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**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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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

**APPLICATION FOR REHEARING
OF THE NORTHEAST OHIO PUBLIC ENERGY COUNCIL
AND NORTHWEST OHIO AGGREGATION COALITION
AND REQUEST FOR EXPEDITED RULING**

Pursuant to Ohio Revised Code ("R.C.") § 4903.10 and Rule 4901-1-35, Ohio Administrative Code, the Northeast Ohio Public Energy Council ("NOPEC") and Northwest Ohio Aggregation Coalition ("NOAC") (collectively the "Large-Scale Governmental Aggregations") hereby apply for rehearing of the Finding and Order issued in the above-captioned case on January 7, 2009 ("Order") as affirmed in the Commission's January 14, 2009 Entry. The Large-Scale Governmental Aggregations request the Commission consider this Application on an expedited basis in order to ensure that NOPEC and FPL Energy ("FPLE") can consummate their firm, full-requirements power supply agreement and commence the statutory opt-out process to supply NOPEC's nearly 600,000 eligible customers either on a short-term or longer term basis prior to April 15, 2009. As explained in more detail in the attached Memorandum in Support, the Commission's Order is unreasonable and unlawful based on the following grounds:

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- A. The Order is unreasonable and unlawful in its application of R.C. § 4928.143(C)(2)(b) because it fails to appropriately apply the provisions, terms, and conditions of Ohio Edison Company, the Cleveland Electric Illuminating Company and Toledo Edison Company's (the "FirstEnergy Distribution Companies" or "Companies") Rate Stability Plan/Rate Certainty Plan Standard Service Offer, which specifically provides for the shopping credit and shopping credit cap provisions to be increased if a fuel-cost based generation rate increase is approved by the Commission. A fuel-cost based generation rate increase was approved on January 14, 2009 in Case No. 09-21 *et al.* in the form of Rider FUEL.
- B. The Order is unreasonable and unlawful in its application of R.C. § 4928.143(C)(2)(b) because it fails to appropriately apply the provisions, terms, and conditions of the previous Rate Stability Plan/Rate Certainty Plan Standard Service Offer, which necessitates updating the notice requirements to reflect the continuation of the plan past December 31, 2008 and to allow the Large-Scale Governmental Aggregations to immediately commence taking competitive, firm, full-requirements third-party generation supply, considering that the FirstEnergy Distribution Companies no longer retain any POLR shopping risk after January 1, 2009 under their current competitive bid solicitation process.
- C. The Order is unreasonable and unlawful because the Commission failed to assert its authority under R.C. § 4928.141 to require the FirstEnergy Distribution Companies to file a new SSO pursuant to R.C. § 4928.142 or R.C. § 4928.143 as is necessary to return these Companies to lawful compliance with Am. Sub. Senate Bill 221.

For these reasons, as explained in the Memorandum in Support of this Application, attached hereto, the Commission should grant this Application for Rehearing and modify its Order expressly to recognize the increase in the shopping credit and shopping credit cap provisions required under the terms of the FirstEnergy Distribution Companies' SSO to reflect the full fuel increase, to eliminate the now inapplicable notice provisions, and otherwise enable NOPEC to immediately arrange for CRES-supplied firm, full-requirements third-party generation supply to its customers on or about April 15, 2009.

Unless the Commission grants this Application and acts expeditiously, NOPEC's and NOAC's nearly 750,000 electric customers will continue to be wholly captive customers of the FirstEnergy Distribution Companies under a de facto series of temporary MROs designed solely

by the FirstEnergy Distribution Companies and not authorized or otherwise appropriately overseen by this Commission. Due to the immediacy of NOPEC's intended service date to its customers, the Large-Scale Governmental Aggregations request the Commission's Entry on Rehearing on or before February 4, 2009.

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In the Matter of the Application of Ohio Edison)	
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MEMORANDUM IN SUPPORT

I. INTRODUCTION

Through its unilateral and purely self-interested actions, FirstEnergy Corp. ("FirstEnergy"), on behalf Ohio Edison Company ("OE"), Toledo Edison Company ("TE"), and The Cleveland Electric Illuminating Company ("CEI") (collectively "Distribution Companies" or "Companies"), has forced the Commission to implement the regulatory back-stop of Am. Sub. Senate Bill 221 ("S.B. 221"), which requires the provisions, terms, and conditions of the Companies' most recent standard service offer ("SSO") to continue, perhaps indefinitely according to FirstEnergy,¹ after January 1, 2009.² Since FirstEnergy's decision to brazenly reject the Commission's just and reasonable December 19, 2008 Opinion and Order, the Commission has thoughtfully attempted to carry forward the terms and conditions of the prior Rate Stability

¹ See FirstEnergy Press Release, *Competitive Bidding Process to Begin for FirstEnergy Ohio Utilities To Procure Electric Generation Supply*, Dec. 22, 2008 (stating "A bid process consistent with the one described above will be conducted at a later date to meet customer supply needs beyond March 31, 2009").

² See R.C. § 4928.143(C)(2)(b).

Plan/Rate Certainty Plan ("RSP/RCP") while also attempting to carry out the intent of S.B. 221 in response to repeated unilateral actions and threats by FirstEnergy.

The Northeast Ohio Public Energy Council ("NOPEC") and the Northwest Ohio Aggregation Coalition ("NOAC") (collectively the "Large-Scale Governmental Aggregations") believe the Commission's January 7, 2009 Finding and Order ("Order") was generally reasonable and lawful in its application of S.B. 221 by carrying forward or updating *certain* RSP/RCP SSO provisions *as of January 7, 2009*. However, FirstEnergy's "dramatic" request on January 9, 2009, followed by the Commission's approval of Rider FUEL on January 14, 2009, now makes the Commission's Order unreasonable and unlawful in the respects described in this Application for Rehearing. The Order fails to recognize, update and implement the provisions of the RSP/RCP SSO to provide for increases to shopping credits and shopping credit caps resulting from Commission approval of an increase in FirstEnergy's generation charge. According to the shopping credit and credit cap provisions of the RSP proposed by FirstEnergy,³ approved by the Commission,⁴ incorporated into the RCP, and affirmed by the Supreme Court of Ohio,⁵ the Commission's approval of Rider FUEL triggers an increase in the avoidable expenses to be included in the shopping credit as well as an increase of the shopping credit cap.⁶

The fate of nearly 750,000 customers of NOPEC and NOAC is now at issue. FirstEnergy has unilaterally imposed what may very well be a series of three-month temporary competitive generation solicitations it has designed, without PUCO authorization or meaningful FERC

³ See Case No. 03-2144-EL-ATA *et al.* (Feb. 24, 2004), *Rebuttal Testimony of Anthony J. Alexander*, Attached Revised Rate Stabilization Plan at 2 [§ I(5)], at 3 [§I(5)(d)(1)], and at 6-8 [§ II(1)-(2)].

⁴ See Case No. 03-2144-EL-ATA *et al.* (June 9, 2004) *Opinion and Order*, at 33, 51.

⁵ See *Elyria Foundry Company v. PUCO* (2007), 114 Ohio St.3d 305, 320-321.

⁶ The shopping credit and shopping credit cap provisions of the RSP were continued under the RCP as the Commission rejected challenges to the suspension of the caps, while the shopping credits were increased only to the extent of the fuel increase being incurred by customers. See Case No. 05-704-EL-ATA *et al.* (Jan. 4, 2006), *Opinion and Order*, at 10.

oversight, creating an unregulated de facto temporary MRO. By failing to appropriately adjust the shopping credit caps in its currently effective legacy tariffs to reflect the generation charge rate increase, the Distribution Companies are continuing to hold NOPEC's and NOAC's approximately 750,000 customers captive. The Large-Scale Governmental Aggregations' customers are captive to the whims and caprices of this newly deregulated monopoly obtained by FirstEnergy through gamesmanship with the Commission and all of the Companies' Ohio customers to whom the Companies owe a duty of good faith and fair dealing. The situation FirstEnergy has created is truly insidious: arguing to go to market at wholesale to enrich its FirstEnergy Solutions generation affiliate, while constructing non-justifiable retail barriers to prevent its Large-Scale Governmental Aggregations customers from going to market at retail, thus creating the perfect "deregulated monopoly". The Commission must act decisively to properly update the Companies' tariffs to ensure that the shopping credits set forth in those tariffs reflect the full and appropriately avoidable cost of the Companies' generation rates passing through to SSO customers – currently 6.98 cents per kWh – which may change in FirstEnergy's next self-designed "competitive generation solicitation".

In addition to correctly recalculating the shopping credit and credit cap, as discussed more fully herein, the Commission also must make reasonable updates to the shopping provisions, specifically including the notice requirements to take third-party supply, in order to reflect that the Plan is being continued beyond its contemplated December 31, 2008 termination date. These updates, similar to the termination of the OE and TE Regulatory Transition Charges ("RTCs"), are necessary to *continue* the provisions, terms and conditions of the RSP/RCP SSO past their intended termination date. These updates also effectively reconcile the forced

continuation of the legacy RSP/RCP SSO with the controlling new mandates and policies of S.B. 221, specifically the encouragement and promotion of large-scale governmental aggregation.⁷

Finally, the Commission's Order was unreasonable and unlawful because the Commission failed to assert its statutory authority to direct FirstEnergy to file a new SSO pursuant to either R.C. §§ 4928.142 or 4928.143 as contemplated by S.B. 221, thereby ending the current period of regulatory limbo being imposed unilaterally by FirstEnergy. It is currently *unclear* whether FirstEnergy intends to return to the statutory realm of S.B. 221 or whether the Companies intend to repeat their Request for Proposal ("RFP") auction process in order to meet customer supply needs beyond March 31, 2009. The Large-Scale Governmental Aggregations are concerned that it *remains unclear* that "Rider FUEL is to be in effect for a limited time" and it may not be "evident that the [Companies' Rider FUEL] request was not filed merely to circumvent, and as a substitute for, permanent rate relief."⁸ Without Commission action directing FirstEnergy to file a new SSO application under S.B. 221, the current situation will *remain unclear* whether the Companies' RFP auction process, a process implemented without Commission authority or oversight and outside of S.B. 221, will be repeated seriatim until the Commission's decision in Case No. 08-936-EL-SSO is reviewed on appeal by the Ohio Supreme Court.⁹ What *is clear* is that R.C. § 4928.141 provides the Commission with the authority to direct FirstEnergy to comply with S.B. 221 by filing a new SSO for the Commission's review and consideration. It was unreasonable and unlawful for the Commission not to act upon that authority. Put simply, it is time for the Commission to order the Distribution Companies to put up or shut up.

⁷ See R.C. § 4928.20(K).

⁸ See Case No. 09-21 *et al.* (Jan. 14, 2009) *Finding and Order*, at 4.

⁹ See Case No. 08-936-EL-SSO (Jan. 13, 2009) *Letter from Jon A. Husted to Chairman Schriber* (asserting that Commission's Opinion and Order was unlawful and inconsistent with S.B. 221).

Based on the foregoing, and as discussed in more detail below, the Large-Scale Governmental Aggregations hereby request the Commission grant this Application for Rehearing of its January 7, 2009 Order and provide the following relief:

1. The Shopping Credit and Shopping Credit Cap provisions of the RSP/RCP SSO be updated so that the credit equates to the entire 6.98 cents per kWh generation price currently being recovered by the Companies consistent with the Commission's Order approving Rider FUEL in Case No. 09-21 *et al*, and that the credit automatically increase with any increases that may be recovered by the Companies in later periods.
2. The notice requirement provisions be updated to allow for shopping to continue under the continuing RSP/RCP SSO by requiring the Large-Scale Governmental Aggregations to provide the Companies' 30 days notice of their intent to commence the statutory opt-out process and shop, considering that the Companies no longer retain any POLR shopping risk.
3. The Commission exert its statutory authority under R.C. § 4928.141, and direct the Companies to file a new SSO pursuant to R.C. §§ 4928.142 or 4928.143 by February 1, 2009 or such other date as the Commission determines to be in the public interest.

Further, due to the critical implications of the Commission's decision on these issues for the Large-Scale Governmental Aggregations, specifically NOPEC's ability to:

1. immediately finalize a firm, full requirements power supply agreement with FPLE resulting in material savings to NOPEC's 600,000 customers in the OE and CEI service territories;
2. commence the statutory opt-out notice process to enroll all eligible customers pursuant to R.C. § 4928.20(D) and the Commission's Rules; and
3. provide notice to FirstEnergy of NOPEC's intention to take alternative generation supply from FPLE so that customers can be enrolled and service begun no later than April 15, 2009,

the Large-Scale Governmental Aggregations hereby request the Commission address this Application for Rehearing and grant the relief requested by NOPEC and NOAC on an expedited basis on or before February 4, 2009.

II. BACKGROUND

On December 19, 2008, the Commission issued an Opinion and Order in this case *authorizing* FirstEnergy to implement an SSO pursuant to the Companies' proposed Electric Security Plan ("ESP") with certain modifications deemed to advance the public's interest and the policies of the state. Importantly, for the Large-Scale Governmental Aggregations and other parties wishing to shop, the Commission's December 19, 2008 Order ("ESP Order") eliminated the major barriers to competition initially included by FirstEnergy in its ESP Application as filed on July 31, 2008.

On December 22, 2008, the Companies determined it to be in their self interest to reject, as is their right under R.C. § 4928.143(C)(2)(a), the ESP Order. Thus, because their Market Rate Option ("MRO") application had been previously rejected by the Commission, FirstEnergy has been operating, since December 22, 2008, outside of the regulatory scheme established by S.B. 221 and has not yet proposed a new SSO, pursuant to either R.C. §§ 4928.142 or 4928.143.¹⁰

The Companies also made public on December 22, 2008 their intent to continue the prior SSO in effect and to unilaterally carry out a competitive bidding process ("CBP") using an unapproved RFP format to procure electric generation for its Ohio utilities for an approximate three-month period from January 5, 2009 through March 31, 2009. Importantly, under the terms of the CBP RFP, the Companies shifted shopping and other risks associated with serving as the provider of last resort ("POLR") to FirstEnergy Solutions ("FES") and the other undisclosed suppliers, a unilateral modification of the prior RSP/RCP SSO. As expressed by FirstEnergy in the information provided to potential bidders:

¹⁰ Previously, on November 25, 2008, the Commission rejected the Companies' MRO application in Case No. 08-936-EL-SSO. The Large-Scale Governmental Aggregations do not believe the Commission's limited granting of the Companies' Application for Rehearing for "further consideration of the matters specified in the application for rehearing" constitutes a return to compliance by the Companies with S.B. 221. See Case No. 08-936-EL-SSO (Jan. 21, 2009), *Entry on Rehearing*.

*Table 1 shows the nominal MW quantity associated with the energy to be delivered for each tranche based solely on historical data for the maximum hourly energy but is not necessarily indicative of the actual energy quantity to be delivered for each tranche because the amount of actual SSO Load will depend upon many factors, including but not limited to, customer migration to CRES Suppliers and weather conditions. Bidders are responsible for evaluating the uncertainties associated with providing the wholesale energy needed to serve the FirstEnergy Ohio Utilities SSO Load.*¹¹ (Emphasis supplied.)

The CBP RFP occurred on December 31, 2008 resulting in a winning bid price of 6.98 cents per kWh, which, according to a FirstEnergy Press Release, “will be used to provide generation service to retail customers who choose not to shop with alternative suppliers.”¹²

In its January 7, 2009 Order, the Commission established the terms and conditions of SSO service after January 1, 2009 pursuant to R.C. § 4928.143(C)(2)(b).¹³ The Commission determined that certain provisions, terms and conditions of “the [Companies’] most recent SSO contained in the Companies’ RCP approved by the Commission in Case No. 05-1125-EL-ATA, which incorporates provisions of the RSP approved in Case No. 03-2144-EL-ATA, et al.” must continue until the Commission approves a new SSO pursuant to R.C. § 4928.142 or R.C. § 4928.143 as contemplated by S.B. 221.¹⁴ The Commission’s Order also determined that the terms of the RSP/RCP SSO should be updated to reflect that all regulatory transition costs had been fully recovered by OE and TE from customers as of December 31, 2008, and, therefore, regulatory transition charges (RTCs) for OE and TE should also be terminated.¹⁵ Similarly, the Commission’s Order also determined that the Fuel Cost Recovery Mechanism (“FRM”), RTC

¹¹ See FirstEnergy Ohio RFP Frequently Asked Questions – General GEN017, 26-Dec.-08.

¹² See FirstEnergy Press Release, *FirstEnergy Ohio Utilities Secure Supply of Power; Successful Competitive Process Results in Four Winning Bidders*, January 2, 2009.

¹³ Importantly, the Commission rejected the Companies’ argument that R.C. § 4928.141(A) controlled, as the ESP Order had *authorized* a new ESP SSO. See Case No. 08-935-EL-SSO (Jan. 7, 2009) *Finding and Order*, at 7.

¹⁴ See Case No. 08-935-EL-SSO (Jan. 7, 2009) *Finding and Order*, at 8, 13.

¹⁵ See Case No. 08-935-EL-SSO (Jan. 7, 2009) *Finding and Order*, at 8-9.

Offset (“RTCO”) Rider, and Fuel Cost Recovery (“FCR”) Rider should also be terminated.¹⁶

The Commission determined that these provisions were displaced by the provision in R.C. § 4928.143(C)(2)(b) permitting the Companies to file for any increases or decreases in fuel costs.¹⁷ Importantly, the Commission determined it appropriate to update the RSP/RCP SSO to reflect its forced continuation past its intended termination date.

The Commission also determined that Rate Stability Charges (“RSC”) and shopping credits and caps must continue to apply after December 31, 2008 as the terms of the RCP did not contemplate an end to these provisions separate from the termination of the RCP itself.¹⁸ While sympathetically noting that the “shopping credit model may not have a place in an SSO established pursuant to Section 4928.142 or 4928.143,” the Commission asserted that “at this time, we are not establishing an SSO pursuant to Section 4928.142 or 4928.143, Revised Code; rather, we are continuing the most current SSO pursuant to the statutory requirements and the current SSO includes shopping credits and shopping credit caps.”¹⁹ However, the Commission’s decision to eliminate the FCR Rider and FRM, as discussed in further detail below, did directly impact shopping credits as the shopping credit adder (“Adder”) provisions approved in the RCP case specifically incorporated the FCR Rider into the amount of the credit.

In sum, the Commission ordered FirstEnergy to continue its RSP/RCP SSO, but determined it necessary and appropriate to update the Plan to terminate charging RTCs for OE and TE along with the FRM, RTCO Rider, and FCR Rider. The Commission also noted the Companies’ statutory right to recover fuel cost increases under R.C. § 4928.143(C)(2)(b), but, as

¹⁶ See Case No. 08-935-EL-SSO (Jan. 7, 2009) *Finding and Order*, at 8-9. (noting the FCR should “remain in place for the limited purpose of collecting all remaining 2008 actual fuel costs . . .”).

¹⁷ See Case No. 08-935-EL-SSO (Jan. 7, 2009) *Finding and Order*, at 9, 13.

¹⁸ See Case No. 08-935-EL-SSO (Jan. 7, 2009) *Finding and Order*, at 8.

¹⁹ See Case No. 08-935-EL-SSO (Jan. 7, 2009) *Finding and Order*, at 9-10.

of the date of the Order, FirstEnergy had not yet filed for any fuel cost increases resulting from its December 31, 2008 CBP RFP.

On January 9, 2009, asserting dire financial circumstances resulting from the Commission's January 7, 2009 Order, the Companies filed a barrage of pleadings, including an application in Case No. 09-21 *et al.* ("Rider FUEL Application") requesting authority:

to apply a retail surcharge on all Standard Service Offer retail electric customers ("SSO Customers") for the difference in all costs incurred by the Companies to purchase power for customers receiving generation service beginning with service rendered on January 1, 2009 and the unbundled generation revenue for each of the Companies and customer classes as set out in the Companies' current rate plan.²⁰

The surcharge, Rider FUEL, was proposed to recover:

the difference between each Company's fuel costs, including purchased power, . . . and any other expenses to provide generation service for all retail customers receiving generation service from each Company and the generation revenue - including generation charges and rate stabilization charges - charged to those customers.²¹

Importantly, the Rider FUEL Application states:

Rider FUEL will remain in effect, subject to full recovery of any reconciliation balance, until the effective date of tariffs filed to implement the Commission's authorization of a SSO under R.C. §§ 4928.142 or 4928.143.²²

On January 14, 2009, the Commission granted the Companies' demand for rate relief through Rider FUEL "on a temporary basis and only at the minimal level."²³ Specifically, the Commission determined for OE and TE that

Rider FUEL should be established at an amount equal to the difference in the costs incurred by the Companies to purchase power for customers

²⁰ See Case No. 09-21 *et al.* (Jan. 9, 2009), *Application*, at 2.

²¹ See Case No. 09-21 *et al.* (Jan. 9, 2009), *Application*, at 3.

²² See Case No. 09-21 *et al.* (Jan. 9, 2009), *Application*, at 3.

²³ See Case No. 09-21 *et al.* (Jan. 14, 2009), *Finding and Order*, at 4.

receiving generation service pursuant to the Companies' power supply agreement and the unbundled generation revenues for OE's and TE's customer classes as set out in the Companies' current rate plan.²⁴

For CEI, due to the ongoing recovery of RTCs after January 1, 2009, the Commission determined Rider FUEL should be set at the same level as OE and TE, but, additionally, that

CEI be granted the appropriate accounting authority to defer, with carrying costs, any amount for such purchased power that exceeds the authorized amount in Rider FUEL for future recovery plus the current unbundled generation revenues for CEI's customer classes as set out in the Companies' current rate plan.²⁵

The net effect of the Commission's approval of Rider FUEL is to update the current RSP/RCP SSO by increasing the amount of generation revenues being recovered by FirstEnergy to a level commensurate with the recently determined cost of generation as determined by the RFP CBP. Updating the generation provisions of the current RSP/RCP SSO by "approving new rates reflecting the Companies' current costs and investments" was clearly what FirstEnergy was requesting in Case No. 09-21 *et al.*²⁶ However, as argued in further detail below, FirstEnergy's actions and the Commission's *duty* to continue the prior RSP/RCP SSO triggers *other* updates to the RSP/RCP SSO not addressed either in the Commission's January 7, 2009 Order in Case No. 08-935-EL-SSO or in its January 14, 2009 Finding and Order in Case No. 09-21-EL-ATA. Because these "temporary" tariffs may last longer than what any stakeholder initially contemplated, it is very important for the Commission to make a specific order to update the tariffs in accordance with the terms of the RSP/RCP, as requested herein.

²⁴ See Case No. 09-21-EL-ATA *et al.* (Jan. 14, 2009), *Finding and Order*, at 6.

²⁵ See Case No. 09-21-EL-ATA *et al.* (Jan. 14, 2009), *Finding and Order*, at 6-7.

²⁶ See Case No. 08-935-EL-ATA *et al.* (Jan. 9, 2009), *Application for Rehearing*, at 17.

III. ARGUMENT

- A. **The Order is unreasonable and unlawful in its application of R.C. § 4928.143(C)(2)(b) because it fails to appropriately continue the provisions, terms, and conditions of the previous Rate Stability Plan/Rate Certainty Plan Standard Service Offer, which specifically provides for the shopping credit and shopping credit cap provisions to be increased if a fuel cost based generation rate increase in the form of Rider FUEL is approved by the Commission as occurred on January 14, 2009 in Case No. 09-21 *et al.***

1. **R.C. 4928.143(C)(2)(b) requires the Commission to *continue* the shopping credit and cap provisions of the prior SSO.**

The Commission's January 7, 2009 Order correctly asserts that R.C. § 4928.143(C)(2)(b) controls the current regulatory predicament created by FirstEnergy's rejection of the Commission's December 19, 2008 Opinion and Order. The Commission also correctly asserts that the current SSO to be continued is the "Companies' RCP approved by the Commission in Case No. 05-1125-EL-ATA *et al.*, which incorporates provisions of the RSP approved in Case No. 03-2144-EL-ATA."²⁷ While the Commission determined that the shopping credits, including RSCs, and the shopping credit caps must continue, the Commission failed to consider *how* these provisions should be *continued* and what updates to these provisions are necessary in light of the continuation of the RSP/RCP SSO. Specifically, as noted above, elimination of the FCR Rider and FRM directly affects the shopping credits by eliminating the Adder provision approved pursuant to the RCP.²⁸ Similarly, the Commission's approval of Rider FUEL on January 14, 2009 adjusted the amount of generation revenue being recovered by FirstEnergy, another adjustment that, as discussed below, affects the shopping credits. As Rider FUEL is "avoidable for customers who shop with a certified supplier" pursuant to its own terms, the

²⁷ See Case No. 08-935-EL-SSO (Jan. 7, 2009) *Finding and Order*, at 8, 13.

²⁸ See OE tariff, Original Sheets No. 63, 64, and 107; See CEI tariff, Original Sheets No. 101, 103, 107.

Commission needs to take the additional step to update the RSP/RCP SSO to apply this generation charge adjustment to the SSO's shopping credit and shopping credit cap provisions.²⁹

2. **The RSP as continued in the RCP and affirmed by the Ohio Supreme Court expressly requires the shopping credit and cap provisions to be updated to reflect purchased power generation adjustments.**

Both the shopping credits and cap provisions of the continuing SSO are constructed so that adjustments (increases) to the generation charge being recovered by FirstEnergy will result in equal adjustment to both the shopping credit and credit cap provisions. The shopping credits and cap provisions of the continuing SSO are derived from the revised Rate Stabilization Plan proposed in the "Rebuttal Testimony of Anthony J. Alexander" on February 24, 2004 in Case No. 03-2144-EL-ATA *et al.* as eventually modified and approved by the Commission in its initial Opinion and Order³⁰ and revised by the Commission in its Entry on Rehearing.³¹ Section I(5) of the revised plan establishes when and how the Companies may increase their generation charges, stating:

the Companies may adjust the tariffed generation charge (for purposes of this Section, the tariffed generation charge shall equal unbundled "little g" as determined in Paragraph 1 of Section II plus any adjustments made pursuant to this Section) beginning January 1, 2006 and thereafter, only for actual costs incurred and if the company satisfies the reasons identified in Paragraph 5(d) of this Section and the conditions contained in this Paragraph are met.³² (Emphasis supplied.)

Critical to the analysis of the shopping credit provisions, Section I(5)(d) provides that the Companies may apply for an adjustment to the tariffed generation charge based on an

²⁹ See CEI tariff, Original Sheet No. 105, Page 1 of 2.

³⁰ See Case No. 03-2144-EL-ATA (June 9, 2004), *Opinion and Order*.

³¹ See Case No. 03-2144-EL-ATA (Aug. 4, 2004), *Entry on Rehearing*.

³² Although the Companies have boldly and unequivocally asserted their authority to recover purchased power costs while also asserting that the RSP/RCP SSO should continue, looking back to the actual provisions of the plan limits adjustments to the generation tariff charge to no more often than 12 months for increases no greater than 15% after Commission approval. See *Revised RSP Plan I(5)(a)-(c)*.

increase to fuel costs stemming from a purchased power arrangement.³³ Rider FUEL is such an approved generation charge adjustment stemming from the Companies' December 31, 2008 purchased power arrangement pursuant to the RFP CBP, as was strenuously argued by the Companies in the Rider FUEL Application.³⁴

Under the current RSP/RCP SSO, the "enhanced" shopping credit, as initially proposed by FirstEnergy, continues to equal a customer's generation charge (including "any riders or charges implemented pursuant to Section I Paragraph 5"³⁵) plus a portion or potentially 100% of RSC.³⁶ In the RCP, a limited modification to the shopping credit was made actually applying the RSP avoidable expense model to increase the shopping credits "by the amount of the fuel cost increases reflected in rates rather than the full fuel cost increases incurred."³⁷ This modification was applied through the Adder, which, as discussed above, was recently eviscerated by elimination of the FCR Rider and FRM. The Commission's Opinion in the RCP case unambiguously continues the RSP's provisions for determining how the shopping credits are to be calculated by asserting:

The shopping credit in the RSP is actually an avoidable expense model and under the RCP the shopping credit will maintain the avoidance of all relevant expenses. The fuel expense deferral cannot be included as an

³³ See Case No. 03-2144-EL-ATA (Feb. 24, 2004), *Rebuttal Testimony of Anthony J. Alexander, Revised Plan*.

³⁴ See Case No. 09-21-EL-ATA *et al.* (Jan. 14, 2009), *Application* at 12-13 (asserting that fuel cost adjustments include purchased power cost).

³⁵ See Case No. 03-2144-EL-ATA (Feb. 24, 2004), *Rebuttal Testimony of Anthony J. Alexander, Revised Plan*, at 6. Section II, Paragraph 1 explains the generation charge as:

The generation charge by tariff effective with bills rendered as of January 1, 2006 and usage through December 31, 2008, shall equal "little g" in effect as of December 31, 2005, without regard to the transition rate credit rider, plus any riders or charges implemented pursuant to Section I Paragraph 5.

³⁶ See Case No. 03-2144-EL-ATA (June 9, 2004), *Opinion and Order*, at 6.

³⁷ See Case No. 05-1125-EL-ATA (Jan. 4, 2006), *Opinion and Order*, at 10.

avoidable expense as it is not yet an expense being incurred by customers.³⁸

Pursuant to both the terms and the logic of the RSP, as incorporated into the RCP, Rider FUEL is an avoidable expense generation charge adjustment currently being incurred by customers. Therefore, the shopping credit must be adjusted to include the full amount of this Rider.

Similar to the shopping credit, adjustment of the generation charge pursuant to Section I, Paragraph 5 is also referenced in Section II, Paragraph (2)(b) of the Revised RSP Plan as the trigger for increasing the shopping credit cap. Specifically, the applicable portion of Section II, Paragraph (2)(b) states:

In no event shall the total shopping credit as determined in this Section for any customer be greater than the shopping credit set forth in Attachment 5 hereto, plus any riders or charges implemented pursuant to Section I Paragraph 5.³⁹ (Emphasis supplied.)

Attachment 5 to the Revised RSP Plan referenced the Companies' proposal to use the 2004 shopping credit as the applicable cap.⁴⁰ The Commission, in its RSP Order, referencing the prior success of shopping credits in promoting and achieving then-perceived successful levels of shopping, determined it appropriate to approve this shopping credit cap language with a modification to utilize the 2005 shopping credit as the initial avoided cost cap under the RSP.⁴¹ The Commission, in its Entry on Rehearing, expressly stated

³⁸ See Case No. 05-1125-EL-ATA (Jan. 4, 2006), *Opinion and Order*, at 10.

³⁹ See Case No. 03-2144-EL-ATA (Feb. 24, 2004), *Rebuttal Testimony of Anthony J. Alexander, Revised Plan*, at 7.

⁴⁰ See Case No. 03-2144-EL-ATA (Feb. 24, 2004), *Rebuttal Testimony of Anthony J. Alexander, Revised Plan*, at Attachment 5.

⁴¹ See Case No. 03-2144-EL-ATA (June 9, 2004), *Opinion and Order*, at 33. The Commission also noted that it was "concerned that the impact of the RSP on shopping cannot be determined at this time, and there is a definite benefit to the retention of at least minimum shopping levels as the market develops." Clearly, this premonition that the RSP could potentially severely limit customer shopping as argued by the Large-Scale Governmental Aggregations, the marketers, and OCC has come to pass. See *Id.* at 35.

The Commission finds that giving FirstEnergy the ability to file an application to adjust generation rates to account for increases in the cost of fuel and taxes, as well as the establishment of a rate stabilization charge (RSC), creates an appropriate balance of risk and benefits for both customers and FirstEnergy in providing stabilized rates for electric service for a period of 2006 through 2008. We also believe that any approved increases will not adversely affect marketers inasmuch as any increases in the generation rate would have the effect of increasing the avoidable costs, shopping credit caps, and the price of MSG. (emphasis supplied)⁴²

The approved language from the RSP was then continued under the RCP, without modification, as the Commission, in this January 4, 2006 Opinion, expressly rejected Constellation's request to suspend the cost cap provisions, stating the caps are "not part of the instant proceeding, and suspension of the price caps is not appropriate at this time."⁴³

Just as is the case with shopping credits themselves, by both the terms and the logic of the RSP, as incorporated into the RCP, Rider FUEL is an approved avoidable expense generation charge adjustment currently being incurred by customers as contemplated in Section I, Paragraph 5 of the RSP now incorporated into the RSP/RCP SSO. Therefore, the shopping credit caps, like the shopping credits, must be adjusted to include the full amount of this Rider.

Reviewing the terms and conditions of the RSP/RCP SSO as approved by the Commission's Orders and Entries on Rehearing in both Case Nos. 03-2144-EL-ATA and 05-1125-EL-ATA, the terms and conditions of the current SSO logically require that the shopping credit and cap provisions be updated to reflect the Rider FUEL adjustment to the SSO. This result was expressly contemplated by the Ohio Supreme Court when it reviewed the shopping credit cap issue in *Elyria Foundry v. PUCO*.⁴⁴ The Court, in rejecting

⁴² See Case No. 03-2144-EL-ATA (Aug. 4, 2004), *Entry on Rehearing*, at 3.

⁴³ See Case No. 05-1125-EL-ATA (Jan. 4, 2006), *Opinion and Order*, at 10.

⁴⁴ See *Elyria Foundry v. PUCO* (2007), 114 Ohio St.3d 305, 2007 Ohio 4164, at 320-321.

Appellant WPS Energy Services' argument that the Commission should have eliminated the shopping credit caps in the RCP, continued the shopping credit caps and reasserted the Commission's determination of how best to protect the competitive market, stating:

In order to protect marketers like WPS, the commission's order approving the rate-stabilization plan provided that any approved increases in FirstEnergy's generation rates for 2006 through 2008 would also increase "the avoidable costs (i.e., shopping credits) [and] shopping credit caps." Rather than choosing to completely eliminate shopping-credit caps, the commission decided that adjusting the caps to reflect any future increases in FirstEnergy's generation rates better protected the competitive market. Again, decisions on the level of shopping incentives are within the discretion of the commission.⁴⁵ (Emphasis supplied.)

FirstEnergy unilaterally has forced the extension of the RSP/RCP SSO, and the Commission has approved an adjustment (increase) to generation rates that is now being recovered from customers. The controlling RSP/RCP SSO provides a specific mechanism to increase the shopping credits and shopping credit caps in light of this approved adjustment. Failure to update the shopping credit and shopping credit cap provisions would be unlawful and unreasonable because this would be a failure by the Commission to continue the Plan, as designed, approved, affirmed, and intended to be carried out. In essence, failure to adjust the shopping credit would force shopping customers to subsidize FirstEnergy's cost of fuel.

3. The shopping credit and shopping credit cap provisions should be updated to reflect the current 6.98 cents per kWh generation charge.

The Commission in its January 14, 2009 Finding and Order approved the Rider FUEL to the extent it recovers the "actual, reasonable, and prudently incurred purchased power costs set forth in Column G of Attachment C to the application . . ."⁴⁶ While the Commission determined that it would review the prudence of these purchased power costs, it is currently allowing

⁴⁵ See *Elyria Foundry v. PUCO* (2007), 114 Ohio St.3d 305, 2007 Ohio 4164, at 320-321.

⁴⁶ See Case No. 09-21-EL-ATA *et al.* (Jan. 14, 2009), *Finding and Order* at 6.

FirstEnergy to recover *at least* the full 6.98 cents per kWh that FirstEnergy is paying pursuant to the RFP CBP.⁴⁷ The Large-Scale Governmental Aggregations respectfully assert that the appropriate update of the shopping credit and credit cap provisions should include *at least* this full 6.98 cents per kWh being recovered by FirstEnergy.

B. The Order is unreasonable and unlawful in its application of R.C. § 4928.143(C)(2)(b) because it fails to appropriately continue the provisions, terms, and conditions of the previous RSP/RCP SSO, which necessitates updating the notice requirements to reflect the continuation of the Plan past December 31, 2008 and to allow the Large-Scale Governmental Aggregations to immediately commence taking competitive, firm, full-requirements, third-party generation supply, considering that FirstEnergy no longer retains any POLR risk after January 1, 2009.

1. The shopping notice provisions are unworkable and inapplicable as currently set forth in the RSP/RCP SSO and must be updated to continue the ability to shop under the plan after January 1, 2009.

The Commissions' Findings of Fact and Conclusions of Law in its RSP decision determined that "[a] properly structured RSP can provide stable rates through 2008, fulfill the requirements of Section 4928.14, Revised Code, and continue to foster the development of a competitive market."⁴⁸ Without addressing the success of the RSP as incorporated into the RCP at continuing to develop a competitive market prior to December 31, 2008, the notice and enhanced shopping credit provisions must be updated by the Commission for shopping to continue *at all* after January 1, 2009 pursuant to the RSP/RCP SSO's terms.

Returning to the revised RSP proposed in the Rebuttal Testimony of Anthony J. Alexander, the RSP, as eventually approved and incorporated into the RCP, sets forth specified shopping options available to customers to take advantage of an enhanced shopping credit

⁴⁷ See Case No. 09-21-EL-ATA *et al.* (Jan. 14, 2009), *Finding and Order* at 7.

⁴⁸ See Case No. 03-2144-EL-ATA (June 9, 2004), *Opinion and Order*, at 49.

including “little g” and a percentage of up to 100% of RSCs.⁴⁹ These options, set forth in Section II, Paragraph (2.) (b)(1)-(2) were as follows:

(B) Commencing with usage as of January 1, 2006 and while this Plan is in effect through December 31, 2008, shopping customers for each Company shall receive a credit equal to their generation charge as defined in Paragraph 1 of this Section. In addition, if government aggregators or commercial/industrial customers enter into a firm generation service electric contracts), i.e., satisfying the full capacity, energy and transmission requirements associated with such customer loads and with a credit worthy supplier, for a binding term

- (i) commencing January 1, 2006 *through December 31, 2008*, and sufficient *evidence of such contract(s) is provided to the Company prior to December 31, 2004*, or
- (ii) commencing January 1, 2007 *through December 31, 2008* and such *notice is provided prior to December 31, 2005*, or
- (iii) commencing January 1, 2008 *through December 31, 2008* and such *notice is provided prior to December 31, 2006*,

then such government aggregators and/or commercial/industrial customers shall be entitled to increase the credit by selecting at the time of the applicable contract notice set forth above either the credit set forth in Paragraph 2(b)(1) or 2(b)(2) of this Section for the entire period of the contract and for aggregators all customers within the aggregated group shall be under the same credit election. . . .

- (1) The credit shall be increased to include the following percentages of the RSC in effect as of January 1, 2006 as to those customers
 - 65% during the period January 1, 2006 *through December 31, 2006*;
 - 75% during the period January 1, 2007 *through December 31, 2007*; and
 - 85% during the period January 1, 2008 *through December 31, 2008* . . .
- (2) The credits shall be increased to include 100% of the RSC in effect as of January 1, 2006, provided that if for any reason customers within the aggregation group or such commercial/industrial customers return to the Company for generation service during the term of such contracts), except

⁴⁹ See Case No. 03-2144-EL-ATA (Feb. 24, 2004), *Rebuttal Testimony of Anthony J. Alexander*.

customers that elect to opt out of an aggregation program pursuant to Section 4928.20(D) O.R.C., the Company notwithstanding any other provision hereof, will charge such returning customers the then current market price for electricity. . . .⁵⁰ (Emphasis supplied.)

Clearly, no option extends past December 31, 2008. Further, no option contemplates a three-month extension of the RCP/RSP SSO. Similarly, no option contemplates the continuation of RSCs themselves past December 31, 2008, especially in a situation where the FirstEnergy utilities have shifted shopping and other POLR risk onto their generation suppliers selected in their own procurement process. Since all parties presumed that FirstEnergy would comply with the Commission's application of S.B. 221, the earliest that any party could have known they would need to notify FirstEnergy of their intent to take competitive third-party supply pursuant to an RSP/RCP SSO was December 22, 2008, with an actual Commission Order directing the RSP/RCP SSO to continue coming out as recently as January 7, 2009.

Clearly it is now absolutely necessary for the Commission to update these shopping provisions to reflect the current circumstances of the continuation of these provisions of the RSP/RCP SSO. Failure to do so would be unjust and unreasonable as shopping by the Large-Scale Governmental Aggregations would be impossible.

- 2. FirstEnergy has already made its own updates to the RSP/RCP SSO thereby eliminating any potential harm resulting from updating the notice provisions to allow for customer shopping.**

FirstEnergy's actions since December 19, 2008 have already resulted in material modifications of the RSP/RCP SSO as initially proposed by FirstEnergy and as approved by the Commission and incorporated into the RCP SSO. While FirstEnergy may have asserted dire financial consequences as the basis for its actions, these actions were self-interested and brought

⁵⁰ See Case No. 03-2144-EL-ATA (Feb. 24, 2004), *Rebuttal Testimony of Anthony J. Alexander, Revised Plan*, at 6-8.

about by FirstEnergy's own profit-driven decision to reject the Commission's just and reasonable Order authorizing the Companies' ESP.

First, FirstEnergy, through its unapproved and unilateral implementation of the RFP CBP, has shifted the shopping and other risks associated with serving as the provider of last resort to FirstEnergy Solutions ("FES") and the other undisclosed suppliers. Integral to the RSP/RCP SSO, the Commission approved the Plan as an appropriate balance of compensation for the risk retained by FirstEnergy, and customers have been and now continue to richly compensate FirstEnergy through the RSCs for retaining this risk.⁵¹

As specifically stated in Section II, Paragraph (3) of the Revised RSP Plan,

3. In exchange for the payment of the RSC and the other provisions hereof, the Companies shall:
 - (a) provide the price and rate discounts herein proposed;
 - (b) provide price certainty and supply assurances over an extended period of time;
 - (c) bear the risks, costs and assume the volatility associated with rate and price certainty during the period of this Plan; and serve as the provider of last resort for customers. (Emphasis supplied.)⁵²

As noted above, the terms of the RFP CBP state that the bidding generation suppliers are now responsible for the *"the uncertainties associated with providing the wholesale energy needed to serve the FirstEnergy Ohio Utilities SSO Load."*⁵³

In conjunction with this first self-serving modification, FirstEnergy has also advantageously ignored a second provision under its approved RSP Plan to which FirstEnergy

⁵¹ See Case No. 03-2144-EL-ATA (Aug. 4, 2004), *Entry on Rehearing*, at 3.

⁵² See Case No. 03-2144-EL-ATA (Feb. 24, 2004), *Rebuttal Testimony of Anthony J. Alexander, Revised Plan*, at 9.

⁵³ See FirstEnergy Ohio RFP Frequently Asked Questions – General GEN017, 26-Dec.-08.

expressly obligated the Companies and their affiliate, FES. Specifically, in order to maintain the balance of rate certainty, financial stability of the operating companies, and continued development of competitive markets, FirstEnergy agreed under Section I, Paragraph (5)(e) that

- (e) The Companies will make changes in the affiliated contract for generation service to reflect the above provisions or any other change to make such contract consistent with the terms of this Plan, including the extension thereof. (Emphasis supplied.)⁵⁴

Since FirstEnergy determined it prudent to continue the RSP/RCP SSO instead of accepting the Commission's Order authorizing its ESP, shouldn't the Companies and their affiliate have been required to continue their current affiliate contract pursuant to the terms of the RSP/RCP SSO as opposed to commencing an RFP CBP? Clearly, another contract was possible as the Companies' determined as of July 31, 2008 that "Integral to the design of [FirstEnergy's ESP] Plan is an arrangement with FirstEnergy Solutions for Generation Supply."⁵⁵ Instead, they unilaterally implemented a RFP CBP process that shifted the POLR risk they continue to be compensated for to their suppliers, and are now recovering such generation charge adjustments through Rider FUEL.

While these unilateral updates were for the benefit of FirstEnergy and its affiliates, they should also have a silver lining for the Large-Scale Governmental Aggregations and, perhaps, other parties intent on shopping during the current period of regulatory limbo. The justifications for the extensive notice requirements incorporated into the RSP/RCP SSO have disappeared as of January 1, 2009 because FirstEnergy no longer retains any shopping risk for the three-month term of the current *or any potential future* RFP CBPs. Under the RSP/RCP SSO, prior to the Companies' unilateral updates, the Commission found that "Applicants should be allowed to

⁵⁴ See Case No. 03-2144-EL-ATA (Feb. 24, 2004), *Rebuttal Testimony of Anthony J. Alexander, Revised Plan*, at 4.

⁵⁵ See Case No. 08-935-EL-SSO (July 31, 2008), *Electric Security Plan Application*, at 7.

properly manage their risk. . .” Under the RFP CBP, FirstEnergy no longer retains the risks subsumed within its prior procurement strategy, and the CBP RFP auction winners are now the parties contractually obligated to either reap the benefits of the RFP CBP auction or bear the lost opportunities if they arise.⁵⁶ The Large-Scale Governmental Aggregations assert that these changes in circumstances need to be considered by the Commission in its update of the shopping notice provisions to continue those provisions after January 1, 2009.

3. The Commission should update the notice provisions of the RSP/RCP SSO to allow shopping to commence during FirstEnergy’s current or future RFP CBP auction procurements *until* FirstEnergy proposes another SSO pursuant to R.C. §§ 4928.142 or 4928.143 as required by S.B. 221.

As discussed above, shopping is simply impossible without the Commission updating the notice provisions of the RSP/RCP SSO, a “status quo” that greatly benefits FirstEnergy to the detriment of *any* further development of the competitive market. This result is completely inconsistent with the Commission’s commendable efforts in its December 19, 2008 Opinion and Order to remove the substantial barriers to competition erected by FirstEnergy in its ESP application. The Large-Scale Governmental Aggregations would submit that a reasonable update of these notice provisions would provide for 30-days’ notice to the Companies. The Commission should also consider whether it is appropriate to adjust the percentage of RSC available under Option (1) above to reflect the short term of the current and any future three-month RFPs. Option (2) should remain untouched to allow customers to avoid 100% of RTCs if they agree not to return during the duration of the Plan or subject customers to market.

Further, NOPEC would note that FirstEnergy has been on notice that NOPEC intends to enter into a firm, full-requirements power supply agreement with FPLE since NOPEC’s Letter of Intent (“LOI”) with FPLE was entered into the record in this case on September 29, 2008 as an

⁵⁶ See Case No. 03-2144-EL-ATA (June 9, 2004), *Opinion and Order*, at 36.

attachment to the testimony of FPLE witness Robert M. Garvin.⁵⁷ While NOPEC will certainly provide formal notice to the Companies as directed by the Commission pursuant to any Entry on Rehearing of this matter, NOPEC asserts that this constructive notice should be taken into account by the Commission in its decision as it was presumably taken into account by the bidders in the RFP CBP.

C. The Order is unreasonable and unlawful because the Commission failed to assert its authority under R.C. § 4928.141 thereby requiring the FirstEnergy Companies to file a new SSO pursuant to R.C. §§ 4928.142 or 4928.143 as is necessary to return these Companies to lawful compliance with Am. Sub. Senate Bill 221.

On December 22, 2008, FirstEnergy determined it to be in its own self interest to exercise its right pursuant to R.C. 4928.143(C)(2)(b) to withdraw and thereby terminate the Companies' applications for an ESP. As the Commission previously rejected FirstEnergy's MRO application, as filed, FirstEnergy has been operating outside the regulatory scheme of S.B. 221 since then. As discussed above, it is unclear whether or when FirstEnergy will return to the newly enacted regulatory scheme by submitting a new application pursuant to R.C. §§ 4928.142 or 4928.143. FirstEnergy has publicly asserted that the Companies are prepared to commence another RFP CBP process "to meet customer supply needs beyond March 31, 2009."⁵⁸ Either as posturing or sincere belief, FirstEnergy is acting as if they have no duty to return to the regulatory scheme established by S.B. 221. However, to the contrary, the Large-Scale Governmental Aggregations believe and hereby assert that R.C. § 4928.141(A), combined with the Commission's supervisory authority as an administrative agency required to carry out its regulatory scheme provides the Commission with the authority to direct the Companies to file a

⁵⁷ See Case No. 08-935-EL-SSO (Sept. 29, 2008), *Direct Testimony of Robert M. Garvin on behalf of FPL Energy*, Attachment A.

⁵⁸ See FirstEnergy Press Release, *Competitive Bidding Process to Begin for FirstEnergy Ohio Utilities To Procure Electric Generation Supply*, Dec. 22, 2008

new application under R.C. §§ 4928.142 or 4928.143. Failure by the Commission to do so would be unlawful and unreasonable.

Section 4928.141(A) of the Revised Code provides

(A) Beginning January 1, 2009, an electric distribution utility shall provide consumers, on a comparable and nondiscriminatory basis within its certified territory, a standard service offer of all competitive retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service. To that end, the electric distribution utility shall apply to the public utilities commission to establish the standard service offer in accordance with section 4928.142 or 4928.143 of the Revised Code and, at its discretion, may apply simultaneously under both sections, except that the utility's first standard service offer application at minimum shall include a filing under section 4928.143 of the Revised Code. Only a standard service offer authorized in accordance with section 4928.142 or 4928.143 of the Revised Code, shall serve as the utility's standard service offer for the purpose of compliance with this section; and that standard service offer shall serve as the utility's default standard service offer for the purpose of section 4928.14 of the Revised Code. Notwithstanding the foregoing provision, the rate plan of an electric distribution utility shall continue for the purpose of the utility's compliance with this division until a standard service offer is first authorized under section 4928.142 or 4928.143 of the Revised Code, and, as applicable, pursuant to division (D) of section 4928.143 of the Revised Code, any rate plan that extends beyond December 31, 2008, shall continue to be in effect for the subject electric distribution utility for the duration of the plan's term. A standard service offer under section 4928.142 or 4928.143 of the Revised Code shall exclude any previously authorized allowances for transition costs, with such exclusion being effective on and after the date that the allowance is scheduled to end under the utility's rate plan. (Emphasis supplied.)

This section is the keystone provision of S.B. 221's regulatory scheme. It provides that beginning January 1, 2009, the electric distribution utilities *shall provide* customers with a new SSO pursuant to R.C. §§ 4928.142 or 4928.143, and, importantly, after January 1, 2009,

*Only a standard service offer authorized in accordance with section 4928.142 or 4928.143 of the Revised Code, shall serve as the utility's standard service offer for the purpose of compliance with this section; and that standard service offer shall serve as the utility's default standard service offer for the purpose of section 4928.14 of the Revised Code.*⁵⁹

⁵⁹ See R.C. § 4928.141(A).

As recently noted by the United States Supreme Court, the use of the word “shall” in a statute imposes “discretionless obligations” and “generally indicates a command that admits no discretion on the part of the person instructed to carry out the directive.”⁶⁰ Ohio Revised Code Section 4928.141(A) establishes a discretionless obligation on the distribution utilities in the state to provide a SSO pursuant to either R.C. §§ 4928.142 or 4928.143 after January 1, 2009. The language of this statute does not contemplate the perceived regulatory gap currently being exploited by FirstEnergy for profit. While it was within the Companies’ statutory authority to withdraw their ESP pursuant to R.C. § 4928.142(C)(2)(b) on December 22, 2008, now that January 1, 2009 has come and gone, FirstEnergy is not in compliance with Ohio law. FirstEnergy must comply with R.C. 4928.141(A) and file a new SSO pursuant to R.C. §§ 4928.142 or R.C. 4928.143.

To carry out its regulatory scheme, the Commission has the authority to direct the Companies to return to the statutory scheme established by S.B. 221. As expressed by the Ohio Supreme Court, the General Assembly has vested the Commission with the “duty and authority to enforce the competition-encouraging statutory scheme established in S.B. 3” and now the *duty* and *authority* to enforce S.B. 221.⁶¹ The obligation on the Companies under R.C. 4928.141(A) is clear. As it is not clear that FirstEnergy will act of its own accord, the Commission must now direct FirstEnergy to act. Failure to do so would be unlawful and unreasonable and contrary to the public interest.

⁶⁰ See *Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518, 2531-2532 (U.S. 2007); citing *Lopez v. Davis*, 531 U.S. 230, 241, 121 S. Ct. 714, 148 L. Ed. 2d 635 (2001); *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35, 118 S. Ct. 956, 140 L. Ed. 2d 62 (1998); *Association of Civil Technicians v. FLRA*, 306 U.S. App. D.C. 68, 22 F.3d 1150, 1153 (CA DC 1994).

⁶¹ *Ohio Consumers’ Counsel v. PUC* (2006), 111 Ohio St.3d 300, 311 2006 Ohio 5789 citing *Migden-Ostrander v. Pub. Util. Comm.* (2004), 102 Ohio St.3d 451, 2004 Ohio 3924, 812 N.E.2d 955, at P23.

The Large-Scale Governmental Aggregations therefore request the Commission direct the Companies to file a new application pursuant to R.C. §§ 4928.142 or 4928.143 by February 1, 2009 or such date as the Commission determines appropriate and within the public's interest. Further, the Large-Scale Governmental Aggregations also request the Commission direct the next SSO filed pursuant to S.B. 221 to reflect the Commission's December 19, 2008 Order in Case No. 08-935-EL-SSO and/or November 25, 2008 Order in Case No. 08-936-EL-SSO.

D. The Commission should grant the Large-Scale Governmental Aggregations' request for an expedited entry on rehearing.

As set forth above, updates to the provisions, terms, and conditions of the RSP/RCP SSO are clearly necessary for shopping to be at all feasible during the current regulatory predicament initiated by FirstEnergy. Every day that these issues are not addressed is another day that FirstEnergy controls the ongoing regulatory process and ensures its deregulated monopoly "status quo", with zero shopping. As asserted in our joint Brief and Reply Brief prior to the Commission's December 19, 2008 ESP Order, the Large-Scale Governmental Aggregations are ready, willing and able to provide materially lower prices to customers. In today's economy, precluding the Large-Scale Governmental Aggregations' customers from taking advantage of cost savings available through shopping, as expressly contemplated by the RSP/RCP SSO, should be viewed as creating equivalent dire financial consequences to NOPEC's and NOAC's customers as were asserted by the Companies on Friday, January 9, 2009. The Large-Scale Governmental Aggregations hereby request any responsive memorandum be filed by no later than January 26, 2009. An Entry on Rehearing by the Commission granting the relief requested above by February 4, 2009 should allow the Large-Scale Governmental Aggregations, and specifically NOPEC, to:

1. immediately finalize a firm, full-requirements power supply agreement with FPLE resulting in material savings to NOPEC's nearly 600,000 customers in the OE and CEI service territories;
2. commence the statutory opt-out notice process to enroll all eligible customers pursuant to R.C. § 4928.20(D) and the Commission's Rules; and
3. provide notice to FirstEnergy of NOPEC's intention to take alternative generation supply from FPLE for service to commence on or about April 15, 2009.

IV. CONCLUSION

WHEREFORE, the Large-Scale Governmental Aggregations respectfully request the Commission comply with the mandates and advance the policies of S.B. 221, and order the necessary and appropriate updates to the RSP/RCP SSO proposed above.


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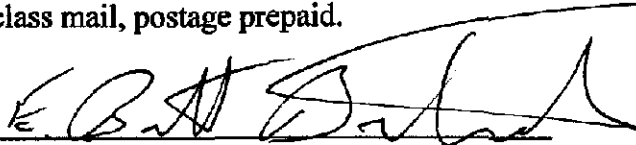

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Application for Rehearing and Request for Expedited Ruling of The Northeast Ohio Public Energy Council and Northwest Ohio Aggregation Coalition was served upon the following parties of record this 22nd day of January 2009, via electronic transmission, hand-delivery or first class mail, postage prepaid.



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