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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 INDUSTRIAL ENERGY USERS-OHIO

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I. INTRODUCTION

As the Public Utilities Commission of Ohio ("Commission") is aware, the current standard service offer ("SSO"), or default service for customers who do not shop and are in the service territories of Ohio Edison Company ("OE"), The Cleveland Electric Illuminating Company ("CEI") and The Toledo Edison Company ("TE", collectively "FE EDUs" or "Companies"), was established in Case No. 08-935-EL-SSO and expires on May 31, 2011. The SSO generation supply price was set by a competitive bidding process ("CBP") conducted on May 13 and 14, 2009 that was generally regarded as successful because of the customer-friendly results.[1]

On October 20, 2009, the Companies filed an application for approval of a market rate offer ("MRO") to conduct a CBP to obtain generation supply for SSO supply beginning on June 1, 2011, so as to maintain uninterrupted SSO generation service.[2] In

[1] Tr. Vol. IV at 935-936.

[2] *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of a Market Rate Offer to Conduct a Competitive Bidding Process for Standard Service Offer Electric Generation Supply, Accounting Modifications Associated with Reconciliation Mechanism, and Tariffs for Generation Service*, Case No. 09-906-EL-SSO, Application (October 20, 2009) (hereinafter "MRO Case").

the responsive comments submitted on behalf of the Commission's Staff, Staff stated, "Staff would recommend that the Applicants strongly consider building on the successful electric security plan rather than to proceed with the somewhat more limited market rate option. Staff will distribute to all parties of the case a straw man proposal to facilitate discussions at the December 1, 2009 pre-hearing."[3] An evidentiary hearing to consider the Companies' MRO application commenced on December 15, 2009 and concluded on December 23, 2009. The issues in the MRO Case were fully litigated, briefed and are awaiting the Commission's resolution.

Since December 15, 2009 and as a result of the above-mentioned Staff recommendation in the MRO Case, serious and lengthy discussions, deliberations and negotiations have taken place. All parties interested in doing so actively participated in these discussions, deliberations and negotiations. This process produced a Stipulation and Recommendation ("Stipulation") filed on March 23, 2010.[4]

The Stipulation is described and explained in the testimony of William Ridmann.[5] It is significantly focused on establishing the default generation supply price that will apply to consumers not receiving generation supply from a competitive retail electric services ("CRES") supplier when the current electric security plan ("ESP") ends and during the period June 1, 2011 through May 31, 2014. The Stipulation also addresses and recommends resolution of a number of issues that are before the Commission in

[3] MRO Case, Comments Submitted on behalf of the Staff of the Public Utilities Commission of Ohio at 22 (November 24, 2009).

[4] The Stipulation is Joint Exhibit 1.

[5] Company Exhibit 4 at 3–8; *see also,* Staff Exhibit 2 at 2–6; Staff Exhibit 3 at 1–5; Staff Exhibit 1 at 2-8; IEU-Ohio Exhibit 2.

other proceedings,[6] including the MRO Case, using the legal framework that applies to an ESP. The Stipulation was accompanied by an application made pursuant to Section 4928.143, Revised Code ("ESP 2 Application"[7]), thereby providing the Commission with the opportunity to enable a successor ESP for OE, CEI and TE. But for the ESP 2 Application, the Commission could not, as a matter of law, enable a successor ESP.[8]

The ESP 2 Application requested that all parties who intervened in its recent MRO Case be granted intervention in this proceeding without any need of filing additional motions and that all attorneys who were authorized to appear *pro hac vice* in the MRO Case be authorized to appear *pro hac vice* in this proceeding.[9] This request was granted by an Entry issued on March 24, 2010 without objection.[10]

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[6] Section 4928.12, Revised Code, requires persons who own or control transmission facilities to be a member of a Federal Energy Regulatory Commission ("FERC") approved regional transmission entity meeting certain criteria. On August 17, 2009, FirstEnergy Service Company ("FirstEnergy"), on behalf of six of its affiliates, including OE, CEI, TE, and American Transmission Systems, Inc. ("ATSI"), filed an application with FERC in FERC Docket No. ER09-1589. The FERC application requested permission for the FirstEnergy affiliates to withdraw their transmission facilities from the Midwest Independent Transmission System Operator ("MISO") and transfer operational control to PJM Interconnection, Inc. ("PJM"). The application characterized this transfer as the regional transmission organization ("RTO") realignment. Subsequently, on September 4, 2009, the Commission opened Case No. 09-778-EL-UNC to review the impact of RTO realignment upon stakeholders in this state. During this proceeding, the Commission requested and received written comments from 11 stakeholders and heard oral presentations regarding the RTO realignment on September 15, 2009, and January 1, 2010. Among other things, the Stipulation recommends the resolution of retail rate-related issues associated with the proposed RTO realignment and recommends that the Commission close the RTO realignment proceeding (Case No. 09-778-EL-UNC).

[7] The ESP 2 Application is Company Exhibit 1.

[8] Sections 4928.141 and 4928.143, Revised Code.

[9] Company Exhibit 1 at 2.

[10] *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to R.C. §4928.143 in the Form of an Electric Security Plan*, Case No. 10-388-EL-SSO, Entry (March 24, 2010) (hereinafter "ESP 2 Case").

The ESP 2 Application also requested the Commission to incorporate the record from the MRO Case in this proceeding.[11] This request was granted by the Commission in an Entry issued in this proceeding on April 6, 2010.[12]

The ESP 2 Application also requested that the Commission act on the ESP Application and Stipulation by May 5, 2010 so as to permit an initial CBP to proceed on July 13, 2010.[13] Accordingly, a procedural schedule was established by Entry issued March 24, 2010.[14] The March 24, 2010 Entry indicated that the local public hearings would be scheduled by a subsequent Entry which was issued on April 12, 2010.

In accordance with the procedural schedule, prepared testimony was submitted on April 15, 2010 by parties wishing to do so and the evidentiary hearing held in Columbus, Ohio began on April 20, 2010 and concluded on April 23, 2010. Prior to the commencement of the evidentiary hearing, parties were permitted to conduct discovery using an expedited process established by the March 24, 2010 Entry. Pursuant to the briefing schedule established by the Attorney Examiners, Industrial Energy Users-Ohio ("IEU-Ohio") hereby respectfully submits its Brief for the Commission's consideration.

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[11] Company Exhibit 1 at 3. This request was also included in the Stipulation (Joint Exhibit 1) at page 33.

[12] ESP 2 Case, Entry (April 6, 2010). At pages 2 and 3, the Commission directed that all testimony and exhibits admitted into evidence in the MRO Case be admitted into the evidentiary record in the ESP 2 Case. The Commission's Entry of April 6, 2010 is the object of an Application for Rehearing filed by EnerNOC, Inc. ("EnerNOC"), which was not authorized to do business in the state of Ohio when it filed its Application for Rehearing. Tr. Vol. II at 368. In addition to EnerNOC's lack of standing to protest the Commission's Entry of April 6, 2010, the substantive arguments advanced by EnerNOC in its Application for Rehearing filed on April 19, 2010 are without merit for the reasons demonstrated repeatedly by the record in this proceeding. To the extent that EnerNOC has suffered any injury during its frolic in this proceeding, that injury was self-inflicted.

[13] Company Exhibit 1 at 1 (the ESP 2 Application) states that: "[t]ime is of the essence; the Commission must act quickly on this Application as such expedited approval will permit the Companies to immediately proceed with implementing the competitive bidding process to take advantage of historically low market prices for wholesale electric generation, to the benefit of customers." Even parties that have expressed opposition to the Stipulation acknowledge that customers will likely benefit by proceeding with a CBP sooner as opposed to later. Tr. Vol. IV at 934-935.

[14] ESP 2 Case, Entry at 2, 3 (March 24, 2010).

For the reasons described below, IEU-Ohio recommends that the Commission approve the Stipulation forthwith and as filed.

II. STANDARD OF REVIEW

In considering the reasonableness of a stipulation, the Commission has applied the following criteria:

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

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

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

Cincinnati Gas & Elec. Co., FirstEnergy Corp. and Columbus & Southern Ohio Elec. Co., Case No. 84-1187-EL-UNC (November 26, 1985), and *Cleveland Elec. Illuminating Co.*, Case No. 82-485-EL-AIR (March 30, 1983). Furthermore, the Ohio Supreme Court has endorsed the Commission's use of these criteria to evaluate the reasonableness of settlements and their effect on the interests of customers and public utilities. *Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St. 3d 123 (1992).

Additionally, as the Stipulation encompasses an ESP, it must be evaluated according to Section 4928.143, Revised Code. Pursuant to Section 4928.143(C)(1), Revised Code, the Commission must find that the ESP is, in the aggregate, "... more favorable ... as compared to the expected results that would otherwise apply under section 4928.142 of the Revised Code." Also, Section 4928.143(B)(2), Revised Code, is instructive on what an ESP may provide for, including, among other things, "[p]rovisions under which the electric distribution utility may implement economic development, job retention, and energy efficiency programs, which provisions may

allocate program costs across all classes of customers of the utility and those of electric distribution utilities in the same holding company system." Section 4928.143(B)(2)(i), Revised Code.

Moreover, within the body of law that the Commission must apply, the General Assembly has provided policy guidance in Section 4928.02, Revised Code, which instructs the Commission to, among other things, "[f]acilitate the state's effectiveness in the global economy".[15] The General Assembly has also provided specific policy guidance on the interaction between provisions dealing with electric distribution infrastructure and development in Ohio: "In carrying out this policy, the commission shall consider rules as they apply to the costs of electric distribution infrastructure, including, but not limited to, line extensions, for the purpose of development in this state".[16]

III. ARGUMENT

A. APPLICATION OF THE COMMISSION'S CRITERIA

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

The testimony of Mr. Ridmann (on behalf of the Companies) describes the background circumstances that led to the Stipulation, identifies the signatory parties to the Stipulation and describes the process that produced the Stipulation.[17] The testimony of Ms. Turkenton (on behalf of the Staff) demonstrates that notices of

[15] Section 4928.02(N), Revised Code.

[16] *Id.* Development-related cost of electric distribution infrastructure, including cost related to a significant line extension, is addressed by Section F.2 of the Stipulation (Joint Exhibit 1 at 26-28.) As Mr. Fortney explained, the provision of the Stipulation that address The Cleveland Clinic Foundation's ("Clinic") expansion opportunity is a provision dealing with the line extension elements in CEI's existing tariff as applied to this expansion opportunity. Tr. Vol. III at 603.

[17] Company Exhibit 4 at 8-12.

settlement meetings were sent to all parties and that all parties who elected to participate in the meetings were present either in person or *via* telephone. (It is worth noting that the Staff participated in all the negotiations.) Her testimony also confirms that the Stipulation is the product of serious bargaining among knowledgeable parties that were represented by able counsel and technical experts during an open settlement process.[18]

As the Commission knows, the parties to this proceeding are, in many cases, parties who have participated in Commission proceedings for decades and have presented settlements to the Commission that the Commission has adopted based on the above-mentioned criteria.[19] Most of the signatory parties to the Stipulation also actively participated in the MRO Case. Yet, the Office of the Ohio Consumers' Counsel ("OCC") boldly tried to concoct a claim that the above question regarding the Commission's first criteria should be answered in the negative.

While an initial reading of Mr. Gonzalez's testimony might suggest that he believes that the Stipulation "... is not a result of serious bargaining among capable, knowledgeable parties," his cross-examination demonstrated otherwise.[20]

During questioning regarding his testimony, Mr. Gonzalez eventually agreed that the settlement parties were capable.[21] He awkwardly tried to explain that he was really questioning whether the parties that participated in the settlement process had enough information and time to participate effectively in the settlement discussions and

[18] Staff Exhibit 2 at 2.

[19] Company Exhibit 4 at 11.

[20] OCC Exhibit 2 at 13.

[21] Tr. Vol. IV at 904-905.

negotiations.[22] He admitted that he did not know what information was secured by other parties participating in the settlement process, acknowledged that he did not participate in all the settlement meetings and that there were no outstanding or unanswered discovery requests by the time he took the stand to testify.[23] He agreed that there were plenty of opportunities for parties to obtain information regarding any issues associated with what OCC identified as the "major elements" of the Stipulation.[24] He agreed that the absence of OCC's signature on the Stipulation was not controlling since the Commission has adopted many Stipulations not signed by OCC.[25]

Based on the evidence of record, the Commission should find that the settlement is a product of serious bargaining among capable, knowledgeable parties.

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

As the Commission knows, the potential scope of an ESP was defined broadly by the General Assembly to permit the Commission to assemble a package that responsibly addresses, among other things: the pricing and reliability of non-competitive services; the pricing and availability of competitive services available from the Companies; the costs and benefits related to new electric generating plants; terms and conditions that apply to customer shopping including those that dictate what charges are bypassable; the establishment of automatic rate adjustment mechanisms;

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[22] *Id.* at 905-906.

[23] *Id.* As explained below, it is IEU-Ohio's position that OCC Exhibit 2 should have been excluded from the evidence because it is unreliable and therefore not eligible to be considered as "expert" testimony for the purposes of identifying and resolving any issues in this proceeding.

[24] Compare OCC Exhibit 2 beginning at page 6 with Mr. Gonzalez's responses to Examiner Price's questions at Tr. Vol. IV at 948-955.

[25] Tr. Vol. IV at 910. Mr. Ridmann's testimony also describes the opportunity that has been provided for interested parties to consider and discuss ESP topics as well as acquire knowledgeable about the various components of the Stipulation. Company Exhibit 4 at 13, 14.

transmission, ancillary and congestion costs; a long-term plan for delivery infrastructure modernization based on an alignment of interests between the utility and its customers; and economic development, job retention and energy efficiency programs, the cost of which may be allocated to the customers of all the Companies.[26]

As described by Mr. Ridmann,[27] Dr. Choueiki,[28] Ms. Turkenton,[29] Mr. Fortney,[30] and Mr. D'Angelo,[31] the package created by the Stipulation has a scope that is entirely consistent with the scope established for ESPs by the General Assembly. Their testimony also demonstrates that the package created by the Stipulation benefits ratepayers and the public interest as defined by the General Assembly and, in the aggregate, provides better qualitative and quantitative outcomes than might be expected from the application of Section 4928.142, Revised Code.[32]

The record evidence indicates that some parties have asked the Commission to find that the Stipulation does not benefit ratepayers and the public interest. Individually, some of these parties want the Commission to make the package larger by, for example, requiring the Companies to enter into long-term contracts to purchase solar renewable energy credits ("S-RECs") or smaller by, for example, stripping out provisions such as those regarding the ELR and OLR riders or the provisions in Section F of the Stipulation. But, these package expansion and contraction requests are without merit.

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[26] Section 4928.143(B), Revised Code.

[27] Company Exhibit 4 at 3-8.

[28] Staff Exhibit 1.

[29] Staff Exhibit 2.

[30] Staff Exhibit 3.

[31] IEU-Ohio Exhibit 2. As Mr. Fortney testified, Mr. D'Angelo's testimony satisfied the first of the four items he identified at page 3 of his testimony. Tr. Vol. III at 576.

[32] *See*, for example, Staff Exhibit 2 at 7-9.

Dr. Ibrahim, OCC's witness responsible for addressing the economic development and job retention provision in the Stipulation (Section F),[33] did not address the merits of the provisions regarding the Clinic and domestic automakers.[34] He acknowledged that OCC could not say, as a general matter, that it supports economic development in Ohio[35] whereas the Commission has an obligation to "[f]acilitate the state's effectiveness in the global economy".[36]

Nonetheless, Dr. Ibrahim's proposal, if adopted, would permit the Companies to fully recover the costs of these the economic development provisions from customers; his testimony merely suggested an alternative allocation of such costs that results in rather small typical bill variances for residential customers.[37] And, his proposed alternative allocation of such costs would improperly recover distribution-related costs as though they were, in part, generation-related costs.[38]

Mr. Gonzalez[39] and Ms. Hitt[40] proposed expanding the Stipulation's package to include a requirement that the Companies enter into long-term contracts to purchase S-RECs. While they both said that their recommendations were designed to make it easier for developers to obtain financing for solar plants, Ms. Hitt, the President of The

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[33] Joint Exhibit 1 at 26-29.

[34] OCC Exhibit 1 at 5.

[35] Tr. Vol. III at 703.

[36] Section 4928.02(N), Revised Code.

[37] Tr. Vol. III at 722; *Id.* at 725–731.

[38] *Id.* at 715-719. The use of generation revenue to allocate distribution-related costs would also involve speculation since generation revenue collected by the Companies is a function of their default generation supply sales and this revenue amount also ultimately depends on the generation supply price that will be established under Sections 4928.142 or 4928.143, Revised Code.

[39] OCC Exhibit 2 at 51–52.

[40] Ohio Environmental Council ("OEC") Exhibit 1 at 2.

Solar Alliance, could not say if solar developers are generally experiencing problems raising capital.[41]

Ms. Hitt did not identify or propose solutions for the obvious problems that arise from the fact that the cost of complying with Ohio's solar-related portfolio requirement is bypassable.[42]

Oddly, Mr. Gonzalez's S-REC recommendation, if adopted, would not require the solar developer receiving the benefit of the long-term S-REC purchase contract to dedicate the S-RECs for the benefit of Ohio's customers.[43]

Mr. Sullivan, testifying on behalf of The Natural Resources Defense Council ("NRDC"), addressed the provision in the Stipulation providing for recovery of lost distribution revenues.[44] Among other things, he wrongly concluded that the Stipulation, if approved, would preclude implementation of alternatives until mid-2014.[45] And, even if the Commission were to modify the Stipulation as he proposed, he was unable to say if this would be enough to cause NRDC to support the as-modified ESP[46] and such modification would not alter the fact that the Stipulation is better in the aggregate than the alternative.[47]

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[41] Tr. Vol. II at 540.

[42] Tr. Vol. II at 538–539.

[43] Tr. Vol. IV at 932–933. Thus, Mr. Gonzalez's recommendation is either in direct or indirect conflict with Section 4928.143 (B)(2)(c), Revised Code.

[44] NRDC Exhibit 1 at 2. Mr. Sullivan was not personally or directly involved in the discussions and negotiations that produced the Stipulation. Tr. Vol. II at 470.

[45] Tr. Vol. II at 491-494.

[46] *Id.* at 494-495.

[47] Tr. Vol. I at 250.

EnerNOC's witness, Mr. Schisler, urged the Commission to remove the OLR[48] and ELR riders from the Stipulation because of EnerNOC's unsubstantiated claim that it was somehow injured by the Companies or their affiliates during the capacity-related CBP that took place in March under the supervision of PJM. EnerNOC's testimony took unacceptable liberties with the facts and it failed completely to recite an actionable legal theory or to identify a remedy that was within the Commission's jurisdiction.[49] It was still hunting these required elements of effective advocacy as, figuratively speaking, the sun mercifully set on its evidentiary opportunity.

EnerNOC's witness and counsel claimed repeatedly during the hearing that EnerNOC was unduly prejudiced by things done by the Companies or their affiliates. But the remedy proposed by EnerNOC (removing the OLR and ELR riders from the Stipulation) effectively punishes customers for this alleged but remarkably unlikely prejudice.

EnerNOC advanced this claim of prejudice even though EnerNOC was monitoring the MRO Case, knew or should have known that proposals to extend the ELR and OLR riders were advanced in the MRO Case and decided to do nothing in the MRO Case.[50] EnerNOC did not do anything in the MRO Case because of EnerNOC's incorrect view that the Companies had the power to veto any decision issued by the Commission.[51]

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[48] Since there are no customers on the OLR rider, EnerNOC has no legitimate basis for claiming that it lost any opportunity to serve OLR rider customers. Tr. Vol. I at 140.

[49] It appears that EnerNOC's allegations must be brought before PJM or FERC itself. Tr. Vol. II at 454-461. However and as IEU-Ohio Exhibit 1 demonstrates, the PJM Market Monitor certified that the ATSI integration auction results were competitive, the Market Clearing Prices were calculated accurately and the auction process was conducted with no undue preference of any participant.

[50] Tr. Vol. I at 29.

[51] *Id.*

Also, EnerNOC's failure to register to do business in Ohio where it has had customers since 2006 or 2007[52] makes its preachy rendition of the principles that, according to EnerNOC, may be found on the regulatory high road more notable for its irony than its usefulness.

IEU-Ohio Exhibit 1 explains the auction process that EnerNOC claims provoked its ire. Of course, but for the RTO realignment, EnerNOC had no interest in soliciting retail customers in the Companies' service areas to participate in PJM's demand response programs for such retail customers.[53] And, since EnerNOC was not registered to do business in Ohio prior to and after the ATSI integration auction, it cannot rightly claim that it could have been a contender for providing demand response services to retail customers located in the Companies' service areas at the time the ATSI integration auction took place.[54]

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[52] Tr. Vol. II at 365.

[53] *Id.* at 372.

[54] Section 4928.09, Revised Code, states:

> (A)(1) No person shall operate in this state as an electric utility, an electric services company, a billing and collection agent, or a regional transmission organization approved by the federal energy regulatory commission and having the responsibility for maintaining reliability in all or part of this state on and after the starting date of competitive retail electric service unless that person first does both of the following:
>
> (a) Consents irrevocably to the jurisdiction of the courts of this state and service of process in this state, including, without limitation, service of summonses and subpoenas, for any civil or criminal proceeding arising out of or relating to such operation, by providing that irrevocable consent in accordance with division (A)(4) of this section;
>
> (b) Designates an agent authorized to receive that service of process in this state, by filing with the commission a document designating that agent.
>
> (2) No person shall continue to operate as such an electric utility, electric services company, billing and collection agent, or regional transmission organization described in division (A)(1) of this section unless that person continues to consent to such jurisdiction and service of process in this state and continues to designate an agent as provided under this division, by refiling in accordance with division (A)(4) of this section the appropriate documents filed under division (A)(1) of this section or, as applicable, the appropriate amended documents filed under division (A)(3) of this section. Such refiling

In any event, IEU-Ohio Exhibit 1 shows that various types of capacity resources (generation, demand response and energy efficiency resources) participated in the ATSI integration auctions. It also shows that more capacity resources bid into the auction than cleared (were accepted) through the auction process. This means, as admitted by EnerNOC, that the price associated with each resource offer dictated whether the offer cleared or did not clear through the auction process.[55]

Within the category of demand response capacity resources, there were two types of resources that were eligible to be the object of resource offers for purposes of the ATSI integration auction; "existing resources" and "planned resources."[56] According to the Frequently Asked Questions ("FAQ") document published by PJM prior to the

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shall occur during the month of December of every fourth year after the initial filing of a document under division (A)(1) of this section.

(3) If the address of the person filing a document under division (A)(1) or (2) of this section changes, or if a person's agent or the address of the agent changes, from that listed on the most recently filed of such documents, the person shall file an amended document containing the new information.

(4) The consent and designation required by divisions (A)(1) to (3) of this section shall be in writing, on forms prescribed by the public utilities commission. The original of each such document or amended document shall be legible and shall be filed with the commission, with a copy filed with the office of the consumers' counsel and with the attorney general's office.

(B) A person who enters this state pursuant to a summons, subpoena, or other form of process authorized by this section is not subject to arrest or service of process, whether civil or criminal, in connection with other matters that arose before the person's entrance into this state pursuant to such summons, subpoena, or other form of process.

(C) Divisions (A) and (B) of this section do not apply to any of the following:

(1) A corporation incorporated under the laws of this state that has appointed a statutory agent pursuant to section 1701.07 or 1702.06 of the Revised Code;

(2) A foreign corporation licensed to transact business in this state that has appointed a designated agent pursuant to section 1703.041 of the Revised Code;

(3) Any other person that is a resident of this state or that files consent to service of process and designates a statutory agent pursuant to other laws of this state.

[55] Tr. Vol. III at 373–374.

[56] *Id.* at 376–378.

ATSI integration auction, customers currently taking service under the ELR rider were classified as existing resources.[57] The FAQ document makes it clear that any party that wished to offer existing demand resources into the ATSI integration auction had to follow certain procedures unique to an offer of existing demand resources.

EnerNOC has claimed that the conduct of the Companies or the Companies' affiliates somehow deprived EnerNOC of a fair opportunity to bid the demand response capabilities of customers currently receiving service under the ELR rider into the ATSI integration auction.[58] But, the public record shows that if EnerNOC did not make an offer of existing resources into the ATSI integration auction, EnerNOC rendered itself ineligible to offer the demand response capabilities of current ELR rider customers into the ATSI integration auction.[59]

As importantly, the version of the ELR rider contained in the Stipulation required customers wishing to be eligible to continue service under the proposed ELR rider submitted with the Stipulation to execute an addendum within thirty (30) days of the date of the Stipulation.[60] Until a current ELR rider customer executed such addendum, the customer was free to sign up for EnerNOC's services (assuming EnerNOC was eligible to do business in Ohio) and was not obligated to commit its customer-sited demand response capabilities to the Companies pursuant to the proposed terms of the ELR rider included with the Stipulation.[61]

In summary, EnerNOC's claims are bogus claims.

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[57] *Id.* at 378; IEU-Ohio Exhibit 3 at 22, CR22.

[58] EnerNOC Exhibit 1 at 10–11.

[59] Tr. Vol. III at 378-379.

[60] Tr. Vol. II at 442.

[61] *Id.* at 442-443.

Mr. Campbell testified on behalf of several other curtailment service providers ("CSPs") operating under the umbrella of the Demand Response Coalition or "DR Coalition." Like EnerNOC, it appears that the members of this *ad hoc* coalition may not be registered to do business in Ohio.[62]

While Mr. Campbell testified that he supported the goals that the proposed OLR and ELR riders are intended to meet,[63] he discussed the interplay between the Commission's rules applicable to the customer-sited capabilities of mercantile customers, PJM's demand response programs and the opportunity for mercantile customers to secure an exemption from the DSE and DSE2 riders. His recommendations broadly touched on all these areas.[64]

IEU-Ohio urges the Commission to advise the DR Coalition that its views and recommendations are more appropriate for consideration in the Companies' energy efficiency and peak demand reduction collaborative process and the Commission's rulemaking process.

Based on the evidence of record, the Commission should find that the settlement, as a package, benefits ratepayers and the public interest.

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

As discussed above, the ESP 2 Application and Stipulation rely on Section 4928.143, Revised Code, as the source of the Commission's authority to receive and approve such Application and Stipulation. Based on the testimony of Mr. Ridmann,[65]

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[62] Tr. Vol. III at 630–636.

[63] DR Coalition Exhibit 1 at 6.

[64] *Id.* at 13.

[65] Company Exhibit 4 at 21-27.

Dr. Choueiki,[66] Ms. Turkenton,[67] Mr. Fortney,[68] and Mr. D'Angelo,[69] the evidence demonstrates how both the ESP 2 Application and Stipulation respect and advance principles that are relevant to the Commission's evaluation and potential approval of proposed ESPs.

The record in this proceeding shows that some of the parties opposing the Stipulation and, indeed, opposing any use of the ESP option, have a preference, at least in this case, to establish default generation supply prices using the MRO option or to address the economic development and retention opportunities provided for under Section 4928.143, Revised Code, through the Commission's Section 4905.31, Revised Code, authority. For purposes of argument, one might assume that these preferences are legitimate.

But, a preference, even a legitimate and honestly held preference, does not a regulatory principle make.

The fundamental theoretical mistake the opposing parties have made throughout this proceeding stems from their attempt to equate their preferences with the principles that apply to the Commission's evaluation and potential approval of proposed ESPs. For example, in the section of his testimony that discusses regulatory principles and in response to a question asking for his observations, Mr. Gonzalez's testimony indicates that OCC would prefer that statutorily-appropriate economic development provisions be presented to the Commission in a separate application disconnected from an ESP.[70]

[66] Staff Exhibit 1.

[67] Staff Exhibit 2 at 2-8.

[68] Staff Exhibit 3.

[69] IEU-Ohio Exhibit 2; Tr. Vol. III at 576.

[70] OCC Exhibit 2 at 21.

But the important regulatory principle that the General Assembly codified in Section 4928.143, Revised Code, states that an ESP submitted to and approved by the Commission can include provisions dealing with economic development and job retention. As a matter of law, the General Assembly's preferences trump those of OCC.

The General Assembly has also instructed the Commission to facilitate Ohio's effectiveness in the global economy, thereby establishing the end result (a principle objective) towards which the Commission must direct its delegated authority.

Regardless of the means chosen by individual parties to present their approval requests to the Commission – whether, for example, by an ESP application or an application under Section 4905.31, Revised Code – the question of which important principles apply produces the same answer. And, with regard to Ohio's economic development and retention goals, the record sadly discloses where OCC stands.

As noted above, the person at OCC responsible for formulating OCC's positions on economic development could not say, as a general proposition, that OCC supports economic development in Ohio.[71] In fact, in no case initiated under Section 4905.31, Revised Code, and in which Dr. Ibrahim has testified, has OCC recommended that the Commission approve an economic development request.[72]

OCC's arguments regarding its so-called "principles and practices"[73] essentially confuse the end results the Commission is obligated to pursue with the means by which the Commission is presented with an opportunity to do so. Any other conclusion would eliminate the optionality that the General Assembly has provided to the Commission

[71] Tr. Vol. IV at 702-703.

[72] *Id.* at 702.

[73] *OCC Exhibit 2 at 13.*

through its delegation of authority to the Commission to protect and promote the public interest.

Based on the evidence of record, the Commission should find that the settlement package does not violate any important regulatory principle or practice.

B. OCC EXHIBIT 2 SHOULD NOT HAVE BEEN ADMITTED INTO EVIDENCE

Section 4901-1-15(F), Ohio Administrative Code, states:

> Any party that is adversely affected by a ruling issued under rule 4901-1-14 of the Administrative Code or any oral ruling issued during a public hearing or prehearing conference and that (1) elects not to take an interlocutory appeal from the ruling or (2) files an interlocutory appeal that is not certified by the attorney examiner **may still raise the propriety of that ruling as an issue for the commission's consideration by discussing the matter as a distinct issue in its initial brief** or in any other appropriate filing prior to the issuance of the commission's opinion and order or finding and order in the case. (emphasis added).

Following examination, OCC moved for the admission of OCC Exhibit 2, Mr. Gonzalez's prepared testimony as modified by motions to strike and Mr. Gonzalez's changes and corrections. Counsel to IEU-Ohio objected to the admission of OCC Exhibit 2 saying:

> Your Honor, I think through the course of cross-examination this witness has demonstrated a fundamental lack of knowledge not only with regard to Ohio law that he relies upon, but the subject matter of his testimony. It is -- there's a fundamental tenet of evidence that requires it to be useful for purposes of resolving issues in the case, and I believe this testimony lacks any probative value based upon the answers that this witness has given throughout this hearing.
>
> In addition to that, I'm mindful in making this motion that I have little chance of succeeding, but think it is important to note, that we have a pattern here that involves the filing of testimony and the issuing of press releases on behalf of the Office of Consumers' Counsel that make broad claims and accusations that rely significantly on testimony that the Office of Consumers' Counsel files in this proceeding or any proceeding for that matter.

> And to the extent that this testimony stays in, I think the Commission risks further degradation in the integrity of the process that is associated with Public Utilities Commission of Ohio proceedings.[74]

The Attorney Examiner nonetheless admitted OCC Exhibit 2.[75] IEU-Ohio urges the Commission to find that OCC Exhibit 2 should not have been admitted into evidence.

The General Assembly has instructed the Commission to use the rules that apply to Ohio civil proceedings for purposes of performing the adjudicatory duties set out in Title 49, Revised Code.[76]

The Ohio Rules of Evidence applicable to civil proceedings address the use of expert testimony.

> **RULE 702. Testimony by Experts**
>
> A witness may testify as an expert if **all** of the following apply:
>
> (A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;
>
> (B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;
>
> (C) The witness' testimony is based on reliable scientific, technical, or other specialized information. To the extent that the testimony reports the result of a procedure, test, or experiment, the testimony is reliable only if all of the following apply:
>
> (1) The theory upon which the procedure, test, or experiment is based is objectively verifiable or is validly derived from widely accepted knowledge, facts, or principles;
>
> (2) The design of the procedure, test, or experiment reliably implements the theory;

[74] Tr. Vol. IV at 967.

[75] *Id.* at 969.

[76] Section 4903.22, Revised Code.

(3) The particular procedure, test, or experiment was conducted in a way that will yield an accurate result.[77]

The Commission is required to follow the law and even the OCC agrees with this principle (at least as it applies to the Commission).[78]

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[77] The Staff Note to Rule 702, Testimony by Experts, states:

> ..., the expert's testimony 'Assist[s] the trier' only if it meets a threshold standard of reliability, as established either by testimony or by judicial notice. (The trier of fact remains free, of course to make its own assessment of reliability and to accept or reject the testimony accordingly once it has been admitted.) See *State v. Bresson* (1990), 51 Ohio St. 3d 123, 128 (prior case-law establishing reliability of test sufficed to show reliability as a general matter, and test was admissible on a case-specific showing regarding the tester's qualifications and the reliability of the specific test administration); *State v. Williams* (1983), 4 Ohio St. 3d 53, 59 (expert testimony as to test was admissible "[I]n view of the unrebutted evidence of reliability of [the test] in general, and of [the witness's] analysis in particular"). See also *State v. Pierce* (1992), 64 Ohio St. 3d 490, 494-501 (scientific evidence was admissible where unreliability in specific case was not shown and where balance of probative value and reliability against risk of misleading or confusing the jury did not warrant exclusion).
>
> * * *
>
> Under Ohio law it is also clear that reliability is properly determined only by reference to the principles and methods employed by the expert witness, without regard to whether the court regards the witness's conclusions themselves as persuasive or correct. See *Pierce*, *supra*, 64 Ohio St. 3d at 498 (emphasizing that unreliability could not be shown by differences in the conclusions of experts, without evidence that the procedures employed were "somehow deficient"). *See also Daubert, supra*, 113 S.Ct. at 2797 (the focus "must be solely on principles and methodology, not on the conclusions they generate").
>
> * * *
>
> ...the amended rule expressly states the three existing requirements for the admissibility of expert testimony:
>
> (1) The witness must be qualified to testify by reason of specialized knowledge, skill, experience, training, or education. Evid. R. 702(B), incorporating original Evid. R. 702.
>
> (2) The witness's testimony must relate to matters beyond the knowledge or experience possessed by lay persons, or dispel a misconception common among lay persons. Evid. R. 702(A), codifying *Koss*, *Buell*, and *Thomas*, *supra*. (The reference to "dispel[ling] a misconception" is a codification of the specific holding in *Koss*, *supra*, 49 Ohio St. 3d at 216, that the permissible subject matter of expert testimony includes not only matters beyond common knowledge, but also matters of common but mistaken belief.)
>
> (3) The witness's testimony must have its basis in reliable scientific, technical, or otherwise specialized knowledge. Evid. R. 702(C), codifying *Bresson* and *Williams*, *supra*. As to evidence regarding a "test, procedure, or experiment," reliability must be shown both as to the test generally (that is, the underlying theory and the implementation of the theory), Evid. R. 702(C)(1) and (2), and as to the specific application. Evid. R. 702(C)(3). See *Bresson*, *supra*; *Williams*, *supra*. See generally 1 P. Giannelli and E. Imwinkelried, Scientific Evidence 1-2 (2d ed. 1993).

[78] Tr. Vol. IV at 876.

OCC's prepared testimony attached words like "principles and practices"[79] to its positions as though they have been tried, tested and shown to be reliable for use in promoting the public interest. Then came the cross-examination and motions that are part of the public and transparent process that the Commission uses to resolve contested issues. During this traditional and transparent process, OCC failed to offer any facts or legal citations to connect the so-called "principles and practices" to any reason it offered as part of its "throw-something-to-see-if-it-will-stick" attack on the Stipulation and the sponsoring signatory parties.

Much of OCC's prepared testimony was found to be irrelevant for purposes of an ESP proceeding and was properly excluded from the record evidence. The remaining OCC prepared testimony that was admitted into the record is riddled with conclusions and recommendations formed without adequate knowledge, is based on false and misleading claims and is entirely unreliable.

OCC's main objection to the ESP Stipulation (in its press releases and testimony) was based on a claim that it did not have adequate time to obtain information on the ESP Stipulation. But, OCC's primary witness acknowledged that there were plenty of opportunities for OCC to obtain information regarding any issues associated with what OCC identified as the "major elements" of the ESP Stipulation.[80]

[79] *See*, for example, OCC Exhibit 2 at 5.

[80] Compare OCC Exhibit 2 beginning at page 6 with Mr. Gonzalez's responses to Examiner Price's questions at Tr. Vol. IV at 948-955.

Among other things, OCC's primary witness, Mr. Gonzalez, did not know that Ohio law obligates owners and operators of transmission facilities to be a member of a regional transmission entity.[81]

He wrongly believed that the definition of "mercantile customer" contains a usage threshold of "750,000 million kWh".[82]

OCC's primary witness wrongly believed that the "national account" branch of the definition of "mercantile customer" *could not confer* mercantile customer status unless the accounts were located in more than one state.[83]

OCC's primary witness was unaware that the Association of Independent Colleges and Universities of Ohio's ("AICUO") unopposed testimony in the MRO Case stated, among other things:

> Additionally, the Commission and First Energy should ensure that the statutory definition of "mercantile customer," contained in Revised Code section 4929.01 and used throughout title 49 of the Revised Code, is not applied in a manner so as to eliminate colleges and universities from being eligible for energy efficiency and other programs.[84]

Mr. Gonzalez submitted prepared testimony and otherwise participated in the MRO Case. When asked why he did not protest the AICUO's position when advanced in the MRO Case regarding the definition of "mercantile customer," he testified as follows:

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[81] Tr. Vol. IV at 912. Section 4928.12, Revised Code, requires entities that own or control transmission facilities in Ohio to transfer control of such facilities to a regional transmission entity meeting the criteria specified therein. Amended Substitute Senate Bill 221 ("SB 221") added Section 4928.24 to the Revised Code. Section 4928.24, Revised Code, gives the Commission authority to employ a federal energy advocate to, among other things, advocate on behalf of the interests of <u>all</u> retail customers.

[82] Tr. Vol. IV at 883.

[83] *Id.* at 884-885.

[84] MRO Case, AICUO Exhibit 1 at 6 (Direct Testimony of Thomas V. Chema) (December 4, 2009). OCC intervened in Case No. 09-906-EL-SSO on October 22, 2009 and was authorized to commence discovery according to the Commission's rules on the date it filed its intervention request. On October 29, 2009, OCC's motion for expedited discovery in the MRO Case was granted.

Q. (By Mr. Randazzo) Mr. Gonzalez, I'd like to talk about the quality of the opportunity that has been presented over time to raise issues and focus on the opportunity that the Office of Consumers' Counsel has had throughout the pending MRO proceeding as well as this proceeding, the current proposed ESP proceeding. I'd like to use an example and if Mr. Porter will forgive me, in your -- or not – in your testimony you focus on a provision in the settlement dealing with independent colleges, correct?

A. That's correct.

Q. Now, was there testimony in the MRO proceeding regarding the concerns of independent colleges relative to the definition of mercantile customers?

A. I don't know. I wasn't focusing in on that part of the proceeding -- that part of the case.

Q. You don't remember whether the former chairman of this commission, Tom Chema.

EXAMINER PRICE: Esteemed former chairman.

Q. Esteemed, highly dignified, highly regarded, much loved, and in good standing filed testimony dealing with the precise question of how the independent colleges should be classified relative to the definition of mercantile customers; you don't recall that.

A. I don't recall. I wasn't – if he – I wasn't -- I didn't attend that particular hearing date. I was just concentrating on the topics I was going to -- I had written testimony on.

Q. In the MRO proceeding did the Office of Consumers' Counsel raise any concerns about classifying the independent colleges as mercantile customers?

A. Again, I don't know.

Q. You testified in the proceeding, right?

A. Yes, I did.

Q. You didn't raise it, did you?

A. No. I've said I haven't raised it, no. But I don't know whether my counsel raised it in brief or –

Q. I'm sorry?

A. I'm not aware if it was raised, you know, I didn't attend all the hearings so I don't know if there was a concern expressed by either -- by my counsel in the proceedings.[85]

[85] Tr. Vol. IV at 926–928.

He was not aware of whether OCC has protested ATSI's migration to PJM because he was not part of OCC's "case team".[86]

While he had a general understanding of the "filed rate doctrine," OCC's primary witness was not aware of any litigation in Ohio involving the doctrine, including litigation related to the Monongahela Power Company.[87]

While he alleged that all the signatories to the ESP Stipulation lacked the ability to compel the Companies to provide information, OCC's primary witness did not know that the Commission's Staff has "... a statutory right to obtain any information it wants from a regulated company at any time regardless of whether there is a case pending or not".[88]

OCC's primary witness was unaware of whether FirstEnergy Corp. ("FirstEnergy") and American Electric Power ("AEP") participated in the Alliance Regional Transmission Organization ("Alliance RTO"). As the Commission knows, FERC finally (on April 25, 2002) pulled the plug on the ill-fated Alliance RTO and directed the former Alliance Companies to make a filing stating which other regional transmission organization ("RTO") they intended to join.[89] And contrary to the implications of Mr. Gonzalez's assignment of zero probability to the risk that retail

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[86] *Id.* at 913.

[87] *Id. See, Monongahela Power Co. v. Alan R. Schriber, et al.*, Case No. C2-04-084, Opinion and Order, slip op. (S.D. Ohio May 19, 2004); *In the Matter of the Application for Approval of a Market-Based Standard Service Offer and Competitive Bidding Process For Monongahela Power Company*, Case No. 03-1104-EL-ATA, Finding and Order (July 24, 2003); Finding and Order at 7 (October 22, 2003); and Entry on Rehearing (December 17, 2003); *In the Matter of the Application of Monongahela Power Company to Approve a Passthrough and Implement a Surcharge for Wholesale Power Supply*, Case No. 03-2567-EL-ATA (December 31, 2003); *Monongahela Power Co. v. Pub. Util. Comm.*, 104 Ohio St.3d 571; *In the Matter of the Continuation of the Rate Freeze and Extension for Monongahela Power Company*, Case No. 04-880-EL-UNC, Opinion and Order (December 8, 2004).

[88] Tr. Vol. IV at 937.

[89] *Alliance Companies, et al.*, 99 FERC ¶ 61,105 (2002).

customers might have to pay such costs,[90] the Commission has permitted recovery of Alliance RTO-related costs from Ohio customers over the objections of customers.[91]

Mr. Gonzalez attached a newspaper article to his testimony[92] to support his claim that a transmission project would likely not be approved by the appropriate regulatory body. He printed the January 15, 2010 newspaper article on April 14, 2010, the day prior to the day his testimony was filed. Had he bothered to check on the status of the transmission project based on reports published in the same newspaper subsequent to January 15, 2010, he would have been required to withdraw his claim because the transmission project was, in fact, unanimously approved by the New Jersey Board of Public Utilities.[93]

Mr. Gonzalez implied that there is a "normal" Commission process for considering economic development provisions like those contained in the ESP Stipulation in Section F and that this "normal" process is somehow superior to the process in this proceeding.[94] He offered no facts or citations to back up this claim so his conclusion is, at best, a naked conclusion. More importantly, the ESP process itself has only been part of Ohio law since July of 2008 when SB 221 became effective and there are economic development and retention provisions in each ESP modified and approved by the Commission since the effective date of SB 221. Neither of OCC's witnesses addressed the merits of the economic development provisions in the ESP

[90] Tr. Vol. III at 824-825.

[91] *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of a Post-Market Development Period Rate Stabilization Plan*, Case No. 04-169-EL-UNC, Opinion and Order at 25-27 (January 26, 2005).

[92] OCC Exhibit 2, Attachment 5.

[93] Tr. Vol. III at 816-822.

[94] OCC Exhibit 2 at 5.

Stipulation nor did they discuss how such provisions should be evaluated based on the requirements of Section 4928.143, Revised Code.[95]

While the details of their coordinating agreement are unknown, the record shows that the positions that OCC has offered while claiming that it is performing its statutory duty to represent residential customers are positions that have been developed through consultation with parties not representing residential consumers. Indeed, this side arrangement between OCC and other parties would require OCC to discuss any intentions to sign the ESP Stipulation prior to OCC acting on behalf of residential customers.[96] It is clear that this undisclosed side arrangement affected the ability of some parties to the proceeding to express a view about what changes in the ESP Stipulation would permit them to sign the ESP Stipulation.[97] Accordingly, Mr. Gonzalez's opinions and OCC's positions have been affected by an arrangement

[95] As part of its general "not-enough-time" propaganda, IEU-Ohio expects that OCC's Brief will claim that the requirements applicable to reasonable arrangements filed pursuant to Section 4905.31, Revised Code, must be used to evaluate the economic development provision in the ESP Stipulation. But the Commission is not required to hold a hearing before acting on an application for a reasonable arrangement and the Commission has frequently acted on such applications without holding a hearing. *In the Matter of the Application for Approval of a Contract for Electric Service Between Columbus Southern Power Company and Solsil, Inc.*, Case Nos. 08-883-EL-AEC, *et al.*, Finding and Order (July 31, 2008). The applications in this case were filed on July 16, 2008, OCC's intervention was granted and its comments were considered according to the Commission's Finding and Order issued July 31, 2008. There was no hearing. When the Commission has held hearings on an application for approval of a reasonable arrangement filed under Section 4905.31, Revised Code, it has held the hearing promptly and within about the same amount of time that OCC has had to prepare for the hearing since the Stipulation was filed in this proceeding. *In the Matter of the Application for a Reasonable Arrangement Between the Ohio Edison Company and V&M Star*, Case No. 09-80-EL-AEC, Opinion and Order (March 4, 2009). The application was filed January 29, 2009 and the Commission issued its decision on March 4, 2009.

[96] Tr. Vol. IV at 915-916. Canon 5 of the Ohio Code of Professional Responsibility adopted by the Ohio Supreme Court and applicable to lawyers admitted to the Ohio Bar states: "A lawyer should exercise independent professional judgment on behalf of a client". The first ethical consideration under Canon 5 states: "The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client." On perhaps a related topic, Ethical Consideration 7-14 states as follows: **"A government lawyer in a civil action or administrative proceeding has the responsibility to seek justice and to develop a full and fair record, and he should not use his position or the economic power of the government to harass parties or to bring about unjust settlements or results".**

[97] Tr. Vol. II at 494-495.

between OCC and other parties and not formulated and advanced based on Mr. Gonzalez's "... specialized knowledge, skill, experience, training, or education regarding the subject matter of testimony ..." containing the opinions and recommendations. It is also clear that OCC's testimony is not based on ".... reliable scientific, technical, or other specialized information ...." as required by the Ohio Rules of Evidence.

As noted in IEU-Ohio's objection to the admission of OCC Exhibit 2, the claims made by Mr. Gonzalez were not confined to OCC's litigation effort in this proceeding. Instead, OCC used its prefiled testimony as the foundation for the content of press releases like the press release that OCC issued on April 16, 2010.[98] OCC's April 16, 2010 press release states (emphasis original and added):

> **OCC: FirstEnergy agreement should be rejected by PUCO**
>
> COLUMBUS, Ohio – April 16, 2010 – The Public Utilities Commission of Ohio (PUCO) should reject an agreement among FirstEnergy, the PUCO staff and others to establish an electric security plan from June 2011-May 2014. The PUCO should instead issue a decision on the utility's pending market rate offer case, **the Office of the Ohio Consumers' Counsel (OCC) said in testimony filed yesterday**.
>
> The OCC has concerns about many issues proposed under FirstEnergy's electric security plan agreement. They include:

[98] OCC's April 16, 2010 press release is posted on OCC's website at http://www.pickocc.org/news/2010/pressrelease.php?date=04162010 (last accessed April 30, 2010). The Code of Professional Responsibility adopted by the Ohio Supreme Court for purposes of governing the conduct of lawyers authorized to practice in Ohio includes provisions that govern the issuance of public statements by lawyers involved in a case that is pending before a court or administrative agency. Disciplinary Rule 7-107, Trial Publicity, states as follows:

> (A) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.
>
> * * *
>
> (D) No lawyer associated in a firm or government agency with a lawyer subject to division (A) of this rule shall make a statement prohibited by division (A) of this rule.

- **Replacement of the current delivery system improvement charge with a new delivery capital recovery charge**. The current charge is set to expire in December 2011. The new proposal would allow FirstEnergy to collect up to $390 million through quarterly increases over approximately two-and-a-half years without any provision to audit the reasonableness or prudence of the expenses;
- **FirstEnergy incorrectly claiming a benefit of the utilities' agreement not to charge customers for certain future transmission-related costs. The OCC's testimony demonstrates** that the alleged savings may be overstated. These costs are a result of FirstEnergy's business decision to switch from one regional transmission organization to another. Customers should not be responsible for any of these costs; and
- **Economic development arrangements that would cost customers millions of dollars in additional charges**. These deals should be reviewed in separate proceedings that allow for full disclosure of information and complete PUCO review, including provisions guaranteeing accountability for jobs creation.

In addition to its opposition to specific portions of the FirstEnergy agreement, the OCC is concerned about the shortened and exclusive process that led to the agreement filed March 23.

Based on OCC's long-standing practice of issuing press releases and the dependency of claims made in these press releases on claims made in OCC's testimony filed at the Commission, IEU-Ohio's objection to the admission of OCC Exhibit 2 is not only designed to ensure that the Commission follows the rules of evidence regarding the admission of expert testimony. IEU-Ohio's concern runs to the impact of OCC's combined conduct (unreliable claims placed in testimony filed with the Commission and press releases that rely on the unreliable testimony) as it ultimately affects the public interest.

The Commission is, of course, capable of appreciating the obvious lack of reliability of OCC's testimony. But, the public has no such ability either when a case is entering the hearing phase or after the Commission issues a decision and OCC

predictably launches into an attack on the Commission and parties to Commission proceedings based on the unfounded claims of its so-called expert witness.

While IEU-Ohio believes that OCC Exhibit 2 must be excluded from the record evidence in accordance with the Ohio Rules of Evidence because it is unreliable, the importance of excluding the evidence runs more strongly to protecting the public from being misled and misinformed by OCC. Based on OCC's prior conduct and its conduct in this proceeding, there is no good reason to expect that OCC will issue a press release retracting its prior public claims simply because they are found to be without merit when subjected to independent evaluation.

Based on the foregoing, IEU-Ohio urges the Commission to find that OCC Exhibit 2 was improperly admitted as evidence in this proceeding.

IV. CONCLUSION

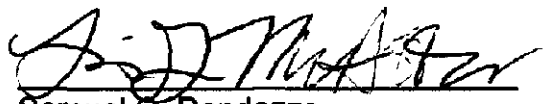
As a package, the Stipulation will benefit customers, CRES providers, and the Companies. Adoption of the Stipulation also eliminates the uncertainty confronting the Companies' customers and CRES providers alike on issues regarding the price and reliability of electricity for the period extending through May 31, 2014. Additionally, Staff witness Turkenton outlined numerous benefits of the Stipulation that are not guaranteed or necessarily achievable through litigation, including, among other things: a reasonable bid process to procure generation; discounted generation supply for percentage of income payment plan ("PIPP") customers; economic development and job retention opportunities and support; and a commitment of approximately $300 million of shareholder funds towards the MISO exit fees, PJM integration costs and regional transmission expansion plan ("RTEP") charges through May 31, 2016 related

to ATSI's migration from MISO to PJM.[99] These and the other components of the Stipulation create significant benefits for customers and the public interest.

Finally, as noted by Ms. Turkenton and the Companies' witness, William Ridmann, this Stipulation does not violate any important regulatory principle or practice.

For the reasons expressed above and based on the record evidence, IEU-Ohio urges the Commission to approve the Stipulation as filed and forthwith.

Respectfully submitted,



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[99] Staff Exhibit 1 at 3-6.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Post Hearing Brief of Industrial Energy Users-Ohio* was served upon the following parties of record this 30th day of April 2010, *via* electronic transmission, hand-delivery or first class mail, postage prepaid.

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