FAX

FILE

38

RECEIVED-DOCKETING DIV
2010 APR 16 PM 4:18
PUCO

BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to R.C. § 4928.143 in the Form of an Electric Security Plan	)	Case No. 10-388-EL-SSO

MOTION OF ENERNOC, INC. TO VACATE ATTORNEY EXAMINER'S ENTRY OF MARCH 24, 2010, AND IF DENIED, JOINT INTERLOCUTORY APPEAL, MOTION FOR CERTIFICATION TO FULL COMMISSION AND APPLICATION FOR REVIEW

EnerNOC, Inc. ("EnerNOC") moves to vacate the Attorney Examiner's Entry issued on March 24, 2010 ("AE Entry"). The AE Entry should be vacated and a more reasonable procedural schedule should be set. The existing schedule, as set forth in the AE Entry, violates EnerNOC's due process rights under Ohio law and the United States Constitution and unduly prejudices EnerNOC.

Should this Motion be denied, EnerNOC moves (immediately after denial) the legal director, deputy legal director, attorney examiner, or presiding hearing officer to certify this appeal from the adverse ruling to the full Commission. Certification is proper because a denial of the motion to vacate would create both a new question of policy and represent a departure from Ohio Supreme Court precedent.

This is to certify that the images appearing are an accurate and complete reproduction of a case file document delivered in the regular course of business.
Technician SM Date Processed APR 19 2010

Respectfully submitted,

Jacqueline Lake Roberts (0026806)
Trial Attorney
13212 Havens Corner Road S.W.
Pataskala, OH 43062
Telephone: (740) 927-3344
Email: jroberts@enernoc.com

Charles J. Faruki (0010417)
D. Jeffrey Ireland (0010443)
FARUKI IRELAND & COX P.L.L.
500 Courthouse Plaza, S.W.
10 North Ludlow Street
Dayton, OH 45402
Telephone: (937) 227-3705
Telecopier: (937) 227-3749
Email: cfaruki@ficlaw.com

Attorneys for EnerNOC, Inc.

TABLE OF CONTENTS

Page

I. BACKGROUND 1

II. THE MARCH 24, 2010 ATTORNEY EXAMINER'S ENTRY SHOULD BE VACATED 3

A. Due Process Requires that the Procedural Schedule Be Vacated 3

B. The AE Entry's Expedited Procedural Schedule Inhibits EnerNOC From Adequately Challenging the Settlement 6

C. The Public Interest in Fair Regulatory Proceedings Will Be Compromised Unless the AE Entry is Vacated 7

III. CERTIFICATION OF APPEAL FOR FULL COMMISSION REVIEW IS APPROPRIATE 8

IV. CONCLUSION 10

BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to R.C. § 4928.143 in the Form of an Electric Security Plan	)	Case No. 10-388-EL-SSO

MEMORANDUM IN SUPPORT

I. BACKGROUND

EnerNOC, Inc. ("EnerNOC"), a provider of demand response and energy efficiency services, was not a party to MRO Docket (No. 09-906-EL-SSO). The genesis of this proceeding to adopt a Stipulation and Recommendation ("Stipulation") was negotiated by FirstEnergy[1] and a number of other parties. EnerNOC did not participate because the case, as filed and as repeatedly affirmed by FirstEnergy, did not involve demand response or efficiency issues germane to its business or customers.

The Stipulation purports to resolve "any other case designations as may be applicable to the scope of the proposals made herein." Stipulation, p. 1, fn.1. As a result of the scope, the settlement of issues in the SSO proceeding has resolved certain issues pertaining to EnerNOC in other cases. These issues were resolved without any notice to EnerNOC, nor was there any reason for EnerNOC to participate in the discussions that led to this Stipulation.

[1] FirstEnergy Service Company refers collectively to Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company. The Stipulation was filed on March 23, 2010.

Nevertheless, as part of the Stipulation that has been submitted for approval in this case, EnerNOC's interests are affected and have been prejudiced. Specifically, FirstEnergy has modified and extended the Riders for the ELR and OLR tariffs in a manner that contradicts the Riders as filed originally. The modifications have prejudiced EnerNOC's preparation for and participation in the ATSI Integration auction because the changes were made without EnerNOC's knowledge or opportunity to participate. Since EnerNOC had no notice of the scope of the settlement negotiations, it did not have an opportunity to participate in the negotiations that resolved these issues. Accordingly, EnerNOC was not privy to, nor did it have an opportunity to be heard in, the negotiations among parties that led to the Stipulation that is the subject matter of this proceeding.

Notwithstanding its lack of participation, EnerNOC monitors proceedings of the Public Utilities Commission of Ohio ("PUCO") and discovered after the Attorney Examiner's March 24, 2010 Entry ("AE Entry") that the proposed Stipulation contains changes to tariffs for interruptible loads that have a direct effect on EnerNOC's business. While the case was pending EnerNOC relied on FirstEnergy's statements that the tariffs were not changing. By the time of its discovery, the Attorney Examiner had already imposed a discovery and hearing schedule of less than 30 days. The truncated schedule prohibits EnerNOC from participating effectively.

Moreover, the abbreviated discovery schedule approved by the Attorney Examiner on March 24, 2010, prejudices and restricts EnerNOC's ability to test the reasonableness of the Stipulation. Specifically, EnerNOC cannot conduct full and thorough discussions of the issues, it cannot conduct discovery relating to the settlement, it cannot prepare for and cross-examine witnesses meaningfully at the hearing and it cannot prepare and effectively submit expert testimony.

Further, the regulatory authority of the PUCO is undermined and compromised because of the failure to enable all parties to participate. As a practical matter, the PUCO's desire to encourage and achieve settlements is being abused by FirstEnergy, as it fails to disclose material information relating to its application, and further, as it circumvents the requirements of the statute and regulatory authority.

II. THE MARCH 24, 2010 ATTORNEY EXAMINER'S ENTRY SHOULD BE VACATED

The procedural schedule contained in Paragraph 6 of the AE Entry should be vacated. A more reasonable procedural schedule is necessary to provide sufficient time for the parties, including EnerNOC, to conduct discovery and prepare adequately for the hearing, which is now scheduled for April 20, 2010.

The schedule in the AE Entry violates EnerNOC's due process rights under Ohio law and the United States Constitution and unduly prejudices EnerNOC. The Motion to Vacate should be granted for three separate reasons. First, the filed Stipulation, and subsequent procedural schedule, violate EnerNOC's due process rights under both Ohio law and federal law. Second, EnerNOC's ability to challenge the Stipulation is prejudiced by a truncated proceeding, where adequate discovery cannot be completed when discovery responses are due just before the scheduled hearing. Third, the public interest in fair regulatory proceedings is compromised, where EnerNOC, and similarly situated entities, do not have an opportunity to participate fairly in proceedings before the Commission. For these three reasons, the AE Entry should be vacated.

A. Due Process Requires that the Procedural Schedule Be Vacated

The AE Entry should be vacated because the filed Stipulation, and subsequent procedural schedule, violate EnerNOC's due process rights under both Ohio law and federal law.

Here, EnerNOC was excluded from all settlement negotiations relating to the Stipulation, and FirstEnergy proceeded with settlement negotiations with only a limited group of parties. Time Warner AxS v. PUCO (1996), 75 Ohio St. 3d 229, 233 n.2, 661 N.E.2d 1097.

These negotiations occurred because EnerNOC never received notice of the scope of the negotiations. Since it was unaware of the settlement discussions, EnerNOC was denied the opportunity to be heard during the settlement negotiations. Importantly, the negotiations resulted in a settlement in FirstEnergy's MRO case, Case No. 09-906-EL-SSO, in which EnerNOC's rights have been compromised. EnerNOC was a party to and had interests in other cases before the PUCO and other regulatory bodies, and issues in these other cases are -- to the surprise and dismay of EnerNOC -- subject to resolution by the Stipulation at issue here. Hence, FirstEnergy's proposed Stipulation resolves issues not only beyond the scope of its filing, but resolves issues in other cases in which EnerNOC is a party -- prejudicing the rights of EnerNOC and other parties.

In addition, FirstEnergy failed to disclose material information about the ELR and OLR Riders, tariffs that are material to EnerNOC. Based on the filing made in the MRO proceeding (Case No. 09-906-EL-SSO) and various representations made to it by FirstEnergy and its representatives,[2] EnerNOC relied on statements that the ELR and OLR tariffs were expiring and FirstEnergy was not seeking to extend its participation in that business.

The Supreme Court of Ohio has admonished parties, like FirstEnergy, that the exclusion of parties from settlement negotiations creates due process concerns: "we have grave concerns regarding the commission's adoption of a partial stipulation which arose from the

[2] These representations are detailed in the pre-filed testimony of Kenneth D. Schisler, which was filed with the Commission on April 15, 2010 and is incorporated by reference. A copy of Mr. Schisler's testimony is attached as Exhibit A.

exclusionary settlement meetings." Time Warner, 75 Ohio St. 3d at 233 n.2. The Supreme Court of Ohio is concerned, as is EnerNOC, with the "integrity and openness of the negotiation process" in reaching a proposed stipulation. Ohio Consumers' Counsel v. PUCO, 111 Ohio St. 3d 300, 2006-Ohio-5789, 856 N.E.2d 213, at ¶ 85. EnerNOC's exclusion from settlement negotiations violates EnerNOC's due process rights under Ohio law and prejudices EnerNOC. These due process violations are compounded further by the accelerated procedural schedule in the AE Entry, which as shown in the next section, fail to provide EnerNOC with any meaningful opportunity to participate in discovery.

Like Ohio, federal constitutional law requires due process: "The essential requirements of due process . . . are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement." Cleveland Bd. Educ. V. Loudermill (1985), 470 U.S. 532, 546, 105 S. Ct. 1487 (affirming the Sixth Circuit's holding that due process had been denied). Due process is required when parties attempt to resolve issues by agreement: "It is fundamental to our notions of due process that a consent decree cannot prejudice the rights of a third party who fails to consent to it. This rule is founded in our 'deep-rooted historic tradition that everyone should have his own day in court.'" EEOC v. Pan Am. World Airways, Inc. (9th Cir. 1990), 897 F.2d 1499, 1506 (internal citation omitted) (quoting 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4449, at 417 (1981)), cert. denied sub. nom. (1990), 498 U.S. 815, 111 S.Ct. 55). Similarly, "only parties to suits, or persons with at least proper notice and an opportunity to be heard, may be bound by a consent decree." Sweeney v. City of Steubenville (S.D. Ohio 2001), 147 F. Supp. 2d 872, 881. Here, EnerNOC did not have notice of, and thus was excluded from negotiations; adherence to the AE Entry denies EnerNOC a fair opportunity to engage in meaningful discovery and participate effectively in the hearing.

B. The AE Entry's Expedited Procedural Schedule Inhibits EnerNOC From Adequately Challenging the Settlement

EnerNOC's ability to challenge the settlement is prejudiced by a truncated procedural schedule. On March 23, 2010, FirstEnergy filed its Application and Stipulation. On this same day, FirstEnergy filed a Motion for Waiver of Rules that was accompanied by a Request for an Expedited Ruling. On March, 24, 2010, the AE Entry was issued. The AE Entry should be vacated because EnerNOC is unable to participate in meaningful discovery, based on which EnerNOC could adequately challenge the settlement.

The AE Entry set the hearing date for April 20, 2010, which is only 28 days from the date on which FirstEnergy filed its Application and Stipulation. This small window -- particularly in light of FirstEnergy's exclusion of EnerNOC from settlement negotiations -- does not provide EnerNOC with "ample rights of discovery." Ohio Rev. Code § 4903.082. Under Ohio statutory law, the PUCO is charged with ensuring "full and reasonable discovery by all parties." Id. The AE Entry fails to comply with these statutory requirements.

Even with the shortened response time period of ten days for discovery responses, this accelerated schedule would result in EnerNOC's not receiving responses to its discovery requests until just before the scheduled hearing. Moreover, EnerNOC will not have any opportunity to supplement its discovery requests, if necessary. If any discovery related disputes arise, the parties would not have sufficient time to resolve them. But even assuming complete discovery responses are provided without delay and with few objections, EnerNOC will have little, if any, time to review such responses in preparation for the hearing on April 20, 2010. Consequently, EnerNOC will be impeded in its preparation of cross examination of adverse witnesses, and EnerNOC will be unable to prepare expert testimony or respond effectively to the Applicant. Therefore, based on this lack of opportunity to conduct full and reasonable discovery,

EnerNOC is unable to fully develop meaningful challenges to the legal issues that will be presented at the hearing.

C. The Public Interest in Fair Regulatory Proceedings Will Be Compromised Unless the AE Entry is Vacated

The public interest in fair regulatory proceedings is being compromised by the implementation of the expedited procedural schedule. One of the requirements of deregulated markets is to allow all service providers an opportunity to present their programs to the PUCO. FirstEnergy Corp. v. PUCO, 95 Ohio St. 3d 401, 2002-Ohio-2430, 768 N.E.2d 648, at ¶ 1. However, a truncated proceeding, like this one, is anticompetitive and contrary to the public policy of deregulation passed by the General Assembly. Id.; Ohio Rev. Code § 4903.082.

In addition, non-negotiated issues are being resolved under the guise of the PUCO's settlement authority, in the name of expediency. For example, FirstEnergy and its affiliates made multiple representations that tariff Riders ELR and OLR would expire by their own terms on May 31, 2011. However, Riders ELR and OLR were proposed to be extended through 2014 when the Stipulation was filed on March 23, 2010. EnerNOC and other parties that would be affected by this proposal had no opportunity to participate in negotiations regarding the propriety of extending Riders ELR and OLR. Time Warner, 75 Ohio St. 3d at 233 n.2 (expressing "grave concerns" regarding a "a partial stipulation which arose from the exclusionary settlement meetings"). Accord: EEOC v. Pan Am. World Airways, Inc. (9th Cir. 1990), 897 F.2d 1499, 1506 ("It is fundamental to our notions of due process that a consent decree cannot prejudice the rights of a third party who fails to consent to it."). The strict requirements of the Ohio Revised Code are being circumvented under the guise of this settlement. The public expects that PUCO's decisions will be made on a fully developed record, of which all parties have had an opportunity to be heard.

III. CERTIFICATION OF APPEAL FOR FULL COMMISSION REVIEW IS APPROPRIATE

Should this Motion be denied, EnerNOC moves the legal director, deputy legal director, attorney examiner, or presiding hearing officer to certify this appeal from the adverse ruling to the full Commission. A denial of the motion to vacate would result in an appeal that both (1) "presents a new or novel question of interpretation, law, or policy," and (2) "is taken from a ruling which represents a departure from past precedent and an immediate determination by the commission is needed to prevent the likelihood of undue prejudice or expense to one or more of the parties." Ohio Admin. Code 4901-1-15(B). EnerNOC incorporates the arguments previously set forth in this memorandum in support.

If the Motion to Vacate is denied (which it should not), this appeal presents a "new or novel question of interpretation, law, or policy." Exclusion of EnerNOC from the settlement discussions, settling EnerNOC's interests without an opportunity to be heard and the expedited procedural schedule (were it to be maintained) introduce a new, harsh policy that has never been countenanced by this Commission. It effectively endorses a new policy under which parties, like EnerNOC, would not be entitled to "ample rights of discovery" or "full and reasonable discovery" as required under Ohio Rev. Code § 4903.082.

Moreover, it would encourage certain parties to engage in settlement discussions and exclude those that may disagree or challenge the terms. EnerNOC would have insufficient time to obtain and consider responses to its discovery requests. EnerNOC would also be unable to challenge legal issues presented because of the lack of discovery. Further, EnerNOC would be inhibited from the ability to conduct effective cross examination because of an inadequate record, and would be impeded from preparing expert testimony or otherwise responding effectively to PUCO staff or the Applicant because of the lack of full discovery.

This new policy would ignore existing policy concerned with permitting "full and reasonable discovery by all parties" into matters that relate to the "integrity and openness of the negotiation process" in reaching a proposed stipulation, Ohio Consumers' Counsel v. PUCO, 111 Ohio St. 3d 300, 2006-Ohio-5789, 856 N.E.2d 213, at ¶ 82, 85 (holding that PUCO abused its discretion by prohibiting discovery of information related to the fairness of the negotiation process).

Likewise, regardless of whether a denial of the motion to vacate would constitute a new policy for purposes of an appeal, a denial of the motion to vacate would comprise a departure from Ohio Supreme Court precedent. As shown above, the Ohio Supreme Court has expressly touted the importance of "integrity and openness" in negotiations relating to stipulations, which is absent here. EnerNOC was excluded from settlement negotiations, despite the fact that EnerNOC would be bound by the terms of the Stipulation. The expedited procedural schedule exacerbates FirstEnergy's exclusionary tactics, as EnerNOC has not been afforded a reasonable opportunity to conduct meaningful discovery. A denial of the motion to vacate would belie the Ohio Supreme Court's decision that discovery related to the "integrity and openness of the negotiation process" should be permitted. Ohio Consumers' Counsel, 2006-Ohio-5789, at ¶ 85-86. This accelerated procedural schedule also undermines the Ohio Supreme Court's admonition against exclusionary tactics as set forth in Time Warner. Moreover, the AE Entry fails to comport with the requirements of Ohio Rev. Code § 4903.082. Therefore, certification of this matter for appeal is proper for the additional reason that the existing procedural schedule is inconsistent with Ohio precedent.

IV. CONCLUSION

For the foregoing reasons, EnerNOC's motion to vacate the AE Entry of March 24, 2010 should be granted. If this motion is denied, then EnerNOC hereby submits its application for an interlocutory appeal; this appeal should be certified to the full Commission and the Commission should reverse the ruling denying the Motion to Vacate for the reasons set forth above, and the Commission should modify the procedural schedule to provide additional time for parties, including EnerNOC, to conduct meaningful discovery prior to the filing of testimony and participation in the hearing. As part of the modification, the hearing should be rescheduled for a later date.

Respectfully submitted,

Jacqueline Roberts (by DTI)

Jacqueline Lake Roberts (0026806)
Trial Attorney
13212 Havens Corner Road S.W.
Pataskala, OH 43062
Telephone: (740) 927-3344
Email: jroberts@enernoc.com

Charles J. Faruki (0010417)
D. Jeffrey Ireland (0010443)
FARUKI IRELAND & COX P.L.L.
500 Courthouse Plaza, S.W.
10 North Ludlow Street
Dayton, OH 45402
Telephone: (937) 227-3705
Telecopier: (937) 227-3749
Email: cfaruki@ficlaw.com

Attorneys for EnerNOC, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Motion of EnerNOC, Inc. to Vacate Attorney Examiner's Entry of March 24, 2010, and if Denied, Joint Interlocutory Appeal, Motion for Certification to Full Commission and Application for Review was served electronically to the counsel identified on the attached Service List this 16th day of April, 2010.

D. Jeffrey Ireland

383359.1

SERVICE LIST

amyspiller@kravitzllc.com
aporter@szd.com
beitingm@firstenergycorp.com
burkj@firstenergycorp.com
cmiller@szd.com
cmooney2@columbus.rr.com
Cynthia.brady@constellation.com
dakutik@jonesday.com
dane.stinson@baileycavalieri.com
David.fein@constellation.com
dboehm@BKLlawfirm.com
dmancino@mwe.com
drinebolt@aol.com
duane.luckey@puc.state.oh.us
elmiller@firstenergycorp.com
gas@bbrslaw.com
gdunn@szd.com
gkrassen@bricker.com
glawrence@mwe.com
Greg.price@ puc.state.oh.us
haydenm@firstenergycorp.com
henryeckhart@aol.com
jbentine@cwslaw.com
jclark@mwncmh.com
jlang@calfee.com
jpmeissn@lasclev.org
jroberts@enernoc.com
kim.bojko@puc.state.oh.us
korkosza@firstenergycorp.com
lkeiffer@co.lucas.oh.us
lmcalister@mwncmh.com
lmcbride@calfee.com
MHPetricoff@vorys.com
mhpetricoff@vssp.com
mkl@bbrslaw.com
mkurtz@BKLlawfirm.com
mparke@firstenergycorp.com
mvincel@lasclev.org
mwarnock@bricker.com
mwhite@cwslaw.com
myurick@cwslaw.com
nmoser@theOEC.org
Poulos@occ.state.oh.us
poulos@occ.state.oh.us
ricks@ohanet.org
robinson@citizenpower.com
rtriozzi@city.cleveland.oh.us
sam@mwncmh.com
sbeeler@city.cleveland.oh.us
small@occ.state.oh.us
small@occ.state.oh.us
smhoward@vorys.com
Thomas.Mcnamee@puc.state.oh.us
tobrien@bricker.com
trent@theOEC.org
will@theOEC.org
Williams.toddm@gmail.com
wis29@yahoo.com

383359.1

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to R.C. §4928.143 in the Form of an Electric Security Plan	)	Case No. 10- 388 -EL-SSO

DIRECT TESTIMONY OF

KENNETH D. SCHISLER

ON BEHALF OF

ENERNOC, INC.

EXHIBIT A

Q. PLEASE STATE YOUR NAME, POSITION AND BUSINESS ADDRESS.

A. My name is Kenneth D. Schisler. I am employed by EnerNOC, Inc. as the Senior Director of Regulatory Affairs. My business address is 101 Federal Street, Suite 1100, Boston, MA 02110.

Q. PLEASE DESCRIBE YOUR EDUCATIONAL BACKGROUND AND PROFESSIONAL QUALIFICATIONS.

A. I earned a Bachelor of Science in Biology from Salisbury University, Salisbury, Maryland. I earned a Juris Doctorate with Honor from the University of Maryland School of Law. From 1991-2003, I served as an elected member of the Maryland House of Delegates, and served my entire tenure on the committee with jurisdiction over energy, environment, and public utility matters. When the legislature was not in session, I held private employment. From the beginning of my career until 1999, I worked as a commercial waterman on the Chesapeake Bay and wholesale grocery broker. Beginning in 1999 until 2003, I was engaged in the private practice of law in Maryland. In 2003, I resigned from the Maryland House of Delegates to assume the chairmanship of the Maryland Public Service Commission. In 2007, I resigned from the Maryland Public Service Commission. In 2007, I was engaged by EnerNOC, Inc. in my current position. In my current role, I have worked extensively (and almost exclusively) on demand response policy matters at the Federal Energy Regulatory Commission (FERC), before nearly 20 state commissions, and PJM Interconnection LLC (PJM), (as well as other wholesale markets), including Independent System Operator of New England (ISO-NE), New York Independent System Operator (NYISO", Midwest Independent System Operator, and the Independent Electric System Operator of Ontario, Canada (IESO).

1 **Q. PLEASE DESCRIBE YOUR RESPONSIBILITIES AS SENIOR DIRECTOR,**
2 **REGULATORY AFFAIRS.**
3 A. My responsibilities include managing state, federal, and Regional Transmission
4 Organization (RTO), and Independent System Operator (ISO) regulatory matters for eastern
5 North America on behalf of EnerNOC, Inc.
6
7 **Q. WHAT IS ENERNOC'S BUSINESS?**
8 A. EnerNOC, Inc. is a provider of demand response and energy efficiency services.
9 EnerNOC enables and supports customers who want the opportunity to manage energy costs and
10 participate in demand side management activities. Among other things, EnerNOC works with
11 customers to participate in wholesale market demand side opportunities such as those available
12 through the PJM. EnerNOC and companies like EnerNOC are members of PJM and other
13 wholesale markets and are known as Curtailment Service Providers (CSPs) or Aggregators of
14 Retail Customers (ARCs). As of December 31, 2009, EnerNOC had over 3,500 MW of demand
15 response resources under management in the across the United States, Canada and the United
16 Kingdom.
17
18 **Q. WHAT IS THE RELATIONSHIP BETWEEN ENERNOC AND THE UTILITIES**
19 **LIKE FIRSTENERGY?**
20 A. EnerNOC is a competitor of FirstEnergy in the sense that EnerNOC's services enable its
21 clients to reduce their demand for electricity. EnerNOC's clients are FirstEnergy's customers.
22 As required by the General Assembly, FirstEnergy also must provide these services to its
23 customers. EnerNOC is also, albeit indirectly, a customer of FirstEnergy because it works

1 directly with and assists a class of customers that are served by FirstEnergy, and as explained
2 below, the class is subject to the OLR and ELR Riders.
3
4 **Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?**
5 A. The purpose of my testimony is threefold. First, I will discuss due process concerns,
6 procedural deficiencies and secrecy surrounding the settlement discussions that resulted in the
7 filing of the Stipulation. These issues are troubling because FirstEnergy did not engage in good
8 faith negotiations with the entities affected by this Stipulation, and EnerNOC cannot effectively
9 challenge the Stipulation because of the abbreviated schedule.
10 Second, I will explain how FirstEnergy misled participants in the recent PJM/American
11 Transmission Systems, Inc. (ATSI) Integration auction by proposing to extend its demand
12 response Riders ELR and OLR beyond May 31, 2011. The ATSI Integration Auctions were the
13 mechanism by which the FirstEnergy/ATSI utilities were making a transition from the MISO
14 wholesale market to the PJM wholesale market scheduled for June 1, 2011. In PJM ATSI
15 Integration Auction stakeholder meetings, in FirstEnergy's Application in PUCO Docket 09-
16 906-El-SSO before March 23, 2010, and in First Energy's tariff itself, FirstEnergy repeatedly
17 and unequivocally stated that it would allow those Riders ELR and OLR to expire on May 31,
18 2011. But Riders ELR and OLR were proposed to be extended through 2014 when FirstEnergy
19 filed athe stipulation in this case with the Commission on March 23, 2010. March 23rd was after
20 the ATSI Auction Closed March 19, 2010 and two business days before the ATSI Auction
21 results were posted. I will testify to the misleading nature of FirstEnergy's representations, and
22 how the company allowed the following material to continue in the public domain. This
23 misleading information was material to the ATSI Integration auctions: that Riders ERL and OLR

1 would expire May 31, 2011. FirstEnergy caused this information to persist in the market through
2 the close of the ATSI Integration auction on March 19, 2010. FirstEnergy took no steps to notify
3 market participants and rectify or correct this misinformation. Through my testimony, I will
4 demonstrate that if FirstEnergy is allowed to extend its Riders ELR and OLR as proposed in this
5 stipulation, such approval will compromise the integrity of the ATSI Integration auctions, and
6 the competitive procurement process for Standard Service Offer (SSO) proposed in the
7 stipulation, and condone behavior detrimental to the electricity markets and all retail customers.
8 Finally, my testimony will recommend that, in these circumstances, and to preserve the
9 integrity of the regulatory process and the Ohio electricity market, the Commission should allow
10 Riders ELR and OLR to expire by their terms (May 31, 2011), as they were intended. The
11 Commission should modify the Stipulation accordingly or allow the parties to conduct extensive
12 discovery about the Stipulation, its negotiations and the reasons why FirstEnergy failed to
13 disclose what it knew about the affected Riders. If the Commission is not prepared to take that
14 step in the extremely tight timeframe imposed upon the Commission by FirstEnergy in this
15 Stipulation, it should strip Riders ELR and OLR from the Stipulation and initiate a separate
16 docket to consider not only the interruptible tariffs and contracts, but also the propriety of
17 FirstEnergy's actions in this matter.
18

19 **Q. DESCRIBE THE DUE PROCESS DEFICIENCIES YOU HAVE IDENTIFIED IN**
20 **THESE PROCEEDINGS.**

21 A. First, the Stipulation resolves many issues from other cases without notifying the parties that
22 the issues were being discussed and resolved in the Stipulation. EnerNOC did not know these
23 issues were a part of the FirstEnergy settlement discussions, and it had no reason to believe,
24 based on FirstEnergy's public disclosures, that its interests were affected. Without notice,

EnerNOC could not participate in the settlement negotiations. In the *Application* initiating this proceeding, FirstEnergy describes broadly the issues resolved through settlement negotiations:

> … competitive bidding process, recovery of transmission related costs, distribution reliability and cost recovery, economic development in many forms, energy efficiency, and support for low income customers, as well as the efficient and timely resolution of other pending proceedings….[1]

Those issues, however, involved only the parties to those other cases and only the parties to the MRO, Docket 09-906-El-SSO. Some of the issues resolved by the stipulation include:

- a distribution rate increase and implementation of new rider DCR to recover the rate increase even though no distribution rate proceeding has been initiated and noticed to the public;[2]
- Docket No. 09-462-El-UNC, the corporate separation plan;
- FERC Docket No. ER09-1589, the FirstEnergy integration into PJM case;
- FERC Docket EL10-06 relating to FirstEnergy integration into PJM;
- Docket No. 09-778-El-UNC, the PUCO docket relating to FirstEnergy integration into PJM;
- An agreement that the PUCO will not assert jurisdiction over the FirstEnergy Corp and Allegheny Energy Inc. merger, which has not been noticed to the public;
- Docket 09-1820-El-ATA – cost recovery for the SmartGrid initiative;
- Case No. 08-935-EL-SSO, revision of the administrators as determined in that case;
- A new discounted rate for domestic automakers that was never noticed to the public;[3]

EnerNOC was a party to some of the cases listed above, and may have become a party to the cases that would have to be initiated to seek the rate increases for the distribution rate increase or

---

[1] Stipulation at 2.
[2] Stipulation page 13, paragraph 2.
[3] All of this information is from the FirstEnergy April 5, 2010 Technical Conference Slide Presentation, PUCO Docket No. 10-388.

1 discounts for the domestic automakers. Yet, like members of the public, EnerNOC was denied
2 this opportunity because it did not know these issues were on the table.
3 I see several due process issues with the proposed Stipulation. First, issues were
4 resolved in cases other than the MRO case 09-906[4], yet the parties to those other cases were
5 provided *no opportunity* to participate in the settlement negotiations resulting in the Stipulation.
6 The absence of notice and an opportunity to be heard means the excluded parties had no
7 opportunity to take discovery of or obtain information from FirstEnergy. The excluded parties
8 could not negotiate and had no opportunity to obtain leverage in discussions with FirstEnergy.
9 As a former chairman of a state utilities commission, the absence of notice and an opportunity
10 for parties to participate in the resolution of issues in which they have an interest undermines the
11 integrity of the regulatory process. Due process requires that those affected have an opportunity
12 to participate effectively. Excluding these other parties and denying them an opportunity to
13 obtain and offer evidence and confront witnesses is unreasonable and a violation of due process
14 because of 1) an unreasonably constrained hearing and discovery schedule; and 2) the excluded
15 parties are litigating against a settlement with a higher burden of proof *when they were denied*
16 *participation in the underlying settlement.*
17
18 **Q. TURNING TO THE SECOND POINT OF YOUR TESTIMONY WHY DID YOU**
19 **BELIEVE TARIFF RIDERS ELR AND OLR WOULD EXPIRE MAY 31, 2011?**
20 A. FirstEnergy and its affiliates made several representations that these tariffs would expire May
21 31, 2011. These statements were made orally in the ATSI Integration Auction stakeholder

---

[4] At the FirstEnergy Technical conference April 5, 2010, and in Mr.Ridmann's deposition April 13, 2010 it was stated that the only parties to the stipulation were parties to the FirstEnergy MRO case, 09-906-El-SSO.

1 meetings[5] and in FirstEnergy's *Application* in PUCO Docket 09-906-El-SSO: in FirstEnergy's
2 MRO case 09-906-EL-SSO, the Direct Testimony of Santino L. Fanelli discussed the expiration
3 of Riders ELR and OLR as of May 31, 2010 (emphasis supplied) (Page 9 line 20); and
4 FirstEnergy's *Application* in Docket 09-906 stated at page 24 and 25 that Riders ELR and OLR
5 expire "on their own terms" and that thereafter FE will seek bids in accordance with an RFP to
6 secure demand response.

7 The Tariffs themselves state:

8 Tariff ELR:

9 G. Term
10 This Rider shall become effective for service rendered beginning June 1, 2009 and
11 shall expire with service rendered through May 31, 2011.
12
13 Tariff OLR:
14
15 F. Term
16 This Rider shall become effective for service rendered beginning June 1, 2009 and
17 shall expire with service rendered through May 31, 2011.
18

19 **Q. WERE THESE THE ONLY STATEMENTS FIRSTENERGY MADE THAT TARIFF**
20 **RIDERS ELR AND OLR WOULD EXPIRE?**

21 A. No. FirstEnergy continued to state that the Tariffs would expire in both the PJM/ATSI
22 Integration Auction materials and in representations of FirstEnergy counsel in at PJM/ATSI
23 Integration Meetings.

24

25 **Q. WHY IS THIS IMPORTANT?**

---

[5] PJM ATSI Integration Stakeholder Meetings October 2, 2009, Columbus, Ohio.

1 A. For two reasons. First, it affects how market participants in the ATSI
2 Integration auctions evaluate the market and formulate their bids. When the ATSI Integration
3 auctions opened on March 15, 2010, the only market participants who knew there would be a
4 material change in the curtailable load available in the market were the participants in the
5 settlement discussions that resulted in the stipulation in this case. Those excluded because notice
6 was not given did not have an opportunity to formulate their bids based on current information,
7 and it appears that EnerNOC and companies like it, were excluded intentionally and the
8 information was withheld from us. Some of those participating in the settlement discussions,
9 including First Energy affiliates, and other non-affiliated firms were market participants in the
10 ATSI Auction. As a result of participation in the settlement, those parties became aware that
11 First Energy was stipulating to changes that rendered affirmative representations by First Energy
12 in ATSI Integration Auctions materials and public filings materially false. EnerNOC and others
13 that were parties to cases that the stipulation purports to settle, were not made aware of
14 materially false information provided by FirstEnergy and allowed by FirstEnergy to remain in
15 the public domain while the ATSI Integration Auctions were underway.
16

17 **Q. ISN'T THIS SIMPLY A HAZARD OF UTILITY REGULATION – EXTRANEOUS**
18 **ISSUES ARE RESOLVED BY NEGOTIATIONS?**

19 A. Not at all, and these issues are not extraneous, but rather they are central to effective
20 deregulation. . It is absolutely essential to the operation of the markets that the auctions are
21 transparent, open, and fair, and that all market participants have the same information.
22 FirstEnergy understands this principle, and appreciates that uncertainty about the terms and
23 conditions of the market can adversely affect outcomes. In FirstEnergy's own words:

24 I would submit to you that the most important thing we need to preserve here is
25 certainty. The energy markets crave certainty. We have laid out a process here starting

> in August, August 17 and going forward that has set a timetable for a move to PJM. Putting it in the end of January, we have aligned that with the Ohio procurement process. We have allowed for this integration auction to occur in March of 2010 so that there is abundant notice to bidders in that Ohio procurement. That process in that sequence has been known, understood, discussed with FERC, put together with PJM. We have had a PJM stakeholder process that has considered that time line in 2009 throughout the fall. There's going to be another one coming up here. Both RTOs are aware of that plan, of the timetable, and now of our move to PJM. I submit to you it would be terribly disruptive, terribly disruptive, to the energy markets and harmful to the very interests that I know you so earnestly serve, and we seek to serve, to throw a monkey wrench in the works here of either starting a proceeding that interferes with our move to PJM, or just as bad, treats uncertainty over our authority to go there and causes the myriad suppliers, LSEs and other affected parties in both RTOs to wonder what is going on.[6]

What makes the present situation so egregious is that the PJM integration auctions were ATSI auctions where PJM acted as the auction manager. First Energy set auction rules for the ATSI Integration Auction that were different from PJM capacity auction rules – for example the credit requirements for bidding demand response resources – and ATSI had full knowledge before the Integration auctions opened for 2011/2012 and 2012/2013 of exactly who the market participants were. First Energy could have notified market participants in the ATSI Auction that aproposed change to Tariffs ELO and OLR was being considered. Instead, FirstEnergy permitted materially false statements to remain in the ATSI Auction informational materials through the close of the ATSI Auction.

Q. IS THIS A STATE MATTER FOR THIS COMMISSION?

A. Yes. The Commission approved the expiration of Riders ELR and OLR. FirstEnergy's terms and conditions of service – including its conduct – are regulated by this Commission. It is

[6] PUCO Docket No 09-778-El-UNC, Tr. Witness Reffner at pages 45-48 (January 21, 2010).

1 incumbent on this Commission to take action to protect the public when presented with
2 information about the behavior of a utility concerning its state jurisdictional tariffs that
3 compromises the integrity of the auctions integrating it into a new RTO. Here, FirstEnergy is --
4 to use its words -- throwing a monkey wrench into the works, and it and it is a legitimate exercise
5 of Commission authority. What is equally important is that such conduct, if condoned by the
6 Commission, would cast doubt over the integrity of the descending clock competitive
7 procurement process that is proposed in the stipulation to procure Standard Service Offer (SSO).
8 Like the ATSI Auction, it is important that the ESP procurement process for SSO have integrity
9 and be free from any taint of irregularity. It is ironic and disturbing that in a stipulation in which
10 FirstEnergy seeks to propose a mechanism for the procurement of SSO service, that First Energy
11 itself failed to correct materially false information it had put in the record and created a serious
12 irregularity in the ATSI Auction in which it was procuring energy resources to meet its
13 obligations to the PJM wholesale market.

14

15 **Q. HOW DID THE TERMS AND CONDITIONS OF THE AUCTION CHANGED BY**
16 **FIRST ENERGY FAILING TO DISCLOSE IT WAS EXTENDING RIDERS ELR AND**
17 **OLR?**

18 A. This omission by FirstEnergy of failing to notify market participants of material changes in
19 information that participants were entitled to rely uponaffected several aspects of the auction.
20 First, there are about 400 MWs of legacy Rider ELR customers with curtailable loads of more
21 than 1 MW each that would now be unavailable as prospects for CSPs to satisfy their cleared
22 commitment to provide demand resources. This change dramatically shrinks the market size of
23 available customers to meet the demand response obligations assumed by market participants in
24 the ATSI Auction that cleared demand response supply obligations. Some 978 MW of demand

1 response resources cleared the 2011/2012 ATSI Integration auction. Those resources must be in
2 service as demand response resources by June 1, 2011. If the Commission approves the
3 continuation of Rider ELR and OLR despite First Energy's misinformation to the market, those
4 customers who remain on the Riders are now unavailable.
5

6 **Q. ARE THERE ANY OTHER NEGATIVE EFFECTS?**

7 A. Yes. Another important factor is that the Rider ELR is anticompetitive. As it relates to
8 whether the Riders ELR and OLR are just, reasonable and in the public interest, I agree with Mr.
9 Campbell from the Demand Response Coalition that they are not. The payments to customers
10 are far higher than market pricing, and will be partially or fully subsidized by ratepayers.
11 Competitive demand response providers cannot force other ratepayers to subsidize demand
12 response payments to their customers.
13 I understand that there is an economic buy though provision in Tariff Rider ELR, but
14 since it has never been called and customers are on a fixed GEN rate and required to take service
15 from FirstEnergy[7] I don't see how this provision hedges power supply fluctuation risks to retail
16 customers. Allowing First Energy to have out-of-market compensation would be distinctly bad
17 for the sustainable development of demand side resources in Ohio.
18

19 **Q. WHAT WAS THE TIMING OF THE INTEGRATION AUCTION CLOSING AND**
20 **FIRSTENERGY FILING THE STIPULATION?**

---

[7] Testimony of Mr. Ridmann in his deposition April 13, 2010.

1 A. The Stipulation was filed with this Commission by FirstEnergy on March 23, 2010. The
2 ATSI Integration Auctions for the 2011/2012 and 2012/2013 delivery years opened ran from
3 March 15 to 19th, and results were posted on March 26, 2010. Had ATSI Auction market
4 participants been made aware of the proposed terms of the stipulation, they could have
5 considered this information and made a deliberate decision whether to adjust their bids. In fact,
6 we know that this information was probably known much earlier by participating parties in the
7 stipulation because these settlement negotiations continued for months. When settlement
8 discussions commenced after the conclusion of the MRO Docket 09-906 FirstEnergy gave no
9 indication that it would propose or accept a continuation of the tariffs. It certainly became
10 obvious to FirstEnergy much earlier than March 23 that retaining the Tariffs ELR and OLR was
11 a term in the stipulation it that was proposed and to which it would agree. Even if its agreement
12 was not certain at that time, the mere possibility of this term would have caused bidders to
13 reconsider their offers. The timing is certainly curious, and it is one subject that requires
14 discovery and cannot be effectively challenged on such an abbreviated schedule.
15
16 **Q. EARLIER IN YOUR TESTIMONY YOU INDICATED THAT FIRST ENERGY**
17 **MADE SIMILAR STATEMENTS ABOUT THE INTERRUPTIBLE RIDERS EXPIRING**
18 **IN CONNECTION WITH THE ATSI INTEGRATION AUCTIONS. PLEASE**
19 **ELABORATE.**
20 A. I was told that the interruptible riders were expiring directly by Morgan Parke, a FirstEnergy
21 FERC attorney and, who was also counsel to an intervenor in FE's MRO case 09-906 and
22 therefore representing a party to the settlement negotiations resulting in the stipulation. Mr.
23 Parke made statements regarding the expiration of the interruptible tariffs at the January 19,
24 2010, ATSI/FirstEnergy-PJM Integration Stakeholder Meeting in Cleveland. Mr. Parke has been

1 one of FirstEnergy's lead spokesmen on ATSI Integration Auctions matters. Also, in its
2 responses to the ATSI Integration Auctions Frequently Asked Questions (FAQs) on the PJM
3 website[8], ATSI represented that it planned to do an RFP to procure demand response, which is
4 exactly what FirstEnergy's public filings in Ohio stated and was consistent with Mr. Parke's
5 statements. As the my references above to FirstEnergy's Ohio testimony show, the RFP was
6 going to be held in connection with the expiration of Riders ELR and OLR.
7
8 **Q. YOU MENTION REPRESENTATIONS BY FIRSTENERGY IN THE ATSI**
9 **INTEGRATION AUCTIONS FREQUENTLY ASKED QUESTIONS. PLEASE**
10 **EXPLAIN.**
11 A. Because of the way that FirstEnergy proposed to conduct the ATSI Integration Auctions,
12 there was a FERC legal requirement that all communications concerning auction details had to
13 be made available to all market participants on an equal basis. Market participants obviously had
14 lots of questions about the auctions as they were evaluating their potential market positions and
15 conducting their due diligence. In order to address those questions in an efficient manner,
16 FirstEnergy and PJM held public informational sessions and also posted responses to auction
17 related questions submitted through Frequently Asked Questions (FAQs) posted on the PJM
18 website. The materials communicated through these meetings and the FAQs was information
19 market participants could rely upon as they prepared and bid into the ATSI Integration Auctions.
20 I posed questions about how demand response resources in the ATSI zone would be treated.
21 Others may have asked similar questions. In any event, in the ATSI Integration Auction FAQ
22 framed the questions I had posed and posted a response:

---

[8] http://www.pjm.com/markets-and-operations/~/media/markets-ops/atsi-integration/atsi-integration-faqs.ashx.

> (CR3) How will PJM treat behind the meter generation and interruptible load for the 2011/2012 and 2012/2013 DYs for the ATSI zone?
>
> These resources will be allowed to participate in the RPM auctions as DR. However, if used as DR, the Behind the Meter Generation cannot be netted from load for the purposes of calculating the Peak Load Contributions for that Delivery Year. Requests for Behind the Meter changes for capacity obligations must be received by PJM by December 1 prior to the start of the Delivery Year as outlined in *PJM Manual 14D: Load Generator Operational Requirements*.
>
> a. Will such resources be treated as existing or planned resources?
>
> To the extent the behind the meter generation or interruptible load capability already exists, it will be treated as existing DR.
>
> The ATSI utilities are planning to hold an RFP to procure demand response resources. To utilize these resources in the integration auctions, the ATSI Utilities will be required to submit a plan to PJM that demonstrates to PJM that the RFP product will meet the PJM requirements for planned DR resources. The plan will also include a timeline including the milestones that demonstrates to PJM's satisfactions that the DR resources will be available before the start of the delivery year.[9]

In this FAQ response, which is still posted on PJM's website, First Energy once again reiterated its plan to procure demand response resources through an RFP. That statement was also consistent with what Mr. Parke stated at the ATSI Integration Stakeholder meeting in Cleveland, and with FirstEnergy's public filings and statements of witnesses in PUCO proceedings. Mr. Parke and his FirstEnergy told market participants in Ohio and the ATSI Integration Auctions and PJM that it would procure demand response through an RFP instead of extending Riders ELR and OLR.

---

[9] http://www.pjm.com/markets-and-operations/atsi-integration/~/media/markets-ops/atsi-integration/fcr-integration-auctions-faqs.ashx

1 **Q. CAN YOU DESCRIBE THE CIRCUMSTANCES SURROUNDING MR. PARKE'S**
2 **STATEMENTS AND WHAT HE SAID?**
3 A. During the ATSI Integration Auctions stakeholder meeting on January 19, 2010,
4 representatives of FirstEnergy explained of the credit requirements for participation in the ATSI
5 Integration auction. I asked a series of questions at the meeting as to the standard for
6 determining whether a demand response resource was an "existing" or "planned" demand
7 response resource, which was important because additional credit is required for existing
8 resources. The thrust of my question was aimed at seeking a clearly defined objective standard
9 for planned vs. existing DR, because in the absence of a clear standard, FirstEnergy could apply
10 a standard in a discriminatory manner, including in a manner that favored the ATSI utilities or
11 other FirstEnergy affiliates.
12 Mr. Parke sought to assuage my concerns about affiliate favoritism by explaining that
13 FirstEnergy was discontinuing its interruptible tariffs. He told me that the FirstEnergy/ATSI
14 utilities were allowing their interruptible tariffs to expire on May 31, 2011, and said to me, "That
15 is what you guys are for. We want the competition." These statements by Mr. Parke to me were
16 made in the presence of Mr. Jeff Mayes, General Counsel for Monitoring Analytics, the PJM
17 Market Monitor.
18 These statements by Mr. Parke told me unequivocally that market participants did not
19 need to worry about a fundamentally important credit issue in the ATSI Integration Auctions
20 *because the FirstEnergy utilities were not going to be continuing Riders ELR and OLR.*
21
22 **Q. WHY DOES IT MAKE A DIFFERENCE WHETHER FIRSTENERGY PROCURES**
23 **DEMAND RESPONSE THROUGH AN RFP OR THROUGH ITS INTERRUPTIBLE**
24 **RIDERS?**

1 A. It makes all the difference in the world. As the company stated in PUCO Docket No. 09-
2 906-EL-SSO, the purpose of the RFP was to ensure that there were sufficient demand response
3 resources to comply with the requirements of Am. SB 221, codified in R.C. Section 4928.66.
4 The RFP would be conducted annually based upon its annual load-reduction targets and the
5 amount of demand response that was already occurring on the FirstEnergy system and could
6 count toward FirstEnergy's load reduction target. In other words, FirstEnergy was proposing to
7 procure through an RFP the residual amount of demand response capability, if any, that
8 FirstEnergy would need to comply with its statutory targets. EnerNOC and other curtailment
9 service providers would have likely worked with FirstEnergy under the RFP arrangement to
10 ensure that FirstEnergy always had sufficient demand response to meet its statutory obligations.
11 However, by the abrupt change to and questionable timing of extending the Riders, without any
12 notice, FirstEnergy proposed to re-enroll the customers for a three year period directly to into its
13 own demand response program. After repeatedly and unequivocally stating that it was no longer
14 going to enroll demand response capability directly through its utility interruptible tariffs,
15 FirstEnergy reversed its position in the March 23rd stipulation in order to serve the very
16 customers that curtailment service customers were expecting to serve if they cleared demand
17 response resources in the ATSI Integration auction. However, despite FirstEnergy's repeated
18 assertions that it would not enroll customers through its interruptible tariffs post-PJM integration,
19 FirstEnergy gave no information to ATSI Integration Auction market participants of this fact
20 before the Auctions closed.
21 FirstEnergy knew with absolute certainty that market participants were relying upon the
22 available information in the market, including FirstEnergy's representations in the FAQs, to
23 formulate their bids. By the time FirstEnergy filed its stipulation, FirstEnergy had received pre-
24 bid security in the amount of $500,000 for prospective bidders in the ATSI Integration auction,
25 and together with PJM, would have approved the required pre-bid ATSI Demand Response Plan

1 which articulated the underlying assumptions supporting the anticipated bids of prospective
2 market participants. In short, officials involved in the ATSI Integration auction knew exactly
3 who the prospective bidders were and what their assumptions were based upon publicly available
4 market information. Yet when FirstEnergy filed the Stipulation with the PUCO after the
5 Auctions closed and before the results were posted, FirstEnergy did not c simultaneously correct
6 the ATSI informational materials When the Stipulation was filed, materially false statements
7 were contained in the ATSI Integration auction FAQs, and FirstEnergy made no effort to notify
8 market participants of its abrupt changes to the material information that was being relied upon
9 by market participants.

10

11 [BEGIN CONFIDENTIAL INFORMATION]

12 [redacted]
13 [redacted]

14 [redacted]
15 [redacted]
16 [redacted]
17 [redacted]
18 [redacted]
19 [redacted]
20 [redacted]

21

22 [redacted]

[END CONFIDENTIAL INFORMATION]

1 **Q. WHAT DO YOU PROPOSE IS THE APPROPRIATE ACTION THAT THE**
2 **COMMISSION SHOULD TAKE IN THIS CIRCUMSTANCE?**

3 A. In the present circumstances, it would be unfair and unjust to allow FirstEnergy to continue
4 Riders ELR and OLR as is proposed in the Stipulation. As such, the Commission should simply
5 allow the Tariff Riders ELR and OLR to expire on their own terms. FirstEnergy failed to correct
6 materially false market information related to the ATSI Integration auction that it knew became
7 false the moment it struck its private deal with a exclusive subset of parties involved in relevant
8 dockets that it seeks to resolve through its stipulation. FirstEnergy could have corrected, but
9 chose not to correct, what became materially incorrect information that it put into the ATSI
10 Integration auction and PUCO filings. FirstEnergy could have prevented harm to the integrity of
11 the ATSI Integration auction, but it did not do so. FirstEnergy cshould not be allowed to simply
12 change its position after misleading market participants in Ohio and in the ATSI Integration
13 auction. The Commission should not allow itself to become party to conduct that condones
14 market manipulation and undermines the integrity of the Commission. It is fundamentally
15 unfair.

16 If the Commission is not prepared to simply allow the Tariff Riders ELR and OLR to
17 expire on their own terms, the Commission should strip Riders ELR and OLR from the
18 stipulation, and allow all of the parties to conduct discovery and challenge the proposed Riders.

19 **Q. DOES THIS CONCLUDE YOUR TESTIMONY?**

20 A. Yes.

BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to R.C. § 4928.143 in the Form of an Electric Security Plan	)	Case No. 10-388-EL-SSO

ENTRY OF APPEARANCE

EnerNOC, Inc. gives notice that the law firm of Faruki Ireland & Cox P.L.L., through Charles J. Faruki and D. Jeffrey Ireland, hereby enter their appearance as local counsel on behalf of EnerNOC, Inc.

Respectfully submitted,

Jacqueline Lake Roberts (0026806)
Trial Attorney
13212 Havens Corner Road S.W.
Pataskala, OH 43062
Telephone: (740) 927-3344
Email: jroberts@enernoc.com

Charles J. Faruki (0010417)
D. Jeffrey Ireland (0010443)
FARUKI IRELAND & COX P.L.L.
500 Courthouse Plaza, S.W.
10 North Ludlow Street
Dayton, OH 45402
Telephone: (937) 227-3705
Telecopier: (937) 227-3749
Email: cfaruki@ficlaw.com

Attorneys for EnerNOC, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Entry of Appearance was served electronically to the counsel identified on the attached Service List this 16th day of April, 2010.

D. Jeffrey Ireland

383749.1

SERVICE LIST

amyspiller@kravitzllc.com
aporter@szd.com
beitingm@firstenergycorp.com
burkj@firstenergycorp.com
cmiller@szd.com
cmooney2@columbus.rr.com
Cynthia.brady@constellation.com
dakutik@jonesday.com
dane.stinson@baileycavalieri.com
David.fein@constellation.com
dboehm@BKLlawfirm.com
dmancino@mwe.com
drinebolt@aol.com
duane.luckey@puc.state.oh.us
elmiller@firstenergycorp.com
gas@bbrslaw.com
gdunn@szd.com
gkrassen@bricker.com
glawrence@mwe.com
Greg.price@ puc.state.oh.us
haydenm@firstenergycorp.com
henryeckhart@aol.com
jbentine@cwslaw.com
jclark@mwncmh.com
jlang@calfee.com
jpmeissn@lasclev.org
jroberts@enernoc.com
kim.bojko@puc.state.oh.us
korkosza@firstenergycorp.com
lkeiffer@co.lucas.oh.us
lmcalister@mwncmh.com
lmcbride@calfee.com
MHPetricoff@vorys.com
mhpetricoff@vssp.com
mkl@bbrslaw.com
mkurtz@BKLlawfirm.com
mparke@firstenergycorp.com
mvincel@lasclev.org
mwarnock@bricker.com
mwhite@cwslaw.com
myurick@cwslaw.com
nmoser@theOEC.org
Poulos@occ.state.oh.us
poulos@occ.state.oh.us
ricks@ohanet.org
robinson@citizenpower.com
rtriozzi@city.cleveland.oh.us
sam@mwncmh.com
sbeeler@city.cleveland.oh.us
small@occ.state.oh.us
small@occ.state.oh.us
smhoward@vorys.com
Thomas.Mcnamee@puc.state.oh.us
tobrien@bricker.com
trent@theOEC.org
will@theOEC.org
Williams.toddm@gmail.com
wis29@yahoo.com