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April 30, 2010

Via Electronic Filing

Ms. Renee Jenkins
Public Utilities Commission of Ohio
180 East Broad Street, 13th Floor
Columbus, OH 43215

Re: Case No. 10-388-EL-SSO, In the Matter of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan.

Dear Ms. Jenkins:

Enclosed is EnerNOC's Brief in the above-identified docket.

Very truly yours,

/s/ Jacqueline Lake Roberts
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Enclosure
cc: Parties of Record
Hearing Examiners Bojko and Price

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 ENERNOC, INC.

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I. INTRODUCTION AND STATEMENT OF THE FACTS

This brief addresses the stipulation (Stipulation) filed by some parties (Signatory Parties) to PUCO Docket 09-906-El-SSO case (FE MRO). The FE MRO case was initiated by the FirstEnergy utilities: The Cleveland Electric Illuminating Company, Toledo Edison Company, and The Ohio Edison Company (collectively FE or Companies) by Application October 20, 2009. After hearings in December, 2009 the FE MRO parties engage in settlement discussions that resulted in the Stipulation that initiated the instant case when it was filed March 24, 2010.[1] On March 24, 2010, an Entry was issued establishing a truncated procedural schedule with extraordinarily limited discovery. Although the Entry shortened the response time for discovery to 10 days, this only permitted one round of additional follow-up discovery if the initial discovery could be filed *the same day* as the testimony of FE Witness Ridmann, and only one round of discovery if it were filed later.

II. FE HAS NOT MET ITS BURDEN OF PROOF

A. Companies Have The Burden Of Proof And They Did Not Meet It.

FE did not satisfy its burden of proof in support of the Application and Stipulation. The requirements imposed upon the Commission for considering an Electric Security Plan (ESP) are found in R. C. Chapter 4928, as revised by S.B. 221. These statutes squarely place the burden of proof for an ESP plan on the Companies. Regarding the ESP proceeding itself, R. C. 4928.143(C)(1) provides that the "burden of proof in the [ESP] proceeding shall be on the electric distribution utility." A disturbing aspect of the Stipulation is the lack of information on important components of the Stipulation and that the Stipulation reaches beyond the ESP case and resolves issues in many other cases that are 1) pending before the Commission; 2) have not

[1]The Application was filed the evening of March 23, 2010 after docketing closed.

been filed with the Commission (such as the distribution rate increase and FE/Allegheny merger case); or 3) relate to the Signatory Parties and the Commission participation in cases before the Federal Energy Regulatory Commission (FERC). The entire Stipulation was supported by only by the testimony of FE Witness Ridmann, filed March 31, 2010.[2]

The Commission may not approve an ESP unless it finds it "more favorable in the aggregate as compared to the expected results that would otherwise apply under section 4928.142 of the Revised Code."[3] The Commission must, however, consider not only an ESP's pricing but also "all other terms and conditions, including any deferrals and any future recovery of deferrals."[4] Despite these statutory requirements, the Stipulation seeks to resolve many more issues than whether the approval of the ESP is more favorable compared to the FE MRO. It resolves the FE corporate separation plan, which was not part of the 09-906 FE MRO case. It resolves without any review whatsoever that this Commission will not analyze and approve the Allegheny/FirstEnergy merger, which was not part of the 09-906 FE MRO case. The Stipulation resolves issues concerning the costs of FE's integration into PJM and the costs from FE's exit from MISO, which was not part of the 09-906 FE MRO case. It resolves that FE will collect additional distribution revenues from all its customers that previously have only been authorized by the Commission after a fully-litigated distribution rate case, which was not part of the 09-906 FE MRO case. It also requires this Commission to withdraw its objections in FERC cases related to the FE integration into PJM, which was not part of the 09-906 FE MRO case.

FE attempted to lessen its burden of proof in this case by requesting administrative notice of the record in 09-906, the FE MRO case. It's request was incorrectly granted, but it is

[2] Other parties filed testimony in support of the stipulation April 15, 2010, but such testimony only included general support for approval of the Stipulation, and contained no analyses or objective facts that supported the Stipulation.
[3] R. C. 4928.142(C)(1).
[4] Id.

important to note that even if the record were correctly noticed, there is nothing in the record that supports the proposed resolution of the several issues identified above that were not addressed in the 09-906 case. The Companies have failed to meet their burden of proof.

Turning to taking administrative notice of the record in 09-906, the Commission may not take notice of that record because disputed facts exist. *In the Matter of the Regulation of the Elec. Fuel Component Contained within the Rate Schedule of the Ohio Edison Co.* (Aug. 3, 1983), No. 82-164-EL-EFC, 1983 Ohio PUC LEXIS 49, at *24:

> The rule provides that 'a judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. (emphasis supplied).

In determining whether to take administrative notice the same guidelines in Ohio R. Evid. 201 apply. Ohio courts, in applying Ohio R. Evid. 201 recognize this principle:

> For a matter properly to be a subject of judicial notice it must be 'known,' [i.e.,] well established and authoritatively settled. Matters of which a court will take judicial notice are necessarily uniform or fixed and do not depend upon uncertain testimony, for as soon as a matter becomes disputable, it ceases to fall under the head of common knowledge and so will not be judicially recognized.[5]

Federal law is similar: Under Rule 20 1(b) of the Federal Rules of Evidence, judicial notice of adjudicative facts is limited to facts that are 'not subject to reasonable dispute." *Banks v. Schweiker* (9th Cir. 1981), 654 F.2d 637, 639.[6] The "limitation upon taking judicial notice is to further the tradition that extreme caution should be used in taking notice of adjudicative facts." *Id.* (emphasis supplied).[7] "The reason for this tradition is the belief that the taking of evidence,

[5] *McCoy v. Gilbert (Madison Cty. 1959)*, 110 Ohio App. 453, 463, 169 N.E.2d 624, 632-33 quoting from 21 O. Jur. (2d), 40, Evid., § 20; *Polivka v. Cox* (Aug. 19, 2003), *Franklin App. No. O2AP-1364*, 2003 Ohio 4371, at ¶ 26).

[6] "While [Fed. R. Evid. 201] does not apply directly to administrative proceedings, it plainly reflects the general principle concerning administrative notice." *Cribbs v. Astrue* (M.D. Fla. Dec. 20, 2008), No. 8:07-CV-1745, 2008 U.S. Dist. LEXIS 105515, at *7.

[7] "Basic consideration of procedural fairness demand an opportunity to be heard on the propriety of taking judicial notice and the tenor of the matter noticed. . . . And in the absence of advance notice, a request made after the fact could not in fairness be considered untimely." Fed. R. Evid. 201, advisory committee's note.

subject to established safeguards, is the best way to resolve controversies involving disputes of adjudicative facts. *Id.* Since there is disparity of viewpoints among the parties to this proceeding concerning the propriety of numerous issues, including Riders ELR and OLR, these subjects are disputable and cannot be administratively noticed.

For all these reasons the Companies have not met their burden of proof.

B. Administrative Notice and Unreasonable Discovery Violated EnerNOC's Due Process Rights.

Not only is administrative notice improper because the issues involved are disputed, but administrative notice in these circumstances constitutes reversible error and violates EnerNOC's due process rights under Ohio law and federal law. '[The] commission may take administrative notice of facts if the complaining parties have had an opportunity to prepare and respond to the evidence, and they are not prejudiced by its introduction." *Canton Storage and Transfer Co. v. PUCO*, (1995), 72 Ohio St. 3d 1, 8, 647 N.E.2d 136, 143. However, administrative notice of facts may not be taken where an entity was not a party to prior proceedings and did not have "knowledge of, and an adequate opportunity to explain and rebut, the evidence." (emphasis supplied.[8]

To determine if the Commission's taking of administrative notice is proper, the Ohio Supreme Court stated: "[T]he factors we deem significant include whether the complaining party had prior knowledge of, and had an adequate opportunity to explain and rebut, the facts administratively noticed." (emphasis supplied).[9]

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[8] *Allen v. PUCO* (1988), 40 Ohio St. 3d 184, 186, 532 N.E.2d 1307, 1310 (finding that notice was proper because the parties who were objecting to administrative notice (unlike here) were 'parties to the . . . proceeding [of which notice was taken] and, as such, arguably had knowledge of, and an adequate opportunity to explain and rebut, the evidence."

[9] *Canton Storage*, 72 Ohio St. 3d at 8, 647 N.E.2d at 143 (quoting *Allen v. PUCO* (1988), 40 Ohio St. 3d 184, 186, 532 N.E.2d 1307, 1310).

Due Process requires parties be given notice, an opportunity to be heard and prepare their case, including ample discovery.[10] The due process rights of all non-signatory parties have been denied in this proceeding, and the due process rights of parties that were not parties to 09-906-EL-SSO are the most egregiously violated by the taking of administrative notice and the procedural schedule in this case.[11] The procedural schedule permitted a mere twenty-one days (which included a holiday weekend) between the filing of FE's testimony supporting the Application and the commencement of hearings. Discovery and depositions were not capable of being conducted in an orderly, deliberate manner, and sufficient manner to permit EnerNOC to prepare its case.[12]

EnerNOC was not a party to the 09-906 FE MRO proceeding. EnerNOC did not have knowledge of, or an adequate opportunity to explain or rebut, any evidence that is being administratively noticed in this proceeding. Multiple issues within the Stipulation that refer to issues addressed in Case No. 09-906-EL-SSO are in dispute. For example, EnerNOC disagrees with FirstEnergy's reasons for extending Riders ELR and OLR. To the extent that any evidence was offered in support of such an extension, such cannot properly be an adjudicated fact upon which the Commission may take administrative notice. Not only are issues that were the subjects of a separate proceeding involved, EnerNOC, as a non-party to the separate proceeding, did not have an opportunity to "prepare and respond to the evidence."[13]

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[10] *See,* EnerNOC's April 19,2010 Motion to Vacate. Due Process is guaranteed by Ohio and the United States Constitution.
[11] Id.
[12] "*** a plaintiff must be given the opportunity to challenge the evidence and assumptions upon which" administrative notice is taken. Id. at *18. "An adjudicative fact is a fact 'concerning the immediate parties -- who did what, where, when, how, and with what motive or intent." *Doty v. State Farm Fire and Cas.* (9th Cir. Jan. 22, 1993), No. 91-16381, 1993 U.S. App. LEXIS 1439, at *9 (emphasis in original).
[13] *Canton Storage,* 72 Ohio St. 3d at 8, 647 N.E.2d at 143.

The Commission's taking of administrative notice, and failing to accord EnerNOC ample discovery, each constitutes a denial of EnerNOC's due process rights under Ohio and federal law.

III. THIS COMMISSION HAS FULL REGULATORY AUTHORITY OVER COMPANIES AND THEIR BUSINESS DEALINGS AND SHOULD REQUIRE COMPANIES TO CONDUCT THEMSELVES IN A MANNER THAT DOES NO DISSERVICE TO OHIO OR ITS RETAIL ELECTRICITY CUSTOMERS.

All Ohioans have a stake in the behavior of their regulated utilities and the perception of whether the Ohio Commission insists upon open, fair and transparent auctions. FE has harmed Ohio's reputation in this regard by creating a disturbing irregularity in the recent ATSI Integration Auctions concerning materially false information about Tariffs ELR and OLR. After initially leading market participants in the ATSI Auctions to rely upon the Companies material representations that the tariffs would expire and the Companies would conduct an RFP for demand response, the company waited two business days after the conclusion of the auction to announce its stunning reversal. The Stipulation clearly contradicts previous public representations by FE and extends Tariffs ELR and OLR through May 31, 2014. Though market participants in the ATSI Auction and FE itself were prohibited from discussing ATSI Auction issues outside of the formal FERC-approved process, FE conducted private negotiations to alter the ATSI Auctions information that potential bidders were relying upon. Had FE not made representations concerning its state activities in the ATSI Auction, there would be no problem. But having inserted this material into the ATSI Auction, FE subjected the information to the ATSI Auction rules – rules which it violated.

This Commission's broad regulatory authority over FE allows it to address FE's conduct that is damaging to Ohio customers in the recent ATSI Integration Auctions and any future

auction that will be conducted in Ohio. FE's own statements concerning the ATSI Integration Auctions and the Ohio auction called for in the Stipulation evidence the importance of certainty to market participants in auctions:

> **I would submit to you that the most important thing we need to preserve here is certainty. The energy markets crave certainty.** We have laid out a process here starting in August, August 17 and going forward that has set a timetable for a move to PJM. **Putting it in the end of January, we have aligned that with the Ohio procurement process. We have allowed for this integration auction to occur in March of 2010 so that there is abundant notice to bidders in that Ohio procurement. That process in that sequence has been known, understood, discussed with FERC, put together with PJM.** We have had a PJM stakeholder process that has considered that time line in 2009 throughout the fall. There's going to be another one coming up here. Both RTOs are aware of that plan, of the timetable, and now of our move to PJM. **I submit to you it would be terribly disruptive, terribly disruptive, to the energy markets and harmful to the very interests that I know you so earnestly serve, and we seek to serve, to throw a monkey wrench in the works here of either starting a proceeding that interferes with our move to PJM, or just as bad, treats uncertainty over our authority to go there and causes the myriad suppliers, LSEs and other affected parties in both RTOs to wonder what is going on.** (emphasis supplied).[14]

Parties to this case attempt to paint these issues as completely beyond the scope of this Commissions' jurisdiction. They are not. They are squarely within the jurisdiction of the Commission. As EnerNOC's Witness Schisler testified:

> FirstEnergy's terms and conditions of service – including its conduct – are regulated by this Commission. It is incumbent on this Commission to take action to protect the public when presented with information about the behavior of a utility concerning its state jurisdictional tariffs that compromises the integrity of the auctions integrating it into a new RTO.[15]

The sequence of information FE posted about Tariffs ELR and OLR and the effect this had on the ATSI Integration Auctions is described in detail below. The reasons that issues persist about FE's representations in the auctions is because FE voluntarily put information about its state activities into the ATSI Auction. Contrary to the rules of the ATSI Auction and FERC

[14] EnerNOC Exhibit 1 at 8, 9; PUCO Docket No 09-778-El-UNC, Tr. Witness Reffner at pages 45-48 (January 21, 2010).
[15] EnerNOC Exhibit 1, Prefiled Direct Testimony of Kenneth D. Schisler, at 9, 10.

standards FE then failed to ensure that information published to market participants remained accurate when FE thereafter conducted private negotiations (that included some, but not other market participants) which led to the agreement represented by the Stipulation. Had FE not posted information in the ATSI Integration Auctions materials about its state activities in the first instance the integrity of the ATSI Auctions would not be an issue today. But having done so, FE subjected itself to ATSI Auction and FERC rules that rendered its private negotiations about ATSI Auctions issues entirely improper. EnerNOC is certainly not suggesting that confidential settlement negotiations are *per se* improper: however, FE and its affiliates cannot escape their obligations to the markets and market participants by characterizing information disseminated in state settlement proceedings as "confidential." These actions created a material information mis-match, whereby FE affiliates and others had access to material market sensitive information about the auctions that was not available to the market at large.

All information relevant to the Integration Auctions: the FAQs,[16] the ATSI Integration Auctions stakeholder meetings, and other information posted in the ATSI Integration Auctions web site (located on the PJM Interconnection LLC's (PJM) web site constitute the information available regarding the auctions. This information is posted or available in a publically-noticed, publically-available forum and comprises the universe of information market participants rely upon in evaluating 1) whether to participate in the Integration Auctions, and 2) what their bid positions should be.

This issue is very simple: when FE made representations in the ATSI Integration Auction FAQs and Stakeholder meetings, FE is required to either abide by the information provided to market participants in those forums or update/correct the information provided. It has done neither, and its actions harm market participants and all Ohioans.

[16] FE/IEU Exhibit ___ (FAQs).

FE's representations in these forums to market participants were also very simple: Tariffs ELR and OLR would expire May 31, 2011 by their own terms and FE would thereafter procure demand response through an RFP process. This information indicated to market participants several important factors: first, FE's legacy interruptible customers would be available to be served by demand side providers in the competitive market; second, the most powerful incumbent curtailment service provider in the FE service territory – FE themselves - would not be competing for interruptible load except through an RFP; and third, that the size of the market for interruptible load would not significantly change. By waiting until after the ATSI Auctions to make the public aware that the information FE supplied to the ATSI Auctions beforehand was inaccurate, FE denied market participants the information and opportunity to assess these changed circumstances. Making matters worse, this information, denied to everyone else because FE failed to correct the then false information statements in the Auctions materials, was known to FE affiliates. The sanctity of market information relating to any auctions is a serious matter for Ohio and the electricity markets. The Commission should use its authority to protect the markets and require FE to comply with the statements it made to the markets.

IV. THE FAILURE BY FE TO UPDATE INFORMATION PROVIDED TO MARKET PARTICIPANTS RELATED TO THE PROPOSED EXTENSION OF TARIFFS ELR AND OLR VIOLATES COMMISSION POLICY AND THE ATSI AUCTION RULES.

This Commission has a longstanding policy of requiring upon fair, transparent, and open auctions that affect Ohio retail customers. This important policy ensures Ohio retail customers will receive the most advantageous auction outcomes and that bidders are assured equal access to competitive information. FE's handling of the settlement process leading to the Stipulation violated numerous auction rules and Ohio policies which the Commission should not tolerate

because to do so will harm all Ohio retail customers through the outcomes in future auctions. FE's actions have already harmed Ohio retail customers in the recent ATSI Integration Auctions.

A. Factual Background

As part of its plan to integrate into the PJM capacity markets, FE proposed "that the ATSI zone load serving entities be required to acquire this capacity through special auctions, which will utilize a vertical demand curve, rather than the downward sloping demand curve generally used in PJM auctions."[17] The Commission approved FE proposals and found, in addition that demand response and energy efficiency resources in the ATSI zone should be allowed that participate in the auctions.[18] Under the terms of the FE's integration into PJM, the legal obligation to supply committed capacity remained with the FE; in other words, the buyer of the capacity through these auctions was the FE.

The ATSI Integration Auctions structure included an extensive stakeholder process designed to inform potential bidders and other stakeholders of their rights and obligations under the ATSI Integration Auctions' rules and procedures. As a means of ensuring that all potential bidders had access to the same market information, communications concerning the ATSI Integration Auctions were limited to two means: 1) through open public stakeholder meetings and teleconferences, and 2) through information made available on the PJM website ATSI Integration Auctions page.[19] These public information transparency rules include the threat of sanctions, including possible disqualification, if bidders violated rules or compromised Auction results.

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[17] Order Addressing RTO Realignment Request and Complaint, Docket No. ER09-1589-000 and EL10-6-000, 129 FERC ¶61,249 (December 17,2009) at ¶60..
[18] Id at ¶87.
[19] http://www.pjm.com/markets-and-operations/atsi-integration/rpm-frr-integration-auctions.aspx.

The ATSI Integration Auctions page included a link to a FAQ document. The FAQs were designed as an efficient means to post various questions posed by market participants about the auction and the answers to those questions. Questions were submitted through a formal process. The FAQs also included follow up responses to questions posed at the public stakeholder meetings. Market participants were encouraged to check the FAQs and other publicly posted ATSI Integration Auctions information frequently for any updates. FAQs and public stakeholder meetings comprised the exclusive means of obtaining authoritative information pertinent to the ATSI Integration Auctions.

At the ATSI Integration Auctions stakeholder meeting on January 19, 2010, in Cleveland, Ohio, EnerNOC followed up questions it posed at the meeting by submitting a FAQ. At the same meeting, FE attorney Morgan Parke, who was one of the lead attorneys and spokesmen during the ATSI Integration stakeholder meetings, and counsel to FirstEnergy Solutions in the 09-906-El-SSO case, told an EnerNOC Witness Schisler that the FE were discontinuing their retail interruptible load riders in Ohio.[20] Mr. Parke further stated "That's what you guys are for. We want the competition."[21] By this statement Mr. Parke was referring to EnerNOC and wanting there to be competition in the FE territory. Mr. Parke's comments were made in the presence of Mr. Jeffrey Mayes, counsel to Monitoring Analytics, the PJM market monitor.[22]

On or about January 21, 2010, the FAQs were updated to include a FAQ addressed to the demand response credit issue raised by EnerNOC and discussed at the January 19th stakeholder meeting:

> CR3) How will PJM treat behind the meter generation and interruptible load for the 2011/2012 and 2012/2013 DYs for the ATSI zone?

[20] EnerNOC Exhibit 1 at 12-15.
[21] Id. at 15.
[22] Id.

These resources will be allowed to participate in the RPM auctions as DR. However, if used as DR, the Behind the Meter Generation cannot be netted from load for the purposes of calculating the Peak Load Contributions for that Delivery Year. Requests for Behind the Meter changes for capacity obligations must be received by PJM by December 1 prior to the start of the Delivery Year as outlined in *PJM Manual 14D: Load Generator Operational Requirements.*

a. Will such resources be treated as existing or planned resources?

To the extent the behind the meter generation or interruptible load capability already exists, it will be treated as existing DR.
The ATSI utilities are planning to hold an RFP to procure demand response resources. To utilize these resources in the integration auctions, the ATSI Utilities will be required to submit a plan to PJM that demonstrates to PJM that the RFP product will meet the PJM requirements for planned DR resources. The plan will also include a timeline including the milestones that demonstrates to PJM's satisfactions that the DR resources will be available before the start of the delivery year. (emphasis supplied).

On January 26, 2010, the FAQs were further updated to further clarify the definition of existing demand response for credit purposes as it relates to the legacy interruptible riders offered by the ATSI utilities:

CR22) What standards are being used to determine which demand resources are considered existing resources for the purpose of the FRR Integration Auctions?

Existing Demand Resources are defined as those resources that are currently linked to emergency load reduction customers registered in PJM's Load Response application for the current Delivery Year. **Since demand response customers located in the ATSI Zone for the current Delivery Year do not yet exist in the PJM Load Response application, PJM will consider sites currently participating in the ATSI Utilities DR program via Rider ELR as Existing Demand Resources. These resources total approximately 400 MW.** Participants wishing to offer these sites into the FRR Integration Auction should contact PJM with the appropriate EDC account numbers to qualify these sites as Existing. If requested by a CSP, sites in the ATSI zone not participating in the ATSI Utilities DR program via Rider ELR will be evaluated on a case by case basis to determine if they are eligible to offer as existing DR. (emphasis supplied).

Similar to the current RPM process, in the event two providers claim ownership of the same site, letters from the customer site will be required that clearly designate the correct supplier. If consensus cannot be reached, no supplier may claim the site as Existing in their portfolio, but either supplier has the option to offer the site as a planned resource provided appropriate DR plan documentation has been submitted by February 22, 2010.

> Unlike other RPM auctions, Planned Resources do not establish an RPM Credit Limit with PJM prior to the ATSI FRR Integration Auction. Instead, PJM will require credit from FE for any Planned Resources contained in their FRR Capacity Plan.
>
> FE will require Performance Assurance from non-investment grade companies for all resources, including planned, that clear in the ATSI FRR Auctions. In this case, non-investment grade is defined as being rated below BBB- by S&P or below Baa3 by Moody's. The Performance Assurance amount is based on the calculation shown in Article 6.1 of the Capacity Purchase and Sale Agreement.

The response to FAQ question CR3 and Mr. Parke's statements to EnerNOC on January 19th were regarding termination of interruptible riders and conducting an RFP were consistent with the FE public statements in Ohio filings with this Commission. In the 09-906 FE MRO case FE stated it would allow the interruptible riders (Riders ELR and OLR) to expire according to their terms on May 31, 2011. FE further represented to the Commission that it would conduct an RFP to procure demand response resources to satisfy Ohio law peak load reduction requirements in lieu of Riders ELR and OLR.

In FirstEnergy's application for a Market Rate Order before the PUCO in Docket 09-906, FirstEnergy stated:

> 72. **The Companies will issue a Request for Proposal seeking bids from eligible customers for a price and corresponding interruptible load at which those customers would agree to be interrupted.** Each of the Companies would accept the lowest bids that would satisfy the number of MWs that each Company needs to comply with its load-reduction requirements under R.C. Section 4928.66. The RFP would be conducted annually for the period of interruption June 1 through May 31 of each year, to align with the MRO's annual calendar. Annual RFPs are appropriate because the Companies' load-reduction targets vary on an annual basis. The Companies are seeking approval through this Application of such a Request for Proposal process to assist in securing compliance with the peak demand reduction requirements in R.C. Section 4928.66. (emphasis supplied)

Regarding interruptible riders ELR and OLR, FirstEnergy further stated that these interruptible riders would expire by their own terms:

> 74. The Companies' existing Rider DSE, which consist of a DSE1 charge and a DSE2 charge, **will only be modified to the extent necessary to reflect the expiration of the Companies' Economic Load Response Rider (Rider ELR) and Optional Load Response Rider (Rider OLR), both of which expire on their own terms.** The Rider DSE1 charge will remain in place under the Companies' proposed MRO to ensure all reconciliation amounts associated with costs incurred as a result of Rider ELR and Rider OLR are fully recovered. There are no changes to the DSE2 charge under Rider DSE as a result of the Companies' proposed MRO. (emphasis supplied)

As stated above, the response to ATSI Auction FAQ CR3 stated clearly that the FE was planning to conduct an RFP to procure demand response resources. From a demand response market perspective this statement was very significant and material because the RFP process was linked to the end of legacy interruptible riders of FE. The termination of these legacy riders creates an opportunity for curtailment service providers to compete to serve the demand response needs of the customers presently served on these legacy interruptible riders. While the details of how the RFP would operate were not yet determined, what was important from a markets perspective was that customers previously served under interruptible riders would not have a utility interruptible rider option and would be available to be served by curtailment service providers.

Since the conclusion of the hearings in 09-906 FE entered into private settlement discussions in Ohio with parties to that case, including FirstEnergy Solutions and its counsel Mr. Parke. The result of these settlement discussions produced a stipulation of settlement filed on March 23, 2010 just two business days after the ATSI Integration Auctions closed on March 19, 2010, and before the results of the ATSI Integration Auction were announced on March 26,

2010. That stipulation revealed, for the very first time in information available to the market participants and the public that FE agreed to change their previously announced plan to hold an RFP and instead would extend its legacy interruptible riders which require customers to remain on the riders for three years.

Despite having rules requiring publicly available market information, and federal prohibitions against information sharing with affiliates, FE negotiated material changes to the information the FE put into the ATSI Auction FAQs by agreeing to continue Tariffs ELR and OLR and abandon the DR RFP. FE failed to make any correction or change to what then became materially false information.

The ATSI Integration Auction rules bind the *conduct* of FirstEnergy Services Corp. and its affiliates regarding the public information and the integrity of the ATSI Integration Auctions. FE was not obligated to place the information concerning its RFP for demand response or the expiration of riders ELR and OLR into the ATSI Integration Auctions information on the PJM website. They did so, at least initially, to address concerns about affiliate abuses concerning how credit rules might be applied. However, having made material representations to the public and market participants, FE had an obligation to ensure the information remained accurate and up to date – a responsibility which they failed to meet. When FE decided to negotiate in private concerning changes that affected the veracity of the ATSI Integration Auctions materials (which negotiations included its affiliates) FE had an obligation to remove or correct the information it posted concerning Riders ELR, OLR, and the RFP process in the ATSI Integration Auctions Information. These important issues of some information being available to some (but not all) market participants that constitutes violations of the Auctions Rules and Ohio and FERC Policy

could have been avoided by FE correcting or an updating to the information it placed in the ATSI Integrations FAQs. Unfortunately, FE did not do this.

Moreover, it is important to understand that having put this information into the ATSI Integration Auctions FAQs, potential bidders such as EnerNOC were prohibited by the ATSI Integration Auctions rules from speaking to FE about the ATSI Integration Auctions information outside of the FERC-approved means: stakeholder meetings or the publicly available FAQs. Doing so would subject potential bidders to sanctions for attempting to circumvent transparency rules governing the ATSI Integration Auctions. EnerNOC and other potential bidders had no lawful means to inquire whether FE was negotiating issues privately with their affiliates and other potential bidders that materially changed the ATSI Auctions Information market participants were relying upon.

B. FE's Conduct Violated Auction Rules Established to Assure a Fair, Transparent, Open Auction Process.

The FERC FRR Integration Auction Rules establish the rules, terms and conditions that govern the competitive auction that was conducted from March 15 to March 19, 2010. The Auction Rules are posted on the FRR integration Auctions Information webpage[23] along with the FAQs[24] and other key auction documents. Several Auction Rule provisions address conduct to ensure that the integrity and the competitive nature of the auction are maintained.

1. The Settlement Discussions conveyed to bidders or between bidders information relevant to the auction that was not properly disclosed.

Article III.2.11 prevents information sharing among bidders that would jeopardize the

[23] http://www.pjm.com/markets-and-operations/atsi-integration/~/media/markets-ops/atsi-integration/frr-integration-auction-rules.ashx.
[24] http://www.pjm.com/markets-and-operations/atsi-integration/~/media/markets-ops/atsi-integration/frr-integration-auctions-faqs.ashx

integrity of the competitive auction. It establishes the following:

> Offerors are prohibited from communications with each other in ways that would compromise the integrity and competitiveness of the Auctions. Sanctions will be applied if these rules are violated, including, among other things, possible disqualification of Offerors found to have violated the Auction rules or otherwise compromised the Auction results.

Violations occurred when potential bidders in the ATSI Integration Auction negotiated to render relevant Auction information incorrect, when such information was known to some but not all market participants, including FE affiliates.

These changed positions discussed by the parties to 09-906-EL-SSO, and some but not all market participants, were formalized March 23, 2010 when the FE (and its Affiliate FE Solutions) filed a stipulation that proposed to extend its demand response Riders ELR and OLR beyond May 31, 2011, a decision that was contrary to FirstEnergy Utility's repeated and unequivocal statements in the ATSI Auctions materials to the contrary.

These communications between FE and other, but not all, market participants, is a direct violation of Article III.2.11 which prohibits communications that compromise the competitiveness of the Auction.

EnerNOC recognizes that the settlement negotiations in 09-906-EL-SSO involved a myriad of issues that were of independent and legitimate interest to the parties to that proceeding. Further, even the continuation or termination of the tariffs in question was clearly a matter of legitimate interest to parties in the state proceeding. That notwithstanding, the Company had made specific public statements on its FAQ's website that gave no indication it had any intention of agreeing to an extension of the tariffs, even as it was negotiating with other bidders to extend them. With respect to these tariffs, the Company had an affirmative obligation to assure that any information relevant to their continuation that was made available to potential bidders in the

settlement process was also available to other potential bidders who relied on the publicly available information.

2. Auction related information must be publicly available.

Article III addresses "Information Provided for Offerors; Communications Process," and requires that "Relevant documents, data and information related to this auction are available on the Auction Manager's Internet website." *See* Auction Rules §III.1.1. Offerors are advised to check the website frequently to ensure it has the latest documentation and information. *Id.* Among the information required for posting on the website are the FAQs and responses, whereby Offerors interface with the Auction Manager about relevant facts underpinning the Auctions. *Id.* This rule assures that all bidders receive the same information and that relevant information is publicly available.

These rules were not observed by FE. Settlement discussions with a subset of potential bidders (and not others) were held where information relevant to the auction and specifically relevant to a particular representation made by the company to the public was conveyed in a non-public setting. The relevant auction information was not, however, provided to the public via the website. Information existed as a result of the settlement negotiations that resulted in the continuation of interruptible riders, however FAQs did not disclose the information, and in fact represented contrary information on the PJM website. On its website, ATSI represented that it planned to do an RFP to procure demand response, with no equivocation or qualification, and publicly stated that the riders would expire. In fact, all of FE's public statements were consistent with the ATSI Auctions Information – only parties to the private negotiations, including FE affiliates, could have known that the information was false prior to the auction.

3. Failure to disclose that settlement negotiations were ongoing and relevant to the auction, violating the Auction Rules.

EnerNOC does not have specific information as to whether any particular market participant who participated in the settlement negotiations bid or cleared in the Auction. However, among the signatories to the Ohio settlement with FE was First Energy Solutions. First Energy Solutions was represented in the Stipulation by attorney Morgan Parke, who was also FE's attorney in the FERC proceeding establishing the ATSI Auctions and spokesman for FE during the ATSI stakeholder discussions. In a Memorandum of Support of FirstEnergy Solutions Motion to Intervene in Docket 09-906, on behalf of his client FirstEnergy Solutions, Mr. Parke stated:

> [FirstEnergy] Solutions owns and controls the electric output of significant generating resources that are located so as to provide generation supply in the Applicants' service territories. Solutions may participate as a wholesale energy supplier in the Applicants' procurement processes that is the subject of this proceeding . . . .[25]

Mr. Parke's memorandum on behalf of FirstEnergy Solutions went on to state:

> Solutions has significant experience with supply of competitive wholesale electric energy products, which means that Solutions is in a position to contribute significantly to the factual development of the record. Moreover, Solutions has significant experience with participating in regulatory proceedings, and therefore understands and accepts its responsibility to contribute to the equitable resolution of this proceeding.[26]

First Energy Solutions was clearly a potential bidder in the auctions.

Auction Rule Article IV.2 "No Collusion/Independence" prevents bidders from entering agreements with other potential bidders that related to participation in the Auction. The rule provides as follows:

[25] Motion to Intervene and Memorandum in Support thereof of FirstEnergy Solutions, PUCO Case No. 09-906-EL-SSO Memorandum at 2 (November 25, 2009).
[26] Id at 3.

> Upon submitting its Attestation Form, each Offeror must disclose to the Auction Manager and PJM Market Monitor any bidding agreement or any other arrangement…which the Offeror may have entered into with one or more other Offerors or other suppliers or other Market Participants and which is related to its participation in the Auction. An Offeror that has entered into such an agreement or arrangement must name the entities with which the Offeror has entered into such bidding agreement, including any joint venture, bidding consortium or other arrangement pertaining to participating in the Auction.

This provision was violated when FE, FirstEnergy Solutions and other potential participants in the auction bid process entered into an arrangement whereby they were negotiating the outcome of a revised stipulation that would extend Riders ELR and OLR to May 31, 2014, rather than allowing their expiration on May 31, 2011, which is when they were set to expire under their own, publicly available terms. The continuation of the interruptible riders substantially reduced the available customer base to satisfy their cleared commitment to provide demand response. Therefore, Offerors were required to disclose, pursuant to Auction Rule IV.2.1 their participation in the negotiation arrangements and process leading up to the March 23, 2010 stipulation.

That the stipulation was not released publicly until the close of the negotiations bears no impact on the violation of Rule IV that occurred, as the participants were required to disclose the "other arrangement[s]" that they had entered into that related to participation in the Auction. At the very least, the spirit and intent of this rule was violated as a result of the failure to disclose pertinent information to the market that was available to some potential bidders.

C. Harm to the Competitive Process Has Occurred in Fact

Potential bidders who were privy to the settlement talks that lead to the proposed continuation of the interruptible riders would have been able to take inside information into account in structuring their bids. To this end, bidders not privy to those settlements or even

aware that they were taking place, relied upon the public information that was made available and formulated bids accordingly. For example, First Energy Solutions had the opportunity to make a decision to bid or not bid demand response resources into the ATSI Integration Auctions with the knowledge that its affiliates, the ATSI utilities, were planning dramatic changes to what they represented to the public about their plans to bid resources in the same auctions and the overall availability of customer demand response capacity in the ATSI zone. This advance knowledge of market sensitive information was an unfair advantage that only FirstEnergy Solutions and others privy to the private discussion had in advance of the auctions.

V. CURTAILMENT SERVICE PROVIDERS ARE NOT COMPETITIVE RETAIL ELECTRIC SERVICE PROVIDERS

The certification requirement for competitive retail electric service (CRES) providers under Ohio law and regulation do not require CSPs to be certified as a CRES provider to provide demand response services to Ohio retail customers. Ohio requirements for certification are clearly limited by 1) the type of company providing a service; and 2) the type of service provided. R. C. § 4928.08(b) limits the certification requirement to an "electric utility, electric services company, electric cooperative, or governmental aggregator." Similarly, Ohio Admin. Code 4901:1-24-02(a) states:

> ***Any electric utility, electric services company, electric cooperative, or governmental aggregator which intends to offer or provide a competitive retail electric service (CRES) to consumers in this state shall obtain a certificate to operate from the commission prior to commencing operations.

This is consistent with Ohio Admin. Code § 4901:1-24-03(a) that states "no person shall offer,

contract, or provide a competitive retail electric service in this state without a valid certificate."

Further, the Federal Energy Regulatory Commission has never held that demand response is a sale for resale of power. This was further clarified in a January 2010 FERC Order:

> Nevertheless, where an entity is only engaged in the provision of demand response services, and makes no sales of electric energy for resale, that entity would not own or operate facilities that are Commission's jurisdiction and would not be a public utility that is required to have a rate on file with the Commission. While jurisdictional facilitates may include contracts, memoranda, and other records utilized in connection with jurisdictional sales, we do not regard agreements to provide services from only demand response resources to be jurisdictional facilities because they involve agreements to reduce demand, i.e., agreements not to purchase electric energy under certain circumstances, rather than agreements to sell electric energy at wholesale. Such agreements are not jurisdictional facilities that cause a seller to be a public utility.[27]

In this Order, FERC defines demand response as:

> "…a reduction in the consumption of electric energy by customers from their expected consumption in response to an increase in the price of electric energy or to incentive payments designed to induce lower consumption of electric energy."[28]

This is important because the services EnerNOC provides its customers do not involve power sales or supply as contemplated by the laws and regulations pertaining to CRES certification.

Parties to this case attempt to bootstrap CSP's demand response services to Ohio retail customers with competitive services provided by electricity suppliers. This is a misreading of the entire law as it related to CRES suppliers. Ohio Admin. Code § 4901:1-24-03(A) provides that "No person shall offer, contract, or provide a competitive retail electric service in this state without a valid certificate." "Competitive retail electric service" is defined in the Ohio Revised Code as a component of retail electric service that is competitive as provided under division (B) of this section.[29] However, CRES is defined as including "the services provided by retail electric

[27] Id at ¶ 30.
[28] Id at ¶ 31.
[29] Ohio Rev. Code § 4928.01(A)(4).

generation providers, power marketers, power brokers, aggregators, and governmental aggregators"[30] (emphasis supplied) and "Retail electric service" is defined as:

> any service involved in supplying or arranging for the supply of electricity to ultimate consumers in this state, from the point of generation to the point of consumption. For the purposes of this chapter, retail electric service includes one or more of the following "service components:" generation service, aggregation service, power marketing service, power brokerage service, transmission service, distribution service, ancillary service, metering service, and billing and collection service.[31]

While CSPs compete in Ohio for retail customers' curtailment load, CSPs are not competing to supply of electricity to retail consumers. A plain reading of the statute[32] clearly indicates it is the competitive supply of electricity the stature regulates, not the services provided by CSPs. The Commission has never made a determination that CSP activities relating to demand response are subject to provisions relating to CRES Providers requiring certification.

VI. CONCLUSION

FE's behavior in telling the market one thing in the ATSI Integration Auctions information while telling some, but not all market participants, something different in the negotiations of following hearings in FE's MRO, casts real doubt about the certainty of FE auctions – whether wholesale or retail. This Commission should not abide such a threat to the reputation of Ohio as a place where transparent, fair and open auctions occur without Ohio retail electric customers suffering palpable harm. For all the reasons stated herein, the Commission should reject the provision of the Stipulation that extends Tariffs ELR and OLR, or in the alternative, spin these Tariffs out of the Stipulation where they can be addressed by the parties who will be accorded their requisite due process protections.

[30]Ohio Admin. Code 4901:1-24-01(H).
[31] Ohio Rev. Code § 4928.01(A)(27).
[32] Id.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of EnerNOC's Post-Hearing Brief was served on the persons identified below, *via Electronic Service*, this 30th day of April 2010.

/s/ Jacqueline Lake Roberts
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Summary: Brief Post-hearing Brief of EnerNOC, Inc. electronically filed by Ms. Jacqueline Lake Roberts on behalf of EnerNOC, Inc.