BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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

OPINION AND ORDER

The Commission, considering the above-entitled application, hereby issues its opinion and order in this matter.

APPEARANCES:

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

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

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

Boehm, Kurtz & Lowry, by David F. Boehm, Michael L. Kurtz, and Kurt J. Boehm, 36 East Seventh Street, Suite 1510, Cincinnati, Ohio 45202, on behalf of Ohio Energy Group.

Chester, Willcox & Saxbe, LLP, by John W. Bentine, Mark S. Yurick, and Matthew S. White, 65 East State Street, Suite 1000, Columbus, Ohio 43215-4213, on behalf of The Kroger Company.

McNees, Wallace & Nurick, LLC, by Samuel C. Randazzo and Lisa G. McAlister, 21 East State Street, 17th Floor, Columbus, Ohio 43215-4228, on behalf of Industrial Energy Users-Ohio.

David C. Rinebolt and Colleen L. Mooney, 231 West Lima Street, P.O. Box 1793, Findlay, Ohio 45839-1793, on behalf of Ohio Partners for Affordable Energy.

Brickfield, Burchette, Ritts & Stone, P.C., by Michael K. Lavanga and Garrett A. Stone, 1025 Thomas Jefferson Street, N.W., 8th Floor, West Tower, Washington, D.C. 20007, on behalf of Nucor Steel Marion, Inc.

Vorys, Sater, Seymour & Pease, LLP, by M. Howard Petricoff, Stephen M. Howard, and Matthew J. Settineri, 52 East Gay Street, Columbus, Ohio 43216-1008, and Cynthia Fonner Brady, Constellation Energy Group, Inc., 550 West Washington Street, Suite 3000, Chicago, Illinois 60661, on behalf of Constellation NewEnergy, Inc., and Constellation Energy Commodities Group, Inc.

Robert J. Triozzi, Director of Law, and Steven Beeler, Assistant Director of Law, City of Cleveland, Cleveland City Hall, 601 Lakeside Avenue, Room 106, Cleveland, Ohio 44114-1077, on behalf of the city of Cleveland.

Megan De Lisi, Will Reisinger, Nolan Moser and Trent Dougherty, 1207 Grandview Avenue, Suite 201, Columbus, Ohio 43212-3449, on behalf of the Ohio Environmental Council.

Michael E. Heinz, Staff Attorney, 1207 Grandview Avenue, Suite 201, Columbus, Ohio 43212-3449, on behalf of the Environmental Law and Policy Center.

Bricker & Eckler, LLP, by Thomas J. O'Brien, 100 South Third Street, Columbus, Ohio 43215, and Richard L. Sites, General Counsel and Senior Director of Health Policy, 155 East Broad Street, 15th Floor, Columbus, Ohio 43215-3620, on behalf of the Ohio Hospital Association.

Bricker & Eckler, LLP, by Thomas J. O'Brien, 100 South Third Street, Columbus, Ohio 43215, on behalf of the Ohio Manufacturers' Association.

The Legal Aid Society of Cleveland, by Joseph P. Meissner and Matthew Vincel, 1223 West 6th Street, Cleveland, Ohio 44113, on behalf of The Neighborhood

Environmental Coalition, The Empowerment Center of Greater Cleveland, United Clevelanders Against Poverty, Cleveland Housing Network, and The Consumers for Fair Utility Rates.

Lucas County Prosecutor's Office, by Lance M. Keiffer, Assistant Prosecuting Attorney, 711 Adams Street, 2nd Floor, Toledo, Ohio 43624-1680, and Leslie A. Kovacik, City of Toledo, 420 Madison Avenue, Suite 100, Toledo Ohio 43604-1219, on behalf of Northwest Ohio Aggregation Group.

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

Barnes & Thornburg LLP, by Charles R. Dyas, Jr., Matthew D. Austin, and C. David Paragas, 21 East State Street, Suite 1850, Columbus, Ohio 43215, on behalf of Direct Energy Services, LLC.

Theodore S. Robinson, Staff Attorney and Counsel, Citizen Power, Inc., 2121 Murray Avenue, Pittsburgh, Pennsylvania 15217, on behalf of Citizen Power, Inc.

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

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

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

Schottenstein, Zox & Dunn Co., LPA, by Andre T. Porter, Gregory H. Dunn, and Christopher L. Miller, 250 West Street, Columbus, Ohio 43215, and C. Todd Jones, General Counsel, Association of Independent Colleges and Universities of Ohio, 1100 11th Street, #10, Sacramento, California 95814, on behalf of the Association of Independent Colleges and Universities of Ohio.

Morgan E. Parke and Michael Beiting, FirstEnergy Service Company, 76 South Main Street, Akron, Ohio 44308, and Porter Wright Morris & Arthur, by Daniel R. Conway and Eric B. Gallon, 41 South High Street, Columbus, Ohio 43215, on behalf of FirstEnergy Solutions Corporation.

McDermott, Will & Emery, LLP, by Douglas M. Mancino, 2049 Century Park East, Suite 3800, Los Angeles, California, 90067-3218, and Gregory K. Lawrence, 28 State Street, Boston, Massachusetts 02109, on behalf of Morgan Stanley Capital Group, Inc.

Tucker, Ellis & West, LLP, by Eric D. Weldele, 1225 Huntington Center, 41 South High Street, Columbus, Ohio 43215-6197, and Steve Millard, 100 Public Square, Suite 201, Cleveland, Ohio 44113, on behalf of Council of Smaller Enterprises.

Faruki, Ireland & Cox, P.L.L., by D. Jeffrey Ireland, Charles J. Faruki, and Stephen A. Weigand, 500 Courthouse Plaza, S.W., 10 Ludlow Street, Dayton, Ohio 45402, on behalf of EnerNOC, Inc.

Cheri B. Cunningham, Director of Law, 161 S. High Street, Suite 262, Akron, Ohio 44308, and McNees, Wallace & Nurick, LLC, by Joseph Clark, 21 East State Street, 17th Floor, Columbus, Ohio 43215-4228, on behalf of the City of Akron.

Samuel Wolfe, Viridity Energy, Inc., 100 West Elm Street, Conshohocken, Pennsylvania 19428, on behalf of CPower, Inc., Viridity Energy, Inc., Energy Connect, Converge, Inc., Enterprise Technologies, Inc., and Energy Curtailment Specialists, Inc.

OPINION:

I. HISTORY OF THE PROCEEDINGS

On August 17, 2009, FirstEnergy Service Company, on behalf of six of its affiliates, including Ohio Edison Company (OE), The Cleveland Electric Illuminating Company (CEI), The Toledo Edison Company (TE), and American Transmission Systems, Inc. (ATSI), filed an application with the Federal Energy Regulatory Commission (FERC) in FERC Docket No. ER09-1589. The application requested permission for the FirstEnergy affiliates to withdraw their transmission facilities from the Midwest Independent Transmission System Operator and transfer operational control to PJM Interconnection, Inc. (PJM). The application characterized this transfer as the RTO realignment. Subsequently, on September 4, 2009, the Commission opened Case No. 09-778-EL-UNC (*FirstEnergy RTO Realignment Case*) to review the impact of RTO realignment upon stakeholders in this state. During this proceeding, the Commission received written comments from 11 stakeholders and heard oral presentations regarding the RTO realignment on September 15, 2009, and January 7, 2010. ATSI's application was approved by FERC on December 17, 2009. *FirstEnergy Service Company, Inc.*, FERC Docket No. ER09-1589, Order addressing RTO Realignment Request and Complaint (December 17, 2009) (*FERC RTO Realignment Order*).

Further, on October 20, 2009, OE, CEI, and TE (collectively, FirstEnergy or the Companies) filed an application, Case No. 09-906-EL-SSO (*MRO Case*), for its standard service offer (SSO) commencing June 1, 2011, pursuant to Section 4928.141, Revised Code. This application was for a market rate offer (MRO) in accordance with Section 4928.142, Revised Code. On October 29, 2009, a technical conference was held regarding FirstEnergy's application. The Staff filed comments regarding the application on November 24, 2009; in its comments, Staff recommended that FirstEnergy consider a new electric security plan (ESP) for its SSO rather than the proposed MRO. The hearing in this proceeding commenced on December 15, 2009, and concluded on December 22, 2009.

Subsequently, on March 23, 2010, the Companies filed an application in this proceeding for a SSO, in the form of an ESP in accordance with Section 4928.143, Revised Code. FirstEnergy stated in the application that, since the directive by the Commission in the *MRO Case* for Staff to submit comments related to FirstEnergy's proposed SSO or alternative SSOs and Staff's recommendation that the Companies should consider an ESP, FirstEnergy and numerous parties engaged in a wide range of discussions over several months regarding various aspects of a proposed ESP, all of which culminated in the filing with the application of the original stipulation (Joint Ex. 1), in which various parties stipulated to the terms of a proposed ESP. On March 24, 2010, the attorney examiner established a procedural schedule, setting the matter for hearing on April 20, 2010.

Moreover, pursuant to a request contained in FirstEnergy's application, on March 24, 2010, the attorney examiner granted intervention in this proceeding to all parties who were granted intervention in the *MRO Case*: Ohio Consumers' Counsel (OCC); Ohio Energy Group (OEG); Constellation NewEnergy and Constellation Energy Commodities Group, Inc. (Constellation); Industrial Energy Users-Ohio (IEU-Ohio); Nucor Steel Marion, Inc. (Nucor); Northeast Ohio Public Energy Council (NOPEC); Ohio Partners for Affordable Energy (OPAE); City of Cleveland (Cleveland); Ohio Manufacturers' Association (OMA); Ohio Hospital Association (OHA); The Kroger Company (Kroger); Direct Energy Services, LLC (Direct Energy); Ohio Environmental Council (OEC); Duke Energy Ohio, Inc.; Duke Energy Retail Sales LLC; Northwest Ohio Aggregation Coalition (NOAC); Morgan Stanley Capital Group, Inc. (Morgan Stanley); Ohio Schools Council (OSC); FirstEnergy Solutions Corp. (FES); Material Sciences Corporation (Materials Sciences); Citizen Power, Inc. (Citizens Power); Association of Independent Colleges and Universities of Ohio (AICUO); Natural Resources Defense Council (NRDC); Gexa Energy-Ohio, LLC; and The Neighborhood Environmental Coalition, The Empowerment Center of Greater Cleveland, United Clevelanders Against Poverty, Cleveland Housing Network, and The Consumers for Fair Utility Rates (collectively, the Citizens' Coalition). In addition, on April 20, 2010, the attorney examiner granted motions to intervene filed by the Council of Smaller Enterprises

(COSE); the Environmental Law and Policy Center (ELPC); EnerNOC, Inc. (EnerNOC); the City of Akron (Akron); and CPower, Inc., Viridity Energy, Inc., Energy Connect, Converge, Inc., Enterprise Technologies, Inc., and Energy Curtailment Specialists, Inc. (collectively, the Demand Response Coalition).

In its application filed on March 24, 2010, FirstEnergy requested that the Commission take administrative notice of the record in the *MRO Case* for purposes of this proceeding. No memoranda contra were filed opposing FirstEnergy's request. Subsequently, on April 6, 2010, the Commission granted FirstEnergy's request, admitting all testimony and exhibits which were admitted into evidence in the *MRO Case* into the evidentiary record of this proceeding.[1] The Commission also granted in part and denied in part a request by FirstEnergy for various waivers of the filing requirements of Chapter 4901:1-35, Ohio Administrative Code (O.A.C.).

On April 20, 2010, EnerNOC filed an application for rehearing regarding the Commission's April 6, 2010 entry, alleging that the entry violated EnerNoc's due process rights under Ohio and Federal law. Further, on April 21, 2010, Citizen Power, Citizens' Coalition, OCC, NRDC, NOAC, NOPEC, OEC, and ELPC filed an application for rehearing, alleging that the entry was unreasonable and unlawful on three separate grounds. On April 26, 2010, Nucor filed a memorandum contra the applications for rehearing. Further, FirstEnergy filed memoranda contra the applications for rehearing on April 29, 2010. The Commission denied the applications for rehearing on May 13, 2010.

The evidentiary hearing in this proceeding commenced on April 20, 2010 and continued through April 23, 2010. Four witnesses presented testimony in support of the original stipulation. Six witnesses presented testimony in opposition to the original stipulation. One witness testified in favor of the provisions of the stipulation related to the Cleveland Clinic but did not provide a recommendation on the other provisions of the stipulation.

Pursuant to published notice, public hearings were held in Akron and Toledo on April 19, 2010; in Cleveland and Garfield Heights on April 20, 2010; in Austintown and North Ridgeville on April 21, 2010; in Springfield on April 22, 2010; and in Kirkland on April 27, 2010. Based upon the comments presented in the public hearings, on May 13, 2010, the Commission directed that the evidentiary hearing resume in order to hear additional evidence regarding the impact of the proposed ESP on customers' bills. Moreover, on May 13, 2010, the signatory parties filed the first supplemental stipulation

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1 In this Opinion and Order, evidence admitted in the *MRO Case* will be referred to as "[Party] MRO Ex. __," and transcripts from the hearing in the *MRO Case* will be referred to as "MRO Tr. at __." On the other hand, evidence admitted directly in this proceeding will be referred to as "[Party] Ex. __," and transcripts from this hearing will be referred to as "Tr. __."

(Joint Ex. 2), modifying the terms of the original stipulation. The hearing resumed on June 21, 2010; one witness presented testimony regarding the bill impacts of the proposed ESP, and one witness testified in favor the first supplemental stipulation filed on May 13, 2010.

Further, on July 19, 2010, a second supplemental stipulation (Joint Ex. 3) was filed by: FirstEnergy, IEU-Ohio, OEG, OHA, OPAE, Akron, OSC, Nucor, Cleveland, COSE, MSC, Constellation, NOPEC, NOAC, FES, AICUO, Morgan Stanley, OMA, and Staff (Signatory Parties). In addition, with the filing of the second supplemental stipulation, the Citizen's Coalition and ELPC withdrew their opposition to the stipulation, as supplemented. A hearing regarding the second supplemental stipulation was held on July 29, 2010. One witness testified in support of the stipulation, as supplemented, and one witness testified in opposition to the stipulation, as supplemented. The parties waived the filing of further additional briefs following the July 29, 2010, hearing.

II. DISCUSSION

A. Applicable Law

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

In addition, SB 221 amended Section 4928.14, Revised Code, which now provides that, beginning on January 1, 2009, electric utilities must provide customers with an SSO, consisting of either an MRO or an ESP. The SSO is to serve as the electric utility's default SSO. Section 4928.143, Revised Code, sets out the requirements for an ESP. Section 4928.143(C)(1), Revised Code, provides that the Commission is required to determine whether the ESP, including its pricing and all other terms and conditions, including deferrals and future recovery of deferrals, is more favorable in the aggregate as compared to the expected results that would otherwise apply under Section 4928.142, Revised Code.

B. Summary of the Combined Stipulation

In this proceeding, the parties submitted the original stipulation and two supplemental stipulations (collectively, the Combined Stipulation). According to the Combined Stipulation, the Signatory Parties agree to all of the terms and conditions of an ESP for FirstEnergy and resolve all remaining issues in a number of other Commission proceedings. The Combined Stipulation includes, *inter alia*, the following provisions:

(1) For the period between June 1, 2011, through May 31, 2014, retail generation rates for SSO will be determined by a descending-clock format competitive bid process (CBP). In the CBP, the Companies will seek to procure, on a slice of system basis, 100 percent of the aggregate wholesale full requirements SSO supply. The CBP will be conducted by an independent bid manager, CRA International (CRA). The bidding will occur initially using three products of varying lengths and multiple bid processes will held over the term of the ESP. All bidders, including FES, may participate subject to the limitations contained in the Combined Stipulation. CRA will select the winning bidder(s), but the Commission may reject the results within 48 hours of the auction conclusion (Joint Ex. 1 at 5-7).

(2) The Companies will provide their Percentage of Income (PIPP) customers with a six percent discount off of the otherwise applicable price to compare during the period of this ESP (*id.* at 7-8).

(3) There will be no minimum stay for residential and small commercial non-aggregation customers (*id.* at 8).

(4) There will be no minimum default service rider, standby charges, or rate stabilization charges. Unless otherwise noted in the Combined Stipulation, all generation rates for the ESP period are avoidable, and there are no shopping credit caps (*id.* 8-9).

(5) Renewable energy resource requirements for the period of June 1, 2011, through May 31, 2014, will be met by using a separate request for proposal (RFP) process to obtain renewable energy credits (RECs). If the Companies are unable to acquire the required number of RECs through the

RFP process, the Companies may acquire the remaining needed RECs through bilateral contracts. The costs related to the procurement of all RECs, including any costs associated with administering the RFP, will be included in Rider AER for recovery in the year in which the RECs are utilized to meet the Companies' renewable energy requirements, with any reconciliation between actual and forecasted information being recognized through Rider AER in the subsequent quarter (*id.* at 9).

(6) The rate design currently in effect will remain in place, except as modified below. However the Commission may, with the Companies' concurrence, institute a changed revenue neutral distribution rate design (*id.* at 10).

(a) The average total rate overall percentage increase, for the 12 month period ending May 2012, resulting from the CBP for customers on Rate GT, Private Outdoor Lighting, Traffic Lighting, and Street Lighting rates shall not exceed a percentage in excess of one and one-half times the system average increase by Company. If the average percent change by Company is negative, then no cap shall be applied.

(b) Any revenue shortfall resulting from the application of the interruptible credits in Rider OLR and Rider ELR will be recovered from all non-interruptible customers as part of the non-bypassable demand side management and energy efficiency rider (Rider DSE).

(c) The seasonality factors proposed by the Companies in Case No. 09-906-EL-SSO shall be adopted in this proceeding.

(d) Capacity costs that result from the PJM capacity auctions will be used to develop capacity costs for Rider Gen.

(e) Rate schedule RS will have a flat-rate structure.

(f) The initial allocation of revenue responsibility associated with establishing rates to recover the results of the competitive bid process for the Companies' rate schedules Rate GS and Rate GP will be implemented so as to produce a percentage increase, as compared to overall July 2010 rate levels, which is approximately equal for the two schedules (*id.* at 10-11).

(7) The Generation Service Uncollectible Rider (Rider NDU) shall be continued to recover non-distribution-related uncollectible costs associated with supply cost from the CBP arising from SSO customers and will be avoidable (*id.* at 11).

(8) The Generation Cost Reconciliation Rider (Rider GCR) will be avoidable by customers during the period that the customer purchases retail electric generation service from a CRES provider unless the allowed balance of Rider GCR reaches five percent of the generation expense in two consecutive quarters (Joint Ex. 3 at 3-4).

(9) Recovery of costs through Rider DFC and Rider DGC may be accelerated if such acceleration would be beneficial to customers and other Signatory Parties (Joint Ex. 1 at 12).

(10) The Commission may order a load cap of no less than 80 percent on an aggregated load basis across all auction products for each auction date such that any given bidder may not win more than 80 percent of the tranches in any auction (*id.*).

(11) The Companies will work with any interested Signatory Party or non-opposing party to the Combined Stipulation to develop four RFPs to purchase RECs, including solar RECs, through ten-year contracts. The Companies will file with the Commission a separate application for approval of each of the four RFPs. The first application will be filed within 90 days after the Commission's Opinion and Order in this proceeding and will seek competitive bids to purchase through ten-year contracts the annual delivery of 5,000 solar RECS originating in Ohio, with a delivery period between June 1, 2011 and December 31, 2020, and the annual delivery of 20,000 non-solar RECs originating in Ohio, with a delivery

period between June 1, 2011 and December 31, 2020. The number of solar RECs to be purchased in subsequent RFPs will be conditioned upon the SSO load of the Companies. The applications to the Commission will seek approval of recovery of all reasonable costs associated with acquiring RECs through the ten-year contracts through Rider AER or such other rider established to recover such costs (Joint Ex. 3 at 2-3).

(12) During the ESP period, no proceeding will be commenced whereby an adjustment to the base distribution rates of the Companies would go into effect prior to June 1, 2014, subject to riders and other charges provided in the tariffs and subject to the "significantly excessive earnings test," except in case of an emergency pursuant to the provisions of Section 4909.16, Revised Code. The Companies are not precluded during this period from implementing changes in rate design that are designed to be revenue neutral or any new service offering, subject to Commission approval (Joint Ex. 1 at 13).

(13) Effective January 1, 2012, the Delivery Capital Recovery Rider (Rider DCR) will be established to provide the Companies with the opportunity to recovery property taxes, commercial activity tax and associated income taxes and earn a return on and of plant in service associated with distribution, subtransmission, and general and intangible plant, including general plant from FirstEnergy Service Company that supports the Companies and was not included in the rate base determined in *In re FirstEnergy*, Case No. 07-551-EL-AIR, et al., Opinion and Order (January 21, 2009). The return earned on such plant will be based on the cost of debt of 6.54 percent and a return on equity of 10.5 percent determined in that proceeding utilizing a 51 percent debt and 49 percent equity capital structure (*id.* at 13-14).

For the first twelve months Rider DCR is in effect, the revenue collected by the Companies shall be capped at $150 million; for the following 12 months, the revenue collected under Rider DCR shall be capped at $165 million; and for the following five months, the revenues collected under Rider DCR shall be capped at $75 million. Capital additions recovered through Riders LEX, EDR, and AMI, or any other subsequent rider authorized by the Commission to recover delivery-related capital additions, will be excluded from Rider DCR and the annual cap allowance. Net capital additions for plant in service for general plant shall be included in Rider DCR provided that there are no net job losses at the Companies as a result of involuntary attrition due to the merger between FirstEnergy Corp. and Allegheny Energy, Inc. (*id.* at 14-15).

Rider DCR will be adjusted quarterly, and the quarterly Rider DCR update filing will not be an application to increase rates within the meaning of Section 4909.18, Revised Code. The first quarterly filing will be made on or about October 31, 2011, based upon an estimated balance as of December 31, 2011, with rates effective for bills rendered as of January 1, 2012. For any year that the Companies' spending would produce revenue in excess of that period's cap, the overage shall be recovered in the following cap period subject to such period's cap. For any year the revenue collected under the Companies' Rider DCR is less than the annual cap allowance, the difference between the revenue collected and the cap shall be applied to increase the level of the subsequent period's cap (*id.* at 15-17).

(14) Any charges billed through existing Rider DSI prior to January 1, 2012, shall not be included as revenue in the return on equity calculation for the Companies for purposes of applying the significantly excessive earnings test nor considered as an adjustment eligible for refund. Any charges billed through Rider DCR after January 1, 2012, will be included as revenue in the return on equity calculation for purposes of applying the significantly excessive earnings test and will be considered as an adjustment eligible for refund (*id.* at 17).

(15) Network integration transmission services (NITS) and other non-market based FERC/RTO charges will be paid by the Companies for all shopping and non-shopping load, and the amount shall be recovered through the proposed Non-Market-Based Services Rider (Rider NMB). Winning bidders and retail suppliers will remain responsible for all other FREC/RTO imposed or related charges such as congestion, market based ancillary services and losses (*id.* at 18).

(16) All MTEP that are charged to the Companies shall be recovered from customers through Rider NMB. The Companies agree not to seek recovery through retail rates for MISO exit fees or PJM integration costs from retail customers of the Companies. The Companies agree to not seek recovery through retail rates of legacy RTEP costs for the longer of: (1) during the period of June 1, 2011 though May 31, 2016; or (2) when a total of $360 million of legacy RTEP costs have been paid by the Companies and have not been recovered by the Companies through retail rates from Ohio customers (Joint Ex. 3 at 5).

(17) The demand response capabilities of customers taking services under Riders ELR and OLR shall count towards the Companies compliance with the peak demand reduction benchmarks set forth in Section 4928.66, Revised Code, and shall be considered incremental to interruptible load on the Companies' system that existed in 2008 (Joint Ex. 1 at 21).

(18) The following issues in the Companies' application for the Ohio Site Deployment of the smart grid initiative, filed in Case No. 09-1820-EL-ATA, shall be approved as set forth below.

(a) Costs shall be recovered from customers of OE, CEI, and TE, exclusive of rate schedule GT customers.

(b) All costs associated with the project will be considered incremental for recovery under Rider AMI.

(c) Recovery of the costs shall be over a 10 year period. The recovery of costs over a 10 year period is limited to this ESP and shall not be used as precedent in any subsequent AMI or smart grid proceeding.

(d) Return on the investment shall be at the overall rate of return from Case Nos. 07-551-EL-AIR, et al.

(e) Rate base is defined as plant in service, depreciation reserve and accumulated deferred income taxes.

(f) All reasonably incurred operating expenses associated with the project will also be recovered.

(g) During the term of the ESP, the deployment of the smart grid initiative will not include prepaid smart meters and there will be no remote disconnection for nonpayment without complying with the requirements of Rule 4901:1-18-05, O.A.C.

(h) The Companies shall not complete any part of the Ohio Site Deployment that the United States Department of Energy does not match funding in an equal amount (*id.* at 22-23).

(19) In lieu of the fixed monthly compensation provided pursuant to Case No. 09-553-EL-EEC, the Companies will provide funding to COSE, AICUO, OHA and OMA for their roles as energy efficiency administrators for completed energy efficiency projects in the following amounts, with such amounts being recovered through Rider DSE: COSE, $25,000 in 2011, $50,000 in 2012, $50,000 in 2013, and $25,000 in 2014; AICUO, $50,000 in 2011, $25,000 in 2012, $25,000 in 2013, and $25,000 in 2014; OHA, $25,000 in 2011, $50,000 in 2012, $50,000, in 2013, and $25,000 in 2014; and OMA, $100,000 in 2011, $100,000 in 2012, and $100,000 in 2013 (Joint Ex. 2 at 1-2).

(20) During the term of the ESP, the Companies shall be entitled to receive lost distribution revenue for all energy efficiency and peak demand reduction programs approved by the Commission, except for historic mercantile self-directed projects. The collection of lost distribution revenues by FirstEnergy after May 31, 2014, is not addressed nor resolved by the Combined Stipulation (Joint Ex. 1 at 24).

(21) The Companies will continue funding the Community Connections program under current terms, conditions and amounts for the period of the ESP; however, provide that the

amount may be increased as a result of the energy efficiency collaborative approval of such funding increase, and the Commission approves the increase and authorizes a recovery of the increased funding through Rider DSE or another applicable rider. OPAE shall be paid an administrative fee equal to five percent of the program funding (*id.* at 24-25).

(22) An AICUO college or university member may elect to be treated as a mercantile customer, and FirstEnergy will treat such college or university as a mercantile customer, for the limited purposes of Section 4928.66, Revised Code, provided that the aggregate load of facilities situated on a campus and owned or operated by the college or university qualifies such entity as a mercantile customer and makes the college or university eligible for any incentive, program, or other benefit made available to a mercantile customer pursuant to Section 4928.66, Revised Code (*id.* at 25).

(23) The Companies will provide energy efficiency funding to the City of Cleveland to be used for the benefit of CEI customers in the City of Cleveland in the following amounts, with such amounts recovered through Rider DSE: $100,000 in 2012, $100,000 in 2013, and $100,000 in 2013. The Companies also will provide energy efficiency funding to the City of Akron to be used for the benefit of OE customers in the City of Akron in the following amounts, with such amounts recovered through Rider DSE: $100,000 in 2012, $100,000 in 2013, and $100,000 in 2013. Further, the Companies also will provide energy efficiency funding to Lucas County to be used for the benefit of TE customers in the Lucas County in the following amounts, with such amounts recovered through Rider DSE: $100,000 in 2012, $100,000 in 2013, and $100,000 in 2013 (Joint Ex. 2 at 2-3; Joint Ex. 3 at 5-6).

(24) For the period of June 1, 2011, through May 31, 2014, the Companies will contribute, in aggregate, $3 million to support economic development and job retention activities within their service areas. The Companies will not seek recovery of such contribution from customers, and such contribution will not be used to fund special contracts and/or reasonable arrangements filed with the Commission (Joint Ex. 1 at 26).

(25) CEI shall be responsible for the cost of the electric utility plant, facilities, and equipment to support the Cleveland Clinic's Main Campus expansion plan to the extent that such cost might otherwise be demanded by CEI from the Clinic in the form of a contribution in aid of construction or otherwise. CEI shall be entitled to classify the original cost of investment made in utility plant, facilities, and equipment at or below the subtransmission level as distribution plant in service subject to the Commission's jurisdiction for ratemaking purposes at the time of the next base rate case. The first $70 million of the original cost of such plant, facilities, and equipment shall be funded by a non-bypassable distribution rider that shall apply to retail residential, commercial, and industrial customers (exclusive of customers on rates schedules STL, TRF, and POL). Further, Cleveland Clinic will be obligated to work in good faith to install cost-effective energy efficiency measures in its facilities, with, where needed, the assistance of an independent energy facility auditor selected by Cleveland Clinic with input from the Companies and Staff. Cleveland Clinic will work with the Companies and Staff for the purpose of committing its new-customer-sited capabilities to the Companies for integration in their Section 4928.55, Revised Code, benchmarks in exchange for the Companies' investment in the distribution utility plant, facilities, and equipment (*id.* at 27-28).

(26) Domestic automaker facilities that used more than 45 million kWhs at a single site in 2009 will receive a discount on usage which exceeds, by more than ten percent, a baseline energy consumption level based upon their average monthly consumption for 2009. Any discount provided will be collected based on a levelized rate for all three Companies under Rider EDR from customers under the RS, GS, CP and GSU rate schedules (*id.* at 28-29).

(27) CEI agrees to establish an LED streetlight pilot program for the City of Cleveland for the period of the ESP (*id.* at 29).

(28) The Companies corporate separation plan filed in *In re FirstEnergy*, Case No. 09-462-EL-UNC will be approved as filed (*id.* at 30).

(29) The Companies will file a separate application to commence recovery of any new or incremental taxes arising after June 1, 2011, whether paid by or collected by the Companies, and not recovered elsewhere, the recovery of which is contemplated by the Combined Stipulation (*id.*).

(30) Time differentiated pricing concepts as proposed by the Companies and approved by the Commission in Case No. 09-541-EL-ATA shall continue in effect through the term of this ESP (*id.* at 31).

(31) The Signatory Parties and the Commission will withdraw from FERC cases FirstEnergy Service Co. v. PJM, Docket No. EL10-6-000 and American Transmission Systems, Inc., ER09-1589-000, and the Commission will close the *RTO Realignment Case*.

(32) With respect to the announced combination of FirstEnergy Corp. and Allegheny Energy, Inc., the Commission will not assert jurisdiction and review the merger in light of the facts that the merger is the result of an all stock transaction and there is no change in control of the Companies (*id* at 31-32).

(33) In order to assist low-income customers in paying their electric bills from the Companies, a fuel fund provided by the Companies shall be created consisting of $4 million to be spent in each calendar year from 2012 through 2014 (Joint Ex. 3 at 6 at 32).

(34) If the Commission orders a phase-in of the Companies' generation prices and a government aggregation group elects to phase-in generation costs, each aggregation customer served by a governmental aggregation generation supplier (GAGS) shall receive a phase-in credit equal to the phase-in credit approved by the Commission for the Companies' SSO customers. For every kWh of energy a GAGS delivers to a governmental aggregation customer, the GAGS will be granted the right to receive from the Companies a receivable amount equal to the phase-in credit received by the aggregation customer, plus carrying charges. Any uncollectable GAGS receivables shall be included in the calculation of a Commission-approved cost recovery rider,

which shall not be avoidable and will be reconciled on a quarterly basis (Joint Ex. 3 at 7-9).

(35) The ESP is more favorable in the aggregate as compared to the expected results that would otherwise occur under an MRO alternative and represents a serous compromise of complex issues and involves substantial customer benefits that would not otherwise have been achievable (Joint Ex. 1 at 31).

C. Procedural Issues

(1) IEU-Ohio's Objection to the Admission of the Testimony of Mr. Gonzalez.

At the hearing, IEU-Ohio opposed the admission of the direct testimony of OCC witness Gonzalez (OCC Ex. 2). At the hearing, IEU-Ohio argued that Mr. Gonzalez's testimony revealed a fundamental lack of knowledge regarding both Ohio law and the subject matter of his testimony. Consequently, IEU-Ohio claimed that the direct testimony lacked any probative value (Tr. IV at 967). However, Mr. Gonzalez's testimony was admitted by the attorney examiner.

IEU-Ohio argues that the testimony is riddled with conclusions and recommendations formed without adequate knowledge, is based on false and misleading claims and is entirely unreliable. IEU-Ohio cites to numerous instances in which IEU-Ohio claims that Mr. Gonzalez lacked adequate knowledge of the subject matter or Mr. Gonzalez contradicted his prepared testimony on cross-examination. For example, IEU-Ohio notes that, although the witness testified that the parties lacked the opportunity to obtain adequate information regarding the original stipulation prior to its filing (OCC Ex. 2 at 9-10), at the hearing, the witness acknowledged that OCC had the opportunity to obtain information regarding the major elements of the stipulation as identified by the witness (Tr. IV at 948-955). IEU-Ohio claims that the witness wrongly believes that the "national account" provision of the definition of "mercantile customer" in Section 4928.01(A)(19), Revised Code, requires that accounts be located in more than one state (Tr. IV at 883) and that the witness was unaware of testimony in the *MRO Case* regarding whether colleges and universities should be treated as mercantile customers in order be eligible for energy efficiency programs (Tr. IV at 926-928). IEU-Ohio also alleges that the witness appended a newspaper article to his testimony in order to demonstrate that a transmission project likely would not be approved but was unaware that a subsequent article, from the same newspaper, reported that the project had received regulatory approval (Tr. III at 816-822).

The Commission affirms the ruling by the attorney examiner admitting the testimony of Mr. Gonzalez. The Commission does not believe that the examples cited by IEU-Ohio merit the complete exclusion of the witness's testimony. However, to the extent that the cross-examination of the witness demonstrates that the testimony lacks an adequate foundation or that his answers on cross-examination contradict his direct testimony, the Commission will consider the weight to be given to such testimony.

(2) IEU-Ohio's Motion to Strike Portions of Testimony of Dr. Ibrahim.

At the hearing, the attorney examiner granted IEU-Ohio's motion to strike portions of the testimony of OCC witness Ibrahim (Tr. III at 687). OCC, Citizen Power and NRDC (hereinafter Ohio Environmental and Consumer Advocates or OCEA) claim that Dr. Ibrahim was not permitted to testify that the information in the record of this proceeding supporting the economic development provisions of the proposed ESP is inconsistent with the Commission policies as reflected in Rule 4901:1-38-03, O.A.C. OCC claims that the procedures promulgated by the Commission in Chapter 4901-1-38, O.A.C., were established to protect the interests of residential customers and other stakeholders and that such policies should not be ignored even if these rules do not apply to FirstEnergy's application.

OEG responds that OCEA's argument is legally unsound. OEG argues that the review procedure under Chapter 4901-1-38, O.A.C., does not apply to economic development programs contained in an ESP. OEG claims that Section 4928.143(B)(2)(i), Revised Code, provides different and independent statutory authority for the Commission to approve economic development programs.

The Commission finds that the ruling by the attorney examiner should be affirmed. Chapter 4901:1-1-38, O.A.C. applies to applications for reasonable arrangements filed pursuant to Section 4905.31, Revised Code. However, FirstEnergy's application in this proceeding was filed pursuant to Section 4928.141, Revised Code, and was subject to the filing requirements contained in 4901:1-35, O.A.C. Dr. Ibrahim was permitted to testify that the economic development provisions should have been filed as reasonable arrangements pursuant to Section 4905.31, Revised Code, and that the application should be rejected for that reason (OCC Ex. 1 at 6-7). However, in light of the fact that the application was not filed pursuant to Section 4905.31, Revised Code, his testimony that the application did not meet the specific requirements of Rule 4901:1-38-03, O.A.C., has no probative value because this Rule does not apply to FirstEnergy's application in this proceeding.

(3) Scope and Conduct of Hearings.

OCEA has raised a number of other objections regarding the scope and conduct of both the evidentiary hearings and the public hearings in this proceeding. The Commission has reviewed each of these objections and finds that each objection is meritless. Further the Commission finds that OCEA was not prejudiced by any of the disputed issues regarding the scope and conduct of the hearings in this proceeding.

D. Consideration of the Combined Stipulation

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

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

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

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

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

However, OCEA argues that the circumstances presented by this case demonstrate that the Commission's criteria for the evaluation of stipulations should be augmented. OCC believes that SSO cases resulting from the enactment of S.B. 221 present additional problems that should be considered in the evaluation of settlements.

OCC believes that the statutory provision contained in Section 4928.143(C)(2)(a), Revised Code, authorizing electric utilities to reject Commission modifications to an ESP and to withdraw an application which has been modified by the Commission strengthens the bargaining positions of an electric utility relative to other parties. OCEA believes that this asymmetric bargaining position should be recognized in the Commission's evaluation of stipulations by the creation of a fourth prong: is the settlement a product of negotiations among parties occupying asymmetric bargaining positions that affected the settlement result?

The Commission finds that the proposed change to our criteria is unnecessary and should not be adopted. As noted above, the three-prong test has been used extensively by the Commission and has been approved by the Ohio Supreme Court. Under the three-prong test, the Commission always carefully reviews all terms and conditions of a proposed stipulation in order to determine whether the stipulation is in the public interest. In making this determination, the Commission exercises its independent judgment, based upon its statutory authority, the evidentiary record in the case, and the Commission's specialized expertise and discretion. *Monongahela Power Co. v. Pub. Util. Comm.* (2004), 104 Ohio St.3d 571.

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

   a. Summary of the Parties' Arguments.

FirstEnergy claims that the Signatory Parties, and others, have devoted significant time and effort to the development of the Combined Stipulation. FirstEnergy notes that the process was initiated by Staff in conjunction with the *MRO Case* (Staff Comments, Case No. 09-906-EL-SSO (November 24, 2009)) and that the Companies, the Signatory Parties, and others continued the process through extensive negotiations, resulting in a cooperative document that integrates the Signatory Parties' diverse interests. FirstEnergy also claims that the numerous Signatory Parties clearly are capable and knowledgeable (Joint Ex. 3 at 4-5; Joint Ex. 3a). The Companies note that the Signatory Parties include Staff and municipalities along with representatives of manufacturers, industrial and commercial customers, hospitals, small businesses, schools of all levels, low and moderate income customers, CRES suppliers and other generation suppliers (Co. Ex. 4 at 10; Co. Ex. 12 at 3). FirstEnergy notes that the Signatory Parties have consistently participated in the Companies' regulatory proceedings and have been represented by experienced counsel.

FirstEnergy also argues that the Combined Stipulation was the result of serious bargaining. The Companies note that the negotiations held for the Combined Stipulation lasted months, beginning on December 1, 2009 and ending with the filing of the original stipulation on March 23, 2010. During this time, there were several settlement meetings, which were noticed to all parties (Staff Ex. 2 at 2) and direct discussions between the Companies and parties (Tr. I at 119; Tr. III at 770-771). FirstEnergy contends that the December 1, 2009, settlement discussion was not the first time that the parties discussed many of the issues addressed in the Stipulation; in fact, the parties have been engaged in some of the issues in related proceedings involving the Companies for more than a year.

Moreover, OEG, IEU-Ohio, AICUO, Akron, MSC and Nucor all agree that the Combined Stipulation is the result of serious bargaining among capable, knowledgeable parties.

Staff argues that it is abundantly clear that the Combined Stipulation is the result of serious bargaining among knowledgeable parties. Staff notes that the negotiations were open to all parties in the proceeding and that the settlement meetings were well attended, including parties who ultimately did not sign the Combined Stipulation (Co. Ex. 4 at 9, 10).

OCEA contends that the Combined Stipulation is not the product of serious bargaining among capable, knowledgeable parties. OCEA argues that the circumstances surrounding the Combined Stipulation raise questions regarding the ability of parties to negotiate seriously. As an example of the confusion resulting from rushed negotiations, OCEA notes that FirstEnergy's litigation position in the *MRO Case* regarding the timing of the CBP auctions differs from the recommended resolution of this issue in the Combined Stipulation. Citing to the testimony of OCC witness Gonzalez, OCEA claims that, because the settlement was arrived at outside of the context of a litigated case, the means to compel FirstEnergy to provide information regarding the issues addressed by the original stipulation were absent (OCC Ex. 2 at 10).

OCEA also claims that diversity of interests among signatory parties is an important consideration to ensure that a stipulation is reasonable. OCEA claims that the stipulation, as originally filed, did not include representatives of residential customers or parties who were not parties to the *MRO Case* (OCC Ex. 2 at 11). As an example of the impact of this lack of diversity, OCEA notes that residential customers will pay more lost revenues associated with energy efficiency and peak demand reduction programs relative to other customer classes.

OCEA further argues that the settlement negotiations were a rushed process because the settlement discussions were undertaken in less than one month. Although preliminary discussions began on December 1, 2009, following Staff's recommendation that FirstEnergy explore alternative to its pending MRO application, these discussions were abandoned with the beginning of the hearing in the *MRO Case* on December 15, 2009, and no further meetings were held with all parties to the *MRO Case* until February 25, 2010 (OCC Ex. 2 at 12 and Attachment 1). Based upon these factors, OCEA concludes that the stipulation, as originally filed, was not the result of serious bargaining among capable knowledgeable parties (OCC Ex. 2 at 13).

Staff responds that OCEA has no basis to assess the information that was available to other parties and no ability to speak for them. Staff claims that the signatory parties are quite capable of speaking for themselves and have spoken by endorsing the Combined Stipulation. OEG notes that, in addition to the Companies and Staff, 15 knowledgeable parties supporting diverse interests signed the stipulation, as proposed, and that the issues were well-defined and thoroughly understood from the beginning. FirstEnergy claims that, at hearing, OCC's witness Gonzalez admitted to having an undefined and limited role in the negotiations. FirstEnergy and IEU-Ohio both point out that Mr. Gonzalez cannot say what information was provided to other OCC staff members or to the Signatory Parties (Tr. III at 767-774; Tr. IV at 900-907). The Companies and IEU-Ohio also note that Mr. Gonzalez acknowledged that the vast majority of the original stipulation's key provisions, as identified by Mr. Gonzalez, have been explored by the parties in other proceedings (Tr. IV at 949-957).

OCEA further argues that any weight given to the parties' adoption of the Combined Stipulation should be discounted due to asymmetric bargaining positions in the settlement negotiations. OCEA notes that FirstEnergy has the ability to withdraw its application and terminate the ESP if the Commission did not approve the application by May 5, 2010, of if the Commission, or any court, rejects all or any part of the ESP. OCEA claims that the statutory provision allowing FirstEnergy to withdraw and terminate the ESP if the Commission modifies and approves the ESP lessens the weight of every non-FirstEnergy party's execution of the stipulation as an expression of such party's fundamental support for the package (OCC Ex. 2 at 11).

In response to OCEA, Staff argues that the General Assembly has established the regulatory structure and that, if OCEA is correct, there never would be a stipulation in an ESP case because the electric utility always will be in the position of strength which the General Assembly assigned to it. Staff concludes that this would be poor public policy and was certainly not the intent of the General Assembly.

b. Commission Decision.

With respect to the issues raised by OCEA, the Commission notes that OCEA does not cite to any evidence that the Combined Stipulation, *including the supplemental stipulations*, does not meet the first criterion of the three-prong test. All of the evidence cited by OCEA relates to the original stipulation as it existed prior to the filing of the supplemental stipulations. In addition, the Commission finds that the testimony of the

OCC witness regarding this issue was inconsistent and contradictory (Tr. IV at 904-906), and the Commission has assessed the weight to be given to this testimony accordingly.

Further, it appears that the revisions to the Stipulation contained in the second supplemental stipulation address many of the issues raised by OCEA. OCEA had objected that the original stipulation did not include a diversity of interests among the Signatory Parties, arguing that the Signatory Parties did not include parties who represent the interests of residential customers or parties who were not parties to the *MRO Case*; however, the parties to the Combined Stipulation, as supplemented, includes governmental aggregators, municipalities and advocates for low income and moderate income customers as well as several parties who were not parties to the *MRO Case*. In addition, the Commission notes that both the Citizens' Coalition and ELPC withdrew their opposition to the Combined Stipulation with the filing of the second supplemental stipulation (Co. Ex. 12 at 3; Joint Ex. 3 at 12).

Moreover, OCEA had objected to the negotiations process, contending that the process was rushed and completed in less than one month. However, it is apparent from the record in this case that the Signatory Parties continued to pursue settlement negotiations and that such negotiations continued with the filing of the first supplemental stipulation on May 13, 2010, and with the filing of the second supplemental stipulation on July 22, 2010 (Co. Ex. 12 at 3-4; Joint Ex. 2; Joint Ex. 3; Joint Ex. 3a). The Commission cannot conclude that a settlement process which began on December 1, 2009, and ended on July 22, 2010, did not allow sufficient time for the parties to negotiate in good faith a resolution to this proceeding.

Accordingly, the Commission finds that the Combined Stipulation, as supplemented, appears to be the product of serious bargaining among capable, knowledgeable parties. The signatory parties represent diverse interests including the Companies, governmental aggregators, municipalities, competitive suppliers, industrial consumers, commercial consumers, advocates for low and moderate income customers, and Staff. Further, we note that the signatory parties routinely participate in complex Commission proceedings and that counsel for the signatory parties have extensive experience practicing before the Commission in utility matters (Co. Ex. 12 at 3, 5; Co. Ex. 4 at 11-12; Staff Ex. 2 at 2).

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

a. Summary of the Parties' Arguments.

FirstEnergy contends that the Combined Stipulation benefits ratepayers and the public interest. The Companies claim that the ESP provides more stable and certain pricing for three years. With respect to generation pricing through the CBP, the

Companies argue that the proposed CBP is an open, fair, transparent, competitive, standardized, clearly-defined and independently administered process that mirrors in many ways the CBP used to procure generation supply for the Companies' current ESP. FirstEnergy notes that OCC's witness Wallach agreed that there is no reason to believe the process is not fair, open, transparent, and nondiscriminatory (MRO Tr. VI at 806). The Companies contend that the proposed CBP also incorporates several improvements over the CBP in their current ESP. First, it will obtain generation load through multiple auctions and multiple auction products in order to mitigate market prices and stabilize generation prices (Tr. I at 249; Co. MRO Ex. 1 at 7; MRO Tr. III at 424-425). The proposed CBP includes two auctions in the first year and additional auctions in July 2011 and July 2012 (Joint Ex. 1; Attachment A).

In addition, the Companies allege that another improvement in the proposed CBP is the separation of certain transmission costs from the CBP product. NITS and other non-market-based FERC and RTO charges will be recovered through Rider NMB. The Companies contend that this may lower overall energy costs by removing any hedging risk that would otherwise be reflected in a competitive supplier's bid (Nucor MRO Ex. 1 at 45-46).

The Companies also note that the Combined Stipulation provides the Commission with the discretion to implement a load cap for the CBP of no less than 80 percent. Although the Combined Stipulation gives the Commission the discretion to order a load cap, the Companies recommend against the implementation of a load cap. The Companies contend that the evidence in the record indicates that a load cap may result in a higher clearing price in the auction and therefore higher prices for SSO customers (Co. MRO Ex. 13 at 39; MRO Tr. VII at 1036-37; Tr. I at 178; MRO Tr. VI at 822).

The Companies also claim that the proposed ESP provides for certainty and stability for distribution rates because the proposed ESP includes a distribution base rate freeze through June 1, 2014, except for certain emergency conditions provided for by Section 4909.16, Revised Code (Staff Ex. 2 at 4). Only revenue-neutral changes in distribution rate design would be permitted. FirstEnergy further notes that the proposed ESP would replace its existing Rider DSI with the Rider DCR; FirstEnergy contends that Rider DCR will provide for important investments in the Companies' distribution infrastructure and that Rider DCR incorporates additional customer and regulatory improvements over Rider DSI (Staff Ex. 2 at 4). FirstEnergy notes that Staff and other Signatory Parties will have the opportunity to review quarterly updates to Rider DCR and to participate in an annual audit process (Co. Ex. 4 at 18; Tr. I at 225-227).

Moreover, FirstEnergy claims that the proposed ESP provides for the Companies' compliance with energy efficiency and peak demand reduction requirements and promotes other energy efficiency initiatives. The proposed ESP will provide for the continuation of Riders ELR and OLR as a demand response program under Section 4928.66, Revised Code. The Companies contend that this provision benefits all customers because suppliers will take into account the ability to reduce load at peak pricing in their CBP bids, which should promote lower generation prices resulting from the CBP (Tr. I at 145-147).

FirstEnergy also asserts that the Combined Stipulation clarifies that AICUO member schools will be eligible to institute mercantile customer-sited energy efficiency projects if their aggregate load qualifies as a mercantile customer. The Companies claim that this provision merely confirms the statutory eligibility of AICUO schools for the credit under Rider DSE associated with customer-sited energy efficiency programs. Moreover, the Companies note that the Combined Stipulation provides for an LED streetlight pilot project for Cleveland; energy efficiency funding for Cleveland; Akron and Lucas County; and continued funding for energy efficiency administrators.

Further, FirstEnergy claims that the proposed ESP will benefit northern Ohio's economy. The proposed ESP provides support for the expansion of Cleveland Clinic, one of the largest private employers in northern Ohio. The proposed ESP also provides incentives for domestic automakers who increase production. Moreover, the proposed ESP provides rate mitigation for certain rate schedules and shareholder funding for economic development and job retention programs.

In addition, the Companies claim that the proposed ESP provides support for low-income residential customers. The proposed ESP provides a six percent discount for PIPP customers off of their price to compare. This discount will be provided through a bilateral contract with FES. However, the Combined Stipulation recognizes that the Ohio Department of Development (ODOD) may secure a better price with another supplier pursuant to Section 4928.66, Revised Code (Tr. I at 95-96). The proposed ESP also provides funding for the Community Connections program and for funding for low-income customer assistance.

FirstEnergy also claims that the proposed ESP includes significant commitments from the Companies' shareholder for transmission costs. The Companies have agreed not to seek recovery of any MISO exit fees or PJM integration costs resulting from the RTO realignment, an amount estimated to exceed $42 million (Co. Ex. 4 ; Attachment 1; Staff Ex. 1 at 4; Tr. I at 197-199, 204-206, 213). The Companies have also agreed to forgo recovery of legacy RTEP charges. According to the Combined Stipulation, this will represent a minimum of $360 million (Joint Ex. 3 at 5).

Finally, FirstEnergy notes that the Combined Stipulation resolves several other matters that would otherwise be subject to litigation. These cases include the *MRO Case*, which will be moot if the ESP is adopted; the cost recovery issues in FirstEnergy's smart grid proceeding, Case Nos. 09-1820-EL-ATA, et al.; FirstEnergy's corporate separation plan proceeding, Case No. 09-462-EL-UNC; and the *FirstEnergy RTO Realignment Case* in Case No. 09-778-EL-UNC.

OEG, IEU-Ohio, AICUO, Akron, MSC and Nucor all concur that the Combined Stipulation benefits ratepayers and the public interest.

Staff contends that the benefits of the Combined Stipulation are large and broad. Staff notes that these benefits are not available under an MRO, demonstrating that the Combined Stipulation is in the public interest. Staff notes that the Combined Stipulation provides for a reasonable bid process to procure generation, including a staggered set of solicitations and delivery periods that will protect customers by mitigating market price fluctuations. Moreover, PIPP customers will receive a six percent discount off their price to compare. Rider GCR will be avoidable, with some limitations, ensuring that generation costs are truly avoidable for all customers who choose to shop. There will be no new accounting deferrals, and a base rate distribution freeze will be in place through May 31, 2014.

Moreover, Staff claims that Rider DCR will recover costs, subject to revenue requirement caps each year, associated with actual investments in the Companies' distribution system. All revenue associated with Rider DCR will be included as revenue in the return on equity calculation for purposes of the SEET test and will be eligible for refund. Staff also notes that the Combined Stipulation provides for shareholder funding to limit recovery from ratepayers of MISO exit fees, PJM integration costs and legacy RTEP charges. FirstEnergy will also provide shareholder funding to support economic development and job retention activities, and there are provisions and credits in Rider EDR to help domestic automakers and provide funding for Cleveland Clinic, one of the largest employers in Ohio, to implement a major plant expansion. Staff and OPAE also note that the Combined Stipulation provides shareholder funding for assistance to low-income customers to maintain essential electric service.

OEG argues that the Combined Stipulation provides for a reasonable compromise regarding whether MISO exit fees, PJM integration fees, and legacy RTEP charges will be recovered from Ohio retail customers. OEG notes that, as originally proposed, the stipulation provided for a net present value savings for customers of $257 million (Staff Ex. 1 at 4, 7). OEG claims that these savings are significant. OEG further claims that the domestic automobile production incentive is a reasonable economic development program. OEG asserts that the only direct testimony on the merits of the incentive was provided by Staff and was in support of the incentive (Staff Ex. 3 at 4-5).

Constellation notes that the Combined Stipulation includes two provisions which will promote continued growth of the competitive retail market. The Combined Stipulation makes Rider GCR avoidable for customers who shop, and the Combined Stipulation provides for important customer data to be provided to suppliers in usable electronic format. Constellation believes that with these changes the proposed ESP will serve the public interest and carry out the policies of this state as expressed in Section 4928.02, Revised Code.

OCEA argues that the settlement, as a package, does not benefit ratepayers or the public interest. OCEA cites to the testimony of OCC witness Gonzalez, who presented a net present value analysis of the proposed ESP compared to an MRO combined with a potential distribution rate case for the Companies based upon three alternative scenarios. Based upon these scenarios, Mr. Gonzalez concluded that the proposed ESP would cost between $183 million and $322 million compared to an MRO combined with a distribution rate increase (OCC Ex. 2A, Corrected Schedule WG-1; OCC Ex. 2A, Corrected Schedule WG-1A; OCC Ex. 2A, Corrected Schedule WG-1B). OCEA notes that a key value in the net present value analysis is whether charges for legacy RTEP projects will be charged to FirstEnergy by ATSI and subsequently recovered from Ohio retail customers.

OCEA argues that the likelihood that retail customers will be required to pay the legacy RTEP charges is key to the present value results. OCEA notes that FirstEnergy Ridmann assumes that recovery of the legacy RTEP charges is certain while Mr. Gonzalez assumes that there will be zero recovery of the legacy RTEP charges from FirstEnergy's retail customers. In support of its assumption that there is zero possibility that the legacy RTEP charges will be recovered from Ohio retail customers, OCEA notes that FERC, in approving the RTO realignment, FERC held:

> Transmission owners that seek to change RTOs should be prepared to assume the costs attributable to their decisions. ATSI is permitted to balance the benefits it associates with its decision to join PJM under its existing tariff against the costs it anticipates it will incur in exiting the Midwest ISO and joining PJM to determine whether such move is cost justified . . . . We see no basis to modify the existing RTO rules simply because a particular cost allocation makes a transmission owner's business decision more expensive.

FERC RTO Realignment Order, ¶113.

In addition, OCEA contends that an MRO, combined with a distribution rate case, is more favorable than the proposed ESP even if the probability that retail customers in Ohio will be required to pay the legacy RTEP charges is greater than zero. For example, OCEA notes that, even if there is a 100 percent probability that retail customers will be required to pay legacy RTEP charges, the MRO is more favorable in the aggregate than the proposed ESP if the distribution rate case is assumed to result in no rate increase to customers (OCC Ex. 2A, Corrected Schedule WG-1B).

Moreover, OCEA notes that the Combined Stipulation does not resolve the amount of energy efficiency program induced lost distribution revenues that the Companies will be allowed to recover from energy efficiency programs approved during the term of the proposed ESP. OCEA notes that the Companies will be permitted to fully collect lost distribution revenues for the term of the ESP but that the collection of lost distribution revenues after May 31, 2014 is not addressed. OCEA recommends that the Commission modify the Combined Stipulation and order the explicit development of a rate adjustment revenue decoupling mechanism that ensures that the Companies recover no more and no less than the revenue requirement authorized in the Companies' last distribution rate case. OCEA cites to the testimony of OCC witness Gonzalez and NRDC witness Sullivan that a decoupling mechanism is a superior method to address lost distribution revenues than the approach contained in the Combined Stipulation (OCC Ex. 2 at 39; NRDC Ex. 1 at 5).

OPAE contends that OCEA has not shown that decoupling is preferable to lost revenue recovery. OPAE claims that both witnesses relied upon by OCEA failed to define what they are proposing in terms of decoupling. OPAE notes that there are scenarios for decoupling under which utilities will over-earn, depending on factors such as weather normalization, corrections for price elasticity and load growth. OPAE also alleges that the Companies will not collect lost revenues for certain portions of their demand-side management portfolio, such as energy efficiency related to the commitment of mercantile customer efficiency; decoupling, on the other hand, would compensate the utilities for lost revenue caused by these projects.

Further, OCEA and Direct Energy note that the Combined Stipulation provides that PIPP customers will be served based upon a sole-source contract between FirstEnergy and FES at a six percent discount from the SSO rate. OCEA argues that a market solution should provide at least this amount of benefit to consumers (Tr. IV at 938). Direct Energy alleges that the proposed ESP provides FES with an exclusive opportunity to provide load for PIPP customers without any bid or RFP. Direct Energy notes that Section 4928.54, Revised Code, provides the Ohio Department of Development (ODOD) with the ability to conduct an auction or RFP in order to provide the best price for the PIPP load, rather than provide FES with a guaranteed source of revenue. Direct Energy claims that, without competitive procurement for the load, there has been no true test whether the discount provides a benefit (Tr. I at 74).

OPAE responds that the parties opposed to the Combined Stipulation have not recognized the statutory authority of the ODOD to bid out competitively the generation load of PIPP customers. OPAE asserts that, because the Combined Stipulation cannot waive ODOD's authority under Section 4928.54, Revised Code, ODOD retains the authority to bid out competitively the PIPP load.

OCEA and OEC also argue that the short-term nature of the RFP will not garner a sufficient response from the renewable energy community to produce sufficient RECs. OCEA and OEC claim that renewable energy developers need an upfront, guaranteed stream of revenues to obtain bank financing for new projects (OCC Ex. 2 at 52). Therefore, OCEA and OEC contend that long-term contracts, at least 10 years, with REC developers are necessary for the Companies to meet S.B. 221 requirements.

The Demand Response Coalition contends that modifications to the Combined Stipulation would help Ohio achieve its peak demand reduction goals. The Demand Response Coalition argues that the Commission should ensure that the process for accepting demand response through approved RTO programs remains simple and that the Commission can facilitate further reductions in peak demand by exempting customers participating in RTO demand response programs from paying charges to fund the Companies' demand response programs under Rider DSE. The Demand Response Coalition contends that requiring participants in RTO programs to pay charges to fund the Companies' demand response programs contradicts Section 4928.66, Revised Code.

The Demand Response Coalition also suggests that the Commission refrain from putting customers who participate in demand response programs at a disadvantage to customers in substantially similar utility programs. The Demand Response Coalition recommends that the Commission allow Riders ELR and OLR to expire because the Riders sidestep available competitive processes, leading to inefficient and costly added expense to ratepayers.

OEG responds that the Commission should reject the recommendations of the Demand Response Coalition to terminate Riders ELR and OLR. OEG claims that terminating Riders ELR and OLR would have severe negative consequences for many major industries in northern Ohio. OEG also asserts that the RTO demand response program cited by the Demand Response Coalition differs from Riders ELR and OLR in significant ways. OEG notes that the capacity credit in the RTO program is fixed for one year while, for Riders ELR and OLR, it is fixed for three years (Tr. III at 660). OEG asserts that Riders ELR and OLR have an economic development component, but the

RTO program does not (Tr. III at 661). Rider ELR limits the customer to 876 hours of economic interruption, but the RTO program does not (Tr. III at 662).

Nucor contends that Riders ELR and OLR should be extended as modified in the Combined Stipulation. Nucor claims that Riders ELR and OLR provide a broad array of benefits. These benefits include: avoided generation capacity cost savings (Nucor Ex. 1 at 12; MRO Tr. I at 116, MRO Tr. IV at 610); avoided energy cost savings; avoided transmission and distribution cost savings (Nucor MRO Ex. 1 at 27); savings from avoided reserve and transmission losses (*id.* at 29); reliability benefits (*id.* at 12-13); environmental benefits through the avoidance of the need for new peaking generation and additional transmission capacity (*id.*); avoidance of enormous negative rate impacts to Rider ELR customers (OEG MRO Ex. 1 at 11-12, 14-15); and economic development and job retention benefits (Nucor MRO Ex. 1 at 12-13).

Nucor also asserts that Riders ELR and OLR are not virtually identical to the RTO demand response program cited by the Demand Response Coalition; there are significant differences between a customer's obligations under Riders ELR and OLR and a customer's obligations in the RTO program. Nucor claims that these differences make Riders ELR and OLR distinctly different products from the RTO program and much more valuable to Ohio. Nucor argues that the credits under Riders ELR and OLR are more than justified, citing to the uncontroverted testimony of its witness Goins (Nucor MRO Ex. 1 at 25-29).

Nucor further claims that arguments that the Rider ELR credit is above the PJM capacity market prices are invalid and irrelevant to whether Rider ELR is just and reasonable and should be approved. Nucor alleges that the PJM capacity market prices are widely varying one-year capacity prices from a single auction (Demand Response Coalition Ex. 1 at 10-11) and that, in any event, the record in this proceeding only includes such data for two of the three years covered by Rider ELR. Nucor claims that a credit that reflects the long-tem cost of capacity, as well as the other cost savings, ensures that FirstEnergy will be able to attract and retain interruptible load over the term of the proposed ESP (Nucor MRO Ex. 1 at 31). Therefore, Rider ELR is a more certain mechanism for FirstEnergy to rely upon to meet its peak demand reduction benchmarks.

MSC argues that elimination of Rider ELR would violate important regulatory principles and practices by ignoring the state policy requirements under Section 4928.02, Revised Code, and subjecting large industrial customers to rate shock. MSC claims that Rider ELR provides Ohio's largest energy users with price and quality options to remain competitive, further economic development and job retention, and facilitate Ohio's competitiveness in the global market.

b. Commission Decision.

With respect to the issues raised by OCEA, the Commission notes that OCEA does not cite to any evidence regarding the Combined Stipulation, *as supplemented*. All of the evidence cited by OCEA relates to the original stipulation, as it existed prior to the filing of the supplemental stipulations. However, undisputed evidence in the record demonstrates that the second supplemental stipulation, in particular, provided for additional quantifiable benefits to customers (Co. Ex. 12 at 1-2, 4). Although OCEA filed testimony regarding the second supplemental stipulation (OCC Ex. 8), OCEA did not update their analysis to account for those additional benefits although OCEA was provided a full and fair opportunity to provide such additional testimony.

Among the additional customer benefits provided by the second supplemental stipulation, the amount of legacy RTEP charges for which the Companies agreed not to seek recovery increased to $360 million (Co. Ex. 12 at 4; Joint Ex. 3 at 5). The amount of shareholder funding for assistance for low-income customers increased to $12 million over the term of the proposed ESP (Co. Ex. 12 at 4; Joint Ex. 3 at 6). Accordingly, the net present value analysis relied upon by OCEA, which is based solely upon the stipulation as originally filed, is of little probative value to the Commission in our consideration of the Combined Stipulation.

Although the Commission agrees with OCEA's statement that the likelihood that retail customers in Ohio will be required to pay the legacy RTEP charges is key to determining whether the Combined Stipulation benefits ratepayers and the public interest, we cannot accept OCEA's assumption that there is a zero probability that retail customers will be required to pay such charges without further clarification from FERC (Tr. III at 824-825).[2] OCEA does not cite to any FERC or Federal Court precedents in support of its position. The Commission believes that there are strong arguments to be made that Ohio retail customers should not be responsible for such charges. We also believe that there would be significant litigation regarding this issue at both the state and Federal level (Tr. III at 826-827, 840-843) and that the risk of Ohio ratepayers ultimately being required to pay the full amount of the legacy RTEP charges is substantially greater than zero (Staff Ex. 1 at 7-8). This Commission is unwilling to accept that risk in light of FirstEnergy's agreement in the Combined Stipulation to forgo recovery of the first $360 million of such charges.

Further, the Commission notes that the second supplemental stipulation appears to substantially address one issue raised by OCEA and OEC. OCEA and OEC had recommended that FirstEnergy be required to enter into long-term contracts with renewable energy developers in order to ensure that sufficient RECs are produced to meet the Companies' requirements under S.B. 221 (Tr. IV at 870). The second

2 The record indicates that OCC has sought such clarification (Tr. III at 825-826).

supplemental stipulation provides for the development of four requests for proposal to purchase RECs, including solar RECs, through ten-year contracts (Joint Ex. 3 at 1-3).

Finally, with respect to the objections raised by OCEA and Direct Energy regarding the proposed six percent discount for PIPP customers, the Commission finds that the six percent discount provided for in the Combined Stipulation benefits ratepayers and the public interest. OCEA, citing the testimony of OCC witness Gonzalez, claims that a market bid should result in a discount of at least one-half percent greater than that provided under the Combined Stipulation (OCC Ex. 2 at 27). However, the Commission finds that this estimate was not based upon any quantitative analysis, consultations with competitive suppliers, or comparisons with other states' programs (Tr. III at 795, 796-797, 799). The Commission further notes that both OCEA and Direct Energy incorrectly claim that the proposed six percent discount precludes a competitive bid process; the Combined Stipulation expressly provides that ODOD retains its authority to competitively shop the aggregated PIPP load if a better price can be obtained (Joint Ex. 1 at 8). Therefore, the six percent discount to be provided to PIPP customers represents the *minimum discount* during the ESP, and a better price may be obtained by ODOD through a competitive bid.

However, before we can find that the Combined Stipulation advances the public interest, additional clarifications and modifications are necessary based upon the record in this proceeding. First, the Combined Stipulation provided for auctions under the CBP to take place in July 2010, October 2010, July 2011, and July 2012. Accordingly, the July 2010 auction needs to be rescheduled, and the Commission finds that the first two auctions in the ESP should be held in October 2010 and January 2011. The precise date should be established by the independent auction manager in consultation with Staff and FirstEnergy.

The Commission notes that, pursuant to Section 4928.02, Revised Code, we are determined to encourage electric utilities to provide consumers with options to meet their respective needs. Such options include, but are not limited to, the various constructs that promote price-responsive demand. The Commission continues to have concerns regarding the long-term impacts of PJM capacity obligations for price responsive consumers. RTO tariffs that impose capacity obligations for demand that would not be present at higher energy prices or discriminate against price responsive demand are inconsistent with efficient markets and may be in conflict with State policy. While the *RTO Realignment Case,* Case No. 09-778-EL-UNC, has given the Commission a vehicle to express our concerns regarding price responsive demand and scarcity pricing to FERC and PJM, we hesitate to undermine the Combined Stipulation and the recommendation of the Signatory Parties that the *RTO Realignment Case* be closed. Therefore, while we will adhere to the Combined Stipulation's recommendation, we nevertheless put all parties on notice that, in the absence of an expeditious resolution of the issues relating to price responsive demand and scarcity pricing, we will open a new proceeding, if necessary, in order to address our concerns.

Further, OCEA objected to the scheduling of the auctions under the CBP during peak months, citing the testimony of OCC witness Wilson (MRO Tr. VI at 820). FirstEnergy claims that no logical relationship has been established between auction pricing and conducting an auction in peak months. FirstEnergy cites that testimony of its witness Schnitzer, who testified that there is no "market timing" justification for holding the auction on any particular date (Co. MRO Ex. 13 at 33). The Commission notes that testimony in the record indicates that there is some risk of a price spike during peak months (MRO Tr. VI at 820). OCC witness Gonzalez also testified that the timing of the auction in a peak month was the most significant difference between the CBP in the MRO recommended by OCC and the CBP in the proposed ESP (Tr. IV at 942-945). The Commission finds that, even if the risk of holding an auction during peak months is limited, there is no reason to take that risk. There certainly is no affirmative reason to hold the auctions during peak months. The Commission also believes that, in order to mitigate risk, the remaining two proposed auctions, with 34 tranches to be procured in each, should be further divided into four separate auctions, with 17 tranches to be procured in each auction. Accordingly, we will modify the Combined Stipulation and order that the auctions proposed for July 2011 and July 2012 be rescheduled into four auctions to be held in October 2011, January 2012, October 2012, and January 2013.

Moreover, the Combined Stipulation states that the Commission may impose a load cap of no less than 80 percent for each auction provided for in the CBP. The Staff recommended that the Commission impose the 80 percent load cap (Tr. I at 249). OCC witness Gonzalez also endorsed the imposition of a load cap (Tr. IV at 45-46). The Commission will accept Staff's recommendation for an 80 percent load cap for the auctions provided for by the CBP. However, the Commission notes that we reserve the right to modify and alter the load cap or any other feature of the CBP process for future auctions as the Commission deems necessary based upon our continuing review of the CBP process, including the reports on the auctions provided to the Commission by the independent auction manager, our consultant, the Companies, and Staff. Moreover, the Commission will clarify that no bidder may obtain tranches through a post-auction assignment if such assignment, when added to the tranches won during the auction, would cause the bidder to exceed the load cap. The Commission will modify the Combined Stipulation to require all bidders to immediately disclose to the Commission and Staff, upon request and subject to appropriate protections for confidential or proprietary information, any information regarding the CBP, including, but not limited to, all prices, terms and conditions for any post-auction assignments of tranches obtained through the CBP. Finally, with regard to the CBP process, the Combined Stipulation provides that the Commission may reject the results of the auction upon a recommendation from the independent bid manager or the Commission's consultant that the auction violated the competitive bidding process rules. The Commission notes that this provision does not circumscribe the authority which the Commission possesses to oversee the CBP process.

With respect to Rider GCR, the Combined Stipulation provides that Rider GCR will be avoidable to shopping customers, subject to certain conditions (Joint Ex. 1 at 12; Joint Ex. 3 at 3-4). The Commission clarifies that, as with any other tariff provision, FirstEnergy may modify Rider GCR to make it unavoidable only with the approval of the Commission. The Commission further notes that the Combined Stipulation provides that the Commission may, with the Companies' concurrence, institute a changed revenue neutral distribution rate design. The Commission clarifies that, while it will actively engage the Companies prior to consideration of a rate design modification, rate design, within the stipulated parameters of revenue neutrality, remains within the discretion of the Commission.

Expanding the availability of and enabling consumers to take full advantage of dynamic and time-differentiated pricing options is essential for efficient markets and meeting State policy objectives. The competitive bidding process should ensure that consumers on such rates benefit from the generation cost savings associated with reducing their demand during peak periods. Therefore, after consideration in future proceedings, and with sufficient notice to participants in the competitive bidding process, the Commission may carve out from future auctions supply procurements for consumers on dynamic and time-differentiated rates.

The Commission also believes that the Combined Stipulation should be modified with respect to the provision that net capital additions for plant in service for general plant shall be included in Rider DCR so long as there are no net job losses at "the Companies" as a result of involuntary attrition as a result of the merger between FirstEnergy Corp. and Allegheny Energy, Inc. (Joint Ex. 1 at 15). According to testimony at the hearing, this provision does not cover employees of FirstEnergy Service Company (Tr. I at 85-86). However, many functions for the Companies are performed by employees of the FirstEnergy Service Company (Co. MRO Ex. 6 at 4-5). Therefore, the Commission will modify the Combined Stipulation to include employees of FirstEnergy Service Company who provide support for distribution services provided by OE, CEI, and TE and are located in Ohio within the meaning of "no net job losses" in the Combined Stipulation.

Further, the Commission will clarify that the second paragraph on page 15 of the original stipulation will be replaced by the new language contained in the second supplemental stipulation (Joint Ex. 1 at 15; Joint Ex. 3 at 4).

Moreover, the Commission notes that Staff proposed additional modifications of the Combined Stipulation based upon its in-depth bill analysis. Staff recommends that rate schedule TRF be responsible for 100 percent of the allocation of PJM capacity costs associated with the lighting schedules' contribution to coincident peaks in June through September (Staff Ex. 4 at 4). Further, Staff recommends that, in the event of an overall Company average percent decrease, all lighting schedules (rate schedules STL, POL, and TRF) be limited to a maximum increase of zero percent (Staff Ex. 4 at 5). The Commission agrees with these recommendations and modifies the Combined Stipulations accordingly.

Finally, with respect to FirstEnergy's smart grid initiative, the Combined Stipulation provides that the Companies shall not complete any part of the Ohio Site Deployment that the DOE does not match funding in an equal amount. The Commission will modify the Combined Stipulation such that, in the event that the DOE does not provide matching funding for any part of the Ohio Site Deployment for any reason, FirstEnergy should seek guidance from the Commission regarding how it should proceed with completion of the Ohio Site Deployment and any related cost recovery.

The Commission finds that, subject to the modifications discussed above, the evidence in the record indicates that, as a package, the Combined Stipulation advances the public interest by resolving all the issues raised in these matters without resulting in extensive litigation and by providing for stable and predictable rates, established by a competitive procurement process, for customers during the ESP period (Co. 4 at 3, 12; Staff Ex 2 at 3). As agreed to by the signatory parties, approval of Rider DCR, which will not be implemented until January 1, 2012, is in recognition of the Companies' commitments to freeze base distribution rates through May 31, 2014, and to forgo recovery of a minimum of $360 million of legacy RTEP charges (Co. Ex. 12 at 2, 4; Joint Ex. 3 at 6) as well as approximately $42 million in MISO exit fees and PJM integration charges (Staff Ex. 1 at 4). The Combined Stipulation serves the public interest by resolving the cost recovery issues in the FirstEnergy smart grid proceeding, Case Nos. 09-1820-EL-ATA, et al. Finally, the proposed ESP established by the Combined Stipulation promotes competition because the proposed ESP contains no minimum stay for residential and small commercial customers (Joint Ex. 1 at 8), and no minimum default service rider or standby charges; all generation rates, with limited exceptions, will be avoidable, and there will be no shopping credit caps (*id.* at 8-9).

Moreover, testimony in the record indicates that there are significant additional benefits for customers in the Combined Stipulation. In the Combined Stipulation, the Companies have committed shareholder funding for economic development. Further, the Combined Stipulation provides the Commission the flexibility to order the phase-in generation prices if the Commission determines that a phase-in is necessary. The

Combined Stipulation also provides additional benefits to interruptible industrial customers, schools, municipalities, and certain residential customers. Finally, the Combined Stipulation promotes energy efficiency programs and renewable energy resource development.

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

a. Summary of the Parties' Arguments.

FirstEnergy argues that the Combined Stipulation does not violate any important regulatory principles or practices. FirstEnergy cites to the testimony of Staff witness Turkenton who testified that the Combined Stipulation furthers the policies of the state to provide reasonably priced and reliable electric service, provides customers with effective choices that ensures diversity of supplies and suppliers, and provides flexible regulatory treatment not achievable through an MRO (Staff Ex. 2 at 6).

OEG, IEU-Ohio, AICUO, Akron, MSC and Nucor each represent that the Combined Stipulation does not violate any important regulatory principle or practice.

Staff contends that the Combined Stipulation furthers important regulatory policies rather than violate them. Staff contends that the settlement ensures the availability to consumers of adequate, reliable safe, efficient, nondiscriminatory, and reasonably priced electric service. Section 4928.02(A), Revised Code. According to Staff, the proposed ESP improves the CBP used in the current ESP, and, in Rider DCR, provides for a mechanism to expedite funding for reliability enhancements. Moreover, the proposed ESP provides for a distribution base rate freeze and limits increases in transmission costs.

Moreover, Staff claims notes that the proposed ESP ensures the availability of unbundled and comparable retail electric service that provides consumers with the supplier, price, terms, conditions, and quality options they elect to meet their respective needs. Section 4928.02(B), Revised Code. Staff notes that the proposed ESP preserves Rider ELR for large industrial customers and provides PIPP customers with a discounted rate while preserving the option of an alternative supplier.

Further, Staff notes that the Commission must facilitate the State's effectiveness in the global economy. Section 4928.02(N), Revised Code. Staff argues that the Combined Stipulation provides necessary support for domestic automobile manufacturers and the Cleveland Clinic. Staff also claims that the proposed ESP provides for funding for low-income customers in order to further the policy of protecting at-risk populations. Section 4928.02(L), Revised Code. Finally, Staff claims that, by making Rider GCR avoidable, the proposed ESP enables more shopping pursuant to the policy of ensuring the diversity of electricity supplies and suppliers. Section 4928.02(C), Revised Code.

OCEA claims that the Combined Stipulation violates numerous regulatory principles and practices. OCEA claims that, with respect to the provision related to AICUO member schools, if a member school otherwise qualifies as a mercantile customer no reason exists to limit the status of the member school as a mercantile customer to the limited purposes of Section 4928.66, Revised Code.

On the other hand, AICUO argues that adoption of the language in the Combined Stipulation regarding the treatment of AICUO member schools as mercantile customers would be consistent with Section 4928.01(A)(19), Revised Code. AICUO asserts that thee is no regulatory principle or practice that prevails over the Revised Code's definition of mercantile customer, as OCC witness Gonzalez acknowledged on cross-examination (Tr. IV at 887-888). AICUO further argues that Section 4928.01(A)(19), Revised Code, does not prohibit the aggregation of the electric load of facilities on a particular college or university campus in order to meet the statutory threshold for a mercantile customer. AICUO claims that OCC witness Gonzalez testimony that multiple loads may be aggregated only where those accounts are part of a national account (OCC Ex. 2 at 16) misrepresents Ohio law. AICUO states that a commercial customer qualifies for treatment as a mercantile load if the customer uses more than 700,000 kWh per year *or* is part of a national account in one or more states. Section 4928.01(A)(19), Revised Code. FirstEnergy claims that the Combined Stipulation simply clarifies the eligibility of AICUO member schools whose aggregate consumption exceed the threshold set forth in Section 4928.01(A)(19), Revised Code, as mercantile customers.

OCEA also claims that provisions of the Combined Stipulation related to Rider DCR violate regulatory principles and practices. These provisions include the provision that states that updated filings shall not be considered to be "an application to increase rates" within the meaning of Section 4909.18, Revised Code (OCC Ex. 2 at 14). OCEA also cites to the provision of the Combined Stipulation which provides for participation in the audits for the DCR by Staff and other Signatory Parties but does not mention other interested parties (OCC Ex. 2 at 16).

Moreover, OCEA contends that the provisions of the Combined Stipulation related to the discount for domestic automobile manufacturers and the Cleveland Clinic should have been filed as special arrangements under Section 4905.31, Revised Code. OCEA argues that a filing under Section 4905.31, Revised Code, would have been better able to deal with verification of benefits, accountability, and transparency. FirstEnergy counters that the General Assembly's framework for ESPs explicitly anticipates that such plans may include provisions for economic development and job retention. Section 4928.143(B)(2)(i), Revised Code.

OCEA argues that the provisions in the Combined Stipulation conflict with prior Commission orders. OCEA believes that the provision of the Combined Stipulation which provides that all interruptible capabilities for peak demand reduction after 2008 shall be considered "incremental" conflicts with the Commission order issued in *In re FirstEnergy*, Case Nos. 09-535-EL-EEC, et al., Finding and Order (March 10, 2010) (*FirstEnergy Benchmarks Case*) because the Commission concluded there was insufficient information, in the record in that docket, regarding the incremental peak demand reductions that the Companies qualifying 2009 programs were designed to achieve, compared to the reductions that programs in place the preceding year were designed to achieve. *FirstEnergy Benchmarks Case* at 6. FirstEnergy notes that the language in the *FirstEnergy Benchmarks Case* is dicta, but FirstEnergy argues that the interruptible load from Riders ELR and OLR is incremental to 2008 load because the programs did not exist in 2008. Nucor agrees with FirstEnergy that Riders ELR and OLR can properly be considered incremental to interruptible load on the FirstEnergy system that existed in 2008.

OCEA also claims that authorizing the continuation of deferrals previously approved in the *FirstEnergy Distribution Rate Case* violates the Opinion and Order in that case, which provided that the deferrals would end the earlier of December 31, 2011 or the effective date of the Commission's order in the next FirstEnergy base distribution rate case. OCEA also contends that a provision in the Combined Stipulations related to storm damages deferrals is vague (OCC Ex. 2 at 20).

b. Commission Decision

With respect to the specific claims made by OCEA that the Combined Stipulation violates important regulatory principles or practices, the Commission is not persuaded that any of these claims have merit.

OCEA believes that the economic development provisions in the Combined Stipulation related to the discount for domestic automobile manufacturers and the Cleveland Clinic should have been filed as special arrangements under Section 4905.31, Revised Code. However, Section 4928.143(B)(2)(i), Revised Code, specifically authorizes electric utilities to include provisions related to economic development in a proposed ESP. OCEA has not demonstrated a violation of an important regulatory principle or practice simply because FirstEnergy chose to file these programs under Section 4928.143(B)(2)(i), Revised Code, rather than the statute preferred by OCEA. Further, the Commission finds that there is sufficient evidence in the record of this proceeding to approve the economic development provisions of the proposed ESP (Staff Ex. 3; IEU-Ohio Ex. 2).

With respect to OCEA's claim that the provisions related to Rider DCR violate important regulatory principles and practices, the Commission expects that reasonable management will carry out the investments funded by Rider DCR in a manner to achieve significant improvements in distribution reliability and energy efficiency in order to facilitate Ohio's effectiveness in the global economy. Section 4928.02(N), Revised Code. Further, the Commission finds that the provision of the Combined Stipulation which clarifies that the quarterly updates to Rider DCR are not "applications for an increase in rates" subject to the requirements of Section 4909.18, Revised Code, was filed as part of an application submitted pursuant to Section 4928.143, Revised Code. The statutory authority to file an application under Section 4928.143, Revised Code is separate and independent from the statutory provisions of Section 4909.18, Revised Code. OCEA has cited to no previous decision by the Commission or the Ohio Supreme Court holding that adjustments to riders authorized under an ESP must be filed pursuant to Section 4909.18, Revised Code.

OCEA also objects to the provision of the Combined Stipulation which provides for participation in the audits for Rider DCR by Staff and other Signatory Parties. The Commission finds that the Signatory Parties negotiated in good faith for the right to participate in the DCR audits. Nothing in the Combined Stipulation precludes FirstEnergy from including non-signatory parties in the audit process, and OCEA is free to negotiate with FirstEnergy for the right to participate along with the Signatory Parties. Further, OCEA will have the opportunity to fully participate in any Commission proceeding resulting from the audit process, including ample rights for discovery.

Likewise, OCC witness Gonzalez expressed concern that parties opposed to the Combined Stipulation were excluded from the development of the REC RFPs provided for by the second supplemental stipulation (OCC Ex. 8 at 3-4; Joint Ex. 3 at 1). However, nothing in the Combined Stipulation precludes FirstEnergy from including non-signatory parties in the development of the RFPs, and OCEA is free to negotiate with FirstEnergy for the right to participate along with the other parties. Further, OCEA will have the opportunity to fully participate in the Commission proceeding in which FirstEnergy will seek Commission approval of the RFPs.

OCEA's allegations that the Combined Stipulation conflicts with prior Commission orders are meritless. OCEA claims that the Combined Stipulation conflicts with our Finding and Order in the *FirstEnergy Benchmarks Case*. However, in that proceeding, we did not determine that interruptible capabilities after 2008 were not incremental; we concluded that there was *insufficient information* in the record in that proceeding to make that determination. OCEA also argues that the Combined Stipulation conflicts with our Opinion and Order in the *FirstEnergy Distribution Rate*

Case. However, under the Combined Stipulation, circumstances will have changed. The base distribution rate freeze will be extended from December 31, 2011, to June 1, 2014. The proposed modification of a Commission order, based upon changed circumstances, does not violate an important regulatory principle or practice.

Direct Energy claims that the proposed ESP does not comply with the provisions of Section 4928.143(B)(2)(h), Revised Code, which states:

> As part of its determination as to whether to allow in an electric distribution utility's electric security plan inclusion of any provision described in division (B)(2)(h) of this section, the commission shall examine the reliability of the electric distribution utility's distribution system and ensure that customers' and the electric distribution utility's expectations are aligned and that the electric distribution utility is placing sufficient emphasis on and dedicating sufficient resources to the reliability of its distribution system.

Direct Energy states that there is no evidence in the record the Commission has examined the reliability of FirstEnergy's distribution system for the proposed ESP.

The Commission finds that Direct Energy's reliance upon Section 4928.143(B)(2)(h), Revised Code, is misplaced. The provisions of the Combined Stipulation related to Rider DCR were not filed under Section 4928.143(B)(2)(h), Revised Code; therefore, there is no requirement to conduct an examination of the reliability of FirstEnergy's distribution system.

Moreover, Direct Energy argues the proposed ESP fails to establish corporate separation between the FirstEnergy operating utilities and FES. Direct Energy notes that an SSO application that contains a proposed ESP must provide a description of the electric utility's corporate separation plan. Rule 4901:1-35-03(C)(4), O.A.C. Direct Energy claims that the only reference to the Companies' corporate separation plan in the application is the provision in the Combined Stipulation which would approve the corporate separation plan filed in Case No. 09-462-EL-UNC (Joint Ex. 1 at 30).

Direct Energy fails to recognize that the Combined Stipulation seeks approval of FirstEnergy's application for the corporate separation plan filed in Case No. 09-462-EL-UNC. The Signatory Parties have recommended that the Commission approve this plan as filed. Direct Energy has not cited to any evidence admitted into the record in this proceeding demonstrating that the proposed corporate separation plan should not be approved. Instead, Direct Energy relies upon statements made in pleadings submitted by NOPEC, which is a signatory party to the Combined Stipulation. These statements have not been subject to cross-examination, have not been admitted as evidence into the record, and will not be considered by the Commission.

Finally, Direct Energy argues that the GAGS phase-in generation credit and GAGS receivables program should apply to all suppliers and shopping customers. However, the Commission notes that this provision promotes large-scale governmental aggregation in the Companies' service territories, rather than the interests of individual suppliers.

Accordingly, based upon the evidence in the record in this proceeding, the Commission finds that the Combined Stipulation does not violate any important regulatory principles or practices.

E. Is the proposed ESP more favorable in the aggregate as compared to the expected results that would otherwise apply under Section 4928.142, Revised Code.

The Commission must also consider the applicable statutory test for approval of an ESP. Section 4928.143(C)(1), Revised Code, provides that the Commission should approve, or modify and approve, an application for an ESP if it finds that the ESP, including its pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, is more favorable in the aggregate as compared to the expected results that would otherwise apply under Section 4928.142, Revised Code.

FirstEnergy contends that the proposed ESP provides both qualitative and quantitative benefits over an MRO. FirstEnergy notes that the proposed ESP includes numerous benefits in the form of economic development, energy efficiency, assistance for low-income customers, direct shareholder contributions and waivers of certain transmission costs. FirstEnergy argues that the ESP comprehensive terms provide more certainty and stability for an additional three years and that the proposed ESP promotes competition in the generation markets.

FirstEnergy also claims that the proposed ESP provide quantitative benefits of over $280 million to customers over the three-year term of the proposed ESP (Co. Ex. 4; Att. 1). Moreover, FirstEnergy's witness Ridmann testified that the second supplemental stipulation provides additional benefits to customers, by ensuring that customers will not pay for the first $360 million in legacy RTEP costs and by increasing assistance to low-income customers to $4 million per year (Co. Ex. 12 at 4).

IEU-Ohio cites to the testimony of FirstEnergy witness Ridmann (Co. Ex. 4 at 3-8), Staff witness Choueiki (Staff Ex. 1), Staff witness Turkenton (Staff Ex. 2), Staff witness Fortney (Staff Ex. 3), and IEU-Ohio witness D'Angelo (IEU-Ohio Ex. 2) as evidence that the proposed ESP, in the aggregate, provides better qualitative and quantitative outcomes than might be expected from the application of Section 4928.142, Revised Code.

OEG notes that, under Section 4928.142(F), Revised Code, once an electric utility receives Commission approval for an MRO, there can never again be an ESP. However, OEG argues that an ESP grants the Commission far more flexibility than an MRO to be responsive to consumers' needs and to deal with changing circumstances than an MRO. OEG believes that this is an important consideration which tilts in favor of the ESP.

At hearing, OCC witness Gonzalez presented a net present value analysis of the proposed ESP compared to an MRO combined with a potential distribution rate case for the Companies based upon three alternative scenarios. In all three scenarios, Mr. Gonzalez assumed that there will be zero recovery of the legacy RTEP charges from FirstEnergy's retail customers and that revenue decoupling would be implemented as proposed by OCEA. In his first scenario, Mr. Gonzalez assumed that the DCR would collect $303 million, based upon Mr. Ridmann's testimony, and that FirstEnergy would receive only 60 percent of the revenue assumed by Mr. Ridmann from a base rate distribution case. Based upon these assumptions, Mr. Gonzalez concluded that the present value cost of the proposed ESP would be $183 million compared to an MRO combined with a distribution rate increase (OCC Ex. 2A, Corrected Schedule WG-1).

In his second scenario, Mr. Gonzalez assumed that the DCR would collect $390 million, based upon the annual caps contained in the Combined Stipulation, and that FirstEnergy would receive only 60 percent of the revenue assumed by Mr. Ridmann from a base rate distribution case. Based upon these assumptions, Mr. Gonzalez concluded that the present value cost of the proposed ESP would be $255 million compared to an MRO combined with a distribution rate increase (OCC Ex. 2A, Corrected Schedule WG-1A).

In his third scenario, Mr. Gonzalez assumed that the DCR would collect $303 million, based upon Mr. Ridmann's testimony, and that FirstEnergy would receive no increase in distribution revenue from a base rate distribution case. Based upon these assumptions, Mr. Gonzalez concluded that the present value cost of the proposed ESP would be $322 million compared to an MRO (OCC Ex. 2A, Corrected Schedule WG-1B). Based upon these scenarios, OCEA claims that the present value analysis favors an MRO and rejection of the proposed ESP.

FirstEnergy responds that Mr. Gonzalez's testimony is flawed because it ignores all transmission cost recovery, manipulates distribution cost recovery by using an arbitrary factor, and grossly overstates the amount of lost distribution revenue while grossly overstating the benefits of revenue decoupling.

The Commission finds that the record of these proceedings demonstrates that the proposed ESP is, in fact, more favorable in the aggregate than the expected results under Section 4928.142, Revised Code. Under the proposed ESP in the Combined Stipulation, the rates to be charged customers will be established through a CBP; therefore, the rates in the ESP should be equivalent to the results which would be obtained under Section 4928.142, Revised Code (Co. Ex. Ex. 4 at 26). However, the evidence in the record demonstrates that there are additional benefits contained in the Combined Stipulation makes the ESP more favorable in the aggregate than the expected results under Section 4928.142, Revised Code (Co. Ex. Ex. 4 at 21-26; Co. Ex. 12 at 4-5; Staff Ex. 2 at 7-9). These additional benefits, which would not be provided in an MRO, include the Companies' commitment of shareholder funding for economic development (Staff Ex. 4 at 5; Joint Ex. 1 at 26); the Companies' agreement to forgo recovery of approximately $42 million in MISO exit fees and PJM integration charges (Staff Ex. 1 at 4; Staff Ex. 4 at 4; Joint Ex. 1 at 18) and a minimum of $360 million in RTEP charges (Co. Ex. 12 at 4; Joint Ex. 3 at 5); shareholder funding for assistance to low-income customers (Co. Ex. 12 at 4; Joint Ex. 3 at 6), and frozen base distribution rates through May 31, 2014, except for emergencies and increases in taxes (Staff Ex. 2 at 4; Joint Ex. 1 at 13). The Combined Stipulation also provides additional benefits to interruptible industrial customers, schools, and municipalities. Finally, the Combined Stipulation promotes energy efficiency programs and renewable energy resource development, including provisions for four RFPs to procure ten-year contracts for solar RECs (Joint Ex. 3 at 1-3).

The Commission again notes that OCEA does not cite to any evidence regarding the Combined Stipulation, as supplemented. All of the evidence cited by OCEA relates to the ESP as proposed in the original stipulation, prior to the filing of the supplemental stipulations. However, undisputed evidence in the record demonstrates that the second supplemental stipulation, in particular, provided for additional quantifiable benefits to customers (Co. Ex. 12 at 1-2, 4). Although OCEA filed testimony regarding the second supplemental stipulation, OCC witness simply asserted that the proposed ESP was not more favorable in the aggregate than an MRO and did not provide an updated analysis to support that assertion (OCC Ex. 8 at 10).

Further, the Commission finds that the assumptions underlying OCC witness Gonzalez's testimony are arbitrary and unrealistic. The key to his present value analysis is his assumption that there is zero probability that FERC will permit recovery from Ohio retail customers of any part of the MISO exit fees, PJM integration charges, or legacy RTEP charges related to RTO realignment (Tr. III at 825). Further, in two of his scenarios, Mr. Gonzalez may have understated the potential costs of a future distribution rate case by arbitrarily assuming that a distribution rate case would only result in only 60 percent of the revenue increase requested by the Companies. Mr. Gonzalez's sole basis for this arbitrary assumption was a review of only three electric distribution rate cases recently decided by the Commission (Tr. IV at 962-963). In his third scenario, Mr. Gonzalez simply assumed a distribution base rate increase of zero. Finally, Mr. Gonzalez assumed increased lost distribution revenues by adding additional recovery which is not provided for in the Combined Stipulation (Tr. IV at 847-854).

Therefore, based upon the evidence in the record in these proceedings, the Commission finds that the ESP, including its pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, is more favorable in the aggregate as compared to the expected results that would otherwise apply under Section 4928.142, Revised Code. Accordingly, we find that the Combined Stipulation should be adopted.

F. <u>EnerNOC's allegations regarding the FRR auction.</u>

EnerNOC alleges that FirstEnergy failed to provide updated information related to the proposed extension of Riders ELR and OLR to market participants prior to the FRR auction and that such failure violates Commission policy and ATSI auction rules.

EnerNOC claims that FirstEnergy's conduct violated auction rules established to assure a fair, transparent, open auction process. EnerNOC claims that the settlement discussions conveyed information relevant to the auction to some potential market participants that was not properly disclosed to all potential bidders. EnerNOC claims that the auction rules established for the FRR auction required that auction-related information must be publicly available in order to ensure that all bidders receive the same information. Therefore, the failure by FirstEnergy to disclose that settlement negotiations were ongoing and relevant to the auction violated the auction rules. Finally, EnerNOC claims that harm to the competitive process occurred because potential bidders who were privy to the settlement discussions would have been able to use that knowledge in structuring their bids.

Nucor argues that any claims that EnerNOC was misled in the ATSI auction process should be pursued at PJM or FERC and should have no bearing in the Commission's determination of whether Riders ELR and OLR should be extended as proposed in the Combined Stipulation.

The Commission notes that continuation of Riders ELR and OLR has been one objective of several parties in this proceeding since the filing of the *MRO Case*. The recommendation to continue Riders ELR and OLR was the result of good faith negotiations between those parties and the other signatory parties to the Combined Stipulation. The relief sought by EnerNOC -- modification of the Combined Stipulation and termination Riders ELR and OLR -- would have no impact upon ATSI or the

FirstEnergy operating utilities and would only harm large industrial consumers in this state. Thus, while the Commission takes the allegations of anti-competitive behavior seriously, we find the remedy proposed by EnerNOC to be inappropriate.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

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

(2) On March 23, 2010, FirstEnergy filed an application for an SSO in accordance with Section 4928.141, Revised Code. A stipulation was included with the application.

(3) On May 13, 2010, a supplemental stipulation was filed in this proceeding. A second supplemental stipulation was filed on July 19, 2010.

(4) The signatory parties to the Combined Stipulation are FirstEnergy, IEU-Ohio, OEG, OHA, OPAE, Akron, OSC, Nucor, Cleveland, COSE, MSC, Constellation, NOPEC, NOAC, FES, AICUO, Morgan Stanley, OMA, and Staff.

(5) The evidentiary hearing in this proceeding was held on April 20, 2010 through April 23, 2010, June 21, 2010, and July 23, 2010.

(6) Pursuant to published notice, public hearings were held in Akron and Toledo on April 19, 2010; in Cleveland and Garfield Heights on April 20, 2010; in Austintown and North Ridgeville on April 21, 2010; in Springfield on April 22, 2010; and in Kirkland on April 27, 2010.

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

(8) The Commission finds that the Combined Stipulation, as modified, meets the three criteria for adoption of stipulations, is reasonable, and should be adopted.

(9) The proposed ESP, including its pricing and all other terms and conditions, including deferrals and future recovery of

deferrals, is more favorable in the aggregate as compared to the expected results that would otherwise apply under Section 4928.142, Revised Code.

<u>ORDER</u>:

It is, therefore,

ORDERED, That the Combined Stipulation, as modified by the Commission, be adopted and approved. It is, further,

ORDERED, That the Companies file proposed tariffs consistent with the Combined Stipulation as modified.

ORDERED, That a copy of this Opinion and Order be served on all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Alan R. Schriber, Chairman

Paul A. Centolella

Valerie A. Lemmie

Steven D. Lesser

Cheryl L. Roberto

GAP/sc

Entered in the Journal

AUG 25 2010

Reneé J. Jenkins
Secretary