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 Section 4928.143, Revised Code, in the Form of an Electric Security Plan.	)	Case No. 08-935-EL-SSO
In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of Rider FUEL and Related Accounting Authority.	)	Case Nos. 09-21-EL-ATA 09-22-EL-AEM 09-23-EL-AAM

SECOND OPINION AND ORDER

The Commission, considering the evidence presented in the above-entitled applications, hereby issues its second opinion and order in these matters.

APPEARANCES:

James W. Burk, Arthur E. Korkosz, Mark A. Hayden, Ebony L. Miller, FirstEnergy Service Company, 76 South Main Street, Akron, Ohio 44308, Jones Day, by David A. Kutik, North Point, 901 Lakeside Avenue, Cleveland, Ohio 44114-1190, and Calfee, Halter & Griswold, LLP, by James F. Lang and Laura C. McBride, 1400 KeyBank Center, 800 Superior Avenue, Cleveland, Ohio 44114, on behalf of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company.

Richard Cordray, Ohio Attorney General, by Duane W. Luckey, Section Chief, and William L. Wright, Thomas W. McNamee, and John H. Jones, Assistant Attorneys General, 180 East Broad Street, Columbus, Ohio 43215, on behalf of the staff of the Public Utilities Commission of Ohio.

Janine L. Migden-Ostrander, Ohio Consumers' Counsel, by Jeffrey L. Small, Jacqueline Lake Roberts, Richard C. Reese, Gregory J. Poulos, and Terry Etter, Assistant Consumers' Counsel, 10 West Broad Street, Columbus, Ohio 43215-3485, on behalf of the residential utility consumers of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company.

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Henry W. Eckhart, 50 West Broad Street, Suite 2117, Columbus, Ohio 43215, on behalf of the Natural Resources Defense Council.

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Sean W. Vollman and David A Muntean, 161 South High Street, Suite 202, Akron, Ohio 44308, on behalf of the city of Akron.

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Henry W. Eckhart, 50 West Broad Street, Suite 2117, Columbus, Ohio 43215, on behalf of the Sierra Club, Ohio Chapter.

Bricker & Eckler, LLP, by Glenn S. Krassen, 1375 East Ninth Street, Suite 1500, Cleveland, Ohio 44114, and E. Brett Breitschwerdt, 100 South Third Street, Columbus, Ohio 43215, on behalf of Northeast Ohio Public Energy Council.

Larry Gearhardt, 280 North High Street, P.O. Box 182383, Columbus, Ohio 43218-2383, on behalf of Ohio Farm Bureau Federation.

Bricker & Eckler, LLP, by Sally W. Bloomfield and Terrence O'Donnell, 100 South Third Street, Columbus, Ohio 43215, on behalf of American Wind Energy Association, Wind on the Wires, and Ohio Advanced Energy.

Theodore S. Robinson, 2121 Murray Avenue, Pittsburgh, Pennsylvania 15217, on behalf of Citizens Power, Inc.

McDermott, Will & Emery, LLP, by Douglas M. Mancino, 2049 Century Park East, Suite 3800, Los Angeles, California, 90067-3218, and Grace C. Wung, 600 Thirteenth Street, N.W., Washington, D.C. 20005, on behalf of Wal-Mart Stores East, LP, Sam's East, Inc., LP, Macy's, Inc., and BJ's Wholesale Club, Inc.

Craig I. Smith, 2824 Coventry Road, Cleveland, Ohio 44120, on behalf of Material Sciences Corporation.

Bricker & Eckler, LLP, by Glenn S. Krassen, 1375 East Ninth Street, Suite 1500, Cleveland, Ohio 44114, and E. Brett Breitschwerdt, 100 South Third Street, Columbus, Ohio 43215, on behalf of Ohio Schools Council.

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100 Public Square, Suite 201, Cleveland, Ohio 44113, on behalf of Council of Smaller Enterprises.

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Morgan E. Parke and Michael R. Beiting, FirstEnergy Service Company, 76 South Main Street, Akron, Ohio 44308, on behalf of FirstEnergy Solutions Corp.

Timothy G. Dobeck, 6611 Ridge Road, Parma, Ohio 44129, on behalf of the city of Parma.

OPINION:

I. HISTORY OF PROCEEDINGS

On July 31, 2008, Ohio Edison Company (OE), The Cleveland Electric Illuminating Company (CEI), and The Toledo Edison Company (TE) (collectively, FirstEnergy or the Companies) filed an application for a standard service offer (SSO), in the form of an electric security plan (ESP) in accordance with Section 4928.143, Revised Code, in Case No. 08-935-EL-SSO (*FirstEnergy ESP Case*). On December 19, 2008, the Commission issued an opinion and order that approved FirstEnergy's proposed ESP with certain modifications. Subsequently, FirstEnergy withdrew its application.

On January 9, 2009, FirstEnergy filed an application in Case No. 09-21-EL-ATA, et. al *(FirstEnergy Rider FUEL Case)*, which, *inter alia*, requested approval of a fuel rider (Rider FUEL). As proposed by FirstEnergy, Rider FUEL would recover the costs for power purchased for customers receiving generation service for the time period of January 1, 2009, through March 31, 2009; and costs incurred after March 31, 2009, would be determined by the results of a future competitive bid process. On January 14, 2009, the Commission issued a finding and order in the *FirstEnergy Rider FUEL Case* which, *inter alia*, authorized FirstEnergy to implement Rider FUEL on a temporary basis until March 31, 2009. In addition, the Commission stated that it would conduct a prudency review of the costs included in Rider FUEL.

The following parties have been granted intervention in the *FirstEnergy ESP Case* and the *FirstEnergy Rider FUEL Case*: Ohio Energy Group (OEG); the Office of the Ohio Consumers' Counsel (OCC); Kroger Company (Kroger); Ohio Environmental Council (OEC); Industrial Energy Users-Ohio (IEU-Ohio); Ohio Partners for Affordable Energy (OPAE); Nucor Steel Marion, Inc. (Nucor); Northwest Ohio Aggregation Coalition (NOAC); Constellation NewEnergy and Constellation Energy Commodities Group, Inc. (Constellation); Dominion Retail, Inc. (Dominion); Ohio Hospital Association (OHA); Neighborhood Environmental Coalition, The Empowerment Center of Greater Cleveland, United Clevelanders Against Poverty, Cleveland Housing Network, and The Consumers for Fair Utility Rates (Citizens' Coalition); Natural Resources Defense Council (NRDC); Sierra Club; National Energy Marketers Association (NEMA); Integrys Energy Service, Inc. (Integrys); Direct Energy Services, LLC (Direct Energy); city of Akron (Akron); Ohio Manufacturers' Association (OMA); NextEra Energy Resources, LLC, FPL Energy Power Marketing, LLC, Gexa Energy Holdings, LLC, and Gexa Energy - Ohio, LLC (NextEra); city of Cleveland (Cleveland); Northeast Ohio Public Energy Council (NOPEC); Ohio Farm Bureau Federation (OFBF); American Wind Energy Association, Wind on the Wires, and Ohio Advance Energy (AWEA/WOW/OAE); Citizen Power, Inc. (Citizen Power); Omnisource Corporation (Omnisource); Material Sciences Corporation (Material Sciences); Ohio Schools Council (OSC); Council of Smaller Enterprises (COSE); Morgan Stanley Capital Group (MSCG); Wal-Mart Stores East, LP, Sam's East, Inc., Macy's, Inc., and BJ's Wholesale Club, Inc. (Commercial Group); Ohio Association of School Business Officials, Ohio School Boards Association, and Buckeye Association of School Administrators (OASBO/OSBA/BASA); The Association of Independent Colleges and Universities of Ohio (AICUO); city of Parma (Parma); and FirstEnergy Solutions Corp. (FES).

On February 19, 2009, FirstEnergy filed an amended application in the *FirstEnergy ESP Case*, with an attached stipulation and recommendation (stipulation), which sets forth a Stipulated ESP. The stipulation was also filed in the *FirstEnergy Rider FUEL Case*. The stipulating parties recommended that the Commission act, by March 4, 2009, on the limited term ESP that is contained within the interim provisions set forth in the stipulation. These interim provisions are delineated in Section I of the stipulation and are effective prior to June 1, 2009 (namely, Sections A.1, A.2, A.3, A.4, and I, as well as Section A.12). Furthermore, the stipulating parties recommended that the Commission act, by March 25, 2009, on the remaining provisions of the stipulation.

By entry issued February 19, 2009, the attorney examiner, *inter alia*, agreed with the stipulating parties that the provisions set forth in Sections A.1, A.2, A.3 A.4, and I of the stipulation (hereinafter these provisions will be referred to as the interim provisions), which relate to FirstEnergy's interim procurement of power, as well as the prudency review mandated by the Commission's January 14, 2009, order in the *FirstEnergy Rider FUEL Case*, should be considered expeditiously. With regard to the Generation Service Uncollectible Rider proposal set forth in Section A.12 of the stipulation, as well as all

remaining matters addressed in the amended application and stipulation, the attorney examiner found that the hearing on those matters should follow a subsequent procedural schedule. By this same entry, the attorney examiner directed FirstEnergy to publish notice of the two evidentiary hearings; FirstEnergy provided the requisite proofs of publication (Co. Ex. 100).

The evidentiary hearing addressing the interim provisions of the stipulation commenced on February 25, 2009. At the hearing, the attorney examiners determined that the *FirstEnergy ESP Case* and the *FirstEnergy Rider FUEL Case* should be consolidated. Furthermore, at the hearing, the parties submitted a supplemental stipulation (Jt. Ex. 101). The supplemental stipulation was signed by CEI, TE, OE, Staff, OCC, IEU-Ohio, OEG, OHA, OPAE, Akron, OSC, Nucor, Cleveland, COSE, Material Sciences, OMA, Kroger, OEC, NOPEC, NOAC, Citizens' Coalition, Lucas County, FES, AICUO, NRDC, Sierra Club, city of Toledo, NextEra, MSCG, OASBO/OSBA/BASA, Commercial Group, Parma, AWEA/WOW/OAE, and Citizen Power. On March 3, 2009, Direct Energy and Integrys filed a letter stating that they will not oppose the supplemental stipulation. By its second finding and order issued March 4, 2009, in these cases, the Commission found that the limited term ESP contained in the interim provisions of the stipulation, as supplemented, were reasonable and should be adopted.[1]

The evidentiary hearing addressing the remaining provisions of the stipulation, as supplemented, was held on March 11, 2009. Since the interim provisions of the stipulation were approved in our March 4, 2009, order, the purpose of this second opinion and order is for the Commission to consider the remaining provisions agreed to by the signatory parties.

II. DISCUSSION

A. Applicable Law

Chapter 4928 of the Revised Code provides an integrated system of regulation in which specific provisions were designed to advance state policies of ensuring access to adequate, reliable, and reasonably priced electric service in the context of significant economic and environmental challenges. In considering these cases, the Commission is cognizant of the challenges facing Ohioans and the electric power industry and is guided by the policies of the state as established by the General Assembly in Section 4928.02, Revised Code, as amended by SB 221.

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[1] The Commission notes that, in correspondence docketed on March 19, 2009, OEG and FirstEnergy agreed that nothing in the stipulation, including the provisions set forth on pages 36-37 of the stipulation is intended to affect the rights of the parties with respect to an application for rehearing or an appeal of the Commission's decisions in Case Nos. 07-1255-EL-CSS, 08-67-EL-CSS or 08-254-EL-CSS.

In addition, SB 221 amended Section 4928.14, Revised Code, which now provides that, beginning on January 1, 2009, electric utilities must provide customers with an SSO, consisting of either a market rate offer (MRO) or an ESP. The SSO is to serve as the electric utility's default SSO. Section 4928.143, Revised Code, sets out the requirements for an ESP. Section 4928.143(C)(1), Revised Code, provides that the Commission is required to determine whether the ESP, including its pricing and all other terms and conditions, including deferrals and future recovery of deferrals, is more favorable in the aggregate as compared to the expected results that would otherwise apply under an MRO.

B. Summary of the Stipulation

Pursuant to the supplemental stipulation, the parties agree to all of the terms and conditions of the stipulation filed on February 19, 2009, subject to and including certain specified additions, modifications, and clarifications to the February 19, 2009, stipulation. The stipulation is quite detailed; therefore, the following is a brief summary of the major provisions contained in the stipulation, as supplemented, and is not intended to supplant the actual language contained in the stipulation:

(1) The term of the Stipulated ESP is April 1, 2009, to May 31, 2011 (Jt. Ex. 100 at 44).

(2) For June 1, 2009, through May 31, 2011, retail generation rates will be determined by a descending-clock format competitive bid process (CBP). In the CBP, the Companies will seek to procure, on a slice of system basis, 100 percent of the aggregate wholesale "full requirements" SSO supply. The CBP will be conducted by an independent bid manager, CRA International (CRA). The bidding will occur for a single two-year product and there will not be a load cap for bidders. FES may participate without limitation. CRA will select the winning bidder(s), but the Commission may reject the results within 48 hours of the auction conclusion (*Id.* at 8-9).

(3) Commencing June 1, 2009, the Commission will have the option of phasing-in generation prices resulting from the CBP in an amount not to exceed, in the aggregate for all three companies, $300 million in 2009, $500 million in 2010, and $200 million in 2011, provided the Companies have the ability to finance the additional funds. Purchased power costs equal to the amounts constituting the phase-in discount will be deferred and collected through a rider. Recovery of the accumulated phase-in deferrals, including carrying charges, will commence on June 1, 2011, through an unavoidable charge to all

customers (except to certain governmental aggregation customers consistent with Section 4928.20(I)), Revised Code, for the company(ies) for which the phase-in has been authorized. The charge will not exceed ten years and will be adjusted annually, or more frequently if necessary, to attain complete recovery (*Id.* at 9-10).

(4) There will be no minimum stay for residential and small commercial non-aggregation customers (*Id.* at 10).

(5) There will be no rate stabilization charges starting June 1, 2009 (*Id.*).

(6) Unless otherwise noted in the stipulation, all generation rates for the Stipulated ESP period are avoidable and there are no shopping credit caps (*Id.*).

(7) Renewable energy resource requirements for January 1, 2009, through May 31, 2011, will be met by using a separate request for proposal (RFP) process to obtain renewable energy credits (RECs). An avoidable generation rider will recover, on a quarterly basis, the prudently incurred costs of the credits pursuant to Section 4928.64, Revised Code, including the cost of administering the RFP and the carrying charges on any unrecovered balances, including accumulated deferred interest (*Id.* 10-11).

(8) The Companies will work with interested signatory parties to include a residential REC purchase program by June 30, 2009, that will be available during the ESP period. If a consumer inquires about the installation of renewable energy generation, the Companies will make information on net metering, interconnection, and the REC purchase program available to the consumer. The costs of the RECs will be recovered through the renewable energy rider (Jt. Ex. 101 at 9).

(9) Any waiver of the alternative energy resource requirements shall be limited to those waivers identified in Section 4928.64, Revised Code (Jt. Ex. 100 at 11).

(10) The rate design shall be as proposed by the Companies in their application for an MRO, Case No. 08-936-EL-SSO (*FirstEnergy MRO Case*), with the following modifications:

(a) The average rate increase for the period of 2008 to 2009 resulting from the CBP for customers on Rate GT, Private Outdoor Lighting, Traffic Lighting, and Street Lighting rates shall not exceed a percentage in excess of one and one-half times the system average increase (the cap) proposed in the Companies' ESP. In determining the increase that will be subject to the cap, the increase shall include the impact of Case No. 07-551-EL-AIR (*FirstEnergy Distribution Rate Case*), transmission rider changes, and the termination of special contracts.

(b) The Economic Load Response Program Rider (Rider ELR) and the Optional Load Response Program Rider (Rider OLR), as proposed in the Companies' ESP and as modified in attachment B to the stipulation, shall be approved.

(c) Generation rates from the CBP will be discounted for qualifying schools by 8.693 percent to match the discount process from the *FirstEnergy Distribution Rate Case*.

(d) Residential generation rates will be modified to reflect the first 500 kilowatt hour (kWh) blocking as proposed in the Companies' ESP.

(e) As a demand response program under Section 4928.66, Revised Code, any revenue shortfall resulting from the application of the $1.95 per kW interruptible credit in Rider ELR and Rider OLR will be recovered as part of an unavoidable Demand Side Management and Energy Efficiency Rider (Rider DSE).

(f) Any revenue shortfall resulting from the application of (a) through (d), above, shall be recovered from the General Service and General Primary customers on an unavoidable basis.

(g) Rider EDR will be reconciled quarterly and allocated on a per company per class basis.

(*Id.* at 11-13).

(11) A Generation Service Uncollectible Rider shall be established for the Companies to recover uncollectible costs through May 31, 2009, as well as uncollectible costs subsequent to May 31, 2009. Effective April 1, 2009, the rider will initially be set at the average rate of .0539 cents per kWh. If there is no phase-in of generation rates for SSO customers, or if no governmental aggregation program elects to phase-in generation pricing, then the rider shall only apply to generation and transmission uncollectible costs arising from SSO customers and the rider will be avoidable. If there is a phase-in of generation rates, the rider shall be unavoidable; however, it will not apply to Rate GT and Rate GSU customers that are not part of a governmental aggregation program during the period they receive electric generation service from a competitive retail electric service supplier (Jt. Ex. 101 at 5-6).

(12) An unavoidable Generation Cost Reconciliation True-up Rider shall be established to reconcile the seasonal generation cost recovery and to recover the difference in the amounts paid to suppliers and the amount billed to customers (Jt. Ex. 100 at 13).

(13) At least 60 days before the filing of another ESP that contains a CBP, or an MRO, the signatory parties will engage in a collaborative process (*Id.* at 14).

(14) The bid price for winning bidders will be incrementally adjusted to the extent the Midwest Independent Transmission System Operator, Inc. (MISO) rate for Network Integration Transmission Service, Seams Elimination Cost Adjustment, or other nonmarket-based charges approved by the Federal Energy Regulatory Commission (FERC) change, or are newly approved. Retail rates shall automatically be adjusted through Rider GEN (*Id.*).

(15) There will be a distribution rate freeze until December 31, 2011, subject to the significantly excessive earnings test (SEET), and certain other factors (*Id.*).

(16) A Delivery Service Improvement Rider (Rider DSI) should be approved for April 1, 2009, through December 31, 2011, for the purpose of improving the overall performance, including

reliability of the distribution systems. Rider DSI will, on average, be set at $.002 per kWh (*Id.* at 15).

(17) For January 1, 2009, through December 31, 2011, the Companies, in the aggregate, may defer line extension costs, including post-in-service carrying charges, in an amount representing the difference between: what customers would have paid for line extension projects under the Companies' proposed program in the *FirstEnergy Distribution Rate Case* and the amounts customers are required to pay for line extensions under the Commission's decision in the *FirstEnergy Distribution Rate Case*. Cost recovery for the line extension deferrals shall occur over three years beginning January 1, 2012 (*Id.* at 16-17).

(18) A rider shall be approved to recover reasonably incurred deferrals for distribution uncollectible expenses incurred after December 31, 2008, including uncollectible expenses for Regulatory Transition Charge (RTC) rates, in excess of those provided for in the *FirstEnergy Distribution Rate Case* (*Id.* at 17).

(19) The calculation of the return on equity for the significantly excessive earning test shall exclude: the write-off of regulatory assets due to the implementation of the Stipulated ESP, the revenues for Rider DSI, a reduction in equity from any write-off goodwill, and deferred carrying charges (*Id.*).

(20) Effective January 1, 2011, an unavoidable Deferred Distribution Cost Recovery Rider shall be established to recover the post-May 31, 2007, unrecovered actual balances of: distribution costs under the rate certainty plan (RCP) in Case No. 05-1125-EL-ATA, deferred transition taxes under the electric transition plan in Case No. 99-1212-EL-ETP, and line extension deferrals in Case No. 01-2708-EL-COI (*Id.* at 18).

(21) For June 1, 2009, through May 31, 2011, transmission, as proposed in the Companies' MRO, will be part of the product obtained through the CBP and, except for reconciliation, the transmission rider will be set at zero for this period (*Id.* at 19).

(22) An unavoidable Deferred Transmission Cost Recovery Rider should be approved to recover certain deferred incremental transmission and ancillary service-related charges, authorized in Case Nos. 04-1931-EL-AAM and 04-1932-EL-ATA, to be

recovered during the period of April 1, 2009, through December 31, 2010 (*Id.*).

(23) Fifty percent of CEI's extended RTC balance, approximately $215 million, as of May 31, 2009, shall be written off. Recovery of CEI's remaining RTC and extended RTC balances is modified from the process included in the RCP as set forth in the stipulation. After full recovery of CEI's RTC and extended RTC balances, any additional amounts collected through the RTC charge shall be applied to reduce the purchased power deferral that arose for CEI for the January 1, 2009, through May 31, 2009, period (*Id.* at 20).

(24) There will be no company-funded energy efficiency and advanced metering infrastructure (AMI) programs as part of the Stipulated ESP (*Id.*).

(25) An unavoidable Demand Side Management and Energy Efficiency rider, as proposed in the Companies' ESP (excluding smart grid), will recover costs incurred by the Companies associated with energy efficiency, peak load reduction, and demand-side management programs (*Id.* at 21).

(26) The Companies will develop a proposal to pursue federal funds available under the Economic Recovery Act that may be available for smart grid investment. The Companies will work with signatory parties to develop tariffs for customers that include critical peak, time-of-day and real-time pricing, and consideration of a load factor provision for Rate GSU and Rate GP. Recovery for smart grid investment shall be through an unavoidable rider. Any under or overrecovery of costs by the distribution company due to time-differentiated rate structures will be passed through via an unavoidable rider and allocated on a voltage differentiated basis. Any load factor pricing provisions shall be funded within the specific rate schedule by unavoidable demand charges and unavoidable energy credits (*Id.* at 21-22).

(27) An Energy Efficiency and Peak Demand (EEPD) Program shall be established for the period 2009 through 2011. On or before September 1, 2009, the Companies will conduct a market study to identify potential residential, small commercial, and industrial energy efficiency and peak demand reduction

opportunities. The Companies will then commence a collaborative process. Independent third-party administrators will implement the programs. The Companies will request Commission approval of the proposed programs. In addition, the Companies will propose an independent third-party administrator (M&V consultant) to establish measurements and verification protocol and ascertain whether the programs have achieved the desired impact and savings. The costs associated with the EEPD Program will be recovered through the Demand-Side Management and Energy Efficiency rider (Rider DSE), as proposed in the ESP. Customers that commit their demand-response or other customer-sited capabilities for integration into the Companies' program may be exempt, with Commission approval, from the Companies' cost recovery mechanism. Lost distribution revenues associated with the program shall be recovered from all customers for a period not to exceed the earlier of the effective date of the Companies' next base rate case or six years from the effective date of the Stipulated ESP.[2] Mercantile customers may receive their electric supply from the Companies or a competitive retail electric service (CRES) provider. Mercantile customers that commit some or all of the results from their self-directed demand-response, energy efficiency, or other customer-sited capabilities, whether existing or new, for use by the Companies to achieve the targets in SB 221, may seek approval from the Commission for exemption from Rider DSE (Jt. Ex. 100 at 23-30; Jt. Ex. 101 at 8-9).

(28) For the April 1, 2009, through December 31, 2011, period, the Companies will contribute, in aggregate, $25 million to support economic development and job retention including: $7.5 million for projects identified by OMA; $1 million for OPAE's community connections program or the fuel fund; Cleveland, Akron, and Toledo will each have available at least $500,000, and other municipalities will have available at least $200,000 for economic development and job development activities; and, to assist low-income customers in paying their electric bills, a fuel fund shall be created consisting of $2 million per year for 2009 through 2011 (Jt. Ex. 101 at 6-7).

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2 NRDC does not support the collection of lost revenues for six years; however, for purposes of settlement, NRDC will not challenge this provision (Jt. Ex. 101 at 9).

(29) As proposed in the Companies' ESP, a Reasonable Arrangements rider and a Delta Revenue Recovery rider (Rider DRR) will be established for contracts approved by the Commission after January 1, 2009, on an unavoidable basis. Rider DRR will initially be set at zero and reconciled quarterly (Jt. Ex. 100 at 31-32).

(30) A separate unavoidable Rider DRR for existing CEI contracts that continue past December 31, 2008, will be established effective April 1, 2009, for 100 percent of the delta revenue associated with those contracts, and these charges will be recovered only from CEI customers (*Id.* at 32).

(31) The Companies may securitize and recover the generation-related and distribution-related deferrals and carrying charges, provided such securitization has lower future costs as compared to Section A.6 of the stipulation. The recovery would be unavoidable and may not exceed ten years (*Id.*).

(32) Recovery of the 2006 and 2007 deferred fuel expense and associated carrying charges is pending in Case No. 08-124-EL-ATA (*FirstEnergy Deferred Fuel Costs Case*). The Companies will establish an unavoidable rider to recover $10 million less than the December 31, 2008, balance of deferred fuel costs including carrying charges. Recovery through the rider will begin January 1, 2011, for a period of 25 years (*Id.* at 33).

(33) The Companies will continue to offer the Green Resource program for Type I renewable resources in accordance with Case No. 06-1112-EL-UNC (*Id.*).

(34) Effective April 1, 2009, an unavoidable percentage of income payment plan (PIPP) Uncollectible Rider shall be established. It will be initially set at zero and reconciled quarterly (*Id.* at 33-34).

(35) Purchased power is considered fuel for purposes of cost recovery (*Id.* at 34).[3]

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[3] Ohio Consumer and Environmental Advocates (OCEA) assert that the purchased power acquired through the RFP procurement process does not constitute fuel costs, as defined in Section 4928.143(C)(2)(b), Revised Code, for purposes of cost recovery; however, for purposes of settlement, OCEA agreed not to pursue this issue (Jt. Ex. 101 at 9).

(36) The parties agree that Stipulated ESP is more favorable in the aggregate as compared to an MRO alternative (*Id.*).

(37) If the Commission orders a phase-in of the Companies' generation prices and a government aggregation group elects to phase-in generation costs: each aggregation customer served by a governmental aggregation generation supplier (GAGS) shall receive a phase-in credit equal to the phase-in credit approved by the Commission for the Company's(ies') SSO customers; for every kWh of energy a GAGS delivers to a governmental aggregation customer, the GAGS will be granted, subject to certain provisions of the stipulation, the right to receive from the Company(ies) a receivable amount equal to the phase-in credit received by the aggregation customer, plus carrying charges; any uncollectible GAGS receivables shall be included in the calculation of the Generation Service Uncollectible Rider; and the Generation Service Uncollectible Rider shall remain in full force to allow the Companies throughout the phase-in period and recovery period to charge and collect the uncollectible amounts associated with the GAGS receivables (Jt. Ex. 101 at 2-4).

(38) The Stipulated ESP is conditioned upon FirstEnergy receiving all necessary FERC approvals (Jt. Ex. 100 at 45).

C. Consideration of the Stipulation

Rule 4901-1-30, Ohio Administrative Code, authorizes parties to Commission proceedings to enter into a stipulation. Although not binding on the Commission, the terms of such an agreement are accorded substantial weight. *Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, at 125 (1992), *citing Akron v. Pub. Util. Comm.*, 55 Ohio St.2d 155 (1978). The standard of review for considering the reasonableness of a stipulation has been discussed in a number of prior Commission proceedings. *Cincinnati Gas & Electric Co.*, Case No. 91-410-EL-AIR (April 14, 1994); *Western Reserve Telephone Co.*, Case No. 93-230-TP-ALT (March 30, 1994); *Ohio Edison Co.*, Case No. 91-698-EL-FOR *et al.* (December 30, 1993). The ultimate issue for our consideration is whether the agreement, which embodies considerable time and effort by the signatory parties, is reasonable and should be adopted. In considering the reasonableness of a stipulation, the Commission has used the following criteria:

(1) Is the settlement a product of serious bargaining among capable, knowledgeable parties?

(2) Does the settlement, as a package, benefit ratepayers and the public interest?

(3) Does the settlement package violate any important regulatory principle or practice?

The Ohio Supreme Court has endorsed the Commission's analysis using these criteria to resolve issues in a manner economical to ratepayers and public utilities. *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.*, 68 Ohio St.3d 559 (1994), *citing Consumers' Counsel, supra,* at 126. The court stated in that case that the Commission may place substantial weight on the terms of a stipulation, even though the stipulation does not bind the Commission (*Id.*).

The Commission finds that the stipulation, as supplemented, in these cases appears to be the product of serious bargaining among capable, knowledgeable parties. The signatory parties represent diverse interests including the Companies, governmental aggregators, municipalities, competitive suppliers, industrial consumers, commercial consumers, residential consumers, environmental advocates, and Staff. Further, we note that the signatory parties routinely participate in complex Commission proceedings and that counsel for the signatory parties have extensive experience practicing before the Commission in utility matters (Co. Ex. 105 at 4-5).

With respect to the second criterion, the evidence in the record indicates that, as a package, the stipulation, as supplemented, advances the public interest by resolving all the issues raised in these matters without resulting in extensive litigation and by providing for stable and predictable rates, established by a competitive procurement process, for customers during the ESP period (Co. Ex. 105 at 8, 10). As agreed to by the signatory parties, approval of Rider DSI is in recognition of the Companies' commitments to stabilize rates through December 31, 2011, write-off over $200 million of RTC recovery, and make a total aggregate investment of not less than $615 million for January 1, 2009, through December 31, 2011 (Jt. Ex. 100 at 15). The stipulation, as supplemented, provides for the creation of a collaborative before the filing of any future MRO or ESP which contains a CBP for establishing generation prices. In addition, the stipulation, as supplemented, provides for the withdrawal of complaints pending before the Commission related to interruptible tariff provisions (Co. Ex. 105 at 10). Finally, the ESP established by the stipulation, as supplemented, contains no minimum default service rider or standby charges, no rate stabilization charges commencing June 1, 2009, and no minimum stay for residential and small commercial customers; all generation rates under the ESP will be avoidable, and there will be no shopping credit caps (*Id.* at 9).

Moreover, testimony in the record indicates that there are significant additional benefits for customers in the stipulation, as supplemented. In the stipulation, as supplemented, the Companies have committed $25 million over three years for economic

development. Further, the stipulation, as supplemented, provides the Commission the flexibility to order the phase-in generation prices if the Commission determines that a phase-in is necessary. Moreover, the stipulation, as supplemented, would freeze distribution rates through December 31, 2009, at the rates established in the *FirstEnergy Distribution Rate Case*, except for emergencies and increases in taxes. The stipulation, as supplemented, also provides additional benefits to interruptible industrial customers, schools, municipalities, and certain residential customers. Finally, the stipulation, as supplemented establishes an energy efficiency collaborative to develop energy efficiency and demand-side management programs and continues the existing green resource program which allows customers an opportunity to purchase RECs on a monthly basis (*Id.* at 8-9).

With respect to the third criterion testimony in the record of these proceedings indicates that the stipulation, as supplemented, does not violate any important regulatory principle or practice (Co. Ex. 105 at 7; Staff Ex. 103 at 2). However, the Commission believes that a number of clarifications to the stipulation, as supplemented, are necessary before the Commission can find that the stipulation meets the third criterion. First, the Commission notes that the stipulation provides that "[i]f this Stipulated ESP is inconsistent with the Commission's rules *in effect*, the Companies request waivers to the extent deemed necessary, and the Commission's approval of this Stipulated ESP shall constitute a waiver of any Commission rule that is inconsistent with or in conflict with the provisions of this Stipulated ESP" (Jt. Ex. 101 at 35) (emphasis added). The Commission clarifies that this waiver applies only to rules in effect on the date of this second opinion and order. Similarly, customers that seek exemption from Rider DSE must do so in a manner consistent with any rules adopted by the Commission pursuant to Section 4928.66, Revised Code.

Moreover, the stipulation, as supplemented, contains a number of exclusions from the calculation of the return on equity for the SEET (Jt. Ex. 101 at 17-18). Although the Commission will convene a workshop of interested parties to discuss the implementation of the SEET, with respect to FirstEnergy, this workshop will address those aspects of the SEET which are not specifically discussed in the stipulation, as supplemented.

In addition, the Commission notes that the EEPD program to be created under the stipulation, as supplemented, provides for the use of independent third-party administrators both to implement proposed programs and to review whether such programs achieved the desired impact and savings (Jt. Ex. 101 at 23-27). The Commission clarifies that the same third-party administrator shall not be used to both implement a proposed program and to review whether such program achieved the desired impact and savings.

Further, the Commission notes that the stipulation, as supplemented, provides that the Companies may elect to securitize any generation-related and distribution- related deferrals and carrying charges provided that such securitization has lower future costs for customers as compared to a deferral with carrying charges as provided in Section A.6. of the stipulation, as supplemented (Jt. Ex. 101 at 32). The Commission clarifies that the Companies will be required to provide a demonstration of such cost-savings *prior to* the implementation of the securitization option.

Finally, we wish to emphasize our desire that this competitive bidding process proceeds to a successful conclusion securing the Companies' POLR supply requirements. However, the Commission will review the results of the auction and, within 48 hours of the conclusion of the auction, excluding weekends and holidays, the Commission may reject the results if, following a report by the independent bid manager or the Commission's auction monitor, the Commission finds that the auction violated the competitive bidding process rules in such a manner as to invalidate the auction or that the results are inconsistent with the Commission's statutory obligations.

With these clarifications, the Commission finds that the stipulation, as supplemented, does not violate any important regulatory principles or practices.

However, the Commission must also consider the applicable statutory test for approval of an ESP as part of our review of whether the stipulation, as supplemented conforms with important regulatory principles. Section 4928.143(C)(1), Revised Code, provides that the Commission should approve, or modify and approve, an application for an ESP if it finds that the ESP, 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, Revised Code. The record of these proceedings demonstrates that the Stipulated ESP is, in fact, more favorable in the aggregate than the expected results under Section 4928.142, Revised Code.

Under the ESP contained in the stipulation, as supplemented, the rates to be charged customers will be established through a CBP; therefore, the rates in the ESP will be equivalent to the results which would be obtained by FirstEnergy under Section 4928.142, Revised Code (Co. Ex. 105 at 10, 11). However, FirstEnergy witness Blank and Staff witness Cahaan both testified that the additional benefits contained in the stipulation, as supplemented, makes the ESP more favorable in the aggregate than the expected results under Section 4928.142, Revised Code (Co. Ex. 105 at 11-13; Staff Ex. 103 at 2-6).

FirstEnergy witness Blank notes that an MRO would be strictly limited to a determination of the SSO prices and would not provide any additional benefits to consumers. On the other hand, the ESP contained in the stipulation, as supplemented

contains additional quantitative advantages for consumers. Mr. Blank testified that his analysis shows these benefits to be nearly $100 million if no deferrals are authorized by the Commission and over $160 million if the Commission authorizes the maximum deferrals contained in the stipulation (Co. Ex. 105 at 11-12; Blank Attachment 1). In addition, Mr. Blank testified that the ESP preserves the ability of FirstEnergy to enter into a subsequent ESP in the future, which would not be permitted under Section 4928.143(F), Revised Code, if the Commission approved an MRO for the Companies (Co. Ex. 105 at 12-13).

Staff witness Cahaan testified that the ESP is superior to an MRO because the ESP provides a net benefit to customers of nearly $100 million (Staff Ex. 103 at 3-5). Further, Mr. Cahaan also notes that the ESP preserves the option of establishing an ESP in the future, which would not be an option under an MRO (*Id.* at 5-6).

Therefore, based upon the evidence in the record in these proceedings, the Commission finds that the ESP, 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, Revised Code. Accordingly, we find that the stipulation, as supplemented, should be adopted.

Finally the Commission notes that the Commission is committed to making the upcoming CBP a success. We will need a large number of suppliers and a large quantity of power offered to achieve this. Therefore, it is of greatest importance that the procurement be designed in such a way as to attract as many bidders as possible. The CBP design has several features which we believe will be enticing to bidders.

(a) The CBP features a transparent product definition which allows bidders to accurately price their product. The full requirements service being sought in the CBP is familiar to bidders in that it is solicited in other jurisdictions such as New Jersey, Delaware, Maryland and Pennsylvania.

(b) The CBP features a fair and transparent process for submitting and evaluating bids. All bidders will be informed of a single price for the product and then have an opportunity to offer to serve a number of "tranches" at that price.

(c) Bids will be judged solely on the basis of price, with the suppliers offering the lowest-cost supply being declared the winners. There will be no subjective "non-price" evaluation.

(d) To enable the "price only" evaluation all bidders will sign the same supply contract with the same terms and conditions, including credit requirements.

(e) The total supply being sought is extremely large; approximately 11,500 Megawatts of Peak Load must be served.

(f) The process will be monitored for openness, fairness, transparency and competitiveness by the Commission's independent monitor, Boston Pacific Company, Inc., as well as by the auction manager, CRA International.

An additional protection for suppliers and ratepayers in this CBP are the association rules that each bidder must abide by. These rules will prevent collusion by forcing bidders to declare any bidding consortiums that they may form. In addition, we believe that the implementation of the CBP rules by the independent auction manager must prevent participants from circumventing these rules by selling the full requirements product to other participants for the express purpose of providing supply in this CBP.

In sum, the Commission is committed to having an open, fair, transparent and competitive solicitation which attracts a large number of qualified bidders and, therefore, assures the best deal possible for ratepayers.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

(1) The Companies are public utilities as defined in Section 4905.02, Revised Code, and, as such, are subject to the jurisdiction of this Commission.

(2) On July 31, 2008, FirstEnergy filed an application for an SSO in accordance with Section 4928.141, Revised Code.

(3) On December 19, 2008, the Commission issued an opinion and order that approved FirstEnergy's proposed ESP with certain modifications. Subsequently, FirstEnergy withdrew its application.

(4) On January 9, 2009, FirstEnergy filed an application in the *FirstEnergy Rider FUEL Case* requesting approval of Rider FUEL for the time period of January 1, 2009, through March 31, 2009.

(5) On January 14, 2009, the Commission issued a finding and order in the *FirstEnergy Rider FUEL Case* authorizing FirstEnergy to implement Rider FUEL until March 31, 2009.

(6) The following parties have been granted intervention in the *FirstEnergy ESP Case* and the *FirstEnergy Rider FUEL Case*: OEG; OCC; Kroger; OEC; IEU-Ohio; OPAE; Nucor; NOAC; Constellation; Dominion; OHA; Citizens' Coalition; NRDC; Sierra Club; NEMA; Integrys; Direct Energy; Akron; OMA; NextEra; Cleveland; NOPEC; OFBF; AWEA/WOW/OAE; Citizen Power; Omnisource; Material Sciences; OSC; COSE; MSCG; Commercial Group; OASBO/OSBA/BASA; AICUO; Parma; and FES.

(7) On February 19, 2009, FirstEnergy filed an amended application in the *FirstEnergy ESP Case,* with an attached Stipulated ESP. The stipulation was also filed in the *FirstEnergy Rider FUEL Case*.

(8) The hearing on the interim provisions of the stipulation commenced on February 25, 2009. At the hearing, the attorney examiner consolidated the *FirstEnergy ESP Case* and the *FirstEnergy Rider FUEL Case,* and the parties submitted a supplemental stipulation.

(9) The supplemental stipulation was signed by CEI, TE, OE, Staff, OCC, IEU-Ohio, OEG, OHA, OPAE, Akron, OSC, Nucor, Cleveland, COSE, Material Sciences, OMA, Kroger, OEC, NOPEC, NOAC, Citizens' Coalition, Lucas County, FES, AICUO, NRDC, Sierra Club, city of Toledo, NextEra, MSCG, OASBO/OSBA/BASA, Commercial Group, Parma, AWEA/WOW/OAE, and Citizen Power. On March 3, 2009, Direct Energy and Integrys filed a letter stating that they will not oppose the stipulation, as supplemented.

(10) By its second finding and order issued March 4, 2009, in these cases, the Commission found that the limited term ESP contained in the interim provisions of the stipulation, as supplemented, is reasonable and should be adopted.

(11) The evidentiary hearing addressing the remaining provisions of the stipulation, as supplemented, was held on March 11, 2009.

(12) The Companies' application in the *FirstEnergy ESP Case* was filed pursuant to Section 4928.143, Revised Code, which authorizes the electric utilities to file an ESP as their SSO.

(13) The Commission finds that the stipulation, as supplemented, meets the three criteria for adoption of stipulations, is reasonable, and should, therefore, be adopted.

(14) The proposed Stipulated ESP, including its pricing and all other terms and conditions, including deferrals and future recovery of deferrals, is more favorable in the aggregate as compared to the expected results that would otherwise apply under Section 4928.142, Revised Code.

ORDER:

It is, therefore,

ORDERED, That the stipulation, as supplemented, be adopted and approved. It is, further,

ORDERED, That the Companies be authorized to file in final form four complete, printed copies of tariffs consistent with this second opinion and order, and to cancel and withdraw their superseded tariffs. The Companies shall file one copy in this case docket and one copy in its TRF docket (or may make such filing electronically, as directed in Case No. 06-900-AU-WVR). The remaining two copies shall be designated for distribution to the Rates and Tariffs, Energy, and Water Division of the Commission's Utilities Department. It is, further,

ORDERED, That the effective date of the new tariffs shall be a date not earlier than April 1, 2009, or the date upon which four complete, printed copies of final tariffs are filed with the Commission, whichever date is later. The new tariffs shall be effective for services rendered on or after such effective date. It is, further,

ORDERED, That the Companies shall notify their customers of the changes approved by this second opinion and order, as described herein. It is, further,

ORDERED, That a copy of this second opinion and order be served on all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Alan R. Schriber, Chairman

Paul A. Centolella

Ronda Hartman Fergus

Valerie A. Lemmie

Cheryl L. Roberto

CMTP/GAP/vrm

Entered in the Journal
MAR 2 5 2009

Reneé J. Jenkins
Secretary

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 Section 4928.143, Revised Code, in the Form of an Electric Security Plan.	)	Case No. 08-935-EL-SSO
In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of Rider FUEL and Related Accounting Authority.	)	Case Nos. 09-21-EL-ATA 09-22-EL-AEM 09-23-EL-AAM

CONCURRING OPINION OF CHAIRMAN ALAN R. SCHRIBER AND COMMISSIONER RONDA HARTMAN FERGUS

Having been presented with a Stipulation agreed to by (or at least not opposed by) virtually all parties in FirstEnergy's ESP case, the Commission is now confronted with the challenge of deciding a difficult issue. Having very little experience in the competitive bid process, we are nevertheless questioning the efficacy of the application of a cap on the amount a single supplier can bid upon and acquire. Does a load cap make sense as some would argue? Would the absence of a load cap skew the outcome of the auction? Having spent hour upon hour contemplating the issue, we can say unequivocally that we really have no idea.

The bottom line should be a process that brings the lowest prices to customers. It seems that such a price would be directly related to the number of participants that bid into the auction. On the one hand, it can be argued that a load cap sends a signal that the auction is serious about moving forward in a vigorous fashion. On the other hand, it might be argued that the bidders are sufficiently knowledgeable that an equal number will show up no matter the load cap. In other words, if there are a significant number of participants in the process, then the load cap really should not matter.

What we do know is that we have a stipulation in front of us that was signed by a significant number of entities. One would have to believe that the majority of these knowledgeable parties understood the provision that speaks to the lack of a limitation on the load that can be bid upon by any one bidder. It should be obvious that the signatories negotiated something of value for agreeing to settle this case, and clearly, what they

received was more valuable to them than what they perceived to be the outcome of an auction with or without a load cap.

The overarching issue here is that each and every one of the signatories will be impacted by the competitive bid, yet each agreed to sign on with the understanding that, perhaps like me, it is exceptionally difficult to dissect this auction. Given this incontrovertible conclusion, there is virtually no one left to "protect" by modifying the Stipulation, because either individually or by counsel, all implicitly agreed to the auction terms as presented.

As a final matter, we believe that we now speak for all of our colleagues in expressing as ardently as possible our desire for a dynamic auction. This requires many qualified, serious bidders, and we will do all in our power to assure that if any party questions the sincerity of our intent, we stand prepared to address all concerns.

Alan R. Schriber

Ronda Hartman Fergus

Entered in the Journal

MAR 2 5 2009

Reneé J. Jenkins
Secretary

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 Section 4928.143, Revised Code, in the Form of an Electric Security Plan.	)	Case No. 08-935-EL-SSO
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CONCURRING IN PART AND DISSENTING IN PART
OPINION OF COMMISSIONER CHERYL L. ROBERTO

All parties, including FirstEnergy, are to be applauded for working together to reach a stipulated agreement. It is clear that considerable time and effort has been invested by the signatory parties. The concept of blending a competitive bid process (CBP) into an electric security plan (ESP) standard service offer pursuant to Section 4928.143, Revised Code, is a creative solution to the seemingly intractable stalemate created when a public utility, operating fully within its statutory authority, may reject a unanimous decision of the regulatory Commission vested with the power and jurisdiction to supervise and regulate it. Section 4928.143(C)(2)(a), Revised Code.

While the Commission gives substantial weight to stipulations, it is well established that, "a stipulation entered by the parties...is merely a recommendation made to the commission and is in no sense legally binding upon the commission. The commission may take the stipulation into consideration, but must determine what is just and reasonable from the evidence presented at the hearing." *Consumers' Counsel v. Pub. Util. Comm.* (1992), 64 Ohio St.3d 123, 592 N.E.2d 1370. When parties are capable, knowledgeable and stand equal before the Commission, a stipulation is a valuable indicator of the parties' general satisfaction that the jointly recommended result will meet private or collective needs. It is not a substitute, however, for the Commission's judgment as to the public interest. The Commission is obligated to exercise independent judgment based on the statutes that it has been entrusted to implement, the record before it, and its specialized expertise and discretion. *Monongahela Power Co. v. Pub. Util. Comm.* (2004), 104 Ohio St.3d 571, 820 N.E.2d 921.

In the case of an ESP, the balance of power created by an electric distribution utility's authority to withdraw a Commission-modified and approved plan creates a dynamic that is impossible to ignore. I have no reservation that the parties are indeed capable and knowledgeable but, because of the utility's ability to withdraw, the remaining parties certainly do not possess equal bargaining power in an ESP action before the Commission. The Commission must consider whether an agreed-upon stipulation arising under an ESP represents what the parties truly view to be in their best interest – or simply the best that they can hope to achieve when one party has the singular authority to reject not only any and all modifications proffered by the other parties but the Commission's independent judgment as to what is just and reasonable. In light of the Commission's fundamental lack of authority in the context of an ESP application to serve as the binding arbiter of what is reasonable, a party's willingness to agree with an electric distribution utility application can not be afforded the same weight due as when an agreement arises within the context of other regulatory frameworks. As such, the Commission must review carefully all terms and conditions of this stipulation.

Pursuant to Chapter 4928, Revised Code, Competitive Retail Electric Service, it is the policy of this state to ensure the availability to consumers of reasonably priced retail electric service, encourage market access for cost-effective supply-side retail electric service, ensure diversity of electricity supplies and suppliers, ensure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service, and ensure retail electric service consumers protection against unreasonable sales practices, market deficiencies, and market power. Sections 4928.02(A),(C),(D),(H), and (I), Revised Code. Revised Code Section 4928.06(A) imposes an affirmative obligation to carry out these policies, "... the public utilities commission shall ensure that the policy specified in section 4928.02 of the Revised Code is effectuated." It is incumbent upon this Commission, within the limits of its authority, to ensure that any electric security plan is consistent with and advances the policies adopted in Revised Code Section 4928.02. For this reason, it is imperative that the Commission assess the reasonableness of any CBP in the context of these policies.

In this case, the Commission must consider whether there are essential features of a competitive procurement process that are needed to promote reasonable prices, encourage market access, ensure a diversity of suppliers, enhance competition, and protect against market power but that have not been adopted within the stipulation. I believe that a bid load cap is just such an essential feature. A load cap limits the number or percentage of tranches that any one bidder can bid on and win. FirstEnergy witnesses Bradley A. Miller and Dean W. Stathis both testified that a load cap facilitates diversity of suppliers (Co. Ex. 102 13; Co. Ex. 101 at 15). In the only two prior actions that this Commission has taken to approve a competitive bid process for the purchase of retail electric supply using a descending clock auction, the Commission has mandated a load cap. In so ruling, the

Commission found that a CBP should include at least two winning bidders because it serves to spread the risk and creates a more competitive post-auction market. *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Approval of a Competitive Bid Process to Bid Out Their Retail Electric Load,* Case No. 04-1371-EL-ATA (October 6, 2004, at finding 15) (*First Energy* 04-1371); *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Approval of a Competitive Bid Process for Retail Electric Load,* Case No. 05-936-EL-ATA (January 25, 2006, at finding 12) (*First Energy* 05-946).[1]

Additionally, the record in this matter establishes that New Jersey has a successful history of purchasing retail electric service using a descending clock auction. In fact witnesses could identify no jurisdiction, other than New Jersey, currently competitively procuring electricity using a descending clock auction. *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of a Market Rate Offer to Conduct a Competitive Bidding Process for Standard Service Offer Electric Generation Supply, Accounting Modifications Associated with Reconciliation Mechanism, and Tariffs for Generation Service,* Case No. 08-936-EL-SSO (Tr. I at 27, 42-43, 72-73; Tr. IV at 22, 91). New Jersey implements bid load caps on both a statewide basis and for each electric distribution utility. *In the Matter of the Provision of Basic Generation Service For the Period Beginning June 1, 2009,* Energy, Decision and Order No. ER08050310, New Jersey Board of Public Utilities (January 20, 2009). In the past, this Commission has considered the New Jersey process in establishing competitive procurement standards for retail electric supply here in Ohio. *FirstEnergy* 04-1371 at finding 20.

No reason was offered in the record of this matter to support varying from past Commission practice in mandating a bid load cap. It is difficult to conceive of any legitimate reason for an electric distribution company, or for that matter any party to this case, to object to a bid load cap in the CBP. The uncontroverted evidence indicates that a load cap will support competition, facilitate diversity of suppliers, mitigate the risk from a supplier's failure to perform, and protect consumers from the exercise of market power. For all of these reasons, a bid load cap should be included in the CBP adopted within this order. Therefore, while I concur with the remainder of the stipulation and the majority opinion, in the absence of a load cap, I dissent from the majority finding that the stipulation is reasonable.

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[1] FirstEnergy, on its own accord, also included a seventy-five percent bid load cap in the request for proposal procurement process that it used to purchase power in this matter for the term beginning January 4, 2009, and ending May 31, 2009. The results of that RFP, which are currently confidential, suggest that, had FirstEnergy used the process at issue in the stipulated CBP, the resulting purchase price would have been higher.

Having concluded that a bid load cap is necessary, I turn next to determining the appropriate bid cap level. The Commission has previously imposed a bid load cap of sixty-five percent in CBPs intended to test the value of a negotiated rate stabilization plan. *First Energy* 04-1371 at Finding 15; *First Energy* 05-946 at Finding 12. New Jersey imposes a bid load cap of approximately thirty-five percent statewide and fifty percent for each distribution company in its CBP to procure electricity. *Final BGS-FP Auction Rules* at http://www.bgs-auction.com/documents/Final_2009_BGS-FP_Auction_Rules_December_08_2008.pdfIn; *Minimum and Maximum Starting Prices, Tranche Targets, and Statewide Load Cap for the BGS-CIEP Auction* at http://www.bgs-auction.com/bgs.press.annc.item.asp?anncId=232; *Minimum and Maximum Starting Prices, Tranche Targets, and Load Caps for the BGS-FP Auction* at http://www.bgs-auction.com/bgs.press.annc.item.asp?anncId=231. In this matter, the CBP is for the purchase of the retail loads for three distribution companies, which in combination serve a vast region of the State of Ohio. Based upon the record of this case, the laws we are entrusted to implement, and the experience both here in Ohio and in New Jersey, the CBP should have a bid load cap of fifty percent.

Even as I urge this result, however, I am mindful that such a modification would enable FirstEnergy to once again reject a modified ESP.

Cheryl L. Roberto

Entered in the Journal
MAR 2 5 2009

Reneé J. Jenkins
Secretary

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 Section 4928.143, Revised Code, in the Form of an Electric Security Plan.	)	Case No. 08-935-EL-SSO
In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of Rider FUEL and Related Accounting Authority.	)	Case Nos. 09-21-EL-ATA 09-22-EL-AEM 09-23-EL-AAM

CONCURRING OPINION OF
COMMISSIONERS PAUL A. CENTOLELLA AND VALERIE A. LEMMIE

In December, the FirstEnergy Companies withdrew a modified electric security plan (ESP) that provided a fair result for the Companies and consumers and had been unanimously approved by this Commission. The Companies' exercise of its statutory option to withdraw created uncertainty for consumers seeking to manage their energy costs and placed businesses at risk in an already difficult economic environment. This lack of alignment between the Companies' interests and the interests of the customers they serve has limited the available options for setting Standard Service Offer (SSO) prices.[1]

The use of a competitive bidding process (CBP) in an ESP under Section 4928.143, Revised Code, will create a period of rate stability and certainty to consumers, while providing an opportunity to resolve other key issues. All parties, including FirstEnergy, are to be applauded for working together to reach this agreement. The

[1] In the event the Companies for any reason are not successful in obtaining POLR supplies through the competitive bidding process authorized in this case, the alternative may be for the Companies to rely heavily on Midwest ISO energy and ancillary service markets where there is active market monitoring and mitigation. The Commission has adequate mechanisms within Sections 4928.141, 4928.143, and 4928.144 of the Revised Code to manage any price volatility that might result from purchases of energy and ancillary services in the Midwest ISO markets and from short-term capacity purchases and to ensure the Companies an opportunity to earn reasonable returns.

Commission appreciates the time and effort that has been invested by the signatory parties.

While the Commission gives substantial weight to stipulations recommending what the parties believe to be an appropriate resolution, it is well established that, "a stipulation entered into by the parties ... is merely a recommendation made to the commission and is in no sense legally binding upon the commission. The commission may take the stipulation into consideration, but must determine what is just and reasonable from the evidence presented at the hearing." *Consumers' Counsel v. Pub. Util. Comm.* (1992), 64 Ohio St.3d 123, 592 N.E.2d 1370 (citing: *Duff v. Pub. Util. Comm.* (1978), 56 Ohio St.2d 367, 379, 10 O.O.3d 493, 499, 384 N.E.2d 264, 273). The Commission is obligated to exercise independent judgment based on the statutes that it has been entrusted to implement, the record before it, and its specialized expertise.[2]

The ability of an electric distribution utility to withdraw a Commission-modified and approved ESP and the Companies' prior withdrawal from an approved plan in this case need to be taken into account when considering the weight to be given to this stipulation. The Commission must evaluate whether the stipulation represents a balanced and appropriate resolution of the issues.

It is the policy of this state to ensure the availability to consumers of reasonably priced retail electric service, encourage market access for cost-effective supply-side retail electric service, ensure diversity of electricity supplies and suppliers, ensure effective competition in the provision of retail electric service, and ensure retail electric service consumers protection against unreasonable sales practices, market deficiencies, and market power. Sections 4928.02(A), (C), (D), (H), and (I), Revised Code. Section 4928.06(A), Revised Code, imposes an affirmative obligation on the Commission to "...shall ensure that the policy specified in section 4928.02 of the Revised Code is effectuated." See also *Elyria Foundry Co. v. Pub. Util. Comm.* (2007), 114 Ohio St.3d 305. The Commission must ensure that the Companies' electric security plan effectuates the policies adopted in Section 4928.02, Revised Code.

In this case, the Commission had to consider whether there are essential features of a forward competitive procurement that are needed to achieve a reasonable price, encourage market access, ensure a diversity of suppliers, enhance competition, and protect against market power but that have not been adopted within the stipulation. In our view, a load cap is an essential feature of a forward competitive procurement for these companies, given that they have until recently been served by a single large

2 The Ohio Supreme Court "has consistently found it proper to defer to the commission's judgment in matters that require the commission to apply its specialized expertise and discretion." *Monongahela Power Co. v. Pub. Util. Comm.* (2004), 104 Ohio St.3d 571, 820 N.E.2d 921.

incumbent supplier.[3] And, it would have been preferable to modify the stipulation to provide for a load cap.

A load cap limits the number or percentage of tranches that any one bidder can win. Effective competition depends upon having a diversity of suppliers independently competing to serve the POLR load. However, to the extent that potential suppliers perceive that an incumbent's structural advantages could prevent them from winning load, additional suppliers may be less likely to participate. A load cap ensures that there will be multiple winners and encourages additional participation and competition. FirstEnergy witnesses Bradley A. Miller and Dean W. Stathis both testified that a load cap facilitates diversity of suppliers (Co. Ex. 101 at 15; Co. Ex. 102 at 13). In the only two prior instances in which this Commission has approved a competitive bid process for the purchase of retail electric supply using a descending clock auction, the Commission imposed a load cap. In so ruling, the Commission found that a CBP should include at least two winning bidders because it serves to diversify risk and create a more competitive market. *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Approval of a Competitive Bid Process to Bid Out Their Retail Electric Load,* Case No. 04-1371-EL-ATA (October 6, 2004, at finding 15); *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Approval of a Competitive Bid Process for Retail Electric Load,* Case No. 05-936-EL-ATA (January 25, 2006, at finding 12).[4] The auction mechanism proposed in the Stipulation follows many of the features of the New Jersey descending clock auction. However, New Jersey has continued to use load caps on both a statewide basis and for each electric distribution utility. *In the Matter of the Provision of Basic Generation Service For the Period Beginning June 1, 2009,* Energy, Decision and Order No. ER08050310, New Jersey Board of Public Utilities (January 20, 2009). No compelling reason has been presented in this case to vary from the past Commission practice of using a load cap.

The relevant provisions of the stipulation are, "... the bidding process will not be subject to a load cap. The Companies' competitive affiliate, FirstEnergy Solutions Corp., may participate without limitation." (Jt. Ex. 100 at 8.) The conjunction of these

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[3] In the Companies' short-term procurement for January through March 2009, although 11 potential suppliers initially expressed interest, only 4 suppliers submitted qualifying offers, and the procurement was undersubscribed due to inadequate participation from alternative suppliers. While we anticipate greater participation in this auction, given the longer time available to suppliers to evaluate the procurement, prior limited participation underscores the need to encourage multiple suppliers to participate. The Commission also is aware that questions relating to the definition of the relevant wholesale market and whether FirstEnergy's generation affiliate can exercise market power to raise prices above competitive levels are currently pending before the Federal Energy Regulatory Commission in FERC Docket No. ER01-1403-000.

[4] FirstEnergy, on its own accord, included a seventy-five percent bid load cap in the request for proposal procurement process that it used to purchase power in this matter for the term beginning January 4, 2009, and ending May 31, 2009.

terms might be seen by potential suppliers as signaling a desire by the Companies to discourage the participation of non-affiliated suppliers. Any such signaling is anti-competitive and would be a violation of the electric utilities' obligation to not extend any undue preference or advantage to an affiliate. Section 4928.17(A)(3), Revised Code. The Commission today is sending the opposite signal to potential bidders. The Commission is committed to the success of this competitive bidding process and will need a large number of suppliers and a large quantity of power offered to achieve this objective. Therefore, it is of great importance that the procurement be designed as to attract as many bidders as possible.

The Commission has previously imposed a load cap of sixty-five percent. To clearly indicate to potential bidders that the Commission is seeking the broadest possible participation, we would have retained such a load cap for this auction.

The Commission is obligated to ensure the availability to consumers of reasonably priced retail electric service. Robust competition in this auction is essential to achieving that objective. There are pending questions regarding whether FirstEnergy's generation affiliate can exercise market power within the relevant market. The Commission expects the Auction Manager and the Commission's consultant to closely monitor bidding behavior of FirstEnergy Solutions Corporation. And, most importantly, we want to encourage the broadest possible participation in the auction such that no individual supplier can set prices above competitive levels.

Although we are concerned that the lack of a load cap could be misconstrued and might lead bidders to limit their participation, we concur in the result permitting the auction to proceed. The breadth and depth of participation, whether multiple suppliers are successful in the auction, and the bidding behavior of FirstEnergy Solutions will be relevant considerations in evaluating the auction results.

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Reneé J. Jenkins
Secretary