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BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

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

OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY'S MEMORANDUM CONTRA THE APPLICATION FOR REHEARING BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL, CITIZEN POWER AND NATURAL RESOURCES DEFENSE COUNCIL

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I. INTRODUCTION

The Application for Rehearing filed by the Office of the Ohio Consumers' Counsel, Citizen Power and Natural Resources Defense Council (collectively, "OCC")[1] raises nothing new that was not considered and correctly determined by the Commission in its August 25, 2010 Opinion and Order (the "Order"). Indeed, the Commission acted reasonably and lawfully in approving the comprehensive Electric Security Plan ("ESP") proposed by Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, the "Companies") and twenty-five signatory and non-opposing parties via a thoroughly negotiated series of stipulations. OCC has not shown grounds for rehearing.

The Commission's Order approved the ESP proposed by the Companies and described in the Application, Stipulation and Recommendation (the "Stipulation") filed on March 23, 2010 (as modified by the Errata filed on March 30, 2010 and on April 13, 2010), subject to and including all of the additions and modifications set forth in the Supplemental Stipulation filed on May 13, 2010 and the Second Supplemental Stipulation filed on July 22, 2010 (collectively, the "Combined Stipulation"). The Combined Stipulation reflects wide-ranging agreement between and among the Companies, the Signatory Parties[2] and the Non-Opposing Parties[3] supporting or

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[1] These three parties initially were participants in a group styled as the Ohio Consumer and Environmental Advocates or OCEA, together with the Citizens Coalition (which itself was a coalition of several consumer organizations), Northwest Ohio Aggregation Coalition ("NOAC"), Northeast Ohio Public Energy Council ("NOPEC") and the Ohio Environmental Council. Because a majority of the OCEA members are now either signatory parties or non-opposing parties, the Companies will no longer use this acronym for the minority that remains.

[2] The Signatory Parties include the Staff of the Public Utilities Commission of Ohio ("Staff"), Ohio Partners for Affordable Energy, City of Akron, City of Cleveland, Council of Smaller Enterprises, Ohio Schools Council, Ohio Energy Group, FirstEnergy Solutions, Industrial Energy Users - Ohio, Constellation Energy Commodities Group, Inc., Constellation NewEnergy, Inc., Material Science Corporation, Ohio Hospital Association, Ohio Manufacturers Association, Association of Independent Colleges and Universities of Ohio, Nucor Steel Marion, Inc., Morgan Stanley Capital Group, Inc., NOPEC and NOAC.

[3] The Non-Opposing Parties are The Kroger Company, PJM Power Providers Group, Environmental Law and Policy Center, and the consumer organizations using the name Citizens Coalition.

not opposing the Commission's approval of the ESP. In the Order, the Commission found that the Combined Stipulation, as modified by the Commission, was a product of serious bargaining among capable, knowledgeable parties,[4] benefits ratepayers and the public interest,[5] and does not violate any important regulatory principle or practice.[6] The Commission also found that the ESP is more favorable in the aggregate as compared to the expected results that would otherwise apply under R.C. § 4928.142.[7] Because the Commission did not err in making these findings, OCC's Application for Rehearing ("AFR") should be denied.

Remarkably, only one of OCC's eleven assignments of error could, if proven true, justify rehearing of the Commission's Order – OCC's tenth assignment, which contends that the ESP is not more favorable in the aggregate than the expected results of an MRO. The remainder of OCC's assignments of error are manufactured complaints about specific provisions of the ESP or the process for reviewing the ESP. None of these assignments of error go to the fundamental question presented, which is whether the Commission acted unreasonably or unlawfully in approving the Companies' ESP. None of these assignments of error show that the Commission improperly applied the three-part test for reviewing stipulations. And none of these assignments of error, except for OCC's tenth, relate to whether the ESP is more favorable in the aggregate than the expected results of an MRO. Thus, even if OCC could muster support for its assignments of error other than the tenth – and as discussed below, it has not mustered support for any assignment of error, including the tenth – the Commission still would lack a legitimate basis for granting rehearing.

[4] Order, p. 24.

[5] Order, pp. 32-37.

[6] Order, pp. 39-42.

[7] Order, pp. 42-45. The Companies accepted the Order's modifications to the Combined Stipulation by filing made Sept. 8, 2010.

As a preliminary matter, by inclusion of the case number in the caption, OCC appears to seek rehearing of the Order as though it had been entered in Case No. 09-906-EL-SSO – the Companies' Market Rate Offer ("MRO") proceeding – although the Order was not entered in that proceeding and did not resolve that proceeding. In fact, the Commission has not issued a final order in that proceeding. While the Commission took administrative notice of the record in Case No. 09-906-EL-SSO, it did not consolidate that docket with this proceeding. Thus, the Companies will address the assignments of error only as they relate to the Order actually entered in Case No. 10-388-EL-SSO.

II. ARGUMENT

A. The Commission Properly Permitted Parties to the Combined Stipulation to Withdraw Their Briefs and Testimony.

OCC questions the Commission's ability to "exclude briefs simply to support its Order" and to "modify the record based upon the agreement of stipulating parties."[8] This is an extreme mischaracterization of the Second Supplemental Stipulation, under which the Signatory Parties and Non-Opposing Parties, other than the Companies, Staff and Cleveland Clinic, agreed to withdraw their testimony and briefs not in support of the ESP.[9] Because the Commission's Order did not result in the exclusion of briefs or modification of the record, OCC's first assignment of error lacks merit and should be denied.

OCC presumably is not arguing that there are no circumstances under which a party may withdraw some or all of its brief – OCC itself has done this in the past.[10] OCC's concern is that

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[8] OCC AFR, pp. 5-8.

[9] Second Supp. Stip. p. 9, ¶ 9.

[10] *See, e.g., In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan*, Case Nos. 08-917-EL-SSO, 08-918-EL-SSO, 2009 WL 803606, *2 (Op. & Order Mar. 18, 2009) (OCC agreeing to withdraw portions of its brief).

it jointly filed briefs with parties that are now either Stipulating Parties or Non-Opposing Parties, and it argues that the Commission cannot approve the withdrawal of those briefs by those parties. Of course, the Commission did no such thing. What actually occurred is that the Stipulating Parties and Non-Opposing Parties agreed to withdraw their briefs and to support the Combined Stipulation.[11] To the extent briefs were filed by other parties, whether individually or jointly, those briefs could not have been withdrawn without the consent of those parties. With respect to briefs filed jointly by parties that support or do not oppose the Combined Stipulation and other parties that continue to oppose it, the practical effect of the Second Supplemental Stipulation is that those joint briefs are submitted only by the opposing parties. As OCC itself notes, the Commission reviewed and rejected OCC's arguments in its joint brief. Thus, OCC's assignment of error simply reflects its misunderstanding of the effect of paragraph 9 of the Second Supplemental Stipulation.

OCC also cannot be arguing that a stipulating party cannot withdraw testimony that the party no longer supports, as this is common practice.[12] Further, a party that has pre-filed testimony but has not yet had that testimony admitted into the record can choose to not offer that testimony into the record. OCC seems to be arguing that it can force a party to maintain a position taken in filed testimony that the party no longer supports, and that the Commission is prohibited from approving the withdrawal of that testimony. OCC cites no support for this baseless proposition, and it should be denied.

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[11] Second Supp. Stip. p. 9, ¶ 9.

[12] *See, e.g., In re WPS Energy Services, Inc. v. FirstEnergy Corp.*, Case No. 02-1944-EL-CSS, 2003 WL 22020294, *3 (Op. & Order Aug. 06, 2003) ("As part of the stipulation the parties have agreed to withdraw filed testimony and all motions, subpoenas, and applications in this case"); *In re Dayton Power and Light Co.*, Case No. 83-777-GA-AIR, 61 P.U.R.4th 275 (Op. & Order Aug. 07, 1984) (OCC agreeing by stipulation to withdraw objections to staff report).

Further, OCC's argument is factually at odds with the plain language of the Second Supplemental Stipulation. OCC, at page 7 of its Application for Rehearing, woefully misquotes one provision of the Second Supplemental Stipulation regarding the withdrawal of prefiled testimony, and then wholly relies on that misquote to make its argument. The provision of the Second Supplemental Stipulation at page 9 to which OCC refers actually states:

> The Signatory Parties to this Second Supplemental Stipulation and all parties signing this Second Supplemental Stipulation as non-opposing parties, other than the Companies, Cleveland Clinic, and the Staff, agree that their *filed testimony* and any briefs that were *filed in response to the filing of the Stipulation and Recommendation* which were not in support of this ESP are hereby withdrawn. (Emphasis added)

First, the Second Supplemental Stipulation makes no mention of the withdrawal of cross examination from the record, so OCC's complaint in this regard is without basis. Second, only filed testimony "in response to the filing of the Stipulation and Recommendation" would be withdrawn. The Stipulation and Recommendation in this proceeding was filed on March 23, 2010. OCC's argument that testimonies from the 09-906-EL-SSO case, all of which were filed long before March 2010, would have to be withdrawn is simply in error and contrary to the plain language of the Second Supplemental Stipulation.[13] Those testimonies clearly were not made, and could not have been made, in response to the filing of the Stipulation and Recommendation in this proceeding.

The testimonies of concern to OCC were not withdrawn under this provision, OCC describes no harm it has suffered, and OCC cites no testimony that it sought to rely on but was unable to do so. As such, OCC has not shown how it may have been prejudiced by the parties'

[13] Additionally, although OCC references several exhibits from the MRO Case, it fails to explain how any of this testimony is inconsistent with the Combined Stipulation or how withdrawal of this testimony would prejudice OCC.

agreement. Again, OCC's first assignment of error results from its misunderstanding of the effect of paragraph 9 of the Second Supplemental Stipulation, which has not prejudiced OCC in any way. Thus, this assignment of error should be rejected.

B. The Commission Properly Conducted Public Hearings on the Companies' Application.

OCC complains that inadequate notice was provided of public hearings and that the hearings were conducted inappropriately. Neither complaint is true or is a basis for granting rehearing.

The Commission in this proceeding adhered to all statutory procedures by setting the time for hearing, sending written notice of the hearing to the Companies, and directing the Companies to publish notice in a newspaper of general circulation in each county in their certified territory.[14] The Commission "has the discretion to decide how, in light of its internal organization and docket considerations, it may best proceed to manage and expedite the orderly flow of its business, avoid undue delay and eliminate unnecessary duplication of effort."[15] Although no public hearings are required by statute or rule when reviewing a Standard Service Offer application, the Commission exercised its discretion to schedule eight separate public hearings between April 19 and April 27, 2010. The Commission announced these public hearings on April 12, and notice was again provided in local newspapers on April 16, 2010.[16] OCC has not shown that the Commission violated any statutory requirement as to notice of the

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[14] *See* R.C. § 4928.141(B).

[15] *Toledo Coalition for Safe Energy v. Pub. Util. Comm.*, 69 Ohio St. 2d 559, 560 (1982).

[16] Company Exh. 7. *See Parma v. Pub. Util. Comm.*, 86 Ohio St. 3d 144, 148, 1999-Ohio-141 ("The attorney examiner's entry dated July 11, 1997, which was served on the parties, provided notice of the commission hearing"); *Central Puget Sound Regional Transit Auth. v. Miller*, 128 P.3d 588, 595 (Wash. 2006) (public notice provided by a government agency's website is sufficient, and at least as good as newspaper notice).

public hearings, and, since OCC participated in each of those hearings, it was not prejudiced by the allegedly insufficient notice.

OCC also has not shown that the conduct of the hearings was inappropriate or prevented any member of the public from sharing his or her view. OCC's description of statements made in a Staff handout actually rebut its contention.[17] As OCC explains, its representatives at the public hearings, as well as members of the public, were free to criticize, and did criticize, those statements they believed to be false.[18] It is clear from OCC's own description of the events that the public was not left misinformed. It also is clear that OCC's complaint does not justify rehearing, since OCC itself seeks rehearing only so that the Commission may "recognize the irregularities" regarding how the hearings were conducted and take action to avoid such issues in the future.[19] Because OCC can raise these concerns with the Commission at future public hearings, rehearing is unnecessary and would be inappropriate as no grounds for rehearing have been stated.

OCC also complains that Companies' attorney Miller stated at the Akron hearing that the ESP freezes distribution rates.[20] In fact, Attorney Examiner Bulgrin first said, accurately, that the ESP includes a distribution rate freeze, with possible quarterly adjustments through Rider DCR:

> Under the proposed ESP, FirstEnergy's distribution rates would remain frozen through May 31st, 2014. The company would also

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[17] *See* OCC AFR, p. 10 & fn. 31 (showing handout was not part of record except as introduced by two members of public at North Ridgeville hearing).

[18] OCC AFR. p. 10. *See* Akron Tr. pp. 15-16 (Ms. Hotz stating that OCC has not signed the stipulation); North Ridgeville Tr. p. 24 (witness Corcoran describing Staff's statement that "'The proposed ESP was filed with an agreement with the parties involved in the case.' Again, that is technically correct, but it is somewhat misleading. The Ohio Consumers' Counsel is listed as a party in this case, but they certainly did not agree to this proposal.")

[19] OCC AFR, p. 12.

[20] OCC AFR, p. 10. *See* Stip. § B.1 (distribution rate freeze).

> establish a mechanism in 2012 to recover improvements to the company's distribution system. This cost recovery would be subject to quarterly filings and annual audits by the PUCO.[21]

Ms. Miller then described that an ESP "provides a comprehensive approach" and that "the plan, as Mr. Davis indicated, that the plan includes a rate freeze, and so we're trying to take care of the distribution as well within the context of a comprehensive Electric Security Plan."[22] Neither the Attorney Examiner nor Ms. Miller misrepresented the ESP.

OCC also focuses on one additional statement by Ms. Miller at the Akron hearing as sufficient to grant rehearing to reject the provisions in the Combined Stipulation regarding approval of the Companies' corporate separate plan.[23] OCC believes that the entire corporate separation plan should be revisited because this single non-evidentiary statement made by Ms. Miller could be construed as suggesting that the Companies will absorb the cost of the six percent discount off PIPP customers' price to compare.[24] OCC's position is absurd. First, one sentence from an introductory statement at one public hearing cannot be grounds for rehearing. Simply put, the statement is not record evidence. Second, OCC's entire complaint is based on its mischaracterization of Ms. Miller's statement that the Companies would be absorbing over $200 million in costs, but she did not say this. OCC's brief does not include Ms. Miller's entire statement relating to PIPP, which is as follows:

> One of the things we're really happy about and excited about is that the Electric Security Plan will provide over approximately $280 million of customer benefits that how these customer benefits are incurred is the company absorbing certain costs. For example, the company will provide $3 million in economic development and job support, $1.5 million to low-income assistance programs, a six

[21] Akron Tr. p. 5.

[22] Akron Tr. p. 9. Ms. Miller apparently referred to the Attorney Examiner as Mr. Davis instead of Mr. Bulgrin.

[23] OCC AFR, pp. 11-12.

[24] OCC AFR, p. 11.

> percent discount to percentage, percentage of income payment plan.
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> And I'm not sure if everyone's familiar with that plan, it's also referred to as PIP. It's run by the Department of Development. And what it is is low-income customers who aren't able to pay their bill, they're put onto a payment plan that allows them to pay their bill and provide some sort of discount on a better payment plan that's better for their budget. The company, on top of what Department of Development is doing, will add another six percent discount to help those people.[25]

As stated in the Stipulation, the six percent PIPP discount will be provided by the Companies to their PIPP customers, and this pricing will be accomplished through a wholesale bilateral contract with FirstEnergy Solutions.[26] Ms. Miller accurately informed attendees of the public hearing that the Companies were providing this six percent discount as an element of the Stipulation, and that the comprehensive ESP should result in over $280 million of customer benefits.[27]

Remarkably, OCC's second assignment of error does not address the substantive comments actually received by the Commission at the public hearings. Based on those comments, the Commission directed that the evidentiary hearing resume so that it could gather additional evidence on the impact of the ESP on customer bills.[28] This resulted in the Commission modifying the Combined Stipulation to alter the terms of the traffic lighting rate schedule (schedule TRF).[29] Thus, OCC cannot show that evidence submitted during the public hearings was disregarded.

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[25] Akron Tr. at 11-12 (April 19, 2010).

[26] Stip. § A.1.

[27] Co. Exh. 4, Att. 1.

[28] Order, p. 6.

[29] Order, p. 36.

The Commission should deny OCC's second assignment of error.

C. The Commission Did Not Adopt an MRO that Includes Impermissible Rate Plan Elements.

OCC argues in its third assignment of error that the Commission adopted an MRO in the Order and, thus, none of the non-generation terms of the ESP can be retained because R.C. § 4928.142 applies, not R.C. § 4928.143.[30] Essentially, OCC believes that an ESP cannot set generation pricing by use of a Competitive Bidding Process ("CBP") without converting the entire ESP filing to an MRO. Notably, OCC cites no authority to support its argument. OCC's dip into the waters of absurdity continues.

R.C. § 4928.143(B)(1) states that "[a]n electric security plan shall include provisions relating to the supply and pricing of electric generation service." The Companies' first Commission-approved ESP determined retail generation rates based upon the outcome of a CBP. OCC lodged no objection to this approach in the Companies' first ESP. This second Commission-approved ESP will determine retail generation rates based upon a similar CBP. As the Commission noted in the Order, "the rates in the ESP should be equivalent to the results which would be obtained under Section 4928.142, Revised Code."[31] Yet the use of a CBP to determine retail generation rates does not convert an ESP to an MRO or make the provisions of R.C. § 4928.142 applicable to the Companies' ESP. The Companies filed in this proceeding an application for approval of an ESP under R.C. § 4928.143, and that is what the Commission approved.[32]

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[30] OCC AFR, pp. 12-15.

[31] Order, p. 44.

[32] Order, p. 5.

If the Commission were to revise the ESP to move forward with only the CBP as OCC recommends, many consumer benefits of the ESP would be eliminated. The Commission listed in its Order several of these benefits that would not be provided in an MRO:

- the Companies' commitment of shareholder funding for economic development;
- the Companies' agreement to forgo recovery of approximately $42 million in MISO exit fees and PJM integration charges and a minimum of $360 million in RTEP charges;
- shareholder funding for assistance to low-income customers;
- frozen base distribution rates through May 31, 2014, except for emergencies and increases in taxes;
- additional benefits to interruptible industrial customers, schools and municipalities;
- promotion of energy efficiency programs and renewable energy resource development, including provisions for four RFPs to procure ten-year contracts for solar RECs.[33]

If OCC's absurd argument were to be adopted, all of these consumer benefits, including significant benefits for residential customers, would be lost. OCC has not stated grounds for rehearing.

D. The Commission Properly Permitted All Parties to Reference Testimony and Exhibits Admitted Into Evidence in the MRO Case.

OCC criticizes the Commission for incorporating the record from Case No. 09-906-EL-SSO, which was the Companies' second MRO Case.[34] The Commission addressed and rejected this criticism in detail in Paragraph 14 of its May 13, 2010 Entry on Rehearing. As the Commission correctly found, OCC had ample opportunity to prepare and respond to the evidence administratively noticed in the record of the MRO Case. Plus, as the Commission found, the

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[33] Order, p. 44.

[34] OCC AFR, pp. 15-17.

Commission's decision to allow the parties to reference evidence from the MRO Case in this proceeding did not shift the burden of proof from the Companies.

The Commission properly took administrative notice of the MRO Case record. In evaluating a party's challenge to administrative notice, the Supreme Court and the Commission must consider two factors: (i) whether the complaining party had notice of and an opportunity to explain and rebut the subject of the notice; and (ii) whether the complaining party suffered prejudice.[35] OCC fails to mention this test or discuss its first factor, which is not surprising given that OCC had ample notice and opportunity in both the MRO Case and this proceeding to explain and rebut the evidence submitted in the MRO Case. Each of the three parties filing this AFR participated fully in the MRO Case and helped create the record in that proceeding. They also had an opportunity in this ESP proceeding to submit testimony – and did submit testimony – addressing, among other things, the CBP process. Remarkably, OCC states in its AFR, without any sense of irony, that the Commission adopted its witnesses' recommended changes to the CBP process.[36]

Moreover, OCC fails to show that it was prejudiced. OCC claims that the Commission eliminated a portion of the Companies' burden of proof in this proceeding, but OCC fails to support this claim. The Companies' burden of proof in this proceeding was the same before and after the Commission took notice of the MRO testimony: to show that the ESP is "more favorable in the aggregate as compared to the expected results" of an MRO.[37] The Commission did not reduce this burden. The facts here are entirely distinguishable from those in *Canton Storage*, which involved the consolidation of cases by independent motor transportation

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[35] *See Allen v. Pub. Util. Comm.*, 40 Ohio St. 3d 184, 185 (1988).

[36] OCC AFR, p. 5 n. 14 (citing OCC witness Wallach's testimony regarding the CBP procedures).

[37] R.C. 4928.143(C)(1).

companies in a manner which allowed multiple companies that had introduced no evidence relating to their operations to rely upon evidence introduced by another company in a separate proceeding.[38] The record from the MRO Case, of course, relates directly to the Companies. This fundamental factual difference, ignored by OCC, makes clear that the holding in *Canton Storage* is inapplicable to the present proceeding. OCC was not prejudiced by the Commission's taking administrative notice of the MRO Case record.

OCC's fourth assignment of error offers no basis for the Commission to change its well-reasoned May 13, 2010 Entry on Rehearing.

E. The Commission Properly Approved Distribution Rate Provisions in the ESP.

The Commission properly rejected OCC's claim that R.C. § 4909.18 must be applied to the Companies' Rider DCR provision, which is authorized by R.C. § 4928.143(B)(2)(h).[39] As the Commission correctly stated, "[t]he 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."[40] OCC's AFR fails to cite to any such decision. OCC also fails to explain why R.C. § 4909.18 should apply when R.C. § 4928.143(B)

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[38] *Canton Storage & Transfer Co. v. Pub. Util. Comm.*, 72 Ohio St. 3d 1, 9-10 (1995).

[39] OCC AFR, pp. 17-18. OCC's AFR mistakenly states that the Commission approved an increase in distribution rates by an average annual $161 million. OCC AFR, p. 17. Mr. Ridmann testified that the expected level of Rider DCR on an annual basis is projected to be $51.3 million for June 2011-May 2012, $124.5 million for June 2012-May 2013, and $127 million for June 2013-May 2014. Co. Exh. 4, Att. 1. OCC also fails to mention the fact that Rider DSI expires on December 31, 2011 while Rider DCR begins January 1, 2012. Combining these two facts, customers are not expected to see an increase in their overall bill due to the implementation of Rider DCR.

[40] Order, p. 40.

specifically states that ESP provisions may be adopted "[n]otwithstanding any other provision of Title XLIX of the Revised Code to the contrary."

OCC also argues for the first time that the Commission failed to follow R.C. § 4928.143(B)(2)(h), but OCC fails to show what distribution-related provisions of the Combined Stipulation require that the Commission analyze the Companies' emphasis on system reliability. Indeed, as OCC notes, the Commission specifically stated its expectation that the Companies "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." Thus, even if R.C. § 4928.143(B)(2)(h) were to apply here as to Rider DCR, the Commission has satisfied its requirements.

OCC's fifth assignment of error is contrary to Ohio law and should be denied.

F. The Commission Properly Approved the Second Supplemental Stipulation's Rider DCR Audit Process.

OCC is wrong that the Combined Stipulation "excludes non-signatories from the most substantial portion of the proceeding that oversees the setting of new distribution rates," by which OCC means the Commission's review and approval of quarterly filings and adjustments to Rider DCR.[41] The Combined Stipulation includes two processes related to review and amendment of Rider DCR. The first is an independent audit. The second – the "most substantial portion" according to OCC – involves a quarterly filing with the Commission to review the reasonableness of expenditures. OCC is not excluded from the quarterly filing process.

As to the first process, there is no legal requirement that *any* parties be involved in the independent audit. This is not a delegation of the Commission's authority because it is not an

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[41] OCC AFR, p. 21. *See* Second Supp. Stip. p. 4, ¶ 3.

exercise of the Commission's authority. Instead, it is an audit that will be conducted by an independent auditor selected by Commission Staff.[42] In contrast to the court decision cited by OCC,[43] the audit process is not a Commission proceeding to which the provisions of R.C. § 4903.221 apply.[44] That court decision involved a case pending before the Commission and, as the Commission correctly noted, OCC will have all statutory rights available to it should a Commission proceeding include a review of the audit results.

With respect to the quarterly filings, the Second Supplemental Stipulation does not preclude OCC's participation in Commission proceedings resulting from those filings. It states that, upon the Companies meeting their burden of proof to demonstrate the accuracy of filings, "*any* party may challenge such expenditures with evidence."[45] The Commission's Order did not exclude OCC from any opportunity it may have to intervene and participate in proceedings related to the quarterly filings.

G. The Commission Properly Approved the Second Supplemental Stipulation's REC Procurement Process.

OCC's assignment of error challenging the Companies' agreement to work with the Signatory Parties and Non-Opposing Parties to develop RFPs to purchase RECs[46] is a text-book example of how OCC has chosen to marginalize itself. The Companies must purchase solar RECs in order to meet the solar benchmarks in R.C. § 4928.64. OEC witness Hitt recommended

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[42] Second Supp. Stip. p. 4, ¶ 3.

[43] *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St. 3d 384, 2006-Ohio-5853.

[44] As the Ohio Supreme Court observed, "intervention ought to be liberally allowed so that the positions of all persons with a real and substantial interest in the proceedings can be considered by the PUCO." *Id.*, 2006-Ohio-5853, ¶ 20. The informal audit process negotiated by the Stipulating Parties does not itself result in consideration of various positions by the Commission, so OCC's reliance upon this court decision is misguided.

[45] Second Supp. Stip. p. 4 , ¶ 3 (emphasis added).

[46] OCC AFR, pp. 21-22.

that the Companies use ten-year contracts to purchase solar RECs.[47] The Companies agreed in the Second Supplemental Stipulation: (1) to use ten-year contracts to purchase both solar RECs and non-solar RECs; and (2) to work with any interested Signatory Parties or Non-Opposing Parties to develop the RFPs for these procurements.[48] The Environmental Law and Policy Center supports this procurement process and believes that it makes the ESP more favorable than an MRO.[49] OCC, however, is upset that its continued objections to the ESP have disqualified it as a participant in the informal RFP drafting process.

The provision at issue is a commitment to work together toward a common goal – a successful RFP that results in the purchase of solar RECs at a reasonable price. Yet OCC is opposed to the REC RFP provision because OCC fears the provision gives the Companies leverage that will result in "inevitable loss associated with the negotiations (since FirstEnergy will seek something in return)."[50] In OCC's view, a commitment to work together is nothing more than a Company trick to manipulate other parties. This prompts three obvious questions: (1) why is OCC nevertheless claiming to be interested in participating in this informal process; (2) why does OCC fear working with the Companies but the Stipulating Parties and Non-Opposing Parties have committed to do so; and (3) why would the Companies or any other party view OCC's participation as beneficial to the process?

The Companies are free to work informally with those who share a common interest. Once the RFPs are developed and filed with the Commission for approval, the Combined Stipulation does not preclude OCC from seeking intervention to the extent permitted by law.

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[47] *See* Direct Testimony of Carrie Cullen Hitt, filed April 15, 2010, p. 7.

[48] Second Supp. Stip. pp. 1-3.

[49] *Id.* p. 12.

[50] OCC AFR, p. 22.

Further, the Second Supplemental Stipulation does not restrict the Commission's authority to review OCC's motion and, thus, does not violate any regulatory principle or law.

H. The Commission Properly Approved the Interruptible Service Offerings Included in the ESP.

The ESP approved in this proceeding continues the practice established in the Companies' first ESP of providing the Companies' interruptible service offerings in the form of Rider ELR and Rider OLR, as modified, as a demand response program under R.C. § 4928.66.[51] Under these riders, industrial customers receive known compensation for their interruptible load over the term of the ESP.[52] In accordance with R.C. § 4928.66, the Companies will recover any delta revenue from these credits through the DSE1 charge of Rider DSE. Rider ELR also includes a buy-through option for economic interruption. This provision benefits all customers because, as Companies' witness Ridmann explained, suppliers would take into account the ability to reduce load at peak pricing in their CBP bids, which should promote lower generation prices that result from the CBP.[53]

OCC has not shown that continuing Riders ELR and OLR is unreasonable or unlawful in the context of the Combined Stipulation.[54] Instead, OCC pursues the reddest of red herrings by complaining about Rider PDR.[55] That rider is not included in the ESP. Rider PDR was proposed in the MRO Case to recover the costs associated with the requests for proposals for

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[51] Stip. § D.2.

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

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

[54] OCC refers to Mr. Gonzalez's testimony recommending that the costs of the ELR/OLR program be recovered only from industrial customers. OCC AFR p. 24. OCC doesn't recognize that the Combined Stipulation is a balancing of interests among all customer groups. For example, OCC doesn't urge the Commission to grant rehearing to eliminate section "e" of Rider EDR, pursuant to which GS and GP customers absorb the costs of the Residential Non-Standard Credit Provision.

[55] OCC AFR, pp. 23-24.

peak demand reduction that would replace Riders ELR and OLR.[56] The ESP, however, continues Riders ELR and OLR.[57] Thus, none of OCC's criticisms of Rider PDR are even remotely relevant to the Commission's Order in this docket, which does not include a Rider PDR.

OCC continues to complain that the "incremental" reference in Riders ELR and OLR violates the Commission's March 10, 2010 Finding and Order in Case No. 09-535-EL-EEC *et al.* despite the Commission's clear statement in the Order that it does not. As the Commission explained, it has not reversed its prior decision.[58] Continued insistence by OCC that the Commission has done so does not justify rehearing.

Moreover, OCC's witness agreed during cross-examination that Riders ELR and OLR are demand reduction programs initiated by the Companies effective June 1, 2009 in furtherance of the requirements of S.B. 221.[59] As such, they both constitute demand response programs "beginning in 2009," as required by R.C. § 4928.66(A)(1)(b). The interruptible load from these programs is "incremental" to 2008 load because the programs themselves did not exist in 2008. Indeed, under the ESP, the requirements of these programs and definition of curtailable load itself are being redefined effective June 1, 2011 to be consistent with PJM tariff requirements. As such, OCC's eighth assignment of error lacks merit.

I. The Commission Properly Approved the Companies' Recovery of Lost Distribution Revenue.

The Order resolves disputes, through May 31, 2014, concerning the Companies' recovery of lost distribution revenue associated with approved energy efficiency and peak demand

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[56] Direct Testimony of Santino L. Fanelli, Co. Exh. 4 at p. 11, Case No. 09-906-EL-SSO.

[57] Stip. § D.2.

[58] Order, p. 40.

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

reduction programs. The Companies will be allowed to recover these revenues during the term of the ESP, as they are now authorized to do under the Companies' first ESP for all programs.[60] OCC complains that the Companies are free to negotiate for recovery of lost distribution revenues after May 31, 2014, but lost distribution revenue recovery is authorized by the Ohio Revised Code and Commission rule.[61] How the Companies will recover their lost distribution revenues resulting from energy efficiency savings after May 31, 2014 has not been determined, but most likely will be a topic for discussion in a future filing, such as the Companies' next Energy Efficiency/Peak Demand Reduction portfolio plan filing expected to be made in 2012.[62]

While OCC argues that this provision should not have been approved as one element of the Combined Stipulation, OCC has not and cannot argue that recovery of lost distribution revenues is unlawful. OCC also has not and cannot argue that this one provision renders the Commission's approval of the Combined Stipulation unreasonable or unlawful. OCC complains that the record lacks evidence of actual revenues lost as a result of energy efficiency and peak demand reduction programs. This is beside the point. The Combined Stipulation states that the Companies are entitled to recover those revenues lost as a result of the Commission's approval of energy efficiency and peak demand reduction programs, which approval is pending in Case No. 09-1947-EL-POR *et al.* The amount of actual revenues lost will be determined by the Commission's order in that proceeding.

OCC's complaint is little more than a preference for use of an alternative recovery mechanism in the future. Indeed, its hearing witnesses argued that the selection of an alternative

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

[61] *See* R.C. § 4928.66(D); O.A.C. 4901:1-39-07.

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

methodology for recovering lost distribution revenues is a complex issue.[63] The Commission did not err by approving the Combined Stipulation's provisions regarding recovery of lost distribution revenue.[64]

J. The Commission Properly Approved Deferral of Storm Damage Expenses.

OCC objected at hearing to the Stipulation's storm damage deferral provision, and it raises no new arguments here. The Stipulation provides, "All deferrals previously approved in Case Nos. 08-935-EL-SSO and 07-551-EL-AIR et al. shall continue under the approved terms and conditions, ... Such storm damages deferrals shall be dependent upon deferral criteria being agreed upon by the Staff and the Companies, with such agreement being sought within thirty days of the filing of the Stipulation."[65] The Companies sought and obtained agreement from Staff within the allotted time. Despite OCC's complaints, there is no requirement to inform non-signatory parties of the details of Staff's internal process for reviewing those deferrals. Regardless, the Stipulation is clear that the storm damage deferrals will continue through May 31, 2014 "under the approved terms and conditions" until full recovery is accomplished.[66]

Moreover, as explained previously,[67] OCC is simply wrong that the Commission's statement in the Companies' rate case, 07-551-EL-AIR, applies here. The deferral authorized by

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[63] *Id. See generally* Sullivan Testimony; Tr. Vol. II, pp. 470-471, 475-77.

[64] OCC's heading on page 27 states that the Order "Conflicts with a Previous Commission Determination." This appears to be an editing error, which resulted from OCC copying to its section I the same language from section H. Perhaps, however, OCC meant by "Previous Commission Determination" the Commission's order in AEP's Energy Efficiency Portfolio Plan Case, which OCC references at pages 28-29 of its AFR. Yet that order creates no conflict as it did not involve the Companies and was not issued pursuant to R.C. § 4928.143.

[65] Stip. § D.4.

[66] Stip. § D.4.

[67] Post-Hearing Brief Of Ohio Edison Company, The Cleveland Electric Illuminating Company, And The Toledo Edison Company at pp. 38-39 (April 30, 2010) ("Companies' Post-Hearing Brief").

the ESP relates to new expenses and is not indefinite. The Commission properly rejected OCC's objection.

K. The Commission Correctly Found that the ESP Is More Favorable Than the Expected Results of an MRO.

OCC continues, without any apparent shame, to rely upon Wilson Gonzalez's net present value "analysis" as proof that the ESP is not more favorable in the aggregate than the Companies' MRO.[68] The Commission was more than polite in describing Mr. Gonzalez's assumptions as "arbitrary and unrealistic."[69] He misrepresented facts and drew conclusions that were directly contrary to his own understanding of sound economic principles.[70] His testimony lacked any probative value, and the Commission did not err in disregarding it.

The ESP is more favorable in the aggregate than the expected results of an MRO, as the Commission properly concluded:

> Given that the ESP includes a Competitive Bidding Process 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.[71]

Despite OCC's election to assign no value to the Companies' agreement to waive their right to seek recovery of legacy Regional Transmission Expansion Plan ("RTEP") charges approved by

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[68] OCC AFR, pp. 31-33. Although OCC states a preference now for an MRO, it must be noted that OCC sought substantial modifications to the MRO proposed by the Companies in Case No. 09-906-EL-SSO. *See* Initial Post-Hearing Brief By The Office Of The Ohio Consumers' Counsel, Citizen Power, The Citizens Coalition, And The National Resources Defense Council at pp. 7-19, Case No. 09-906-EL-SSO (Jan. 8, 2010).

[69] Order, p. 44.

[70] *See* Companies' Post-Hearing Brief, pp. 42-45.

[71] Order, p. 44.

PJM prior to ATSI's integration to PJM,[72] the record is clear that this waiver has a value of hundreds of millions of dollars.[73] OCC grossly misrepresents the FERC order issued December 17, 2009.[74] As Dr. Choueiki explained, the FERC order did not address the Commission's concerns regarding the allocation of legacy RTEP charges, which "caused Staff some consternation" as to whether customers would be held harmless for these charges.[75] The FERC Order had nothing whatsoever to do with ATSI's ability to recover costs from load serving entities such the Companies, and says nothing about the Companies' right to pass those transmission costs through to their customers. The Companies' commitment to not seek recovery of these legacy RTEP charges is "a much better outcome than simply hoping for FERC to ultimately order [the Companies] to absorb 100% of the legacy RTEP charges. The latter, likely, holds an infinitesimal probability."[76]

In seeking rehearing, OCC fails to offer any probative evidence to counter the testimony provided by the Companies and Staff. OCC's tenth assignment of error fails to state a basis for rehearing.

L. The Commission Properly Applied Its Three-Part Test for Review of Stipulations.

In this proceeding, there is no question that the Combined Stipulation is a product of serious bargaining among capable, knowledgeable parties. Indeed, OCC does not assert otherwise in its Application for Rehearing. There also is credible, probative evidence showing

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[72] Stip. § C.2.

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

[74] OCC AFR, p. 31.

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

[76] Choueiki Testimony, p. 8.

that the ESP offers both quantitative and qualitative benefits when compared to an MRO. As a result, the settlement, as a package, benefits ratepayers and the public interest without violating any important regulatory principle.

In addition to these three criteria, OCC seeks to add a fourth that requires the Commission to recognize the "asymmetry" OCC argues is inherent in the Commission's review of ESPs under R.C. § 4928.143. The Commission correctly determined that changing the review criteria previously approved by the Ohio Supreme Court is unnecessary.[77]

OCC's proposed fourth criterion for review of ESP stipulations would add nothing. The Commission and the parties have a choice between an MRO or an ESP to establish the standard service offer. The Commission must approve one or the other in a form that is acceptable to the applicant. OCC may allege that this results in "asymmetric bargaining positions," but the simple truth is that it is the process mandated by the General Assembly. The result of the process is that customers benefit – either by having the standard service offer provided under an MRO or by having the standard service offer provided under an ESP that is more favorable in the aggregate than an MRO. When the Commission is asked to approve an ESP stipulation seriously negotiated by capable, knowledgeable parties who all agree that the ESP is more favorable in the aggregate than the expected results of an MRO, then the Commission need only determine whether it agrees. If it does, the process established by the General Assembly has succeeded in customers receiving a standard service offer that is superior to the default position of an MRO.

OCC clearly fails to understand this process (or obstinately refuses to recognize it), which likely explains its inability to participate effectively in the process. Regardless, OCC has made no showing that the Commission's review of the Combined Stipulation was unreasonable or

[77] Order, p. 21.

unlawful. The Commission diligently adhered to the ESP review process created by the General Assembly and properly applied the criteria for review of stipulations approved by the Ohio Supreme Court. Thus, OCC's eleventh assignment of error must be denied.

III. CONCLUSION

OCC has failed to state any legitimate grounds for rehearing. Contrary to OCC's complaints, the Commission acted reasonably and lawfully in approving the Combined Stipulation and directing the Companies to proceed with their second ESP. Accordingly, the Commission should deny OCC's Application for Rehearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The foregoing *Memorandum Contra of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company* was served via electronic mail on this 4th day of October, 2010, upon parties on the attached service list.

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