers shop in 2009 and beyond.

Two parties ask the Commission to reject this rider or parts of it. Competitive Suppliers imply that this rider is contrary to the decision of the Ohio Supreme Court in *Elyria Foundry v. Pub. Util. Comm.*, 114 Ohio St. 3d 305 (2007). Quite to the contrary, in *Elyria Foundry*, the Court held that generation costs could be recovered in generation rates, and not in distribution rates. *Id.* ("R.C. 4928.02(G) prohibits public utilities from using revenues from competitive generation-service components to subsidize the cost of providing noncompetitive distribution service, or vice versa."). Permitting the Companies to collect generation related costs through a nonbypassable generation charge is lawful and fully consistent with the *Elyria Foundry* decision. It is also consistent with previous Court precedent. For example, in *OCC v. Pub. Util. Comm.*, 111 Ohio St.3d 300 (2006), the Court affirmed the Commission upholding the collection of POLR charges from shopping customers. *Id.* at 316. Nothing in S.B. 221 abrogates the Supreme Court's decisions. In fact, R.C. § 4928.02(H) expressly prohibits "the recovery of any generation-related costs through distribution or transmission rates." Because Rider DFC recovers generation-related costs through a generation rider, it is appropriate and consistent with the statute and Supreme Court precedent.

Staff and the Companies disagree on certain items relating to deferred fuel costs and the recovery of those items, including profits on the sale of emission allowances. The Companies will only make a couple of final points related to the proper treatment of the proceeds from the sale of emission allowances, as related to the amount of deferred fuel costs to be collected through Rider DFC.

Certain allowances are provided to *generators* by the U.S EPA at no cost. Therefore, these zero cost allowances are owned by the generator, not customers. Generators can also buy additional allowances. Staff believes that profits from allowances sold by generators supplying the Companies' load, but never paid for or consumed by customers, should nonetheless be applied to reduce the amount of fuel cost deferral balances. There are three reasons why this position should not be adopted. First, the allowances are not owned by the Companies or customers. They belong to the generator, in this case to FES. They have not been paid for by Companies' retail customers, consumed by the Companies' retail customers, or used to provide generation to the Companies' retail customers. These allowances are like any other asset that FES has. It can be bought or sold. No one would suggest that fuel cost should reflect the profit or loss experienced on an asset that FES sold. Emission allowances should be treated the same.

Second, as Staff alludes to, the deferred fuel costs are to be determined in reference to a 2002 baseline. Staff Brief, p. 27. The baseline was attached as Attachment 2 to the Application in the RSP case. Application, Attachment 2, Case No. 03-2144-EL-ATA. The only reference to emission allowances in the baseline is to "Emission allowances consumed". There is no evidence to suggest that the baseline costs reflected any allowance sales related to sales of allowances that were not consumed. Because the baseline reflects no profits or losses from emission allowance sold, but only includes the cost of emission allowances consumed, the fuel

costs deferred above the baseline can only contain like items. In other words, reductions cannot be made to the amount of deferred fuel costs unless similar reductions were made in the baseline, which reductions were not made.

Third, as Staff also acknowledges, customers do get the benefit of the no cost allowances received from the EPA. Staff Brief, p. 31. These allowances are accumulated with other allowances and a weighted average allowance cost is determined. *Id.* Because the cost of the allowances from the EPA is zero, those allowances *reduce* the weighted average cost of emission allowances consumed by customers. Customers only pay for allowances when they are consumed based upon the weighted average cost. Thus, customers obtain the benefit of the receipt of those zero cost allowances through the reduction in the weighted average cost. The Companies' proposed deferred fuel cost amount should be approved as part of the Plan and recovered with carrying charges through Rider DFC.

F. The Plan's Proposed Rate Design Is Reasonable.

The proposed rate design for the Plan is based on the framework of the rate structure proposed by the Companies in their pending distribution rate case. Two key features of that rate structure are: (a) consolidation of over 100 rate schedules into 8; and (b) uniform base rates across the Companies for similarly situated customers. Even the witnesses sponsored by those parties critical of the Plan's rate design conceded that the historical basis of different rates for each of the Companies was no longer valid. Hearing Tr., Vol. VI, pp. 22-23; Hearing Tr., Vol. VIII, pp. 22-23 (Goins). They also agreed that the consolidation and uniformity are legitimate and reasonable goals in designing rates. Hearing Tr., Vol. VI, pp. 22-24; Hearing Tr., Vol. VIII, p. 22.

Nevertheless, those parties critical of the Companies' rate design attempt to attack it in two areas. First, they assert that the rate design is unsupported, unfair, illegal and bad public policy. Second, they question various parts of the Companies' proposals for interruptible service. They are wrong on all counts. Notably, the parties complaining the loudest about rate design have historically enjoyed significant discounts. Because those discounts are being reduced or eliminated as part of the proposed rate structure, these parties seek to maintain their favored status – at the apparent expense of all other customers.

1. The proposed rate design is supported, reasonable, fair, lawful, and consistent with public policy.

The rate design critics consist of OEG, Nucor, Kroger, OMA, IEU and OSC. They spend much effort in their briefs claiming that they or their members will suffer greater rate increases than customers in other rate classes. For example, Kroger, Nucor and OEG all point to data that shows that some customers – particularly those large customers taking transmission level service – will receive greater increases in rates than other classes. Kroger Br., pp. 8-9; Nucor Br., pp. 10-11; OEG Br., 14. But as OEG witness Baron and Nucor witness Goins admitted, this data merely reflects the differences in the current total revenue generated by the customer classes and thus reflects existing discounts that these customers have received. Hearing Tr., Vol. VI, p. 26; Hearing Tr., Vol. VIII, p. 34.

Similarly, OSC points to data to show all of the large increases that some of OSC's members will experience. OSC Br., pp. 8-9, 13. As OSC Brief concedes, certain school districts served by CEI and TE participated in the Energy for Education Programs, which featured discounts of over 10% off of tariffed rates. *Id.* at p. 2. Thus, the expiration of the discount program accounts for much of the increases that many of the schools may experience. For all of OSC's discussion about schools served by CEI and TE, however, OSC doesn't say much about

schools served by OE. As shown on OSC Ex. 2, of the 76 schools served by OE, 64 schools would experience increases of less than 10%; 48 would experience increases of less than 5%; and 22 would actually experience decreases in rates. Yet, even participants in the Energy for Education program, as a group, will receive relatively modest increases. As the Companies' witness Gregory Hussing testified, the average increase for schools in the Energy for Education program was about 7%. Hearing Tr., Vol. V, p. 86.

Next, these parties attempt to take the Companies to task for the manner in which the rates were designed. Nucor and Kroger contend that the rates make no effort to recognize the cost differences to serve different customer classes. Nucor Br., p. 9; Kroger Br., p. 8. Nucor argues that the relatively large increases that it will see are directly attributable to the alleged failure to account for the lower average cost to serve higher load factor customers. Nucor Br., pp. 13-14. Further proof of the failings of the rate design, according to Nucor, is the lack of any cost of service study to support the rate design. *Id.*, p. 15. OSC goes further and contends that the Companies used "no bright line test" and used only "management judgment." OSC Br., p. 12 (citing Hearing Tr., Vol. V, pp. 38-40).[23]

These arguments are faulty for many reasons. To begin, these parties assume that there are differences in costs to the Companies to serve these customers. However, without any generation facilities of their own, the Companies have no fixed costs for generation service. The Companies buy generation on a kWh basis only. While they criticize the Companies for not presenting a cost of service study, these parties ignore that fact that generation rates are not required to be cost-based. Further, they presented no studies of their own to support any

[23] OMA asserts that the only factor that came into play in the Companies' rate design was the belief that selecting volumetric allocation would likely maximize revenues. OMA Br., p. 7. OMA contends that this was "revealed" in OMA's counsel's cross-examination of Mr. Hussing. OMA neglects to cite to any part of Mr. Hussing's testimony to support that the record contains such a "revelation." A review of Mr. Hussing's testimony "reveals" the reason for this omission: he said no such thing.

differences in the Companies' costs to serve these customers. The best that they can do is to point to data developed by the Companies' expert witness Dr. Jones. Nucor Br., pp, 14-15. But that data did not reflect the Companies' costs. In any event, the Companies' rate design for voltage and seasonality appropriately considers any cost differences.

These parties are also wrong to assert that the Companies did little analysis to develop the rates in the Plan. To the contrary, Mr. Hussing set forth his approach as described in his direct testimony at pages 5-6. As Mr. Hussing testified during examination:

> Q. Would you agree that companies did not use specific criteria in applying gradualism principles to mitigate significant customer impacts?
>
> A. I would -- I used a process. I didn't have any red line test that I had when I was mitigating the rates, but I had a process by which I mitigated the rights where I looked at the customers that we were going to -- that were going to have to pay for the gradualism and then the amount of money that we were going to utilize then to mitigate the rate impact so I would -- I would say I had a process.
>
> Q. If the Commission were trying to understand the process that you used, does the Application set forth this process or any of the criteria you used in this process?
>
> A. The Application does not. I believe that was your question.
>
> Q. That was. And just to follow up my understanding from your answer earlier, you did not use any specific threshold percentages to designate an increase across all customer classes above -- above that increased gradualism would be used to mitigate increases; is that correct?
>
> A. No, I didn't have a percentage but I tried to mitigate the largest increases of the customer classes.

Hearing Tr., Vol. V, pp. 39-40. Thus, Mr. Hussing applied the regulatory principle of gradualism to adjust rates for those classes receiving rate decreases, or little or relatively modest increases to, in effect, reduce increases or, stated another way, to discount the rates of customers

receiving the largest increases. What Mr. Hussing did not do was merely rotely continue discounts or rate differentials that have no further use or justification going forward, much to the chagrin of those parties here who had enjoyed such favorable rate treatment.

Certain parties attempt to raise legal challenges to the rate design. OHA argues that the proposed design violates R.C. § 4928.02(A) because it discriminates among customers, particularly high load factor, non-residential customers. OHA Br., p. 18. OHA cites only four lines from the testimony of Kroger witness Higgins. *Compare id. with* Higgins Testimony, pp. 1-4. Nothing in that section of Mr. Higgins' testimony (or anywhere else in his testimony) supports any basis to continue the preferences provided to certain customers in the past.

Similarly, OSC claims that the rate design is discriminatory in violation of R.C. § 4905.35. OSC does not point to any difference in costs to serve its members. Rather, OSC asserts that Ohio law *entitles* the schools to continuation of the special discounted rates that they received under the Energy for Education program that expired. OSC Br., p. 10. But, the law does not support OSC's argument that a discount for schools is mandatory as a matter of law. Nor does the record support implementing a special, discriminatory discount for schools. As an initial matter, OSC never explains how OE could have lawfully offered base distribution rates for years without ever offering the discounted school rates advocated by OSC.

At its core, OSC's legal argument is based on a misreading of the Ohio Supreme Court's decision in *County Commissioners' Ass'n. v. Pub. Util. Comm.*, 63 Ohio St. 2d 243 (1980). In that case the court allowed, but did not require, the Commission to approve a favorable telephone rate for Ohio public schools. The County Commissioners' Association argued that granting the favorable rate only to public schools (and not to counties) was barred by R.C. § 4905.35. The

court upheld the Commission's decision to allow preferential rate treatment for the schools, because the record differences between the schools and the counties justified it.

OSC turns this decision on its head. OSC argues that because the Ohio Supreme Court *allows* preferential rate treatment for schools, in spite of R.C. § 4905.35, it also ***requires*** preferential rate treatment for schools. OSC Br., p. 10. This does not follow. There is simply no basis in law for expansion of the *County Commissioners' Ass'n* holding. Ohio law allows for "a reasonable differential or inequality of rates . . . where such differential is based upon some actual and measurable differences in the furnishing of services to the consumer." *AK Steel Corp. v. Pub. Util. Comm.*, 95 Ohio St. 3d 81, 87 (2002). But here, the record does not support that there are such differences in furnishing service to the schools. OSC has offered no evidence that there is any difference – much less, an "actual and measurable difference" – between furnishing service to schools and to any other customer.

Moreover, OSC has offered no justification to continue the socialized subsidies it proposes. At hearing, OSC witness Cottrell agreed that "[c]urrently the market is not very favorable for such a transaction as a prepayment bond issue as we have done in education for -- Energy for Education I and II." Hearing Tr., Vol. VIII, p. 67. Mr. Cottrell also admitted that other prepayment programs previously available to the schools, such as gas prepayment, no longer exist today. *Id.* at pp. 67-68. Further, Attachment A to OSC's brief does not show evidence of any undue or unreasonable expected billing impacts.

Mr. Cottrell also admitted that "the schools are facing increases in all levels in all phases of their budget," irrespective of the Companies' Plan. Hearing Tr., Vol. VIII, p. 66. He could not answer whether proposed electricity increases are in line with the schools' other operating expense increases. *Id.* There is no evidence that the expected increases shown in Attachment A

to its brief are not in line with any other expected operating expense increases, either, and OSC does not claim otherwise.

OEG argues that the proposed rate design violates R.C. § 4928.02(A) because the rates produced therefrom are not "reasonably priced." OEG Br., pp. 14-15. OEG also says that the design violates R.C. § 4928.02(N) because it does not "facilitate the state's effectiveness in the global economy." *Id.* Not surprisingly, OEG cites no authority for this argument. Indeed, it cites nothing in the record either. Instead, OEG supports its view with citations to media stories about the loss of jobs at a facility outside of the Companies' service territory and to the potential bankruptcy of the "big three" automobile manufacturers.[24] But the state of the economy is no reason to continue preferences enjoyed by one class of customers at the expense of others without justification.

Another rate design critic attempts to fault the Plan on policy grounds. Specifically, IEU claims that elimination of demand charges sends an inappropriate price signal that demand does not matter. IEU Br., pp. 28-30. The record shows otherwise. A study of customers of the Companies' affiliate, Jersey Central Power & Light ("JCPL"), showed that changes in demand charges had no effect on the load characteristics of its customers. Blank Rebuttal, p. 18. IEU challenges this study, asserting that the Companies' witness Blank mischaracterized the study and, more particularly, the differences in the rate designs studied. IEU contends that JCPL did not eliminate demand charges and thus demand charges were still an important factor in energy usage. IEU Br., p. 31. But, as IEU's brief concedes, the demand charge for JCPL decreased from a range of $12 to $15 per kW per month to $3 per kW per month. If demand charges truly drive energy choice decisions, as IEU suggests, then a reduction of demand charges by 75 to

[24] And if such information is going to be considered, then it also should be noted that FirstEnergy was recently named by *Site Selection* magazine as one of the top utilities in the country for promoting economic development.

80% would have resulted in some change in customer loads. It is undisputed that no such change occurred. Thus, IEU's position that the elimination or reduction of demand charges will have an adverse effect on energy usage is wholly without support.[25]

The suggestions for alternative rate designs show the real motivation of the parties suggesting them. All want to keep their favored status and discounted rates. Nucor and OMA suggest that the current rate design be maintained. Nucor Br., p. 21; OMA Br., p. 7. Kroger has a similar proposal. Kroger Br., pp. 9-10. Alternatively, Nucor suggests that the allocation factors proposed by the Companies in their 2007 CBP proposal be used. But, this is simply another proposal to maintain the status quo. Those allocation factors reflected the current respective revenue contribution of the various classes. Hearing Tr., Vol. VIII, pp. 34-35..

OEG recommends the "rate mitigation plan" suggested by its witness Mr. Baron. OEG Br., pp. 13-20. This recommendation would result in little difference in the relationship of the rates among different customer classes and among the same customer classes for different companies. By limiting the amount of increases, OEG's plan just helps to preserve the status quo. Indeed, the test for a satisfactory rate design suggested by Mr. Baron is plainly arbitrary. Mr. Baron admitted that he could not identify a single case in which his proposed test was used, adopted or referred to in any way. Hearing Tr., Vol. VI, pp. 20-21.

None of the parties' suggested rate design alternatives provide any clue as to how any discounts maintained by their proposals would be paid for. Unlike the rate design process used by Mr. Hussing, no Intervenor proposal is designed to leave the Companies revenue neutral. They all appear to require the Companies alone to bear the burden of the suggested discount. For

[25] In any event, IEU's suggested demand charge of $14 per kW per month (IEU Br, p. 30) for the Plan is arbitrary. It is not based on any cost of service study and represents a charge developed over a decade ago. Hearing Tr., Vol. VIII, p. 85.

this reason alone, the rate design arguments of those parties critical of the Plan should be rejected.

2. The Plan's interruptible options are tailored to compensate eligible customers appropriately for service interruptions.

(a) The eligibility criteria for the Plan's two interruptible options are proper.

Intervenors raise several complaints regarding the applicability of Riders ELR and OLR. First, they argue that Rider ELR should not be limited to customers with interruptible service as of July 31, 2008. *See* IEU Br., p. 32; OMA Br., p. 8. However, that is simply the mechanism used to grandfather current interruptible customers onto Rider ELR. Hearing Tr., Vol. I, p. 56. The Companies were better able to provide the significant aggregate benefits of the Plan's package of terms based on a known variable for Rider ELR. Further, as Companies' witness Warvell explained, customers who are not eligible for Rider ELR can seek a special arrangement for economic interruptions not available under Rider OLR. *Id.* at pp. 57-58. Despite Intervenors' concerns otherwise, Rider RAR is, in fact, available for such arrangements – an option IEU "appreciates."[26] *Id.*; IEU Br., p. 33.

Intervenors also allege that economic and emergency interruptions should be made available in separate products and suggest that without such separation, the Plan's interruptible options will be less attractive to customers. Nucor Br., p. 38; Omnisource Br., p. 6. However, the current tariffs include a similar combined offering and many customers elect to receive interruptible service under these offerings, so Intervenors' concern is for naught. *See* Warvell Testimony, p. 22.

[26] Rider RAR does note that customers who are enrolled in "any other load curtailment program" are ineligible for a special arrangement. Cos. Ex. 9C, Sched. 3A. However, this language seeks only to limit customers who are enrolled in curtailment programs offered by entities other than the Companies. For operational concerns, it is important that the Companies control when a customer's load will be interrupted.

(b) The calculation of the interruptible credit is well supported.

Nucor claims that the Plan's proposed $1.95/kW/month credit for emergency interruptions is "inappropriately" based on short-run market prices for two reasons, both of which lack merit. Nucor Br., pp. 41-42. First, Nucor argues that the DNR price relied on by the Companies is not a proper value for the credit because DNR prices are more susceptible to fluctuation. *See id.* at pp. 42-43. This argument is unpersuasive. The emergency credit is established annually under the Plan. Hearing Tr., Vol. II, pp. 49-50. Thus, it should not vary substantially as feared by Nucor, except to reflect changes in capacity cost, as discussed below. *Id.* Second, Nucor argues that DNR is different from interruptible load and "does not recognize all the benefits interruptible load provides [sic]." Nucor Br., p. 43. But Nucor fails to explain how such differences are relevant to the calculation of the emergency credit. Specifically, Nucor states that interruptible load must be curtailed in ten minutes. *Id.* Nucor never explains, however, why that fact leads to the conclusion that a DNR price is not a good proxy for the value of interruptible load. Finally, Nucor argues that the Companies have not utilized an accurate DNR value. *Id.*, pp. 44-45. It points to different capacity costs used by Companies' witnesses Warvell and Jones, but as explained at hearing, the Plan's credit ($1.95/kW) is based on the cost of DNR calculated in the calendar year budgeting process, whereas Dr. Jones uses a DNR value ($2.20/kW) for a planning year that coincides with MISO (June-May). *See* Warvell Testimony, p. 22; Hearing Tr., Vol. III, pp. 89-90, 165-168. As with any other market variable, DNR values change with the market and so it is not surprising that different, but very similar values, would result. *See* Hearing Tr., Vol. III, pp. 165-168. Further, MISO has not yet determined the planning reserve requirement percentage and, as such, the Companies could not factor that

percentage in to the calculation of the credit.[27] *See* Hearing Tr., Vol. I, pp. 163-164. Mr. Warvell testified that the Companies will adjust the credit annually and can then take the reserve requirement into account in re-calculating the credit -- mooting Nucor's complaint. Hearing Tr., Vol. II, pp. 44-46, 49-50.

OMA generically argues that the Companies do not justify why the credit is "a small fraction of its firm generation rate." OMA Br., p. 8. But OMA offers no explanation of why a different credit is appropriate or what the credit should be, rendering its arguments hollow. *See id.* As discussed above, the Companies do provide the basis for the size of the credit as reflective of the cost of capacity in the MISO market. *See* Warvell Testimony, p. 22; Hearing Tr., Vol. III, pp. 89-90, 165-168.

Finally, Nucor raises smokescreens regarding the Plan's economic interruptible credit. Mr. Warvell clearly testified that the economic interruptible credit offered under the Plan is $6.05 and is effectuated through Rider EDR.[28] Hearing Tr., Vol. II, pp. 65-66; Warvell Testimony, p. 23. However, at the end of the day, Nucor admits in its Brief that, "Nucor supports the $6.05 credit proposed in Rider EDR as an economic development and gradualism credit." Nucor Br., p. 47. Thus, nothing more need be said on this issue.[29]

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[27] Nucor also references the Companies' discovery response providing information on the 2007 CBP interruptible credit to suggest that the Plan's credit should be higher. However, the 2007 CBP credit value was an estimate. The actual cost would be calculated after the bidding, which did not occur. Thus, the 2007 CBP credit is of no relevance to the Plan's credit.

[28] In its brief, Nucor complains that Mr. Warvell did not provide direct testimony that the economic credit was housed in Rider EDR. Nucor Br., p. 47. Nucor apparently did not read page 23 of Mr. Warvell's pre-filed testimony, which states that Rider ELR works with the interruptible credit provision of Rider EDR. *See also* Cos. Ex. 10. Despite Nucor's argument otherwise, the mechanism for applying the economic interruption credit is of no import: customers taking service under Rider ELR will receive a $6.05 credit for such interruptions regardless.

[29] Nucor also makes much of the Companies' discovery response in which they stated that there is no value to the Companies for an economic buy-through. Nucor Br., pp. 46-47. While the economic interruptions do result in an *avoided* cost to the Companies, they also result in an equal amount of avoided revenue. *See* Hearing Tr., Vol. II, pp. 77-79.

(c) The Plan's calculation of RCL provides more than adequate compensation for interruptible customers.

As anticipated by the Companies' Initial Brief, OEG and Nucor argue in support of alternative and over-reaching calculations for the realizable curtailable load ("RCL") used to calculate interruptible credit. *See* Companies' Br., pp. 42-43. These Intervenors assert that RCL should be calculated based on customers' monthly peak, as opposed to the average hourly peak period demand utilized by the Plan. OEG Br., pp. 23-24; Nucor Br., pp. 28-30. Nucor argues that its proposed calculation would better reflect the load that interruptible customers provide. Nucor Br., p. 29. This can only be true, however, if the interruption occurs exactly within the customers' peak usage – a coincidence that is unlikely to occur. In fact, the record evidence reveals that emergency interruptions on the Companies' systems have occurred at or around the system peak, which does not necessarily coincide with customers' monthly peak. Warvell Rebuttal, p. 4. Intervenors provide no evidence that emergency interruptions have occurred (or will likely occur) at any time other than the system peak.

The Plan properly uses an <u>average</u> hourly demand. The use of an average best reflects, over time, the load that will be available for interruption. Intervenors assert that the Plan's RCL calculation will lead to under-compensation during customers' monthly peak (particularly when economic interruptions may not occur during peak periods). *See* Nucor Br., pp. 35-37. However, customers also will be over-compensated when an interruption occurs at times other than the customers' monthly peak. Thus, an average is appropriate to moderate the possibilities of over- and under-compensation for interruptible loads.

Mr. Warvell's rebuttal testimony illustrates the appropriateness of using average hourly demand as compared to Intervenors' proposed monthly peak demand: Intervenors' proposed calculations lead to a gross over-compensation for interruptible service. Warvell Rebuttal, pp. 2-

7.[30] The Companies' calculation of RCL also leads to generous compensation for interruptible service; it is more in line with the most likely burdens imposed on interruptible loads. *See* Warvell Rebuttal, KTW Rebuttal 1 (table reflecting the significant impact on the different calculations proposed by the Companies versus Intervenors' proposal). For example, Mr. Warvell illustrated that where the potential cost to customers of economic interruptions was $13.2 million, the Companies' RCL would lead to a credit of over $30 million to economically interrupted customers. Warvell Rebuttal, p. 7. Intervenors' proposed RCL calculation would lead to even greater compensation that would be well in excess of the true cost to customers. *Id.* The fact that the Plan's RCL better reflects the cost to customers of interruptible service alone justifies its usage despite Intervenors' complaints that the calculation is inconsistent with other demand charges, which are based on peak demand. *See* Nucor Br., pp. 30-31; Hearing Tr., Vol. II, p. 55-56. Nucor also argues that the Plan's RCL calculation sends an improper price signal to interruptible customers. Nucor Br., pp. 29-30. Nucor, based on the testimony of its witness, Dr. Goins, argues that under the Plan's definition of RCL, interruptible customers would have an incentive to increase usage during the summer peak hours. *Id.*, p. 30. Apparently, Dr. Goins believes that customers would do this to increase their average demands in order to enjoy a greater interruptible credit. However, it would be much more costly for customers to "game" the RCL system (*i.e.*, to change usage to achieve a greater RCL) under the Plan's definition because customers would be required to significantly increase their usage, at times of higher prices, over the entire peak period in order to raise their <u>average</u> demand. On the other hand, under Dr. Goins' proposed RCL calculation, to achieve a greater RCL value, customers would simply need

[30] Nucor questions Mr. Warvell's credibility by suggesting Mr. Warvell did not know the definition of an emergency interruption. Nucor Br., pp. 33-34. However, nothing in the tariff contradicts Mr. Warvell's testimony. The definition of an "emergency curtailment event" is necessarily broad to allow for the relevant entities' discretion in determining when an emergency exists and is consistent with the historical evidence showing that emergency interruptions have occurred at the system peak. *See* Application, Sched. 3a, pp. 81-86.

to increase their usage for a few hours to record an increase in their peak monthly demand. Thus, the Plan's RCL better protects against such manipulation by interruptible customers.

(d) The Plan does not provide for limitations on economic interruptions, which would otherwise require a reduction in the associated credit.

OEG and Nucor seek to place hour and value limitations on the Companies' ability to interrupt service. Nucor recommends that economic interruptions be limited to 250 hours per year and OEG argues for a 1000 hour limit. Nucor Br., p. 48; OEG Br., p. 22. Nucor also adopts OEG's recommendation that economic interruptions be limited to instances in which LMPs are 125% above the Rider GEN and Rider GPI charges for three consecutive hours. Nucor Br., p. 48; OEG Br., p. 22. The Plan simply does not provide for such limitations, which would otherwise reduce the value of the interruptible options. The risks customers face under unlimited interruptible service are, however, accounted for in the credits provided by the Plan. Intervenors' proposals should, necessarily, lead to a reduced credit because the number of hours available for interruptible service would be reduced. Warvell Rebuttal, pp. 8-10; *see also* Hearing Tr., Vol. VI, pp. 54-55 (OEG witness Baron admitted that a value limitation for economic interruptions would put the Companies at risk of potentially being unable to economically interrupt customers). A reduced credit, however, is not part of their proposal. To the extent Intervenors express concern over whether unlimited interruptible service would be a disincentive for such service, these concerns are unfounded as the Companies' current interruptible options have no time limitation. Warvell Rebuttal, p. 8.

3. Rider EDR is an important mechanism for effectuating the Plan's rate design, including its interruptible credit.

Intervenors' few arguments regarding Rider EDR have been addressed – and rebutted – elsewhere in this Brief. For example, Competitive Suppliers and Material Sciences complain

that the Rider is not bypassable and is, thus, anti-competitive. Comp. Suppliers' Br., p. 20; Material Sciences Br., p. 14. As discussed in Section II.A.1 *supra*, the General Assembly enacted a framework for ESPs that inherently may limit the competitive market in exchange for more favorable rates for customers. Competitive Suppliers in effect recognize this shift, but turn it on its head: they argue that the Companies "ha[ve] twisted the legislature's noble goal of keeping and attracting Ohio business, into favoring the customers of one electric supplier over another." Comp. Suppliers Br., p. 20 (emphasis added). Rider EDR does, indeed, seek to further the State's goals of keeping and attracting Ohio business, along with promoting gradualism for all customers' rates. And, because these goals are societal and felt by all, Rider EDR is properly nonbypassable. *See* Hussing Testimony, pp. 8-9.

Omnisource seeks to further expand the benefits of Rider EDR's economic interruptible credit to all interruptible customers. But, as discussed in Section II.D.2.a *supra*, customers who are ineligible for Rider ELR (which works in tandem with Rider EDR to provide the economic interruption option) may seek a reasonable arrangement.

G. The Plan's Distribution-related Provisions Contribute To The Plan's Aggregate Benefit.

1. The DSI Rider is needed to address significant near-term challenges to the Companies and it will provide important revenue and incentives to ensure adequate and reliable service.

Most of Intervenors' challenges to the DSI Rider can be rejected out of hand because they stem from those Intervenors' misrepresentation of the applicable standard for provisions of an ESP. As explained in Section II(A) *supra*, the acceptability of the Plan's provisions does not rest on whether the provisions are cost-based. *See* R.C. § 4928.143(B). Yet, numerous Intervenors (most notably, OCC, OPAE, and Kroger) urge the Commission to reject the DSI Rider in large part for this very reason. Kroger and OPAE argue that the Rider has no

connection to actual costs. Kroger Br., p. 13; OPAE Br., p. 12 (justified only by "management judgment"). OCC argues that the Companies provided an inadequate justification for the costs associated with the DSI Rider and complains that the costs were not justified in the Distribution Case. OCC Br., pp. 29-30, 36-38. While such a cost basis is not required, Companies' witness Schneider explained at length, as referenced in the Companies' Initial Brief, the unique, significant challenges facing the Companies' delivery system giving rise to the need for the DSI Rider, including the need to train replacements for a significant number of front-line employees in the near-term, to maintain and improve an aging infrastructure, and to respond to increasingly stringent purchasing requirements arising in the face of economic challenges. *See* Companies' Br., pp. 55-57.

There is no record evidence or reasonable basis to believe that these challenges are caused by the Companies' management, as suggested by OCC. OCC Br., pp. 33-34. Certainly the requirements that the Companies' vendors impose on their customers, including the Companies, are not in any way the fault of the Companies. Further, Mr. Schneider explained that these are costs faced by the Companies in part because of the unprecedented number of employees who are eligible for retirement during the Plan period. The Companies are properly planning to manage and mitigate the turnover by training new employees and preparing to allow for overlap to allow for older, experienced employees to provide on-the-job training to new hires. Schneider Testimony, p. 3. Moreover, the Companies' infrastructure arises in large part from post-World War II construction that is now nearing the end of its useful life. Hearing Tr., Vol. III, pp. 237-238. Rather than subject customers to costs to replace equipment that was still providing adequate and reliable service, the Companies properly and cost-effectively sustained the system for as long as possible. *See* Hearing Tr., Vol. III, pp. 236-237. All of these financial

challenges, which arise in concert, represent extraordinary circumstances justifying the DSI Rider that will not be resolved in a traditional rate case during the Plan period. *See* Companies' Br., p. 56. As Mr. Schneider testified, without the DSI Rider, the Companies would have extreme difficulty in satisfying their obligations to provide adequate and reliable service to their customers. Hearing Tr., Vol. III, pp. 267-268.

The DSI Rider's performance band is challenged by Intervenors on unbelievable grounds. We do not understand how OPAE can argue that the performance band is biased toward a deterioration in service reliability. *See* OPAE Br., p. 12. The DSI Rider is structured to decrease revenues to the Companies more quickly upon a deterioration in SAIDI performance than providing an increase when performance improves. *See* Companies' Br., p. 57. And, for Competitive Suppliers to argue that the performance band provides no benefit to customers is inexplicable. *See* Comp. Suppliers Br., p. 27. At either end of the performance band, customers will receive benefits: if the Companies' SAIDI performance improves to 89 minutes or less (top decile performance of utilities across the country), customers will receive exemplary service reliability. Companies' Br., pp. 57-58. If the Companies' SAIDI performance declines to 130 minutes or more (which still remains in the top two quartiles of national performance), customers in 2010 and 2011 will receive relief in the form of lower DSI Rider charges, and in 2012 and 2013 customers will receive a credit to their bill. *Id.*

At the same time, the performance band clearly incentivizes the Companies to improve performance by providing a carrot of 15% greater revenues through the DSI Rider. OCC complains that the performance band provides inadequate incentives and suggests that it would more properly function if the Companies received no additional revenue unless reliability improves. OCC Br., p. 31. This is exactly how the incentive works – in order to encourage a

desired goal (top *decile* performance for SAIDI), one is provided with a reward (slightly increased DSI Rider revenues). Such incentives are expressly encouraged by S.B. 221. R.C. § 4928.143(B)(2)(h). The General Assembly recognized that ESPs could include, without limitation, "provisions regarding the utility's distribution service" provided that "customers' and the electric distribution utilities' expectations are aligned." R.C. § 4928.143(B)(2)(h). The Plan's DSI Rider does just that.

2. CEI's SAIDI target should be amended to reflect its unique challenges.

OCC argues that there is no support for the Plan's adjustment to CEI's SAIDI target from 95 minutes to 120 minutes. OCC Br., pp. 46-49; *see also* Staff Br., p. 15 (Staff "is not opposed to this change upon a proper showing of justification for it . . . ."). The testimony of Company witness Schneider reveals that such an adjustment is well justified. CEI has the most aged distribution system of the three Companies. It also has the most challenging system design and service area geography. Schneider Testimony, p. 6; *see* Hearing Tr., Vol. III, p. 237. The Companies established that CEI faces greater challenges than OE and TE that justify a SAIDI target that is no lower than the 120 minute target employed by OE and TE, rather than a significantly lower SAIDI target. The adjustment is necessary to align CEI's SAIDI target with its historical performance, system design, and service-area geography, which creates a more realistic SAIDI target under which to align customer expectations.

The issues addressed by the Rear-lot Factor are another example of these particular challenges faced by CEI. The Rear-lot Factor is appropriate given the significant number of rear-lot facilities within CEI's territory. Staff and others allege that such a factor is not needed because other utilities also face the challenges of rear-lot facilities or, somehow, because it was not justified. *See* Staff Br., pp. 14-15; Cleveland Br., pp. 11-13; OCC Br., pp. 46-48. But, Mr.

Schneider explained that CEI's challenges are heightened because CEI's territory includes such a large percentage of rear-lot facilities. Hearing Tr., Vol. III, p. 255. It has nothing to do with how such customers will be treated (as suggested by City of Cleveland, p. 13), but rather will establish proper incentives for CEI, through the DSI Rider's performance band, to increase its performance by setting a realistic and more appropriate target that reflects the unique performance abilities of its territory.

3. Rider SDE institutes proper deferrals recognized by S.B. 221 and is particularly appropriate in light of the Companies' commitment to maintain distribution rates.

OCC asserts that Rider SDE should be rejected because under R.C. § 4928.143, distribution rate provisions extending beyond the period generation service is available under the plan are impermissible. *See* OCC Br., p. 39. That is simply an unsupported assertion and incorrect interpretation of the statute. OCC's interpretation is intuitively unsound in that, by definition, deferred recovery of currently incurred costs means that an integral aspect of that deferral – its recovery – may extend beyond the specific term of an ESP. R.C. § 4928.143(B) provides that various provisions, including those addressing aspects of distribution service such as those here, can be included in an ESP without limitation and "notwithstanding" other provisions of Title 49. Importantly, the General Assembly recognized the propriety of deferrals in the enactment of S.B. 221, which expressly anticipated and permitted the use of these mechanisms. *See* R.C. §§ 4928.143(C)(1) (Commission shall approve an ESP if the ESP "including any deferrals and any future recovery of deferrals" is more favorable in the aggregate than the expected results of an MRO), 4928.144.

Staff does not appear to oppose recovery of costs represented by these deferrals, but simply suggests that they can be captured through normal ratemaking processes. Staff Br., pp.

15-16; *see also* OCC Br., p. 40 (subscribing to the Staff position in this respect). However, Staff bases this position on a Plan that does not incorporate a stay-out period for distribution rate cases and, as we pointed out in Initial Brief, that doesn't reflect the provisions of *this* Plan. *See* Companies' Br., pp. 60-61. Indeed, the Plan's stay-out period for distribution rate increases adds to the certainty and stability of the Plan's pricing provisions. OCC, Staff, and Kroger's request to do away with the distribution rate freeze so that the deferrals can be eliminated would reduce the rate mitigation and stability that the Companies seek to provide consumers and that the Plan achieves.

4. Other distribution-related riders are supported by the arguments asserted by the Companies in their Distribution Case.

Few parties commented on the Plan's riders to recover legacy costs from the Companies' prior rate proceedings (Riders DDC, DTC), perhaps because the Hearing Examiner clearly determined that the underlying issues were to be resolved in the context of the Companies' Distribution Case or because they represent the Companies' already approved right to recovery of past costs. Staff withholds any recommendation whether to permit Rider DDC, although it does note that if the Rider is permitted, the calculation of deferral balances should reflect the positions Staff took in the Distribution Case. Staff Br., pp. 15-16. We reiterate the position expressed in the Initial Brief: the Companies are entitled to recover these previously authorized deferred costs and the correct calculation of the deferrals is as we set out in our Distribution Case briefs. *See* Companies' Br., pp. 60-64. OCC, over the course of tens of pages, simply reasserts the positions it took with respect to the recovery of deferred distribution costs in the Distribution Case. *See* OCC Br., pp. 71-92. As in the Companies' Initial Brief, we rely on the arguments set out in our Distribution Case briefs without further repetition here.

5. The Plan includes a significant commitment from the Companies' shareholders for at least $1 billion in capital improvements to their energy delivery system.

OCC attempts to undercut the significance of the Companies' $1 billion capital commitment pledged through the Plan by complaining that the Companies did not present any analysis of how the funds would be spent. *See* OCC Br., pp. 49-50; *see also* Staff Br., p. 13 (making a similar inquiry). OCC seeks what has not yet been determined; no such definitive information is yet available. OCC also argues that the Companies should be required to spend the funds prudently. OCC Br., p. 51. As discussed in Section II.A.1.b. *supra*, and unfortunately necessarily repeated throughout this Reply Brief, there is no statutory requirement for the Commission to make a prudence judgment as part of approving the Plan. However, Companies' witness Schneider explained that the investment would be implemented using a value-of-service analysis to assure that the capital is invested in projects that most benefit customers. Schneider Testimony, p. 10; Hearing Tr., Vol. III, pp. 302-303. This commitment is a significant response by the Companies to the issues it faces in the coming years. Staff recognizes this and it "encourages this level of spending to address many needs of [the Companies'] aging energy delivery infrastructure." Staff Br., p. 14.

6. Rider DSE is an important avenue to encourage customer-sited energy efficiency programs.

Both of Rider DSE's two components promote energy efficiency and demand-side management programs. Application, ¶ A.4.i.; Sched. 5o. The few Intervenor challenges to this important rider generally focus on the specifics of the programs, and these challenges do not counsel in favor of rejecting the rider. The Commercial Group's suggestion that Rider DSE hinders the goals of R.C. § 4928.66 are simply misplaced. *See* Commercial Group Br., p. 7. As

set forth in Section II.H.2 *infra*, the considerations of R.C. § 4928.66 are implemented in a separate proceeding and have no place in the Commission's review of the Plan.

The Commercial Group also suggests that Rider DSE be rejected, or suspended until the parties and the Companies determine programs proper for the credits offered by Rider DSE. Commercial Group Brief, p. 8. However, the specifics of the programs should not be the focus – rather it is the final objective, which the Plan properly institutes. In order to qualify to avoid the DSE2 charge under the Plan, which may be avoided by nonresidential customers pursuant to R.C. § 4928.66(C) if certain energy efficiency reductions are provided, non-residential customers must achieve reductions over their current usage in increasing amounts over 5 years, culminating in reductions of 4.8% for service in 2013. *See* Application, Sched. 5o, p. 1. The Commercial Group challenges this threshold as unsupported. Commercial Group Br., pp. 7-8. On the other hand, OEC recommends a $10,000 threshold for eligibility. OEC Brief, p. 8. But then IEU challenges OEC's threshold as against the statute's desire to include "all" programs. IEU Br., pp. 19-20. However, the Plan properly directs participating customers' focus on measured reductions in usage and correlates those reductions with the minimums imposed on the Companies by the separate provisions of R.C. § 4928.66. *See* Hearing Tr., Vol. IV, pp. 204-205.

IEU also argues that the Rider provides no incentive because of its initial 0.00¢ charge. IEU Br., p. 18. However, as the Companies explained in their Initial Brief, the costs recovered by Rider DSE in the DSE2 component will begin as early as mid-2009 and will be updated semi-annually in each year of the Plan. Companies' Br., pp. 39-40. And, the costs could be significant (several Intervenors provide estimates in the tens of millions of dollars), which would result in an attractive incentive offer. *Id.* Rider DSE is appropriately structured to encourage the Companies' and customers' energy efficiency measures.

H. The Plan's Alternative Energy, Energy Efficiency, DSM and Environmental Provisions Satisfy S.B. 221's Requirements For ESPs and Support Approval of the Plan.

The Plan includes specific commitments regarding S.B. 221's alternative energy and energy efficiency benchmarks that contribute to the Plan being more favorable in the aggregate than the expected result of an MRO.[31] These include the Companies' commitment to satisfy the alternative energy resource requirement in S.B. 221 during the Plan period (Application, ¶ A.2.d.; Warvell Testimony, p. 7), and the Companies' commitment to provide up to $25 million of shareholder funds from 2009 through 2013 for customer demand-side management and energy efficiency ("DSM/EE") improvements (Application, ¶ A.4.g.; Blank Testimony, p. 9). These commitments support adoption of the Plan because the Companies' shareholders would not partially relieve customers of the cost of the Companies' DSM/EE programs under an MRO. Likewise, the Companies' commitment to invest in AMI, Smart Grid and environmental remediation efforts also support adoption of the Plan over an MRO. Not surprisingly, no party objects to the commitments themselves.

Nevertheless, certain Intervenors raise objections or request action from the Commission concerning advanced energy or energy efficiency matters. For example, the so-called Citizens Coalition seeks a collaborative removing control of all energy efficiency efforts from the Companies and also demands that the Companies invest $100 million annually in these efforts. Citizens Br., pp. 8-9.[32] Similarly, the City of Cleveland argues that the Commission must ensure that S.B. 221's advanced energy requirements are met, although Cleveland fails to point to any

[31] Even without these provisions, the Companies have established that the Plan is more favorable in the aggregate than the expected result of an MRO.

[32] The brief filed by the Citizens Coalition is little more than a vehicle for sarcasm and inflammatory invective without much concern for the evidentiary standards applicable to Commission proceedings, or respect for the standard of professionalism that governs the legal profession. Indeed, the Companies were unable to find one citation to record evidence anywhere in this brief. As such, the Citizens Coalition's brief is improper and does not merit serious consideration.

evidence suggesting that these requirements will not be met. Cleveland Br., pp. 6-7. Yet details of the efforts that the Companies and others must undertake to meet the alternative energy portfolio benchmarks in R.C. § 4928.64 and the energy efficiency and peak reduction benchmarks in R.C. § 4928.66 generally are not relevant given that these efforts (except for the specific commitments made in the Plan) will occur regardless of whether the Plan or an MRO is approved by the Commission as the Companies' SSO.[33] Moreover, as made clear by statute and in the Commission's draft rules, the Commission's review of the Companies' efforts in these areas will occur in future proceedings. Thus, the Intervenors' objections involve matters that are outside the scope of this proceeding or lack record support, and the Commission should disregard them.

1. The alternative energy portfolio standards set forth in R.C. § 4928.64 are properly the subject of a separate proceeding.

Although Staff and IEU-Ohio point out that the Plan does not contain details concerning how the Companies anticipate meeting the alternative energy benchmarks in R.C. § 4928.64 (IEU Br., p. 17; Staff Br., p. 17), this lack of detail does not affect the Commission's review under R.C. § 4928.143(C). Under the Plan, the Companies commit to meet the alternative energy benchmarks consistent with S.B. 221 during the Plan period. Application, ¶ A.2.d.; Warvell Testimony, p. 7. This commitment, when aggregated with other provisions of the Plan, can be relied upon by the Commission in approving the Plan. Details of how the Companies intend to fulfill this commitment are unnecessary at this juncture.[34]

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[33] IEU recognizes that the Companies must meet these requirements regardless of whether the Commission authorizes an ESP or MRO. *See* IEU Br., p. 16. OEC makes the same point, but fails to understand its significance. *See* OEC Br., p. 4.

[34] Had the Companies proposed to not follow the statute regarding alternative energy, then it may be reasonable to explore the scope of such a proposal. However, the Companies here have proposed to meet the statutory requirements consistent with the provisions of R.C. § 4928.64. Thus, the Commission needs no additional evidence in order to be able to value this commitment as part of the Plan.

In addition, the General Assembly created a separate review process governing electric distribution utility compliance with the alternative energy benchmarks. The General Assembly mandated that the Commission perform an annual, *after the fact* review, and that it "shall impose a renewable energy compliance payment on the utility" if the utility is not in compliance. R.C. § 4928.64(C). The General Assembly did not impose any additional requirements on utilities to include advanced energy plans in SSO applications. Likewise, the General Assembly did not grant the Commission any additional review authority allowing it to incorporate advanced energy plans into its review of SSO applications. To the contrary, the General Assembly imposed these benchmarks on utilities and electric service companies (which do not file SSO applications), and granted the Commission authority to review utility and company compliance. No prior supervision or approval by the Commission is expressed or implied in the statute, and the Commission is not empowered to impose it.

2. The energy efficiency and peak reduction requirements set forth in R.C. § 4928.66 are to be reviewed in a separate proceeding, not in the Commission's consideration of an ESP.

Wish lists submitted by Intervenors in their post-hearing briefs relating to the Companies' forthcoming energy efficiency programs to be implemented to satisfy R.C. § 4928.66 are not properly before the Commission as a necessary part of its determination of whether the Plan satisfies the "more favorable" test in R.C. § 4928.143. Indeed, OEC's Mr. Gunn concedes that regulatory review of detailed energy efficiency programs across the United States always occurs in a regulatory proceeding dedicated to DSM/EE planning, not in an SSO proceeding. Hearing Tr., Vol. IX, pp. 22-23. There is a good reason for this: except for specific commitments made in an SSO proceeding that may favor the selection of one type of SSO over another, the design of advanced energy and DSM/EE plans and programs do not affect that selection. Instead, in Ohio

and every other state, those programs are implemented pursuant to separate statutory requirements subject to Commission review and approval. As noted by OPAE, both the energy efficiency benchmarks and the alternative energy benchmarks require a long-term focus (*see* OPAE Br., p. 10), and, thus, are most appropriately dealt with in a separate proceeding.

Notably, the Commission has proposed rules requiring utilities to file plans for compliance with the energy efficiency and peak reduction benchmarks as part of the utilities' long-term forecast report beginning on April 15, 2009 and annually thereafter. *See* proposed 4901:1-39-03(A) in *In the Matter of the Adoption of Rules for Alternative and Renewable Energy Technologies and Resources, and Emission Control Reporting Requirements, and Amendment of Chapters 4901:5-1, 4901:5-3, 4901:5-5, and 4901:5-7 of the Ohio Administrative Code, Pursuant to Chapter 4928, Revised Code, to Implement Senate Bill No. 221*, Case No. 08-888-EL-ORD (Entry Aug. 20, 2008). Under the proposed rules, the Companies' benchmark report that will be filed on April 15, 2009, must include, among other things, all plans for meeting future benchmarks and a five-year action plan for current programs. *Id.* at 4901:1-39-04. Once filed, interested persons may file comments and the Staff must issue a report. *Id.* at 4901:1-39-03. The Commission has, through its own proposed rules, clearly set forth its detailed process for the filing of the utility's energy efficiency and peak reduction plans. All of the issues raised by Intervenors in their briefs are premature and best reserved for, and can be addressed in, a future proceeding dedicated to reviewing the Companies' benchmark report filed pursuant to O.A.C. 4901:1-39 and R.C. § 4928.66.[35] There is no statutory basis for a separate, duplicative filing as part of an ESP application.

[35] As one example, Staff recommends that the Companies adopt a 30-year rolling average of weather data with a 65-degree day as the basis for determining heating and cooling days (Staff Br., p. 35), although Staff's Mr. Scheck testified that Staff would agree to a departure from a 65-degree day if the Companies can prove statistically that a different baseline is better. Hearing Tr., Vol. VII, p. 273. Such details are not appropriately part of an ESP review

3. The DSM/EE commitment supports Commission approval of the Plan.

The Plan commits the Companies to provide up to $25 million of shareholder funds from 2009 through 2013 for customer DSM/EE improvements. Application, ¶ A.4.g.; Blank Testimony, p. 9. Although Competitive Suppliers suggest that $5 million per year might not be spent because FirstEnergy has not evaluated what an appropriate level of spending might be (Comp. Suppliers' Br., p. 25), Intervenor and Staff witnesses were in universal agreement that the Companies would have to spend much more than $5 million per year on DSM/EE. *See* Gunn Testimony, pp. 9-10 (estimating Companies will have to spend $9 million more than is committed in 2009 alone); Sullivan Testimony, p. 9 (estimating 2009 DSM/EE expenditures of at least $32.5 million); Gonzalez Testimony, p. 7 (estimating $49 million annual investment); Scheck Testimony, pp. 13-14 ($25 million commitment unlikely to meet benchmarks); Hearing Tr., Vol. IX, p. 27 (Mr. Gunn estimating maximum cost for energy efficiency programs in 2009 of $63 million); *see also* Alexander Testimony, pp. 20-24 (describing as "insufficient" the Companies' proposal to commit up to $25 million in shareholder funds). As explained repeatedly by the Companies, this $5 million per year commitment is the portion of spending on DSM/EE that will be absorbed by the Companies' shareholders, not the total amount that will be spent on these efforts. As Mr. Blank testified, the Companies' intent is to spend the totality of the $25 million commitment, and in prior cases in which the "up to" language has been used the Companies "have always lived up to spending at the maximum level identified." Hearing Tr., Vol. VI, p. 243. Thus, Competitive Suppliers' objection lacks a reasonable basis.

OEC similarly misconstrues the import of the Companies' commitment by arguing that the Commission cannot determine whether the Company's future DSM/EE programs represent a benefit of the Plan without first knowing the details of those programs. OEC Br., p. 7. However,

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and should be left for determination in the upcoming proceeding to review the Companies' benchmark report.

the Companies are not asking the Commission to find that the DSM/EE programs it will implement in 2009 and future years are a benefit of the ESP. The value contributed by the Plan, which is not available under an MRO, is the shareholder contribution to funding of future DSM/EE programs. The Commission does not need to learn the details of programs that will be implemented in future years pursuant to R.C. § 4928.66 and Staff oversight in order to understand that a $25 million contribution to those programs from the Companies' shareholders is a substantial benefit to customers that will not be available under an MRO.

OCC and OPAE suggest the Commission should implement a separate collaborative bureaucracy, which would essentially function independently of the Companies, to oversee DSM/EE programs. OCC Br., pp. 58-62; OPAE Br., p. 10. Arguments in favor of the need for such a bureaucracy are not only outside the scope of the Commission's review authority under R.C. § 4928.143(C), but they also appear to conflict with the benchmark process created by the General Assembly in R.C. § 4928.66. The General Assembly imposed on electric distribution utilities, not independent bureaucracies, the obligation to implement energy efficiency programs and peak demand reduction programs. R.C. § 4928.66(A)(1)(a), (b). The mandate is clear in the language used by the General Assembly: "[b]eginning in 2009, an electric distribution utility shall implement energy efficiency programs . . ." and "[b]eginning in 2009, an electric distribution utility shall implement peak demand reduction programs . . . ." *Id.* There is no need for a Commission order in this case requiring the Companies to do what is already imposed by law, and there certainly is no need for a Commission order that removes from the Companies, as suggested by OCC and others, the responsibility for designing and implementing the programs that the Companies are required by law to design and implement. NRDC's Mr. Sullivan intriguingly suggests that both the responsibility for implementing programs and the liability for

failing to meet statutory benchmarks could be transferred to an independent program administrator with an insurer or surety (paid for by consumers through the DSE Rider) liable for any potential forfeiture imposed by the Commission on the Companies pursuant to R.C. § 4928.66(C). Sullivan Testimony, pp. 7-8; Hearing Tr., Vol. VIII, pp. 105-08. Incredibly, although OCC in its brief seeks to transfer program responsibilities to a third party, it appears to leave all financial responsibility for noncompliance with the Companies. OCC Br., pp. 61-62. The Commission may not issue an order, either in this proceeding or in a future DSM/EE proceeding, that violates the plain language of R.C. § 4928.66(A)(1). While the establishment of a collaborative is certainly an issue that the Companies will consider as part of their continued development of energy efficiency programs[36] and their drafting of a 2009 benchmark report to be filed with the Commission on or before April 15, 2009, the demands of OCC and others simply are contrary to state law and sound reason and, thus, must be rejected by the Commission.

4. Criticisms of the Companies' proposed AMI pilot are unfounded.

Staff supports the AMI pilot program but suggests minor changes in how it is implemented. *See* Staff Br., pp. 33-34. Generally, Staff's suggestions can be addressed in discussions with stakeholders that are proposed to take place as part of the program. *See* Application, Att. F; Hussing Testimony, p. 17. However, Staff indefensibly suggests that program costs exceeding $1 million – all costs up to this amount will be paid by the Companies without passing on those costs to customers – not be recovered through the DSE Rider as proposed by the Companies but through yet another rider designated only for AMI pilot cost

[36] OCC speculates that the Companies are dragging their feet in not considering energy efficiency and demand reduction programs and could, as a result, be forced to procure additional resources at a cost premium. OCC Br., pp. 59-60. There is no evidence in the record to support OCC's speculation. Again, R.C. § 4928.66(A) clearly provides that the Companies shall implement energy efficiency and peak demand reduction programs beginning in 2009, and the Company is taking this statutory mandate seriously. Indeed, Mr. Blank testified that "[w]e are working on the programs" and "[w]e are still studying what technology arrangements are appropriate to use to minimize the cost to customers to achieve the requirements." Hearing Tr., Vol. V, p. 247.

recovery. Staff Br., p. 33. When questioned at hearing, Staff's Mr. Scheck was insistent that this was necessary although his professed basis for a separate rider – that Staff wants to be able to track the costs and benefits of the AMI pilot program – is illogical. *See* Hearing Tr., Vol. VII, pp. 270-71. Staff fails to understand that the DSE Rider is a cost recovery mechanism that has no relationship to how one would track the costs and benefits of the AMI pilot program. All tracking of costs and benefits performed by the Companies will be available for review by Staff and other stakeholders, regardless of whether recovery of costs over $1 million, which may never occur, is done through the DSE Rider or a separate rider.

OCC objects that the AMI pilot program is not big enough, not expensive enough, and that the Companies are retaining too much control through the proposed collaborative process. OCC Br., pp. 51-57. The Companies' proposal specifically includes a collaborative in which stakeholders, including OCC if it is interested, can "design potential programs on a comprehensive basis" and "facilitate the implementation of such programs by the Companies if they are cost effective." Application, Att. F, p. 1. Apparently, OCC seeks to circumvent this process via Commission order here without doing the hard work needed to reach agreement on the framework of comprehensive program design. Regardless, the 500-participant program designed by the Companies is what the Companies are willing to pay for in an amount of up to $1 million, which is a proposal that Mr. Gonzalez agrees has no equal. *See* Hearing Tr., Vol. IX, p. 40.[37] If the Commission determines that a future expansion as designed by the collaborative is cost-effective and that recovery of additional program costs through the DSE Rider is reasonable, then a program of the type favored by Mr. Gonzalez can be implemented at that time.

[37]Mr. Gonzalez questioned why the program is not year round (*see* OCC Br., p. 56), which is answered easily enough by reference to Attachment F of the Application – the "purpose of the pilot is to determine whether a program that combines Summer time-of-day generation rates with real time energy usage information can effectively change customer behavior and energy consumption." Expansion of the program as proposed by Mr. Gonzalez would be contrary to the program's focus.

Competitive Suppliers' claims that the AMI program is little more than a single sentence in Mr. Blank's testimony (Comp. Suppliers' Br., p. 24), but fails to cite to Attachment F to the Application, which provides the details of the proposed AMI program. Competitive Suppliers also rely upon one part of a compound question asked by its counsel as support for the proposition that the AMI program is "strictly in the concept stage." *Id.* However, the witness's response to this compound question does not support this proposition, as Mr. Blank simply answered that the Companies "are willing to develop this in a collaborative setting, yes. Mr. Hussing testified to the proposal that we have." Hearing Tr., Vol. VII, p. 17. Competitive Suppliers' criticisms are not supported by the record.

5. Criticisms of the Companies' proposed Smart Grid study are unfounded.

The Plan commits the Companies to conduct a comprehensive Smart Grid study by the end of the Plan's first year, and Staff is not opposed to this aspect of the Plan. Application, ¶ A.4.f, Att. E; Schneider Testimony, p. 11; Staff Br., pp. 36-27. OCC misrepresents the status of the Companies' proposal by suggesting that the Companies have not moved quickly enough to begin the study and suggesting a collaborative (the stock answer to all problems for OCC) to define goals and timelines. OCC Br., pp. 57-58. Yet the Companies have provided a clear timeline for commencing and completing the study – as a proposal included in the Plan, the Companies cannot begin this study until after the Commission approves the Plan, and then must "start it soon enough to make sure that it's completed by the end of 2009." Hearing Tr., Vol. III, p. 288. The Companies also have described in Attachment E to the Application the analyses to be performed and objectives to be accomplished. To further define the details of the Plan, the Companies will consult with expert suppliers of Smart Grid analyses for guidance. *Id.*, p. 288-89. Moreover, as OCC correctly states, the Companies will absorb all costs of this study. *See*

OCC Br., p. 57; Application, Att. E, p. 3. Thus, OCC's modest criticisms of the Companies' Smart Grid study lack merit.

Competitive Suppliers miss the point entirely by accusing the Companies of "insinuating" (a term used when the actual record does not support the point a party seeks to make) that it will not explore Smart Grid improvements if the Plan is not approved. Comp. Suppliers' Br., p. 27. The clear benefit of the Companies' proposal is that the study will be completed in 2009 and paid for *entirely* by the Company without passing any costs of the study through to customers.

6. Rider GRN is a Plan benefit.

Staff recommends the approval of Rider GRN – which implements a renewable energy credits program for customers – and "appreciates and fully supports the Companies' efforts to continue to make this voluntary green product offering available during the ESP plan period." Turkenton Testimony, pp. 12-13; Staff Br., p. 22. Under the Plan, the Companies will extend the Green Resource program beyond the end of 2008 when it currently is scheduled to terminate, thus providing an additional benefit to customers. *See* Application, ¶ A.2.d.; Hearing Tr., Vol. V, p. 248. Although Competitive Suppliers weakly complain that green options are available to customers from other sources (Comp. Suppliers' Br., p. 26), it cannot contest the fact that the Companies' renewal of the Green Resource program through Rider GRN is "an easy way for customers to get these at a very low cost and a competitively low cost, actually." Hearing Tr., Vol. V, p. 248. Thus, Rider GRN is a Plan benefit.

7. The Plan's requirement that FES support environmental remediation and reclamation efforts is a net benefit.

Under the Plan, the Companies will require FES to pay up to $15 million of remediation costs each year during the Plan period. Application, ¶ A.2.m. Staff does not oppose this aspect

of the Plan. Staff Br., p. 37. Competitive Suppliers is the only Intervenor to attempt to criticize this commitment, although it recognizes that the Companies alone retain the obligation to remediate the retired plants included in the remediation plan discussed in ¶ A.2.m. of the Application. Comp. Suppliers Br., p. 26. It nevertheless complains that the Companies have not clearly defined the total remediation cost or provided assurance that FES's contribution to the remediation costs "comes without strings." *Id.* Mr. Blank testified, however, that the costs identified in this proposal are costs that the Companies otherwise would seek to recover from customers in the future but for FES's agreement to support the remediation efforts. Hearing Tr., Vol. VI, p. 245. Moreover, there are no "strings" in the Application, and no "strings" were identified by Mr. Blank during his testimony. *See* Hearing Tr., Vol. V, pp. 211-212; Hearing Tr., Vol. VI, pp. 244-245. Competitive Suppliers have no record support for their complaints.

I. The SEE Test Should Be Resolved In This Proceeding Using The Companies' Reasoned Methodology.

A limited number of parties addressed the Companies' significantly excessive earnings test ("SEE") proposal. Other than those parties who presented witnesses, only Material Sciences and OMA mention it on brief. Material Sciences essentially just reiterates conclusions from the direct testimony of various witnesses, all of which was addressed in our Initial Brief and requires no further comment here. OMA, in almost a passing comment, opines that if the Plan didn't contain nonbypassable riders there would be no need for a SEE evaluation. The response to that view is two-fold. First, it in no way bears on the relevant issue here – i.e. whether the proposed SEE methodology is appropriate. Second, R.C. § 4928.143 provides both for nonbypassable charges as part of an ESP as well as for the SEE test. Whatever OMA's opinion, the General Assembly's enactment of S.B. 221 has already decided the question that having both mechanisms is necessary and appropriate.

As to the briefs of the parties who presented witness testimony on the SEE, most of the discussion is a repetition of that testimony, which was addressed in the Companies' Initial Brief and requires only limited comment. The Commercial Group complains the Companies' selection of the comparables group fails to give adequate weight to relevant business and financial risks of other regulated electric utilities in Ohio. There are a couple things wrong with this. First, that particular criticism has no support from any witness, least of all the Commercial Group's own Mr. Gorman who didn't address comparison with, or selection of, a comparables group at all, instead focusing only on a comparison with the utility's own allowed rate of return. Second, this suggested limitation is inconsistent with the language of the statute which in no way implies that the measure of comparability ends at the Ohio state line – under the statute, the comparables are to be selected from "publicly traded" companies facing comparable financial and business risk, wherever they are geographically located.

OEG repeats much of the direct testimony of its witnesses Messrs. Kollen and King, although with respect to the latter, it seems to overlook the fact that during cross-examination, Mr. King abandoned his pre-filed testimony, stating that the SEE criteria should not be fully resolved in this proceeding, thus putting him at odds with his OEG colleague Mr. Kollen who says that it must be fully resolved here. An alternative interpretation of OEG's Brief, of course, is that OEG has simply chosen to ignore Mr. King in this regard. In any event, this and the other arguments OEG raises on brief were fully addressed in the Companies' Initial Brief.[38]

Somewhat akin to OEG, OCC also abandons its own witness Dr. Woolridge, in favor of Mr. Cahaan's recommendation to rely on a future technical conference instead of fully resolving

[38] We don't quite know what to make of the OEG statement that "[v]igorous application of the earnings test can be used to incentivize FirstEnergy to cooperate with the Commission." *See* OEG Br., p. 37. If this is a veiled suggestion that the Commission should make some sort of extortive use of the SEE methodology in the future, the suggestion is highly inappropriate.

the SEE test in this case.[39] OCC Br., p. 94. The issue can and should, however, be resolved here for the reasons set out in the Companies' Initial Brief. OCC also criticizes statistical significance test, arguing instead for adoption of the FERC based adder which Dr. Woolridge and Mr. King proposed or, alternatively, the "zone of reasonableness" offered by Mr. Cahaan. OCC forgets, however, that Dr. Woolridge himself relied in part[40] on the same *type* of statistical significance test as did Companies' witness Dr. Vilbert (albeit with a different multiplier for the standard deviation). Thus, OCC's criticism on brief is belied by the testimony of its own witness.[41]

Staff offers an entirely new argument on brief, unsupported by any testimony on the record, essentially asserting that the General Assembly could not have intended the SEE determination to rely upon a statistical test. Staff Br., p. 40. What this argument overlooks, however, is that all of the analytic approaches used to determine the comparable sample group of companies are in fact statistical approaches, using various filtering criteria and using averaging and means, *i.e.,* statistical techniques. Staff, through the testimony of Mr. Cahaan, only eschews use of a statistical approach with respect to determining one element of the SEE analysis, the threshold increment of what is significantly excessive. Staff seems to have no problem, however, with the use of statistical analysis with respect to analyzing the data from the sample group of companies.[42] Thus, this new "insight" on brief as to what the General Assembly meant

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[39] Although it is unclear whether OCC, in asserting that "the recommendation that the 'significantly excessive earnings' test should be considered after the ESP proceeding has concluded was also made by Staff Witness Cahaan" (OCC Br., p. 94), understands that Mr. Cahaan recommended only that the question of selection of the comparables group and, derivatively, the determination of its representative return on equity be deferred to the technical conference, not the entire SEE test.

[40] Dr. Woolridge averaged his statistical confidence interval result with the 150 basis point adder to arrive at his final recommendation for what should be the threshold increment for determining what is "significantly excessive." OCC's assertion that "Dr. Woolridge's 150 basis point adder is reasonable and should be adopted" is simply a mischaracterization of Dr. Woolridge's position and his testimony. OCC Br., p. 96.

[41] As well as by Mr. King who, however reluctantly, agreed that there was some statistical confidence interval that would supply an appropriate measure.

[42] Indeed, Mr. Cahaan endorsed much of the analysis of Companies' witness Vilbert in this regard. Hearing Tr.,

is undercut by Staff's own earlier stated views. Thus, Intervenors and Staff present no valid challenge to the reasoned SEE test proposed by the Companies.

CONCLUSION

The record evidence establishes that the Plan, as proposed by the Companies, confers significant qualitative and quantitative benefits on customers and, as a result, is more favorable in the aggregate than the expected results of an MRO. In fact, based upon pricing alone without the qualitative considerations, the Plan is more favorable than an MRO. Intervenors assert a number of varied arguments against the Plan's comprehensive terms, but those arguments are in conflict with the law, self-serving, unsupported, and/or in conflict with the Plan's goals of providing stable and mitigated prices across all levels of electric service. None of the arguments erode the Plan's net present value to customers. Additionally, if the Plan is not approved, customers likely will be exposed to the risk and uncertainty of market-based pricing. Because the Plan is more favorable in the aggregate than the expected results of an MRO, the Commission must approve it.

Respectfully submitted,

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Vol. IX, p. 119 ("If the Commission had a strict up or down choice right now based upon the record of this case without such a technical conference, we have no objection to adopting Dr. Vilbert's method. And everybody can argue anything they want, but we happen to think Dr. Vilbert's method has much to commend it."); *see also id.* at p. 116 (Mr. Cahaan describing "[t]he part that I like about Dr. Vilbert's approach").

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CERTIFICATE OF SERVICE

The foregoing *Reply Brief of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company In Support Of Their Electric Security Plan* was served via electronic mail and regular mail on this 12th day of December, 2008, upon all parties of record.

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