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

**POST-HEARING BRIEF OF OHIO EDISON COMPANY,
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY,
AND THE TOLEDO EDISON COMPANY**

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INTRODUCTION

The Commission should approve the Electric Security Plan (the "ESP") proposed by Applicants, Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company (collectively, the "Companies"), and 16 other interested parties as described in the Application, Stipulation and Recommendation (the "Stipulation") and Direct Testimony of William R. Ridmann.[1] The ESP provides comprehensive benefits for customers and complies with all applicable statutory and regulatory criteria. It reflects the cooperation between and among the Companies and a diverse group of interested parties (the "Signatory Parties") who have agreed to submit the Stipulation to the Commission for its review and approval. The Signatory Parties worked diligently over several months to create a standard service offer ("SSO") for the Companies' customers that provides significant quantitative and qualitative benefits. The ESP provides for more predictable rates, including competitively set generation pricing, and it promotes economic development and energy efficiency initiatives. The ESP also includes several elements that will benefit low-income residential customers, including a substantial commitment of shareholder funds toward programs serving those customers. Importantly, the ESP includes the Companies' commitment not to seek cost recovery from customers of millions of dollars of costs, fees, and charges related to the Companies' membership (and transfer of membership) in a regional transmission organization ("RTO"). It satisfies all criteria for the Commission's approval of a stipulation, as well as the underlying statutory criteria set forth in R.C. § 4928.143 for electric security plans.[2] Indeed, as described in

[1] The Application is Company Exhibit 1. The Stipulation is Joint Exhibit 1, as corrected through errata marked as Company Exhibits 2 and 3. The Direct Testimony of William R. Ridmann ("Ridmann Testimony"), is Company Exhibit 4.

[2] Notably, although the Commission received comments from the public in multiple hearings conducted across the Companies' service territories, very few addressed the proposed ESP, yet alone the relevant review criteria.

further detail below, the ESP is more favorable in the aggregate than the expected outcome of a market-rate offer ("MRO") and, therefore, should be approved.

The Companies, the Signatory Parties,[3] the parties not opposing the Stipulation,[4] and most of the remaining parties who oppose the Stipulation (the "Opposing Intervenors")[5] have investigated, debated and negotiated the issues set forth in the Stipulation since at least October 2009, when the Companies filed an application to set SSO pricing through an MRO. Although negotiations for a new ESP that includes provisions related to those at issue in the MRO application formally began in December, many of these issues actually have been a focus for all of the parties for more than a year as the proposed new ESP contains many provisions that are reflected in the existing SSO. Indeed, the Companies' current SSO was set by the terms of an electric security plan that was presented to, and approved by, the Commission in March 2009 as a stipulation (the "2009 ESP" or the "Current ESP"). The Current ESP will expire on May 31, 2011. Accordingly, the parties – through the MRO Application and now the Stipulation – have been working to set the terms for SSO service beginning thereafter on June 1, 2011. The ESP proposed by the Signatory Parties incorporates significant compromises that result in a broad set of benefits for all customers and the greater public interest.

[3] The Signatory Parties include the Staff of the Public Utilities Commission of Ohio ("Staff"), Ohio Partners for Affordable Energy ("OPAE"), Ohio Schools Council ("Schools"), Ohio Energy Group ("OEG"), FirstEnergy Solutions ("FES"), Industrial Energy Users - Ohio ("IEU-Ohio"), Constellation Energy Commodities Group, Inc. and Constellation NewEnergy, Inc. (collectively "Constellation Energy"), Material Science Corporation, Ohio Hospital Association ("OHA"), Ohio Manufacturers Association ("OMA"), Association of Independent Colleges and Universities of Ohio ("AICUO"), Nucor Steel Marion, Inc. ("Nucor"), as well as the Companies. The Council of Smaller Enterprises ("COSE") and the City of Akron ("Akron") also have joined the Stipulation through a Supplemental Stipulation expected to be filed on or after May 3, 2010. For purposes of this brief, references to the Stipulation include the Supplemental Stipulation.

[4] The Non-Opposing Intervenors are The Kroger Company ("Kroger") and the PJM Providers Group.

[5] The Opposing Intervenors are the Office of Ohio Consumers' Counsel ("OCC"), Ohio Environmental Council ("OEC"), Natural Resources Defense Council ("NRDC"), the Environmental Law and Policy Center ("ELPC"), EnerNOC, Inc. ("EnerNOC"), Direct Energy Services, LLC ("Direct Energy"), the Demand Response Coalition, the Northeast Public Energy Council ("NOPEC"), the Northwest Ohio Aggregation Coalition ("NOAC"), and the Consumer Coalition.

The value of the ESP includes the proposed timeline for the Companies' purchase of necessary generation service beginning June 1, 2011, through a competitive bidding process ("CBP") with the first auction proposed for July 2010, to take advantage of the current favorable market conditions. In order to timely prepare for and complete the CBP, the Signatory Parties have requested that the ESP be approved on or before May 5, 2010. The parties' experience with the issues raised by the ESP, including the discovery, testimony, and briefing compiled in connection with the MRO application,[6] have allowed for a timely submission of the ESP and its benefits to the Commission. Timely approval of the Stipulation by the Commission is the final step toward maximizing the benefits of the ESP for the Companies' customers. The ESP's aggregate benefits are well-established and, accordingly, the Signatory Parties urge the Commission to approve the ESP as set forth in the Stipulation and supporting testimony.

ARGUMENT

The Companies are pleased to submit the ESP for the Commission's review as a settlement agreement reached by the numerous Signatory Parties. Rule 4901-1-30, O.A.C., authorizes parties to Commission proceedings to enter into a settlement, such as the Stipulation submitted here. The terms of a settlement stipulation are accorded substantial weight.[7] The

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[6] The Commission has properly ordered that it will take administrative notice of the record in the Companies' MRO proceeding for the purposes of its consideration of the Stipulation: "All testimony and exhibits which were admitted into evidence in Case No. 09-906-EL-SSO shall be admitted into the evidentiary record of this proceeding. Further, all briefs and other pleadings filed in Case No. 09-906-EL-SSO may be used for any appropriate purpose in this proceeding." Entry, Case No. 10-388-EL-SSO, filed April 6, 2010. In accordance with the Commission's decision, the Companies shall identify all citations to the record in the MRO proceeding as "MRO Testimony" or, for citations to the hearing transcript, as "MRO Tr. Vol. __." It should also be noted that nothing in the Commission's decision to incorporate the MRO docket into the record of this proceeding (a standard practice that furthers the interests of judicial efficiency and economy) serves to lessen the burden of proof in this matter, as OCC alleges. Indeed, this burden is not affected in any way by the Commission's April 6, 2010 Entry.

[7] *Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, 125 (1992), *citing Akron v. Pub. Util. Comm.*, 55 Ohio St.2d 155 (1978).

Commission's determination is focused on whether the stipulation is reasonable and should be adopted.[8] In doing so, the Commission considers three criteria:[9]

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

(2) Does the stipulation, as a whole, benefit ratepayers and the public interest?

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

The Signatory Parties' Stipulation satisfies each of these criteria and, therefore, should be approved. Approval of the Stipulation also is proper because the ESP proposed therein also satisfies the statutory criteria for electric security plans set forth in R.C. § 4928.143. The capable and knowledgeable Signatory Parties have created an ESP for the delivery of SSO service to the Companies' customers that provides qualitative and quantitative benefits that render the ESP more favorable in the aggregate than an MRO. The Stipulation should be approved.

I. The Stipulation Is The Product Of Serious Bargaining Among Capable And Knowledgeable Parties.

The Signatory Parties and others devoted significant time and effort to the development of the Stipulation. The process was initiated by Staff in conjunction with the Companies' MRO proceeding.[10] The Companies, the Signatory Parties, and others then continued the process through extensive negotiations. As a result, the Stipulation reflects a cooperative document that integrates the Signatory Parties' diverse interests and establishes a comprehensive framework for the provision of electric generation and distribution service that benefits the Companies' customers and the greater region.

[8] *Id.*

[9] *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.*, 68 Ohio St.3d 559 (1994), *citing Consumers' Counsel*, 64 Ohio St.3d at 126.

[10] *See* Staff Comments, Case No. 09-906-EL-SSO (filed Nov. 24, 2009).

The numerous and diverse Signatory Parties clearly are capable and knowledgeable.[11] They include the Commission's Staff and municipalities (both of which represent the interests of all customers[12]), along with representatives of manufacturers, industrial and commercial customers, hospitals, small businesses, schools of all levels, low and moderate-income residential customers, CRES suppliers, and other generation service providers.[13] The Signatory Parties have consistently participated in the Companies' regulatory proceedings, including the 2009 ESP and the more recent MRO proceedings, and other Ohio utility proceedings, and have been represented by similarly experienced counsel. The Commission has recognized this type of experience in approving other stipulations.[14]

The Stipulation also was the result of serious bargaining. The Signatory Parties, meeting both collectively and in individual conferences, extensively negotiated the Stipulation. The negotiations held specifically for the Stipulation lasted months. The first formal meeting took place on December 1, 2009, in the form of a prehearing conference.[15] The Stipulation was eventually filed on March 23, 2010. In between, there were several settlement meetings, which were noticed to all parties.[16] Staff was present at all of these negotiations.[17] Numerous other discussions were held between the Companies and parties directly.[18]

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[11] *See* Suppl. Stip., pp. 4-5 (signatory pages).

[12] *See* Tr. Vol. III, p. 775; *see also* Tr. Vol. II, pp. 483-484.

[13] *See* Stip., pp. 36-37. Kroger and the PJM Providers group also do not oppose the Stipulation. *See* Ridmann Testimony, p. 10.

[14] *See In the Matter of the Application of Duke Energy Ohio, Inc., to Establish its Fuel and Economy Purchased Power Component of its Market-Based Standard Service Offer for the Period of Jul. 1, 2007, through Dec. 31, 2008,* Case Nos. 07-974-EL-UNC, 07-975-EL-UNC, Opinion and Order, 2009 WL 3228703 (Ohio Pub. Util. Comm. Sept. 30, 2009) (approving stipulation and finding first criterion met where "[t]he parties to these cases have been involved in numerous cases before the Commission and have provided extensive and helpful information to the Commission").

[15] *See* Ridmann Testimony, p. 9.

[16] Turkenton Testimony, p. 2.

However, the December 2009 pre-hearing conference was not the first time these parties discussed the many issues addressed in the Stipulation; all of the parties have been engaged with these issues in related proceedings involving the Companies for more than a year. Most recently, the Companies and numerous interested parties, including the Signatory Parties, were involved in the proceedings stemming from the Companies' MRO Application, which was filed in October 2009 and remains pending. As the Commission noted in its April 6, 2010 Entry in this case, "the application and the [S]tipulation filed in this proceeding appear on their face to be the culmination of a lengthy process beginning with [the Companies'] application to [the Federal Energy Regulatory Commission ("FERC")] for RTO realignment and continuing with the extensive litigation conducted in the MRO proceeding."[19] The Signatory Parties and most of the Opposing Intervenors were also involved in the Companies' proceedings to establish SSO service after the initiation of Am. Sub. Senate Bill 221 ("S.B. 221"), when the Companies filed an application for both an MRO and an electric security plan in July 2008.[20] Those proceedings continued through the fall of 2008 until the Companies' Current ESP was approved via stipulation in March 2009. The Signatory Parties gained significant experience in these prior proceedings with the CBP and riders that are included in the Stipulation here, which experience informed the Signatory Parties in their negotiations.

The knowledge of the Signatory Parties also has been informed through several other proceedings instituted by the Companies over the past two years. For example, the Stipulation contains provisions regarding the Companies' corporate separation plan, which was filed for

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[17] *Id.*

[18] Tr. Vol. I, p. 119; Tr. Vol. III, pp. 770-771.

[19] Entry, Case No. 10-388-EL-SSO, filed Apr. 6, 2010, p. 4.

[20] *See* Case Nos. 08-935-EL-SSO (for an ESP) and 08-936-EL-SSO (for an MRO), both of which were filed July 31, 2008.

Commission approval in June 2009 and has been the subject of discovery since that time.[21] The Stipulation also contains provisions related to the Companies' energy efficiency / peak demand reduction ("EE/PDR") filings, the preparation for which began in the Summer of 2009 through the Companies' collaborative groups and which similarly involved many of the Signatory Parties and Opposing Intervenors.[22] Therefore, the Signatory Parties have engaged in extensive communications and information sharing, including discovery, depositions, hearing testimony, and briefing, regarding the issues presented in the Stipulation.[23] Accordingly, there is no basis for claiming that the Stipulation is not the result of serious bargaining by capable, knowledge parties.

Indeed, OCC's challenge to the Signatory Parties' negotiations – made through the testimony of OCC witness Gonzalez – lacked any credibility. It is clear from his testimony that much of the events leading up to the submission of the Stipulation to the Commission either fell outside of his purview or are not as represented in his testimony. He lacks familiarity with the MRO proceeding, the 2009 ESP proceeding, the Companies' EE/PDR proceedings, and the negotiation of the Stipulation itself.[24] He somewhat recalls being present at several – up to six – negotiation sessions, but has provided little detail supporting the radical allegations in his testimony.[25] He has some memory of being provided information by the Companies during the negotiations, but has provided no specificity regarding information not provided.[26] In fact, he admits to an undefined and limited role in the negotiations and, thus, he cannot say what

[21] *See* Case No. 09-462-EL-UNC.

[22] *See* Case No. 09-1947-EL-POR *et seq.*

[23] *See* Ridmann Testimony, p. 11.

[24] Tr. Vol. IV, pp. 927-928.

[25] Tr. Vol. III, pp. 767-770.

[26] Tr. Vol. III, pp. 767-770.

information was provided to other OCC staff members or to the Signatory Parties.[27] He also places most of the blame on what he calls unequal power over available information between the Companies and interested parties, but he acknowledges that this "inequality" can be overcome as it was for the 2009 ESP Stipulation.[28] Moreover, Mr. Gonzalez can point to no request for discovery from OCC to which the Companies have not responded.[29] And, he acknowledged that the vast majority of the Stipulation's key provisions (as determined by him) have been explored by the parties in other proceedings.[30] His "expert" testimony was reckless[31] and should carry no weight with the Commission.

NRDC witness Sullivan's testimony is similarly problematic. He suggests that the negotiations surrounding the Stipulation's provision for the recovery of lost distribution revenue associated with energy efficiency programs do not satisfy the first criterion for approval of settlements because the parties "most interested" in this issue are not Signatory Parties.[32] This allegation is empty, if not insulting.[33] First, Mr. Sullivan acknowledged that he was not even present during the negotiations and, therefore, cannot have any basis upon which to question the substance of the negotiations.[34] Second, Mr. Sullivan also has no basis for his "understanding"

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[27] Tr. Vol. III, pp. 767-774, Tr. Vol. IV, pp. 900-907.

[28] Tr. Vol. IV, pp. 922-924.

[29] Tr. Vol. IV, p. 906.

[30] Tr. Vol. IV, pp. 949-957.

[31] *See* Tr. Vol. IV, pp. 919-920 (IEU-Ohio counsel questioning OCC witness Gonzalez regarding his reckless claim that the Signatory Parties lacked adequate knowledge to enter into serious settlement negotiations).

[32] Mr. Sullivan originally testified that none of the parties interested in this issue are Signatory Parties. Sullivan Testimony, p. 6. He later backed off this position by amending his testimony to reflect that the parties "most" interested in this issue are not signatories. Tr. Vol. II, p. 465.

[33] *See* Sullivan Testimony, p. 6.

[34] Tr. Vol. II, pp. 470, 498.

regarding which parties are "most interested" in this issue.[35] He broadly assumes that the customer groups who do not pay lost revenues at the "same magnitude" as residential customers cannot be "most interested," but he did not consult with any rate class GS customers, from whom lost distribution revenue is recovered and representatives of whom are Signatory Parties, and he acknowledges that the City of Cleveland "[t]o the extent that they are arguing on behalf of their residents, . . . might have an interest."[36] The City of Akron would have a similar interest. Mr. Sullivan's dispersions spread as far as Staff and OPAE, both of whom cannot be said to ignore the interests of residential customers, but are Signatory Parties.[37]

Similarly, EnerNOC's argument that it has been deprived of due process and cannot effectively challenge the Stipulation collapsed at hearing under the weight of its witness's admissions. That witness – Kenneth Schisler – claimed in his prefiled testimony that EnerNOC did not know about settlement discussions in the MRO case, that EnerNOC could not participate in those negotiations, and further that EnerNOC was excluded from those discussions.[38] On cross-examination, however, a dramatically different picture came to light. Mr. Schisler admitted that EnerNOC had been monitoring the MRO docket and would have expected to have someone at EnerNOC review the Commission's orders and the filings by the Staff in that case.[39] He further admitted that, although he was not specifically aware of that fact, a review of such materials would have revealed that the Staff did, in fact, announce its intention to circulate a

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[35] *See* Tr. Vol. II, pp. 482.

[36] Tr. Vol. II, pp. 483-484.

[37] Tr. Vol. II, pp. 482-487. Mr. Sullivan also was unable to identify the members of OPAE. *Id.*, p. 487. OCC witness Gonzalez shared his curious view on the constituency of OPAE as being made up entirely of weatherization providers, which view is easily dispelled by, among other things, a reading of OPAE's motion to intervene and its administration of fuel funds. Tr. Vol. IV, pp. 776-777; *see* OPAE Memorandum in Support of Motion to Intervene, Case No. 09-906-EL-SSO, filed Oct. 29, 2009, at p. 2.

[38] Schisler Testimony, pp. 4-6.

[39] Tr. Vol. II, p. 283, 287, 288.

settlement proposal.[40] He also admitted that even if he was aware of the fact that the Staff had submitted a proposal, he would not have asked for it.[41] Still further, Mr. Schisler admitted that he not only would have expected that settlement talks where going on, but that he knew "through the trade" that such talks were taking place.[42] Even though Mr. Schisler admitted to discussing the MRO case with some of the parties to that case, he did not ask the Companies or anyone else about the settlement negotiations.[43] And, even though EnerNOC was aware of the settlement talks, EnerNOC did not bother to intervene in the MRO case but did intervene in the Companies' EE/PDR portfolio plan proceeding.[44]

Thus, what emerges from the record is not that EnerNOC was unaware of settlement or that it was "excluded" from anything. Instead, as Mr. Schisler admitted, EnerNOC knew that settlement talks were going on and affirmatively chose not to get involved.[45] Once the Stipulation was filed, EnerNOC chose to intervene in this proceeding and eventually served discovery on the Companies. Although Mr. Schisler claimed in his pre-filed testimony that EnerNOC was unable to "effectively" challenge the Stipulation, he admitted at hearing that it had no discovery outstanding.[46] Of course, EnerNOC also was able to present testimony and cross-examine all witnesses. EnerNOC's complaints regarding the Stipulation process should be

[40] Tr. Vol. II, p. 291.

[41] *Id.*

[42] Tr. Vol. II, pp. 294-95.

[43] Tr. Vol. II, p. 283-284, 295.

[44] Tr. Vol. II, pp. 296, 312-13.

[45] In his direct testimony, Mr. Schisler's due process discussion also included a claim that there had been some change in the burden of proof in this case. EnerNOC Exh. 1, p. 6. On cross-examination, however, he admitted that he didn't even know which parties had the burden of proof. Tr. Vol. II, p. 325. Similarly, although, in his direct testimony Mr. Schisler claimed that EnerNOC had been constrained to do discovery (EnerNOC Ex. 1. p. 6), he did not identify any discovery that EnerNOC asked for and didn't get. Moreover, he could not discuss the progress of discovery at all because he could not recall what role, if any, he played in formulating EnerNOC's discovery. Tr. Vol. II, pp. 324-25.

[46] Tr. Vol. II, p. 451.

understood for what they really are: unhappiness that a handful of interruptible customers may elect to take service under Rider ELR because it is "an incredibly better deal" than EnerNOC intends to offer those same customers.[47]

None of the Opposing Intervenors' challenges to the development of the Stipulation alter the fact that the comprehensive document incorporates the efforts of numerous, diverse parties with years of experience and negotiations spanning months, if not years. As Staff concluded, the Stipulation "is the product of an open process in which all parties were represented by able counsel and technical experts. Negotiations and analysis on complex issues occurred, including new issues and other mandates provided for in" S.B. 221.[48] The Stipulation satisfies the first criterion.

II. The Stipulation Benefits Ratepayers And The Public Interest.

The Stipulation proposes adoption of an ESP with numerous, wide-ranging provisions that will provide diverse benefits to the Companies' customers. Indeed, the broad benefits of the ESP are reflected by the statutory criteria with which it complies and which are described in further detail in Section IV *infra*. R.C. § 4928.143 acknowledges that an electric security plan benefits ratepayers because "its pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, [must be] *more favorable in the aggregate* as compared to the expected results that would otherwise apply under" a market-rate offer.[49] Electric security plans also are beneficial because R.C. § 4928.143 provides for breadth and flexibility. The statute explicitly anticipates both quantitative and qualitative benefits, including the opportunity to promote economic development, job retention, and energy efficiency

[47] *See* Tr. Vol. II, p. 445.

[48] Turkenton Testimony, p. 2.

[49] R.C. § 4928.143(C)(1) (emphasis added).

programs.[50] Here, the Signatory Parties have proposed an ESP that takes advantage of all of these features of an electric security plan and, in so doing, benefits customers and the public interest. As a result, the Stipulation satisfies the second criterion of the Commission's review.

A. The ESP Provides More Stable And Certain Pricing For Three Years.

1. <u>Generation</u>

The ESP's provisions for generation service are significant. First and foremost, the ESP allows the Companies to procure the necessary generation supply for their SSO load, other than the load discussed in Section II.D. *infra*, from June 1, 2011 until May 31, 2014 via a descending-clock CBP.[51] The proposed CBP is an open, fair, transparent, competitive, standardized, clearly defined, and independently administered process that mirrors in many respects the CBP used to procure generation supply in the Companies' successful May 2009 Auction. Indeed, it received the support of Constellation Energy, a bidder in the May 2009 Auction and potential bidder for the proposed ESP, and former Commission Chairman Chema, who testified on behalf of the AICUO that the CBP is "designed to promote customers obtaining the lowest possible generation rates."[52] OCC witness Wallach agreed that there was no reason to believe the process is not fair, open, transparent, and nondiscriminatory.[53] The following benefits were described extensively in the Companies' MRO proceeding:

- The proposed CBP promotes competition and lower prices through an open, fair and transparent process that includes significant information-sharing, standardized documents and protocols, and competitive safeguards.[54]

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[50] R.C. § 4928.143(B)(2)(i).

[51] *See* Stip., § A.1.

[52] Fein MRO Testimony, pp. 5-6; *see also* MRO Tr. Vol. III, pp. 372-373; Chema MRO Testimony, pp. 2-3.

[53] MRO Tr. Vol. VI, p. 806.

[54] *See* Staff MRO Exh. 1, p. 3.; *see also* Chema MRO Testimony, pp. 3-4.

- The proposed CBP product seeks a clearly defined slice-of-system, full requirements tranche of the Companies' aggregated SSO load, including energy services, capacity services, market-based transmission services and ancillary services.[55]

- Bidders will be subject to standardized evaluation criteria both at the front-end, in terms of which interested bidders are qualified to participate, and at the back-end, in terms of the selection of the least-cost bidder(s).[56]

- The CBP will be coordinated and conducted by an independent CBP manager, CRA International, which served in a similar role for the May 2009 Auction and has received support from Staff and Constellation Energy.[57]

The proposed CBP also incorporates several improvements over the May 2009 Auction. First, it will solicit SSO generation load through multiple auctions and multiple auction products.[58] This auction process serves to mitigate market prices and stabilize generation prices.[59] In the first year, there will be two auctions, designed to take advantage of the current, favorable wholesale energy market.[60] Thereafter, auctions will occur in July 2011 and 2012, which can help mitigate any volatility in energy prices going forward.[61]

Contrary to OCC's speculation, no logical relationship has been established between auction pricing and conducting an auction in July when it is "hot."[62] The July 2010 auction (and the October 2010 auction) will solicit three products of varying lengths for future SSO load.[63]

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[55] Stip, § A.1.; *see* Staff MRO Exh. 1, p. 3; Fein MRO Testimony, p. 5.

[56] Stip, § A.1.; Staff MRO Exh. 1, p. 4; *see also* Fein MRO Testimony, p. 5; R.C. § 4928.142(A)(1); O.A.C. 4901:1-35-03(B)(2)(h).

[57] *See* Staff MRO Exh. 1, p. 4; Fein MRO Testimony, p. 5.

[58] Tr. Vol. I, p. 249 (Staff witness Turkenton acknowledging the staggered auctions as a benefit of the proposed ESP).

[59] Warvell MRO Testimony, p. 7; MRO Tr. Vol. III, pp. 424-425.

[60] *See* Stip., Att. B; Ridmann Testimony, p. 27; Tr. Vol. I, pp. 186-187.

[61] *See* Stip., Att. B.

[62] *See* Tr. Vol. I, pp. 91-92 (OCC's counsel making the point that it generally is hotter in July than in May).

[63] *See* Stip., Att. B.

These products are not limited to July prices or peak-season loads; rather, bidders must offer tranches (1% slices of the SSO load) of the Companies' load for the entire duration of the product for which they submit bids. To the extent there is commodity uncertainty, using staggered product lengths reasonably addresses that uncertainty.[64] OCC recommends that the auction instead take place in March or April of 2011 to avoid July.[65] But, this recommendation is offered with no evidence to support the benefits of an auction in such a timeframe and was not based on any discussions with any suppliers who would participate in the CBP.[66] OCC's recommendation would only limit suppliers' ability to hedge their risks because an auction in either March or April 2011 would occur after PJM's process to allocate ARR rights, thereby precluding suppliers from using that process to hedge.[67] A delayed auction also could preclude the Companies' customers from taking advantage of the current market conditions, the benefits of which OCC witness Gonzalez acknowledged.[68] As Companies' witness Schnitzer explained in the MRO proceeding, "there is no 'market timing' justification for holding the auction on any particular date."[69] Further, supplier witness Fein testified that by initiating the auction process nearly a year in advance of the date of service – as proposed in the Stipulation – suppliers would have a greater ability to mitigate risk and initiate hedging transactions, thereby promoting lower prices.[70] No other potential bidders have indicated any issues with the timing of the auctions and

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[64] Schnitzer MRO Testimony, p. 33-34.

[65] Tr. Vol. IV, pp. 863-864.

[66] *Id.*, p. 865.

[67] *See id.*, pp. 864-866.

[68] *See* Tr. Vol. IV, pp. 934-935.

[69] Schnitzer MRO Testimony, p. 33; *see also* Tr. Vol. I, p. 91.

[70] Fein MRO Testimony, pp. 6-7.

holding an auction more than a year in advance of the delivery date is consistent with Commission precedent.[71]

Another improvement in the proposed CBP is the separation of certain transmission costs from the CBP product. As originally proposed in the MRO, network integration transmission services ("NITS") and other non-market-based FERC and RTO charges billed to the Companies for the Companies' load, including shopping customers, will be recovered through Rider NMB.[72] Suppliers initially requested this change after the May 2009 Auction because these charges are not easily hedged or managed by suppliers.[73] Nucor MRO witness Goins testified that "procuring non-market based transmission services directly may lower overall energy costs by removing any hedging risk that would otherwise be reflected in a competitive supplier's bid."[74]

The Stipulation also gives the Commission discretion to order a load cap of no less than 80%, which one or more Signatory Parties may view as a benefit.[75] As made clear through testimony in the MRO proceeding, however, the use of load caps is ill-advised. The Companies' MRO witness Schnitzer explained that "the imposition of a load cap could result in a higher clearing price (because a bidder at the load cap would be precluded from offering additional supply at a price below the auction clearing price) and therefore higher costs to SSO customers"[76] – a principle recognized by OCC's MRO witness Wilson.[77] In addition, other

[71] In Case No. 04-1371-EL-ATA, the Commission ordered that an auction take place on December 2, 2004 for delivery commencing on January 1, 2006.

[72] Stip., §§ C.1., C.4.

[73] MRO Tr. Vol. II, pp. 239-241; Warvell MRO Testimony, p. 8; *see also* Fein MRO Testimony, pp. 6-8.

[74] Goins MRO Testimony, pp. 45-46.

[75] Stip., § A.10.

[76] Schnitzer MRO Rebuttal, p. 39; MRO Tr. Vol. VII, pp. 1036-1037; Tr. Vol. I, p. 178.

[77] MRO Tr. Vol. VI, p. 822.

auctions that implemented load caps in the past were unsuccessful.[78] Nevertheless, under the Stipulation, the Commission retains the option of instituting a load cap consistent with the parameters set forth in the Stipulation.

The proposed CBP also allows for additional Commission oversight. The Commission may retain a consultant to monitor the CBP and advise the Commission as to its progress.[79] The Commission may reject the bid manager's selection of the CBP winning bidder(s) within 48 hours of the close of the auction if its consultant or the bid manager report that there were violations in the CBP rules such that the results should be invalidated, as set forth in the Stipulation.[80] Further, the Stipulation provides that the Commission may make certain modifications to future CBP solicitations under the ESP, in accordance with recommendations from the CBP manager and/or the Commission's consultant.[81] The CBP proposed by the Stipulation benefits ratepayers and the public interest by instituting an open and competitive process that promotes lower and more stable generation prices for the three-year term of the ESP.

2. **Distribution**

The ESP's distribution provisions also provide certainty and stability to customer rates. The ESP includes a distribution base rate-freeze through June 1, 2014, except for certain emergency conditions available under R.C. § 4909.16.[82] Only revenue-neutral changes in the rate design would be available.[83] This agreement serves to help stabilize the distribution portion

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[78] *See* Staff MRO Exh. 1, p. 3; MRO Tr. Vol. III, pp. 441-446.

[79] Stip., § A.1.

[80] *Id*.

[81] *Id*.

[82] Stip., § B.1; Turkenton Testimony, p. 4 (identified by Staff as a benefit to ratepayers and the public interest).

[83] *Id*.

of customer rates for another three years, continuing the distribution base rate freeze instituted by the Current ESP, which is scheduled to expire on December 31, 2011.

The ESP also continues to provide for important investments in the Companies' distribution infrastructure by replacing Rider DSI, which was agreed to by the parties and approved by the Commission as part of the Current ESP, with a new rider that incorporates additional customer and regulatory benefits. The Companies will institute the Delivery Capital Recovery Rider ("Rider DCR"), effective January 1, 2012, through the ESP.[84] Rider DCR allows the Companies to recover certain taxes[85] and a return on and of plant in service associated with distribution, subtransmission, general, and intangible plant that was not included in the Companies' last base distribution rate case.[86] Net capital additions for general plant will be recovered by the Companies only if there is no net involuntary job loss at the Companies between a date prior to and after the merger with Alleghany Energy, Inc.[87] This provision protects the Companies' linemen and other operational employees.[88]

At the same time, Rider DCR includes improvements to the current Rider DSI. Recovery under Rider DCR will be capped, reconciled quarterly, subject to the significantly excessive earnings test ("SEET"), and eligible for refund.[89] Further, Staff and the Signatory Parties will have the opportunity to review quarterly updates to Rider DCR and file recommendations and/or

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[84] *See* Stip., § B.2.

[85] The Companies retain the right to submit a separate application for the recovery of any new or incremental taxes arising after June 1, 2011. *See* Stip., § H.2.

[86] *Id.*; Ridmann Testimony, p. 18.

[87] Stip., p. 15; Tr. Vol. I, pp. 89-90.

[88] *See* Tr. Vol. I, pp. 85-88.

[89] Stip., § B.3; *see also* Turkenton Testimony, p. 4 (identified by Staff as a benefit to ratepayers and the public interest).

objections in an annual audit process.[90] OCC raises certain challenges to the procedures of Rider DCR, which are discussed and refuted in Sections III and IV *infra* based on the inaccurate calculations and unsupported assumptions that purportedly support those challenges. Those challenges do not alter the fact that the ESP proposed by the Stipulation includes favorable terms for the provision of distribution service to the Companies' customers.

3. Rate Design and Other Riders

Certainty and stability are furthered by the minimal changes proposed by the ESP to the Companies' current rate design and riders. The few proposed changes include: the use of seasonality factors as proposed in the Companies' MRO; a flat rate structure for schedule RS as proposed by OCC in the MRO; and, the use of results of the prior year's PJM capacity auctions to develop Rider GEN's capacity and non-capacity related energy charges.[91] No Intervenor has submitted any testimony objecting to these changes. As described in further detail in Section D of the Stipulation, the majority of the riders currently in effect through the 2009 ESP also will continue in place, some with limited modifications.[92] The Companies' riders providing for time-differentiated generation pricing will continue in effect through the term of this ESP, without any auction bidding rule barriers to development of any new time-differentiated generation-related pricing concepts. Rider NDU also continues to recover non-distribution related uncollectible costs associated with the CBP on a bypassable basis.[93] In fact, there are only two new proposed riders, one of which will replace an expiring rider: Rider DCR (discussed in Section I.A.2. *supra*, which replaces Rider DSI) and Rider NMB (discussed in Section I.A.1. *supra*). And,

[90] Ridmann Testimony, p. 18; *see also* Tr. Vol. I, pp. 225-227 (Staff witness Turkenton explained the scope of Staff audits in such a scenario, including additional verification).

[91] Stip., § A.5.

[92] *See* Stip., Att. B.

[93] *Id*., § A.6.

proposed modifications to existing riders are favorable for customers. For example, recovery under Riders DFC and DGC may be accelerated if it would be beneficial to customers and other Signatory Parties.[94] The ESP's rate design and supporting riders further the benefits to ratepayers and the public interest.

B. The ESP Provides For The Companies' Compliance With Energy Efficiency and Peak Demand Reduction Requirements, And Promotes Other Efficiency Initiatives.

1. Interruptible Service Options

The ESP, as with the Current ESP, will provide the Companies' interruptible service offerings in the form of Rider ELR and Rider OLR, as modified, as a demand response program under R.C. § 4928.66.[95] The Companies' larger, interruptible customers advocated strongly for these riders during the MRO proceeding, including testimony that these riders provide further certainty for industrial customers, who will receive a known compensation for their interruptible load over the term of the ESP.[96] Indeed, over the course of the ESP proposed by the Stipulation, Rider OLR will provide a $1.95/kW/month credit for interruptible load and Rider ELR will provide a $5.00/kW/month credit.[97] In accordance with R.C. § 4928.66, the Companies will recover any delta revenue from these credits through the DSE1 charge of Rider DSE. The Companies will pass on any revenue received from PJM for PJM's demand response program in order to reduce the Rider DSE charges.[98] Rider ELR also includes a buy-through option for economic interruption. This provision benefits all customers because, as Companies' witness

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[94] *Id*., § A.9.

[95] *Id*., § D.2.

[96] *See* Goins MRO Testimony, pp. 21-23.

[97] Stip., § D.2., Att B.

[98] Tr. Vol. I, pp. 153-154.

Ridmann explained, suppliers would take into account the ability to reduce load at peak pricing in their CBP bids, which should promote lower generation prices that result from the CBP.[99]

To the extent Opposing Intervenors EnerNOC or the Demand Response Coalition suggest that the credits provided under Riders ELR and OLR are unfair or anticompetitive because they exceed the PJM FRR auction clearing prices, such a comparison is improper and the argument fails. As Companies' witness Ridmann explained, and the Opposing Intervenors' own witnesses confirmed, a comparison between the PJM FRR product and the Companies' interruptible offerings would be apples to oranges. For example, Rider ELR includes the economic interruption option discussed above, while the PJM FRR product does not.[100] The term of the credits provided under Riders ELR and OLR is for three years, when the PJM FRR commitment is just one year.[101] Further, to the extent the Companies pay more for interruptible load under Riders ELR and OLR than this same load would receive in a PJM auction (which is far from clear), it partly reflects the Companies' cost for compliance with R.C. § 4928.66.[102] EnerNOC may also argue that the Companies should somehow be required to maximize the load they bid into the PJM capacity auction in order to maximize revenues for the interruptible load. However, maximizing load into the PJM program is not necessarily best for customers; the Companies must take into account other considerations, including an assessment of the awarded price for the PJM FRR product, which is not known during the auction process.[103]

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[99] *Id.*, pp. 145-147; *see also* Goins MRO Testimony, p. 13 (explaining how the economic buy-through in Rider ELR mitigates conditions that produce price spikes in the wholesale market).

[100] Tr. Vol. II, p. 339.

[101] *Id.*, p. 340. EnerNOC witness Schisler also acknowledged that PJM's FRR price is unknown for year three of the ESP. *Id.*, pp. 340-341.

[102] *See* Tr. Vol. I, p. 167.

[103] *See id.*, pp. 155-161.

2. **Renewable Energy Credits**

The Signatory Parties propose that the Companies acquire all of their renewable energy resource requirements for the term of the ESP in the form of Renewable Energy Credits ("RECs").[104] RECs will be solicited through a request for proposal ("RFP") process conducted by an independent bid manager.[105] As OEG witness Baron testified in the MRO proceeding, RFPs can be a useful tool in setting market value for a product.[106] Any requirements remaining after the RFP process will be acquired through bilateral contracts. The costs associated with the Companies' acquisition of RECs will be recovered through Rider AER.[107]

OEC witness Hitt does not challenge the Signatory Parties' proposal to achieve the Companies' compliance with renewable energy resource requirements through the purchase of RECs, but she suggests that the Companies acquire solar RECs through long-term contracts of between 10-20 years.[108] OCC witness Gonzalez also parrots Ms. Hitt's proposal for long-term contracts for solar RECs.[109] However, the reasonableness of such an approach to the acquisition of RECs is very much in doubt.[110] First, it should be noted that Ms. Hitt is not involved in negotiating or executing contracts for solar energy, and is, instead, the leader of a trade group of solar energy manufacturers and developers who likely would be the beneficiaries of long-term

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[104] Stip., § A.4.

[105] *Id.*

[106] MRO Tr. Vol. IV, p. 493.

[107] *Id.*

[108] *See generally* Hitt Testimony.

[109] Gonzalez Testimony, pp. 52-53. Indeed, he argues that the Commission should require REC contracts of ten to fifteen years so as to avoid another force majeure filing relating the Companies' solar benchmarks for 2010. He must recognize, however, that any such contracts could not possibly result in RECs being generated in 2010 given that solar projects may take over a year to complete. *See* Tr. Vol. IV, pp. 868-869.

[110] *See generally* Hitt Testimony; Tr. Vol. II, p. 550.

contracts.[111] Long-term contracts for solar energy RECs also are inconsistent with the Companies' relatively short-term purchases of energy for SSO customers.[112] If the Companies entered into long-term purchases and were left with an over-supply of RECs due to load levels, customer shopping levels, or any other reasons, then customers may bear the brunt of that purchasing decision.[113] Long-term contracts also would preclude the Companies from including renewable resource requirements in the CBP product in the future.[114] Ms. Hitt also acknowledged that the solar energy market in Ohio is immature and that contract costs are subject to a number of unknown variables.[115] Moreover, there is no assurance that the benefits provided to solar developers would inure to the benefit of Ohio ratepayers.[116] In sum, Ms. Hitt's testimony regarding the purchase of solar RECs through long-term contracts raises more questions than it answers, and should not affect the Commission's consideration of the Signatory Parties' Stipulation.[117]

3. <u>Other Initiatives</u>

- *Eligibility for Mercantile Projects*. College or university members of AICUO may seek to institute mercantile-sited energy efficiency projects pursuant to R.C. § 4928.66 under the ESP.[118] The Stipulation makes clear that AICUO member institutions will be eligible

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[111] Tr. Vol. II, pp. 547, 553-554.

[112] Tr. Vol. I, pp. 79-80; *see also* Tr. Vol. II, pp. 550-551.

[113] *See* Tr. Vol. II, pp. 550-552, 556-558.

[114] *See* Tr. Vol. IV, p. 867.

[115] Tr. Vol. II, pp. 541-543.

[116] *See* Tr. Vol. IV, pp. 931-933.

[117] OCC's similar arguments against the Companies' acquisition of RECs through an RFP process are not credible for the same reasons as Ms. Hitt's are not. *See* Gonzalez Testimony, p. 52. Further, Mr. Gonzalez's overbroad conclusion that the RFP process as a whole had little success is based on nothing more than the extrapolation of his perception that there were challenges in acquiring solar RECs. Tr. Vol. IV, pp. 866.

[118] Stip., § F.5.

as a mercantile customer for such projects if their aggregate load qualifies as a mercantile customer. The AICUO member institutions also will seek to assist the Companies in performing energy-related research through the institutions' capable professionals.[119] OCC witness Gonzalez suggests that this agreement is improper, but as explained in further detail in Section III *infra*, this ESP provision does little more than confirm the statutory eligibility of AICUO institutions for the credit under Rider DSE associated with customer-sited energy efficiency programs — and thereby promote energy efficiency initiatives at these institutions.

- *The LED Pilot*. The ESP will support the initiation of a LED streetlight pilot program by CEI for the City of Cleveland (the "LED Pilot").[120] Under the LED Pilot, CEI and Cleveland will work cooperatively regarding the installation of LED streetlights in Cleveland during the ESP for the LED Pilot with the billing procedures set forth in the Stipulation. This project will result in energy efficiency savings for Cleveland's residents.

- *Energy Efficiency Contributions for Cleveland and Akron.* The ESP will also obligate CEI to provide direct funding to Cleveland and OE to provide direct funding to Akron to support the cities' energy efficiency and sustainability goals.[121] CEI and OE will each contribute $300,000 over the course of the term of the ESP to their respective city in this regard.

- *Continued Funding of EE Administrators.* The ESP provides for continued service from and compensation of energy efficiency administrators, along with the opportunity for the Companies to appoint additional administrators for commercial and industrial programs.[122] Signatory Parties agree that those of them who were appointed as energy efficiency

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[119] *Id.*, § F.6.

[120] *See id.*, § F.3.

[121] Suppl. Stip., § E.7.

[122] *Id.*, § E.2.

administrators under the 2009 ESP shall continue to serve in that role, including COSE, AICUO, OHA, and OMA. The costs associated with energy efficiency administrators will be recovered through Rider DSE.[123]

C. The ESP Promotes The Region's Economy.

The statutory criteria for electric security plans authorize and anticipate that such plans will include provisions for economic development.[124] The Signatory Parties' ESP fulfills the General Assembly's expectations in that regard by including a number of provisions to help stimulate the economy of the Companies' territories and the development of jobs in the region. The costs associated with these provisions, which are discussed in further detail below, are recovered through the Companies' current Economic Development Rider ("Rider EDR"), other than, of course, the Companies' shareholders' own contributions.[125] These provisions provide important qualitative benefits to the region, the significance of which cannot be underestimated in light of the current state of the economy.

- *Support for Expansion of the Cleveland Clinic.* The Cleveland Clinic Foundation (the "Clinic") is one of the largest private employers in Ohio and operates facilities in all of the Companies' territories.[126] In addition to direct employment, the Clinic also makes significant collateral contributions to the region's economy, including the use of contract employees and services, and the initiation of construction projects and jobs.[127] It has announced several new construction projects (in both CEI and OE territories) for 2010, the largest of which is a major

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[123] *Id.*

[124] R.C. § 4928.143(B)(2)(i). The relevant criteria for electric security plans is discussed in further detail in Section III, *infra*.

[125] *See generally* Stip., § F.

[126] D'Angelo Testimony, p. 4.

[127] *Id*.

expansion plan at its Main Campus on Euclid Avenue in Cleveland.[128] The estimated $1.4 billion Main Campus expansion will allow the Clinic to meet an increasing patient demand and add more than 1,000 new high-quality jobs to the area, as well as hundreds of construction jobs.[129] To support the planned expansion and assure reliable service to the Clinic and its patients, the Clinic requires modifications to the electric plant and equipment that currently serve its Main Campus facilities.[130]

The ESP includes certain provisions to assist the Clinic in this regard and promote the associated economic benefits to Northeast Ohio. Specifically, the ESP provides that CEI will install the plant, facilities and equipment needed to reliably support the Clinic's expansion, and the first $70 million of the cost of that investment will be recovered on a non-bypassable basis from all customers, other than lighting customers, through Rider EDR.[131] The $70 million will be depreciated and not subject to any carrying charges over the five-year recovery period.[132] Further, the ESP obligates the Clinic to initiate cost-effective energy efficiency measures in its facilities with the assistance of an independent energy facility auditor. At the end of the recovery period, the Clinic has unimpaired access to utility and other energy efficiency, peak demand reduction, and alternate energy programs open to mercantile customers, in accordance with R.C. § 4928.66.

This provision clearly encourages economic development. Indeed, Clinic witness D'Angelo confirmed that the Clinic would likely not be able to complete the full expansion

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[128] *Id.*

[129] *Id.*

[130] *Id.*

[131] Stip., § F.2.

[132] *Id.*

without the support of this provision of the ESP.[133] If the Clinic was required to pay part of the costs of expansion of the electric facilities that are proposed to be recovered under the Stipulation, a "large portion [of that expansion] would not be able to occur."[134] The size and the scope of the Clinic's impact on the economy of Northern Ohio cannot be questioned, nor quantified. It is often the case that economic development provisions are limited in impact.[135] Yet the over 1,000 new jobs that are projected to result from the Clinic's expansion, and which are not necessarily limited to any one service territory, have not been disputed. Indeed, county and state legislators have expressed support for this provision of the Stipulation.[136] As one of the state's largest employers in a region suffering from a challenging economy, the Stipulation's support of economic development through expansion of the Clinic and its provision of health care is a significant benefit for ratepayers and the public interest.[137]

- *Support for Domestic Automakers.* The Signatory Parties' agreement recognizes that automakers play an important economic role in the Companies' communities and, consistent with R.C. § 4928.02(N), the global economy. The ESP includes economic development provisions for domestic automakers in the Companies' territories who used more than 45 million kWhs in 2009.[138] The automakers' incremental usage during the term of the ESP that is above

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[133] Tr. Vol. II, pp. 509-510. OCC's suggestion that this provision of the Stipulation is not necessary because the Clinic has already begun its work on the expansion is misplaced; the provision allows the Clinic to complete the full expansion and, without it, the expansion would be more limited. *Id.*

[134] Tr. Vol. II, p. 510.

[135] *See* Tr. Vol. III, p. 592.

[136] *See* Letter from T. Hagan, Cuyahoga County Commissioner, filed Apr. 23, 2010; Letter from B. Boyd, State Representative, 9th House District, filed Apr. 23, 2010; Letter from M. Sweeney, Cleveland City Council, filed Apr. 27, 2010; Letter from M. Mitchell, Cleveland City Council, filed Apr. 27, 2010.

[137] *See* Tr. Vol. II, pp. 512-514, 516-517 (the Cleveland Clinic has established metrics to support the number of staff required for its service areas, which were used to develop the estimate of 1,000 new jobs, not including indirect impact), 522-523.

[138] Stip., § F.3.

the average monthly consumption baseline will be granted a discount of 1.0-1.2¢/kWh, even if the automakers shop for generation.[139] The discount is structured, therefore, to encourage increased business and, derivatively, the economy and job prospects in the Companies' service territories: "the provision will not kick in unless there is increased business in the domestic auto industry."[140] To the extent any Opposing Intervenor misconstrues this economic development provision as discriminatory because of the adjectival qualifier "domestic," it should be noted that currently every automaker that used more than 45 million kWhs in 2009 in the Companies' territories qualifies for the discount.[141]

- *Rate Mitigation for Certain Rate Schedules.* The ESP caps the average total rate overall percentage increase for customers taking service on rate schedules POL, STL, TRF, and GT to 1.5%.[142] The percentage increase cap will be measured off of the CBP results for the twelve months ending May 2012 as compared to the twelve months ending May 2011. This provision of the ESP continues the societal benefits provided under the current ESP because lighting schedule customers mostly are municipalities and GT customers generally are large manufacturers that can help spur economic activity in the region.[143]

- *Additional Shareholder Commitment.* The Companies' shareholders commit through the ESP to contribute $3 million to economic development and job retention

[139] Tr. Vol. I, p. 137.

[140] Tr. Vol. III, p. 579.

[141] Tr. Vol. I, pp. 166-167; Tr. Vol. IV, pp. 910-911. In fact, OCC witness Gonzalez alleged discrimination even though he did not know whether any automakers in the Companies' territories was excluded from the discount. Tr. Vol. III, p. 787.

[142] Stip., § A.5.i.

[143] MRO Tr. Vol. IV, p. 586.

programs.[144] The Companies often become aware of such opportunities through their contact with the business community and from customers directly.[145] This commitment will continue the Companies' investment in their communities via direct funding over the three-year term of the ESP.

D. The ESP Supports Low-Income Residential Customers.

The advantage of the Signatory Parties' ESP is reflected by several features of the ESP that benefit low-income customers. These provisions include a discount for generation service and funding for fuel assistance programs.

- *PIPP Discount.* Customers taking service under the percentage of income payment plan ("PIPP") will receive a 6% discount off of their price to compare.[146] The retail load associated with PIPP customers will not be included in the CBP product, but will instead be supplied to the Companies via a wholesale bilateral contract for the duration of the ESP's term, which insures the discounted price. The ESP anticipates that the bilateral contract will be executed with FirstEnergy Solutions. PIPP customers will remain retail customers of the Companies for generation service. To the extent that Opposing Intervenors challenge the amount of discount or raise the propriety of a bilateral contract with FirstEnergy Solutions, these challenges are misplaced. The PIPP discount is set competitively in that it is applied *on top of* the price to compare: Generation service for PIPP customers will be 6% less than the retail generation rate set for residential customers through the CBP.[147] Further, the Stipulation recognizes that the Ohio Department of Development may secure a better price for PIPP

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[144] Stip., § F.1.

[145] Tr. Vol. I, pp. 107-108.

[146] Stip., § A.1.

[147] Stip., § A.1.

customers with another supplier in accordance with R.C. § 4928.54.[148] Accordingly, the Stipulation provides a benefit of *at least* a 6% discount off of retail generation rates for a group of customers for whom such a discount is vital.

OCC has proposed a separate CBP for PIPP load, but it has done no analysis to suggest it would generate a price lower than that offered by the Stipulation and it is not clear that the MRO statute would allow for it.[149] Further, OCC's proposal was offered by a witness with no experience as a supplier or with the auction process.[150] Accordingly, the proposal should be rejected.

- *Funding for Community Connections.* The ESP continues the current funding for the Community Connections program and its administrator, OPAE.[151] This program provides energy efficiency and weatherization assistance to low income residential customers.[152] As was done under the current ESP and as set forth in the Companies' last distribution rate case, the funding will be recovered from all customers through Rider DSE.[153] Again, the funding provided for by the ESP is only a baseline; the funding for Community Connections may be increased via approval of the energy efficiency collaborative and the Commission. No objection has been asserted regarding this provision of the ESP.

- *Funding for Fuel Fund Program.* The ESP commits the Companies to make $1.5 million available to OPAE for its fuel fund program over the term of the ESP, which provides

[148] Tr. Vol. I, pp. 95-96.

[149] Tr. Vol. III, pp. 790-795.

[150] *Id.*, pp. 795-797.

[151] Stip., § F.4.

[152] Ridmann Testimony, p. 6.

[153] *See* Tr. Vol. I, pp. 109-110.

financial assistance for customers in need to pay for utility services.[154] The funding for this program will be provided by the Companies' shareholders and not recovered from customers.[155]

E. The ESP Includes Significant Commitments From The Companies' Shareholders For Transmission Costs.

The Companies' transmission affiliate, American Transmission Systems Incorporated ("ATSI"), is in the process of transitioning to a new RTO, PJM Interconnection, LLC ("PJM"). As was the subject of much debate in the MRO proceeding and others, the transition process exposes ATSI, and the Companies and their customers by virtue of a pass-through of RTO-related charges to load serving entities, to costs arising in connection with the transition to PJM. Such costs include: (1) those associated with ATSI's exit from the Midwest ISO ("MISO") and integration into PJM; and, (2) those associated with the RTOs' expansion plans. As to the first category, the Companies agree as part of the Stipulation not to seek to recover the MISO exit fees or PJM integration costs from customers.[156] This agreement reflects a waiver of the Companies' right to seek recovery of over $42 million and resolves uncertainty for customers.[157] The agreement also fully addresses any concerns of the Commission as set forth in the Commission's filing before the FERC regarding these costs.[158]

The Stipulation also includes the Companies' agreement to waive their right to seek recovery of legacy Regional Transmission Expansion Plan ("RTEP") charges approved by PJM

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[154] Stip., § G.7.; Letter from L. Hernandez, Cleveland Housing Network, filed Apr. 21, 2010.

[155] *See* Tr. Vol. I, pp. 108-110.

[156] Stip., § C.2.

[157] Ridmann Testimony, Att. 1 (MISO exit fees estimated at $37.5 million and PJM integration fees estimated at $5 million); *see also* Choueiki Testimony, p. 4; Tr. Vol. I, pp. 197-199, 204-206, 213.

[158] Choueiki Testimony, pp. 3-4.

prior to ATSI's integration to PJM.[159] This agreement reflects a waiver of recovery of legacy RTEP charges over the next five years that could be assessed to the Companies through transmission rates – estimated in the hundreds of millions of dollars.[160] Some have suggested that the agreement is not a benefit to customers because the Companies should not be entitled to pass along the costs to customers.[161] However, as Staff witness Choueiki explained, the FERC did not address the Commission's concerns regarding the allocation of legacy RTEP charges, which "caused Staff some consternation" as to whether customers would be held harmless for these charges.[162]

Moreover, although OCC has claimed that the Companies are inflating the value of the waiver, OCC has failed to produce any probative, credible evidence supporting this claim. Staff requested documents and data from PJM directly, which information supports the Companies' calculation regarding the value of the RTEP legacy cost waiver.[163] Staff has determined that the Companies' commitment to not seek recovery of these legacy RTEP charges is "a much better outcome than simply hoping for FERC to ultimately order [the Companies] to absorb 100% of the legacy RTEP charges. The latter, likely, holds an infinitesimal probability."[164] As such, the Companies' agreement not to seek recovery from customers of the costs of these projects through May 31, 2016 is a substantial benefit to customers.

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[159] Stip., § C.2. All other RTEP charges and any remaining MISO transmission expansion plan ("MTEP") charges will be recovered from customers. *Id.*

[160] Ridmann Testimony, Att. A; Choueiki Testimony, p. 7.

[161] *See* Gonzalez Testimony, pp. 28-33.

[162] Choueiki Testimony, p. 7. Dr. Choueiki also explained that, once FERC approves transmission rates, which may include the RTEP charges, the Commission is without jurisdiction to alter the recovery of those charges from customers. Tr. Vol. I, pp. 202-206.

[163] Tr. Vol. I, p. 213.

[164] Choueiki Testimony, p. 8.

F. The ESP Resolves Other Matters That Are Or Would Otherwise Be The Subject Of Litigation.

The ESP also provides certainty and stability to the Commission, its staff, and interested parties, as well as customers, by resolving a number of current and future matters that would require significant resources and unknown outcomes. The agreements reached in the Stipulation would resolve all or some of the issues raised in the following pending matters:

- PUCO Case No. 09-906-EL-SSO: The Companies' MRO application would be rendered moot by virtue of the Commission's approval of this ESP.
- PUCO Case No. 09-1820-EL-ATA: The Companies' proposal for the recovery of costs associated with their Smart Grid Initiative are resolved by virtue of the Signatory Parties' agreements set forth in Section E.1. of the Stipulation.[165]
- PUCO Case No. 09-462-EL-UNC: The Commission's approval of the Stipulation will result in approval of the Companies' corporate separation plan, which was filed in June 2009.[166] However, the Companies have agreed to file an updated corporate separation plan within a specified timeframe after the merger between FirstEnergy Corp. and Allegheny Energy, Inc. should their corporate or operational structure change as a result. The Stipulation reserves authority for the Commission to subject the plan to an independent auditor under its direction, but paid for by the Companies.
- PUCO Case No. 09-778-EL-UNC: The concerns raised by the Commission regarding the allocation of costs associated with ATSI's realignment with PJM have been resolved by the Companies' agreement to waive their right to recover certain RTO charges, as

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[165] The Signatory Parties agree that the Companies: shall recover Smart Grid costs from all customers other than those taking service under rate schedule GT; may consider all approved costs as incremental for recovery under Rider AMI; and other issues. *See* Stip., § E.1.

[166] Stip., § H.1.

described in Section II.E., *supra*. Accordingly, this matter should be closed by virtue of the Stipulation.[167]

- FERC Docket Nos. ER09-1589 and EL10-6-000: For the same reasons, the concerns raised in the Commission's filings with the FERC regarding ATSI's realignment with PJM have been resolved. Accordingly, Commission approval of the Stipulation shall serve as an acceptance of the Signatory Parties' recommendation that the Commission withdraw from those proceedings.[168]

In addition to the resolution of these pending matters, the Stipulation's terms obviate the need for other otherwise-anticipated proceedings. The Stipulation includes a request for the Commission's consent to refrain from instituting any jurisdiction to review the merger between FirstEnergy Corp. and Allegheny Energy, Inc., given the Companies' agreement to submit an updated corporate separation plan if their structure or operations are affected by the merger.[169] Similarly, the Companies' agreement to a distribution base rate-freeze eliminates, except for limited circumstances, the need for a distribution base rate case during the term of the ESP.[170]

The Stipulation also resolves disputes concerning the Companies' recovery of lost distribution revenue associated with approved energy efficiency and peak demand reduction programs through May 31, 2014. The Signatory Parties agree that the Companies will be allowed to recover these revenues during the term of the proposed ESP, as they are now authorized to do under the Current ESP for all programs.[171] The Signatory Parties' agreement in

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[167] *Id*., § H.4.

[168] *Id.*

[169] *Id*., §§ H.5, H.1.

[170] The Companies retain the right to institute a distribution rate proceeding under certain emergency situations. Stip., § B.1.

[171] Stip., § E.3; Tr. Vol. II, p. 471.

this regard simply confirms the Companies' recovery of these revenues through the existing Rider DSE through May 31, 2014.[172] How the Companies will recover their lost distribution revenues resulting from energy efficiency savings after May 31, 2014 has not been determined, but most likely will be a topic for discussion in the Companies next EE/PDR portfolio plan filing expected to be made in late 2012 for the 2013-15 period.[173] While both NRDC witness Sullivan and OCC witness Gonzalez believe this provision should be removed from the ESP, both also recognize that their preference for the use in the future of a new methodology for recovering lost distribution revenues is a complex issue that cannot be resolved in this case.[174] They presented no persuasive basis for blowing up the Stipulation simply to prevent existing cost recovery from continuing through May 31, 2014.

OCC has suggested that the resolution of other matters through the ESP is inappropriate. However, it not unusual for a global settlement such as the Signatory Parties' ESP to resolve other cases.[175] Indeed, OCC itself has agreed to settlements that resolve other cases.[176] Further, the statutory framework for an electric security plan allows for the resolution of a broad array of issues associated with the provision of retail electric service, and the Companies' current ESP similarly resolved other matters.[177] Under other authorized SSO alternatives, these issues would be resolved via a patchwork of proceedings (illustrated by the pending proceedings listed above).

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[172] Tr. Vol. II, pp. 471-473. The Companies' recovery of lost distribution revenue for 2010-2012 is at issue in the Companies' EE/PDR filing, Case Nos. 09-1947-EL-POR *et al.*

[173] *See* Gonzalez Testimony, pp. 38-39 (recommending review of lost distribution revenues as provided in Rule 4901:1-39-07 in Companies' 2013-15 Program Portfolio Plan cases).

[174] *Id.* *See generally* Sullivan Testimony; Tr. Vol. II, pp. 470-471, 475-77. Strangely, NRDC apparently would likely be willing to sign the Stipulation if it included revenue decoupling, but Mr. Sullivan does not recommend that it be included. *Compare* Tr. Vol. II, p. 471 *with* p. 494.

[175] *See* Tr. Vol. I, p. 169.

[176] Tr. Vol. IV, pp. 956-957.

[177] Tr. Vol. I, pp. 169-170.

In contrast, an electric security plan benefits the Commission, the Companies, their customers, and interested parties by providing for a more comprehensive determination as to the Companies' provision of SSO service. The Signatory Parties' ESP provides the additional benefit and comfort of a resolution reached via a negotiated agreement between over fifteen interested parties. The Commission and all other interested parties can now focus their attention, efforts and limited resources on other matters and avoid additional costs associated with further litigation.

III. The Stipulation Does Not Violate Important Regulatory Principles or Precedents.

The Signatory Parties agree that the Stipulation violates no regulatory principle or precedent.[178] As described by Staff witness Turkenton:[179]

> [The Stipulation] furthers the policy of the state to provide reasonably priced and reliable electric service. It gives customers effective choices that ensure diversity of electric supply and suppliers. It additionally provides flexible regulatory treatment that could not be achieved through an MRO. . . . Given the current uncertain state of the economy and electric markets, there is value to the public simply in the Commission retaining the regulatory flexibility that is associated with an ESP. This ESP and Stipulation provide a level of regulatory certainty that ratepayers might otherwise lose under an MRO framework.

Staff's and the other Signatory Parties' conclusion is supported by the fact that the proposed ESP is consistent in all material respects with the current ESP, which received the Commission's approval in March 2009.[180] In addition, the ESP furthers the State's policy of providing no barriers to shopping.[181] All of the Companies' generation rates under the ESP are bypassable, including the Companies' CBP cost-recovery reconciliation mechanism, Rider GCR, which is

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[178] *See* Stip., p. 1.

[179] Turkenton Testimony, p. 6.

[180] *See* Second Opinion and Order, Case No. 08-935-EL-SSO, filed Mar. 25, 2009.

[181] *See* R.C. § 4928.02(B), (H).

non-bypassable under the Current ESP.[182] Only if the balance of Rider GCR reaches 5% of the generation expense, in accordance with the specified calculation or circumstances, would Rider GCR shift to recovery on a non-bypassable basis.[183] The ESP also includes no minimum default service rider or stand-by charges for shopping customers.[184] Nor is there any minimum stay requirement for residential or small commercial non-aggregation customers.[185]

The Opposing Intervenors have presented no credible evidence or argument that the ESP infringes on any regulatory policy. OCC's suggestion that clarifying the eligibility of independent college and university members of AICUO for mercantile-sited energy efficiency programs is somehow violative of state regulatory policy is unpersuasive and wrong.[186] A mercantile customer for the purposes of R.C. § 4928.66 is defined as "a commercial or industrial customer if the electricity consumed is for nonresidential use and the customer consumes more than seven hundred thousand kilowatt hours per year or is part of a national account involving multiple facilities in one or more states."[187] Colleges and universities consume electricity for nonresidential use. The Stipulation simply clarifies that a campus of an AICUO member whose aggregate usage exceeds the statutory threshold (of 700,000 kWh/year) qualifies as a mercantile customer.[188] The provision, therefore, is not contrary to the statute, or any other regulation. In fact, OCC witness Gonzalez admitted upon cross-examination that treating a college or university, with all of its facilities, on one campus at one location would not result in an

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[182] Stip., § A.7.

[183] *Id.*

[184] Stip., § A.3.

[185] *Id.*, § A.2.

[186] *See* Gonzalez Testimony, pp. 15-16.

[187] R.C. § 4928.01(A)(19).

[188] Stip., § E.5.

"unprincipled" application of the statute if the facilities use 700,000 kWh per year — which is the exact requirement of the Stipulation.[189] This provision of the Stipulation appropriately confirms the application of Ohio law to AICUO member institutions and removes any potential uncertainty about the issue now rather than later.

OCC further argues that the Company's collection of distribution costs through Rider DCR violates an important regulatory principle because the process for review and approval of Rider DCR rate adjustments will be less extensive than would take place in a rate case.[190] Yet OCC does not explain why incurring the added cost and burden of a rate case is an important regulatory principle. OCC also fails to explain why Rider DSI as approved in the Current ESP, which is being replaced by Rider DCR, did not also violate an important regulatory principle. OCC argues that limiting participation in the audit process to Staff and Signatory Parties is improper,[191] but there is no legal requirement that *any* parties be involved in an audit of this type. Indeed, the Stipulation's provisions are clearly authorized by R.C. § 4928.143(B)(2)(h), under which an ESP may include provisions "regarding the utility's distribution service, including, without limitation and notwithstanding any provision of Title XLIX of the Revised Code to the contrary, provisions regarding single issue ratemaking." OCC simply ignores the plain language of R.C. § 4928.143(B)(2)(h).

OCC also objects to the broad waiver provision in the ESP, but OCC's hearing witness was ignorant of the specific waiver process followed by the Companies until it was brought to his attention during his deposition on April 19, 2010.[192] In fact, he was unaware until after that

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[189] Tr. Vol. IV, p. 898. Mr. Gonzalez mistakenly stated that the statute required 750,000 kWh/year.

[190] Gonzalez testimony, pp. 14-15.

[191] *Id.*, p. 15. OCC may, of course, become a Signatory Party if it sees benefit in participating in the audit process.

[192] Tr. Vol. IV, pp. 760, 782-83.

deposition that the Commission had granted in part, and denied in part, the Companies' request for waivers.[193] Any concern expressed by OCC relating to waivers has been rendered moot by the Commission's April 6 Entry in this proceeding.

OCC's in-house economist also claims in his testimony that the "incremental" reference in Riders ELR and Riders OLR violates the Commission's March 10, 2010 Finding and Order in Case No. 09-535-EL-EEC *et al*.[194] Perhaps he is unaware of the legal concept of *dicta*, which the statement he cites clearly is.[195] Regardless, he agreed during cross-examination that Riders ELR and OLR are demand reduction programs initiated by the Companies effective June 1, 2009 in furtherance of the requirements of S.B. 221.[196] As such, they both constitute demand response programs "beginning in 2009," as required by R.C. § 4928.66(A)(1)(b). The interruptible load from these programs is "incremental" to 2008 load because the programs themselves did not exist in 2008. Indeed, under the ESP, the requirements of these programs and definition of curtailable load itself are being redefined effective June 1, 2011 to be consistent with PJM tariff requirements. As such, OCC's complaint lacks merit.

OCC's objection to deferral of storm damage expenses under the ESP also lacks merit. OCC's criticism is tied to the Commission's statement in the Companies' rate case that storm damage expenses deferred under that case should not be deferred indefinitely.[197] Yet the deferral authorized by the ESP relates to new expenses and is not indefinite. Thus, there is no conflict

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[193] *Id.*, p. 783.

[194] Gonzalez Testimony, pp. 18-19.

[195] *See Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 797 N.E.2d 1256, 2003-Ohio-5849 (Sweeny, J., dissenting) (citing Black's Law Dictionary at 454 (6th Ed.1990)) (defining "dicta" as "[e]xpressions in court's opinions which go beyond the facts before court and therefore are . . . not binding in subsequent cases as legal precedent.").

[196] Tr. Vol. III, pp. 783-84.

[197] Gonzalez Testimony, pp. 19-20.

with the Commission's statement in Case No. 07-551-EL-AIR. OCC also objects to storm damage deferral criteria being agreed upon by Staff and the Companies, although this is an issue that should only concern Staff and the Companies. The Stipulation is clear that the storm damage deferrals will continue through May 31, 2014 "under the approved terms and conditions" until full recovery is accomplished.[198] There is no requirement that a Stipulation include the details of Staff's internal process for reviewing those deferrals.

Lastly, OCC's arguments regarding the ESP's economic development provisions for the Cleveland Clinic and/or domestic automakers are similarly unavailing.[199] The General Assembly's framework for electric security plans explicitly anticipates that such plans may include provisions for economic development and job retention.[200] While the law does recognize the right of utilities and their customers to seek Commission approval for "reasonable arrangements," there is no regulatory requirement that all such provisions succumb to the process for reasonable arrangements.[201] In fact, the Commission's rules for reasonable arrangements recognize the availability of a waiver of those requirements.[202] Staff agrees that the ESP's provisions for economic development through support for electric facility expansion for the

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[198] Stip., § D.4.

[199] Notably, OCC's witness on these issues, Amr Ibrahim, expressly stated that OCC was not opposing the economic development proposals here. Rather, his problem was that he needed more time and information to study these proposals. Tr. Vol. III, p. 703. Yet, Dr. Ibrahim could not point to a single discovery response that OCC did not receive from the Companies. Tr. Vol. III, p. 705. Further, OCC had done little else but seek discovery from the Companies. OCC conducted no discovery of the Cleveland Clinic, or of any automotive manufacturers, or any party in this case representing the interests of those firms. Tr. Vol. III, pp. 705-706, 711. Moreover, OCC made no effort to get information informally from these entities. *Id*.

[200] R.C. § 4928.143(B)(2)(i).

[201] *See* R.C. § 4905.31; O.A.C. 4901:1-38.

[202] O.A.C. 4901:1-38-02.

Cleveland Clinic and discounts for domestic automakers raise no regulatory issue and should be approved.[203]

IV. The ESP Is More Favorable Than the Expected Results Of An MRO.

Not only does the Signatory Parties' Stipulation satisfy the criteria for the Commission's approval of a settlement, but it also satisfies the unique standard provided by R.C. § 4928.143 for electric security plans.

> [T]he Commission by order *shall* approve or modify and approve an [ESP] application . . . if it finds that the electric security plan so approved, including its pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, is *more favorable in the aggregate* as compared to the expected results that would otherwise apply under Section 4928.142 of the Revised Code.[204]

As discussed throughout this Brief, the Signatory Parties' proposed ESP includes numerous benefits in the form of economic development, energy efficiency, assistance for low-income customers, direct shareholder contributions, and waiver of certain transmission costs – none of which would be available under the narrow form of an MRO.[205] The ESP's comprehensive terms provide more certainty and stability for the Companies' customers for another three years, and allow customers to proactively plan for their electricity needs. The ESP promotes competition in the generation markets and shopping, which can lead to lower prices for all customers. The ESP also resolves numerous outstanding or anticipated issues regarding the Companies' provision of electric service and, thus, minimizes the regulatory resources that would otherwise need to be expended in determining the issues agreed upon in the ESP.

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[203] *See generally* Fortney Testimony; *see also* Tr. Vol. I, pp. 235-236, 243.

[204] R.C. § 4928.143(C)(1).

[205] *See generally* Stip.; *compare* R.C. § 4928.142 (setting forth requirement for an MRO to include a compliant competitive bid process and meet certain information and RTO standards) *with* § 4928.143.

Therefore, it is clear that the ESP provides numerous *qualitative* benefits that make it more favorable than an MRO.

The ESP also represents a *quantitative* benefit over an MRO. In fact, the ESP provides benefits of ***over $280 million*** to customers over the three-year term of the ESP.[206] The Companies' calculation of the quantitative benefits illustrates the benefit of the proposed ESP by focusing on the differences between the proposal and an MRO.[207] Not all of the ESP's benefits are quantifiable, such as the benefits of providing customers with more certainty regarding rates over the term of the ESP, or the benefits of energy efficiency or regulatory resolution. Others, including the impacts of Rider ELR and OLR cannot be quantified because it is not known how many or which customers will take service under these optional riders.[208] The results of the CBP proposed under the ESP also are not currently knowable and so the calculation assumes the same blended CBP price as that resulting from the Companies' similar May 2009 Auction. Accordingly, the calculation can and does include those benefits that have an ascertainable quantitative impact with all else being held equal.[209] The calculation then converts the quantitative impact into present value dollars.[210] This same approach to quantifying the benefits of an ESP was relied upon by the Commission when approving the 2009 ESP.[211] This thorough and reasoned calculation confirms that the ESP's quantitative benefits over an MRO are over

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[206] Ridmann Testimony, p. 22, Att. 1.

[207] *Id.*, pp. 23-25.

[208] Tr. Vol. I, pp. 164-165.

[209] Ridmann Testimony, pp. 23-24. The impact of deferred fuel and generation costs is not included in the calculation because of the ESP's provisions to allow acceleration of the recovery of those deferrals if it is in the best interest of the Companies' customers. Stip., § A.9.; Ridmann Testimony, p. 24. However, the Companies have provided a separate table illustrating the interest savings associated with recovery periods of varying lengths for those deferred amounts. Ridmann Testimony, pp. 24-25.

[210] *See* Ridmann Testimony, p. 23.

[211] *See* March 25, 2009 Second Opinion and Order, Case No. 08-935-EL-SSO, at pp. 19-20.

$280 million in present value dollars to the Companies' customers.[212] Accordingly, the ESP should be approved.

A few Opposing Intervenors make challenges to try to diminish the quantitative benefit of the ESP, but the challenges either do not alter the ESP's net quantitative benefits and/or are unsupported. First, NRDC witness Sullivan claims that the Companies' recovery of lost distribution revenue as provided for by Commission rules and the Stipulation "should be considered a cost that reduces the Compan[ies'] claimed benefits of the agreement."[213] Any alleged merits of Mr. Sullivan's positions aside, even with the additional "cost" he proposes to include in the calculation, Staff witness Turkenton confirmed that the ESP remains quantitatively more favorable in the aggregate than an MRO.[214]

OCC's allegations, which it believes leads to a determination that the ESP has a negative impact as compared to an MRO, are not well founded. OCC witness Gonzalez's Corrected Schedule WG-1 calculates that an MRO would be more favorable by ignoring all transmission cost recovery ($363.8 million), manipulating distribution cost recovery using an arbitrary factor ($136 million), and grossly overstating the amount of lost distribution revenue recovery authorized by the Stipulation while grossly overstating the benefits of revenue decoupling ($95.2 million). None of his calculations were based on or consistent with sound economic analysis, and none provide a basis for rejection of the ESP.

OCC clearly understood the substantial benefit provided by the Companies' agreement not to seek recovery of certain RTO charges and fees, including legacy RTEP charges through May 31, 2016. OCC witness Gonzalez attempted to rebut this benefit by misrepresenting the

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[212] Ridmann Testimony, Att. 1.

[213] Sullivan Testimony, p. 6.

[214] Sullivan Testimony, p. 6; Tr. Vol. I, p. 250.

status of several transmission projects included by the Companies (and by PJM) in their analysis of legacy RTEP costs.[215] On the stand, he was forced to admit that the PATH project is not "effectively cancelled" and that the Susquehanna-Roseland project has been approved – not postponed as he initially claimed – by the New Jersey Board of Public Utilities.[216] He agreed that the Carson-Suffolk and TrAIL projects will be completed as scheduled in 2011, and provided no evidence that the MAPP project would be delayed beyond 2016 or that the Branchburg-Roseland-Hudson project would be delayed beyond 2013.[217] Thus, OCC failed to produce any evidence that the Companies' estimate of RTEP costs is inaccurate.

OCC's second line of defense with regard to all RTO costs and fees – legacy RTEP charges, MISO exit fees and PJM integration fees – is simply to trust that the FERC will act in the future to deny their inclusion in ATSI's transmission rates and that, contrary to all precedent, the FERC's denial of cost recovery will be affirmed on appeal.[218] OCC's only evidence for this conclusion – which Staff witness Choueiki described as an "infinitesimal possibility" – is testimony from a witness who was completely unqualified to offer legal opinions.[219] Indeed, that witness brazenly offered his legal opinion that the FERC had assigned these costs to ATSI, but then had to backpedal during cross-examination and admit that the FERC had done nothing of the sort.[220] That same witness, represented as an economist, refused to conduct the most basic economic analysis by assigning a risk factor to his legal opinion and valuing the Companies'

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[215] *See* Gonzalez Testimony, pp. 31-33.

[216] *Compare* Gonzalez Testimony, pp. 31-33 *with* Tr. Vol. III, pp. 811-822.

[217] *See* Tr. Vol. III, pp. 811; Gonzalez Testimony, Att. WG-4.

[218] Tr. Vol. III, pp. 823-828.

[219] *See* Choueiki Testimony, p. 8; *see also* Gonzalez Testimony, p. 1.

[220] Gonzalez Testimony, pp. 29-31; Tr. Vol. III, pp. 804-807.

commitment accordingly.[221] Thus, OCC's desire to wipe the $363.8 million in transmission costs off the ledger was unsupported by credible evidence, and this alone proves that the ESP is more favorable in the aggregate than an MRO.

OCC's manipulation of distribution cost recovery through Rider DCR was similarly wholly lacking in reason. Company witness Ridmann's Attachment 1 compares two net plant cost numbers: (1) the ESP cost is Rider DCR revenues from January 1, 2012 through May 31, 2014 based on a forecast of plant additions made since the date certain in the last rate case; and (2) the MRO cost is estimated revenues associated with a base distribution rate increase using the same forecast of plant additions and a date certain of March 2011.[222] Mr. Ridmann's MRO cost estimate is limited to net plant additions and does not represent the total of what the Companies would seek to recover in a new rate case, and does not include the additional costs to all parties and the Commission should a new rate case be filed.[223] However, OCC's witness mistakenly assumed that Mr. Ridmann's MRO cost estimate was what the Companies would seek to recover in a new rate case, and then guessed – using a sample of three EDU rate cases – that the Commission would authorize recovery of 60% of that amount.[224] The witness's speculation does not qualify as economic or as expert testimony.

OCC witness Gonzalez's estimate of lost distribution revenue that would be recovered under the ESP borders on the absurd. Although the Stipulation clearly states that lost distribution revenue is authorized only through May 31, 2014, he decided to extend this recovery through the end of 2017 simply because the Current ESP included a six-year recovery period. NRDC

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[221] Tr. Vol. III, pp. 788; Tr. Vol. IV, pp. 840-843.

[222] Ridmann Testimony, pp. 23, 26.

[223] *See* Tr. Vol. IV, pp. 961-962.

[224] *Id.*, pp. 961-966.

witness Sullivan estimated that lost distribution revenues under the ESP would total $30.81 million through March 31, 2014.[225] Although OCC witness Gonzalez used Mr. Sullivan's calculations, he chose to invent an additional three and a half years of recovery to artificially inflate the ESP costs to $114.7 million.[226] The difference – $83.89 million – is not supported by the terms of the Stipulation or anything else. He also estimated that, in his MRO world, a decoupling mechanism would reduce lost distribution revenues during the first two years of the ESP (*i.e.*, June 1, 2011 through May 31, 2013) despite also testifying that revenue decoupling would not be addressed until the Companies EE/PDR Portfolio Plan filing made in late 2012.[227]

It must be noted that OCC witness Gonzalez also imagined a lower PIPP rate in order to inflate the benefits of his MRO alternative by $1 million and speculated that the smart grid pilot would produce $3.6 million in savings in his MRO world.[228] These adjustments are not material to his calculations, but they were similarly lacking in anything that could be described as sound economic analysis.

None of OCC's "modeling" is worthy of consideration, let alone adoption by the Commission. As such, the only probative evidence before the Commission demonstrates that the net present benefit of the ESP exceeds that of an alternative MRO by $280.1 million.

V. Intervenors' Attempt To Derail The Favorable ESP For Their Own Benefit Should Be Disregarded.

Some of the opposition to the Signatory Parties' ESP comes from Opposing Intervenors whose only interest in this proceeding is their profits and whose interests do not align with the Companies' customers. EnerNOC and the members of the Demand Response Coalition are

[225] Sullivan Testimony, p. 3 ($6.78 million in 2012, $14.5 million in 2013, and $9.53 million in 2014).

[226] Tr. Vol. IV, pp. 847-854.

[227] *Id.*, pp. 847-855.

[228] Tr. Vol. III, pp. 790-795; Tr. Vol. IV, pp. 859-862.

curtailment service providers that seek to profit from the management of demand response capabilities for large energy users.[229] They challenge the inclusion of Riders ELR and OLR in the ESP because, essentially, these riders may interfere with their business plans. These companies are placing their own fortunes ahead of the interests of Ohio's consumers. Moreover, the issues raised by these companies are unrelated to any of the decisions the Commission must make in this proceeding.

Indeed, the Commission is not the proper venue for EnerNOC's complaints. EnerNOC's allegations resulted from the Companies' supposed misrepresentations in connection with the PJM FRR auctions. EnerNOC witness Schisler acknowledged that the FERC and/or the PJM market monitor would be responsible for addressing such allegations.[230] The Commission has no jurisdiction regarding the functioning of the RTO capacity markets. EnerNOC's decision to bring its complaints to Ohio appear to be motivated by nothing more than its failure to gain traction with the market monitor. Regardless of what action, if any, is taken at the federal level, EnerNOC's allegations will not and cannot change the fact that the ESP, including the use of Riders ELR and OLR, is more favorable in the aggregate than an MRO and will provide qualitative and quantitative benefits to consumers. The ESP's significant aggregate benefits should not be rejected because of the far-reaching, unsupported, and misplaced allegations of an Opposing Intervenor whose interests are not aligned with the Companies' customers.

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[229] Tr. Vol. II, p. 271. Although the employers of two of the witnesses who testified against the Stipulation – EnerNOC and Energy Connect, Inc. ("Energy Connect") – have customers in Ohio, neither has received approval from the Commission as a competitive retail service provider. Tr. Vol. II, p. 274, Tr, Vol. III, pp. 629-631. Further, despite the fact that EnerNOC and EnergyConnect have Ohio customers, EnerNOC did not register to do business in Ohio until the day of its witness's testimony (Tr. Vol. II, p. 280), and EnergyConnect had its registration to do business in Ohio revoked for failure to make tax payments or filings. Co. Ex. 8.

[230] Tr. Vol. II, pp. 328-329.

Demand Response Coalition witness Campbell attempted to argue that proposed Riders ELR and OLR would not be favorable for consumers in Ohio, but he admitted that he had done no market research or had even spoken to any customers in the state.[231] Further, he admitted that even though interruptible customers would prefer certainty in the amount and duration of the credit that they would receive for their interruptible service, he refused to admit that what he proposes offers such customers less certainty.[232] He persisted in this refusal even after being forced to admit that whereas interruptible customers on Riders ELR and OLR would have a credit that would last for three years, customers offering interruptible service through curtailment service providers like the Demand Response Coalition members might not get any credit if their demand response did not clear the PJM capacity auctions, some of which (the residual auctions) might not even be held.[233]

EnerNOC's case relating to the alleged misstatements made by the Companies fares no better. First and foremost, Mr. Schisler admitted on cross-examination that none of the statements of which he complains – to the effect that the Companies intended to let Riders ELR and OLR expire – were false at the time they were made.[234] Rather, he incorrectly contends that the statements became false because the Companies changed their position. But the record reveals that the Companies did not change anything.

Mr. Schisler based his view about the Companies' changed position on the alleged fact that the Companies "had a deal" on or before March 15, 2010.[235] But Mr. Schisler could not say

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[231] *See generally* Campbell Testimony; Tr. Vol. III, p. 639

[232] Tr. Vol. III, pp. 638-640

[233] *Id.*, pp. 640-642.

[234] Tr. Vol. II, pp. 299-302.

[235] *Id.*, p. 304.

who this deal was with, whether the deal was final, or whether any part of the deal had been reduced to specific terms.[236] Realizing the absurdity of his testimony, he then claimed that, as of March 15, the Companies had made a "unilateral offer" to extend these riders.[237] But Mr. Schisler couldn't say that the idea to extend the riders came from the Companies.[238]

As Mr. Schisler admitted, notwithstanding whatever the Companies had proposed, no one could predict the outcome of the MRO case or this matter.[239] In fact, the ultimate resolution of this issue remains uncertain today since there is no Commission order resolving the matter. Mr. Schisler's belief that the Companies had allegedly changed their position on the riders came from a response to an interrogatory propounded by EnerNOC to the Companies.[240] That interrogatory response stated:

> The Companies did not propose or represent to FERC that as part of the integration into PJM that a demand response would be secured through an RFP or an auction.
>
> However, the Companies did submit a Demand Response Plan to PJM for the March 15, 2010 FRR Integration Auctions in order to describe the load management products in the ATSI zone that may be offered as a Demand Response by the Companies into the FRR Integration Auctions. In this plan the Companies indicated that depending upon the outcome of certain regulatory proceedings in Ohio, the Companies would procure demand response by either 1) extend the existing Economic Load Response (ELR) Rider and modify it to PJM's requirements; or 2) issue an RFP in February 2011 for Demand Response deliverable to the PJM 2011/2012 planning year, and another RFP in February 2012 for Demand Resources deliverable for the 2012/2013 planning year. [Co. Ex. 5.]

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[236] *Id.*, pp. 304-305.

[237] *Id.*, p. 307.

[238] *Id.*

[239] Tr. Vol. II, pp. 297-299.

[240] Tr. Vol. II, p. 306.

Notably, the uncertainty about which the Companies were advising FERC on or before March 15, 2010 was no different than what the Companies had publicly disclosed as early as December of 2009. In the Companies' EE/PDR cases, in which EnerNOC had intervened, the Companies said:

> As a component of the Market Rate Offer (Case No. 09-0906-EL-SSO) filed in the fall of 2009, the Company proposed to substitute a Request for Proposal process to secure customer commitments to reduce loads, rather than continue the provisions included in the ELR and OLR riders. This issue is currently the subject of litigation and, therefore, it is not yet known whether the Request for Proposal process will be incorporated in 2011 as currently contemplated.[241]

Thus, the Companies had certainly not changed their position and, even more to the point, said nothing publicly that was wrong at the time the statements were made, or later. As Mr. Schisler admitted, notwithstanding whatever the Companies had proposed, no one could predict the outcome of the MRO case or this matter.[242]

Apparently, what Mr. Schisler suggests is that the Companies should have made statements suggesting that the Companies should have revealed that the subject of the possibility of extending Riders ELR and OLR were part of settlement discussions, even though such discussions are confidential.[243] More bluntly, Mr. Schisler would have put the Companies in a "no win" position. Mr. Schisler admitted that had the Companies indicated that the riders would be extended, potential bidders in the FRR Integration Auctions would have been discouraged, resulting in higher clearing prices in the auction.[244] Mr. Schisler also admitted that, had the

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[241] Tr. Vol. II, pp. 320-323. *See* The Cleveland Electric Illuminating Company Energy Efficiency and Peak Demand Reduction Program Portfolio and Initial Benchmark Report (for the Period January 1, 2010 through December 31, 2012) at p. 26, Case No. 09-1947-EL-POR (Dec. 15, 2009).

[242] Tr. Vol. II, pp. 297-299.

[243] *Id.*, p. 296.

[244] *Id.*, pp. 307-308.

Companies specifically suggested such a possibility and that possibility was not realized, the Companies would have been subject to a claim that they had intended to manipulate the market by attempting to keep bidders away.[245]

Further, Mr. Schisler's world view is based on fundamental misconceptions. Two examples suffice. First, he contends that the Companies – and only the Companies – had ultimate control over whether the riders would be extended.[246] The law is otherwise. The Commission has the final say on that issue.

Second, Mr. Schisler believes that he was "entitled" to rely on statements made by the Companies in meetings and materials relating to the FRR Integration Auctions.[247] Yet, the FRR Auction Rules contradict this view. Those rules provide:

> No Warranty On Information. The information provided in the Auction or on the Auction website has been provided to assist Offerors in evaluating the Auction. It does not purport to contain all the information that may be relevant to an Offeror in satisfying its due diligence efforts. Neither the ATSI utilities nor the Auction Manager nor any of their representatives make any express or implied representation or warranty as to the accuracy or completeness of the information and shall, either individually or jointly, be liable for information provided in connection with the Auction or any omissions from such information, or any information provided to an Offeror by any other source. Neither the ATSI utilities nor the Auction Manager, nor any of their representatives, shall be liable to an Offeror or any of its representatives for any consequences relating to or arising from the Offeror's use of any information provided through this Auction process.[248]

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[245] *Id.*, pp. 308-311.

[246] *Id.*, pp. 292-297.

[247] *Id.*, p. 428.

[248] Co. Ex. 6 (ATSI Utilities FRR Integration Auction Rules); *see also* Tr. Vol. II, pp. 434-437.

At bottom, the arguments of EnerNOC and the Demand Response Coalition would benefit no one but themselves. Indeed, what they suggest is that the Commission abandon what both of these parties' witnesses admitted was "an incredibly good deal" for customers[249] in favor of businesses that have never earned a profit, may never earn a profit[250] and cause their auditors concern about whether they have any ability to remain a going concern.[251] The Commission should reject the complaints of EnerNOC and the Demand Response Coalition and approve the ESP as proposed in the Stipulation.

CONCLUSION

The Companies' Application and the Signatory Parties' Stipulation proposes an ESP that meets the requirements of R.C. § 4928.143 and benefits customers. Further, the evidence establishes that the Stipulation is reasonable. It is the result of serious bargaining among capable and knowledge parties; it benefits ratepayers and promotes the public interest; and it violates no regulatory principle or precedent. Accordingly, the Commission should approve the Stipulation and the Electric Security Plan proposed therein as filed.

Respectfully submitted,

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[249] Tr. Vol. II, p. 445; Tr. Vol. III, pp. 675-676.

[250] Tr. Vol. II. pp. 432-434; Tr. Vol. III, pp. 627-628.

[251] Tr. Vol. III, pp. 624-626.

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CERTIFICATE OF SERVICE

The foregoing *Post-Hearing Brief of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company* was served via electronic mail on this 30th day of April, 2010, upon parties on the attached service list.

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